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**Civil Rights & Judiciary Committee**

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**E2SSB 5444**

**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:** Senate Committee on Ways & Means (originally sponsored by Senators Dhingra, O'Ban, Darneille, Wagoner, Frockt, Kuderer and Nguyen; by request of Office of the Governor).

**Brief Summary of Engrossed 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.

**Hearing Date:** 3/20/19

**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.

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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.*

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 Washington. 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 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 access services related to diversion and, if ordered, outpatient competency restoration treatment.

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 and parties 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.

Admissions made by a defendant in the course of receiving navigator services may not be used against the defendant in the prosecutor's case in chief.

### 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 permitted, and the prosecuting authority must provide the defense bar and disability community an opportunity to comment on the guidelines prior to adoption.

### 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 clinically appropriate and willing to adhere to medications or receive prescribed intravenous medication and abstain from alcohol and prescribed drugs. A person ordered to receive outpatient competency restoration must be placed by the Department of Social and Health Services (DSHS) into approved housing affiliated with a contracted outpatient competency restoration program. The DSHS must establish conditions of participation that include being subject to medication monitoring and regular urinalysis.

If a person fails to comply with the terms of the conditional release or is in need of additional care and treatment such that an outpatient competency restoration program is no longer appropriate, the DSHS must remove the person to an inpatient competency restoration setting. The DSHS must notify the court and parties of the change in placement, and a hearing must be held within five days of the change.

The court may not order outpatient competency restoration unless the 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 a hearing for a competency restoration order. At the hearing, the court must order a defendant to competency restoration if the prosecuting attorney proves by a preponderance of the evidence that there is a compelling state interest in ordering misdemeanor restoration. The court may consider a number of factors, including 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.

The period for nonfelony competency restoration is modified not to exceed 29 days, instead of 14 days plus any unused time from the evaluation period.

**Appropriation:** None.

**Fiscal Note:** Requested on March 13, 2019.

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