

1 S.3

2 Introduced by Senators Sears, Clarkson, Lyons and White

3 Referred to Committee on Judiciary

4 Date: January 12, 2021

5 Subject: Criminal procedures; mental health; competency to stand trial and  
6 insanity as a defense

7 Statement of purpose of bill as introduced: This bill proposes several  
8 measures related to criminal proceedings involving the defendant's sanity at  
9 the time the offense was committed or the defendant's competency to stand  
10 trial for the offense. The bill (1) clarifies that the psychiatric examination that  
11 must occur when the question of the defendant's sanity or competency has  
12 been raised may evaluate the defendant's competency, or the defendant's  
13 sanity, or both; (2) provides that, if the defendant has been found to be either  
14 insane at the time of the offense or incompetent to stand trial and does not  
15 have a private attorney, the court will appoint counsel from Vermont Legal Aid  
16 to represent the defendant; (3) establishes procedures for notification of the  
17 crime victim when the defendant is discharged from a mental health treatment  
18 facility or from Department of Mental Health custody if the case involves  
19 certain serious offenses; and (4) permits the prosecution to have its own  
20 psychiatrist examine the defendant when a court-ordered examiner has found  
21 the defendant incompetent to stand trial. The bill also establishes a forensic

1 care working group, and requires the Departments of Corrections and of  
2 Mental Health to jointly submit an inventory and evaluation of the mental  
3 health services provided by the entity with whom the Department of  
4 Corrections contracts for health care services.

5 An act relating to competency to stand trial and insanity as a defense

6 It is hereby enacted by the General Assembly of the State of Vermont:

7 ~~Sec. 1. 13 V.S.A. § 4816 is amended to read:~~

8 § 4816 SCOPE OF EXAMINATION; REPORT; EVIDENCE

9 (a) Examinations provided for in section 4815 of this title shall have  
10 reference to one or both of the following:

11 (1) ~~mental~~ Mental competency of the person examined to stand trial for  
12 the alleged offense; ~~and~~.

13 (2) ~~sanity~~ Sanity of the person examined at the time of the alleged  
14 offense.

15 (b) A competency evaluation for an individual thought to have a  
16 developmental disability shall include a current evaluation ~~by~~ a psychologist  
17 skilled in assessing individuals with developmental disabilities.

18 (c)(1) As soon as practicable after the examination has been completed, the  
19 ~~examining psychiatrist or psychologist, if applicable, shall prepare a report~~

1 ~~containing findings in regard to each of the applicable matters listed in~~  
2 provisions of subsection (a) of this section. The report shall be transmitted to  
3 the court issuing the order for examination, and copies of the report sent to the  
4 State's Attorney, and, to the respondent's attorney if the respondent is  
5 represented by counsel, and to the Commissioner of Mental Health.

6 (2) If the psychiatrist or psychologist has been asked to provide  
7 opinions as to both the person's competency to stand trial and the person's  
8 sanity at the time of the alleged offense, those opinions shall be presented in  
9 separate reports and addressed separately by the court. In such cases, the  
10 examination of the person's sanity shall only be undertaken if the psychiatrist  
11 or psychologist is able to form the opinion that the person is competent to  
12 stand trial.

13 \* \* \*

14 Sec. 2. 13 V.S.A. § 4820 is amended to read:

15 § 4820. HEARING REGARDING COMMITMENT

16 (a) When a person charged on information, complaint, or indictment with a  
17 criminal offense:

18 (1) Is reported by the examining psychiatrist following examination  
19 pursuant to sections 4814–4816 of this title to have been insane at the time of  
20 the alleged offense.

1 ~~(2) Is found upon hearing pursuant to section 4817 of this title to be~~  
2 incompetent to stand trial due to a mental disease or mental defect.

3 (3) Is not indicted upon hearing by grand jury by reason of insanity at  
4 the time of the alleged offense, duly certified to the court.

5 (4) Upon trial by court or jury is acquitted by reason of insanity at the  
6 time of the alleged offense; the court before which such person is tried or is to  
7 be tried for such offense shall hold a hearing for the purpose of determining  
8 whether such person should be committed to the custody of the Commissioner  
9 of Mental Health. Such person may be confined in jail or some other suitable  
10 place by order of the court pending hearing for a period not exceeding 15 days.

11 (b) When a person is found to be incompetent to stand trial pursuant to  
12 subdivision (a)(2) of this section, has not been indicted by reason of insanity  
13 for the alleged offense, or has been acquitted by reason of insanity at the time  
14 of the alleged offense, the person shall be entitled to have counsel appointed  
15 from Vermont Legal Aid to represent the person. The Department of Mental  
16 Health shall be entitled to appear and call witnesses at the proceeding and be  
17 represented by the Office of the Attorney General.

18 Sec. 3. 13 V.S.A. § 4822 is amended to read:

19 § 4822. FINDINGS AND ORDER; PERSONS WITH A MENTAL ILLNESS

20 (a) If the court finds that the person is a person in need of treatment or a  
21 patient in need of further treatment as defined in 18 V.S.A. § 7101, the court

1 ~~shall issue an order of commitment directed to the Commissioner of Mental~~  
2 Health that shall admit the person to the care and custody of the Department of  
3 Mental Health for an indeterminate period. In any case involving personal  
4 injury or threat of personal injury, the committing court may issue an order  
5 requiring a court hearing before a person committed under this section may be  
6 discharged from custody.

7 (b) An order of commitment issued pursuant to this section shall have the  
8 same force and effect as an order issued under 18 V.S.A. §§ 7611–7622, and a  
9 person committed under this order shall have the same status and the same  
10 rights, including the right to receive care and treatment, to be examined and  
11 discharged, and to apply for and obtain judicial review of his or her case, as a  
12 person ordered committed under 18 V.S.A. §§ 7611–7622.

13 (c)(1) Notwithstanding the provisions of subsection (b) of this section, at  
14 least 10 days prior to the proposed discharge of any person committed under  
15 this section, the Commissioner of Mental Health shall give notice of the  
16 discharge to the committing court and State's Attorney of the county where the  
17 prosecution originated. In all cases requiring a hearing prior to discharge of a  
18 person found incompetent to stand trial under section 4817 of this title, the  
19 hearing shall be conducted by the committing court issuing the order under  
20 that section. In all other cases, when the committing court orders a hearing  
21 ~~under subsection (a) of this section or when, in the discretion of the~~

1 ~~Commissioner of Mental Health, a hearing should be held prior to the~~  
2 discharge, the hearing shall be held in the Family Division of the Superior  
3 Court to determine if the committed person is no longer a person in need of  
4 treatment of a patient in need of further treatment as set forth in subsection (a)  
5 of this section. Notice of the hearing shall be given to the Commissioner, the  
6 State's Attorney of the county where the prosecution originated, the committed  
7 person, and the person's attorney. Prior to the hearing, the State's Attorney  
8 may enter an appearance in the proceedings and may request examination of  
9 the patient by an independent psychiatrist, who may testify at the hearing.

10 (2)(A) This subdivision (2) shall apply when a person is committed to  
11 the care and custody of the Commissioner of Mental Health under this section  
12 after having been found not guilty by reason of insanity or incompetent to  
13 stand trial for a listed crime as defined in subdivision 5301(7) of this title other  
14 than:

15 (i) lewd or lascivious conduct as defined in section 2601 of this  
16 title;

17 (ii) recklessly endangering another person as defined in section  
18 1025 of this title;

19 (iii) operating a vehicle under the influence of alcohol or other  
20 substance with either death or serious bodily injury resulting as defined in

21 25 V.S.A. § 1210(f) and (g).

1 ~~(iv) careless or negligent operation resulting in serious bodily~~  
2 injury or death as defined in 23 V.S.A. § 1091(b);

3 (v) leaving the scene of an accident resulting in serious bodily  
4 injury or death as defined in 23 V.S.A. § 1128(b) or (c); or

5 (vi) a misdemeanor violation of chapter 28 of this title, relating to  
6 abuse, neglect, and exploitation of vulnerable adults.

7 (B) At least 10 days prior to discharging the person from a secure  
8 mental health treatment facility or from the care and custody of the  
9 Commissioner of Mental Health, the Commissioner shall provide notice of the  
10 proposed action to the State's Attorney of the county where the prosecution  
11 originated or to the Office of the Attorney General if that office prosecuted the  
12 case. The State's Attorney shall provide notice of the proposed action to any  
13 victim of the offense who has not opted out of receiving notice.

14 (C) As used in this subdivision (2), "victim" has the same meaning as  
15 in section 5301 of this title.

16 \* \* \*

17 Sec. 4. Vermont Rule of Criminal Procedure 16.1 is amended to read:

18 RULE 16.1. DISCLOSURE TO THE PROSECUTION

19 ~~(a) The Person of the Defendant.~~

1 ~~(1) Notwithstanding the initiation of judicial proceedings, and subject to~~  
2 constitutional limitations, upon motion and notice a judicial officer may  
3 require the defendant to:

4 \* \* \*

5 (H) provide specimens of ~~his~~ the defendant's handwriting; ~~and~~

6 (I) submit to a reasonable physical or medical inspection of ~~his~~ the  
7 defendant's body or, if notice is given by the defendant that sanity is in issue  
8 or that expert testimony will be offered as provided in Rule 12.1, to a  
9 reasonable mental examination by a psychiatrist or other expert; and

10 (J) submit to a reasonable mental examination by a psychiatrist or  
11 other expert when a court ordered examiner pursuant to 13 V.S.A. § 4814(a)(2)  
12 or (4) reports that a defendant is not competent to stand trial.

13 \* \* \*

14 Sec. 5. CORRECTIONS; ASSESSMENT OF MENTAL HEALTH

15 SERVICES

16 On or before November 1, 2021, the Departments of Corrections and of  
17 Mental Health shall jointly submit an inventory and evaluation of the mental  
18 health services provided by the entity with whom the Department of  
19 Corrections contracts for health care services to the House Committees on  
20 Corrections and Institutions, on Health Care, and on Judiciary and to the  
21 Senate Committees on Health and Welfare and on Judiciary. The evaluation

1 ~~shall include a comparison as to how the type, frequency, and timeliness of~~  
2 mental health services provided in a correctional setting differ from those  
3 services available in the community. The evaluation shall further address how  
4 the memorandum of understanding executed by the Departments of  
5 Corrections and of Mental Health impacts the mental health services provided  
6 by the entity with whom the Department of Corrections contracts for health  
7 care services.

8 Sec. 6. FORENSIC CARE WORKING GROUP

9 (a) On or before August 1, 2021, the Department of Mental Health shall  
10 convene a working group of interested stakeholders, including as appropriate,  
11 the Department of Corrections, the Department of State's Attorneys and  
12 Sheriffs, the Office of the Attorney General, the Office of the Defender  
13 General, the Director of Health Care Reform, the Department of Buildings and  
14 General Services, a representative appointed by Vermont Care Partners, a  
15 representative appointed by Vermont Legal Aid's Mental Health Project, the  
16 Mental Health Care Ombudsman established pursuant to 18 V.F.A. § 7259, a  
17 representative of the designated hospitals appointed by the Vermont  
18 Association of Hospitals and Health Care Systems, a person with lived  
19 experience of mental illness, and any other interested party permitted by the  
20 Commissioner of Mental Health, to.

1 ~~(1) Identify any gaps in the current mental health and criminal justice~~  
2 ~~system structure and opportunities to improve public safety and the~~  
3 ~~coordination of treatment for individuals incompetent to stand trial or who are~~  
4 ~~adjudicated not guilty by reason of insanity. The working group shall review~~  
5 ~~competency restoration models used in other states and explore models used in~~  
6 ~~other states that balance the treatment and public safety risks posed by~~  
7 ~~individuals found not guilty by reason of insanity, such as Psychiatric Security~~  
8 ~~Review Boards, including the Connecticut Psychiatric Security Review Board,~~  
9 ~~and guilty but mentally ill verdicts in criminal cases.~~

10 (2) Evaluate various models for the establishment of a State-funded  
11 forensic treatment facility for individuals found incompetent to stand trial or  
12 who are adjudicated not guilty by reason of insanity. The evaluation shall  
13 address:

14 (A) the need for a forensic treatment facility in Vermont;

15 (B) the entity or entities most appropriate to operate a forensic  
16 treatment facility;

17 (C) the feasibility and appropriateness of repurposing an existing  
18 facility for the purpose of establishing a forensic treatment facility versus  
19 constructing a new facility for this purpose;

20 (D) the number of beds needed in a forensic treatment facility and  
21 the impact that repurposing an existing mental health treatment facility would

1 ~~have on the availability of beds for persons seeking mental health treatment in~~  
2 ~~the community or through the civil commitment system; and~~

3 ~~(E) the fiscal impact of constructing or repurposing a forensic~~  
4 ~~treatment facility and estimated annual operational costs considering~~  
5 ~~“institutions of mental disease” waivers available through the Center for~~  
6 ~~Medicare and Medicaid Services that do not provide federal fiscal participation~~  
7 ~~for forensic mental health patients.~~

8 ~~(b) On or before November 1, 2021, the Department of Mental Health shall~~  
9 ~~submit a report containing the findings and recommendations of the working~~  
10 ~~group to the Joint Legislative Justice Oversight Committee. The report shall~~  
11 ~~include proposed draft legislation addressing any identified needed changes to~~  
12 ~~statute.~~

13 Sec. 7. EFFECTIVE DATE

14 ~~This act shall take effect on July 1, 2021.~~

*Sec. 1. 13 V.S.A. § 4816 is amended to read:*

*§ 4816. SCOPE OF EXAMINATION; REPORT; EVIDENCE*

*(a) Examinations provided for in section 4815 of this title shall have reference to one or both of the following:*

*(1) ~~mental~~ Mental competency of the person examined to stand trial for the alleged offense; ~~and.~~*

*(2) ~~sanity~~ Sanity of the person examined at the time of the alleged offense.*

*(b) A competency evaluation for an individual thought to have a developmental disability shall include a current evaluation by a psychologist skilled in assessing individuals with developmental disabilities.*

*(c)(1) As soon as practicable after the examination has been completed, the examining psychiatrist or psychologist, ~~if applicable,~~ shall prepare a report containing findings in regard to ~~each of the applicable matters listed in provisions of subsection (a) of this section.~~ The report shall be transmitted to the court issuing the order for examination, and copies of the report sent to the State's Attorney, ~~and,~~ to the respondent's attorney if the respondent is represented by counsel, and to the Commissioner of Mental Health.*

*(2) If the psychiatrist or psychologist has been asked to provide opinions as to both the person's competency to stand trial and the person's sanity at the time of the alleged offense, those opinions shall be presented in separate reports and addressed separately by the court. In such cases, the examination of the person's sanity shall only be undertaken if the psychiatrist or psychologist is able to form the opinion that the person is competent to stand trial.*

\* \* \*

Sec. 2. 13 V.S.A. § 4820 is amended to read:

§ 4820. HEARING REGARDING COMMITMENT

*(a) When a person charged on information, complaint, or indictment with a criminal offense:*

*(1) Is reported by the examining psychiatrist following examination pursuant to sections 4814–4816 of this title to have been insane at the time of the alleged offense.*

*(2) Is found upon hearing pursuant to section 4817 of this title to be incompetent to stand trial due to a mental disease or mental defect.*

*(3) Is not indicted upon hearing by grand jury by reason of insanity at the time of the alleged offense, duly certified to the court.*

*(4) Upon trial by court or jury is acquitted by reason of insanity at the time of the alleged offense; the court before which such person is tried or is to be tried for such offense, shall hold a hearing for the purpose of determining whether such person should be committed to the custody of the Commissioner of Mental Health. Such person may be confined in jail or some other suitable place by order of the court pending hearing for a period not exceeding 15 days.*

*(b) When a person is found to be incompetent to stand trial pursuant to subdivision (a)(2) of this section, has not been indicted by reason of insanity for the alleged offense, or has been acquitted by reason of insanity at the time of the alleged offense, the person shall be entitled to have counsel appointed*

from Vermont Legal Aid to represent the person. The Department of Mental Health shall be entitled to appear and call witnesses at the proceeding.

Sec. 3. 13 V.S.A. § 4822 is amended to read:

§ 4822. FINDINGS AND ORDER; PERSONS WITH A MENTAL ILLNESS

(a) *If the court finds that the person is a person in need of treatment or a patient in need of further treatment as defined in 18 V.S.A. § 7101, the court shall issue an order of commitment directed to the Commissioner of Mental Health that shall admit the person to the care and custody of the Department of Mental Health for an indeterminate period. In any case involving personal injury or threat of personal injury, the committing court may issue an order requiring a court hearing before a person committed under this section may be discharged from custody.*

(b) *An order of commitment issued pursuant to this section shall have the same force and effect as an order issued under 18 V.S.A. §§ 7611–7622, and a person committed under this order shall have the same status and the same rights, including the right to receive care and treatment, to be examined and discharged, and to apply for and obtain judicial review of his or her case, as a person ordered committed under 18 V.S.A. §§ 7611–7622.*

(c)(1) *Notwithstanding the provisions of subsection (b) of this section, at least 10 days prior to the proposed discharge of any person committed under this section, the Commissioner of Mental Health shall give notice of the discharge to the committing court and State’s Attorney of the county where the prosecution originated. In all cases requiring a hearing prior to discharge of a person found incompetent to stand trial under section 4817 of this title, the hearing shall be conducted by the committing court issuing the order under that section. In all other cases, when the committing court orders a hearing under subsection (a) of this section or when, in the discretion of the Commissioner of Mental Health, a hearing should be held prior to the discharge, the hearing shall be held in the Family Division of the Superior Court to determine if the committed person is no longer a person in need of treatment or a patient in need of further treatment as set forth in subsection (a) of this section. Notice of the hearing shall be given to the Commissioner, the State’s Attorney of the county where the prosecution originated, the committed person, and the person’s attorney. Prior to the hearing, the State’s Attorney may enter an appearance in the proceedings and may request examination of the patient by an independent psychiatrist, who may testify at the hearing.*

(2)(A) This subdivision (2) shall apply when a person is committed to the care and custody of the Commissioner of Mental Health under this section after having been found:

(i) not guilty by reason of insanity; or

(ii) incompetent to stand trial, provided that the person's criminal case has not been dismissed.

(B)(i) When a person has been committed under this section, the Commissioner shall provide notice to the State's Attorney of the county where the prosecution originated or to the Office of the Attorney General if that office prosecuted the case:

(I) at least 10 days prior to discharging the person from:

(aa) the care and custody of the Commissioner; or

(bb) commitment in a hospital or a secure residential recovery facility to the community on an order of nonhospitalization pursuant to 18 V.S.A. § 7618;

(II) at least 10 days prior to the expiration of a commitment order issued under this section if the Commissioner does not seek continued treatment; or

(III) any time that the person absconds from the custody of the Commissioner.

(ii) When the State's Attorney or Attorney General receives notice under subdivision (i) of this subdivision (B), the Office shall provide notice of the action to any victim of the offense who has not opted out of receiving notice.

(iii) As used in this subdivision (B), "victim" has the same meaning as in section 5301 of this title.

(C) When a person has been committed under this section and is subject to a nonhospitalization order as a result of that commitment under 18 V.S.A. § 7618, the Commissioner shall provide notice to the committing court and to the State's Attorney of the county where the prosecution originated, or to the Office of the Attorney General if that office prosecuted the case, if the Commissioner becomes aware that:

(i) the person is not complying with the order; or

(ii) the alternative treatment has not been adequate to meet the person's treatment needs.

\* \* \*

Sec. 4. Vermont Rule of Criminal Procedure 16.1 is amended to read:

**RULE 16.1. DISCLOSURE TO THE PROSECUTION**

*(a) The Person of the Defendant.*

*(1) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, upon motion and notice a judicial officer may require the defendant to:*

*\* \* \**

*(H) provide specimens of ~~his~~ the defendant's handwriting; ~~and~~*

*(I) submit to a reasonable physical or medical inspection of ~~his~~ the defendant's body or, if notice is given by the defendant that sanity is in issue or that expert testimony will be offered as provided in Rule 12.1, to a reasonable mental examination by a psychiatrist or other expert; and*

*(J) submit to a reasonable mental examination by a psychiatrist or other expert when a court ordered examiner pursuant to 13 V.S.A. § 4814(a)(2) or (4) reports that a defendant is not competent to stand trial.*

*\* \* \**

*Sec. 5. CORRECTIONS; ASSESSMENT OF MENTAL HEALTH  
SERVICES*

*On or before November 1, 2021, the Departments of Corrections and of Mental Health shall jointly submit an inventory and evaluation of the mental health services provided by the entity with whom the Department of Corrections contracts for health care services 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. The evaluation shall include a comparison as to how the type, frequency, and timeliness of mental health services provided in a correctional setting differ from those services available in the community. The evaluation shall further address how the memorandum of understanding executed by the Departments of Corrections and of Mental Health impacts the mental health services provided by the entity with whom the Department of Corrections contracts for health care services.*

*Sec. 6. FORENSIC CARE WORKING GROUP*

*(a) On or before August 1, 2021, the Department of Mental Health shall convene a working group of interested stakeholders, including as appropriate, the Department of Corrections, the Department of State's Attorneys and Sheriffs, the Office of the Attorney General, the Office of the Defender General, the Director of Health Care Reform, the Department of Buildings and General Services, a representative appointed by Vermont Care Partners, a representative appointed by Vermont Legal Aid's Mental Health Project, two*

crime victims representatives appointed by the Vermont Center for Crime Victim Services, the Mental Health Care Ombudsman established pursuant to 18 V.S.A. § 7259, a representative of the designated hospitals appointed by the Vermont Association of Hospitals and Health Care Systems, a person with lived experience of mental illness, and any other interested party permitted by the Commissioner of Mental Health, to:

(1) Identify any gaps in the current mental health and criminal justice system structure and opportunities to improve public safety and the coordination of treatment for individuals incompetent to stand trial or who are adjudicated not guilty by reason of insanity. The working group shall review competency restoration models used in other states and explore models used in other states that balance the treatment and public safety risks posed by individuals found not guilty by reason of insanity, such as Psychiatric Security Review Boards, including the Connecticut Psychiatric Security Review Board, and guilty but mentally ill verdicts in criminal cases.

(2) Evaluate various models for the establishment of a State-funded forensic treatment facility for individuals found incompetent to stand trial or who are adjudicated not guilty by reason of insanity. The evaluation shall address:

(A) the need for a forensic treatment facility in Vermont;

(B) the entity or entities most appropriate to operate a forensic treatment facility;

(C) the feasibility and appropriateness of repurposing an existing facility for the purpose of establishing a forensic treatment facility versus constructing a new facility for this purpose;

(D) the number of beds needed in a forensic treatment facility and the impact that repurposing an existing mental health treatment facility would have on the availability of beds for persons seeking mental health treatment in the community or through the civil commitment system; and

(E) the fiscal impact of constructing or repurposing a forensic treatment facility and estimated annual operational costs considering “institutions of mental disease” waivers available through the Center for Medicare and Medicaid Services that do not provide federal fiscal participation for forensic mental health patients.

(3) Consider the notification process under 13 V.S.A. § 4822(c)(2)(C) when the Commissioner is required to provide notification to the prosecutor upon becoming aware that persons on orders of non-hospitalization are not complying with the order or that the alternative treatment is not adequate to meet the person’s treatment needs. The working group shall make any

recommendations it deems necessary to clarify the process, including recommendations as to what facts and circumstances should trigger the Commissioner's duty to notify the prosecutor, and recommendations as to steps that the prosecutor should take after receiving the notification.

(b) Members of the working group who are not State employees shall be entitled to per diem compensation and reimbursement of expenses for attending meetings as permitted under 32 V.S.A. § 1010.

(c) On or before November 1, 2021, the Department of Mental Health shall submit a report containing the findings and recommendations of the working group to the Joint Legislative Justice Oversight Committee. The report shall include proposed draft legislation addressing any identified needed changes to statute.

*Sec. 7. EFFECTIVE DATE*

This act shall take effect on July 1, 2021.