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**SUBSTITUTE SENATE BILL 5444**

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**State of Washington 66th Legislature 2019 Regular Session**

**By** Senate Behavioral Health Subcommittee to Health & Long Term Care (originally sponsored by Senators Dhingra, O'Ban, Darneille, Wagoner, Frockt, Kuderer, and Nguyen; by request of Office of the Governor)

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; amending RCW 10.31.110, 10.77.086, and 10.77.088; adding new sections to chapter 10.77 RCW; creating a new section; and providing an expiration date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  The legislature recognizes that there has been a nationwide increase in the number of individuals with behavioral health disorders in the criminal justice system. The legislature also recognizes that reforms must be made to our own behavioral health systems and services to meet the increasing demands in our state, to provide timely competency evaluations and restoration services, and to comply with federal court orders issued in *A.B., by and through Trueblood, et al., v. DSHS, et al.*, No. 15-35462 ("Trueblood"). The legislature acknowledges that these reforms will require the support of a broad range of stakeholders, including local law enforcement, prosecuting attorneys, defense attorneys, community members, and health care providers. The legislature further acknowledges the significant efforts of the parties to the Trueblood litigation to establish a roadmap and framework within their settlement agreement for proposed systemic reforms to the forensic mental health care system. It is the intent of the legislature to enact appropriate reforms consistent with the goals agreed to in the Trueblood settlement agreement, to continue to engage with stakeholders and community partners to address the needs of this vulnerable population, and to ensure that the public safety needs of our communities are met.

NEW SECTION. **Sec.**  A new section is added to chapter 10.77 RCW to read as follows:

(1) Subject to the limitations described in this subsection, a court may appoint an impartial forensic navigator employed by or contracted with the department to assist individuals:

(a) Who have been referred by a prosecutor in lieu of filing charges supported by probable cause in circumstances where the individual has a documented history of mental illness or a history of court orders related to competency to stand trial, or whose criminal charges have been dismissed under RCW 10.77.088 and the person is not detained for treatment by a designated crisis responder, for the purpose of ensuring a warm handoff and coordinated transition into the community behavioral health system, including helping the individual access services such as supportive housing, intensive case management, and assertive community treatment; and

(b) Who have been referred for competency evaluation or restoration.

(2) A forensic navigator must assist the individual to navigate the legal process and to access available behavioral health resources. During pending criminal proceedings, the forensic navigator must assist the individual, prosecuting attorney, defense attorney, and the court to understand the options available to the individual and be accountable as an officer of the court for faithful execution of the responsibilities outlined in this section.

(3) The duties of the forensic navigator during a pending criminal proceeding include, but are not limited to, the following:

(a) To collect relevant information about the individual, including prior behavioral health history, prior records of competency evaluation and restoration treatment, the circumstances of the individual leading up to the current matter before the court, and services available to the individual that might support placement in outpatient restoration, diversion, or some combination of these;

(b) To meet with, interview, and observe the individual;

(c) To present information to the court in order to assist the court in understanding the options available to the individual and determining whether he or she is appropriate for outpatient restoration, diversion, or some combination of these; and

(d) To monitor all court orders for compliance and provide periodic updates about the individual's engagement in treatment and any relevant changes in the circumstances of the individual.

(4) Forensic navigators may submit nonclinical recommendations to the court regarding treatment and restoration options for the individual, which the court may consider and weigh in conjunction with the recommendations of all of the parties.

(5) Forensic navigators shall be deemed officers of the court for the purpose of immunity from civil liability.

(6) The signed order for competency evaluation from the court shall serve as authority for the forensic navigator to be given access to all records held by a behavioral health, educational, or law enforcement agency or a correctional facility that relates to an individual. Information that is protected by state or federal law, including health information, shall not be entered into the court record without the consent of the individual or their defense attorney.

(7) A prosecutor may dismiss charges against an individual whenever mental illness or competency to stand trial has become an issue and divert the individual by referring him or her to a forensic navigator or directing the forensic navigator to assist the individual to access services consistent with subsection (1)(a) of this section.

(8) A court may not issue an order appointing a forensic navigator unless the department certifies that there is adequate forensic navigator capacity to provide these services at the time the order is issued.

**Sec.**  RCW 10.31.110 and 2014 c 225 s 57 are each amended to read as follows:

(1) When a police officer has reasonable cause to believe that the individual has committed acts constituting a ((~~nonfelony~~)) crime ((~~that is not a serious offense as identified in RCW 10.77.092~~)), and the individual is known by history or consultation with the behavioral health organization, managed care organization, behavioral health administrative services organization, crisis hotline, or local crisis services providers to suffer from a mental disorder, the arresting officer may:

(a) Take the individual to a crisis stabilization unit as defined in RCW 71.05.020((~~(6)~~)). Individuals delivered to a crisis stabilization unit pursuant to this section may be held by the facility for a period of up to twelve hours. The individual must be examined by a mental health professional within three hours of arrival;

(b) Take the individual to a triage facility as defined in RCW 71.05.020. An individual delivered to a triage facility which has elected to operate as an involuntary facility may be held up to a period of twelve hours. The individual must be examined by a mental health professional within three hours of arrival;

(c) Refer the individual to a mental health professional for evaluation for initial detention and proceeding under chapter 71.05 RCW; or

(d) Release the individual upon agreement to voluntary participation in outpatient treatment.

(2) If the individual is released to the community, the mental health provider shall make reasonable efforts to inform the arresting officer of the planned release ((~~within a reasonable period of time after the~~)) prior to release if the arresting officer has specifically requested notification and provided contact information to the provider.

(3) In deciding whether to refer the individual to treatment under this section, the police officer ((~~shall~~)) must be guided by ((~~standards~~)) local law enforcement diversion guidelines for behavioral health developed and mutually agreed upon with the prosecuting authority((~~, which~~)) with an opportunity for consultation and comment by the defense bar and disability community. These guidelines must address, at a minimum, the length, seriousness, and recency of the known criminal history of the individual, the mental health history of the individual, ((~~where~~)) if available, the opinions of a mental health professional, if available, and the circumstances surrounding the commission of the alleged offense. The guidelines must include a process for clearing outstanding warrants or referring the individual for assistance in clearing outstanding warrants, if any, and issuing a new court date, if appropriate, without booking or incarcerating the individual or disqualifying him or her from referral to treatment under this section, and define the circumstances under which such action is permissible.

(4) Any agreement to participate in treatment shall not require individuals to stipulate to any of the alleged facts regarding the criminal activity as a prerequisite to participation in a mental health treatment alternative. The agreement is inadmissible in any criminal or civil proceeding. The agreement does not create immunity from prosecution for the alleged criminal activity.

(5) If an individual violates such agreement and the mental health treatment alternative is no longer appropriate:

(a) The mental health provider shall inform the referring law enforcement agency of the violation; and

(b) The original charges may be filed or referred to the prosecutor, as appropriate, and the matter may proceed accordingly.

(6) The police officer is immune from liability for any good faith conduct under this section.

(7) The Washington association of sheriffs and police chiefs shall collect and maintain a file of written local law enforcement diversion guidelines for behavioral health developed pursuant to subsection (3) of this section.

**Sec.**  RCW 10.77.086 and 2015 1st sp.s. c 7 s 5 are each amended to read as follows:

(1)(a)(i) If the defendant is charged with a felony and determined to be incompetent, until he or she has regained the competency necessary to understand the proceedings against him or her and assist in his or her own defense, but in any event for a period of no longer than ninety days, the court((~~:~~

~~(A)~~)) shall commit the defendant to the custody of the secretary ((~~who shall place such defendant in an appropriate facility of the department for evaluation and treatment; or~~

~~(B) May alternatively order the defendant to undergo evaluation and treatment at some other facility or provider as determined by the department, or under the guidance and control of a professional person. The facilities or providers may include community mental health providers or other local facilities that contract with the department and are willing and able to provide treatment under this section. During the 2015-2017 fiscal biennium, the department may contract with one or more cities or counties to provide competency restoration services in a city or county jail if the city or county jail is willing and able to serve as a location for competency restoration services and if the secretary determines that there is an emergent need for beds and documents the justification, including a plan to address the emergency. Patients receiving competency restoration services in a city or county jail must be physically separated from other populations at the jail and restoration treatment services must be provided as much as possible within a therapeutic environment.~~)) for competency restoration. The court may order the defendant to receive inpatient competency restoration or outpatient competency restoration based on the clinical recommendation in the competency evaluation.

(A) To be eligible for an order for outpatient competency restoration, a defendant must be:

(I) Adherent to medications or willing to receive prescribed intravenous medication;

(II) Abstinent from alcohol or unprescribed drugs; and

(III) Clinically stable.

(B) If the court orders inpatient competency restoration, the department shall place the defendant in an appropriate facility of the department for evaluation and treatment.

(C) If the court orders outpatient competency restoration, the court shall modify conditions of release as needed to authorize the department to place the person in approved housing, which may include access to supported housing, affiliated with a contracted outpatient competency restoration program. The department must establish conditions of participation in the outpatient competency restoration program which must include the defendant being subject to medication monitoring and daily urinalysis. The outpatient competency restoration program shall monitor the defendant during the defendant's placement in the program and report any noncompliance or significant changes with respect to the defendant to the department and, if applicable, the forensic navigator. The period for outpatient competency restoration must be for up to ninety days, notwithstanding (b) of this subsection.

(D) If a defendant fails to comply with the restrictions of the outpatient restoration program, such that restoration is no longer possible in that setting, the department shall remove the defendant from the outpatient restoration program and place the defendant instead in an appropriate facility of the department for inpatient competency restoration. The department shall promptly notify the court and parties and the forensic navigator, if applicable, of the change in placement. The inpatient competency restoration period following a change in placement under this subsection must be the same length as if the defendant had been initially placed into inpatient competency restoration, and any time periods spent in outpatient competency restoration must be disregarded.

(E) The court may not issue an order for outpatient competency restoration unless the department certifies that there is an available appropriate outpatient competency restoration program that has adequate space for the person at the time the order is issued.

(ii) The ninety day period for ((~~evaluation and treatment~~)) competency restoration under this subsection (1) includes only the time the defendant is actually at the facility and is in addition to reasonable time for transport to or from the facility.

(b) Except as provided in (a)(i)(C) of this subsection, for a defendant whose highest charge is a class C felony, or a class B felony that is not classified as violent under RCW 9.94A.030, the maximum time allowed for the initial period of commitment for competency restoration is forty-five days. The forty-five day period includes only the time the defendant is actually at the facility and is in addition to reasonable time for transport to or from the facility.

(c) If the court determines ((~~or the parties agree~~)) that the defendant is unlikely to regain competency, the court may dismiss the charges without prejudice without ordering the defendant to undergo restoration treatment, in which case the court shall order that the defendant be referred for evaluation for civil commitment in the manner provided in subsection (4) of this section.

(2) On or before expiration of the initial period of commitment under subsection (1) of this section the court shall conduct a hearing, at which it shall determine whether or not the defendant is incompetent.

(3) If the court finds by a preponderance of the evidence that a defendant charged with a felony is incompetent, the court shall have the option of extending the order of commitment or alternative treatment for an additional period of ninety days, but the court must at the time of extension set a date for a prompt hearing to determine the defendant's competency before the expiration of the second restoration period. The defendant, the defendant's attorney, or the prosecutor has the right to demand that the hearing be before a jury. No extension shall be ordered for a second or third restoration period as provided in subsection (4) of this section if the defendant's incompetence has been determined by the secretary to be solely the result of a developmental disability which is such that competence is not reasonably likely to be regained during an extension. The ninety-day period includes only the time the defendant is actually at the facility and is in addition to reasonable time for transport to or from the facility.

(4) For persons charged with a felony, at the hearing upon the expiration of the second restoration period or at the end of the first restoration period in the case of a defendant with a developmental disability, if the jury or court finds that the defendant is incompetent, or if the court or jury at any stage finds that the defendant is incompetent and the court determines that the defendant is unlikely to regain competency, the charges shall be dismissed without prejudice, and the court shall order the defendant be committed to a state hospital as defined in RCW 72.23.010 for up to seventy-two hours starting from admission to the facility, excluding Saturdays, Sundays, and holidays, for evaluation for the purpose of filing a civil commitment petition under chapter 71.05 RCW. The criminal charges shall not be dismissed if the court or jury finds that: (a) The defendant (i) is a substantial danger to other persons; or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (b) there is a substantial probability that the defendant will regain competency within a reasonable period of time. In the event that the court or jury makes such a finding, the court may extend the period of commitment for up to an additional six months. The six-month period includes only the time the defendant is actually at the facility and is in addition to reasonable time for transport to or from the facility.

**Sec.**  RCW 10.77.088 and 2016 sp.s. c 29 s 411 are each amended to read as follows:

(1)((~~(a)~~)) If the defendant is charged with a nonfelony crime which is a serious offense as identified in RCW 10.77.092 and found by the court to be not competent, then the court:

(a) Shall dismiss the proceedings without prejudice and detain the defendant for sufficient time to allow the designated crisis responder to evaluate the defendant and consider initial detention proceedings under chapter 71.05 RCW, unless the prosecutor objects to the dismissal and provides notice of a motion for an order for competency restoration, in which case the court must schedule a hearing to determine whether to enter an order of competency restoration.

(b) At the hearing, the prosecuting attorney must establish that there is a compelling state interest to order competency restoration treatment for the defendant. The court may consider prior criminal history, prior history in treatment, prior history of violence, the quality and severity of the pending charges, and any history that suggests whether or not competency restoration treatment is likely to be successful. If the prosecuting attorney proves by a preponderance of the evidence that there is a compelling state interest in ordering competency restoration, then the court shall order competency restoration in accordance with subsection (2)(a) of this section.

(2)(a) If a court finds pursuant to subsection (1)(b) of this section that there is a compelling state interest in pursuing competency restoration treatment, then the court ((~~(i)~~)) shall commit the defendant to the custody of the secretary ((~~who shall place such defendant in an appropriate facility of the department for evaluation and treatment;~~

~~(ii) May alternatively order the defendant to undergo evaluation and treatment at some other facility or provider as determined by the department, or under the guidance and control of a professional person. The facilities or providers may include community mental health providers or other local facilities that contract with the department and are willing and able to provide treatment under this section. During the 2015-2017 fiscal biennium, the department may contract with one or more cities or counties to provide competency restoration services in a city or county jail if the city or county jail is willing and able to serve as a location for competency restoration services and if the secretary determines that there is an emergent need for beds and documents the justification, including a plan to address the emergency. Patients receiving competency restoration services in a city or county jail must be physically separated from other populations at the jail and restoration treatment services must be provided as much as possible within a therapeutic environment.~~)) for competency restoration. The court may order the defendant to receive inpatient competency restoration or outpatient competency restoration based on the clinical recommendation in the competency evaluation.

(i) To be eligible for an order for outpatient competency restoration, a defendant must be:

(A) Adherent to medications or willing to receive prescribed intravenous medication;

(B) Abstinent from alcohol or unprescribed drugs; and

(C) Clinically stable.

(ii) If the court orders inpatient competency restoration, the department shall place the defendant in an appropriate facility of the department for evaluation and treatment under (b) of this subsection.

(iii) If the court orders outpatient competency restoration, the court shall modify conditions of release as needed to authorize the department to place the person in approved housing, which may include access to supported housing, affiliated with a contracted outpatient competency restoration program. The department shall establish conditions of participation in the outpatient competency restoration program which must include the defendant being subject to medication monitoring and daily urinalysis. The outpatient competency restoration program shall monitor the defendant during the defendant's placement in the program and report any noncompliance or significant changes with respect to the defendant to the department and, if applicable, the forensic navigator. The period for outpatient competency restoration must be for up to ninety days, notwithstanding (b) of this subsection.

(iv) If a defendant fails to comply with the restrictions of the outpatient competency restoration program, such that restoration is no longer possible in that setting, the department shall remove the defendant from the outpatient restoration program and place the defendant instead in an appropriate facility of the department for inpatient competency restoration. The department shall promptly notify the court and parties and the forensic navigator, if applicable, of the change in placement. The inpatient competency restoration period following a change in placement under this subsection must be the same length as if the defendant had been initially placed into inpatient competency restoration and any time periods spent in outpatient competency restoration must be disregarded.

(v) The court may not issue an order for outpatient competency restoration unless the department certifies that there is an available appropriate outpatient restoration program that has adequate space for the person at the time the order is issued.

(b) Except as provided in (a)(iii) of this subsection, the placement under (a) ((~~(i) and (ii)~~)) of this subsection shall not exceed ((~~fourteen~~)) twenty-nine days ((~~in addition to any unused time of the evaluation under RCW 10.77.060. The court shall compute this total period and include its computation in the order. The fourteen-day period plus any unused time of the evaluation under RCW 10.77.060 shall~~)). This period must be considered to include only the time the defendant is actually at the facility and shall be in addition to reasonable time for transport to or from the facility((~~;~~

~~(iii) May alternatively order that the defendant be placed on conditional release for up to ninety days for mental health treatment and restoration of competency; or~~

~~(iv) May order any combination of this subsection~~)).

((~~(b)~~)) (c) If the court has determined ((~~or the parties agree~~)) that the defendant is unlikely to regain competency, the court may dismiss the charges without prejudice without ordering the defendant to undergo restoration treatment, in which case the court shall order that the defendant be referred for evaluation for civil commitment in the manner provided in ((~~(c)~~)) (d) of this subsection.

((~~(c)~~)) (d)(i) If the proceedings are dismissed under RCW 10.77.084 and the defendant was on conditional release at the time of dismissal, the court shall order the designated crisis responder within that county to evaluate the defendant pursuant to chapter 71.05 RCW. The evaluation may be conducted in any location chosen by the professional.

(ii) If the defendant was in custody and not on conditional release at the time of dismissal, the defendant shall be detained and sent to an evaluation and treatment facility for up to seventy-two hours, excluding Saturdays, Sundays, and holidays, for evaluation for purposes of filing a petition under chapter 71.05 RCW. The seventy-two hour period shall commence upon the next nonholiday weekday following the court order and shall run to the end of the last nonholiday weekday within the seventy-two-hour period.

((~~(2)~~)) (3) If the defendant is charged with a nonfelony crime that is not a serious offense as defined in RCW 10.77.092:

The court may stay or dismiss proceedings and detain the defendant for sufficient time to allow the designated crisis responder to evaluate the defendant and consider initial detention proceedings under chapter 71.05 RCW. The court must give notice to all parties at least twenty-four hours before the dismissal of any proceeding under this subsection, and provide an opportunity for a hearing on whether to dismiss the proceedings.

NEW SECTION. **Sec.**  A new section is added to chapter 10.77 RCW to read as follows:

The department must collaborate with the health care authority to ensure that intensive services consistent with section 2(1)(a) of this act are available for individuals involved with the criminal justice system in every county or region in which a forensic navigator is contracted or employed to provide services, on a timeline consistent with the phased implementation of the settlement agreement in *A.B., by and through Trueblood, et al., v. DSHS, et al.*, No. 15-35462 ("Trueblood").

NEW SECTION. **Sec.**  A new section is added to chapter 10.77 RCW to read as follows:

(1) The department must implement an outpatient competency restoration program consistent with RCW 10.77.086 and 10.77.088 in the county that has the highest total volume of referrals for competency evaluation and restoration services no later than January 1, 2020.

(2) This section expires June 30, 2021.

**--- END ---**