

# SENATE BILL REPORT

## E2SSB 5444

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As Amended by House, April 15, 2019

**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:** Behavioral Health Subcommittee to Health & Long Term Care: 1/25/19, 2/14/19 [DPS-WM].

Ways & Means: 2/26/19, 3/01/19 [DP2S].

**Floor Activity:**

Passed Senate: 3/07/19, 48-0.

Passed House: 4/15/19, 97-0.

### Brief Summary of Engrossed Second Substitute Bill

- Establishes forensic navigators, authorized by the Department of Social and Health Services (DSHS), who may assist individuals who are referred for a competency to stand trial evaluation by providing information to the court to support diversion or placement in outpatient competency restoration, and who may help coordinate community services for individuals who are ordered to receive outpatient competency restoration.
- Expands police authority to divert an individual to treatment instead of criminal prosecution to include individuals believed to have committed any crime, subject to local law enforcement diversion guidelines to be agreed upon with the local prosecutor following input from the defense bar and disability community.

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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.*

- Provides guidelines and restrictions pertaining to outpatient competency restoration, which must be administered by a provider contracted with DSHS.
- Restricts nonfelony competency restoration to circumstances in which the prosecutor moves for a competency restoration order and proves the existence of a compelling state interest in competency restoration by a preponderance of the evidence.

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

**Majority Report:** That Substitute Senate Bill No. 5444 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Dhingra, Chair; Wagoner, Ranking Member; Darneille, Frockt and O'Ban.

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

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## SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** That Second Substitute Senate Bill No. 5444 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Operating, Capital Lead; Mullet, Capital Budget Cabinet; Braun, Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Becker, Billig, Carlyle, Conway, Darneille, Hasegawa, Keiser, Liias, Palumbo, Pedersen, Rivers, Schoesler, Van De Wege, Wagoner, Warnick and Wilson, L..

**Staff:** Travis Sugarman (786-7446)

**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:

<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. 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, 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 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 of Engrossed Second Substitute Bill: Forensic Navigators.** If available, an impartial forensic navigator (navigator) authorized 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:

- to collect 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;
- to meet with, interview, and observe the individual; and
- to present 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 intravenous medication, and willing to abstain from alcohol and unprescribed drugs. 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 must establish conditions of participation that include being subject to medication monitoring and regular urinalysis. 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 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.

Competency Restoration. Authority is removed for the parties to stipulate that a defendant is unlikely to regain competency without a factual determination made by the court.

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. 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.

**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 on Original Bill (Behavioral Health Subcommittee to Health & Long Term Care):** *The committee recommended a different version of the bill than what was heard.* PRO: This is about ensuring that defendants have access to competency evaluation services, and I am excited about beefing up outpatient competency restoration services. The *Trueblood* settlement was reached in February 2018 and approved after a long stakeholder process. It is phased into regions. This bill represents the items in the settlement agreement that are believed to require statutory change. It will keep people out of the criminal justice system and in treatment where they will be better served. The settlement has been very collaborative. This is a historic opportunity to better serve and safeguard the rights of persons with mental illness who are caught up in the criminal justice system. We should look beyond the number of forensic beds at the reasons why we put so many people into the system. Forensic navigators should have a case management role that emphasizes diversion and treatment. Protections are needed for confidentiality. Aspect of outpatient restoration and nonfelony competency restoration should be clarified. Class members experience time in custody as confusing, scary, unending, lonely, dirty, and feel everyone is against them. They are isolated and do not get clear answers about what will happen to them. They need someone who has the time to talk to them and create something productive and positive from a terrible experience. Please ensure navigators have to tools needed to work for class members, not against them. We support expanding diversion flexibility for law enforcement and the use of outpatient restoration treatment. Please add language providing residential supports for unstably housed defendants who need support to be eligible for outpatient restoration. Forensic navigators should help people get in and stay in treatment. Incompetent defendants need more assistance than just a referral. Appropriate support will reduce recidivism and improve recovery. Persons in the justice system experience significant trauma. Family members struggle to know how to help a loved one find supportive housing, find a provider, or motivate them to take mediation. They need support. Housing and intensive case management can make a difference. There must be protection from negative use of confidential information. How much help a person needs should not be determined by the level of the crime.

OTHER: The processes in the bill need to be better defined so that the bill creates a set of rules the courts can work with. The forensic navigator function may be better applied upstream, such as by screening everyone admitted to jail like in Snohomish County. Law enforcement diversion statutes should never prevent an officer from diverting a person. We are uncomfortable with the language instructing officers to disregard warrants. We are concerned what will happen to nonfelony defendants who do not receive competency restoration. Prosecutors are concerned about being able to prove a compelling state interest, especially in a 24 hour time frame, which should be extended. People exiting the justice system need intensive wraparound services. A navigator will be little help if services don't exist.

**Persons Testifying (Behavioral Health Subcommittee to Health & Long Term Care):** PRO: Senator Manka Dhingra, Prime Sponsor; Rashi Gupta, Policy Advisor to Governor Inslee; Melanie Smith, NAMI Washington; Joan Miller, Washington Council for Behavioral Health; Kimberly Mosolf, Disability Rights Washington; Heather Dornberger, Consumer Voices Are Born; Darya Farivar, Disability Rights Washington; Laura Van Tosh, citizen; Jerri Clark, Mothers of the Mentally Ill.

OTHER: James McMahan, Washington Association of Sheriffs and Police Chiefs; Russell Brown, Washington Association of Prosecuting Attorneys; Stephen Warning, Superior Court Judges Association.

**Persons Signed In To Testify But Not Testifying (Behavioral Health Subcommittee to Health & Long Term Care):** No one.

**Staff Summary of Public Testimony on First Substitute (Ways & Means):** *The committee recommended a different version of the bill than what was heard.* PRO: Some of the pieces of the settlement agreement relate to competency evaluations and restorations, crisis triage and diversion supports, education and training, and workforce development. The goal of the settlement is to reduce the number of people who become or remain class members. This bill contains the pieces of the settlement agreement that needed statutory changes. OFM is working with House and Senate fiscal staff to amend the fiscal note and hope to have it done soon. King County supports the bill. There are two requested changes in section 4 and section 7. Section 7 only moves up outpatient competency restoration for King County, but not the rest of the settlement services. We need forensic navigators in the jails and I know first had because my 23 year old son was on an involuntary commitment. I would propose an amendment to allow navigators to review all individuals that end up in jails.

OTHER: Referrals to alternatives to booking should be available for allegations of all criminal charges that are not designated as serious violent felonies. The jail environment is not therapeutic and can result in significant harm to those with mental health impairment. Accused individuals should be able to remain in treatment and law enforcement should be discouraged from arresting those who are involuntarily detained. DRW is working on changes and looking to make sure class members are truly engaged. This bill will reduce the time individuals stay in jail. Section 5 creates the presumption that all misdemeanors would be dismissed. This would result in two-thirds of the competency cases being dismissed. Most individuals do not have access to the needed services. Dismissal and diversion to services only works if there are services. We love the navigators but it would be better to have them earlier.

**Persons Testifying (Ways & Means):** PRO: Rashi Gupta, Governor's Office; Mac Nicholson, King County; Angela Daniels, Trueblood Advocate and mother of class member.

OTHER: Kari Reardon, Washington Defender Association; Darya Farivar, Disability Rights Washington; Russell Brown, Washington Association of Prosecuting Attorneys; James McMahan, Washington Association of Sheriffs and Police Chiefs; Juliana Roe, Washington State Association of Counties.

**Persons Signed In To Testify But Not Testifying (Ways & Means):** OTHER: Scott Merriman, OFM.

#### **EFFECT OF HOUSE AMENDMENT(S):**

- Requires a forensic navigator to be employed or contracted by DSHS.

- Provides that the court may order a defendant to receive inpatient competency restoration or outpatient competency restoration based on a recommendation from a forensic navigator and input from the parties.
- Requires DSHS to develop conditions of participation in outpatient competency restoration in conjunction with the Health Care Authority.
- Requires the rules for outpatient competency restoration to include medication management, instead of medication monitoring, and limits the requirement for regular urinalysis testing to defendants who have a current substance use disorder diagnosis.
- Provides that when a defendant is removed from an outpatient competency restoration program the defendant may be placed in inpatient competency restoration for no longer than the time allowed as if the defendant had been initially placed into inpatient competency restoration, in addition to reasonable time for transport to or from the facility.
- Allows a court to order outpatient competency restoration under the guidance and control of a professional person, regardless of whether there is an available appropriate outpatient competency restoration program that has adequate space for the person.
- Requires a court to hold a hearing within seven days to determine whether to order competency restoration or dismiss charges without prejudice for a defendant charged with a serious nonfelony offense who is found to be incompetent to stand trial.
- Allows a court to order a combination of inpatient and outpatient competency restoration that does not exceed 90 days for a defendant charged with a serious nonfelony offense.
- Restores language allowing the parties to stipulate that a defendant is unlikely to regain competency.