

SENATE BILL REPORT

SB 6274

As Reported By Senate Committee On:
Children & Family Services & Corrections, February 4, 2004
Ways & Means, February 9, 2004

Title: An act relating to serious offenses in the context of competency restoration.

Brief Description: Changing provisions relating to serious offenses in the context of competency restoration.

Revised for 1st Substitute: Changing provisions relating to competency restoration.

Sponsors: Senators Regala, Stevens, Hargrove and Kline.

Brief History:

Committee Activity: Children & Family Services & Corrections: 1/21/04, 2/4/04 [DPS-WM].

Ways & Means: 2/9/04 [DP2S].

SENATE COMMITTEE ON CHILDREN & FAMILY SERVICES & CORRECTIONS

Majority Report: That Substitute Senate Bill No. 6274 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Stevens, Chair; Parlette, Vice Chair; Carlson, Deccio, Hargrove, McAuliffe and Regala.

Staff: Fara Daun (786-7459)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 6274 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Zarelli, Chair; Hewitt, Vice Chair; Parlette, Vice Chair; Carlson, Doumit, Fairley, Fraser, Hale, Honeyford, Pflug, Prentice, Rasmussen, Regala, Roach, Sheahan, B. Sheldon and Winsley.

Staff: Tim Yowell (786-7435)

Background: In May 2003, the Washington Court of Appeals handed down a decision in *Born v. Thompson*, 117 Wn. App. 57 (2003), that interpreted the term "non-fatal injuries" in the context of competency evaluations and restoration to be equivalent to "serious bodily injury." This interpretation restricts those offenders whose competency may be restored and differs from the policy of the mentally ill offender legislation from which the term was taken. That policy was based on information that, among mentally ill persons with criminal histories, violent acts were indicative of future dangerousness even if the results of those acts were not especially serious. Consequently, the 1998 legislation expanded the meaning of

"likelihood of serious harm" to include threats when there was a history of violent acts and provided a definition of violent act that expanded what could be considered violent.

In June 2003, the US Supreme Court decided *Sell v. United States*, ___ US ___ (2003). In the *Sell* decision, the court divided the issue of seriousness of the offense from whether an offense was violent in the context of court ordered involuntary medication for the purpose of competency restoration. The *Sell* decision:

- explicitly excludes discussion of violent offenses;
- makes it unconstitutional to order involuntary medication to restore the competency of defendants when the charged crime is neither serious nor violent;
- establishes a four-prong test to order involuntary medication for the purpose of competency restoration for persons charged with crimes that are serious but not violent.

Two major concerns were raised following the *Sell* decision. First, Washington law did not divide crimes into "serious" and "non-serious" and there would be little consistency across the state in how those determinations would be made. Second, one prong of the *Sell* test requires that it is "substantially likely" that involuntary medication will restore the defendant's competency. Making a "substantially likely" assessment partly depends on the length of time permitted to restore competency. The current statute establishing the time periods for non-felony competency restoration has not been consistently interpreted.

Summary of Second Substitute Bill: The term "non-fatal injuries" means the same thing as "bodily injury."

For purposes of determining whether a court may order involuntary medication to restore or maintain a defendant's competency, offenses in listed categories are serious offenses. If a defendant is charged with a crime that is not listed as a serious offense, the court may determine that, under the factual circumstances of the case, the offense is serious if it meets the stated criteria. A city or county may determine by ordinance that a non-felony offense under its jurisdiction is a serious offense if it meets the stated criteria.

Release of mental health information to a court in which there is a pending motion for involuntary medication to restore competency is mandatory.

Second Substitute Bill Compared to Substitute Bill: The second substitute bill drops the provision from SB 6287 that would allow a court to order a defendant detained at the state hospital following competency restoration. The second substitute bill drops the clarification that the time period for competency restoration for non-felony offenses is 29 days.

Substitute Bill Compared to Original Bill: The substitute bill incorporates SB 6287, which permits a court, upon agreement of the parties, to order a defendant detained at the state hospital following competency restoration if the standard is met. City or county ordinances that are equivalent to state crimes that are serious per se are also serious per se. It is clarified that the court must have access to a defendant's civil commitment information when determining whether to order involuntary medication for either competency restoration or maintenance of competency. Upon motion, the court must review a defendant's mental health information in camera.

Appropriation: None.

Fiscal Note: Requested on February 5, 2004.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Testimony For (Children & Family Services & Corrections): The Mental Health Division supports competency restoration but has concerns about the fiscal impact. The state hospitals are doing twice as many forensic evaluations as they were six years ago before the passage of the mentally ill offender law in SB 6214.

This bill gets back to the original intent of SB 6214 with its definition of "non-fatal injuries" and the clarification of the 29-day provision. If a defendant is not restorable without involuntary medication and does not qualify for involuntary medication under *Sell*, they will not be referred for restoration, which should lower the number of beds used. Current law does not provide an incentive for cities and counties to do the evaluation in jail. The bed space issue at the forensic unit at Western State is impacted without the bill because of the 9th Circuit decision in *Oregon Advocacy Center v. Mink*, which limits the time a defendant can wait in jail for a competency evaluation. King County defendants are reaching that limit.

Testimony Against (Children & Family Services & Corrections): To the extent that this would increase the number of patients at Western State Hospital's forensic unit, the Legislature would need to provide adequate funding. The forensic units are at capacity and have waiting lists that in some counties are approaching the legal limit. The Legislature should wait to see if the Washington State Supreme Court agrees with the appellate court on the definition of non-fatal injuries and not put direction into statute. There is concern that some people will be ordered for restoration who would not be subject to involuntary medication orders under the Supreme Court decision in *Sell*. *Sell* requires a case-by-case decision on involuntary medications. Safeguards are needed so that a person's civil commitment information is not reviewed in open court.

Testified (Children & Family Services & Corrections): Senator Debbie Regala, sponsor (pro); Kimberly Gordon, Washington Defender Association and Washington Association of Criminal Defense Lawyers (con); Karl Brimner, DSHS Mental Health Division (con); Mike Finkle, Seattle City Attorney's Office (pro).

Testimony For (Ways & Means): Whether directly as a result of this bill or for other reasons, it is likely that another competency restoration ward will have to be opened at the state hospitals before much longer.

Testimony Against (Ways & Means): Funding is not available to open an additional competency restoration ward at this time.

Testified (Ways & Means): Senator Debbie Regala, sponsor (pro); Karl Brimner, DSHS Mental Health Division (concerns).