HOUSE BILL REPORT
ESB 6610

As Passed House - Amended:
March 2, 2010

Title: An act relating to improving procedures relating to the commitment of persons found not guilty by reason of insanity.

Brief Description: Improving procedures relating to the commitment of persons found not guilty by reason of insanity.

Sponsors: Senators Hargrove and McAuliffe; by request of Governor Gregoire.

Brief History:
Committee Activity:
Human Services: 2/18/10, 2/22/10 [DPA];
Health & Human Services Appropriations: 2/25/10 [DPA(HS)].
Floor Activity:
Passed House - Amended: 3/2/10, 97-0.

Brief Summary of Engrossed Bill
(As Amended by House)

- Permits the Secretary of the Department of Social and Health Services (Secretary) to make an application to the court for the conditional release of a person committed to a state hospital facility in instances where the person has not made such application on his or her own behalf, and requires the Secretary to provide notice to the person and his or her counsel.
- Permits the Secretary to petition the court for the release of a person committed to a state hospital facility where reasonable grounds for such release exist and the person has not made such petition on his or her own behalf, and requires the Secretary to provide notice to the person and his or her counsel.
- Requires a community corrections officer to notify the Secretary if a person on conditional release and ordered to report to the community corrections officer is not in compliance with the terms of the conditional release.
- Requires medical providers for persons on conditional release to report changes in mental health condition.

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.

- Permits the court to deny a petition for release where the court finds that the petitioner suffers from a mental disease that is in remission.
- Requires the Department of Social and Health Services to review models of the Oregon and Virginia review boards regarding persons who have been found guilty but mentally ill or not guilty by reason of insanity and report to the Legislature regarding rates of recidivism, treatment outcomes, and the costs of each model.
- Requires the Washington State Institute for Public Policy, in collaboration with the Department of Social and Health Services, to search for a validated mental health assessment tool or a combination of tools for competency evaluations and risk level assessments and for the development of recommendations regarding conditional release.

HOUSE COMMITTEE ON HUMAN SERVICES

Majority Report: Do pass as amended. Signed by 8 members: Representatives Dickerson, Chair; Orwall, Vice Chair; Dammeier, Ranking Minority Member; Darneille, Green, Herrera, O'Brien and Walsh.

Staff: Linda Merelle (786-7092).

HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Human Services. Signed by 13 members: Representatives Pettigrew, Chair; Seaquist, Vice Chair; Schmick, Ranking Minority Member; Alexander, Assistant Ranking Minority Member; Appleton, Cody, Dickerson, Fagan, Miloscia, Morrell, O'Brien, Roberts and Wood.

Minority Report: Do not pass. Signed by 2 members: Representatives Johnson and Walsh.

Staff: Carma Matti-Jackson (786-7140).

Background:

Persons Found Not Guilty by Reason of Insanity.

A defendant is not guilty by reason of insanity (NGRI) if a judge or jury finds that at the time of the commission of the offense, as a result of a mental disease or defect, the mind of the defendant was affected to the extent that the defendant was unable to perceive the nature and quality of the act with which the defendant is charged, or the defendant was unable to tell right from wrong with respect to the particular act charged. A defendant who is found NGRI may be committed for treatment at one of Washington's two state hospitals if a judge or jury finds that the defendant presents a substantial danger to other persons or a substantial danger of committing criminal acts jeopardizing public safety or security. The term of commitment

may not exceed the maximum sentence for the offense for which the defendant was acquitted by reason of insanity.

A defendant is not competent to stand trial when, as a result of a mental disease or defect, the defendant lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense.

There are currently 186 persons found NGRI confined in the state hospitals: 117 at Western State Hospital, and 69 at Eastern State Hospital. Approximately 27 percent of these individuals were found NGRI for a homicide offense, 34 percent for a combination of offenses including some degree of assault, and the remainder for other offenses. According to the Division of Behavioral Health and Recovery (DBHR), an average of 20 new defendants are found NGRI each year. Data from DBHR indicates that an average of 16 to 24 persons found NGRI per year are granted a conditional release or final release from custody.

Conditional Release.

A person found NGRI may not be released from the state hospital before the expiration of the person's term of commitment without leave of the superior court in the county in which the person was committed. A person found NGRI may petition for conditional release or final release once every six months. The Department of Social and Health Services (DSHS) must submit this petition to the court with its recommendation concerning the release. The court must then determine whether the patient may be released conditionally without substantial danger to other persons, or substantial likelihood of committing criminal acts jeopardizing public safety or security. The court may only reject the recommendation of DSHS based on substantial evidence.

Release.

A committed or conditionally released person may apply for full release from a state hospital. The Secretary of the DSHS must determine whether reasonable grounds exist for release. If the Secretary approves the release, he or she can authorize the person to petition the court for release.

Summary of Amended Bill:

Risk Assessment Tools.

The Washington State Institute for Public Policy (WSIPP) will, in collaboration with the Department of Social and Health Services (DSHS), and other applicable entities, search for a validated mental health assessment tool or combination of tools: (1) for individuals performing competency and risk level assessments for persons for whom a court has ordered a competency evaluation, ordered competency restored, or for whom there has been a finding of not guilty by reason of insanity; and (2) for individuals developing recommendations to courts regarding conditional release. The authority under this provision of the act expires on June 30, 2011.

Authority to Recommend Conditional Release.

The Secretary of the DSHS may request that a person be conditionally released if he or she reasonably believes that such release is appropriate. The Secretary may do so after reviewing and considering the reports of experts resulting from periodic examinations conducted during the person's commitment. The Secretary's recommendation must include any proposed terms and conditions. If the Secretary makes such a request, he or she must provide notice to the person and his or her counsel.

Supervision of Persons on Conditional Release.

If an order of conditional release includes a requirement for the committed person to report to a community corrections officer, the community corrections officer must notify the Secretary if the person is not in compliance with the terms of the conditional release.

For persons who have received court approval for conditional release, the Secretary or his or her designee, must supervise the person's compliance with the court-ordered conditions of release. The level of supervision must correspond with the level of the person's public safety risk. The Secretary will coordinate with any treatment providers, Department of Corrections (DOC) staff, and local law enforcement, as appropriate.

Where a committed person, as a condition of conditional release, must report to a physician or other health practitioner for medication or treatment, the physician or health practitioner must immediately report any change in the mental health condition of the person that renders him or her a potential risk to the public. The report must be made to the court, prosecuting attorney, and the Secretary of the Department of Social and Health Services.

Where a committed person or a person on conditional release has petitioned the court for release and the court finds that the petitioner suffers from a mental disease that is in remission, the court may deny release, place a committed person on conditional release, or continue a person on conditional release.

If an order of conditional release includes a requirement for the committed person to report to a community corrections officer, the community corrections officer must notify the Secretary if the person is not in compliance with the terms of the conditional release.

For persons who have received court approval for conditional release, the Secretary or his or her designee must supervise the person's compliance with the court-ordered conditions of release. The level of supervision must correspond with the level of the person's public safety risk. The Secretary will coordinate with any treatment providers, Department of Corrections (DOC) staff, and local law enforcement, as appropriate.

Authority to Petition for Release.

The Secretary, in cases where a person has not made an application for release, may petition the court for release where she or he believes that reasonable grounds exist for release. Such petition to the court may be made after the Secretary's consideration of reports and

evaluations provided by professionals familiar with the case. The Secretary, upon filing a petition, must provide notice to the person and his or her counsel.

Models for Review Boards.

The Research and Data Analysis Division of the DSHS must review the models for review boards in Oregon and Virginia regarding individuals who have been found guilty but mentally ill or NGRI. The DSHS must examine rates of recidivism, treatment outcomes, and costs of each model. The DSHS must report to the Legislature by December 15, 2010.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on February 20, 2010.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony (Human Services):

(In support) This bill is the result of collaborations between many groups. It provides an independent mechanism for monitoring the progress of a person. It provides an independent review of public safety and individual treatment recommendations from the person's hospital treatment team to the panel. It provides an independent mechanism for monitoring patients' adjustment to community and conditional release, if those privileges are granted. It provides the hospital and clinical staff with a mechanism for peer review that currently does not exist in Washington's system. Over time, we hope this will develop a nexus of information back to the administrative and clinical staff and that it will provide education in conjunction with knowledge bases in the academic universities. The provisions that allow the Secretary of the DSHS to transfer a person, with continued mental health treatment, under the jurisdiction of the Secretary to the DOC for people who are a physical risk to the staff and patients of the state hospital, as well as a security risk beyond the capacity of a forensics program, is a critical hybrid construction that is important for the future. This bill addresses concerns around the eloped-patient incident in September 2009. A fundamental breakdown of the care delivery system could be thought of as a bad outcome in a surgery. The way that contemporary medicine looks at safety and bad outcomes is to look very closely at the key determinants that are important in determining the hoped-for outcome. If there is a bad outcome, it is, more likely than not, because there has been some departure from the optimal execution of those key determinants. The greater the reduction in variability, the better. This bill adopts a safety approach like the airlines might use. This bill retains many of the elements that were in the Governor's original proposal.

(Opposed) Had procedures been followed, the incident of September 2009 would not have happened. The new panel created in this bill would create a significant bottleneck in the process of integrating patients back into the community. The provision in the bill which allows the Secretary to transfer mentally ill patients to the DOC in their unfettered discretion with no standards whatsoever is unconstitutional and unconscionable punishment and is inconsistent with Washington's treatment of the mentally ill, including those found NGRI. It would replace treatment with punishment. It eviscerates the distinction between those found

NGRI and those who have been convicted of a crime and sent to prison. It also violates due process because there are no standards to guide the DSHS in determining who is a safety risk. There is no opportunity for hearings, there is no impartial decision-maker such as a judge, and no right to appeal. If there is a legitimate concern, hospital security should be increased rather than sending persons who have been found not guilty to prison. It is unwise to adopt legislation specifically aimed at one person, particularly since these provisions would have much broader impact. The special offender unit in the DOC is not comparable to a state hospital. The standard of care in a prison is different for medical treatment and mental health treatment. It is governed by the Eighth Amendment to the United States Constitution which is cruel and unusual punishment. The standard that has to be met in a prison is one of "deliberate indifference" to medical and mental health care needs. The fiscal note does not reflect costs of care when a patient is transferred to the DOC. The cost estimated by the DOC for the care of these offenders is insufficient. In the September 2009 incident, policy was not followed. A whole new layer of administration to address that may not be necessary when what really needs to be done is to follow policy or revise the policy. We do not want a system that indefinitely holds people.

Staff Summary of Public Testimony (Health & Human Services Appropriations):

(In support) The state has professionals who do these assessments now, but each individual uses their best professional judgment. There is anecdotal information that some people who are seeking a "not-guilty-by-reason-of-insanity" verdict, might be looking for the doctor that would give them the most favorable outcomes that they want. The review for an assessment tool will look at what other states are doing to see if there are some best practices that offer consistent results and will ensure that our state is using the best tools that are available. This bill will require the DSHS to look at supervision practices that are currently being used and to come up with consistent best practices that will align the level of supervision in relation to the individual's assessed level of risk. The authority the bill gives the DSHS to petition for discharge is not related to one particular case. There are a number of incidences where it would be appropriate for the state to have this power, such as in the case of a split judgment where if released the individual might go to prison. There are also situations where someone has been at the hospital for a very long time, is used to the hospital and is ready for discharge but is fearful about it. The hospital is not supposed to be a long term living situation. It is a place where you are supposed to get rehabilitated and ready to go back to community living.

(Opposed) This bill is aimed at two particular cases. There is already policy in place to deal with the walk away at the state fair so the state does not need to incur new costs and put new mental health tools in place. This bill is really about the state not knowing what to do with the Zamora case and the state wanting to involuntarily discharge him back into the Department of Corrections. If someone is committed to a psychiatric hospital involuntarily, it is not a place someone would want to stay past the time that they would need to get well. Giving the state power to petition for discharge when someone does not think they are ready is not good policy. There will be costs for experts that would need to be hired to handle the case through the court system. The cost that is not quantified is the state's liability. If someone does not petition for their own discharge and the state petitions instead for that person's discharge, if some tragic accident happens the state would have a great deal of liability there.

Persons Testifying (Human Services): (In support) Richard Kellogg, Department of Social and Health Services; Richard Veith, State Psychiatric Hospital Safety Review Panel; and Kari Burrell, Office of the Governor.

(Opposed) Greg Davis, Washington Federation of State Employees; C. Wesley Richards, Washington Defenders Association and Washington Association of Criminal Defense Lawyers; David Lord, Disability Rights Washington; and Steven Pearce, Citizens Commission on Human Rights - Seattle.

Persons Testifying (Health & Human Services Appropriations): (In support) Kari Burrell, Governor's Policy Office.

(Opposed) Bob Cooper, Washington Association of Criminal Defense Lawyers.

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

Persons Signed In To Testify But Not Testifying (Health & Human Services Appropriations): None.