

March 29, 2021

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1181

In lieu of the amendments adopted by the Senate as printed on page 1031 of the Senate Journal, Engrossed 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

Sixty-seventh  
Legislative Assembly  
of North Dakota

**ENGROSSED HOUSE BILL NO. 1181**

Introduced by

Representatives Skroch, Klemin, Vetter

Senators Burckhard, Clemens

1 A BILL for an Act to to create and enact section 12.1-04-04.1 of the North Dakota Century Code,  
2 relating to a defendant's fitness to proceed; and to amend and reenact sections 12.1-04-04,  
3 12.1-04-06, 12.1-04-07, and 12.1-04-08 of the North Dakota Century Code, relating to a  
4 defendant's fitness to proceed.

5 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

6 **SECTION 1. AMENDMENT.** Section 12.1-04-04 of the North Dakota Century Code is  
7 amended and reenacted as follows:

8 **12.1-04-04. Disposition of mentally unfit defendantsDefinitions.**

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

12 As used in this chapter, unless the context otherwise requires:

- 13 1. "Fitness to proceed" means sufficient present ability to consult with the individual's  
14 counsel with a reasonable degree of rational understanding and a rational as well as  
15 factual understanding of the proceedings against the individual.  
16 2. "Least restrictive appropriate setting" means available treatment or service that best  
17 meets the identified need and is no more restrictive of physical or social liberties than  
18 what is necessary to meet the need.  
19 3. "Therapeutically appropriate treatment" means treatment that provides the individual  
20 the greatest probability of improvement or cure.

21 **SECTION 2.** Section 12.1-04-04.1 of the North Dakota Century Code is created and  
22 enacted as follows:

23 **12.1-04-04.1. Disposition of defendants - Lack of fitness to proceed - Records.**

- 24 1. A defendant is presumed to be fit to stand trial, to plead, or to be sentenced.

2. An individual who lacks fitness to proceed may not be tried, convicted, or sentenced for the commission of an offense.

3. ~~The clerk of the district court shall maintain any~~Any report filed pursuant to this chapter regarding "diagnosis, treatment, or treatment plans" ~~separately from the record relating to the offense. The records~~must be kept confidential and may be reviewed only by the court or an appellate court, the state, the defense, the facility providing treatment as required by order of the court, and any other person as directed by the court.

**SECTION 3. AMENDMENT.** Section 12.1-04-06 of the North Dakota Century Code is amended and reenacted as follows:

**12.1-04-06. Examination-- Temporary commitment**~~detention for purposes of examination.~~

Whenever there is reason to doubt the defendant's fitness to proceed, the court may order the ~~temporary~~ detention of the defendant for the purpose of an examination by a tier 1a mental health professional. The ~~temporary~~ detention must be in the least restrictive appropriate setting, including the state hospital, the life skills and transition center, or other suitable facility for a reasonable period, not to exceed thirty days, for such examination. In lieu of detention, the court may allow the defendant to remain in the defendant's present residential setting or other suitable residential setting for the purpose of ~~evaluation by a suitable facility or personnel~~examination, subject to any reasonable limitation the court may impose. A human service center may ~~not be considered a suitable facility and may not be considered suitable personnel under this section unless~~if the court is aware an inquiry was made before the court ordered the evaluation to ensure appropriate resources exist at the human service center being ordered to conduct the ~~evaluation~~examination. ~~The court, by subsequent order and for good cause shown, may extend the detention for a period not to exceed thirty additional days. While the defendant is detained, the defendant's legal counsel, family, and others necessary to assist in the defendant's case must have reasonable opportunity to examine and confer with the defendant.~~

**SECTION 4. AMENDMENT.** Section 12.1-04-07 of the North Dakota Century Code is amended and reenacted as follows:

**12.1-04-07. Examination - Report - Hearing when contested.**

1. ~~The report of the examining psychiatrists or psychologists must be given in writing to the court within three days of expiration of the period of commitment or, if the defendant is not committed, within thirty days after the outpatient evaluation. The court shall cause copies to be delivered to the prosecutor and counsel for the defendant.~~ Whenever there is reason to doubt the defendant's fitness to proceed, the court shall order the defendant be examined by a tier 1a mental health professional.
2. An examination must occur within fifteen days from notice of entry of the order served upon the tier 1a mental health professional. Attorneys shall disclose any materials necessary to examine the fitness of the individual to the tier 1a examiner contemporaneously with the order. For good cause shown, the court may grant an extension allowing an additional seven days to complete the examination.
3. The report of the examining mental health professional, whether for a retrospective evaluation of fitness or an evaluation of the defendant's current fitness, must be provided to the court in writing within fifteen days of the date of the examination.
4. The report must include:
  - a. The identity of the individuals interviewed and records and other information considered.
  - b. Procedures, tests, and techniques utilized in the assessment.
  - c. The date and time of the examination of the defendant, and the identity of each individual present during the examination.
  - d. The relevant information obtained, other information not obtained, 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 which the examiner believes may be relevant, and the findings made.
  - e. An opinion as to whether the defendant is fit to proceed ~~or, is unable~~ able to understand the nature or purpose of the proceedings against the defendant, is able to effectively communicate with counsel, ~~and whether the defendant will attain fitness to proceed or ability to effectively communicate with counsel in the foreseeable future.~~

3. within the time frames set forth in section 12.1-04-08. If the examiner is unable to determine whether the defendant will attain fitness within a specified period of time, the report must include the reasoning. The report may include a general description of the type of treatment needed and of the therapeutically appropriate treatment or other appropriate treatment.

5. ~~If the findings of the report are contested, the court shall hold a hearing prior to before deciding whether the defendant currently lacks fitness to proceed or currently lacks ability to effectively communicate with counsel and whether the defendant will attain fitness to proceed or ability to effectively communicate with counsel in the foreseeable future. Upon hearing, the prosecution and defense have the right to summon and cross-examine the persons responsible for the report and to offer evidence upon the issues.~~

**SECTION 5. AMENDMENT.** Section 12.1-04-08 of the North Dakota Century Code is amended and reenacted as follows:

**12.1-04-08. Suspension or dismissal of proceedings - Referral for services.**

1. If the court determines based upon a preponderance of the evidence that the defendant currently lacks fitness to proceed ~~or to effectively communicate with counsel but that the defendant may attain fitness to proceed or effectively communicate with counsel in the foreseeable future,~~ and the report as required under section 12.1-04-07 indicates a likelihood the defendant will attain fitness within a specified period of time from the date of the finding upon completion of a course of therapeutically appropriate treatment, the proceedings against the defendant must be suspended, ~~except as provided in section 12.1-04-09. For a defendant charged with a felony, the~~ proceedings must be suspended for a period of up to one year 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. For a defendant charged with a misdemeanor, the proceedings must be suspended for a period no longer than the maximum term of imprisonment for the most serious offense charged. When the court determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed ~~or to effectively communicate with counsel,~~ the proceeding must be resumed. If

prosecution of the defendant has not resumed prior to the expiration of the maximum period for which the defendant could be sentenced, or it is determined by the court, after a hearing if a hearing is requested, that the defendant will not regain fitness to proceed or to effectively communicate with counsel within the allotted time, the charges against the defendant must be dismissed. The court may at any time make a referral for other appropriate services, treatment, or civil commitment.

2. If the court determines based upon a preponderance of the evidence that the defendant currently lacks fitness to proceed and that the defendant will not attain fitness to proceed in the foreseeable future, the proceedings must be dismissed. The court may at any time make a referral for other appropriate services, treatment, or civil commitment.

3. Other appropriate services or treatment include:

- a. Determination of incapacity, by a district court with appropriate jurisdiction following petition by the state's attorney, for the appointment of a guardian or conservator pursuant to chapter 30.1-28 or 30.1-29; or
- b. Civil commitment of the person pursuant to chapter 25-03.1; or
- c. Treatment of the person by a human service center or other appropriate public or private provider.

3. If the court determines the defendant currently lacks fitness to proceed and the defendant may attain fitness to proceed under subsection 1, the court may enter an order for a course of treatment considering the least restrictive form of treatment therapeutically appropriate.

a. Unless excused by the court, in a proceeding to determine therapy in an attempt to attain fitness, the defendant shall be represented by trial counsel.

b. If the court finds the individual is not able to retain the services of a tier 1a mental health professional and that those services are not otherwise available, the court shall authorize reasonable expenditures from public funds to examine the individual.

c. In a motion hearing to resume prosecution, the state or prosecuting authority must show by ~~clear and convincing~~ a preponderance of the evidence the defendant has attained fitness to proceed.

- 1       4. If the court orders the defendant committed to a treatment facility in an attempt to  
2       attain fitness to proceed under subsection 1, the court shall provide the special  
3       custody and commitment terms in the order. The special terms of commitment must  
4       include an order for the defendant to accept all nonexperimental, generally accepted  
5       medical, psychiatric, or psychological treatment recommended by the treatment  
6       facility, including the use of involuntary treatment with prescribed medication without  
7       the need for a separate commitment under chapter 25-03.1.
- 8       a. If the order does not indicate the terms of commitment, the director or  
9       superintendent of the treatment facility may determine the nature of the  
10      constraints necessary within the treatment facility to carry out the order of the  
11      court.
- 12      b. If the court orders an individual committed for therapeutic treatment to attain  
13      fitness to proceed, the court shall set a date consistent with the timeline  
14      established in this section for a review of the defendant's fitness to proceed. At  
15      least sixty days before the date specified for review, the director or director's  
16      designee or the superintendent of the treatment facility shall inquire as to whether  
17      the individual is represented by counsel and file a written report of the facts  
18      ascertained with the court.
- 19      5. If the parties to the action have reason to modify the special terms of the commitment  
20      order under this section, the parties shall make a motion to the court and the court  
21      shall determine by a preponderance of the evidence if the modification of the special  
22      terms is necessary and the least restrictive therapeutic alternative therapy in an  
23      attempt to attain fitness to proceed.
- 24      6. The custodian, guardian, or other person charged with the control of the defendant  
25      may take an appeal from the court's order in the manner provided by law. The  
26      procedure provided in this section is not exclusive, but is in addition to any other  
27      procedure for the commitment of individuals to the life skills and transition center, state  
28      hospital, or other state facility.