

ASSEMBLY BILL NO. 377—ASSEMBLYMAN OHRENSCHALL

MARCH 20, 2017

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to the competency of a defendant in a criminal case. (BDR 14-1074)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to criminal procedure; prohibiting a prosecuting attorney from seeking an indictment while competency proceedings are pending except with leave of the court; prohibiting a prosecuting attorney from refile charges against a defendant who has been found incompetent except with leave of the court; authorizing the extension of the commitment of a person in a forensic facility under certain circumstances; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

1 Existing law provides that: (1) a person may not be tried or adjudged to
2 punishment for a public offense while incompetent; and (2) any time after the arrest
3 of a defendant, if doubt arises as to the competence of the defendant, the court must
4 suspend the proceedings, the trial or the pronouncing of the judgment until the
5 question of competence is determined. (NRS 178.400, 178.405) **Section 1** of
6 this bill provides that a prosecuting attorney may not seek an indictment of the
7 defendant for any offense during the period in which the court is considering
8 whether the defendant is competent or incompetent except upon the
9 prosecuting attorney’s application for leave of the court. **Section 1** requires the
10 prosecuting attorney to: (1) demonstrate that an objective factor significantly
11 impacts the ability of the State to prosecute the matter in the absence of such leave
12 of the court; and (2) give at least 24 hours’ notice of the application to the
13 defendant’s attorney.

14 Existing law provides that, under certain circumstances, when a criminal
15 defendant has been found incompetent, the proceedings against the defendant must
16 be dismissed. (NRS 178.425) **Section 2** of this bill provides for the refile of
17 charges arising out of the same circumstances in cases in which the prosecuting
18 attorney applies for, and is granted, leave of the court where: (1) the State has a
19 good faith belief, based on articulable facts, that the defendant has regained



20 competency; (2) the State has a compelling interest in bringing charges again; and
21 (3) the period for commencing the criminal action has not lapsed. **Section 2**
22 requires the prosecuting attorney to give at least 24 hours' notice of the application
23 to the defendant's attorney.

24 Existing law provides that if a court dismisses the proceedings against a
25 defendant who is charged with a category A or certain category B felonies because
26 the court finds that the defendant is incompetent with no substantial probability of
27 attaining competence in the foreseeable future, the prosecuting attorney is
28 authorized to file a motion with the court for a hearing to determine whether to
29 commit the person to the custody of the Administrator of the Division of Public and
30 Behavioral Health of the Department of Health and Human Services. The
31 maximum length of such commitment is 10 years. (NRS 178.461) **Section 4** of this
32 bill revises these provisions to: (1) authorize the Administrator to file a motion to
33 request an extension of the length of commitment for not more than 5 additional
34 years of a person charged with murder or sexual assault under certain
35 circumstances; (2) authorize a court to grant the motion for an extension of
36 commitment after a hearing to determine whether the person meets certain criteria
37 requiring placement at a forensic facility; and (3) provide that a person committed
38 has the right to be represented by counsel at such a hearing and the right to have an
39 attorney appointed for him or her if the person does not have counsel.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 **Section 1.** NRS 178.415 is hereby amended to read as follows:
2 178.415 1. Except as otherwise provided in this subsection,
3 the court shall appoint two psychiatrists, two psychologists,
4 or one psychiatrist and one psychologist, to examine the defendant.
5 If the defendant is accused of a misdemeanor, the court of
6 jurisdiction shall appoint a psychiatric social worker, or other person
7 who is especially qualified by the Division, to examine the
8 defendant.
9 2. Except as otherwise provided in this subsection, at a
10 hearing in open court, the court that orders the examination must
11 receive the report of the examination. If a justice court orders the
12 examination of a defendant who is charged with a gross
13 misdemeanor or felony, the district court must receive the report of
14 the examination.
15 3. The court that receives the report of the examination shall
16 permit counsel for both sides to examine the person or persons
17 appointed to examine the defendant. The prosecuting attorney and
18 the defendant may:
19 (a) Introduce other evidence including, without limitation,
20 evidence related to treatment to competency and the possibility of
21 ordering the involuntary administration of medication; and
22 (b) Cross-examine one another's witnesses.
23 4. *A prosecuting attorney may not seek an indictment of the*
24 *defendant for any offense during the period in which the court is*



1 *considering whether the defendant is competent or incompetent*
2 *except upon application by the prosecuting attorney to the chief*
3 *judge of the district court, or his or her designee, and with leave of*
4 *the court. The prosecuting attorney must demonstrate that*
5 *adequate cause exists for the court to grant leave to seek an*
6 *indictment on the grounds that the availability or unavailability of*
7 *a witness, or any other objective factor, significantly impacts the*
8 *ability of the State to prosecute the matter in the absence of such*
9 *leave. The prosecuting attorney must give notice of an application*
10 *made pursuant to this subsection to the attorney for the defendant*
11 *not less than 24 hours before the hearing on the application.*

12 5. The court that receives the report of the examination shall
13 then make and enter its finding of competence or incompetence.

14 ~~5.1~~ 6. The court shall not appoint a person to provide a report
15 or an evaluation pursuant to this section, unless the person is
16 certified by the Division pursuant to NRS 178.417.

17 **Sec. 2.** NRS 178.425 is hereby amended to read as follows:

18 178.425 1. If the court finds the defendant incompetent, and
19 dangerous to himself or herself or to society and that commitment is
20 required for a determination of the defendant's ability to receive
21 treatment to competency and to attain competence, the judge shall
22 order the sheriff to convey the defendant forthwith, together with a
23 copy of the complaint, the commitment and the physicians'
24 certificate, if any, into the custody of the Administrator or the
25 Administrator's designee for detention and treatment at a division
26 facility that is secure. The order may include the involuntary
27 administration of medication if appropriate for treatment to
28 competency.

29 2. The defendant must be held in such custody until a court
30 orders the defendant's release or until the defendant is returned for
31 trial or judgment as provided in NRS 178.450, 178.455 and
32 178.460.

33 3. If the court finds the defendant incompetent but not
34 dangerous to himself or herself or to society, and finds that
35 commitment is not required for a determination of the defendant's
36 ability to receive treatment to competency and to attain competence,
37 the judge shall order the defendant to report to the Administrator or
38 the Administrator's designee as an outpatient for treatment, if it
39 might be beneficial, and for a determination of the defendant's
40 ability to receive treatment to competency and to attain competence.
41 The court may require the defendant to give bail for any periodic
42 appearances before the Administrator or the Administrator's
43 designee.

44 4. Except as otherwise provided in subsection 5,
45 proceedings against the defendant must be suspended until the



1 Administrator or the Administrator's designee or, if the defendant is
2 charged with a misdemeanor, the judge finds the defendant capable
3 of standing trial or opposing pronouncement of judgment as
4 provided in NRS 178.400.

5 5. Whenever the defendant has been found incompetent, with
6 no substantial probability of attaining competency in the foreseeable
7 future, and released from custody or from obligations as an
8 outpatient pursuant to paragraph (d) of subsection 4 of NRS
9 178.460, the proceedings against the defendant which were
10 suspended must be dismissed. No new charge arising out of the
11 same circumstances may be brought ~~after a~~ *except upon*
12 *application by the prosecuting attorney to the chief judge of the*
13 *district court, or his or her designee, and with leave of the court*
14 *where:*

15 (a) *The State has a good faith belief, based on articulable*
16 *facts, that the defendant has attained competency;*

17 (b) *The State has a compelling interest in bringing charges*
18 *again; and*

19 (c) *The period, equal to the maximum time allowed by law for*
20 *commencing a criminal action for the crime with which the*
21 *defendant was charged, has not lapsed since the date of the alleged*
22 *offense.*

23 *↳ The prosecuting attorney must give notice of an application*
24 *made pursuant to this subsection to the attorney for the defendant*
25 *not less than 24 hours before the hearing on the application.*

26 6. If a defendant is found incompetent pursuant to this section,
27 the court shall cause, within 5 business days after the finding, on a
28 form prescribed by the Department of Public Safety, a record of that
29 finding to be transmitted to the Central Repository for Nevada
30 Records of Criminal History, along with a statement indicating that
31 the record is being transmitted for inclusion in each appropriate
32 database of the National Instant Criminal Background Check
33 System.

34 7. As used in this section, "National Instant Criminal
35 Background Check System" has the meaning ascribed to it in
36 NRS 179A.062.

37 **Sec. 3.** NRS 178.460 is hereby amended to read as follows:

38 178.460 1. If requested by the district attorney or counsel for
39 the defendant within 10 days after the report by the Administrator or
40 the Administrator's designee is sent to them, the judge shall hold a
41 hearing within 10 days after the request at which the district attorney
42 and the defense counsel may examine the members of the treatment
43 team on their report.

44 2. If the judge orders the appointment of a licensed psychiatrist
45 or psychologist who is not employed by the Division to perform an



1 additional evaluation and report concerning the defendant, the cost
2 of the additional evaluation and report is a charge against the
3 county.

4 3. Within 10 days after the hearing or 10 days after the report is
5 sent, if no hearing is requested, the judge shall make and enter a
6 finding of competence or incompetence, and if the judge finds the
7 defendant to be incompetent:

8 (a) Whether there is substantial probability that the defendant
9 can receive treatment to competency and will attain competency to
10 stand trial or receive pronouncement of judgment in the foreseeable
11 future; and

12 (b) Whether the defendant is at that time a danger to himself or
13 herself or to society.

14 4. If the judge finds the defendant:

15 (a) Competent, the judge shall, within 10 days, forward the
16 finding to the prosecuting attorney and counsel for the defendant.
17 Upon receipt thereof, the prosecuting attorney shall notify the
18 sheriff of the county or chief of police of the city that the defendant
19 has been found competent and prearrange with the facility for the
20 return of the defendant to that county or city for trial upon the
21 offense there charged or the pronouncement of judgment, as the case
22 may be.

23 (b) Incompetent, but there is a substantial probability that the
24 defendant can receive treatment to competency and will attain
25 competency to stand trial or receive pronouncement of judgment in
26 the foreseeable future and finds that the defendant is dangerous to
27 himself or herself or to society, the judge shall recommit the
28 defendant and may order the involuntary administration of
29 medication for the purpose of treatment to competency.

30 (c) Incompetent, but there is a substantial probability that the
31 defendant can receive treatment to competency and will attain
32 competency to stand trial or receive pronouncement of judgment in
33 the foreseeable future and finds that the defendant is not dangerous
34 to himself or herself or to society, the judge shall order that the
35 defendant remain an outpatient or be transferred to the status of an
36 outpatient under the provisions of NRS 178.425.

37 (d) Incompetent, with no substantial probability of attaining
38 competency in the foreseeable future, the judge shall order the
39 defendant released from custody or, if the defendant is an outpatient,
40 released from any obligations as an outpatient if, within 10 judicial
41 days, the prosecuting attorney has not filed a motion pursuant to
42 NRS 178.461 or if, within 10 judicial days, a petition is not filed to
43 commit the person pursuant to NRS 433A.200. After the initial 10
44 judicial days, the person may remain an outpatient or in custody
45 under the provisions of this chapter only as long as the motion or



1 petition is pending unless the person is committed to the custody of
2 the Administrator pursuant to NRS 178.461 or involuntarily
3 committed pursuant to chapter 433A of NRS.

4 5. Except as otherwise provided in ~~subsection~~ **subsections** 4
5 **and 7** of NRS 178.461, no person who is committed under
6 the provisions of this chapter may be held in the custody of the
7 Administrator or the Administrator's designee longer than the
8 longest period of incarceration provided for the crime or crimes with
9 which the person is charged or 10 years, whichever period is shorter.
10 Upon expiration of the applicable period provided in this section,
11 subsection 4 **or 7** of NRS 178.461 or subsection 4 of NRS 178.463,
12 the person must be returned to the committing court for a
13 determination as to whether or not involuntary commitment
14 pursuant to chapter 433A of NRS is required.

15 **Sec. 4.** NRS 178.461 is hereby amended to read as follows:

16 178.461 1. If the proceedings against a defendant who is
17 charged with any category A felony or a category B felony listed in
18 subsection 6 are dismissed pursuant to subsection 5 of NRS
19 178.425, the prosecuting attorney may, within 10 judicial days after
20 the dismissal, file a motion with the court for a hearing to determine
21 whether to commit the person to the custody of the Administrator
22 pursuant to subsection 3. Except as otherwise provided in subsection
23 2, the court shall hold the hearing within 10 judicial days after the
24 motion is filed with the court.

25 2. If the prosecuting attorney files a motion pursuant to
26 subsection 1, the prosecuting attorney shall, not later than the date
27 on which the prosecuting attorney files the motion, request from the
28 Division a comprehensive risk assessment which indicates whether
29 the person requires the level of security provided by a forensic
30 facility. The Division shall provide the requested comprehensive
31 risk assessment to the court, the prosecuting attorney and counsel
32 for the person not later than three judicial days before the hearing. If
33 the person was charged with any category A felony other than
34 murder or sexual assault or a category B felony listed in subsection
35 6 and the comprehensive risk assessment indicates that the person
36 does not require the level of security provided by a forensic facility,
37 the court shall dismiss the motion.

38 3. At a hearing held pursuant to subsection 1, if the court finds
39 by clear and convincing evidence that the person has a mental
40 disorder, that the person is a danger to himself or herself or others
41 and that the person's dangerousness is such that the person requires
42 placement at a forensic facility, the court may order:

43 (a) The sheriff to take the person into protective custody and
44 transport the person to a forensic facility; and



1 (b) That the person be committed to the custody of the
2 Administrator and kept under observation until the person is eligible
3 for conditional release pursuant to NRS 178.463 or until the
4 maximum length of commitment described in subsection 4 *or* 7 has
5 expired.

6 4. ~~¶The~~ *Except as otherwise provided in subsection 7, the*
7 *length of commitment of a person pursuant to subsection 3 must not*
8 *exceed 10 years, including any time that the person has been on*
9 *conditional release pursuant to NRS 178.463.*

10 5. *At least once every 12 months, the court shall review the*
11 *eligibility of the defendant for conditional release.*

12 6. *The provisions of subsection 1 apply to any of the following*
13 *category B felonies:*

- 14 (a) *Voluntary manslaughter pursuant to NRS 200.050;*
- 15 (b) *Mayhem pursuant to NRS 200.280;*
- 16 (c) *Kidnapping in the second degree pursuant to NRS 200.330;*
- 17 (d) *Assault with a deadly weapon pursuant to NRS 200.471;*
- 18 (e) *Battery with a deadly weapon pursuant to NRS 200.481;*
- 19 (f) *Aggravated stalking pursuant to NRS 200.575;*
- 20 (g) *First degree arson pursuant to NRS 205.010;*
- 21 (h) *Burglary with a deadly weapon pursuant to NRS 205.060;*
- 22 (i) *Invasion of the home with a deadly weapon pursuant to*
23 *NRS 205.067;*
- 24 (j) *Any category B felony involving the use of a firearm; and*
- 25 (k) *Any attempt to commit a category A felony.*

26 7. *If a person is within 6 months of the maximum length of*
27 *commitment set forth in this subsection or subsection 4, as*
28 *applicable, and:*

- 29 (a) *Was charged with murder or sexual assault; and*
- 30 (b) *Was committed to the custody of the Administrator*
31 *pursuant to this subsection or subsection 3,*
32 *↳ the Administrator may file a motion to request an extension of*
33 *the length of commitment for not more than 5 additional years.*

34 8. *The court may grant a motion for an extension of the*
35 *length of commitment pursuant to subsection 7 if, at a hearing*
36 *conducted on the motion, the court finds by clear and convincing*
37 *evidence that the person is a danger to himself or herself or others*
38 *and that the person's dangerousness is such that the person*
39 *requires placement at a forensic facility.*

40 9. *At a hearing conducted pursuant to subsection 8, a person*
41 *who is committed has the right to be represented by counsel. If the*
42 *person does not have counsel, the court shall appoint an attorney*
43 *to represent the person.*



1 **Sec. 5.** NRS 178.463 is hereby amended to read as follows:

2 178.463 1. The Division or a person who is committed to the
3 custody of the Administrator pursuant to NRS 178.461 may petition
4 the court which committed the person for conditional release.

5 2. A person who is committed to the custody of the
6 Administrator pursuant to NRS 178.461 is eligible for conditional
7 release only after:

8 (a) The Division has completed a comprehensive risk
9 assessment concerning the person;

10 (b) A decision to release the person from commitment with
11 conditions imposed by the court in consultation with the Division
12 has been made based on input from the person's treatment team, the
13 prosecuting attorney, the counsel for the person and the team that
14 will supervise the person in the community; and

15 (c) The court which committed the person has approved the
16 conditional release.

17 3. If a person is serving a period of conditional release pursuant
18 to this section, the court must, at least once every 12 months, review
19 the eligibility of the defendant for discharge from conditional
20 release. If, at the conclusion of the review required by this
21 subsection, the court finds by clear and convincing evidence that the
22 person is not a danger to himself or herself or others, the court must
23 discharge the person from conditional release.

24 4. The length of the period of conditional release must not
25 exceed 10 years, including any time that the person has been
26 committed to the custody of the Administrator pursuant to NRS
27 178.461 and 178.464 ~~H~~, *except that the length of the period of*
28 *conditional release may be extended for not more than 5*
29 *additional years if the length of the period of commitment has*
30 *been extended pursuant to subsection 7 of NRS 178.461.*

