

HOUSE BILL REPORT

HB 1513

As Reported by House Committee On:
Civil Rights & Judiciary
Appropriations

Title: An act relating to providing timely competency evaluations and restoration services to persons suffering from behavioral health disorders within the framework of the forensic mental health care system consistent with the requirements agreed to in the Trueblood settlement agreement.

Brief Description: Providing timely competency evaluations and restoration services to persons suffering from behavioral health disorders within the framework of the forensic mental health care system consistent with the requirements agreed to in the Trueblood settlement agreement.

Sponsors: Representatives Jinkins, Irwin, Goodman, Tharinger, Kilduff, Cody, Frame, Bergquist, Doglio, Reeves and Leavitt; by request of Office of the Governor.

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/8/19, 2/20/19 [DPS];

Appropriations: 2/26/19, 2/28/19 [DP2S(w/o sub CRJ)].

Brief Summary of Second Substitute Bill

- Creates the role of the forensic navigator.
- Expands on the offenses eligible for law enforcement diversion authority.
- Authorizes courts to consider outpatient competency restoration options for nonfelony offenses and certain felony offenses.
- Limits nonfelony competency restoration to instances where a prosecuting attorney proves the existence of a compelling state interest for restoration.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Jinkins, Chair; Thai, Vice Chair; Irwin, Ranking Minority Member; Goodman, Hansen, Kilduff, Kirby, Klippert, Orwall, Valdez and Walen.

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.

Minority Report: Do not pass. Signed by 3 members: Representatives Graham, Shea and Ybarra.

Minority Report: Without recommendation. Signed by 1 member: Representative Dufault, Assistant Ranking Minority Member.

Staff: Ingrid Lewis (786-7289).

Background:

Competency to Stand Trial.

A person is incompetent to stand trial in a criminal case if he or she lacks the capacity to understand the nature of the proceedings or is unable to assist in their own defense. A court may require a competency evaluation of a defendant whenever the issue of competency is raised. A person who is incompetent may not be tried, convicted, or sentenced for a criminal offense as long as the incompetency continues.

If a person is found incompetent to stand trial, the court must stay the proceedings and, depending on the charged offense, either order a period of treatment for restoration of competency or dismiss the charges without prejudice.

Maximum time limits for the provision of competency services were established in 2015, and include a 14-day limit for the completion of an in-jail competency evaluation and a 14-day limit to extend an offer of admission to a state hospital for a defendant to receive inpatient competency evaluation or restoration services.

In *Trueblood v. the Department of Social and Health Services* (2015), a federal district court found that the State of Washington was violating the constitutional rights of in-jail defendants awaiting competency evaluation and restoration services. As a result, the Department of Social and Health Services (DSHS) was ordered to provide in-jail competency evaluations within 14 days of a court order and inpatient competency evaluation and restoration services within seven days of a court order. The court found the state in contempt for continued noncompliance in 2017, and subsequently assessed over \$83 million in fines before the state reached a settlement in December 2018. The settlement requires the state to take numerous actions to meet the timeframes set forth by the court, as well as reduce the number of people ordered to receive competency services. The settlement will be implemented in three phases in different parts of the state. Phase one includes Pierce County, southwest Washington, and Spokane. Phase two includes King County. Phase three will be determined based on implementation outcomes of the first two phases.

Competency Restoration.

A defendant determined to be incompetent to stand trial who is charged with a serious nonfelony or felony crime may be committed for competency restoration treatment. A court ordering competency restoration is required to commit the defendant to a DSHS or DSHS-approved facility or provider. Competency restoration treatment generally occurs on an inpatient basis at either Western or Eastern State Hospital or one of two DSHS competency restoration residential treatment facilities.

Felony Restoration. If a defendant charged with a felony is found not competent, the court may order restoration treatment for up to 90 days, except if the defendant's highest charge is a class C felony or a nonviolent class B felony, the maximum time for the first restoration period is 45 days. A second period of restoration treatment for up to 90 days may be ordered if necessary and reasonably likely to restore competency. Under limited circumstances the court may order a third period of restoration treatment for up to six months.

Nonfelony Restoration. If a defendant is charged with a serious nonfelony offense as defined in statute and is found not competent, the court has several options if restoration is likely. The court may: (1) commit the defendant to a DSHS or DSHS-approved facility or provider for nonfelony competency restoration; (2) place the defendant on conditional release; or (3) order a combination of the two. The period for nonfelony competency restoration is 14 days plus any unused time from the evaluation period. A defendant may not be held for more than 29 days for a nonfelony charge. If a nonfelony defendant remains incompetent to stand trial after restoration treatment, the court must dismiss the charges without prejudice and may detain the defendant to an evaluation and treatment facility for an evaluation under the Involuntary Treatment Act (ITA) or refer the defendant for evaluation by a designated crisis responder (DCR).

Defendants charged with a nonserious nonfelony offense are not eligible for competency restoration, but may be detained to an evaluation and treatment facility for an evaluation under the ITA or referred for evaluation by a DCR.

Law Enforcement Diversion.

When a police officer has reasonable cause to believe that a person has committed a nonserious nonfelony crime, and the person is known to the behavioral health system, the officer is authorized to: (1) release the person upon agreement to voluntary outpatient treatment; (2) divert the person to a crisis stabilization unit or triage facility; or (3) refer the person to a mental health professional for an evaluation under the ITA.

In determining whether to refer a person to behavioral health treatment or arrest, the officer is required to refer to mutually agreed upon standards developed by the local prosecuting authority in coordination with law enforcement.

Classification of Criminal Offenses.

Crimes are classified as misdemeanors, gross misdemeanors, or felonies.

A nonfelony is a misdemeanor or gross misdemeanor. A nonfelony is a nonserious offense when it is not a serious traffic offense, crime against persons, domestic violence offense, or harassment offense.

Felonies may be class A, class B, or class C. All class A felonies and some class B felonies are classified as violent offenses. Certain felonies are classified as sex offenses.

Summary of Substitute Bill:

Forensic Navigator.

The role of the forensic navigator is established. Subject to available resources, a court may appoint an impartial forensic navigator to assist defendants who have been referred for competency evaluation or restoration treatment navigate the legal and behavioral health systems.

Forensic navigators are authorized to investigate and collect information relevant to the defendant's behavioral health history and the criminal matter through both document review and in-person interviews with the defendant. Forensic navigators provide the court with nonclinical recommendations regarding treatment and restoration options and monitor court orders for compliance. Subject to a court order, a state or local agency, school, health care provider, or law enforcement entity must provide a forensic navigator access to a defendant's record. Information obtained may not be entered into the court record without the consent of the defendant and may only be used to assess treatment and restoration options.

Law Enforcement Diversion.

The offenses eligible for law enforcement diversion are expanded to include any offense as determined by the local law enforcement diversion guidelines adopted by a local jurisdiction.

Locally adopted referral standards must address the circumstances in which referrals are permissible, and the prosecuting authority must provide the defense bar and disability community an opportunity to comment prior to adoption. The Washington Association of Sheriffs and Police Chiefs must collect and maintain a file of written local law enforcement diversion guidelines.

Outpatient Competency Restoration.

A court is authorized to commit a person to outpatient competency restoration if there is an appropriate program available. To be eligible for outpatient competency restoration, a person must be adherent to medications or willing to receive prescribed intravenous medication, abstinent from alcohol and unprescribed drugs, and clinically stable. A person ordered to receive outpatient competency restoration must be placed by DSHS into approved housing affiliated with a contracted outpatient competency restoration program. DSHS must establish conditions of participation that include being subject to medication monitoring and daily urinalysis. The outpatient competency restoration treatment period applicable to all defendants is up to 60 days.

If a person fails to comply with the terms of the conditional release or is in need of additional care and treatment such an outpatient competency restoration program is no longer appropriate, DSHS must remove the person to an inpatient competency restoration setting. DSHS must notify the court and parties of the change in placement, and a hearing must be held within five days of the change. At the hearing, the court must determine whether to modify the outpatient competency restoration order or order the person to inpatient treatment. If ordered to inpatient treatment, the time period for treatment must be for no longer than the time period authorized in the original court order for a felony offense, and 29 days for a serious nonfelony offense.

An outpatient competency restoration provider may refer a person for initial detention proceedings under the Involuntary Treatment Act.

The court may not order outpatient competency restoration unless DSHS certifies there is an available program with adequate space for the individual at the time the competency restoration order is issued.

Misdemeanor Restoration.

A court must dismiss a serious nonfelony charge without prejudice unless the prosecutor objects and provides notice of a motion for an order for competency restoration, in which case the court must schedule a hearing within five days of the motion. The court must order a defendant to competency restoration if the prosecuting attorney proves by a preponderance of the evidence a compelling state interest in ordering misdemeanor restoration. The court may consider the defendant's prior criminal history, prior history in treatment, prior history of violence, the nature of the pending charges, and the likelihood of the defendant regaining competency. If the prosecutor meets the burden, the court may order either inpatient or outpatient competency restoration.

Substitute Bill Compared to Original Bill:

The substitute bill makes the following changes to the forensic navigator (navigator), diversion, and outpatient competency restoration provisions, as well as miscellaneous changes.

Forensic Navigators.

A navigator must be employed by or contracted with the Department of Social and Health Services (DSHS). Navigator duties are refined, to include accessing a defendant's housing status and facilitating a coordinated transition to outpatient restoration, diversion, and other community resources. A navigator is prohibited from disclosing communications made by a defendant without the defendant's consent. The navigator access to health, educational, and criminal records is narrowed to only the records necessary for the development of treatment and restoration options.

Law Enforcement Diversion.

Eligible offenses for law enforcement diversion are expanded to include any offense based on local law enforcement diversion guidelines adopted by the local jurisdiction. Language referencing emergent detentions in emergency departments or other appropriate facilities is removed.

Outpatient Competency Restoration (Felony and Serious Nonfelony Offenses).

Eligibility criteria for outpatient competency restoration is created. The outpatient competency restoration treatment period for all defendants is changed to 60 days. A revocation process is established that authorizes the DSHS to remove a defendant from outpatient restoration if the defendant fails to comply with the restrictions of the program or the terms of the court order and provides for an opportunity for a hearing on the revocation. If revoked, the defendant is placed in inpatient competency restoration placement for the remaining period authorized in the original court order if the offense is a felony, or 29 days if the offense is a serious nonfelony. An outpatient competency restoration provider is authorized to refer a defendant for initial detention proceedings under the Involuntary Treatment Act.

Miscellaneous.

The DSHS is required to collaborate with the Health Care Authority to ensure that outpatient behavioral health services are available for individuals involved with the criminal justice system in every county or region where a navigator provides services on a timeline consistent with the phased implementation of the *Trueblood v. the Department of Social and Health Services* (2015) settlement. Language allowing parties to stipulate that a defendant is not likely to regain competency is restored.

Appropriation: None.

Fiscal Note: Requested on February 22, 2019.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The *Trueblood v. the Department of Social and Health Services* (2015) litigation has been challenging. The way that mentally ill defendants are being treated in Washington is inexcusable. This bill represents elements that have been committed to in the settlement agreement, but the language still needs work. If this settlement fails, it puts the state at great risk. The state has paid \$83 million dollars in fines since the case was decided in 2015.

The agreement includes provisions related to competency evaluation, competency restoration, crisis triage and diversion support, education and training, and workforce development. The agreement is a multi-year, multi-phase plan that includes programs such as expanding diversion and crisis services, providing training for jail staff and law enforcement, and establishing court navigators. The goal is to reduce the number of people who become or remain class members and provide timely services for those who cannot be diverted while focusing on effective outcomes.

The bill lays out commonsense solutions and is a historical opportunity to better serve and safeguard the rights of pretrial detainees. The bill addresses areas that require statutory authority to be in compliance with the agreement. The legislation will keep people out of the criminal justice system and get them into appropriate treatment services.

The bill is the result of an extraordinary process. Stakeholders have been involved in the settlement negotiations, including class members, family members, criminal justice stakeholders, and the behavioral health system. It was imperative during the settlement process to consider the number of forensic beds, as well as the increase in the number of people cycling through the criminal justice system.

Forensic navigators (navigators) can help class members become self-sufficient and can help ensure a smoother transition back into the community. To ensure a successful reentry, the

navigator must connect a class member to treatment and a medical prescriber. This is an avenue for class members to find a successful path to freedom and recovery.

One of the cornerstones of public safety is providing help to individuals who need help before law enforcement becomes involved. Many people involved in the criminal justice system describe their time waiting in jail as confusing and scary. Class members are often extremely isolated and experience significant symptoms of mental illness. Defense attorneys are often a person's sole source of information, but their role is limited. Family members who advocate for class members do not have sufficient knowledge of the system.

(Opposed) None.

(Other) It is not enough to divert people out of the criminal justice system. When a person exits the criminal justice system, the person must exit into treatment. These individuals have been found not competent and may need additional supports; therefore, a referral to services may be difficult to navigate alone. The navigators should be available to do screenings of every person who comes into jail to identify those with potential behavioral health issues.

There is a provision in the bill that requires a prosecutor to request a hearing before the expiration of 24 hours, and it is not clear whether the hearing must occur within the 24 hours. The bill creates a presumption that any nonfelony is entitled to dismissal to outpatient restoration services. There are many parts of the state that do not have the service capacity to support the change.

Persons Testifying: (In support) Representative Jinkins, prime sponsor; Rashi Gupta, Office of the Governor; Alexa Polaski and Darya Farivar, Disability Rights Washington; Melanie Smith, National Alliance on Mental Illness Washington; and Jason Draghi.

(Other) Russel Brown, Washington State Association of Prosecuting Attorneys; Juliana Roe, Washington State Association of Counties; James McMahan, Washington State Association of Sheriffs and Police Chiefs; and Sharon Swanson, Association of Washington Cities.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Civil Rights & Judiciary. Signed by 31 members: Representatives Ormsby, Chair; Bergquist, 2nd Vice Chair; Robinson, 1st Vice Chair; Stokesbary, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Rude, Assistant Ranking Minority Member; Caldier, Chandler, Cody, Dolan, Dye, Fitzgibbon, Hansen, Hoff, Hudgins, Jinkins, Kraft, Macri, Mosbrucker, Pettigrew, Pollet, Ryu, Senn, Springer, Stanford, Steele, Sullivan, Sutherland, Tarleton, Tharinger and Ybarra.

Staff: Andy Toulon (786-7178).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Civil Rights & Judiciary:

Technical corrections and changes to clarify that the inpatient competency restoration treatment period for certain felony offenses up to 90 days is recommended. If a defendant is removed from an outpatient competency restoration treatment program to an inpatient treatment program, the inpatient treatment period is for no longer than the remaining time period authorized in the original court order. Language requiring the Department of Social and Health Services to implement an outpatient competency restoration program in the county with the highest total volume of referrals for competency services by January 1, 2020, is removed.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 5, 2019.

Effective Date of Second Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Forensic navigators are vital in preventing recidivism for class members. The federal judge in *Trueblood v. the Department of Social and Health Services* (2015) has levied \$84 million in fines because of the unreasonable length of time defendants with mental illness are spending in jail. The judge has stayed the fines during the legislative session to see if the settlement is implemented. This bill will save the state money in fines. Forensic navigators are a crucial asset to class members and families going through the forensic system. Navigators should screen every person who enters the jail and should be available for individuals who have charges dismissed.

(Opposed) None.

(Other) The eligibility criteria for outpatient competency restoration do not support relationship building or harm reduction approaches. This could be an obstacle to the success of the program. The conditions for outpatient competency restoration should focus on a defendant's ability to agree to behavioral health treatment and the conditions imposed by the court. This would ensure that clinical best practices are supporting individualized treatment recommendations, leading to sustained community stability. While the substitute bill implements a program in King County in an accelerated timeframe, the rest of the supportive services are not set to come online until later. Outpatient restoration requires housing and treatment resources to be successful. Individuals who have misdemeanor charges dismissed need community outpatient services in order to succeed. Lack of services sets defendants up for failure and puts law enforcement at risk when the defendant decompensates in the community. There must be sufficient funding in the budget to ensure the availability of those services. Misdemeanor competency restorations made up two-thirds, or over 2,900 cases, of the total competency restoration cases last year. Under the proposed bill, these cases are presumed to be dismissed unless a prosecutor objects. The criminal justice system is one of the few areas in the community where there is access to mental health care; dismissing the

cases removes the ability of some people to access mental health care. The strategies in the bill do not account for the phased-in implementation of the settlement agreement. The Governor's budget dedicates funding to phase-one counties, which make up 27 percent of competency cases. The rest of the individuals and counties impacted by this bill will not have the benefit of the services the bill contemplates.

Persons Testifying: (In support) Mac Nicholson, King County; and Angela Daniels.

(Other) Juliana Roe, Washington State Association of Counties; Darya Farivar, Disability Rights Washington; Russell Brown, Washington Association of Prosecuting Attorneys; and James McMahan, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying: None.