

# HOUSE BILL REPORT

## ESSB 5176

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**As Reported by House Committee On:**  
Judiciary  
Appropriations

**Title:** An act relating to criminal incompetency and civil commitment.

**Brief Description:** Addressing criminal incompetency and civil commitment.

**Sponsors:** Senate Committee on Human Services & Corrections (originally sponsored by Senators Hargrove, Carrell and Hewitt).

**Brief History:**

**Committee Activity:**

Judiciary: 3/13/13, 3/27/13 [DPA];

Appropriations: 4/1/13, 4/8/13 [DPA(APP w/o JUDI)].

**Brief Summary of Engrossed Substitute Bill**  
**(As Amended by Committee)**

- Requires that evaluations for involuntary treatment of individuals who have had felony charges dismissed due to incompetency occur at state hospitals.
- Modifies procedures and standards for involuntary treatment of persons who have been deemed incompetent to stand trial for violent felonies.
- Provides additional notification and review requirements for release of certain involuntarily detained people.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass as amended. Signed by 11 members: Representatives Pedersen, Chair; Hansen, Vice Chair; Rodne, Ranking Minority Member; O'Ban, Assistant Ranking Minority Member; Hope, Jinkins, Kirby, Klippert, Nealey, Orwall and Roberts.

**Minority Report:** Do not pass. Signed by 2 members: Representatives Goodman and Shea.

**Staff:** Omeara Harrington (786-7136).

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*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.*

## **Background:**

### Incompetency.

A person is incompetent to stand trial in a criminal case if 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 court may require a competency evaluation of a defendant whenever the issue of competency is raised, and a person who is incompetent may not be tried, convicted, or sentenced for a criminal offense as long as the incompetency continues.

If a person 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. If the defendant undergoes restoration but cannot be restored to competency within the designated time period, the criminal case must be dismissed without prejudice.

### Evaluations and Petitions for Involuntary Treatment.

If a person's competency is not restored and charges have been dismissed, the person will be considered for commitment in the civil system. The Involuntary Treatment Act (ITA) sets forth the procedures, rights, and requirements for an involuntary civil commitment. After the court dismisses felony charges, the person must be released or transferred to a hospital or secure mental health facility for up to 72 hours for purposes of an involuntary treatment evaluation. At the end of the 72-hour evaluation period a petition may be filed for up to 180 additional days of treatment.

### Grounds for Involuntary Treatment Following a Felony Dismissal.

A person who has had felony charges dismissed due to incompetency may be detained for a period of up to 180 days if the petitioner can prove by clear, cogent, and convincing evidence that the person has committed acts constituting a felony and, as a result of a mental disorder, the person presents a substantial likelihood of repeating similar acts. If the grounds for commitment have been proven, but treatment less restrictive than detention will be in the best interest of the person or others, the court may order a less restrictive alternative placement for the term of commitment.

No order of commitment under the ITA may exceed 180 days, but commitment may be renewed upon successive petitions and hearings. The grounds on subsequent petitions match those for the initial petition for commitment, but additional factors are considered in the analysis of likelihood of repeating similar acts, including life history, progress in treatment, and the public safety. The person may be released prior to the end of the term of commitment if they no longer meet the commitment criteria.

### Commitment of a Person Found Not Guilty by Reason of Insanity.

A person may be committed as "criminally insane" if the person is found not guilty by reason of insanity (NGRI) and the fact finder determines that the person presents a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court, other persons, or institutions. Insanity in a criminal case means that the person was, at the time of the act underlying the charge, unable to perceive the nature and quality of the act or unable to tell right from wrong with respect to the particular act because of a mental disease or defect. The maximum term of commitment following an

NGRI acquittal is equal to the maximum possible sentence for any offense charged against the person committed. A person committed as criminally insane may petition for conditional release or final release by making an application to the Secretary of the Department of Social and Health Services (DSHS), or by making a direct petition to the court.

#### Release of Involuntarily Committed People.

The DSHS must give advance written notice of a change in a committed person's commitment status to the chief of police and sheriff in the person's jurisdiction of residence, and to victims and witnesses who have requested notice. Notice is required at least 30 days prior to release, authorized leave, or transfer to another facility, or immediately upon escape, of a person who is committed after a dismissal of a sex, violent, or felony harassment offense.

Legislation in 2010 created a public safety review panel to independently review and assess the DSHS proposals for conditional release, furlough, temporary leave, and similar changes in commitment status of people found NGRI. The panel provides written determinations of the public safety risk presented by any release recommendation, and may offer alternative recommendations. The panel's recommendations are submitted to the court with the DSHS recommendations.

The panel must submit a report to the Legislature by December 1, 2014, regarding observed changes in statewide consistency of evaluations and decisions concerning changes in the commitment status of persons found NGRI. The panel's report will also address whether the panel should be given the authority to make release decisions and monitor release conditions.

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### **Summary of Amended Bill:**

#### Evaluations for Involuntary Treatment.

For criminal defendants who have had felony charges dismissed due to incompetency, evaluation for the purposes of filing a civil commitment petition under the ITA must occur at a state hospital. Court discretion to release a defendant who has had felony charges dismissed is eliminated.

#### Grounds and Procedures for Involuntary Treatment Following a Violent Felony Dismissal.

On an initial petition for commitment of a person who has had a violent felony charge dismissed due to incompetency, in addition to the standard criteria for commitment, the court must make a finding as to whether the acts the person committed constitute a violent offense as defined in statute.

On subsequent petitions for continued commitment of a person who has had a violent felony charge dismissed, when the court has made the additional finding at the initial petition, the person will be committed for up to an additional 180 days upon prima facie evidence that the person continues to suffer from a mental disorder or developmental disability that results in a substantial likelihood that the person will commit acts similar to the criminal behavior. The committed person may challenge the renewed commitment with an admissible expert opinion indicating that their condition has changed such that the mental disorder or developmental

disability no longer presents a substantial likelihood that they will commit acts similar to the charged criminal behavior. Additional terms of commitment may include transfer to a specialized intensive support and treatment program, which may be initiated prior to or after release from the state hospital.

#### Release of Involuntarily Committed People.

The prosecuting attorney of the county in which the criminal charges against the committed person were dismissed is entitled to notice of impending release, change in commitment status, or escape of a person involuntarily committed after dismissal of a sex, violent, or felony harassment offense.

The jurisdiction of the independent public safety review panel is expanded to require the panel to provide advice regarding persons committed under the ITA where the court has made an additional finding that person committed acts constituting a violent offense. In particular, the panel must review all decisions to change the person's commitment status, and decisions to seek or not to seek commitment. The panel's report to the Legislature will include recommendations as to whether further changes in the law are necessary to enhance public safety when incompetency prevents the operation of the criminal justice system.

When a person committed as criminally insane submits a direct petition for release to the court, the petition must be served upon the court, the prosecuting attorney, and the Secretary of the DSHS. Upon receipt of service, the Secretary must determine whether reasonable grounds exist for release and provide the recommendation to all parties and the court.

When filing a release petition for a person committed as criminally insane who will be transferred upon release to a correctional facility to serve a sentence for a class A felony, the petitioner must show that the person's mental disease or defect is manageable within a correctional facility, but need not prove that the person does not present a substantial danger to other persons or a substantial likelihood of committing criminal acts that jeopardize public safety or security if released.

#### **Amended Bill Compared to Engrossed Substitute Bill:**

A striking amendment replaced Engrossed Substitute Senate Bill (ESSB) 5176 with Engrossed Second Substitute Senate Bill (E2SSB) 1114, and retained one section of ESSB 5176. The effect was as follows:

Some sections of ESSB 5176 were removed entirely, specifically those regarding: (1) permitting pre-transport screening of in-custody defendants who have had serious misdemeanors dismissed due to incompetency; (2) eliminating the provisions in current law requiring a 48 hour hold for judicial review when an ITA petition is not filed for someone who has had a misdemeanor dismissed due to incompetency; and (3) requiring notice to the prosecutor and defense attorney when an ITA petition is not filed for someone who has had a serious misdemeanor or felony dismissed due to incompetency.

Some sections of ESSB 5176 were replaced with different, but corresponding, provisions of E2SHB 1114. The section outlining the alternative process for commitment of a person found at the initial petition to have committed a violent offense was replaced with language

that calls for a successive petition process rather than a review process. The intent section and the section regarding oversight by the independent public safety review panel are worded to comport with other language in E2SHB 1114.

The striking amendment incorporated one section of ESSB 5176 that was not in E2SHB 1114. That section adds procedural requirements to the petition process when a person committed as NGRI directly petitions the court for review, and modifies standards for release of a person from NGRI commitment who will be transferred to a correctional facility to serve a sentence for a class A felony.

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**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on March 27, 2013.

**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:**

(In support) This bill is designed to address gap cases. The proposed process is preferable to having these cases repeatedly cycle through state hospitals over the course of years. This bill and the House of Representatives (House) companion are very similar in substance, but the language of the House version is preferred. In both versions, the default is that a term of commitment will end after 180 days, but that is clearer in the House version, and the House version offers a less restrictive alternative to inpatient commitment.

The original bill required a state hospital to conduct all evaluations in misdemeanor dismissal cases. The actual fiscal impact would be lower than the estimate. The statute should be amended to allow these evaluations to take place at an evaluation and treatment facility or a state hospital to maximize the number of beds available for evaluations. Currently, some evaluations are ordered to take place at Harborview. The hospital is a poor place for evaluations, and there is no Regional Support Network control or responsibility for these beds. More funding should be dedicated to this issue. The pre-transfer screening language needs to be clarified.

(With concerns) This legislation is not in the Governor's budget proposal. Allowing misdemeanor evaluations to occur at the state hospitals is necessary; otherwise Western State Hospital will not accept any evaluations, which results in people being sent to the emergency room. However, it also creates problems in that the beds are already used for competency evaluations, the ITA commitment, and NGRI commitment. It is important to avoid transferring people who do not meet the commitment criteria, but the screening mechanism is problematic because screening would take place in the jails. This could lead to liability issues.

The House version of the bill is preferable, and the House amendment regarding the less restrictive alternative to inpatient treatment in gap cases should be incorporated.

(Other) Adding language indicating that state hospitals can evaluate people who have had serious misdemeanors dismissed would add flexibility and clarity. Additional funding for beds is needed. People have been denied evaluations and released, which presents issues in terms of providing care and maintaining public safety.

(Opposed) The procedural aspects of the bill create constitutional concerns by removing rights to trial by judge or jury and shifting the burden of proof to the committed person. The standard of proof for commitment is lowered from clear and convincing evidence to a prima facie showing. There will be indefinite commitment for felony dismissal cases. Necessary methods of defense will create backlog in the courts, and challenges to the law will be costly. The public safety review panel process will create further delays. This proposal will cost millions of dollars, and will warehouse rather than treat.

**Persons Testifying:** (In support) Tom McBride, Washington Association of Prosecuting Attorneys; Seth Dawson, National Alliance on Mental Illness; and Darcy Jaffe, Harborview Medical Center.

(With concerns) Jane Beyer, Department of Social and Health Services; and Amnon Shoenfeld, King County Regional Support Networks.

(Other) Lisa Thatcher, Washington State Hospital Association; and Kelsey Beck, King County.

(Opposed) Ruth Martin, Citizens Commission on Human Rights; and Mike De Felice, The Defenders Association.

**Persons Signed In To Testify But Not Testifying:** None.

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** Do pass as amended by Committee on Appropriations and without amendment by Committee on Judiciary. Signed by 27 members: Representatives Hunter, Chair; Ormsby, Vice Chair; Alexander, Ranking Minority Member; Chandler, Assistant Ranking Minority Member; Wilcox, Assistant Ranking Minority Member; Buys, Carlyle, Cody, Dahlquist, Dunshee, Fagan, Haigh, Haler, Harris, Hudgins, Hunt, Jinkins, Kagi, Maxwell, Morrell, Pedersen, Pettigrew, Ross, Schmick, Seaquist, Springer and Sullivan.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Green, Parker, Pike and Taylor.

**Staff:** Andy Toulon (786-7178).

### **Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Judiciary:**

The amendment by the Appropriations Committee allows a civilly committed person who had a violent felony dismissed due to incompetency to transfer to an intensive support and

treatment program during their initial period of commitment, rather than permitting such transfer only during subsequent periods of commitment. A transfer to a specialized program may occur prior to or after discharge from the state hospital (rather than release from the state hospital).

**Appropriation:** None.

**Fiscal Note:** Available.

**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:**

(In support) This is the same language that was passed off the floor of the House of Representatives with one amendment requested by the Department of Social and Health Services. This bill does not do away with the right to a jury trial, and maintains the same standard under current law for commitment. An additional finding must be made if the state hospitals are going to keep an individual longer than 180 days under the new process set forth by the bill. Under this bill individuals do have the right to a jury trial, to cross examine witnesses, and to an attorney. The fiscal note may be on the shy side because while some of these individuals will be served in the community, there will still be some that spend additional time in a state hospital bed.

(With concerns) This bill is not funded in the Governor's budget. A minor amendment is needed to make sure that community alternatives to the state hospital can be effectively used.

(Opposed) There are constitutional due process concerns with this bill. A prior Washington Supreme Court ruling in a case related to sexually violent predators should not be used as the basis for believing this bill provides adequate due process protections. That case, referred to chapter RCW 71.09, which deals with sexually violent predators who have been convicted of crimes and who are given significant due process protections including a full evidentiary hearing, the right to a jury trial, and the right to cross examine witnesses. In cases under chapter RCW 71.09, the burden of proof rests with the state and is beyond a reasonable doubt. Under this bill, individuals with disabilities that have never been convicted of a crime will not have these same protections. This means that people with disabilities who may never have been convicted of a crime may face indefinite costly commitment at the state hospitals.

This bill is unconstitutional and will not solve the problem it is trying to address. Adding more people to an overloaded system is not the answer. Changes should be made to the system as other bills before the committee would do and funding should be provided to the hospitals or the local systems to provide treatment rather than railroading individuals who have not been found to be dangerous into an over-loaded system. This bill will also result in expensive constitutional litigation by replacing a constitutional standard with a lower bar and standards of proof for the state. By striking the right to a jury trial and putting the finding of fact with a judge, the bill may violate a prior United States Supreme Court ruling and is

inviting years of litigation over constitutional principles. The costs of constitutional issues are not addressed in the fiscal note on this bill.

The mentally ill must not violate the civil rights or civil liberties of anyone and should always face consequences for doing so. Mental illness is a medical condition and individuals with mental illness should not be denied protections under law.

(Information only) Under current law, individuals who have committed serious misdemeanor crimes but whose charges have been dismissed due to incompetency are supposed to receive an evaluation for civil commitment. However current law is unclear about where these evaluations will take place and at times people end up waiting in jails for these to happen. There are instances when time runs out and they are released out into the community. There are options for closing this gap which is still a concern.

**Persons Testifying:** (In support) Tom McBride, Washington Association of Prosecuting Attorneys.

(With concerns) Jane Beyer, Department of Social and Health Services.

(Opposed) Emily Cooper, Disability Rights Washington; Shankar Narayan, American Civil Liberties Union of Washington; Bob Cooper, Washington Defender Association and Washington Association of Criminal Defense Lawyers; and John Freeburg.

(Information only) Kelsey Beck, City of Seattle.

**Persons Signed In To Testify But Not Testifying:** None.