

# SENATE BILL REPORT

## SB 5039

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As of February 5, 2019

**Title:** An act relating to adjusting the duration of competency restoration treatment based on risk.

**Brief Description:** Adjusting the duration of competency restoration treatment based on risk.

**Sponsors:** Senators O'Ban, Becker and Wagoner.

**Brief History:**

**Committee Activity:** Behavioral Health Subcommittee to Health & Long Term Care: 1/25/19.

**Brief Summary of Bill**

- Establishes a new method to calculate the competency restoration treatment period available for a criminal defendant, incorporating consideration of the defendant's current charges as well as the defendant's criminal history
- Incorporates consideration of prior charges that were acquitted by reason of insanity or dismissed based on incompetency to stand trial.
- Allows a court to increase the competency restoration treatment period available for the criminal defendant upon motion of the prosecuting attorney based on consideration of specified factors.

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**SENATE COMMITTEE ON BEHAVIORAL HEALTH SUBCOMMITTEE TO HEALTH & LONG TERM CARE**

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

**Background:** Competency to Stand Trial. Court decisions establish a person cannot constitutionally be tried for a criminal offense unless they are competent to stand trial. A person is incompetent to stand trial if they lack the current capacity to understand the proceedings against them or do not have the ability to assist in their own defense. If any party to a criminal case raises doubts about a defendant's competency to stand trial, the criminal proceedings must be stayed for a competency evaluation to assist the court in

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determining if the defendant is competent to stand trial. If the court determines a defendant is incompetent to stand trial, the defendant may be eligible for a period of competency restoration treatment.

Competency Restoration Treatment. Competency restoration treatment is involuntary mental health treatment administered for the purpose of rendering a defendant amenable to criminal prosecution. Eligibility for competency restoration treatment is based on the defendant's current charges:

<b>Classification of Charge</b>	<b>Eligibility for Competency Restoration</b>
Nonfelony—non-serious	None
Nonfelony—serious	14 to 29 days
Felony—nonviolent	45 days + 90 days + 180 days
Felony—violent	90 days + 90 days + 180 days

The competency restoration treatment period for a defendant charged with a nonfelony serious offense is 14 days plus any unused time from the 15-day inpatient competency evaluation period. Competency restoration treatment for felony defendants is provided in three periods, separated by a court hearing to review whether the defendant remains incompetent to stand trial. A third 180-day felony competency restoration treatment period may not be ordered unless the court or a jury finds the defendant is a substantial danger to other persons or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, and there is a substantial probability the defendant will regain competency within a reasonable period of time.

Flip to Involuntary Civil Treatment. If the available competency restoration treatment for the defendant is exhausted and the defendant remains incompetent to stand trial, the court must dismiss the criminal charges without prejudice and order commitment for involuntary civil treatment. Involuntary civil treatment is recovery-based treatment for the purpose of meeting an individual's needs and transitioning them safely back to the community. A felony defendant who flips to civil must be transported to a state hospital for the filing of a 180-day civil commitment petition. A serious nonfelony defendant who flips to civil must be transported to an evaluation and treatment facility for the filing of a 90-day civil commitment petition. A non-serious nonfelony defendant whose case is dismissed based on incompetency to stand trial may be held in jail for a sufficient time to receive a designated crisis responder evaluation for civil commitment.

Classification of Criminal Offenses. The Revised Code of Washington provides classifications for criminal offenses. A nonfelony is a misdemeanor or gross misdemeanor. A nonfelony is a non-serious offense when it is not a serious traffic offense, a crime against persons, a domestic violence offense, or a harassment offense. Felonies are classified as class A, class B, or class C offenses. Violent offenses include all class A felonies and certain specified class B felonies. Sex offenses are specified felonies which may be class A, B, or C felonies. A serious violent offense is a specified class A felony offense taken from a subset of violent offenses.

A felony escalator offense is a criminal act which would be a nonfelony but for a special circumstance which elevates the act to a felony. A simple assault that would otherwise be a gross misdemeanor may be charged as assault 3, a class C felony, if the victim is a transit operator; a school bus driver; a firefighter; a law enforcement officer; a nurse, physician, or health care provider; a judicial officer; or a person in a courtroom, if that person is performing official duties at the time of the assault.

The Trueblood Litigation. In 2015, the state was found liable in federal court in the case of *Trueblood v. Department of Social and Health Services* for imposing excessive wait times on in-custody defendants who are ordered to receive competency evaluation and restoration services. 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 with the plaintiffs which was approved in December 2018. The settlement obligates the state to take numerous actions, including to work during the 2019 session to achieve legislative changes to reduce the number of people ordered to receive competency evaluation and restoration services.

**Summary of Bill:** A new method is established to determine the length of competency restoration treatment for which an incompetent defendant is eligible, incorporating consideration of the defendant's current charges in combination with the defendant's criminal history. First, a point total is assigned based on the highest level offense among the defendant's current charges:

<b>Current Charge</b>	<b>Points</b>
Nonfelony or assault 3 felony escalator offense	1
Felony nonviolent, non-sex, non-escalator offense	2
Violent offense or sex offense	3
Serious violent offense	4

Second, one additional point is added if the defendant's criminal history contains at least one violent offense or sex offense, or two points are added if the criminal history contains at least one serious violent offense, to produce a total of one to six points. For the purposes of this calculation, criminal history includes both the defendant's prior convictions and prior charges that were acquitted by reason of insanity or dismissed based on incompetency to stand trial. This total is used to determine eligibility for competency restoration treatment:

<b>Total Points</b>	<b>Eligibility for Competency Restoration</b>
1	None
2	60 days
3	60 days + 90 days
4 through 6	60 days + 90 days + 180 days

When considering criminal history, a class B felony may not be counted if since the last date of release from confinement, including full-time residential treatment pursuant to the felony charge, the defendant has spent ten consecutive years in the community without committing a

crime, and a class C felony may not be counted if the defendant has spent five consecutive years in the community without committing a crime.

The prosecuting attorney may move to increase the point calculation by one point on the grounds that the defendant's current charges and criminal history do not adequately convey the risk presented by the defendant, based on the consideration of specified factors including the impact of the current charges, the number of victims affected, the number of charges pending, and the length of potential confinement if the defendant is convicted.

A competency evaluation report must include an advisory calculation of the defendant's available competency restoration treatment period if the defendant is found incompetent to stand trial. Similar to current law, an assessment of future dangerousness must be provided following the defendant's last available competency restoration period or prior to a third 180-day competency restoration period, and a third 180-day period of competency restoration treatment may not be ordered unless the court makes findings related to the danger presented by the defendant and the likelihood that competency restoration treatment will be successful.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

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

**Staff Summary of Public Testimony:** PRO: We are all aware of Trueblood sanctions driven because by lack of sufficient forensic capacity for either evaluation or treatment. We can not build our way out of this, because the new capacity contemplated at state hospitals will only meet current demand. We need to do more. This approach tries to take a deeper look at the risk presented by this population. Some lower-level defendants do not need to go through a restoration process and should be diverted, but others who may have prior felonies should receive restoration treatment so they can stand trial for their actions. This is an effort to create a process that is layered, nuanced, and tailored to the individual.

OTHER: We are not experts on competency restoration systems, but are concerned about the impacts of behavioral health crises on public safety and feel that the best outcome is not punishment but the prevention of crimes. We feel unqualified to state the best way to accomplish this. The primary approach should be to build enough capacity for the system, which is incredibly difficult but we think it is possible. We are concerned that nonviolent, nonfelony defendants will not get treatment after their cases are dismissed because they will not meet the standard for civil commitment. Individuals who do not get treatment tend to cycle back. We like a lot about this bill and would like to continue working on solutions. We like that it takes into account prior history and elevates some cases. We like that it provides a more meaningful period for nonfelony restoration—60 days instead of 29 days. We like giving the judge discretion to increase the restoration period. The current delivery of competency restoration services is highly problematic. We suggest clarifying amendments. There could be additional workload attached to determining the length of restoration. This

bill does not allow use of clinical judgement to determine the most effective length of stay to achieve restoration, and is not based on a currently validated risk tool.

**Persons Testifying:** PRO: Senator Steve O'Ban, Prime Sponsor.

OTHER: James McMahan, Washington Association of Sheriffs and Police Chiefs; Russell Brown, Washington Association of Prosecuting Attorneys; Steve Warning, Superior Court Judges Association; Sean Murphy, Department of Social and Health Services, Behavioral Health Administration.

**Persons Signed In To Testify But Not Testifying:** No one.