

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:

A handwritten signature in dark ink, appearing to read 'Travis W. Finck', with a stylized, flowing script.

Travis W. Finck

Executive Director, NDCLCI