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FISCAL IMPACT REPORT

SPONSOR: Martinez DATE TYPED: 3/5/01 HB 903
 SHORT TITLE: Disposition of Mentally Disabled Criminal SB _____
 ANALYST: Esquibel

APPROPRIATION

| Appropriation Contained | | Estimated Additional Impact | | Recurring or Non-Rec | Fund Affected |
|-------------------------|------|-----------------------------|------|----------------------|---------------|
| FY01 | FY02 | FY01 | FY02 | | |
| N/A | | | | | |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

Attorney General’s Office (AG)
 Public Defender’s Department (PDD)
 Administrative Office of the Courts (AOC)

No Response

Administrative Office of the DA (AODA)
 Criminal/Juvenile Justice Coordinating Council (CJJC)
 Human Services Department (HSD)
 Department of Health (DOH)
 State Parole Board (SPB)
 Corrections Department (CD)
 Crime Victim’s Reparation Commission (CVRC)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

House Bill 903 revises a section of the Mental Illness and Competency Code, which is the statute governing the disposition of criminal defendants who are found to be incompetent to stand trial. The purpose of the bill appears to be to make provisions of the statute relating to criminal defendants with mental retardation consistent with the provisions relating to criminal defendants who are incompetent for reasons other than mental retardation, such as mental illness.

Significant Issues

FISCAL IMPLICATIONS

The PDD indicates HB903 would substantially increase expenditures by District Attorney offices to provide attorney representation at court hearings. In turn, the Public Defender Department would be compelled to expend more assets for increased attorney representation at court hearings, and to litigate the constitutionality of the commitment terms (see substantive discussion below). In addition, the PDD would spend considerable time and money on tracking and monitoring services and attorney and social worker client interviews, including per diem and mileage expenses for travel to Las Vegas Medical Center. Expert witnesses cost a minimum of \$50.0 a year which would be required to provide evaluation and testimony evidence, particularly on the issue of dangerousness. Less tangible costs would also rise, because local sheriff department time would be required to transport the client from the Las Vegas Medical Center to and from hearings. The provisions of the bill would necessitate coordination with the PDD that could prove both costly and inconvenient to matters previously docketed, and lost or wasted attorney and staff time. There would also undoubtedly be increased detention center costs for housing high-risk clients around hearing dates, increased costs to courts holding review hearings every two years, and any other hearings on issues as they may arise. The PDD would be required to provide representation at these hearings.

TECHNICAL ISSUES

The AG indicates the current version of § 31-9-1.6 appears to provide for procedures for the commitment of incompetent criminal defendants with mental retardation distinct from the procedures for the commitment of incompetent criminal defendants with mental illness. As it is now written, § 31-9-1.6 transforms the criminal commitment proceeding into a civil commitment proceeding when the district court finds the defendant (1) has mental retardation, (2) will not become competent within nine months, and (3) presents a likelihood of harm to others.

The purpose of this bill seems to be to require procedures for the commitment of a criminal defendant who has mental retardation identical to the procedures for the commitment of a criminal defendant who has mental illness. In other words, the bill eliminates the provision transforming the proceeding into a civil commitment and adds provisions identical to the provisions that apply to a mentally ill criminal defendant. For example, the bill requires the district court to find by clear and convincing evidence that the defendant committed one of several enumerated crimes (no such finding is required by the current version of the statute). In addition, the bill requires hearings every two years to review the defendant's competency and dangerousness, and requires release of the defendant if he is found not to be dangerous. Both of those provisions already apply to mentally ill criminal defendants.

If the purpose of the bill is to require the same procedures for the commitment of incompetent criminal defendants with mental retardation as those required for the commitment of incompetent criminal defendants with mental illness, then it is not necessary. A better approach would be to eliminate § 31-9-1.6 altogether and amend other sections of the statute to reflect the fact that they apply to all incompetent defendants regardless of the reason for their incompetence.

If the legislature wishes to amend rather than eliminate § 31-9-1.6, then the bill should be amended as follows:

- (a) Section 31-9-1.6(B) should be changed to include the language used in Sections 31-9-1.4(A) and 1.5(B) requiring a finding by clear and convincing evidence that the defendant committed a felony that involves the infliction of great bodily harm on another person; a felony

that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-9-11, NMSA 1978; criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978. Without this change, a defendant who has committed other violent felonies such as second-degree murder, manslaughter, aggravated battery or aggravated assault, could not be committed under this section, although a mentally ill person who has committed such offenses could be committed under Section 31-9-1.5.

(b) Section 31-9-1.6(B) should also indicate that the finding that the defendant remains dangerous to himself or others should be made by applying the definition of dangerousness provided in Section 31-9-1.2(D).

OTHER SUBSTANTIVE ISSUES

The PDD indicates that as drafted, HB903 is unconstitutional on its face. It provides almost identical disposition for defendants with mental retardation who are found incompetent to stand trial as defendants with mental illness with certain notable and problematic exceptions in procedural requirements.

The proposed bill provides commitment criteria that is less stringent and release criteria that is more stringent for defendants with mental retardation than for all other defendants similarly situated. All other defendants (without a diagnosis of mental retardation) must first be found incompetent to stand trial, without a substantial probability of attaining competency within a reasonable period of time. They also must be found to meet the higher standard of dangerousness under 31-9-1.2(D) (“if released, defendant presents serious threat of inflicting great bodily harm on another or of committing criminal sexual penetration or criminal sexual contact of a minor”) to be criminally committed.

HB903 does not require a finding that there is not a substantial probability of attaining competency within a reasonable period of time. More problematic, it requires a lesser standard of dangerousness, defined only as “dangerous to himself or others.” This standard is less stringent than required for civil commitment (“likelihood of serious harm to self or others”). Further the bill does not provide the requisite standard for this finding. Given the nature of this particular disability, it is unlikely that individuals who would fall under this section would ever attain competency. Therefore, the only way to be released would be to overcome the “dangerous” definition. Given how broad the definition is, it is unlikely that anyone would be able to prove otherwise. The bill also fails to provide any remedy for failure of the court to provide regular review hearings. Thus, this bill sets up procedures for permanent institutionalization for individuals with mental retardation.

HB903 is inconsistent with the least drastic means principle by mandating commitment in a secure, locked facility upon a finding by clear and convincing evidence that the defendant committed the crime.

RAE/njw