

JOINT BUDGET COMMITTEE



STAFF BUDGET BRIEFING FY 2024-25

JUDICIAL DEPARTMENT Courts and Probation (Judicial Branch) and Independent Agencies

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ADDITIONAL RESOURCES

Brief summaries of all bills that passed during the 2023 legislative sessions that had a fiscal impact on this department are available in Appendix A of the annual Appropriations Report:

<https://spl.cde.state.co.us/artemis/gaserials/ga39internet/ga39202324internet.pdf>

The online version of the briefing document, which includes the Numbers Pages, may be found by searching the budget documents on the General Assembly's website by visiting leg.colorado.gov/content/budget/budget-documents. Once on the budget documents page, select the name of this department's *Department/Topic*, "Briefing" under *Type*, and ensure that *Start date* and *End date* encompass the date a document was presented to the JBC.

ISSUE 1: A RECONSIDERATION OF THE COMPETENCY CRISIS – JUDICIAL PROCESS RECOMMENDATIONS

The "competency crisis" in the state courts that drives the current high cost behavioral health systems approach to build forensic mental health system capacity and infrastructure, should be more precisely stated and considered, reframed within the context of the courts, public safety, and community stability, and solutions reconsidered from that reframe. Specifically, pursuing policies that encourage "diversion from competency" may deliver competency crisis relief at a lower cost than capacity and infrastructure buildout, while also providing a more sustainable, permanent, and holistic approach to addressing behavioral health issues for individuals at risk of entering the competency process.

SUMMARY

- While the question of public safety is always foremost in mind among judges and prosecutors, there is recognition that many individuals arrested for low-level crimes suffer from the interplay of untreated behavioral health issues (mental health and substance abuse) and general economic instability and homelessness, and therefore, a defendant's involvement in the criminal justice system and the community's interest in public safety often coincide and are enhanced through the resolution of the underlying factors creating instability rather than through further engagement in the criminal justice system and incarceration.
- There is a broad belief among officers of the court – judges, defense attorneys, and prosecutors – that a defendant who exhibits behavioral health issues or problems may be best served with a holistic, behavioral health assessment and holistic behavioral health treatment. On this basis, officers of the court typically default to the only court process solution available – the use of the competency process – as a way of seeking a holistic behavioral health solution for defendants.
- However, what is commonly and loosely called "competency" is actually a much more limited legal principle also known as "aid and assist". Can the defendant "aid and assist" in their defense? On that basis, the competency evaluation and restoration process is entirely and only engaged in considering and resolving this slim question.
- Therefore, the belief that engaging a defendant in the competency process as a solution to holistic behavioral health, connection to community support, and sustained personal stability in the community is mostly mistaken. There is no good reason to route individuals into competency who can readily find an off-ramp to additional stability and holistic behavioral health through more refined attention to diagnostic processes that help to avoid the overuse of the competency system.

RECOMMENDATION

Staff recommends that the Committee consider incremental, targeted, funding within the courts and courts-adjacent functions to begin and improve practices for "diversion from competency", including: (1) encourage neuro-psych evaluations (warranted for about a third of the competency population) or comprehensive psychological evaluations and related case planning, as an alternative to the use of

competency evaluations; (2) build state courts capacity to increase practices and opportunities for diversion from the competency process; and (3) build on behavioral health court liaison earlier case planning and expanded access to neuro-psych and other comprehensive psychological evaluations to more effectively connect individuals with community resources to build long-term stability and reduce recidivism from individuals at risk of entering the criminal justice system due to behavioral health issues compounded with economic instability.

DISCUSSION

Disclaimer: Staff has explored the issues around "competency" over the course of the interim through research, conversations, and field visits, but does not claim to have achieved a professional education in any of the professional and clinical fields that revolve around the legal and clinical issue of "competency". There may be points that staff will include in this discussion which may not be legally, technically, or clinically precise as used or communicated within those professions. Staff endeavors to functionally communicate the broad strokes, main issues, and crossover concepts; staff welcomes professional clarification of details, points, and use of language around competency. Additionally, staff does not believe that all of the understanding necessary to address competency issues is either perfectly or thoroughly captured and included in this issue brief. Nevertheless, staff is confident that the information and recommendations are intended to advance the policy conversation around the use of competency in the state courts and are supported by staff's research.

A RECONSIDERATION OF THE COMPETENCY CRISIS

There is a broad belief among officers of the court – judges, defense attorneys, and prosecutors – that a defendant who exhibits traits that suggest a behavioral health issue or problem may be best served with a holistic, behavioral health assessment and holistic behavioral health treatment as necessary. It is intended that such a solution might return that defendant to a state of holistic (sustained, personal, functional stability in the community – as fully as possible) behavioral health, regardless of the defendant's guilt or innocence in the case at hand.

The question of public safety is always foremost in mind among judges and prosecutors. Nevertheless, there is a recognition that many individuals who are arrested for low-level crimes suffer from the interplay of unresolved and untreated behavioral health issues (mental health and substance abuse) and general economic instability and homelessness. Therefore, a defendant's involvement in the criminal justice system and the community's interest in public safety often coincide and are enhanced through the resolution of the underlying factors creating instability rather than through further engagement in the criminal justice system and incarceration.

On this basis, officers of the court typically default to the only court process solution available – the use of the competency process – as a way of seeking a holistic behavioral health solution for these defendants.

However, what is commonly and loosely called "competency" is actually a much more limited legal principle also known as "aid and assist". Can the defendant "aid and assist" in their defense? On that basis, the competency evaluation and restoration process is entirely and only engaged in considering and resolving this slim question. Competency evaluations and competency restorations do not, in and of themselves, deliver behavioral health solutions for the defendant, much less do they deliver personal

holistic behavioral health that leads to long-term stability in the community. Nor do they consider the need to effectively address the social determinants of health, such as housing, transportation, and economic stability.

Competency "restoration" – best understood as education about the legal process – is only intended to return the defendant to a functional state of mind, for as long as the period necessary to resolve the criminal justice case, in which the defendant comprehends the gravity and structure of their court proceedings for their case and their need to helpfully participate in their defense with their attorney.

Therefore, the belief that engaging a defendant in the competency process as a solution to holistic behavioral health, connection to community support, and sustained personal stability in the community is mostly mistaken. As previously suggested, this is despite the good intentions of the officers of the court who are hopefully seeking a solution for individuals experiencing mental illness, substance abuse, homelessness, and ongoing economic instability who enter the criminal justice system and then necessarily get routed into the competency process. The courts and law enforcement are the fulcrum point where the social problems related to behavioral health and economic insecurity intersect with official public processes intended to promote the diverse interests of public safety and individual constitutional liberties. In this case, the courts have become the locus and the focus for addressing much larger and more complex public health and economic issues.

The extended delays in engaging the competency process, due to the institutional delays in evaluations and restoration in state treatment facilities solely for the purpose of providing an individual the ability to aid and assist in their defense, often end up exacerbating the immediate mental health needs. Those needs might be resolved more readily without entry into this cumbersome and delayed legal process that does not at all deliver as its purpose holistic behavioral health solutions for those who enter. It is not unusual for individuals with untreated behavioral health issues to experience severe and rapid decompensation that further threatens theirs and others safety while incarcerated. It is not unusual for the delays currently experienced in the competency process to exacerbate and worsen individual mental health and personal stability.

From the judicial branch perspective, and perhaps even from the legislative perspective, there is frustration at the building backup of evaluations and restorations to be addressed at the state behavioral health office charged with these addressing these issues, the Office of Civil and Forensic Mental Health (OCFMH) in the Department of Human Services (DHS). There is no need to further state the very same concerns at issue in the related lawsuit and settlement agreement that has driven much of the policy discussion and funding needs in recent years.

Similarly, from the OCFMH and DHS perspective, there is frustration that more defendants continue to be routed into the competency process by the legal system, further exacerbating the backup. The OCFMH-DHS solution might be to reduce the over-referrals into the competency process, especially from judges and public defenders; while also misunderstanding the gravity of the role that judges and public defenders fulfill to ensure that justice is delivered for each person involved in the criminal justice system related to constitutional rights. For these officers of the court, this is not a trivial question of efficient administration and bending the numbers on the margins to achieve competency process improvement for the state; this is a moral and constitutional commitment to each person involved in the criminal justice process.

Additionally, most of the backup is specifically related to those waiting for institutional services – hospital beds. This goes to the question of whether a person needs competency restoration services in an institutional setting or in the community. This is a recommendation made by OCFMH evaluators which is generally followed by a judge. Therefore, regardless of the number of individuals "entering" competency at the competency evaluation point in the court process, the OCFMH evaluators are primarily driving the recommendation and need for institutional-inpatient competency restoration. Although staff does not have data, in background conversations on the competency issue, staff was made aware of anecdotal suggestions that Colorado's evaluators recommend inpatient competency restoration services at higher rates than in other states.

Therefore, staff takes a thoroughly practical starting position as follows: there may be many points of improvement to be made in OCFMH process and execution, including capacity buildout; however, it is more important to take steps on the judicial branch side to address items that can be improved without engaging OCFMH and DHS solutions through the competency process. In other words, staff recommends that the Committee, the General Assembly, and ultimately, the Courts *sidestep* OCFMH and DHS solutions at every point possible, in order to more effectively address the competency crisis in the state.

We can continue to have aspirations that these state systems will eventually deliver incremental and systematic resolution for the improvement of this "problem". However, even if perfectly executed by any standard, such a solution is not intended to resolve or improve the mental health, substance abuse, and community instability issues that cause individuals to be arrested, enter the criminal justice system, and continue to re-enter the justice system indefinitely. Public safety in communities is not enhanced through the competency process in its current form and purpose. Individuals in the competency process are not aided in finding personal stability in community life through the therapies and purposes of the competency process.

DIVERSION FROM COMPETENCY

The simplest, most direct name for such a sidestepping of the competency process is "**diversion**" – and specifically, **diversion from competency**.

Officers of the court, and policymakers at all levels, need to understand that the competency process does not and will not deliver public safety and community stability for individuals at risk of entering the competency process in the criminal justice system. There needs to be a commitment at every public policy and administration level that solutions for public safety and community stability for individuals "at risk of entering competency" is to first and foremost limit and prevent their entry into competency, and second build on the systems that reside outside of the competency administration system in the state for enhanced, purpose-based resolution.

The state currently has the building blocks in place to move individuals away from competency and toward holistic behavioral health solutions; most of these supports are found at the community level – they are not delivered effectively by large, state systems. Most of the diverse network connection to community supports can and will occur through the Bridges of Colorado (statewide behavioral health court liaison office) model of connecting individuals involved in the criminal justice system with community provider support to bring stability to individuals at risk of entering competency in the criminal justice system.

Additionally, the state courts have an opportunity to advance the best practices of models for competency dockets that are increasingly deployed to better manage this issue at the district and county court levels. Building on the "competency docket" approach and further moving to a "competency diversion" mindset, approach, and practices at the courts will directly and immediately improve the experience of the competency crisis in the state, regardless of solutions sought at or delivered by the OCFMH-DHS point of administration.

AN OUTLINE OF THE DIVERSION FROM COMPETENCY SOLUTION

Once a defendant is in the competency process, the defendant is essentially confined to resolution through that process and completion of that process. And that process will not help that defendant with the ancillary and unique mental health and substance abuse issues and likely, community supports related to homelessness and economic instability, that can be addressed more effectively outside of the competency process, and especially outside of incarceration.

Jails are not well suited to address mental health issues, should not be used for that purpose, and should not be expected to deliver good public policy results for that purpose. This is functionally warehousing the social problems of mental health, substance abuse, and economic instability and homelessness in our law enforcement and criminal justice institutions.

Jails can continue to be used to safely incarcerate those individuals who are genuine threats to public safety. And the competency process as an institutional solution should be reserved for those cases where public safety is at issue and the defendant must be institutionalized or incarcerated. There is no good reason to route individuals into competency who can readily find an off-ramp to additional stability and holistic behavioral health through more refined attention to diagnostic processes that help to avoid the overuse of the competency system.

When the competency question is raised during legal proceedings – most often by a public defender – the judge is required to make a decision to have the defendant evaluated. The judge might also choose to stay that decision for a period and first request a neuro-psych or comprehensive psychological evaluation prior to ruling on the question of competency.

Prior to committing a defendant to the necessary wait involved in competency evaluation and restoration, a neuro-psych evaluation or – in the case where symptoms do not indicate the need for a neuro-psych evaluation – a comprehensive psychological evaluation can determine, (1) whether a defendant may be *permanently incompetent to proceed* (PITP) due to intellectual and developmental disability, dementia, or mental illness requiring long-term institutional care, and appropriately and immediately route the individual to criminal justice case resolution and provision of appropriate and necessary legal and institutional care; or (2) the need for additional mental health or substance abuse treatment to address the behavioral health issues that may have led to the contact by law enforcement and involvement in the criminal justice system.

For those in the second category, prior to being automatically routed into competency as the only apparent solution to behavioral health concerns, there may first be a need for: mental health diagnosis, treatment, intensive case management, medication, substance abuse treatment, or some combination of these. Any of these alternatives, in combination with addressing social determinants of health, such as housing and transportation, is more likely to return the individual to more stable behavioral health that avoids and precludes the need to route the individual into the competency process – a process not designed or intended to engage the individual from a holistic, behavioral health approach.

A Bridges court liaison may be assigned to a participant who is "at risk of entering competency" as readily as one who is in the competency process. The Bridges liaison can more effectively find community support for a participant that can lead to a quicker determination of diversion from incarceration and possibly diversion from the criminal justice process entirely. While issues like homelessness and finding housing may be the greatest challenge to Bridges liaisons in aiding participants under their care, the greatest frustration is losing the opportunity to help stabilize a participant who is locked into the competency process prematurely or unnecessarily and who cannot receive help to find stability in the community until after the competency process is concluded.

DIVERSION FROM COMPETENCY - RECOMMENDATIONS

- 1 Staff recommends that the Committee provide "pilot program" resources for three to five clinical positions to be located in Bridges of Colorado for two to three years. These clinical evaluator positions will be available through Bridges to conduct more thorough, and more directed, neuro-psych and other comprehensive psychological evaluations prior to a judge's decision on the "question" for a competency evaluation which initiates the competency process for a defendant. The "pilot program" structure is intended to test the effectiveness of the deployment of these resources from within the Bridges model, and to deliver annual reports each budget cycle to report on the effectiveness and use of these resources in achieving diversion from competency. Three positions will provide coverage predominantly for front range urban judicial districts; an additional two positions will provide coverage to the western slope and an additional outlying area of the state. Additionally, Bridges is likely to be structured statewide in six regions; five clinical positions may also enable almost statewide coverage through a regional assignment structure.
- 2 Staff recommends that the Committee provide the state courts with additional "pilot program" resources to allow judges to contract clinical evaluators for neuro-psych evaluations and competency evaluations independent of the OCFMH. Consistent with the preceding recommendation, locating access to independent evaluators directly in the state courts to judges can help determine the most effective organizational location for such resources on an ongoing basis. Consistent with the preceding recommendation, the "pilot program" structure is intended to test the effectiveness of the deployment of these resources from within the Courts, and to deliver annual reports each budget cycle to report on the effectiveness and use of these resources in achieving diversion from competency.
- 3 Staff recommends that the Committee provide additional staff resources for up to three positions in total – one for each of up to three judicial districts with the most experienced and developed competency dockets to provide dedicated staff coordinator positions for the competency dockets at those courts. Currently dockets are loosely managed or coordinated through ancillary court clerk staff; for increased effectiveness, similar to the model for problem-solving courts, a dedicated staff coordinator for three judicial districts will maximize judge and judicial district effectiveness through the competency docket model.

- 4 Staff recommends that the Committee provide additional staff resources for one or two positions for the problem-solving courts program at the State Court Administrator's Office to engage entirely in building competency docket effectiveness and best practices, including the use of practices for diversion from competency. Similar to (and different than) the model for problem-solving courts, this recommendation establishes a state level coordinator and analyst able to collect and analyze data and best practices for competency dockets. It is anticipated that these staff positions will be responsible to report on the effectiveness of resources deployed through the courts for this purpose.
- 5 Staff recommends that the Committee provide additional staff attorneys for the Office of State Public Defender related to competency. In those judicial districts with competency dockets, the one or more public defenders (in staff's experience, two are typically present in court during competency dockets to improve case flow) that have been assigned and dedicated to the competency docket in each judicial district, the more effective the public defender role can be advanced within that model. This ensures that process changes and improvements, including "diversion from competency", is experienced as appropriate and beneficial for the public defender's clients. The goal is to contribute to broad culture change in the public defender role regarding the efficacy of the use of traditional competency versus the adoption of the use of "diversion from competency" as more effective legal representation and holistic support for their clients. The OSPD's R1 request for additional attorneys satisfies this recommendation. Therefore, staff will follow the outline of the OSPD request for this purpose. Staff may include that portion of the OSPD request in the "diversion from competency" recommendation, or may leave that portion within the OSPD request. Staff will clarify that recommendation at figure setting.

Staff will provide more specific guidance in a figure setting recommendation regarding all of these components. It may also be appropriate for the Committee to "package" this resources solution with a statutory pilot program for the purpose of "diversion from competency". Staff will clarify a recommendation on the need or preference for legislation for this purpose at figure setting. In particular, staff will continue to partner with state courts administration leadership and judicial district staff, Bridges of Colorado leadership and staff, and the State Public Defender on this aspect of the recommendation.