2021 HOUSE JUDICIARY

HB 1181

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

HB 1181
1/20/2021

Relating to a defendant's fitness to proceed.

Chairman Klemin called the hearing to order at 10:20 AM.

Representatives	Attendance
Representative Lawrence R. Klemin	P
Representative Karen Karls	P
Representative Rick Becker	P
Representative Ruth Buffalo	P
Representative Cole Christensen	P
Representative Claire Cory	P
Representative Karla Rose Hanson	P
Representative Terry B. Jones	P
Representative Jeffery J. Magrum	P
Representative Bob Paulson	P
Representative Gary Paur	P
Representative Shannon Roers Jones	P
Representative Bernie Satrom	P
Representative Steve Vetter	P

Discussion Topics:

- ND Supreme Court Task force on Mental Illness
- Competency evalualtions
- Updating the ND code
- Difference between competency and criminal responsibility
- Evaluation procedure
- Clients understanding of the procedures

Rep. Skroch: Introduced the bill. Testimony #1903

Travis Finck, Executive Director, NDCLCI: Testimony #1801 10:25

Nick Thornton, Attorney at Law, Fremstad Law Firm: Testimony #1826 10:50

Doctor Rosalie Etherington, Superintendent for ND State Hospital: oral testimony 11:12

Chairman Klemin adjourned at 11:13 AM.

DeLores D. Shimek by Donna Whetham
Committee Clerk

TESTIMONY IN SUPPORT OF HB 1181

Defendant's Fitness to Proceed

House Judiciary Committee

Wednesday, January 20, 2021

Chairman Klemin and members of the House Judiciary Committee,

For the record, my name is Representative Kathy Skroch, District 26 of North Dakota. I appear before today to introduce House Bill 1181. I am not an attorney. There are others who will be testifying in support of the bill who will be able to provide testimony with an in-depth understating of this proposed legislation.

This proposed bill creates a new section in NDCC related to the fitness of an individual to proceed in court. The bill was crafted through a collaborative process working within the North Dakota Supreme Court Taskforce on Mental Illness, to which I have been appointed. This task force was called for, by then Chief Justice Gerald VandeWalle, to address the need for clear protocols and procedures currently lacking when persons suffering with mental illness come before the court. The bill also establishes timelines for processing an individual with suspected competency and mental illness concerns to avoid unnecessary delays. These suggested timelines where heavily debated among those who provided input. The task force members worked with lawyers, representatives from stakeholder groups and the professionals working in this field. Much research and effort were put into the bill draft prior to submitting it to the NDLC.

Those behind the bill in part are states attorneys, defense attorneys, judges, social service agencies and such, who have struggled with the lack of clarity in how to process and proceed in these cases dealing with persons who may have broken laws while mentally ill.
Section 5, page 5, lines 2 through 8, were discussed at length knowing these would likely be the most controversial and will therefore be debated in committee. This subsection addresses the option of a court to dismiss a proceeding with prejudice.

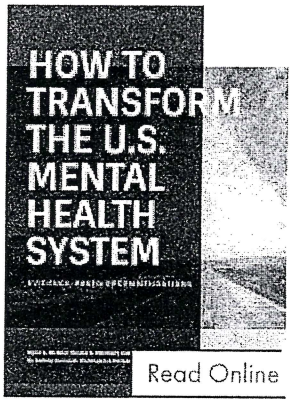
The primary objective of the bill is to ensure a proper and timely assessment is done to verify the cognitive condition of a defendant to ensure fitness to proceed. Part of the discussion must be about the devastating harm that occurs to persons suffering with mental illness when convicted for crimes for which there was lack of culpability due to mental illness. Options were considered to avoid criminality which may have devastating impacts when it comes to housing, credit, employment, college loans and so forth that result from criminal records. Additionally, this bill establishes more clearly define timelines and intent in the law.

With the recommended changes proposed in the bill, uniform procedures will be established to prevent uncertainty and establish best practices.
The pros and cons of dismissal "with prejudice" will certainly be discussed. There are solid reasons for wanting this option, but it should not be presumed that every case would be dismissed depending on each individual situation. The definition for "clear and convincing evidence" was included to prevent ambiguity.
I will stand for questions, however, I believe there are others testifying much more capable of answering your questions.

Representative Kathy Skroch
District 26
Human Services Committee and Interim
Ag Committee and Interim
ND Supreme Court Task Force on Mental Illness

How to Transform the U.S. Mental Health System

Evidence-Based Recommendations



by Ryan K. McBain, Nicole K. Eberhart, Joshua Breslau, Lori Frank, M. Audrey Burnam, Vishnupriya Kareddy, Molly M. Simmons

Related Topics: Depression, Health Care Reform, Integrated Care, Medicaid, Mental Health Treatment, United States

The United States is at a time of promise for historic transformation in mental health care. For decades, systemic problems have persisted — including high levels of unmet need, underdevelopment of community-based supports, and inequities in access and quality of care. In 2019, only 45 percent of people with a mental illness received any mental health treatment. This translates to unmet need for more than 30 million Americans. Additionally, despite similar levels of mental health care need, racial/ethnic minorities in the United States are about half as likely to use mental health care as non-Hispanic Whites. There are also striking geographic variations in availability of mental health specialty care, with rural areas particularly underserved.

Research Questions

1. How can policy changes at all levels of government effect broad transformational change to improve the lives of millions of Americans living with mental illness?
2. What are the best practices and recent innovations in the mental health sector?
3. What opportunities for change in the mental health care system are supported by the research literature?

Yet recent years have seen positive signs of change. Congress has passed key legislation — such as the 2008 Mental Health Parity and Addictions Equity Act – with overwhelmingly bipartisan support, states have endorsed an expanded role of Medicaid in providing coverage for individuals with serious

mental illness who are often lower income and struggling with employment, and researchers have identified new evidence-based treatment models that health systems can implement.

This report provides recommendations to promote transformational change to improve the lives of the millions of Americans living with mental illness. To identify these recommendations, the authors conducted a broad review of policy ideas related to goals for the mental health system. They conducted an extensive analysis of mental health systems processes, policies, and solutions supported by evidence and received input from experts around the country.

Key Findings

Decisive and transformative change to the U.S. mental health landscape is possible

- For change to occur, politicians, public administrators, advocates, and policy experts need to coalesce around a focused set of objectives.
- To this end, the authors provide analysis and recommendations in 15 areas where there is potential for transformative change that can improve the lives of the more than 60 million Americans affected by mental illness.

The analysis and findings are organized under three goals for mental health system transformation: promote pathways to care, improve access to care, and establish an evidence-based continuum of care so patients get the help they need

- Many Americans experience mental illness, but the majority of those in need of assistance go untreated. The authors identified three solutions to increase mental health service utilization by those in need: education initiatives, meeting individuals where they are, and supportive housing.
- Once people decide to seek care for a mental health problem, services that they value and want to access should be available to them in their community without undue financial burden. Services must be affordable, available, accessible, and acceptable.
- Communities should be equipped to provide a well-coordinated and evidence-based continuum of mental health services to meet the needs of people with mental illnesses. For the continuum to succeed, it is necessary to guide individuals to a level of care that corresponds to their level of need, promote effective channels of communication and coordination within the continuum, and establish a payment structure that rewards evidence-based practices within the care continuum.

Recommendations

- Promote systematic mental health education.
- Integrate behavioral health expertise into general health care settings.
- Link homeless individuals with mental illness to supportive housing.
- Develop a mental health diversion strategy centered on community behavioral health.
- Strengthen mental health parity regulation and enforcement.
- Reimburse evidence-based behavioral health treatments at their true cost.
- Establish an evidence-based mental health crisis response system.
- Establish a national strategy to finance and disseminate evidence-based early interventions for serious mental illness.
- Expand scholarships and loan repayment programs to stimulate workforce growth.
- Improve the availability and quality of peer-support services.
- Expand access to digital and telehealth services for mental health.
- Include patient-important outcomes in treatment planning and assessments of care quality.
- Define and institutionalize a continuum of care in states and communities.
- Launch a national care-coordination initiative.
- Form a learning collaborative for Medicaid behavioral health financing.

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Research conducted by

RAND
HEALTH CARE

This research was funded by Otsuka America Pharmaceutical, Inc., and carried out within the Access and Delivery Program in RAND Health Care.

This report is part of the RAND Corporation research report series. RAND reports present research findings and objective analysis that address the challenges facing the public and private sectors. All RAND reports undergo rigorous peer review to ensure high standards for research quality and objectivity.

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HB 1181
House Judiciary Committee
January 20, 2021
Testimony of Travis W. Finck, Executive Director, NDCLCI

Chairman Klemin, members of the House Judiciary Committee, my name is Travis Finck and I am the executive director for the North Dakota Commission on Legal Counsel for Indigents. The Commission is the state agency responsible for the delivery of indigent defense services in North Dakota. I rise today on behalf of the Commission to provide testimony in support of HB 1181.

HB 1181 is a re-write and update of the Criminal Competency or Fitness to Proceed chapter of North Dakota Century Code. To explain the current version of the bill, I will provide some brief history. While serving as the Deputy Director of the Commission, I was contacted several times by our attorneys frustrated over how competency evaluations were being handled in the state. To address these issues, I started a work group with assistance of the State Hospital to review competency and criminal responsibility evaluations. The workgroup consisted of individuals from the State Hospital, Department of Human Services, the Supreme Court, the State's Attorney's Association and Indigent Defense. The workgroup began its work by looking at the processes, forms, bench book the court uses and the statutes to determine what if anything could collaboration fix.

In the fall of 2019, several representatives of the judicial system of North Dakota were invited to attend a Summit on Mental Health and the Courts that was being presented by the National Center for State Courts. As a result of that meeting, the Supreme Court formed a committee which asked my workgroup for recommendations for necessary updates to the competency statute. We then also received technical assistance from the National Center for State Courts. We then arrive at HB 1181. Originally, the workgroup proposed putting the new language in a new subsection of chapter 12.1-02, as the committee felt it was more appropriately placed in a stand alone subsection than 12.1-04 which deals with juveniles and intoxication. However, this committee chooses to proceed, it is the content that matters.

This bill is the very essence of compromise. There have been many discussions around certain items and terms. Some agreed on some sections, some disagreed, however all agreed

the time is right to update the code. This testimony seeks to guide the committee through the sections.

Section 1 is simply an amendment to add definitions which are specific to the new provisions of code. The most notable amendment is definition 4 which starts at line 20-22. This is the standard for fitness to proceed as found in Dusky v. U.S..

Section 2 deals with the disposition of defendants. It starts with a presumption that all defendants are fit. Furthermore, if a defendant is found to lack fitness to proceed, they may not be tried, convicted or sentenced for the commission of an offense. The last part of section 2 is completely new and deals with the confidentiality of records. The current law does not address the confidentiality of records.

Section 3 deals with temporary detention for purposes of examination. There is an important distinction here that garnered a lot of discussion in the workgroup, detention is the right word to use, not commitment. Most of the other language is consistent with what currently exists in code.

Section 4 deals with the examination itself. Perhaps most important of the changes is the requirement the examination be done within 30 days of the tier 1a mental health professional being served with the order. To assist in this, defense attorneys and prosecutors will be required to disclose necessary materials, such as discovery, to the mental health professional along with the order. The contents of the report remain largely unchanged. However, the examiner must now make a determination if the defendant is found to lack fitness, whether or not they will regain fitness within the time periods proscribed in this bill. 1 year for a felony. If a misdemeanor, the length of time for the most serious misdemeanor. Further, the examiner may include in the report a recommendation as to what type of treatment would be necessary in an attempt to regain the fitness.

Section 5 suspends the proceedings upon a finding of lack of fitness. If an individual lacks fitness and the examiner believes they will not regain fitness, the case is dismissed with prejudice. If an individual lacks fitness but the mental health professional determines they may attain fitness in the time frames provided, 1 year for a felony, 360 days if most serious offense is class A misdemeanor, or 30 days if most serious offense is class b misdemeanor, the case

against the defendant is suspended. If fitness is not restored within the allotted times, the case is dismissed with prejudice. This is where the committee had the most discussion. Ultimately, this bill says with prejudice. The final tally was not unanimous, and several members of the group felt the law should remain as just dismissed. The Commission on Legal Counsel defers to the committee on what is best. Furthermore, in a motion to resume prosecution, the state bears the burden of proving the defendant has regained fitness by clear and convincing evidence.

The next changes to existing law is in the restoration of fitness which starts on page 5 at line 17. Currently, there is no provision in state law which provides for restoration of fitness. Simply put, this doesn't exist. Therefore, it is vitally important we look after the rights of the accused and make sure there are sufficient safeguards for the community. We believe this section does that. Page 5 line 17 through the end of the bill adds the ability for the court to enter commitment orders allowing the mental health professionals to attempt to restore fitness. The treatment must be the least restrictive form of treatment therapeutically available. Trial counsel remains on, answering the question of who provides counsel. The bill allows for a forced medication order, but also allows the defendant, through counsel to object. It also requires the court set a date for review of the case. The statute also allows for requests for modification to the terms of the commitment order to be raised by any party to the action.

Mr. Chairman, members of the committee, HB 1181 is the culmination of a lot of hard work and compromise. The Commission on Legal Counsel requests a DO PASS recommendation from the committee.

Respectfully Submitted:

Travis W. Finck

Executive Director, NDCLCI

fremstad | law

MEMORANDUM

From: Nick Thornton
To: Hon. Representative Larry Klemin, Chair, House Judiciary
Date: January 19, 2021
Re: *Testimony of Nicholas D. Thornton, Attorney at Law, in Support of HB 1181*

To Chair Klemin and the honorable members of the House Judiciary Committee, my name is Nick Thornton. I am a criminal defense attorney at the Fremstad Law Firm. I am testifying in my *individual* capacity in support of HB 1181. The views expressed in this testimony are mine and mine alone. I am *not* testifying as a lobbyist. I am a defense bar representative on the taskforce who proposed the underlying bill draft. I strongly support HB 1181 (with exception of section 5, line 24, which I think should read, "must be suspended for a period no longer than one year."). I request a **DO PASS** recommendation from this Committee.

I will provide my narrative testimony below, followed by a "testimony summary" sheet. I will be available to testify remotely to answer any questions posed by committee members.

NARRATIVE TESTIMONY

BACKGROUND AND EXPERIENCE: I have been a criminal defense lawyer in North Dakota for 14 years. I was a full-time public defender in the Fargo office from 2008 through 2013, and have had at least a half-time public defender contract in addition to representing privately retained criminal defendants since then. I have represented well over 4,000 criminal defendants charged with everything from murder to driving under suspension, and everything in-between.

As you can imagine, many of my clients struggle with mental health and chemical dependency issues. On occasion, those issues are so severe that I have significant concerns about my client's ability to understand the proceedings against him or her. I also occasionally have instances where I have concerns about whether my client understands what I am saying (and that I understand what my client is saying). In those situations, I regularly ask the Court to order a competency evaluation, sometimes also referred to as a "fitness to proceed" evaluation.[1] These are typically performed at public expense by a forensic psychologist at the North Dakota State Hospital or at the Developmental Center in Grafton. On average, I ask for 5 to 10 of these evaluations every year, and have every year since I became a public defender. I have litigated competency or "fitness" in multiple counties in North Dakota, in Minnesota, and in U.S. District Court in North Dakota. In working through these issues, I developed form templates to request these evaluations, and my forms have been disseminated

[1] I use fitness to proceed and competency interchangeably throughout my testimony.

throughout the indigent defense network of attorneys. My forms are widely used across the State. I am extremely familiar with the strengths and weaknesses of the current fitness to proceed chapter, N.D.C.C. ch. 12.1-04.

DIFFERENCE BETWEEN COMPETENCY AND CRIMINAL RESPONSIBILITY: From the outset, it is important to make the essential distinction between fitness/competency and criminal responsibility. These concepts are often confused but they really are separate issues and have separate constitutional and public policy considerations.

Criminal responsibility can be thought of as North Dakota's version of the insanity plea. It focuses on the defendant's mental state at the time of the offense. Criminal responsibility is a defense that must be raised by the defense. Criminal responsibility is not at issue in H.B. 1182.

Unlike criminal responsibility, competency focuses on the defendant's *current* mental state and current mental understanding *right now*. It might be months or even years after the alleged criminal conduct occurred. Also, unlike criminal responsibility's "snapshot in time, competency is fluid and potentially changes over time. For example, a defendant may have competency today because he is compliant with his medication, but if he stops taking his medication, he could decompensate and become incompetent in the future. Consequently, a defendant could currently lack competence right now but could have been criminally responsible at the time of the offense. Conversely, a person could lack criminal responsibility for the criminal conduct at the time of the offense but be competent to proceed now.

Also unlike criminal responsibility, which is a defense that can be waived by a defendant who chooses not to assert it, fitness to proceed is a threshold *justiciability* issue implicating Due Process. It *cannot* be waived under any circumstance. Just like jurisdictional issues relating to where the alleged crime occurs or the fact that the person must be an adult or a transferred juvenile to be prosecuted in district court, a person must be competent before the case can proceed. The United States Supreme Court has held that it violates Due Process to proceed if a defendant lacks competency. As a result, when a defendant is deemed unfit or incompetent, everything except legal challenges to the prosecution must be immediately put on hold. If a defendant is unlikely to regain competency, the case can never move forward and must be dismissed.

CURRENT LAW AND PRACTICE:

A. Basic Standard for Competency/Fitness To Proceed: North Dakota's current comptency chapter, N.D.C.C. ch. 12.1-04, has been largely unchanged since it was recodified by North Dakota's restructuring of its criminal code in 1973. It borrows heavily from federal statute, 18 U.S.C. §§ 4241-4248 (1949), *Dusky v. United States*, 362 U.S. 402 (1960), and the Model Penal Code § 4.04 (1962). Unfortunately, it

appears as though it was adopted without much discussion. In *Dusky*, the Supreme Court made clear a defendant has a right to a competency evaluation before trial. The Court also outlined the basic standards for determining whether a person is competent under the federal statutes and the Constitution. After *Dusky*, every defendant must be able to (1) understand the charges against him or her and (2) must have the present ability to aid the attorney in his or her own defense. The *Dusky* standard is currently codified in N.D.C.C. § 12.1-04-04, which states:

> No person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against the person or to assist in the person's own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.

Id. The statute also closely resembles Model Penal Code § 4.04.

B. Circumstances where Competency Issues Arise: Competency issues typically present in one of two circumstances. First, there are occasions where the district court on its own has reason to question the defendant's ability to understand the proceedings. For example, I had a murder defendant suffering from severe schizophrenia. In open court, he claimed that he wanted to represent himself because I was part of a conspiracy with Hillary Clinton, the Pope, and the Blue Army. He made similar allegations about the judge. This defendant continued to behave in an erratic way in open court so inconsistent with reality that I did not have to raise the competency issue—the judge saw it and was concerned about it himself. While I filed a motion in that case just to create a clear record, the judge commented he would have ordered a competency evaluation on his own based on the defendant's conduct in court.

The second way this issue presents is far more common. Many questionably competent defendants have spent a lifetime coping with mental illness. They become quite skillful and adept at hiding it from others for short periods such as during a court hearing. The ability to hide the issue, however, often disappears the longer a the lawyer speaks and interacts with the defendant. In these situations, I may develop concerns when I spend time talking about the person's history, the case facts, and possible defenses. I always ask about mental health diagnoses, treatment, and medication. I may learn more about possible competency concerns from friends, family, guardians, or case managers. At least 90 percent of the cases I raise competency issues in arise from concerns raised outside of the courtroom in my private discussions with clients or others.

C. Court Process After Competency Issue is Raised: Whether the concern arises in open court or from behind the scenes in my interactions with a defendant, the process starts with a motion to the district court for a competency evaluation. The motion typically includes a request for a temporary commitment of the defendant for the

purposes of the evaluation in the least restrictive appropriate setting. *See* N.D.C.C. § 12.1-04-06. These are almost always done at the State Hospital or Life Skills Center. There are very few private tier 1a mental health professionals who do forensic evaluations. Those that do charge, on average, $3,000 to do the evaluation and prepare their report. These private evaluators charge more to testify about their findings. The evaluator prepares a report and submits it to the Court. Because this is a threshold issue affecting whether a case can proceed, the report is shared with the Court, prosecutor, and the defense attorney. *Id.*

Obviously, there are two possible "ultimate conclusions": the defendant is competent or incompetent. If the evaluator concludes the person is competent and the defendant does not challenge the evaluator's conclusions, the court simply continues with holding the next hearing. If the evaluator concludes the person is incompetent and the State does not contest the evaluator's conclusions, the proceedings must be suspended. If either party challenges the evaluator's conclusions, the Court holds a hearing to determine, by a preponderance of the evidence, whether the defendant is competent or not.

If the person is found to be incompetent, the district court then must determine whether the defendant will "attain fitness in the foreseeable future." N.D.C.C. § 12.1-04-08(1). Under current law, "foreseeable future" is not defined. If the court determines the defendant will attain fitness in the undefined foreseeable future, the court must suspend the proceedings—essentially putting the case on an indefinite hold until the maximum term the person could face expires or, after a court hearing, the court determines the defendant will not attain fitness. *See id.* If the court determines the defendant will not regain fitness, the charges must be dismised. There is no statutory indication on whether the charges are dismissed with or without prejudice. *See id.* Finally, the statute authorizes the court to make referrals "for other services or treatment." *See id.* While the statute authorizes referals, it does not provide clear authority for comptency restoration treatment short of initiating separate, time consuming proceedings such as guardianships, civil commitment, or apparently voluntary treatment at a human service center. *See id.*

PROBLEMS WITH CURRENT STATUTE/CURRENT PRACTICE:

There are a number of problems or limitations with the current statute and practice. Each of these problems or limitations are discussed below.

A. Definitional Issues: In a number of cases I have raised these concerns, the Court has struggled with defining the terms used in chapter N.D.C.C. ch. 12.1-04. The current chapter does not have a definitional section, although some of the terms and concepts overlap with language contained in the civil commitment statutes, N.D.C.C. ch. 25-03.1. Having a clearly established definitional section clears up what the Legislature means and certainly aids in judicial interpretation of the statutes.

B. Evaluation Procedure and Commitment: The current evaluation procedure authorizes the Court to order a defendant to be temporariliy committed for an evaluation by a tier 1a mental health professional. This commitment may be at the State Hospital, the Life Skills and Transition Center, or other facility for up to 30 days, which can be extended for up to another 30 days. The commitment must be in the least restrictive appropriate setting. The evaluation may occur in a present residential setting on an outpatient basis.

When I am requesting a competency evaulation, I often have to wait weeks or even months to get my client in to a tier 1a mental health provider. I do not fault the State Hospital for this. It is well known we have a shortage of mental health professionals in North Dakota. There are very few private providers, and the private providers here are quite expensive. The State Hospital professionals are overworked, understaffed, and underfunded.

That said, clients seeking these evaluations are presumed innocent. There is no reason a presumably innocent person should be held in custody for thirty days to do an evaluation. There is even less reason to allow the detention to extend another 30 days. These delays, in addition to the time necessary to prepare, disseminate and digest the report, result in delaying the court proceedings at least two, if not three or four months. This impacts a defendant's right to a speedy trial and an alleged victim's right under N.D. Const. Art. 1, § 25 (Marsy's Law) to a prompt disposition of the case. The shorter the time frame to complete the evaluation and prepare the report, the better for the entire justice system.

C. Records. The records generated by the evaluation to determine fitness, by definition, contain protected mental health and medical information. Unlike other actions where mental health records are included in the court file, *e.g.*, civil commitment or guardianship actions, there is no clear statutory command to keep these records confidential in the current statute. Currently, I have to request the reports and records be filed as confidential in every order to protect my client's information from disclosure as much as possible. Further, I have to do so cobbling together claims of confidentiality under the North Dakota's administrative rules and federal law. A statutory directive in this chapter would clarify the recordkeeping issues to protect confidential information from improper and frankly, illegal disclosure.

D. Court Procedures: In my practice, I have experienced substantial procedural variations between judges and between districts in how these fitness evaluations are ordered. I have had judges on their own attempt to combine competency and criminal responsibility evaluations. I have had judges suspend proceedings before proper notices have been filed. I have had judges resume proceedings without giving me an opportunity to be heard on the state's motion to resume proceedings. I have had situations where the State was given access to records for which they should not have

access. I have had judges delay ruling on a motion to dismiss charges when an evaluator determined my client would never regain fitness because the judge, without contrary evidence, did not believe the evaluator. I have frequently came across issues about whether dismissals should be with or without prejudice. I have had discussions with prosecutors who read the "maximum period of detention" to include consecutive sentence potential (e.g., fifteen years for three class c felony offenses charged in the charging document rather than 5 years, the maximum for a class c felony).

Most troubling, and in contrast to the criminal responsibility and civil commitment chapters, there is no clear statutory authority to order competency restoration treatment. The statute allows the court to "make a referral" for other appropriate services. The authority to make a referral is extremely different than the authority to order commitment for treatment. This becomes particularly complicated if a judge orders treatment based on questionable statutory authorization and the defendant refuses the treatment or medication. The treatment facility is placed in an incredibly precarious legal position. Can they give the person involuntary medication? Can they require the person to attend therapy? Can they hold the person? Because of this precarious position, the State Hospital typically reverts back to the procedure for civil commitment in N.D.C.C. ch. 25-03.1, which duplicates much of what was already done on the criminal side. It substantially delays the start of restoration treatment, further continuing the criminal proceedings.

There needs to be a clearly articulated court procedure laid out in statute to avoid these variations. There needs to be clear, direct authority to initiate competency restoration treatment. A referral is not the same as a commitment order authorizing treatment. A mentally unfit defendant in Pembina County should be treated the same, and should go through the same judicial process, as a mentally unfit defendant in Stark, Burleigh, or Cass County.

BENEFITS OF H.B. 1181:

House Bill 1181 is the product of hours of hard work by a multi-disciplinary task force including vested parties in the criminal justice and mental health worlds. Overall, N.D.C.C. ch. 12.1-04 is largely uncontroversial, but it is a bit procedurally cumbersome, antiquiated, and incomplete or insufficient when compared to its overlapping Century Code chapters, 12.1-04.1 (criminal responsibility) and 25-03.1 (civil commitment). The biggest benefits to H.B. 1181 are as follows:

Section 1 provides a definitional section to address ambiguity of key terms. These definitions are consistent with those contained in other provisions of the Century Code.

Section 2 clears up any ambiguity concerning the awkward and antiquiated language of "mental disease or defect." It also provides clear guidance and authority to restrict access to protected mental health records.

Section 3 cleans up repetitive language in N.D.C.C. § 12.1-04-06. It also removes the ability to extend the duration of a defendant's temporary detention for a subsequent 30 days. The goal here is to speed up the evaluation process as much as reasonably practical to keep the criminal case moving forward without unreasonable delays. Other states with similar language have limited this detention to as short as 7 days, with the average being 14 days. The committee agreed here to allow 30 days' detention, but not the addtiional 30-day etension for good cause previously authorized in the statute.

Section 4 addresses concerns from the State Hospital. In our task force discussions, the State Hospital was concerned that they sometimes do not receive a timely notice of the court's order for the evaluation, which makes it difficult or impossible for them to comply with the 30-day timeline to do the evaluation. Current law does not indicate who must provide the State Hospital with notice of the order. Some clerks automatically send the order; other clerks assume the attorney for the party will provide notice of the entry of order. Section 4 makes clear the 30-day clock to complete the evaluation does not start until they receive notice of entry of the order. Section 4 also addresses another issue raised by the State Hospital: they often do not receive the materials they need to perform the evaluation in a timely fashion. There are several reasons this has historically been a hangup resulting in delays. First, current law does not require its disclosure to the evaluator. It is not something many attorneys think about in requesting an evaluation. Second, there are some materials that are restricted and difficult to send to evaluators. For instance, access to criminal history reports are restricted to those with specialized criminal justice access. Without statutory authority to disclose them, sending those records to the evaluator poses some concern. Section 4 defines how long the evaluator has to prepare and file his or her report. Finally, section 4 allows the evaluator to opine on a general description of what kind of theraputically appropriate treatment may be necessary for the defendant to regain fitness.

Section 5 contains perhaps the biggest change from current law in that it provides concrete temporal limits on the comptency restoration decision. If a defendant under current law is found to be incompetent, the court must determine whether the defendant will attain fitness "within the foreseeable future." The phrase "within the foreseeable future" is undefined. Section 5 sets a 1-year time limit for a felony, and the maximum term of imprisonment for a misdemeanor. Section 5 does slightly deviate from the task force's intent. Line 24 reads the proceedings "must be suspended for a period of one year." The my recollection of the task force discussion was to say that for felony offenses, the proceedings should be suspended for "no longer than one year." The idea was to reasonably define "foreseeable future."

The next proposed change to current law in section 5 addresses the prejudice issue. Current law is silent on dismissal with or without prejudice. The proposal here makes clear the dismissal should be with prejudice. Concededly, this was a hot topic with the

lawyers on the task force, with defense representatives supporting dismissal with prejudice and prosecutor representatives supporting dismissal without prejudice. The Commission on Legal Counsel for Indigents has not taken a position on the issue, but I will. Dismissal contemplates finality. If the provision is left silent or without prejudice, there is no guidance with respect to recharging the offense. Does it comport with notions of Due Process and substantial justice for a prosecutor to continue to recharge an offense over and over? Some offenses have extended statutes of limitations. Homicide, for instance, has no statute of limitations. Dismissal without prejudice would allow a prosecutor to refile the charge the next day. The defense lawyer would have to move for a competency evaluation. We would go through the process again, with a new finding of incompetence. The person would be subject to competency restoration processes again for up to another year. Then, another dismissal without prejudice. This literally could happen every year for the rest of the defendant's life. Even under current law, there is a limit to regaining fitness in the "foreseeable future." Dismissal without prejudice allows prosecutors unfettered and unchecked discretion to circumvent that to avoid dismissal. Consequently, in the interests of judicial economy, state and mental health resource economy, and judicial finality, dismissal with prejudice is a completely appropriate and necessary public policy decision.

Much less controversial is section 5's next big change. Instead of merely authorizing referrals for other appropriate services, section 5 provides the court with clear authority to order competency restoration treatment using the least restrictive, therapeutically appropriate course of treatment. This includes all nonexperimental, generally accepted, psychiatric, or psychological treatment recommended by the faciilty and involuntary medication without the need for a separate commitment proceeding under chapter 25-03.1. Of course, defendants have the right to counsel during these proceedings and can object. This is consistent with provisions contained in chapters 25-03.1 and 12.1-04.1.

Finally, related to the comptency restoration treatment, section 5 clarifies the process for resuming prosecution after a defendant goes through comptency restoration treatment. Current law is silent on this issue.

Mr. Chairman and members of the Committee, House Bill 1181 is a substantial improvement upon chapter 12.1-04. I request a DO PASS recommendation.

Dated January 19, 2021

Nick Thornton

SUMMARY OF TESTIMONY

1. Introduction
    a. Nick Thornton—criminal defense lawyer – individual capacity
    b. Taskforce member
    c. Extensive experience with fitness/competency issues

2. Competency vs. Criminal Responsibility
    a. *Criminal Responsibility*
        i. Focus is on mental state at the time of crime
        ii. ND's insanity, raised as defense
        iii. Waivable
    b. *Competency*
        i. Focus is on mental state, ability to understand and communicate now
        ii. Threshold justiciability issue
        iii. Not waivable

3. Current Law and Practice
    a. Largely unchanged dating back to recodification of criminal code
    b. *Dusky v. United States*, 18 U.S.C. §§ 4241-4248, and MPC § 4.04

4. Competency Issue Presentation
    a. Court observation v. behind the scenes

5. Current Court Process
    a. Motion, eval ordered to NDSH or Life Skills
    b. Report – ultimate conclusions, Hearing on contested findings
    c. Attain fitness in foreseeable future

6. Problems with Current Statute/Practice
    a. Lack of definitions
    b. Procedure – takes too long – speedy trial and Marsy's Law issue
    c. Record confidentiality and disclosure
    d. Variability in court procedures across state
    e. Lack of competency restoration authority and procedure ("referral")

7. Benefits of HB 1181
    a. Definitions consistent with other chapters
    b. Cleanup of antiquated language
    c. Attempts to speed up evaluation process
    d. Addresses concerns from State Hospital concerning notice and discovery
    e. Provides competency restoration authority and provides temporal limits on the decision to define "foreseeable future"
    f. Dismissal with prejudice prevents potential for manipulation and abuses
    g. Provides mechanism for ordering treatment without separate civil commitment
    h. Establishes procedural court mechanism for resumption of proceedings

8. Support DO PASS recommendation

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

HB 1181
2/2/2021

Relating to a defendant's fitness to proceed.

Chairman Klemin called the meeting to order at 4:16 PM.

Representatives	Attendance
Representative Lawrence R. Klemin	P
Representative Karen Karls	A
Representative Rick Becker	P
Representative Ruth Buffalo	P
Representative Cole Christensen	P
Representative Claire Cory	P
Representative Karla Rose Hanson	P
Representative Terry B. Jones	P
Representative Jeffery J. Magrum	P
Representative Bob Paulson	P
Representative Gary Paur	P
Representative Shannon Roers Jones	P
Representative Bernie Satrom	P
Representative Steve Vetter	P

Discussion Topics:

- Amendments to the bill
- Committee action on the bill

Chairman Klemin went through some proposed amendments to the bill. 4:17

Motion Made to adopt the amendments "on Page 1 delete lines 18 and 19; on Page 2 delete lines 3,4,5; on Page 3 line 12 and line 18 Change "30" to "15"; on Page 4 line 24 insert the words "up to" before one year; on Page 5 on lines 2, 7 and 8 delete the words "with prejudice" by **Rep. Vetter**. Seconded by **Rep. Satrom**. Voice vote: Motion carried.

Rep. Satrom moved a Do Pass as amended #21.0480.01001. Seconded by **Rep Vetter.**

Representatives	Vote
Chairman Klemin	Y
Vice Chairman Karls	A
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	Y
Rep T. Jones	Y

Rep Magrum	Y
Rep Paulson	Y
Rep Paur	Y
Rep Roers Jones	Y
Rep B. Satrom	Y
Rep Vetter	Y
Rep Buffalo	Y
Rep K. Hanson	Y

Motion carried. 13-0-1.

Rep. Paur will carry the bill

Chairman Klemin closed the hearing. 4:30 PM

DeLores D. Shimek by Donna Whetham
Committee Clerk

Adopted by the Judiciary Committee

February 2, 2021

2/2/21

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1181

Page 1, line 13, after "1." insert ""Fitness to proceed" means sufficient present ability to consult with the individual's counsel with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against the individual.

2."

Page 1, line 16, replace "2." with "3."

Page 1, remove lines 18 through 22

Page 2, remove lines 3 through 5

Page 2, line 6, replace "3." with "2."

Page 2, line 8, replace "4." with "3."

Page 3, line 12, replace "thirty" with "fifteen"

Page 3, line 18, replace "thirty" with "fifteen"

Page 4, line 24, after "of" insert "up to"

Page 5, line 2, remove "with prejudice"

Page 5, line 7, remove "with"

Page 5, line 8, remove "prejudice"

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1181: Judiciary Committee (Rep. Klemin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1181 was placed on the Sixth order on the calendar.

Page 1, line 13, after "1." insert ""Fitness to proceed" means sufficient present ability to consult with the individual's counsel with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against the individual.

2."

Page 1, line 16, replace "2." with "3."

Page 1, remove lines 18 through 22

Page 2, remove lines 3 through 5

Page 2, line 6, replace "3." with "2."

Page 2, line 8, replace "4." with "3."

Page 3, line 12, replace "thirty" with "fifteen"

Page 3, line 18, replace "thirty" with "fifteen"

Page 4, line 24, after "of" insert "up to"

Page 5, line 2, remove "with prejudice"

Page 5, line 7, remove "with"

Page 5, line 8, remove "prejudice"

Renumber accordingly

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

HB 1181
2/8/2021

Relating to a defendant's fitness to proceed.

Chairman Klemin called the meeting to order at **3:08 PM.**

Present: Representatives Klemin, Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter.

Discussion Topics:

- Reconsideration of HB 1181
- Page 3 Line 18
- Another FTE

Rep Jones made a motion to reconsider, Rep Satrom seconded.

Representatives	Vote
Chairman Klemin	Y
Vice Chairman Karls	Y
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	Y
Rep T. Jones	Y
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	Y
Rep Roers Jones	Y
Rep B. Satrom	Y
Rep Vetter	Y
Rep Buffalo	Y
Rep K. Hanson	Y

Motion carried. 14-0-1.

Rep. Christianson moved to withdraw the amendment on Page 3 Line 18 where 30 days was changed to 15 days- to change back to 30 days, seconded by Rep Hanson.
Voice vote. Motion carried.

Rep Karls moved a Do Pass as Amended, Rep Jones second.

Representatives	Vote
Chairman Klemin	Y
Vice Chairman Karls	Y
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	Y
Rep T. Jones	Y
Rep Magrum	N
Rep Paulson	Y
Rep Paur	Y
Rep Roers Jones	Y
Rep B. Satrom	Y
Rep Vetter	Y
Rep Buffalo	Y
Rep K. Hanson	Y

Motion carried. 13-1-0. Rep Paur is carrier.

3:20 PM Chairman Klemin closed the hearing.

DeLores D. Shimek
Committee Clerk

DB 2/4/21
1 of 1

21.0480.02001
Title.03000

Adopted by the Judiciary Committee

February 8, 2021

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1181

Page 3, line 14, replace "fifteen" with "thirty"

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1181, as engrossed: Judiciary Committee (Rep. Klemin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1181 was placed on the Sixth order on the calendar.

Page 3, line 14, replace "fifteen" with "thirty"

Renumber accordingly

2021 SENATE JUDICIARY

HB 1181

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1181
3/17/2021

Relating to a defendant's fitness to proceed.

Hearing called to order, [8:30] all senators are present: **Myrdal, Luick, Dwyer, Bakke, Heitkamp, Fors, and Larson.**

Discussion Topics:

- Providing competency restoration authority
- Providing mechanisms for ordering treatment
- Establishing procedures for resumption of proceedings
- Definitions of new provisions of code
- Disposition of defendants
- Detention for purpose of examination

Representative Skroch [10:00] introduced Bill 1181 #8872
Nick Thornton [10:05] Attorney, Fremstad Law Firm testified in favor #9746
Travis W Finck [10:24] Executive Director, ND Commission on Legal Counsel for indigents testified in favor #9669
Aaron Birst [10:45] Association of Counties, provided Oral testimony in favor
Rosalie Etherington, [10:52] Chief Clinics Officer for Human Services and Superintendent of State Hospital and Licensed Psychologist, provided Oral testimony in favor

Additional Testimony: #9991

Hearing adjourned [10:55]

Jamal Omar, Committee Clerk

NORTH DAKOTA HOUSE OF REPRESENTATIVES

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360

Representative Kathy Skroch
District 26
10105 155th Avenue SE
Lidgerwood, ND 58053-9761

701-403-0961
kskroch@nd.gov

COMMITTEES:
Human Services
Agriculture

TESTIMONY IN SUPPORT OF HB 1181

Defendant's Fitness to Proceed

Chairman Larson and members of the Senate Judiciary Committee,

For the record, my name is Representative Kathy Skroch, District 26 of North Dakota. I appear before you today to introduce House Bill 1181. To be clear, I am not an attorney. There are others who will be testifying in support of House Bill 1181 who will be able to provide testimony with an in-depth understanding of this proposed legislation.

HB 1181 creates a new section in NDCC related to the fitness of an individual to proceed in court. The bill was crafted through a collaborative process working within the North Dakota Supreme Court Taskforce on Mental Illness, to which I have been appointed. This task force was called for, by then Chief Justice Gerald VandeWalle. The group was tasked with address the need for clear protocols and procedures, currently lacking or unclear in code, when persons suffering with mental illness come before the court. To avoid unnecessary delays, this bill establishes timelines for processing individuals suspected of having competency and mental illness deficiencies. The primary objective of this bill is to ensure a proper and timely assessment is completed to verify the cognitive capacity of a defendant to ensure fitness to proceed.

These suggested timelines where heavily debated among those who provided input. The task force members worked with lawyers, representatives from stakeholder groups and the professionals working in this field. Much research and effort were put into the bill draft prior to submitting it to the NDLC for the first draft.

Those behind the bill, in part, are states attorneys, defense attorneys, judges, and social service agencies who have struggled with the lack of clarity in how to process and proceed in these cases when dealing with persons who may have broken laws while mentally ill. With the recommended changes proposed in the bill, uniform procedures will be established to prevent uncertainty and establish best practices.

Part of the discussion must be about the devastating harm that occurs to persons suffering with mental illness when convicted for crimes for which there was lack of culpability due to mental illness. Options were considered to avoid criminality which may have devastating impacts on an individual's access to housing, credit, employment, college loans and so forth that result from criminal records. Additionally, this bill establishes more clearly define timelines and intent in the law.

Section 5, page 5, lines 2 through 8, were discussed at length prior to drafting knowing these would be debated in legislative committees. This subsection addresses the option of a court to dismiss a proceeding with prejudice. The pros and cons of dismissal **"with prejudice**" may be discussed. There are solid reasons for wanting this option, but it should not be presumed that every case would be dismissed depending on each individual situation. The definition for **"clear and convincing evidence"** was included to prevent ambiguity.
I will stand for questions; however, I believe there are others who will testify who are much more capable of answering your legal questions.

Thank you, Madam Chair and members of the Senate Judiciary Committee.

Representative Kathy Skroch
District 26
Human Services Committee and Interim
Ag Committee and Interim
ND Supreme Court Task Force on Mental Illness

fremstad | law

MEMORANDUM

From: Nick Thornton
To: Hon. Senator Diane Larson, Chair, Senate Judiciary
Date: March 17, 2021
Re: *Testimony of Nicholas D. Thornton, Attorney at Law, in Support of HB 1181*

To Chair Senator Larson and the honorable members of the Senate Judiciary Committee, my name is Nick Thornton. I am a criminal defense attorney at the Fremstad Law Firm. I am testifying in my *individual* capacity in support of HB 1181. I submitted similar tesitmony in the House Judiciary Committee on this bill. The views expressed in this testimony are mine and mine alone. I am *not* testifying as a lobbyist. I am a defense bar representative on the taskforce who proposed the underlying bill draft. I strongly support HB 1181. I request a **DO PASS** recommendation from this Committee.

I will provide my narrative testimony below, followed by a "testimony summary" sheet. I will be available to testify remotely to answer any questions posed by committee members.

NARRATIVE TESTIMONY

BACKGROUND AND EXPERIENCE: I have been a criminal defense lawyer in North Dakota for 14 years. I was a full-time public defender in the Fargo office from 2008 through 2013, and have had at least a half-time public defender contract in addition to representing privately retained criminal defendants since then. I have represented well over 4,000 criminal defendants charged with everything from murder to driving under suspension, and everything in-between.

As you can imagine, many of my clients struggle with mental health and chemical dependency issues. On occasion, those issues are so severe that I have significant concerns about my client's ability to understand the proceedings against him or her. I also occasionally have instances where I have concerns about whether my client understands what I am saying (and that I understand what my client is saying). In those situations, I regularly ask the Court to order a competency evaluation, sometimes also referred to as a "fitness to proceed" evaluation.[1] These are typically performed at public expense by a forensic psychologist at the North Dakota State Hospital or at the Developmental Center in Grafton, although some are done with private forensic psychologists. On average, I ask for 5 to 10 of these evaluations every year, and have every year since I became a public defender. I have litigated competency or "fitness" in multiple counties in North Dakota, in Minnesota, and in U.S. District Court in North Dakota. In working through these issues, I developed form templates to request these

[1]I use fitness to proceed and competency interchangeably throughout my testimony.

evaluations, and my forms have been disseminated throughout the indigent defense network of attorneys. My forms are widely used across the State. I am extremely familiar with the strengths and weaknesses of the current fitness to proceed chapter, N.D.C.C. ch. 12.1-04.

DIFFERENCE BETWEEN COMPETENCY AND CRIMINAL RESPONSIBILITY: From the outset, it is important to make the essential distinction between fitness/competency and criminal responsibility. These concepts are often confused but they really are separate issues and have separate constitutional and public policy considerations.

Criminal responsibility can be thought of as North Dakota's version of the insanity plea. It focuses on the defendant's mental state at the time of the offense. Criminal responsibility is an issue that must be raised by the defense. Criminal responsibility is not at issue in H.B. 1182.

Unlike criminal responsibility, competency focuses on the defendant's *current* mental state and current mental understanding *right now*. It might be months or even years after the alleged criminal conduct occurred. Also, unlike criminal responsibility's "snapshot in time," competency is a fluid construct. It potentially changes over time. For example, a defendant may have competency today because he is compliant with his antipsychotic medication treatment. If the defendant stops taking his medication, he could decompensate and become incompetent in the future. Consequently, a defendant could currently lack competence right now but could have been criminally responsible at the time of the offense. Conversely, a person could lack criminal responsibility for the criminal conduct at the time of the offense but be competent to proceed now.

Also unlike criminal responsibility, which is a defense that can be waived by a defendant who chooses not to assert it, fitness to proceed is a threshold ***justiciability*** issue implicating Due Process. It ***cannot*** be waived under any circumstance. Just like jurisdictional issues relating to where the alleged crime occurs or the fact that the person must be an adult or a transferred juvenile to be prosecuted in district court, a person must be competent before the case can proceed. The United States Supreme Court has held that it violates Due Process to proceed if a defendant lacks competency. As a result, when a defendant is deemed unfit or incompetent, everything except legal challenges to the prosecution must be immediately put on hold. If a defendant is unlikely to regain competency, the case can never move forward and must be dismissed.

CURRENT LAW AND PRACTICE:

A. Basic Standard for Competency/Fitness To Proceed: North Dakota's current comptency chapter, N.D.C.C. ch. 12.1-04, has been largely unchanged since it was recodified by North Dakota's restructuring of its criminal code in 1973. It borrows

heavily from federal statute, 18 U.S.C. §§ 4241-4248 (1949), *Dusky v. United States*, 362 U.S. 402 (1960), and the Model Penal Code § 4.04 (1962). Unfortunately, it appears as though it was adopted without much discussion. In *Dusky*, the Supreme Court made clear a defendant has a right to a competency evaluation before trial. The Court also outlined the basic standards for determining whether a person is competent under the federal statutes and the Constitution. After *Dusky*, every defendant must be able to (1) understand the charges against him or her and (2) must have the present ability to aid the attorney in his or her own defense. The *Dusky* standard is currently codified in N.D.C.C. § 12.1-04-04, which states:

> No person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against the person or to assist in the person's own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.

Id. The statute also closely resembles Model Penal Code § 4.04.

B. Circumstances where Competency Issues Arise: Competency issues typically present in one of two circumstances. First, there are occasions where the district court on its own has reason to question the defendant's ability to understand the proceedings. For example, I had a murder defendant suffering from severe schizophrenia. In open court, he claimed that he wanted to represent himself because I was part of a conspiracy with Hillary Clinton, the Pope, and the Blue Army. He made similar allegations about the judge. This defendant continued to behave in an erratic way in open court so inconsistent with reality that I did not have to raise the competency issue—the judge saw it and was concerned about it himself. While I filed a motion in that case just to create a clear record, the judge commented he would have ordered a competency evaluation on his own based on the defendant's conduct in court.

The second way this issue presents is far more common. Many questionably competent defendants have spent a lifetime coping with mental illness. They become quite skillful and adept at hiding it from others for short periods such as during a court hearing. The ability to hide the issue, however, often disappears the longer a lawyer interacts with the defendant. In my cases, I try to spend enough time with my client and consulting collateral sources to identify fitness or competency issues. Also, I always ask about mental health diagnoses, treatment, and medication. I may learn more about possible competency concerns from friends, family, guardians, or case managers. At least 90 percent of the cases I raise competency issues in arise from concerns raised outside of the courtroom in my private discussions with clients or collateral sources.

C. Court Process After Competency Issue is Raised: Whether the concern arises in open court or from behind the scenes, the process typically starts with a motion to the

district court for a competency evaluation. The motion usually includes a request for a temporary commitment of the defendant for the purposes of the evaluation in the least restrictive appropriate setting. *See* N.D.C.C. § 12.1-04-06. These are almost always done at the State Hospital or Life Skills Center. There are very few private tier 1a mental health professionals who do forensic evaluations. Those that do charge, on average, $3,000 or more to do the evaluation and prepare their report. These private evaluators often charge more to testify about their findings. Whether public or private, the evaluator must prepare and submit a report to the Court. Because this is a threshold issue affecting whether a case can proceed, the report is shared with the Court, prosecutor, and the defense attorney. *See id.*

Obviously, there are two possible "ultimate conclusions": the defendant is competent or incompetent. If the evaluator concludes the person is competent and the defendant does not challenge the evaluator's conclusions, the court simply continues with holding the next hearing. If the evaluator concludes the person is incompetent and the State does not contest the evaluator's conclusions, the proceedings must be suspended. If either party challenges the evaluator's conclusions, the Court must hold a hearing to determine, by a preponderance of the evidence, whether the defendant is competent or not.

If the person is found to be incompetent, the district court then must determine whether the defendant will "attain fitness in the foreseeable future." N.D.C.C. § 12.1-04-08(1). Under current law, "foreseeable future" is not defined. If the court determines the defendant will attain fitness in the undefined foreseeable future, the court must suspend the proceedings—essentially putting the case on an indefinite hold until the maximum term the person could face expires or, after a court hearing, the court determines the defendant will not attain fitness to proceed. *See id.* If the court determines the defendant will not regain fitness, the charges must be dismised. There is no statutory command on whether the charges are dismissed with or without prejudice. *See id.* Finally, the statute authorizes the court to make referrals "for other services or treatment." *See id.* While the statute authorizes referals, it does not provide clear authority for comptency restoration treatment short of initiating separate, time consuming proceedings such as guardianships, civil commitment, or apparently voluntary treatment at a human service center. *See id.*

PROBLEMS WITH CURRENT STATUTE/CURRENT PRACTICE:

There are a number of problems or limitations with the current statute and practice. Each of these problems or limitations are discussed below.

A. Definitional Issues: In a number of cases I have raised these concerns, the Court has struggled with defining the terms used in chapter N.D.C.C. ch. 12.1-04. The current chapter does not have a definitional section, although some of the terms and concepts overlap with language contained in the civil commitment statutes, N.D.C.C.

ch. 25-03.1. Having a clearly established definitional section clears up what the Legislature means and certainly aids in judicial interpretation of the statutes.

B. Evaluation Procedure and Commitment: The current evaluation procedure authorizes the Court to order a defendant to be temporariliy committed for an evaluation by a tier 1a mental health professional. This commitment may be at the State Hospital, the Life Skills and Transition Center, or other facility for up to 30 days, which could be extended for up to another 30 days. The commitment must be in the least restrictive appropriate setting. The evaluation may occur in a present residential setting on an outpatient basis.

In practice, I often have to wait weeks or even months to get my client into a tier 1a mental health provider for a fitness evaluation. I do not fault the State Hospital for this. It is well known we have a shortage of mental health professionals in North Dakota. There are very few private providers, and the private providers here are quite expensive. The State Hospital professionals are overworked, understaffed, and underfunded. That said, clients seeking these evaluations are presumed innocent. This is a pretrial/pre-disposition threshold issue. There is no reason a presumably innocent person should be held in custody for 30 days to do an evaluation. There is even less reason to allow the detention to extend another 30 days. These delays, in addition to the time necessary to prepare, disseminate and digest the report, result in delaying the court proceedings at least two, but usually three to four months. This impacts a defendant's right to a speedy trial and an alleged victim's right under N.D. Const. Art. 1, § 25 (Marsy's Law) to a prompt disposition of the case. The shorter the time frame to complete the evaluation and prepare the report, the better for the entire justice system.

C. Records. The records generated by the evaluation to determine fitness, by definition, contain protected mental health and medical information. Unlike other actions where mental health records are included in the court file, *e.g.*, civil commitment or guardianship actions, there is no clear statutory command to keep these records confidential in the current statute. Currently, I have to request the reports and records be filed as confidential in every order to protect my client's information from disclosure as much as possible. Further, I have to do so cobbling together claims of confidentiality under the North Dakota's administrative rules and federal law. A statutory directive in this chapter would clarify the recordkeeping issues to protect confidential information from improper and frankly, illegal disclosure.

D. Court Procedures: In my practice, I have experienced substantial procedural variations between judges and between districts in how these fitness evaluations are ordered. I have had judges on their own attempt to combine competency and criminal responsibility evaluations. I have been working with another attorney who just had a judge order the competency evaluation combined with the criminal responsibility evaluation, which essentially forced the evaluator to disclose what should be privileged

and confidential information to the State regarding a potential trial defense. I have had judges suspend proceedings before proper notices have been filed. I have had judges resume proceedings without giving me an opportunity to be heard on the state's motion to resume proceedings. I have had situations where the State was given access to records for which they should not have access. This happens quite frequently across the State. I have had judges delay ruling on a motion to dismiss charges when an evaluator determined my client would never regain fitness because the judge, without contrary evidence, did not believe the evaluator. I have frequently came across issues about whether dismissals should be with or without prejudice. I have had discussions with prosecutors who read the "maximum period of detention" to include consecutive sentence potential (e.g., fifteen years for three class c felony offenses charged in the charging document rather than 5 years, the maximum for a class c felony).

Most troubling, and in contrast to the criminal responsibility and civil commitment chapters, there is no clear statutory authority to order competency restoration treatment. The statute allows the court to "make a referral" for other appropriate services. The authority to make a referral is extremely different than the authority to order commitment for treatment. This becomes particularly complicated if a judge orders treatment based on questionable statutory authorization and the defendant refuses the treatment or medication, which places the treatment facility in an incredibly precarious legal position. Can they give the person involuntary medication? Can they require the person to attend therapy? Can they hold the person? Because of this precarious position, the State Hospital typically reverts back to the procedure for civil commitment in N.D.C.C. ch. 25-03.1, which duplicates much of what was already done on the criminal side. It substantially delays the start of restoration treatment, further continuing the criminal proceedings by several months.

There needs to be a clearly articulated court procedure laid out in statute to avoid these variations. There needs to be clear, direct authority to initiate competency restoration treatment. A referral is not the same as a commitment order authorizing treatment. A mentally unfit defendant in Pembina County should be treated the same, and should go through the same judicial process, as a mentally unfit defendant in Stark, Burleigh, or Cass County.

BENEFITS OF H.B. 1181:

House Bill 1181 is the product of hours of hard work by a multi-disciplinary task force including vested parties in the criminal justice and mental health worlds. Overall, N.D.C.C. ch. 12.1-04 is largely uncontroversial, but it is a bit procedurally cumbersome, antiquiated, and incomplete or insufficient when compared to its overlapping Century Code chapters, 12.1-04.1 (criminal responsibility) and 25-03.1 (civil commitment). The biggest benefits to H.B. 1181 are as follows:

Section 1 provides a definitional section to address ambiguity of key terms. These definitions are consistent with those contained in other provisions of the Century Code.

Section 2 clears up any ambiguity concerning the awkward and antiquiated language of "mental disease or defect." It also provides clear guidance and authority to restrict access to protected mental health records.

Section 3 cleans up repetitive language in N.D.C.C. § 12.1-04-06. It also removes the ability to extend the duration of a defendant's temporary detention for a subsequent 30 days. The goal here is to speed up the evaluation process as much as reasonably practical to keep the criminal case moving forward without unreasonable delays. Other states with similar language have limited this detention to as short as 7 days, with the average being 14 days. The committee agreed here to allow 30 days' detention, but not the additional 30-day extension for good cause previously authorized in the statute.

Section 4 addresses concerns from the State Hospital. In our task force discussions, the State Hospital was concerned that they sometimes do not receive a timely notice of the court's order for the evaluation, which makes it difficult or impossible for them to comply with the court-ordered timeline to do the evaluation. Current law does not indicate who must provide the State Hospital with notice of the order. Some clerks automatically send the order; other clerks assume the attorney for the party will provide notice of the entry of order. Section 4 makes clear the clock to complete the evaluation does not start until they receive notice of entry of the order. Section 4 also addresses another issue raised by the State Hospital: they often do not receive the materials they need to perform the evaluation in a timely fashion. There are several reasons this has historically been a hangup resulting in delays. First, current law does not require its disclosure to the evaluator. It is not something many attorneys think about in requesting an evaluation. Second, there are some materials that are restricted and difficult to send to evaluators. For instance, access to criminal history reports are restricted to those with specialized criminal justice access. Without statutory authority to disclose them, sending those records to the evaluator poses some concern. Section 4 defines how long the evaluator has to prepare and file his or her report. Finally, section 4 allows the evaluator to opine on a general description of what kind of theraputically appropriate treatment may be necessary for the defendant to regain fitness.

Section 5 contains perhaps the biggest change from current law in that it provides concrete temporal limits on the comptency restoration decision. If a defendant under current law is found to be incompetent, the court must determine whether the defendant will attain fitness "within the foreseeable future." The phrase "within the foreseeable future" is undefined. Section 5 sets a 1-year time limit for a felony, and the maximum term of imprisonment for a misdemeanor. The idea was to reasonably define "foreseeable future" with concrete timeframes. This is consistent with a number of other states' laws on the matter.

The next proposed change to current law in section 5 addresses the prejudice issue. Current law is silent on dismissal with or without prejudice. The bill as originally introduced in the House made clear the dismissal should be with prejudice. The final House version deleted the "with prejudice" language. Concededly, this was a hot topic with the lawyers on the task force, with defense representatives supporting dismissal with prejudice and prosecutor representatives supporting dismissal without prejudice. The Commission on Legal Counsel for Indigents did not a position on the issue, but I will. Dismissal contemplates finality. If the provision is left silent or without prejudice, there is no guidance with respect to recharging the offense. Does it comport with notions of Due Process and substantial justice for a prosecutor to continue to recharge an offense over and over? Some offenses have extended statutes of limitations. Homicide, for instance, has no statute of limitations. Dismissal without prejudice would allow a prosecutor to refile the charge the next day. The defense lawyer would have to move for a competency evaluation. We would go through the process again, with a new finding of incompetence. The person would be subject to competency restoration processes again for up to another year. Then, another dismissal without prejudice. This literally could happen every year for the rest of the defendant's life. Even under current law, there is a limit to regaining fitness in the "foreseeable future." Dismissal without prejudice allows prosecutors unfettered and unchecked discretion to circumvent that to avoid dismissal. Consequently, in the interests of judicial economy, state and mental health resource economy, and judicial finality, dismissal with prejudice is a completely appropriate and necessary public policy decision.

Much less controversial is section 5's next big change. Instead of merely authorizing referrals for other appropriate services, section 5 provides the court with clear authority to order competency restoration treatment using the least restrictive, therapeutically appropriate course of treatment. This includes all nonexperimental, generally accepted, psychiatric, or psychological treatment recommended by the faciilty and involuntary medication without the need for a separate commitment proceeding under chapter 25-03.1. Of course, defendants have the right to counsel during these proceedings and can object. This is consistent with provisions contained in chapters 25-03.1 and 12.1-04.1. Finally, related to the comptency restoration treatment, section 5 clarifies the process for resuming prosecution after a defendant goes through comptency restoration treatment. Current law is silent on this issue.

Madam Chair and Members, H.B. 1181 is a substantial improvement upon chapter 12.1-04. I request a DO PASS recommendation.

Dated March 16, 2021

Nick Thornton

SUMMARY OF TESTIMONY

1. Introduction
    a. Nick Thornton—criminal defense lawyer – individual capacity
    b. Taskforce member
    c. Extensive experience with fitness/competency issues

2. Competency vs. Criminal Responsibility
    a. *Criminal Responsibility*
        i. Focus is on mental state at the time of crime
        ii. ND's insanity, raised as defense
        iii. Waivable
    b. *Competency*
        i. Focus is on mental state, ability to understand and communicate now
        ii. Threshold justiciability issue
        iii. Not waivable

3. Current Law and Practice
    a. Largely unchanged dating back to recodification of criminal code
    b. *Dusky v. United States*, 18 U.S.C. §§ 4241-4248, and MPC § 4.04

4. Competency Issue Presentation
    a. Court observation v. behind the scenes

5. Current Court Process
    a. Motion, eval ordered to NDSH or Life Skills
    b. Report – ultimate conclusions, Hearing on contested findings
    c. Attain fitness in foreseeable future

6. Problems with Current Statute/Practice
    a. Lack of definitions
    b. Procedure – takes too long – speedy trial and Marsy's Law issue
    c. Record confidentiality and disclosure
    d. Variability in court procedures across state
    e. Lack of competency restoration authority and procedure ("referral")

7. Benefits of HB 1181
    a. Definitions consistent with other chapters
    b. Cleanup of antiquated language
    c. Attempts to speed up evaluation process
    d. Addresses concerns from State Hospital concerning notice and discovery
    e. Provides competency restoration authority and provides temporal limits on the decision to define "foreseeable future"
    f. Dismissal with prejudice prevents potential for manipulation and abuses
    g. Provides mechanism for ordering treatment without separate civil commitment
    h. Establishes procedural court mechanism for resumption of proceedings

8. Support DO PASS recommendation

HB 1181
Senate Judiciary Committee
March 17, 2021
Testimony of Travis W. Finck, Executive Director, NDCLCI

Madam Chair Larson, members of the Judiciary Committee, my name is Travis Finck and I am the executive director for the North Dakota Commission on Legal Counsel for Indigents. The Commission is the state agency responsible for the delivery of indigent defense services in North Dakota. I rise today on behalf of the Commission to provide testimony in support of HB 1181.

HB 1181 is a re-write and update of the Criminal Competency or Fitness to Proceed chapter of North Dakota Century Code. To explain the current version of the bill, I will provide some brief history. While serving as the Deputy Director of the Commission, I was contacted several times by our attorneys frustrated over how competency evaluations were being handled in the state. To address these issues, I started a work group with assistance of the State Hospital to review competency and criminal responsibility evaluations. The workgroup consisted of individuals from the State Hospital, Department of Human Services, the Supreme Court, the State's Attorney's Association and Indigent Defense. The workgroup began its work by looking at the processes, forms, bench book the court uses and the statutes to determine what if anything could collaboration fix.

In the fall of 2019, several representatives of the judicial system of North Dakota were invited to attend a Summit on Mental Health and the Courts that was being presented by the National Center for State Courts. As a result of that meeting, the Supreme Court formed a committee which asked my workgroup for recommendations for necessary updates to the competency statute. We then also received technical assistance from the National Center for State Courts. We then arrive at HB 1181. Originally, the workgroup proposed putting the new language in a new subsection of chapter 12.1-02, as the committee felt it was more appropriately placed in a stand-alone subsection than 12.1-04 which deals with juveniles and intoxication. However, the House left as was drafted in 12.1-04, which is amenable to the Commission. Quite simply, it is the content of this bill that matters.

This bill is the very essence of compromise. There have been many discussions around certain items and terms. Some agreed on some sections, some disagreed, however all agreed the time is right to update the code. This testimony seeks to guide the committee through the sections.

Section 1 is simply an amendment to add definitions which are specific to the new provisions of code. The most notable definition is aligning the term "fitness to proceed" with the case law standard.

Section 2 deals with the disposition of defendants. It starts with a presumption that all defendants are fit. Furthermore, if a defendant is found to lack fitness to proceed, they may not be tried, convicted or sentenced for the commission of an offense. The last part of section 2 is completely new and deals with the confidentiality of records. The current law does not address the confidentiality of records.

Section 3 deals with temporary detention for purposes of examination. There is an important distinction here that garnered a lot of discussion in the workgroup, detention is the right word to use, not commitment. Most of the other language is consistent with what currently exists in code.

Section 4 deals with the examination itself. Perhaps most important of the changes is the requirement the examination be done within 15 days of the tier 1a mental health professional being served with the order. It was originally requested for 30 days but the House shortened the time period to 15 days. To assist in this, defense attorneys and prosecutors will be required to disclose necessary materials, such as discovery, to the mental health professional along with the order. The contents of the report remain largely unchanged. However, the examiner must make a determination if the defendant is found to lack fitness, whether or not they will regain fitness within the time periods proscribed in this bill. 1 year for a felony. If a misdemeanor, the length of time for the most serious misdemeanor. Further, the examiner may include in the report a recommendation as to what type of treatment would be necessary in an attempt to regain the fitness.

Section 5 suspends the proceedings upon a finding of lack of fitness. If an individual lacks fitness and the examiner believes they will not regain fitness, the case is dismissed with

prejudice. If an individual lacks fitness but the mental health professional determines they may attain fitness in the time frames provided, 1 year for a felony, 360 days if most serious offense is class A misdemeanor, or 30 days if most serious offense is class b misdemeanor, the case against the defendant is suspended. If fitness is not restored within the allotted times, the case is dismissed. The original version of the bill said "with prejudice" which was removed by the House Judiciary Committee and adopted by the House. Furthermore, in a motion to resume prosecution, the state bears the burden of proving the defendant has regained fitness by clear and convincing evidence.

The next changes to existing law is in the restoration of fitness which starts on page 5 at line 15. Currently, there is no provision in state law which provides for restoration of fitness for someone who is found to lack fitness to proceed. Simply put, it doesn't exist. Therefore, it is vitally important we look after the rights of the accused and make sure there are sufficient safeguards for the community. We believe this section does that. Page 5 line 15 through the end of the bill adds the ability for the court to enter commitment orders allowing the mental health professionals to attempt to restore fitness. The treatment must be the least restrictive form of treatment therapeutically available. Trial counsel remains on, answering the question of who provides counsel. The bill allows for a forced medication order, but also allows the defendant, through counsel to object. It also requires the court set a date for review of the case. The statute also allows for requests for modification to the terms of the commitment order to be raised by any party to the action.

Madam Chair, members of the committee, HB 1181 is the culmination of a lot of hard work and compromise. The Commission on Legal Counsel requests a DO PASS recommendation from the committee.

Respectfully Submitted:

Travis W. Finck

Executive Director, NDCLCI

NORTH DAKOTA LEAGUE of CITIES

March 18, 2021
Senate Energy and Natural Resources
Sen. Kreun, Chairman
HB 1353

Good morning Chairman Kreun and members of the Committee. For the record, Blake Crosby, Executive Director, North Dakota League of Cities.

I am testifying in support of HB 1353 which reorganizes the Office of the State Engineer (OSE), creates a Department of Water Resources and appoints a director of the department subject to approval of State Water Commission commissioners.

This appointment possibility has been discussed for many months and as with any change, creates some concerns with staff and vendors. This appointment is not to be seen as a dissatisfaction with current personnel nor a correction to a bad process. Rather, it is a recognition that the duties and responsibilities of the OSE and the SWC have evolved tremendously over the past couple of bienniums. That evolution has created the need to enhance the ability of the SWC to respond to the changing environment of managing the state's water resources in a holistic manner. As an increasing number of water projects continue to be submitted for review and approval, it is time to be confident the department has an efficient structure and that communication between project sponsors, consulting and/or engineering firms, legislators and the tax paying public is at an appropriate level.

I see this inclusion of a director to be much like the structure in many of my large cities that have a city administrator and department heads. The city administrator keeps all the departments in communication and on track, but the ultimate decisions still rest with City Council or City Commission. In this case, the members of the State Water Commission.

This is a change for the future and a complement to the OSE and SWC. I respectfully ask for a DO-PASS in HB 1353. I will try to answer any questions.

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1181
3/22/2021

A BILL for an Act relating to a defendant's fitness to proceed.

Hearing called to order, all senators are present: **Myrdal, Luick, Dwyer, Bakke, Heitkamp, Fors, and Larson.** [10:31]

Discussion Topics:

- Consideration about holding the bill

Committee Work [10:31]

Hearing adjourned [10:32]

Jamal Omar, Committee Clerk

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1181
3/24/2021

A BILL for an Act to to create and enact section 12.1-04-04.1 of the North Dakota Century Code, relating to a defendant's fitness to proceed; and to amend and reenact sections 12.1-04-04, 12.1-04-06, 12.1-04-07, and 12.1-04-08 of the North Dakota Century Code, relating to a defendant's fitness to proceed.

Hearing called to order all Senators Present: **Myrdal, Luick, Dwyer, Bakke, Fors, Heitkamp, Larson. [10:37]**

Discussion Topics:

- Statutory rights of indigents
- Trial law procedures

Senator Myrdal Moved Amendment [LC 21.0480.03001] [10:42]
Senator Luick Seconded the Motion
Vote Passed 7-0-0

Vote to Amend HB 1181	Vote
Senator Diane Larson	Y
Senator Michael Dwyer	Y
Senator JoNell A. Bakke	Y
Senator Robert O. Fors	Y
Senator Jason G. Heitkamp	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Senator Luick Moved a DO PASS AS AMENDED [10:46]
Senator Myrdal Seconded the Motion
Vote Passed 7-0-0
Senator Dwyer Carried the Bill

DO PASS AS AMENDED VOTE	Vote
Senator Diane Larson	Y
Senator Michael Dwyer	Y
Senator JoNell A. Bakke	Y
Senator Robert O. Fors	Y
Senator Jason G. Heitkamp	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Hearing Adjourned 10:48

Jamal Omar, Committee Clerk

Adopted by the Senate Judiciary Committee

March 24, 2021

PROPOSED AMENDMENTS TO REENGROSSED HOUSE BILL NO. 1181

Page 3, line 13, after "professional" insert ", whether the report is for a retrospective evaluation of fitness or an evaluation of the defendant's current fitness,"

Page 3, line 21, after the comma insert "the defendant's responses to questions related to the defendant's fitness to proceed,"

Page 3, line 23, remove the overstrike over "~~unable~~"

Page 3, line 23, remove "able"

Page 3, line 25, replace "able" with "unable"

Page 4, line 21, replace "one year" with "one hundred and eighty days. The court may extend the suspension period for an additional three hundred sixty-five days if there is medical evidence the defendant's fitness to proceed will be restored during the extended period"

Page 5, line 26, replace "clear and convincing" with "a preponderance of the"

Page 6, line 11, after "or" insert"director's designee or the"

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1181, as reengrossed: Judiciary Committee (Sen. Larson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Reengrossed HB 1181 was placed on the Sixth order on the calendar.

Page 3, line 13, after "professional" insert ", whether the report is for a retrospective evaluation of fitness or an evaluation of the defendant's current fitness,"

Page 3, line 21, after the comma insert "the defendant's responses to questions related to the defendant's fitness to proceed,"

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Page 6, line 11, after "or" insert"director's designee or the"

Renumber accordingly

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1181
3/30/2021

A BILL for an Act to to create and enact section 12.1-04-04.1 of the North Dakota Century Code, relating to a defendant's fitness to proceed; and to amend and reenact sections 12.1-04-04, 12.1-04-06, 12.1-04-07, and 12.1-04-08 of the North Dakota Century Code, relating to a defendant's fitness to proceed.

Hearing called to order all Senators Present: **Myrdal, Luick, Dwyer, Bakke, Fors, Heitkamp, Larson. [8:15]**

Discussion Topics:

- Mental Health of Indigents
- Criminal Justice Statutes

Senator Dwyer Moved to reconsider [8:16]
Senator Myrdal Seconded the Motion
Vote Passed 7-0-0

Vote to Reconsider Actions	Vote
Senator Diane Larson	Y
Senator Michael Dwyer	Y
Senator JoNell A. Bakke	Y
Senator Robert O. Fors	Y
Senator Jason G. Heitkamp	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Senator Dwyer Moved to Adopt the Amendment 03002 [8:18]
Senator Myrdal Seconded the Motion
Vote Passed 7-0-0

Vote to Amend HB 1181	Vote
Senator Diane Larson	Y
Senator Michael Dwyer	Y
Senator JoNell A. Bakke	Y
Senator Robert O. Fors	Y
Senator Jason G. Heitkamp	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Senator Dwyer Moved a DO PASS AS Amended [8:18]
Senator Myrdal Seconded the Motion
Vote Passed 7-0-0
Senator Dwyer Carried the Bill

Vote to DO PASS AS AMENDED	Vote
Senator Diane Larson	Y
Senator Michael Dwyer	Y
Senator JoNell A. Bakke	Y
Senator Robert O. Fors	Y
Senator Jason G. Heitkamp	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Hearing Adjourned [8:20]

Jamal Omar, Committee Clerk

SW 3/30 1001

21.0480.03002
Title.05000

Prepared by the Legislative Council staff for
Senate Judiciary Committee
March 30, 2021

PROPOSED AMENDMENTS TO REENGROSSED HOUSE BILL NO. 1181

In lieu of the amendments as printed on page 1031 of the Senate Journal, Reengrossed House Bill No. 1181 is amended as follows:

Page 2, line 3, replace "The clerk of the district court shall maintain any" with "Any"

Page 2, line 4, remove "separately from the record"

Page 2, line 5, replace "relating to the offense. The records" with "must be kept confidential and"

Page 3, line 13, after "professional" insert ", whether for a retrospective evaluation of fitness or an evaluation of the defendant's current fitness,"

Page 3, line 21, after the second "obtained" insert ", and the defendant's responses to questions related to the defendant's fitness to proceed, except for any restricted, proprietary, copyrighted, or other information subject to trade secret protection"

Page 4, line 21, replace "one year" with "one hundred eighty days. The court may extend the suspension for an additional three hundred sixty-five days if there is medical evidence to believe the defendant's fitness to proceed will be restored during the extended period"

Page 5, line 26, replace "clear and convincing" with "a preponderance of the"

Page 6, line 11, after "or" insert "director's designee or the"

Renumber accordingly

REPORT OF STANDING COMMITTEE

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