

HOUSE BILL REPORT

2SSB 5664

As Passed House - Amended:

March 3, 2022

Title: An act relating to forensic competency restoration programs.

Brief Description: Concerning forensic competency restoration programs.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Dhingra, Keiser and Nobles).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/22/22, 2/23/22 [DPA];

Appropriations: 2/25/22, 2/28/22 [DPA(CRJ)].

Floor Activity:

Passed House: 3/3/22, 97-1.

Brief Summary of Second Substitute Bill (As Amended by House)

- Establishes procedures for removal of a defendant from an outpatient competency restoration program into inpatient competency restoration, and makes changes to eligibility requirements and time periods for outpatient competency restoration.
- Revises performance targets and maximum time limits for providing competency services.
- Requires the Department of Social and Health Services (DSHS) to provide written notice to the court when it will not be able to meet the maximum time limits for providing competency services, and adds additional defenses for failing to comply with the maximum time limits.
- Allows a party to request a competency to stand trial status check when a defendant remains in jail more than 21 days after a court order to

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transport the person to a facility for inpatient competency restoration.

- Modifies the authorized period of detention for a civil commitment evaluation following dismissal of criminal charges for certain defendants.
- Provides limited immunity from liability for specified individuals and entities performing duties relating to the decision of whether to detain a person for medical clearance or forensic treatment.
- Requires the Health Care Authority to issue an annual report on operation of outpatient competency restoration programs.
- Addresses other issues, including access to records of the Developmental Disability Administration, responsibility for costs for inpatient and outpatient services, and inclusion of psychiatric advanced registered nurse practitioners in the definition of "professional person."

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass as amended. Signed by 13 members: Representatives Hansen, Chair; Simmons, Vice Chair; Abbarno, Davis, Entenman, Goodman, Kirby, Orwall, Peterson, Thai, Valdez, Walen and Ybarra.

Minority Report: Without recommendation. Signed by 4 members: Representatives Walsh, Ranking Minority Member; Gilday, Assistant Ranking Minority Member; Graham, Assistant Ranking Minority Member; Klippert.

Staff: Edie Adams (786-7180).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Civil Rights & Judiciary. Signed by 31 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Boehnke, Caldier, Chandler, Chopp, Cody, Dolan, Dye, Fitzgibbon, Frame, Hansen, Harris, Hoff, Johnson, J., Lekanoff, Pollet, Rude, Ryu, Schmick, Senn, Springer, Steele, Stonier, Sullivan and Tharinger.

Minority Report: Without recommendation. Signed by 2 members: Representatives Stokesbary, Ranking Minority Member; Jacobsen.

Staff: Andrew Toulon (786-7178).

Background:

Competency to Stand Trial.

A person is incompetent to stand trial if, due to a mental disease or defect, he or she lacks the capacity to understand the nature of the proceedings or is unable to assist in his or her own defense. A person who is incompetent to stand trial may not be tried, convicted, or sentenced for a criminal offense as long as the incompetency continues.

Competency Evaluation and Restoration.

When a defendant's competency to stand trial is in question, the court must either appoint, or ask the Department of Social and Health Services (DSHS) to designate, a qualified expert to evaluate and report on the defendant's mental condition. If a defendant is found incompetent to stand trial, the court must stay the criminal proceedings and, depending on the charged offense, either order a period of treatment for restoration of competency, or dismiss the charges without prejudice. A court may order competency restoration treatment for a defendant charged with a felony or a serious nonfelony offense, but not for a defendant charged with a nonfelony that is not a serious offense.

Felony Offenses. If a defendant charged with a felony is found incompetent to stand trial, the court must order a period of competency restoration treatment not to exceed 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. The court must commit the person for inpatient competency restoration treatment at a state hospital or other DSHS competency restoration facility, or the court may order outpatient competency restoration treatment based on a recommendation from a forensic navigator and input from the parties.

Nonfelony Offenses. If a defendant charged with a nonfelony offense is found 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 of competency restoration, which must be scheduled for a hearing within seven days. A court may order competency restoration if the prosecutor establishes that there is a compelling state interest in ordering nonfelony restoration, considering a number of factors. The court may order inpatient competency restoration for a period not to exceed 29 days, or based on a recommendation from the forensic navigator and input of the parties, the court may order outpatient competency restoration for a period not to exceed 90 days. The court may also order a combination of these inpatient and outpatient treatment periods, not to exceed 90 days.

Outpatient Restoration. A court may commit a person to outpatient competency restoration if there is an appropriate program available and the defendant is clinically appropriate for outpatient competency restoration. The defendant must be willing to adhere to medications or receive intramuscular medication and abstain from alcohol and prescribed drugs. The

DSHS must place the person into approved housing affiliated with a contracted outpatient competency restoration program (OCRP). Conditions of participating in outpatient competency restoration include a requirement that the defendant be subject to medication management and regular urinalysis testing if the defendant has a substance use disorder diagnosis.

If a defendant fails to comply with the terms of the OCRP or is in need of additional care and treatment such that the OCRP is no longer appropriate, the DSHS must remove the person to an inpatient competency restoration setting. The DSHS must notify the court and the parties of the change in placement, and the court must schedule a hearing within five days to review the placement and conditions of release of the defendant. If the defendant is receiving restoration on a felony charge, the allowable time period for inpatient competency restoration following removal from an OCRP is for no longer than the time allowed as if the defendant had been initially placed into inpatient competency restoration. If the defendant is receiving restoration on a serious nonfelony charge, the allowable time period for inpatient competency restoration following removal from an OCRP is a maximum of 29 days, regardless of any time spent in outpatient competency restoration.

Dismissal of Charges. If a felony defendant remains incompetent to stand trial following competency restoration treatment, charges are dismissed without prejudice, and the person must be detained for up to 72 hours, excluding weekends and holidays, for evaluation under the Involuntary Treatment Act (ITA). Where a court dismisses nonfelony charges against a defendant because the person is incompetent to stand trial, the court may detain the defendant for up to 72 hours for an evaluation under the ITA or refer the defendant for evaluation by a designated crisis responder.

Trueblood Lawsuit and Timelines for Competency Services.

In *Trueblood v. the Department of Social and Health Services* (2015), a federal district court found that the state was violating the constitutional rights of in-jail defendants for excessive wait times for competency evaluation and restoration services. As a result, the 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. In 2017 the court found the state in contempt for continued noncompliance, and in 2018 the state reached a contempt settlement agreement. The settlement requires the state to take numerous actions to meet the time limits set forth by the court, and is being implemented in three phases in different parts of Washington. The creation of forensic navigators and OCRPs are components of the settlement agreement and were enacted into law in 2019.

Performance targets and maximum time limits for completion of competency evaluations and admissions for inpatient competency restorations are set forth in statute. It is a defense to an allegation that the DSHS has exceeded the maximum time limits if the reason for exceeding the time limits was outside of the DSHS's control including: lack of medical-clearance information necessary for admission to the state hospital; inability to obtain

necessary medical information that is in the custody of a third party; lack of availability or participation by counsel, jail or court personnel, interpreters, or the defendant; the DSHS does not have access to appropriate private space to conduct a jail evaluation; the defendant asserts legal rights that delay the provision of competency services; and an unusual spike in evaluation referrals or the number of defendants needing restoration services.

Summary of Amended Bill:

Outpatient Competency Restoration.

To be eligible for outpatient competency restoration, a defendant must be willing to comply with urinalysis or breathalyzer monitoring if needed. Regular urinalysis testing may be ordered by the court, rather than being required in the DSHS rules on conditions for participation in the outpatient restoration program. The limitation that a person is subject to urinalysis testing only if the person has a current substance use disorder diagnosis is removed.

For a defendant whose highest charge is a class C felony or nonviolent class B felony, the maximum time for an initial outpatient competency restoration period is 90 days. If outpatient competency restoration is terminated and the defendant is admitted to an inpatient facility, the period of inpatient treatment during the initial competency restoration period must not exceed 45 days. For a serious nonfelony offense, the 90-day cap on the time period that a defendant may spend in a combination of outpatient and inpatient competency restoration treatment is removed.

Procedures are established for the transfer of a person to inpatient competency restoration where the person has failed to comply with the conditions of outpatient competency restoration or is no longer clinically appropriate for outpatient competency restoration. The director of the OCRP must notify the Health Care Authority (HCA) and the DSHS of the need to terminate outpatient competency restoration and intent to request placement of the defendant in a facility for inpatient competency restoration. The OCRP must coordinate with the HCA and the DSHS to minimize the time between termination and admission into an inpatient facility. The DSHS must obtain a placement for the defendant within seven days of the notice of intent to terminate outpatient competency restoration. The time period for inpatient competency restoration following removal from an OCRP must be reduced by the time period spent in active treatment within the OCRP, excluding time when the defendant was absent from the program and all time from notice of termination of the outpatient competency restoration period through the defendant's admission to the facility.

The DSHS may authorize a peace officer to detain the defendant into emergency custody for transport to the inpatient competency restoration facility. If medical clearance is required before admission to the facility, the peace officer must transport the defendant to a crisis stabilization unit, evaluation and treatment facility, hospital emergency department, or triage facility for medical clearance once a bed is available at the inpatient competency restoration facility.

Competency Evaluation and Restoration Timelines.

Performance targets and maximum time limits for competency services are revised. The maximum time limit to offer admission for inpatient competency evaluation or restoration for a defendant in pretrial custody is seven days from receipt of the court order, or 14 days from signature of the court order, whichever is shorter. To complete a competency evaluation in jail or to offer admission for a defendant ordered committed for evaluation following dismissal of felony charges, the performance target is 14 days or fewer and the maximum time limit is 14 days from receipt of the court order or 21 days from signature of the court order, whichever is shorter. Language indicating that time periods run from the date the state hospital receives the court referral and charging documents and specified other information is removed.

The DSHS must provide written notice to the court when it will not be able to meet the maximum time limits for providing competency services. The DSHS must identify the reasons for the delay and provide a reasonable estimate of the time needed to complete the competency services. Good cause for an extension for additional time must be presumed absent a written response received within seven days from the court or a party.

The specified defenses to an allegation that the DSHS has exceeded maximum time limits for completion of competency services include that: additional time is needed for the defendant to no longer show active signs and symptoms of substance use impairment so that an accurate evaluation may be completed; and the defendant is medically unavailable for competency evaluation or admission for competency restoration. Lack of adequate space to conduct a competency evaluation for a defendant in pretrial custody is removed from the list of defenses.

If a person remains in jail more than 21 days after a court order to transport the person to a facility for inpatient competency restoration treatment, the DSHS must, upon the request of any party with notice to all parties, perform a competency to stand trial status check at reasonable intervals to determine if the circumstances of the person have changed such that the court should authorize an updated competency evaluation. The DSHS must provide a status update to the parties and the court.

Other.

Where charges are dismissed due to the defendant being incompetent to stand trial, the authorized period of detention for evaluation under the ITA is extended to 120 hours, excluding weekends and holidays, if the defendant has not undergone competency restoration services or has engaged in outpatient competency restoration services. This time period remains at 72 hours, excluding weekends and holidays, where the defendant engaged in inpatient competency restoration services.

Psychiatric advanced registered nurse practitioners are included in the definition of "professional person."

Where a competency evaluation is ordered for a person who may have a developmental disability, the evaluator must have access to records of the Department of Health's Developmental Disabilities Administration.

The responsibility of the DSHS for costs relating to evaluation and inpatient treatment of persons is made subject to amounts appropriated, except as otherwise provided by law. Within amounts appropriated, the HCA is responsible for costs relating to OCRPs.

The following persons and entities are immune from civil or criminal liability for performing duties relating to the decision of whether to detain a person for medical clearance or treatment if the duties were performed in good faith and without gross negligence: a public or private agency officer, superintendent, professional person in charge or his or her professional designee, or attending staff; any public official performing necessary functions; a peace officer responsible for detaining a person; or the state, a unit of local government, an evaluation and treatment facility, a secure withdrawal management and stabilization facility, or an approved substance use disorder treatment program.

Beginning November 1, 2022, the HCA must issue an annual report to the Governor and the Legislature, and make the report public, describing:

- how many individuals are being served by OCRPs and in what locations;
- the length of stay of individuals in OCRPs;
- the number of individuals who are revoked from an OCRP into inpatient treatment, and the outcomes of other individuals whose participation in an OCRP were terminated before the completion of the program; and
- for individuals revoked from an OCRP, how many days the individuals spent in outpatient competency restoration treatment and inpatient competency restoration treatment, and whether the restoration programs resulted in a finding of competent to stand trial or another outcome.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony (Civil Rights & Judiciary):

(In support) There are helpful components in the bill, including providing solid timelines and expectations for competency services. Other helpful improvements include requiring the DSHS to provide written notice to the court if they can't meet timelines, and setting out good cause exception procedures. The requirement for urinalysis monitoring creates more oversight which will help ensure that participants will comply with the outpatient restoration process.

(Opposed) There are a number of concerns with the bill in its current form. It includes a costly requirement that someone who is transferring from outpatient to inpatient restoration must automatically restart their restoration treatment days. This is an unnecessary use of valuable inpatient beds and will add to the *Trueblood* wait list. There is no scientific evidence to support the good cause exemption relating to the defendant no longer showing active signs and symptoms of substance-related impairment. A work group of stakeholders is needed to look at the system given the persistent problems that remain despite six years of court litigation and millions of dollars in court fines.

(Other) The state is not doing a good job with persons who have mental health disorders, especially those involved in the criminal system. Extreme delays in the competency system continue to be a problem. The bill as written has equal protection problems that need to be addressed. The Legislature should establish a task force to look at the laws governing the forensic system to find ways to do more to address the continued delays.

Staff Summary of Public Testimony (Appropriations):

(In support) None.

(Opposed) None.

Persons Testifying (Civil Rights & Judiciary): (In support) Karen Donohue, Superior Court Judges' Association.

(Opposed) Kimberly Mosolf, Disability Rights Washington.

(Other) Kari Reardon, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

Persons Testifying (Appropriations): None.

Persons Signed In To Testify But Not Testifying (Civil Rights & Judiciary): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.