

SENATE BILL REPORT

E2SSB 5440

As Amended by House, April 11, 2023

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.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Dhingra, Nguyen, Saldaña, Valdez, Van De Wege and Wilson, C.; by request of Office of the Governor).

Brief History:

Committee Activity: Law & Justice: 2/02/23, 2/16/23 [DPS-WM, DNP].

Ways & Means: 2/21/23, 2/23/23 [DP2S, w/oRec].

Floor Activity: Passed Senate: 3/2/23, 44-5.

Passed House: 4/11/23, 61-34.

Brief Summary of Engrossed Second Substitute Bill

- Requires a court to determine if there is genuine doubt as to competency before ordering a competency evaluation.
- Requires jails to allow access by clinical intervention specialists to provide direct services and consultation for defendants waiting for competency to stand trial services.
- Prohibits jails from substituting or discontinuing an individual's medication for a serious mental health disorder when the individual is medically stable on the medication.
- Requires courts to dismiss nonfelony charges and refer the defendant for services recommended in a diversion program recommended by a

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forensic navigator if the court finds the defendant is amenable to the services and can safely receive services in the community.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5440 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Padden, Ranking Member; Kuderer, Pedersen, Salomon, Valdez and Wagoner.

Minority Report: Do not pass.

Signed by Senators McCune, Torres and Wilson, L..

Staff: Kevin Black (786-7747)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Second Substitute Senate Bill No. 5440 be substituted therefor, and the second substitute bill do pass.

Signed by Senators Rolfes, Chair; Robinson, Vice Chair, Operating & Revenue; Rivers, Assistant Ranking Member, Capital; Billig, Conway, Dhingra, Hasegawa, Hunt, Keiser, Muzzall, Nguyen, Pedersen, Saldaña, Wagoner and Wellman.

Minority Report: That it be referred without recommendation.

Signed by Senators Mullet, Vice Chair, Capital; Wilson, L., Ranking Member, Operating; Gildon, Assistant Ranking Member, Operating; Schoesler, Ranking Member, Capital; Warnick, Assistant Ranking Member, Capital; Boehnke, Braun, Torres and Van De Wege.

Staff: Monica Fontaine (786-7341)

Background: Competency to Stand Trial. A defendant has a constitutional right to not be tried for a crime if the defendant is incompetent to stand trial. Incompetent to stand trial means the defendant has 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 competency evaluation. The court must appoint an expert or request a competency evaluation be performed by an evaluator employed by the Department of Social and Health Services (DSHS). After the evaluation if the court finds that the defendant is

incompetent to stand trial, the case must remain stayed and the court may order the defendant to undergo competency restoration treatment.

Competency restoration treatment is involuntary mental health treatment directed at restoring legal competency to render the defendant amenable to face criminal charges. A defendant may qualify for variable periods of competency restoration treatment depending on the nature of the defendant's charges—nonserious nonfelony, serious nonfelony, nonviolent felony, or violent felony. Competency restoration is provided by DSHS at a state hospital or other 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.

Forensic Navigators. A forensic navigator is an impartial agent employed by DSHS to assist individuals referred for a competency evaluation with accessing services related to diversion and outpatient competency restoration. The forensic navigator helps defendants who are ordered to OCRPs with attending appointments, classes, and other services. Only certain counties have received state funding for forensic navigators.

The *Trueblood* Lawsuit. In 2015, Washington State was found liable in the case of *Trueblood v. DSHS* for imposing excessive wait times on in-custody criminal defendants for competency to stand trial services. The federal district court ordered Washington to provide timely competency to stand trial services, 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 some fines being paid and other fines being held in suspension. The establishment of OCRPs and forensic navigators was stipulated in the *Trueblood* settlement, and enshrined in law in 2019. The state remains out of compliance with the timelines for competency services required by the *Trueblood* settlement.

Summary of Engrossed Second Substitute Bill: Before ordering a competency evaluation for a defendant, the court must first make a determination whether sufficient facts have been provided to form a genuine doubt as to competency, based upon information provided by counsel, judicial colloquy, or direct observation of the defendant.

A jail or juvenile detention facility may not discontinue prescribing or substitute an antipsychotic, antidepressant, antiepileptic, or other drug prescribed to an individual to treat a serious mental illness by a state hospital, other state facility, behavioral health agency, or medical provider if the individual is medically stable on the drug. This requirement includes situations in which the individual returns to the jail or juvenile detention facility directly after undergoing treatment in a state hospital, behavioral health agency, outpatient competency restoration program, or prison. The jail or juvenile detention facility may substitute a generic version of a name brand drug if the generic version is chemically identical to the name brand drug, or may substitute a drug if the drug cannot be prescribed for reasons of drug recall or removal from the market, or medical evidence indicating no therapeutic effect of the drug.

Jails must allow clinical intervention specialists to have access to defendants who are referred to receive competency services and to all records relating to the health and conduct of these defendants while incarcerated. Clinical intervention specialists must be licensed professionals with prescribing authority who are employed or contracted by DSHS. Clinical intervention specialists must support jail health services in providing direct services and enhanced oversight and monitoring of the behavioral health status of defendants. The clinical intervention specialist must notify DSHS if a defendant appears to have stabilized in their behavioral health such that a new competency evaluation is appropriate to reassess the defendant's need for competency restoration treatment.

If the court orders a competency evaluation for a defendant who is charged with a serious traffic offense, or a felony version of a serious traffic offense, the prosecutor may make a motion to modify the defendant's conditions of release to include a condition prohibiting the defendant from driving during the pendency of the evaluation. If the court finds the defendant incompetent, the court may order revocation of the defendant's driver's license for one year. The court must order reinstatement of the license if it finds the defendant's competency has been restored. The court may vacate the revocation order before the end of one year on good cause upon the petition of the defendant.

A competency evaluator must refer a defendant whom the evaluator finds to be not competent due to intellectual or developmental disability to the Developmental Disabilities Administration for review for eligibility for services. DSHS must provide information about the availability of services to the forensic navigator.

DSHS must submit a report to the court when a competency evaluator is not able to complete an evaluation after two attempts at scheduling with the defendant, and include a date and time for an evaluation at least four weeks later. The court must provide notice of the date and time to the defendant and must issue a warrant for the defendant and recall the order for competency evaluation if the defendant does not appear.

The court must order a defendant who is incompetent to stand trial and referred for competency restoration or civil conversion after dismissal of criminal charges to be

committed to DSHS for placement in a facility operated or contracted by DSHS instead of to a state hospital.

A forensic navigator must assess an individual who is referred for competency evaluation for appropriateness for assisted outpatient treatment. The forensic navigator must provide updates to the court and parties concerning the status of an individual's participation in diversion services and be responsive to inquires from the parties. A forensic navigator who is assisting an individual who is an American Indian or Alaska Native must notify and coordinate with any tribal or Indian health care provider services used by the individual as soon as possible. The forensic navigator must conduct regular classes on the educational components of competency to stand trial related to having a factual and rational understanding of courtroom roles and procedures.

An order for inpatient competency restoration must specify whether the court authorizes DSHS to change the defendant's placement to a step-down facility or outpatient competency restoration program if DSHS determines that such placement is clinically appropriate given the defendant's progress in restoration services.

In counties with a forensic navigator program, a forensic navigator must meet, interview, and observe all defendants whose most serious charge is a nonfelony if the defendant has had two or more competency evaluations in the preceding 24 months on separate charges. The forensic navigator must determine the defendant's willingness to engage with services, and present a recommendation for a diversion program to the defense counsel and prosecuting attorney. If the parties agree to the plan, the prosecutor must request dismissal of the charges. If not, the defendant may move for a court order dismissing the criminal charges without prejudice and referring the defendant to the services described in the diversion program. The court must grant the motion if it finds by a preponderance of the evidence that the defendant is amenable to the services described in the diversion program, and can safely receive services in the community. Individuals who receive dismissal of charges and referral to services described in a diversion program must have a forensic navigator assigned to them for up to six months. The forensic navigator must provide monthly status updates to the court and parties regarding the individual's status in the diversion program.

A rebuttable presumption is created that there is no compelling state interest in ordering competency restoration treatment for a nonfelony defendant if the defendant is subject to an current order for involuntary behavioral health treatment, or proceedings for involuntary treatment against the defendant have been initiated under the Involuntary Treatment Act.

If the defendant is charged with a serious nonfelony, the court finds there is a compelling state interest in pursuing competency restoration, and a forensic navigator recommends outpatient competency restoration from an available program, the court must order outpatient competency restoration, unless the court finds that outpatient competency restoration is inappropriate considering the health and safety of the defendant and risks to

public safety.

Criminal trespass in the first and second degree are excluded from the definition of serious nonfelony offenses for the purpose of nonfelony competency restoration and involuntary medication.

Subject to funding, DSHS must develop a program for individuals who have been involved with the criminal justice system and who are diagnosed with an intellectual or developmental disability or dementia, which involves wraparound services and housing supports appropriate to the needs of the individual. If a person with this diagnosis is committed to the custody of DSHS after dismissal of felony charges due to incompetency to stand trial, DSHS must place the person in the program either directly from the jail or as soon thereafter as may be practicable, without maintaining the person at an inpatient facility for longer than is clinically necessary.

DSHS must coordinate with cities, counties, hospitals, and other private and public entities to identify locations that may be commissioned or renovated for use in treating clients committed to DSHS for competency evaluation, competency restoration, civil conversion, or treatment following acquittal by reason of insanity.

DSHS must collect data so that information can be retrieved based on unique individuals, their complete Washington State criminal history, and referrals for forensic services.

Subject to funding, HCA must require the programs it contracts with to increase compensation for staff in outpatient competency restoration programs to provide compensation at competitive levels to improve recruitment and allow for the full implementation of outpatient competency restoration programs.

An outpatient competency restoration program must include access to a prescriber.

A requirement is removed for a developmental disabilities professional to have three years of experience directly treating or working with persons with developmental disabilities.

Appropriation: The bill contains a section or sections to limit implementation to the availability of amounts appropriated for that specific purpose.

Fiscal Note: Available.

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

Effective Date: Sections 6-8 of the act are subject to an emergency clause and take effect immediately.

Staff Summary of Public Testimony on Proposed Substitute (Law & Justice): *The committee recommended a different version of the bill than what was heard.* PRO: We are in a dire situation, worse than it's been in the last 20 years. We need to come together to figure out how to address it. I am encouraged new resources are coming online. If we can be all hands on deck for the next five years, we will be in a good place when long-term investments come online. We need to pass a bill that will make no one happy; but having defendants wait in jail nine months to a year is unconscionable. Jail-based restoration is not ideal, but if they are waiting nine months in custody it is better for them to be getting restoration services during that time. We need to be real—the status quo will not work. Adequate resources are needed to prevent failure. The state hospitals are beyond capacity. Shifting lower level cases to the community would go a long way to help. Mixing civil patients in forensic wards is not beneficial. Civil conversion timelines are too short. State hospitals have significant staffing issues.

CON: The vision of the original bill is to encourage and push the use of diversion options for people with behavioral health needs in the criminal justice system. The sub does not go far enough. The competency system is stretched beyond its capacity and does not meet the rights or needs of people with behavioral health conditions. Competency restoration is not treatment designed for the path to recovery, but to face criminal charges. We must emphasize outpatient and diversion services and reduce reliance on competency services. Inpatient competency referrals have ballooned by 140%. Hundreds are suffering and that must change. Without a fundamental shift in the way we handle criminal justice referrals for people with behavioral health needs, the only option will be massive expenditures for poor results. The bill does not require or fund counties to procure jail-based competency units or to build them. By implying that this option is available, it creates liability for local governments. Who will pay for this? Counties are concerned about their ability to perform in the face of workforce shortages. Competency restoration should not be in jails. The *Trueblood* plaintiffs strongly oppose jail-based restoration which violates court orders. We cannot negotiate until this idea is removed. Jails are not designed to be therapeutic environments. Prosecutors stand ready to work on solutions. We need to address root causes and fund the beds and services that are required. This is a constitutional and humanitarian crisis. The state should immediately invest in community treatment facilities. We need to stop restoration for nonviolent felony offenses and convert these cases to civil detentions. Fund pretrial home detention as an alternative to jail. Having behavioral health needs is not a crime and we should not use jails to house people who need competency services. Smaller counties don't have the space to segregate forensic patients from the general population and won't be able to hire medical staff. Too many defendants are currently being found incompetent. We should return to inpatient evaluations to make more reliable competency determinations.

OTHER: Jail-based restoration may be considered as one of many options, but many questions are raised. Counties do not have the funds to service these patients without state support. We support creative strategies that open doors to person-centered care and look forward to discussions. Shuttered hospitals and skilled nursing facilities should be used. The

state must stop closing beds before replacement beds are open. The system now is both inhumane and expensive. We need housing and stability to get basic needs met, not to spend millions to arrest someone for the fifteenth time. You can't engage someone in recovery while they are in a jail.

Persons Testifying (Law & Justice): PRO: Senator Manka Dhingra, Prime Sponsor; Mike Yestramski, Washington Federation of State Employees; Anne Tarlton, Washington Federation of State Employees.

CON: Kimberly Mosolf, Disability Rights Washington; Juliana Roe, Washington State Association of Counties; Ryan Mello, Washington State Association of Counties and Pierce County; Jason Cummings, Snohomish County Prosecuting Attorney; Jason Schwarz, Washington Defender Association; Gordon Hill, King County Department of Public Defense; James McMahan, Washington Association of Sheriffs & Police Chiefs; Greg Banks, Island County Prosecutor; Amber Leaders, Office of the Governor.

OTHER: Melanie Smith, NAMI Washington; David Hackett, King County; Kelly Rider, King County Department of Community and Human Services.

Persons Signed In To Testify But Not Testifying (Law & Justice): 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: These are some of the worst wait times for felony restorations. This bill allows courts to refer individuals to step-down facilities. The Legislature has invested significant funds in response to the Trueblood Contempt Settlement Agreement, and has found that changing capacity alone is not going to resolve the issues at hand. There has been a 145% increase in the number of cases to the state hospitals. This bill focuses on earlier interventions for individuals and providing mental health and wraparound services.

CON: This bill will not improve wait times. We need to focus on reducing cases going to the hospitals for competency restoration. Jails are not the setting to conduct competency restorations because it is not therapeutic enough. Jails cannot substitute for like drugs that are available to them, which can result in a large expense for jails. Cities will be responsible for costs of the medical treatment plans. This bill also allows judges to use their opinion in determining whether the defendant is competent.

OTHER: Constituents appreciate the DSHS coordination in locating additional facilities to provide restoration and step-down services. King county is unable to implement the crisis intervention units as detailed in the bill due to understaffing of corrections officers. The language in statute directs civil conversion patients to be committed to state hospitals, so striking the language "state hospitals" would commit patients to DSHS but does not specify which facilities. Clarifying language should be added to direct civil conversion patients to DSHS facilities rather than the emergency department.

Persons Testifying (Ways & Means): PRO: Senator Manka Dhingra, Prime Sponsor; Amber Leaders, Governor's Office.

CON: Lindsey Hueer, Association of Washington Cities; Kari Reardon, WDA/WACDL; Jason Schwarz, WDA/WACDL; Taylor Gardner, WA Assn of Sheriffs and Police Chiefs.

OTHER: Juliana Roe, Washington State Association of Counties; Katie Kolan, Washington State Hospital Association (WSHA); Michael White, King County.

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

EFFECT OF HOUSE AMENDMENT(S):

- Prohibits a court from referring a defendant charged with a qualifying class C felony for competency restoration without first considering all available and appropriate alternatives including diversion and dismissal, involuntary commitment, and outpatient competency restoration.
- Limits defendants charged with a qualifying class C felony to one 45-day period of competency restoration.
- Increases the first competency restoration period from 45 to 90 days for defendants charged with certain nonviolent class C felonies which are not defined as qualifying class C felonies.
- Limits defendants referred for competency restoration treatment who are subject to an involuntary medication order to one period of competency restoration treatment.
- Creates a rebuttable presumption that there is no compelling state interest in competency restoration for any defendant subject to a behavioral health involuntary commitment order or to pending behavioral health involuntary commitment proceedings.
- Requires court to find that sufficient facts have been provided to form a genuine doubt as to competency if defense counsel files a declaration stating they have reason to believe that a competency evaluation is necessary and states the basis on which the defendant is believed to be incompetent without further detail required and without any requirement for waiver of attorney-client privilege.
- Allows a competency evaluator to access records of long-term services or supports and Aging and Long-Term Support Administration records of a defendant.
- Delays the effect of amendments allowing a court to revoke the driver's license of a defendant who is charged with a serious traffic offense and found incompetent to stand trial until October 1, 2023.
- Removes direction to court to specify whether it grants DSHS authority to transfer a defendant committed for inpatient competency restoration to a step-down facility or outpatient competency restoration facility.
- Expands direction to forensic navigators to require them to meet with defendants charged with qualifying class C felonies who have two or more prior competency evaluations in the preceding 24 months.
- Allows courts to impose a 30-day trial diversion period for defendants charged with qualifying class C felonies over the objection of the prosecutor and dismiss the case

without prejudice with a referral to diversion if the defendant meaningfully engages in the diversion program within the 30-day trial period.

- Requires DSHS to reimburse jails and juvenile detention facilities for the cost of continuing a defendant's existing drug therapy to treat a serious mental illness while in the jail if the jail or juvenile detention facility does not otherwise have the drugs available.
- Allows courts to refer defendants who are found to be unlikely to regain competency due to an intellectual or developmental disability, dementia, or traumatic brain injury to competency restoration treatment if they are charged with a violent offense or sex offense.
- Requires DSHS to develop a process to connect defendants who are found incompetent to stand trial with available services from the Developmental Disabilities Administration before serving them in the program developed under this act.
- Creates a pilot program at the University of Washington to provide short-term stabilization and transition support to individuals found incompetent to stand trial due to an intellectual or developmental disability.
- Creates a pilot program at HCA to place behavioral health crisis system regional coordinators in three behavioral health administrative services organizations to support cross-system understanding of resources available for individuals who are in custody and alleged to be incompetent to stand trial.