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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