SENATE BILL REPORT
SB 5664

As Reported by Senate Committee On:
Health & Long Term Care, January 12, 2022
Behavioral Health Subcommittee to Health & Long Term Care, January 28, 2022
Ways & Means, February 7, 2022

Title: An act relating to forensic competency restoration programs.

Brief Description: Concerning forensic competency restoration programs.

Sponsors: Senators Dhingra, Keiser and Nobles.

Brief History:
Committee Activity: Health & Long Term Care: 1/12/22 [w/oRec-BH].
Behavioral Health Subcommittee to Health & Long Term Care: 1/14/22, 1/28/22 [DPS-WM].
Ways & Means: 2/04/22, 2/07/22 [DP2S].

Brief Summary of Second Substitute Bill

- Establishes procedures for removal of a defendant from an outpatient competency restoration program (OCRP) when the program is no longer clinically appropriate.
- Requires the Department of Social and Health Services (DSHS) to provide written notice to the court when it will exceed the maximum time for providing a competency to stand trial service and an estimate of the additional time required.
- Requires a defendant to agree to urinalysis and breathalyzer monitoring to participate in an OCRP.
- Provides liability protection for peace officers and agency personnel who participate in detaining individuals for medical clearance or forensic treatment.
- Allows a party to a criminal case to request competency to stand trial

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

status check from DSHS at reasonable intervals when a defendant ordered to be admitted to a state hospital for competency services has been waiting over 21 days for state hospital admission.

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

Majority Report: That Substitute Senate Bill No. 5664 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Frockt, Chair; Wagoner, Ranking Member; Dhingra, Nobles and Warnick.

Staff: Kevin Black (786-7747)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 5664 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Capital; Robinson, Vice Chair, Operating & Revenue; Wilson, L., Ranking Member; Brown, Assistant Ranking Member, Operating; Schoesler, Assistant Ranking Member, Capital; Honeyford, Ranking Minority Member, Capital; Billig, Braun, Carlyle, Conway, Dhingra, Gildon, Hasegawa, Hunt, Keiser, Mullet, Muzzall, Pedersen, Rivers, Van De Wege, Wagoner, Warnick and Wellman.

Staff: Corban Nemeth (786-7736)

Background: Forensic Civil Commitment and Competency to Stand Trial. Forensic civil commitment is court-ordered involuntary evaluation or treatment for a mental health disorder imposed on a criminal defendant or in relation to criminal charges that have been dismissed based on incompetency to stand trial or criminal insanity. A defendant has a constitutional right to not be tried for a crime unless the defendant is competent to stand trial. Competent to stand trial means the defendant does not have a mental disorder that causes the defendant to be incapable of understanding the nature of the proceedings against them or unable to assist in their own defense.

Competency Evaluations and Competency Restoration Treatment. When the issue of competency to stand trial is raised by any party or the court, the court must stay the proceedings for a determination of competency. The court must appoint an expert or request a competency evaluation by an evaluator provided at no cost by the Department of Social and Health Services (DSHS). If the court finds following the evaluation that the defendant is incompetent to stand trial, the case must remain stayed and the court may order the defendant to undergo a period of competency restoration treatment.

Competency restoration treatment is involuntary mental health treatment for the purpose of restoring legal competency, rendering the defendant amenable to trial. A person may qualify for a period of up to 0, 29, 315, or 360 days of competency restoration treatment depending on the nature of the charges against them—nonserious nonfelony, serious nonfelony, nonviolent felony, or violent felony. Competency restoration is provided at a state hospital or other DSHS facility unless the defendant qualifies for an outpatient competency restoration program (OCRP).

To be eligible for an OCRP, a defendant must:

- be charged in a county within a *Trueblood* settlement region that employs forensic navigators;
- be recommended for an OCRP by a forensic navigator with input from the parties;
- be ordered to receive outpatient competency restoration by the judge;
- be clinically appropriate;
- be willing to adhere to medications or to receive a prescribed intramuscular injection; and
- be willing to abstain from alcohol and unprescribed drugs.

The *Trueblood* Lawsuit. In the case of *Trueblood v. DSHS*, Washington State was found liable in 2015 for imposing excessive wait times for competency to stand trial services. The federal court ordered Washington to provide timely competency to stand trial services to in-custody defendants, and in 2017 found the state in contempt of court for continued noncompliance. The state was assessed over $83 million in fines before reaching a settlement agreement with the plaintiffs at the end of 2018. During the settlement period, which is ongoing, contempt fines continue to accrue, with most fines held in suspension. The creation of OCRPs and employment of forensic navigators were stipulated terms in the *Trueblood* settlement agreement and enshrined in law in 2019. The most recent court monitor report from December 2021 indicates that the state is meeting the court's 14-day maximum time limit on average for performance of a competency evaluation in jail, but remains out-of-compliance with the 14-day maximum time limit for transporting a defendant from jail to a competency restoration facility, averaging about 45 days waiting time per defendant, on a volume of about 113 competency restoration orders per month.

Summary of Bill (Second Substitute): When outpatient competency restoration is no longer appropriate for a defendant who has been ordered to receive it, the director of the OCRP must notify the Health Care Authority (HCA) of the need to terminate the program and intent to request placement of the defendant in an inpatient competency restoration program. The OCRP must coordinate with HCA and DSHS to minimize the time between termination of the OCRP and acceptance into an inpatient facility. DSHS must place the defendant in an inpatient facility within seven days of notice of intent to terminate the OCRP. DSHS may cause a peace officer to take the defendant into emergency custody for transport for medical clearance at a crisis stabilization unit, evaluation and treatment facility, emergency department, or triage facility and thereafter to the inpatient treatment

facility. A competency evaluator must be given access to records held by the Developmental Disabilities Association relating to a defendant ordered to receive a competency evaluation who is identified as having a developmental disability.

DSHS must provide written notice to the court when it will exceed the maximum time limits for a service related to competency to stand trial, identify the reasons for the delay, and provide a reasonable estimate of the time needed to complete the evaluation. Good cause for an extension must be presumed absent a written response from the court or a party received within seven days.

A defendant must agree to comply with urinalysis or breathalyzer monitoring if needed in order to be eligible for an OCRP. A 90-day cap on the time a nonfelony defendant may spend in a combination of outpatient and inpatient competency restoration programs is removed.

The time for a state hospital to file a civil commitment petition for a defendant detained after dismissal of felony charges based on incompetency to stand trial is increased from 72 hours excluding weekends and holidays to 120 hours if the defendant has not undergone competency restoration services, and up to 72 hours if the defendant engaged in competency restoration services, excluding weekends and holidays.

A party to the criminal case may request a competency to stand trial status check at reasonable intervals if a defendant remains in jail 21 days after a court order to transport the defendant to a DSHS facility for competency restoration treatment, to determine if the circumstances of the person have changed such that the court should order a new competency evaluation.

Liability protection is created for peace officers and other public and private agency officials for actions or decisions taken related to the decision to detain a person for medical clearance or treatment under forensic competency statutes, provided their actions are taken in good faith and without gross negligence.

The need for additional time for the defendant to no longer show active signs and symptoms of impairment related to substance use so that an accurate evaluation may be completed, and medical unavailability of the defendant for competency services are recognized as acceptable reasons for exceeding the maximum time limit for completion of a competency evaluation.

DSHS' cost responsibility for costs related to competency to stand trial services is limited to appropriated amounts. Responsibility for OCRP costs is assigned to HCA.

HCA is required to report annually to the Governor and Legislature starting November 1, 2022, describing how many defendants receive services from and are revoked from OCRPs, their length of stay, and the frequency of successful competency restorations.

Language changes clarify that a defendant is not committed to the custody of DSHS when the court orders the defendant to receive outpatient competency restoration treatment.

Nonsubstantive changes are made to competency to stand trial statutes to simplify their language and structure.

EFFECT OF CHANGES MADE BY WAYS & MEANS COMMITTEE (Second Substitute):

- Changes the time for filing a civil commitment petition after a defendant's admission to a facility following dismissal of criminal charges based on incompetency to stand trial to up to 120 hours if the defendant has not undergone competency restoration services, and up to 72 hours if the defendant engaged in competency restoration services, exclusive of weekends and holidays.
- Requires HCA instead of DSHS to provide an annual report related to OCRPs.

EFFECT OF CHANGES MADE BY BEHAVIORAL HEALTH SUBCOMMITTEE TO HEALTH & LONG TERM CARE COMMITTEE (First Substitute):

- Recognizes medical unavailability of the defendant as an acceptable reason for exceeding the maximum time limit for competency services.
- Removes a maximum time limit of 90 days for nonfelony competency restoration when a defendant receives restoration services in both an outpatient and inpatient setting.
- Clarifies that the purpose of a competency to stand trial status check is to determine if the circumstances of the defendant have changed such that the court should authorize an updated competency evaluation.
- Provides liability protection for peace officers and agency personnel related to detaining a person for medical clearance or forensic treatment, provided those duties were performed in good faith and without gross negligence.
- Requires the Department of Social and Health Services to provide an annual report describing overall participation in OCRPs, how many defendants were revoked from OCRPs to inpatient programs, the length of time spent in outpatient and inpatient programs, and whether the defendants' competency to stand trial was restored.

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 bill is inspired by the work session this subcommittee did last September on the roll out of the OCRP. I have received feedback and am working on amendments. We need to provide appropriate levels of care for people when they need them, which is why we need the OCRP. Combining the treatment system with the criminal justice system is an uneasy marriage. Some are uncomfortable with the concept of urinalysis, but the point of the treatment is to restore individuals to continue in a criminal case, and prosecutors and judges have to feel comfortable. We should avoid language that results in state cases being dismissed.

CON: While we support aspects of the bill, we are concerned about the procedures for removal from the OCRP. We caution against changes that could discourage participation in OCRPs or change the nature of the programs. Automatically restarting restoration treatment days is a costly and punitive requirement. We are concerned that defendants participating in OCRPs will be detained for extended periods of time in crowded treatment facilities such as emergency rooms under dubious legal authority. The current statute allows breathalyzer and urinalysis for defendants who have a substance use disorder diagnosis; this was carefully negotiated and should not be expanded. We support clarifying language for obtaining a good cause extension, but oppose extensions based on the defendant showing signs of substance use impairment.

OTHER: The language relating to removal from an OCRP seems to diminish the role of the forensic navigator and transfer their authority to the director of the OCRP. We prefer to have the OCRP notify HCA and the forensic navigator of concerns and request a case consultation. The final say on removal should remain with HCA. Please allow HCA to make the decision in conjunction with DSHS on a case-by-case basis whether to count time spent in an OCRP towards completion of an inpatient program. There are due process issues with not giving defendants credit for the time spent in OCRP. The state has done nothing in response to the *Trueblood* lawsuit and it's just getting worse. We are failing as a state and it's very frustrating. There is a wait list of 232 defendants in custody waiting admission for competency restoration, and 225 defendants waiting an ORCP. Some have waited more than 1000 days for an OCRP. We shouldn't do restoration on every single felony, we need to get people into the civil system. There are 93 nonfelony defendants waiting for competency restoration, 45 of whom in custody.

Persons Testifying (Behavioral Health Subcommittee to Health & Long Term Care): PRO: Senator Manka Dhingra, Prime Sponsor.

CON: Kimberly Mosolf, Disability Rights Washington.

OTHER: Kari Reardon, Washington Defender Association/Washington Association of Criminal Defense Lawyers; Teesha Kirschbaum, Health Care Authority.

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.* OTHER: DSHS is currently failing to provide competency restoration services. DSHS has paid substantial sanctions to the federal court for noncompliance over the past few years. This bill is not the answer that the state needs for forensic competency restoration. The state has continued to violate *Trueblood* mandates for competency evaluation and restoration. Denying individuals credit for the time spent in OCRP presents due process issues. The increase to holds for involuntary treatment to 180 hours is not appropriate in all circumstances.

Persons Testifying (Ways & Means): OTHER: Kari Reardon, WDA/WACDL.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.