THE CLASS OF 1964 POLICY RESEARCH SHOP

# FORENSIC MENTAL HEALTH IN VERMONT

## PRESENTED TO THE VERMONT HOUSE OF REPRESENTATIVES

## Rep. Anne Donohue, Vice-chair, Health Care Committee

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PREPARED BY:

MADELEINE BERNARDEAU '22
MACKENZIE BRADY '24
TAYLOR STADELI '22

**NELSON A. ROCKEFELLER CENTER FOR PUBLIC POLICY AND THE SOCIAL SCIENCES**
Contact:
Nelson A. Rockefeller Center, 6082 Rockefeller Hall, Dartmouth College, Hanover, NH 03755
http://rockefeller.dartmouth.edu/shop/ • Email: Ronald.G.Shaiko@Dartmouth.edu

# TABLE OF CONTENTS

# EXECUTIVE SUMMARY

In the legal system, incompetent individuals are deemed mentally unfit to testify or stand trial by the court. Competency restoration is the mental health treatment provided to legally incompetent defendants so that they can fully participate in judicial proceedings. The current U.S. competency restoration system prevents people from receiving effective psychological help. These issues have surfaced in Vermont, where the state legislature is focused on creating policies to protect mentally ill defendants and to ensure that the community remains safe. This report aims to aid Vermont officials in enacting updated competency restoration legislation. We begin with an overview of the competency restoration crisis in the United States, followed by an analysis of current Vermont policy. Next, we offer a comprehensive research methodology for a case study investigation of competency restoration programs around the country. More specifically, we identify Florida, Connecticut, and Georgia as possible states of interest. In the research methodologies section, we also describe the three most common types of treatment programs for incompetent individuals. Finally, we conclude with a presentation of our findings and policy recommendations for Vermont competency restoration programs.

# 1 INTRODUCTION: COMPETENCY RESTORATION IN THE UNITED STATES

Generally, competency is defined as whether or not a defendant will be able to appear in court and understand the proceedings.[1] According to federal law, determining whether or not a defendant is competent to stand trial falls under proper due process of law.[2] If an individual is found incompetent to stand trial, he or she is not acquitted of the charges. Rather, a ruling of incompetency is designed to pause court proceedings until a defendant can understand and participate in the trial competency restoration is the process of treating a defendant until he or she is prepared to participate fully in one's defense. In contrast to incompetency, a defendant ruled not guilty by reason of insanity was found to be not of sound mind when the crime was committed.[3] This ruling is determined by the jury after a trial and is unrelated to an individual's understanding of the charges brought against him or her. Additionally, those who are deemed not guilty by reason of insanity do not undergo competency restoration. They will most likely receive mental health treatment following their trial. Those who are deemed incompetent to stand trial receive psychological help prior to any legal proceedings. This report specifically focuses on competency restoration and does not discuss individuals who are found not guilty by reason of insanity.

In 2019, there were an estimated 91,000 competency evaluations conducted in the United States.[4] This staggering statistic highlights that competency to stand trial cases have exhausted state mental health resources and, in turn, led to extremely long evaluation and treatment wait times for mentally ill defendants. In 2019, *The Atlantic* reported on an incident in which a Colorado man, named Clay by reporters, waited 55 days in jail for a competency evaluation after stealing a hamburger and fries from a local fast-food restaurant. Upon his arrest, the police were made aware of Clay's recent diagnosis of psychosis and probable bipolar disorder but did nothing to inform the justice system of his mental health needs. During his prison stay, Clay's mother contacted attorneys at a Colorado disability law firm and created a case against the state prison system for the violation of an individual's constitutional rights to a speedy trial and protection against cruel/unusual punishment.[5] Clay's story is not an isolated occurrence. His experience serves as evidence of the fact that, across the United States, competency evaluation systems are flawed to the point where American citizens are no longer protected by the Constitution because of a mental disability.

The increase in competency evaluations has also brought to light additional problems with current forensic mental health policy. First, the long wait times for evaluations cause mentally ill defendants to be warehoused in prisons without mental health resources. The isolating and traumatizing conditions found in jails often exacerbate pre-existing mental conditions.[6] Problems with the competency restoration system also arise when individuals are released from treatment and recommit crimes. In fact, 68 percent of individuals who go through competency restoration programs in the United States will become reoffenders.[7] Evidently, treatment programs are not working and perpetuate the current issues with the forensic mental health system.

# 2 PURPOSE STATEMENT

Current legal debate in Vermont is focused on the long-term effects of state competency restoration programs. In recent years, there have been a number of previously deemed incompetent individuals who leave mental health treatment and recommit crimes. As a result of these events, Vermont has sought to find an effective balance between mental health treatment and public safety concerns.

In response to this ongoing crisis, the Vermont Legislature passed a bill in conjunction with the Department of Mental Health to investigate the gaps in the state's forensic mental health programs. The bill, known as S.3, lays out in Act 57 that this partnership aims to address any legislative issues regarding the legal proceedings regarding or mental health treatment of incompetent individuals and those not guilty by reason of insanity.[8] Although the passage of this bill will provide the legislature with the information they need to update forensic mental health programs, it is a large undertaking. On January 15, 2022, the Department of Mental Health presented a preliminary report to the House Committees on Corrections and Institutions, on Health Care, and on Judiciary and to the Senate Committees on Health and Welfare and on Judiciary summarizing the work completed related to their policy oversight areas. The workgroup met five times over the course of the last six months of 2021 and heard outside expert testimonials from several states such as Connecticut and Colorado. Ultimately, the group identified diversion programs and competency restoration/forensic facilities as two key areas for Vermont to address over the coming months. Within the diversion programs they emphasized further discussion on creating a more formal "probation/parole" model, a formal program to help individuals found incompetent to stand trial transition to a hospital setting and then into the community, and finally to develop mental health courts or similar diversions.[9] Additionally, they recommend considering the Sequential Intercept Model, community setting monitorization for individuals found insane but no longer require hospitalization, as well as more funding and oversight.[10] Regarding competency restoration/forensic facilities, the workgroup highlighted that the least restrictive alternative is a core value and could possibly be achieved through a program both community and hospital based.[11] They also suggest further considerations of staffing, costs, and the population these facilities would serve.[12] This report provides the working group with additional areas of exploration for research on forensic mental health programs across the United States.

# 3 BACKGROUND

Prior to conducting an analysis on the various restoration of competency methods employed in the United States, this section will discuss the current literature on Vermont's legislation regarding competency to stand trial cases. The primary purpose of this research is to provide the Vermont House of Representatives with a comprehensive overview on incompetency so that they may make informed policy decisions when enacting new competency restoration programs in the state.

## 3.1 DEFINING INCOMPETENCY IN VERMONT

The right not to be prosecuted while one is incompetent is guaranteed under the due process clause of the Constitution. At the federal level, a person is deemed incompetent to stand trial if "[the] defendant [is] unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[13] Competency to stand trial is determined before the trial takes place through a court-ordered forensic psychological evaluation. If the defendant is found incompetent, the criminal proceeding is stopped, and he or she will receive treatment until competency is restored. Federal law requires an initial hospitalization for four months then "for a reasonable period of time" if the individual has not regained competency.[14]

In Vermont, the State or an attorney or guardian acting on the behalf of the defendant may, at any time before the final judgment, raise the question of competency. The court also possesses this power and may order a competency hearing if there is reason to believe that the defendant is incompetent to stand trial. However, at the state level, if the court has reason to believe the defendant is not competent to stand trial because of "a mental disease or mental defect," an additional psychiatric evaluation must be completed before the competency hearing.[15] All psychiatric exams must be performed in accordance with 13 V.S.A. § 4814-4816, which can be seen in Appendix A. After an evaluation is made, the court determines the competency of the defendant. If the individual is found incompetent to stand trial for an alleged offense, he or she must receive treatment until competent.[16] Unlike federal law, Vermont does not have a required initial period of treatment. Once competency is thought to be restored, the individual may be tried.

## 3.2 LEGAL PROCEEDINGS OF INCOMPETENT INDIVIDUALS IN VERMONT

Currently, defendants deemed incompetent to stand trial in Vermont are placed in the custody of the Department of Mental Health (DMH). The state operates no formal outpatient restoration programs. If the court determines that a course of treatment other than hospitalization would be most beneficial to the defendant, it may issue an Order of Non-Hospitalization (ONH), which commits the defendant to outpatient care.[17] Typically, ONHs are used to move the defendant out of the criminal justice system without having to wait indefinitely for competency to be restored. However, patients identified by the criminal court as ONH eligible, typically would not have been granted this status by mental health professionals. Additionally, Vermont has no formal system of outpatient treatment for defendants found incompetent, therefore these forensic patients must be treated in the Vermont Psychiatric Care Hospital, alongside civil patients.[18]

Since S.3 went into effect in late July 2021, Vermont allows the prosecution to conduct its own evaluation of a defendant's competency and requires the victim and prosecution to be notified if a defendant is discharged to an ONH.[19] Kelly Carrol, whose daughter was brutally murdered in January 2021 by a man who had evaded jail time after deemed incompetent to stand trial by the court, was one of the loudest advocates of the bill. In her testimony before the Senate Judiciary Committee, Carrol stated that, "Just because one person says that somebody is not competent doesn't mean that they should be able to get away with first-degree murder."[20] In the eyes of Carrol and other victims, the failure to restore a defendant's competency is a barrier to justice.

# 4 RESEARCH METHODOLOGY

This section describes our research methodologies for examining the effectiveness of different competency restoration programs across the United States. The primary purpose of this research is to collect information about how Vermont may revise and adapt its current policies regarding legally incompetent defendants.

## 4.1 CONDUCT STATE-BY-STATE COMPARISONS

The first step in our research was to determine which competency restoration programs are most effective at providing long-term mental health solutions. We did this by conducting a case study evaluation of a variety of state models and programs. Specifically, we focused on competency restoration programs that were implemented in the past ten-to-fifteen years. We were also interested in state models that may be feasible in Vermont due to similarities in population, spending, or policy approaches. The second step of this research was to investigate the three main types of competency restoration programs—inpatient, outpatient, and jail-based—to evaluate their strengths and weaknesses as possible policy solutions in Vermont.

**Florida:** Miami-Dade County has implemented an innovative local inpatient rehabilitation program for individuals deemed incompetent to stand trial. This program diverts those with third-degree and non-violent second-degree felonies to the Miami-Dade Forensic Alternative Center (MD-FAC) where they receive a hybrid of community-based and in-patient treatments. This program addresses many of the challenges that arise from housing mentally ill defendants in poorly equipped correctional facilities.[21] Additionally, Florida State Hospital has been able to optimize scare public resources by hiring new graduates from doctoral psychology programs.

**Connecticut:** With progressive state legislation surrounding competency to stand trial, Connecticut has no waitlist for restoration services and an effective patient discharge plan. The number of state competency to stand trial cases has decreased by 24 percent over the last 20 years, which is indicative of the fact that there are few repeat offenders after treatment.[22] By implementing aspects of Connecticut's forensic discharge plan, such as providing an individual with a continuation of treatment if requested, Vermont could increase state public safety.

**Georgia:** Fulton County, Georgia, has operated a full jail-based competency restoration program since 2011. The state contracted the Emory University to develop a 16-bed restoration pilot unit in the county jail after the waitlist for incompetent inmates to be transferred to a state hospital grew to over 60 days and it was determined that many of the defendants likely did not need hospital-level care in order to be restored. Over eight years after the program's creation, 40 percent of the 398 defendants treated in the Competency Restoration Unit were restored.[23] An additional 31 percent of defendants were diverted out of the criminal justice system, with 76 percent of the misdemeanor defendants being diverted.[24] The majority of patients who were not restored and were referred to inpatient treatment were those that refused medication and suffered from psychosis. Fulton County's program has now

been in operation for 10 years, has already been the subject of extensive analysis, and could serve as an example for jail-based competency restoration in Vermont.

### 4.1.1 PROFILE OF COMPETENCY RESTORATION PROGRAMS

There are three competency restoration models: inpatient-based, outpatient-based, and jail-based. In several states, multiple or all of these methods are used to treat patients with varying levels of need. Below, we briefly describe the contours of each model.

**Inpatient-Based Model:** This is the traditional model for competency restoration. Under this system, patients are placed in either state psychiatric facilities or local inpatient hospitals. In-patient services are focused on stabilization, symptom management, and legal education, with the ultimate goal being to prepare patients to participate in the courtroom process.[25] However, the overuse of inpatient treatment means that there is limited space in state hospitals and other inpatient facilities, which leaves civil patients without beds.[26] This issue has led many states to turn to alternative models of competency restoration.

**Outpatient-Based Model:** Most states have some form, whether government-sponsored or not, of outpatient restoration. Community-based evaluation and restoration services are less expensive than a state or inpatient facility and are much more convenient in rural areas.[27] These programs also benefit patients by removing them from an institutional environment and connecting them with care providers in their communities. [28]

**Jail-Based Model:** Jail-based competency restoration (JBCR) keeps patients in a secure and stable environment throughout the restoration process.[29] This model is controversial, as many people believe jails can never provide a sufficiently therapeutic environment, and only a handful of states have implemented this model of competency restoration.[30] There are two types of jail-based programs. In the first, defendants are held in jail until they regain competency or are found to be unrestorable.[31] In the second, jail-based restoration services are only used for a limited time until the inmate can move to a bed in the state hospital – this method is used as a way to initiate restoration services while inmates wait for inpatient care or to reduce the hospital waitlist by restoring competency in a jail setting.[32] Typically, in a full-scale jail-based program, forensic patients are kept in a specific unit or area of the jail and are treated by either independent contractors or state psychiatric workers.

Jail-based restoration keeps defendants in prisons, which conserves state and hospital resources. However, to be successful, a jail-based restoration system needs an adequate number of licensed mental health professionals to provide services; inadequate staffing can reduce the efficacy of such a program.[33]

# 5 FINDINGS

In this section, we identify competency restoration programs in Florida, Connecticut, and Georgia as models of interest. These analyses also include rationale as to why these programs would be feasible in Vermont. This section concludes with our final recommendation for competency restoration legislation in Vermont.

## 5.1 FLORIDA

In Florida, defendants deemed incompetent to stand trial after a psychiatric evaluation must undergo competency restoration training before they can be criminally tried. Only defendants who are deemed a danger to themselves or others will be served in secure forensic facilities and all others will complete their training in the community under conditional release. Currently, Florida has seven secure forensic facilities for mental illness; however, the Miami-Dade Forensic Alternative Center and Florida State Hospital are the most innovative and resourceful in the state.

The Florida State Hospital in Chattahoochee solves the issue of scarce public resources by hiring recent graduates from doctoral psychology programs in addition to licensed practitioners. This program places new graduates directly into full-time competency evaluator roles where they receive formal and on-the-job training as well as supervision from highly regarded state-certified evaluators. Graduates are also paid lower wages than licensed practioners in return for opportunities to expand their understanding of forensic mental health, increase their independence, assist in licensure acquisition, and facilitate professional advancement. Despite employing less experience individuals, the program has proven to be 25 to 36 percent more successful in restoring competency than other jail-based and outpatient programs in Florida.[34]

The Miami-Dade Forensic Alternative Center (MD-FAC) is an innovative 16-bed inpatient residential treatment unit within the Jackson Memorial Hospital that provides psychiatric stabilization and competency restoration for individuals deemed incompetent to stand trial for third-degree and non-violent second-degree felonies. MD-FAC is unique in that it provides not only medications and competency training but also initiates the recovery process for defendants. While in the program patients learn life skills, take competency courses to improve their understanding of the legal process, and complete daily training focused on illness management and re-entry. The program also has a one-year monitoring period after individuals are released back into the community to minimize patient recidivism and maximize public safety. MD-FAC has achieved its goal to provide a safe, effective, and cost-efficient alternative for incompetent defendants. Not only are recidivism rates one year after discharge 34 percent lower for patients at MD-FAC than other state hospitals, but MD-FAC is also 45 percent cheaper with an average length of stay 73 days less.[35]

Although, the population of Florida is much larger than that of Vermont, the alternative competency restoration programs in Chattahoochee and Miami-Dade County could still be implemented in Vermont. Demographically, both Florida and Vermont are majority white populations with about 20

percent of residents aged 65 and older.[36] Additionally, translating the 16-bed program at MD-FAC to the Vermont Psychiatric Care Hospital (VPCH) 25-bed program would alleviate recent funding pressures as the MD-FAC program is complaint with federal Medicaid funding rules. There are also two local doctorial psychology programs for VPCH to recruit from and five regional programs available for either VPCH or the Brattleboro Retreat to recruit from.

## 5.2 CONNECTICUT

In the Connecticut court system, a defendant is presumed to be mentally fit to stand trial unless proven otherwise by one of the involved parties. Similar to Vermont, if a Connecticut judge questions the competency of an individual, he or she may call for a psychiatric examination. If a defendant is deemed incompetent to stand trial, and is not considered to be violent offenders, he or she is taken to an inpatient competency restoration program at Whiting Forensic Hospital in Middletown, Connecticut. At Whiting, defendants cannot be enrolled in a competency restoration program for more than 18 months.[37] On occasion, mentally ill prisoners may also be brought to an outpatient, community center for treatment. There are no competency restoration programs in state hospitals, which means that defendants do not take away resources from civil patients.

Although mental health resources are not strained at state hospitals, psychiatric care is stretched thin at forensic hospitals due to an increase in competency evaluations. Connecticut struggles to provide its citizens with adequate mental health resources. Because of this, many people turned toward crime to get the help that they need from the prison system. In addition to encouraging Connecticut lawmakers to expand competency restoration programs, forensic mental health experts are calling for more public psychiatric resources.[38] When drafting competency restoration programs in Vermont, the legislature should keep in mind the accessibility of mental health treatment in the state. To ensure that the community remains safe, the Vermont government should discourage individuals from using the justice system as a way to obtain psychiatric help.

In addition to increasing the availability of mental health treatment in the community, Vermont may consider using Connecticut's forensic-specific hospital model. Connecticut's competency restoration program could be implemented in Vermont due to similarities between the states' population and spending. While Connecticut has a larger population than Vermont, both states have populations that are growing at a rapid rate. Additionally, Connecticut and Vermont have majority white populations. Connecticut and Vermont allocate about $12,500 in per capita spending on mental health treatment. They also have similar psychiatric resources with 35 behavioral healthcare specialists per 10,000 residents.[39]

## 5.3 GEORGIA

Fulton County Jail (FCJ) currently operates an all-male 16-bed in-jail competency restoration unit aimed at relieving some of the overcrowding caused by incompetent to stand trial defendants waiting

for an inpatient hospital bed. The jail is also partnered with the Emory School of Medicine and helped develop a fellowship program to assist with competency evaluations in FCJ and greater Fulton County.

Inmates in the competency restoration unit participate in group and individual sessions with a focus on cognitive remediation activities. Each participant has a daily schedule structured around enhancing his problem-solving skills, attention, concentration, and memory which are all key in restoring competency. Furthermore, group sessions have created a positive social environment in the unit similar to community-based programs. Despite negative stigmas around jail-based competency restoration, the FCJ competency restoration unit has seen quicker rates of competency restoration and more individuals diverted out of the criminal system at one-third of the cost than inpatient hospitalization.[40]

Implementing this jail-based model used by Fulton County is feasible given Georgia and Vermont's demographic and incarceration rate similarities. Both Georgia and Vermont have seen similar increases in jail population since 2000 and an increase in the total number of individuals locked up since 1978.[41] Each state also has a similar percentage of residents diagnosed with serious mental health conditions (schizophrenia, bipolar disorder, and or major depression) with Georgia just under four percent and Vermont just shy of five percent.[42] The FCJ program has characteristics amenable for adoption at the Southern State Correctional Facility as it is the only state prison or jail with a mental healthcare unit.

# 6 CONCLUSION

The purpose of this research is to provide Vermont lawmakers with a variety of ways to improve state competency restoration programs in order to reduce recidivism rates among individuals who have previously been deemed incompetent. We hope that the models listed above will help Vermont protect the rights and health of incompetent defendants while equally promoting the safety of the public.

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