

HOUSE BILL REPORT

E2SSB 5444

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: 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 History:

Committee Activity:

Civil Rights & Judiciary: 3/20/19, 3/28/19 [DPA];
Appropriations: 4/6/19, 4/8/19 [DPA(APP w/o CRJ)].

**Brief Summary of Engrossed Second Substitute Bill
(As Amended by Committee)**

- 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

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.

Majority Report: Do pass as amended. Signed by 10 members: Representatives Jinkins, Chair; Thai, Vice Chair; Irwin, Ranking Minority Member; Goodman, Hansen, Kilduff, Kirby, Orwall, Valdez and Walen.

Minority Report: Do not pass. Signed by 2 members: Representatives Klippert and Shea.

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 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 Amended 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.

Amended Bill Compared to Engrossed Second Substitute Bill:

The amended bill provides that forensic navigators are employed or contracted by the Department of Social and Health Services (DSHS), as opposed to authorized by the DSHS. A court may order inpatient or outpatient competency restoration based on a recommendation by a forensic navigator and input from the parties, as opposed to only by recommendation from a competency evaluation. The agency authorized to set conditions of participation for outpatient restoration is changed from the DSHS to the Health Care Authority. The regular urinalysis requirement is amended to only as clinically appropriate. The time period allowed for inpatient competency restoration after a revocation from outpatient restoration is for no longer than the remaining time period authorized in the original court order, in addition to reasonable time for transport to or from the facility. Language that authorizes a court to place a defendant under the guidance and control of a professional person for outpatient competency restoration and language that allows parties to stipulate that a defendant is unlikely to regain competency is restored. A court must schedule a hearing on a prosecutor's motion for misdemeanor competency restoration within seven days. Language authorizing a court to order a combination of inpatient and outpatient restoration is removed.

Appropriation: None.

Fiscal Note: Requested on March 13, 2019.

Effective Date of Amended 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) This bill is specifically related to the *Trueblood* litigation and the settlement. The role of the navigator has to be limited to what was in the settlement. This provides a person with a behavioral health background to help lawyers navigate possible options for a defendant. Navigators will work with class members of the *Trueblood* lawsuit and those individuals waiting for an in-jail competency evaluation. Forensic navigators should be

placed in every jail to screen every defendant. Navigators are needed to meet the needs of people struggling with mental health issues.

There is a class member who was a nationally recognized debate champion and a bright college student. It was impossible to get him help. Parents work tirelessly to help their children. When families reach out to the crisis line for help, instead of assistance with mental health treatment, law enforcement intervenes. People with behavioral health issues are repeatedly told that while things may be bad, they are not bad enough to access help. The system fails people not only when they need help, but it is also difficult to move on from a crisis. Many are traumatized by the system. Once in the forensic system, people spend months in solitary confinement and end up in the state hospital for an indeterminate period of time. Many people could avoid a criminal record, jail time, inpatient psychiatric treatment, and the state could save money if these laws were in place.

The bill is an agreement that is multi-year and multi-phase. The bill addresses a number of issues that require statutory change to operationalize the settlement. The bill diverts individuals from the criminal justice system and provides greater access to services and treatment for some of our state's most vulnerable citizens. The settlement agreement targets phases in a way that will support successful implementation. Counties that are not in the initial phased regions are receiving the benefit of *Trueblood* diversion programs.

Most misdemeanor cases are dismissed. The bill does not require dismissal; it creates a presumption that the cases should be dismissed, but allows for a restoration option if the person has a history of violence.

(Opposed) None.

(Other) The settlement does not require the dismissal of misdemeanor cases. It requires the state to reduce the number of people who need inpatient services. Services should be fully implemented to support the released individuals if the requirement is to dismiss misdemeanor cases.

Individuals involved in the criminal justice system who are found to be not competent should not be sent out on the street without the appropriate services. Recently, a person who had misdemeanor dismissals on multiple occasions tried to throw a woman over the side of a bridge.

The bill does not take into account the phased in structure of the settlement. Only 10 counties will receive funding in the first phase, and King County will receive funding in the second phase. Twenty-eight counties will not be funded.

Part of the *Trueblood* settlement is to divert people away from jails. Law enforcement diversion should allow a person at a facility to remain at the facility once stabilized instead of transferring the person to jail.

Persons Testifying: (In support) Senator Dhingra, prime sponsor; Darya Farivar, Disability Rights Washington; Joshua Stuller; Laura Van Tosh; Angela Daniels; Amber Leaders, Office

of the Governor; Kimberley Mosolf, Disability Rights Washington; Marilyn Roberts; and Kristina Sawyckyj.

(Other) Russell Brown, Washington Association of Prosecuting Attorneys; James McMahan, Washington Association of Sheriffs and Police Chiefs; Juliana Roe, Washington State Association of Counties; and Kari Reardon, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Appropriations and without amendment by Committee on Civil Rights & Judiciary. Signed by 32 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, Schmick, 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:

The House Appropriations Committee recommended that the Department of Social and Health Services work in conjunction with the Health Care Authority to establish rules for conditions of participation in outpatient competency restoration programs. The requirement for regular urinalysis is modified to apply to defendants who have a current substance use disorder, instead of only when it is clinically appropriate. The allowable time period for inpatient competency restoration following removal from an outpatient program is changed to a maximum of 29 days instead of the remaining time period in the original court order. Language is restored allowing for a court to order a combination of inpatient and outpatient restoration, and the restoration period in these cases cannot exceed 90 days. A technical correction is made to a provision related to the administration of injectable medication.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available. New fiscal note requested on April 3, 2019.

Effective Date of Amended 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) This bill provides a framework for the implementation of the *Trueblood* settlement and is contingent upon adequate funding. A forensic navigator is a key position, and communications with the forensic navigator needs to remain confidential. There is amendment language that should be considered to help ensure this. There is another amendment that will be sent for the committee's consideration.

Trueblood class members and advocates believe that items included in this bill could have made a difference in their own lives and in the lives of their loved ones. These include forensic navigators, avenues for diversion, and opportunities for outpatient competency restoration, which are invaluable to current and potential class members who continue to languish in jail. In order for these programs and regulations to be successful, they must be adequately funded. Forensic navigators must have the appropriate training and caseloads, which provide for individualized attention and support. Class members need to be connected to diversion programs with peers and the appropriate resources. Those who go through outpatient restoration need to have appropriate housing support so that they can focus on restoration.

(Opposed) None.

(Other) This bill provides for statewide implementation of some provisions, but the settlement is phased in, and through the first two phases, will only cover half of the state. This bill calls for presumptive dismissals of misdemeanor cases where individuals are found not competent to stand trial. There is probable cause that these individuals have committed a criminal act, and the bill simply sends them out the door. This is a population that poses a risk that they will commit harm to themselves, harm to others, or come into violent confrontations with police officers. The \$11.6 million in funding in the House budget proposal for this population is appreciated, and we encourage you to make sure that these individuals are surrounded by services.

Section 3 of the bill allows some people to be referred for evaluation under RCW 71.05, but it does not address the population of people who have recently been involuntarily detained. These individuals are often extremely psychotic, very vulnerable, and sometimes have an allegation of a criminal assault, harassment, or some other misdemeanor offense, while at a hospital or other facility, and are subsequently taken to jail. An amendment would allow these individuals to stay where they are receiving treatment. Section 5 of the bill should be amended to comport with what was previously in House Bill 1513 in order to ensure discovery is provided to defense attorneys when hearings are requested.

Persons Testifying: (In support) David Lord and Darya Farivar, Disability Rights Washington.

(Other) Kari Reardon, Washington Defender Association and Washington Association of Criminal Defense Lawyers; and James McMahan, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying: None.