

FINAL BILL REPORT

E2SSB 5444

C 326 L 19
Synopsis as Enacted

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).

Senate Committee on Health & Long Term Care
Senate Committee on Behavioral Health Subcommittee to Health & Long Term Care
Senate Committee on Ways & Means
House Committee on Civil Rights & Judiciary
House Committee on Appropriations

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 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. Washington State has established statutory performance targets for timeliness of competency services, which include a seven-day target for completion of a competency evaluation in jail and a seven-day target to be transported from jail to a facility for inpatient competency evaluation or restoration.

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

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.

| Classification of Charge | Eligibility for Competency Restoration |
|---------------------------------|---|
| 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. Felony competency restoration treatment is provided in three periods, separated by court review to determine 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 that there is a substantial probability the defendant will regain competency within a reasonable period of time.

Competency restoration may be provided at an inpatient or outpatient facility that is operated by, or under contract with, the Department of Social and Health Services (DSHS). An overwhelming majority of competency restoration treatment in Washington State is delivered inpatient, typically at a state hospital.

The Trueblood Litigation. In 2014, the state was sued in federal district court in the case of *Trueblood v. DSHS*, and in 2015 it was found liable 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 plaintiffs, approved in December 2018. The settlement obligates the state to take numerous actions calculated to speed the delivery of competency evaluation and restoration services. During the 2019 legislative session, the settlement obligates the state to work to achieve changes to reduce the number of people ordered to receive competency evaluation and restoration services. The most recent court monitoring report posted by DSHS, dated January 31, 2019, indicates a statewide average wait time for in-custody defendants of 13.0 days for completion of a competency evaluation in jail, 28.5 days for transportation to a facility for competency evaluation, and 42.8 days for transportation to a facility for competency restoration.

Classification of 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, 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.

Rights of a Criminal Defendant. Criminal defendants have a panoply of constitutional rights including the right to remain silent, the right to counsel, the right to be presumed innocent until guilt is proved beyond a reasonable doubt, the right to confront witnesses, and the right to a speedy trial. A defendant must be competent to make a valid waiver of their constitutional rights. The right to counsel includes protection from any state interrogation which is not initiated by the defendant.

Summary: Forensic Navigators. If available, an impartial forensic navigator (navigator) employed or contracted by DSHS may assist individuals who are referred for a competency to stand trial evaluation or who are ordered to receive outpatient competency restoration.

The navigator must assist the individual, prosecuting attorney, defense attorney, and court to understand the options available to the individual and be accountable as an officer of the court. Duties include:

- collecting relevant information about the individual, including behavioral health services and supports available to the individual that might support placement in outpatient restoration, diversion, or some combination of these;
- meeting with, interviewing, and observing the individual; and
- presenting information to the court, which may include nonclinical recommendations relating to the options of the individual.

If the individual is ordered to receive outpatient competency restoration, the navigator must provide services to the individual, including assisting them with appointments, coordinating access to housing, coordinating access to community case management services and mental health services, assisting with medication, and planning for a coordinated transition to community behavioral health services. The navigator must provide information to the court concerning the individual's progress in outpatient competency restoration and compliance with court-ordered conditions of release.

The signed order for competency evaluation from the court must allow access to all records held by behavioral health, educational, or law enforcement agencies related to the individual. Information protected by federal law may not be entered into the court record without the consent of the individual or their defense attorney.

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

Diversion Authority. The authority of a police officer to divert an individual known to suffer from a behavioral health disorder to a crisis stabilization unit, triage facility, or facility for civil commitment, instead of arresting the individual, is expanded to include individuals believed to have committed any crime. The police officer must be guided by local law enforcement diversion guidelines for behavioral health developed and agreed upon with the prosecuting attorney with an opportunity for consultation by the defense bar and disability community. The guidelines must include a process for clearing outstanding warrants or referring the individual for assistance in clearing outstanding warrants, without booking or incarcerating the individual or disqualifying the individual from referral for treatment in appropriate circumstances defined by the guidelines.

Outpatient Competency Restoration. To be eligible for outpatient competency restoration, an individual must be clinically appropriate and willing to adhere to medications or to receive prescribed intramuscular medication, and willing to abstain from alcohol and unprescribed drugs. In deciding between inpatient and outpatient competency restoration, the court must receive a recommendation from a forensic navigator and input from the parties. An individual ordered to receive outpatient competency restoration must be placed by DSHS into approved housing affiliated with a contracted outpatient competency restoration program.

DSHS in conjunction with the Health Care Authority must establish conditions of participation that include being subject to medication management and regular urinalysis testing for defendants who have a current substance use disorder diagnosis. The program must monitor the individual and report any noncompliance or significant changes to DSHS and, if applicable, the navigator.

If an individual fails to comply with an outpatient competency restoration program such that restoration is no longer appropriate in that setting for the individual, DSHS must remove the individual to an inpatient competency restoration program for no longer than the time allowed as if the defendant had been initially placed into inpatient competency restoration and notify the court and parties before the close of the next judicial day. The court must schedule a hearing within five days to review the placement and conditions of release for the individual. The court may issue a decision by a preponderance of the evidence and may base its decision on written submissions, live testimony, or remote testimony.

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, or the court places the defendant under the guidance and control of a professional person identified in the court order.

Nonfelony Competency Restoration. When a nonfelony defendant is found to be incompetent to stand trial, the court must dismiss the charges 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 seven days. The prosecutor must prove by a preponderance that there is a compelling state interest in pursuing competency restoration, considering the defendant's prior criminal history, prior history in treatment, prior history of violence, the nature of the pending charges, any available indications as to whether competency restoration treatment is likely to be successful, and other factors including whether the defendant is charged with a harassment offense, domestic violence offense, or serious traffic offense, whether the charge includes an allegation that the defendant inflicted bodily or emotional harm on another person, the number and nature of related charges against the defendant, and the number of potential and actual victims impacted by the defendant's alleged acts.

The time for inpatient competency restoration must be 29 days, instead of 14 days plus any unused time from the competency restoration period. If the court orders a combination of inpatient and outpatient competency restoration, the total period must not exceed 90 days.

Votes on Final Passage:

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| Senate | 48 | 0 | |
| House | 97 | 0 | (House amended) |
| Senate | 48 | 0 | (Senate concurred) |

Effective: July 28, 2019