

# SENATE BILL REPORT

## SB 5176

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As of February 1, 2013

**Title:** An act relating to criminal incompetency and civil commitment.

**Brief Description:** Addressing criminal incompetency and civil commitment.

**Sponsors:** Senators Hargrove, Carrell and Hewitt.

**Brief History:**

**Committee Activity:** Human Services & Corrections: 1/29/13.

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### SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

**Staff:** Kevin Black (786-7747)

**Background:** A person is incompetent to stand trial when, due to a mental disease or defect, the person lacks the capacity to understand the nature of the criminal proceedings against them or to assist in their own defense.

A person may be subject to civil commitment when, due to a mental disorder, the person presents a likelihood of serious harm or is gravely disabled. A person whose felony charges were dismissed based on incompetency to stand trial may additionally be subject to civil commitment if it is proven that the person has committed acts constituting a felony and, due to a mental disorder, presents a substantial likelihood of repeating similar acts. Thirty days before a person committed on this additional basis may be released, the superintendent of the mental health facility must notify the sheriff and chief of police of the area where the person will reside, and anyone specified in writing by the prosecuting attorney, if the felony is classified as a sex, violent, or felony harassment offense; or the prosecutor of the county where the criminal charges were dismissed, if the release is to occur before the expiration of the commitment period.

A mental disorder is any organic, mental, or emotional impairment which has substantial adverse effects on a person's cognitive or volitional functions.

The longest time period allowed by state law for civil commitment, except for persons committed under criminal insanity or sexually violent predator provisions, is 180 days. The committed person must be released at the end of the 180-day period unless the superintendent of the mental health facility files a new petition for involuntary treatment at least three days

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

before the expiration of the current commitment period. New petitions for civil commitment must set forth the legal grounds supporting the commitment and be supported by the affidavits of one witness who is an examining physician or psychiatric advanced registered nurse practitioner and a second witness who is an examining physician, psychiatric advanced registered nurse practitioner, or mental health professional. The affidavits must describe in detail the behavior of the detained person which supports the petition and explain which, if any, less restrictive alternatives to detention are available to the person. The superintendent may release the person before the expiration of the commitment period if the superintendent determines that the person no longer presents a likelihood of serious harm. The superintendent must be represented in court by the county prosecutor or, in the case of a petition for 90 days or more filed by the superintendent of a state hospital, the Attorney General.

A person subject to commitment has the following rights:

- to not be presumed incompetent as a consequence of receiving an evaluation;
- to a judicial hearing in a superior court;
- to have an attorney appointed if they are indigent;
- to present evidence on their own behalf;
- to cross-examine witnesses who testify against them;
- to be proceeded against by the rules of evidence;
- to remain silent; and
- to have access to all petitions and reports in the court file.

If the petition is for 90 days or more, the person has a right to a jury trial. The burden of proof is by clear, cogent, and convincing evidence and is placed upon the petitioner.

When a defendant is incompetent to stand trial, the court may order up to 360 days of competency restoration treatment for felony defendants and 29 days for defendants charged with serious misdemeanors. If treatment is unsuccessful, the court must dismiss the charges without prejudice. For a felony defendant, the court must either release the defendant or transfer the defendant to a hospital or secure mental health facility. For a defendant charged with a serious misdemeanor, the court must send the defendant to an evaluation and treatment facility. The defendant must then be evaluated for civil commitment. For a felony defendant, the hospital or secure mental health facility may directly file a 180-day civil commitment petition. For a defendant charged with a serious misdemeanor, the evaluation and treatment facility may directly file a 90-day civil commitment petition.

A committed person has the right not to have competency determined except pursuant to a criminal or guardianship proceeding.

In 2010, a Public Safety Review Panel (PSRP) was created to provide advice to the Secretary of the Department of Social and Health Services (DSHS) concerning persons committed to the state hospitals as criminally insane, and to review recommendations for release pertaining to those individuals. The PSRP consists of seven volunteer members representing different affiliations appointed by the Governor for renewable three-year terms. Western State Hospital and Eastern State Hospital have 750 beds designated to serve adults civilly detained for 90 days or more.

**Summary of Bill:** An intent section declares the following:

- the public is placed at grave risk by a small number of violent, incompetent, and mentally ill individuals who commit repeated violent acts but cannot be held accountable by the criminal justice system; and
- current involuntary commitment law is insufficient to protect the public because the law fails to recognize the link between violence and incompetence in some individuals, creating an unacceptable risk that these individuals will be released back into society after short periods of time and repeat the cycle of violence.

A defendant whose felony or serious misdemeanor charges are dismissed based on incompetent to stand trial must be sent only to a state hospital, and court discretion to release a felony defendant is removed.

When a defendant committed to DSHS for competency restoration treatment is determined to have a developmental disability, DSHS must either provide the defendant with treatment related to developmental disabilities during the period of commitment at the state hospital, or enroll the defendant in developmental disability division benefits in the community.

The PSRP must provide advice to DSHS regarding all decisions by the Secretary of DSHS, all actions pending in court, and all decisions not to seek further commitment for adults civilly detained for 90 days or more. The PSRP must report to the Legislature by December 1, 2014, whether further changes in the law are necessary to enhance public safety when incompetency thwarts the operation of the criminal justice system.

A state hospital may use the 90-day civil commitment statute applicable to misdemeanor defendants for felony defendants instead of using the 180-day commitment statute, provided that the petition is not filed on the basis that the defendant has committed acts constituting a felony and, due to a mental disorder, presents a substantial likelihood of repeating similar acts.

The superintendent of a state hospital may file a civil commitment petition to detain a felony defendant at the expiration of any period of court-ordered competency restoration treatment.

When considering a civil commitment petition alleging that a person whose felony charges were dismissed based on incompetence to stand trial has committed acts constituting a felony and, due to a mental disorder, presents a substantial likelihood of repeating similar acts, the court must consider the person's continued incompetence. Whenever the felony charge was classified as violent, the court must further determine whether the alleged mental disorder is a contributing factor to the person's continued inability to regain competence. If this determination is affirmative, and the superintendent files a future petition to continue civil commitment on the same basis, the court must continue the commitment for 180 days if the petition presents prima facie evidence. The person may not be permitted to challenge their commitment unless the person can prove through an expert witness that their condition has so changed that the person could be found competent to stand trial; or the person no longer suffers from a mental disorder which has an impact on the person's continuing risk to commit acts similar to the charged criminal behavior.

The superintendent must provide 30 days advance notice to the prosecuting attorney in the county where the criminal charges were dismissed whenever the superintendent determines to release a person committed on the basis that the person has committed a felony classified as a sex, violent, or felony harassment offense, and, due to a mental disorder, presents a substantial likelihood of repeating similar acts, or provide immediate notice to the prosecuting attorney if such a person escapes.

The right of a committed person not to have competency determined except pursuant to a criminal or guardianship proceeding is extinguished.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: The aim of this bill is to reach a small number of gap cases, which is our term for cases where persons charged with serious crimes cannot be placed on trial due to incompetency, and get recommended for release from civil commitment, only to have the dismissed charges refiled by the prosecuting attorney. The persons can bounce back and forth for years. We want to keep these cases out of the criminal justice system by increasing authority to hold patients under civil commitment. Our estimate is that less than 20 cases per year will qualify. We recommend amendments to allow misdemeanor defendants to be committed to a state hospital or evaluation and treatment facility, and to replace the intent section with language more sensitive towards persons with mental illness. The patients will have counsel and the right to a hearing. The standard for civil commitment is not reduced. The bill is not intended to avoid due process. Provisions related to persons with developmental disabilities may not be affordable. There is no single answer to solve the problem of violence in our community. This bill is one of the small things that may contribute towards making a larger difference. The bill targets persons who have a high propensity to be involved in criminal behavior. Our interest in this bill is limited to the issue of placement of misdemeanor defendants at the state hospitals. Since state hospitals recently began declining to accept misdemeanor defendants, they end up in the emergency room instead. The 48-hour hold is a problem. This exacerbates the shortage of mental health beds and is contrary to what was intended.

CON: Please amend the inflammatory language in the intent section which promotes the stereotype that all persons with mental illness are dangerous. This bill has constitutional and due process problems, and would not withstand appellate review. It does away with evidentiary hearings and shifts the burden of proof onto the defense to produce an expert, which does not happen anywhere else in mental health law. Civil commitment has been found to be a massive curtailment of liberty. Civil commitment costs will increase. The Public Safety Review Panel provisions should be removed. The Panel only meets once an month, and its participation delays the disposition of the criminal insanity cases it currently handles. Judges can make decisions without the input of a voluntary community panel. This bill could divert resources at state hospitals, leading to more backlog and delays borne by

persons with mental illnesses in jail waiting for competency evaluations. The impact of jail delays on persons with mental illness is devastating.

OTHER: We are concerned about provisions related to persons with developmental disabilities. There is only a fixed number of forensic beds available, so accepting all misdemeanor defendants could require adding a state hospital ward. We are working to develop a triage strategy for the misdemeanor defendants with our community partners. We want to work together to come up with standards that will pass constitutional muster and be fundamentally fair. We are troubled by the revolving door at the state hospital. In Seattle, seven to ten demeanor defendants per month have cases that are dismissed as incompetent to stand trial, several of whom are not detained and do not get services.

**Persons Testifying:** PRO: Tom McBride, WA Assn. of Prosecuting Attorneys; Don Pierce, WA Assn. of Sheriffs and Police Chiefs; Seth Dawson, National Alliance on Mental Illness (NAMI), NAMI WA; Darcy Jaffe, Harborview Medical Center.

CON: Mike De Felice, WA Defender Assn., WA Assn. of Criminal Defense Lawyers; David Lord, Disability Rights WA.

OTHER: Jane Beyer, DSHS; Kelsey Beck, City of Seattle; Lawrence Thompson, Federation of State Employees 793.