

REPORT

The Legislative Primer Series  
for Front-End Justice

# Competency to Stand Trial



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# The Legislative Primer Series for Front-End Justice: Competency to Stand Trial

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The National Conference of State Legislatures is the bipartisan organization dedicated to serving the lawmakers and staffs of the nation's 50 states, its commonwealths and territories.

NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues, and is an effective and respected advocate for the interests of the states in the American federal system. Its objectives are:

- Improve the quality and effectiveness of state legislatures.
- Promote policy innovation and communication among state legislatures.
- Ensure state legislatures a strong, cohesive voice in the federal system.

The conference operates from offices in Denver, Colorado and Washington, D.C.

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# Introduction

The right to stand trial as well as to aid and assist in one’s own defense are constitutional guarantees. The ability to aid and assist in one’s own defense means the defendant can understand the criminal charges against them and participate in the court process. This understanding is usually referred to as “competency to stand trial.”

If there is suspicion about lack of competency, typically raised by the defense counsel, the court must order an evaluation. Procedures vary by state, but if a person is found to be incompetent to proceed, restoration services are provided with the aim of restoring their competency so the case can proceed.

Restoration services are focused on assisting defendants to participate in the trial process and can include legal education, medication or symptom management. While a person’s legal incompetency to stand trial is distinct from potential behavioral health, disability or other complex needs, there is frequent overlap between the two. Restoration services are different from treatment for underlying mental health or substance use disorders because the focus is on participation in the legal process not overall wellbeing.

Demand for competency evaluations and restoration services has increased. Most competency restoration occurs at state hospitals, and many hospitals maintain waitlists for forensic beds and struggle with limited staffing and resources. There are also limited options for those whose competence cannot be restored.

Individuals charged with a crime can spend a longer time in jail awaiting a competency evaluation or restoration services than if they had been convicted and given the maximum sentence for the underlying charge. At least a dozen states have been sued



Photos are of Pivot Point in Rapid City, South Dakota.



At least thirty-two states, including Arkansas, Oregon and Texas, have established outpatient or community-based competency restoration programs. Outpatient restoration programs, sometimes described as community-based programs, serve as an alternative to detention while an individual receives restoration services.

States vary in the detail afforded in statutory language addressing outpatient competency restoration. Some states, like Kentucky and West Virginia, assert that restoration may occur in an outpatient setting. Other states, like Colorado, specify eligibility for outpatient treatment and the processes to facilitate delivery of services.

Washington law requires that to be eligible for outpatient competency restoration, defendants must agree to certain drug and alcohol testing and adhere to prescribed medications. Further, if a Washington court orders outpatient competency restoration, the court must modify conditions of release so that the defendant has access to supportive housing affiliated with a competency restoration program.

In Connecticut, as long as the defendant is not charged with a felony, the law requires courts to “presume that outpatient treatment is the least restrictive placement appropriate and available to restore competency, unless the court has good cause to find otherwise.” If outpatient treatment is the least restrictive placement, then the court must consider the availability of treatment and whether that is a sufficient basis upon which to release the defendant.

Illinois similarly requires that if a defendant is charged with a misdemeanor, the court must order outpatient treatment unless good cause otherwise is found. In contrast, Louisiana law affords courts complete discretion as to whether to offer outpatient restoration.

Georgia law offers a timeline for outpatient restoration treatment, stating that courts may allow outpatient treatment to be monitored for no longer than nine months. If the defendant has not regained competency to stand trial by the end of the nine-month period, statute requires that courts either allow for civil commitment or release.



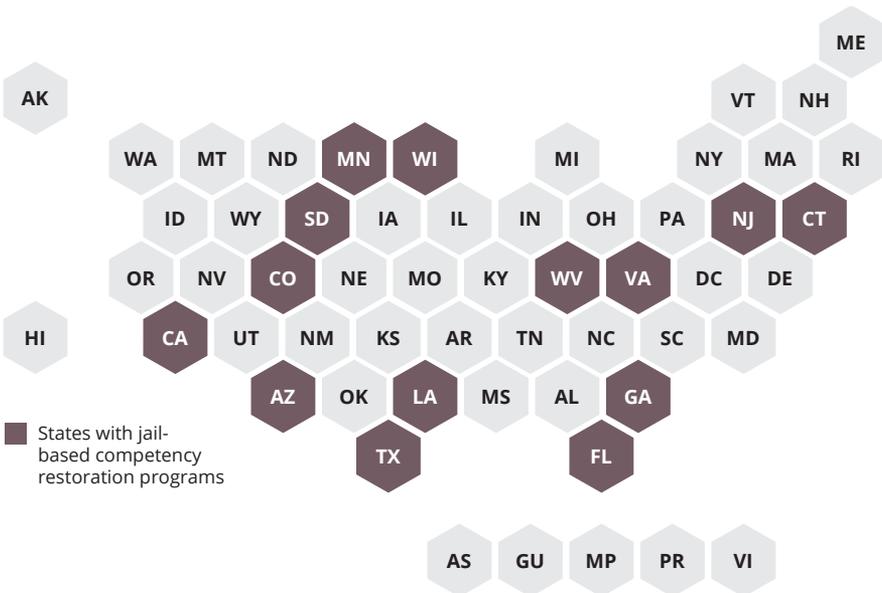
In Texas, as of 2024, 16 local mental health and behavioral health authorities were providing outpatient competency restoration in 57 counties, which focus on providing mental health and substance use disorder treatment, in addition to community-based competency restoration services.

The Oregon Outpatient Competency Restoration Program has received over 59 referrals through 2024, 26 of which were for restoration for out-of-custody defendants. Of those defendants, 16 had pending felony charges and two had misdemeanor charges. Their report notes that a history of charges involving violence has slowed referrals.

A recent report out of Ohio from the Governor’s Work Group on Competency Restoration and Diversion made several recommendations based on the state’s current outpatient competency restoration services. The report noted that defendants ordered to a competency evaluation in the Summit County Jail are provided pre-competency education, including receiving education about the evaluation and signing release forms, resulting in increased defendant attendance and compliance with evaluations.

Based on the success of the pre-competency education efforts, the Ohio report encourages the Ohio Department of Mental Health and Addiction Services to work with Ohio forensic mental health professionals to develop competency to stand trial toolkits. The report also recommends providing specific training to behavioral health and criminal justice professionals to aid in understanding the difference between the services to restore competency and those offered in diversion programs.

## Jail-Based Competency Restoration



Source: NCSL

At least fourteen states, including Arizona, Colorado and Texas have established jail-based competency restoration programs as an alternative to restoration in a state hospital. There are a variety of statutory approaches for guiding the jail-based competency restoration process. Some states, like Arizona and New Jersey, authorize restoration services to happen within local jails without providing further guidance for establishing or operating those programs.

Texas' statutory framework details the requirements of jail-based competency restoration. Programs are required by law to use a multidisciplinary team that operates in a space separate from the general population of the jail. Mental health treatment and substance use disorder treatment must be provided to defendants as necessary. The law also requires that programs employ the services of at least one psychiatrist, use only licensed mental health professionals, provide hours commensurate with an inpatient program, coordinate treatment with general health care, and supply clinically appropriate psychotropic medications if administering court-ordered medication.

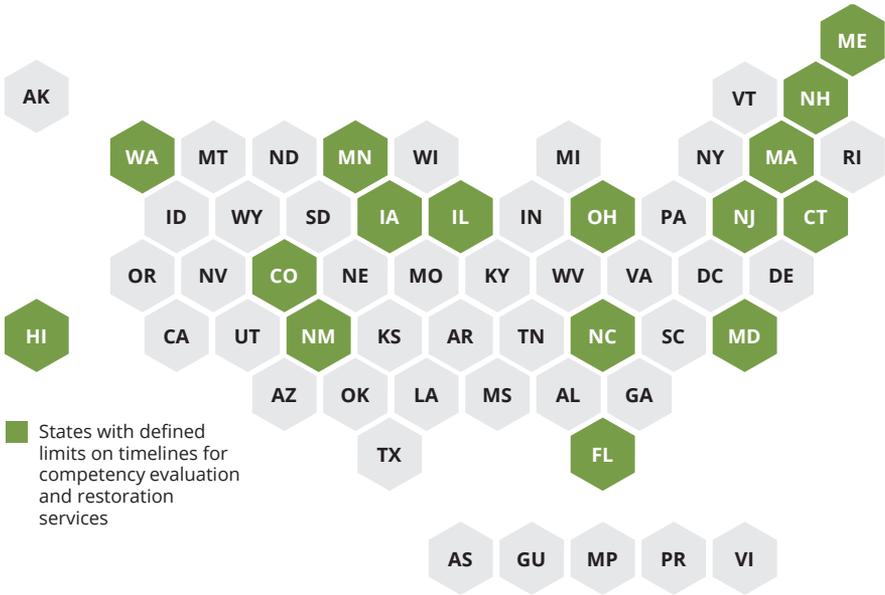


Some jail-based restoration programs include long-term restoration groups in dedicated restoration units and others provide supplemental services within general population housing. Studies of jail-based restoration programs found that the programs generally save some costs and can yield between 50% to 80% savings compared to hospital-based restoration, depending on the various components of the program.

Data from 2013–2015 in Colorado indicates that of the 106 patients who were admitted to the jail-based competency restoration program, 67% were restored. Of the remaining 33%, 18% were transferred to a state psychiatric hospital for more intensive services, less than 1% were released by the court and 12% remained in the restoration program.

In Texas in 2024, 21 local mental health and behavioral health authorities were providing jail-based competency restoration in 34 counties. An older study of Arizona's jail-based restoration program in 2011 indicated that since the program's inception, 79% of defendants were successfully restored, with an average timeline of four months. A follow-up study showed that 86.7% of defendants were restored with the remaining 13.3% being found unrestorable.

# Competency Evaluation and Restoration Timeline



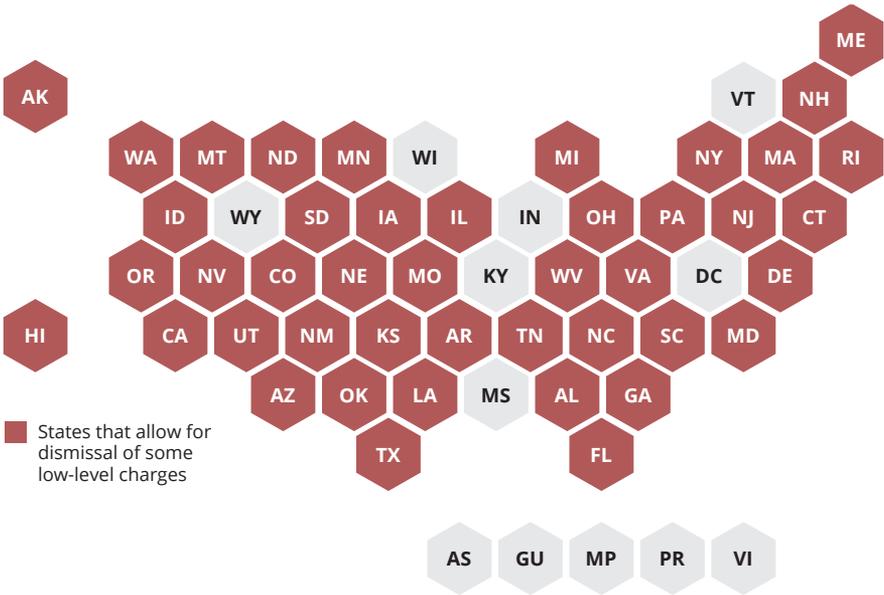
Source: NCSL

While litigation has addressed the timeliness of evaluation and restoration services, at least 16 states, including Hawaii, Ohio and Washington, have adopted their own defined limits on the timelines for competency evaluation and restoration services.

For example, Hawaii requires that when a defendant is charged with a misdemeanor not involving violence or attempted violence, the length of time for restoration services be limited to no longer than 120 days from the date the court determines the defendant lacks fitness to proceed. After this period, Hawaii law requires that the defendant be diverted, if a petty misdemeanor is involved, or have the charges dismissed after the maximum commitment period for that charge is reached.

In Ohio, courts are required to conduct a competency hearing within 30 days of competency being raised and, if an evaluation is ordered, 10 days after filing the evaluation report. Washington's statute provides that restoration services may last for 29 days if inpatient or 90 days if outpatient. The 2024 Annual Report by the Washington Outpatient Competency Restoration Program notes that the average length of stay from enrollment to discharge is 78 days.

# Dismissal of Charges



Source: NCSL

At least forty-three states allow at least some low-level charges to be dismissed if a defendant is deemed unrestorable, though statutes often do not specify if the charges may be brought again should the defendant later be found to be competent. Generally, states only dismiss charges once the maximum period for engagement in restoration services has been reached. However, states have more recently allowed for earlier dismissal of charges in some circumstances.

Alaska and North Carolina both allow charges to be dismissed without prejudice if it is determined that competency cannot be restored, meaning that the charges may still be brought in the future. In Michigan and Virginia, courts can drop charges when the maximum restoration period is reached in all cases except felony murder or aggravated murder.

In Pennsylvania, if a defendant is charged with first- or second-degree murder but is released from commitment after being found unrestorable, the defendant is still required to undergo a competency evaluation on a yearly basis. However, courts still have discretion to dismiss the charges if “by reason of the passage of time and its effect upon the criminal proceedings it would be unjust to resume the prosecution.”

Colorado law requires that, prior to the dismissal of charges, the court must identify whether the defendant will agree to voluntary inpatient competency restoration or

engage with other competency restoration services. If the court finds that the defendant meets the requirements for services but will not agree to voluntary commitment, with the agreement of the prosecuting attorney, the court can stay the dismissal of charges for 21 days.

## Diversion

Another approach by states to address competency evaluation and restoration backlogs is to allow diversion instead of engagement in the competency process. The focus of diversion programs is generally on addressing the underlying needs of the individual, often related to behavioral health, acquired brain injury or intellectual or developmental disabilities, instead of restoring their ability to participate in the legal process. The shifted focus to the defendants' needs and access to treatment provides a greater



chance of stability and overall wellbeing and recovery for individuals. Some states also pursue diversion for individuals whose competency has been previously raised.

In an effort to limit the number of individuals on competency waitlists and improve community safety, Colorado requires every judicial district in the state to coordinate with the Bridges Wraparound Care Program to identify and refer individuals to wraparound services as a community-based alternative to competency proceedings.

Colorado law also authorizes defendants found to be incompetent to proceed to enter into a diversion agreement with the consent of the district attorney and the courts. If a defendant enters into a diversion agreement, they waive their right to a speedy trial for the period of diversion but do not waive the issue of competency to stand trial if a violation of the diversion agreement occurs.

In Washington, the Diversion Navigator program helps identify incarcerated people who might benefit from wraparound services or qualify for diversion. Only those charged with two or more cases that were dismissed due to a finding of incompetency in the preceding two years—and who are not currently charged with violent crimes—are eligible to work with the program. Navigators pair clients with court officers, interim case managers and community liaisons. Navigators interview and observe clients, assess their needs and provide resources and referrals for mental health, substance use, physical health, housing support, vocational support and other services as needed.

Washington law also provides that courts must dismiss the proceedings without prejudice if there is an appropriate diversion program available and if the parties agree it would be appropriate. In addition to staffing the Diversion Navigator Program, Washington's Department of Social and Health Services contracts for services in several counties providing prosecutorial diversion programs. At the time of writing, prosecutorial diversion programs were provided in Spokane, King, Benton and Franklin counties. In exchange for participation, they require the prosecutor to either not file charges or dismiss charges without prejudice upon successful program completion.

California law provides that if restoring a person to competency is not in the interests of justice, a court can grant diversion for a period of up to two years. If the defendant successfully completes the diversion, the court is required to dismiss the charges. If a defendant does not complete the diversion program, the court can hold a hearing to modify the treatment plan or refer the defendant to assisted outpatient treatment (AOT), though this may only occur in counties where AOT services are available.

## Research on Competency Restoration Processes

Research of competency restoration services has identified several strategies to further improve competency processes, including expanding diversion opportunities, ensuring timely evaluations, and creating clearer guidelines for competency evaluations, as

well as increased investment in training of professionals. The Council of the American Academy of Psychiatry and the Law proposed several elements for a model competence restoration program, including:

- A systematic competence evaluation
- Individualized treatment programs
- Experiential competency restoration education
- Education on court processes
- Anxiety reduction services
- Targeted treatment for knowledge deficits
- Periodic reevaluation
- Appropriate medication
- Capacity assessments

Other studies, including a 2020 report by the Council of State Governments (CSG), suggest that creating a common understanding of the competency process among relevant stakeholders and bridging cross-institutional gaps are crucial components when developing changes to competency to stand trial policies. The CSG report also presents additional strategies to improve competency to stand trial processes, including funding community-based care, limiting the use of competency to stand trial processes to those cases that are inappropriate for dismissal or diversion and bolstering the quality of services. A report by the Governor’s Work Group on Competency Restoration and Diversion issued Ohio-specific recommendations, including streamlining motions for competency evaluations through screening tools and expanding strategies to recruit and retain personnel.

## Conclusion

Several factors, including the ongoing waitlists for competency restoration services, will drive states to continue working to find ways to maximize resources in a way that addresses the needs of those incompetent to stand trial and prioritizes public safety.



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