

# SENATE BILL REPORT

## E2SHB 1114

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As of March 27, 2013

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

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

**Sponsors:** House Committee on Appropriations (originally sponsored by Representatives Pedersen, Rodne, Morrell, Nealey, Green and Jinkins).

**Brief History:** Passed House: 3/11/13, 87-11.

**Committee Activity:** Human Services & Corrections: 3/25/13.

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### SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

**Staff:** Kevin Black (786-7747)

**Background:** A person is incompetent to stand trial when, due to a mental disease or defect, the person lacks the capacity to understand the nature of the criminal proceedings against them or assist in their own defense.

A person may be subject to civil commitment when, due to a mental disorder, the person presents a likelihood of serious harm or is gravely disabled. A person whose felony charges were dismissed based on incompetency to stand trial may additionally be subject to civil commitment if it is proven that the person committed acts constituting a felony and, due to a mental disorder, presents a substantial likelihood of repeating similar acts. The superintendent of the mental health facility must notify the sheriff and police chief of the county where such a person will reside 30 days before the person's release if the felony is classified as a sex, violent, or felony harassment offense.

The longest time period allowed by state law for civil commitment under the Involuntary Treatment Act is 180 days. New petitions for civil commitment must set forth the legal grounds supporting the commitment and be supported by the affidavits of one witness who is an examining physician or psychiatric advanced registered nurse practitioner and a second witness who is an examining physician, psychiatric advanced registered nurse practitioner, or mental health professional. The affidavits must describe in detail the behavior of the detained person that supports the petition and explain which, if any, less-restrictive alternatives to detention are available to the person. The superintendent may release the

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person before the expiration of the commitment period if the superintendent determines that the person no longer presents a likelihood of serious harm.

A person subject to commitment has the following rights:

- to not be presumed incompetent as a consequence of receiving an evaluation;
- to a judicial hearing in a superior court;
- to have an attorney appointed if they are indigent;
- to present evidence on their own behalf;
- to cross-examine witnesses who testify against them;
- to be proceeded against by the rules of evidence;
- to remain silent; and
- to have access to all petitions and reports in the court file.

If the petition is for 90 days or more, the person has a right to a jury trial. The burden of proof is by clear, cogent, and convincing evidence and is placed upon the petitioner.

When a defendant is incompetent to stand trial, the court may order up to 360 days of competency restoration treatment for felony defendants and 29 days for defendants charged with serious misdemeanors. If treatment is unsuccessful, the court must dismiss the charges without prejudice. For a felony defendant, the court must either release the defendant or transfer the defendant to a hospital or secure mental health facility. For a defendant charged with a serious misdemeanor, the court must send the defendant to an evaluation and treatment facility. The defendant must then be evaluated for civil commitment. For a felony defendant, the hospital or secure mental health facility may directly file a 180-day civil commitment petition. For a defendant charged with a serious misdemeanor, the evaluation and treatment facility may directly file a 90-day civil commitment petition.

In 2010, the Public Safety Review Panel (PSRP) was created to provide advice to the Secretary of the Department of Social and Health Services (DSHS) concerning persons committed to the state hospitals as criminally insane, and to review release recommendations pertaining to those individuals. The PSRP consists of seven volunteer members representing different affiliations appointed by the Governor for renewable three-year terms.

**Summary of Bill:** A felony defendant whose charges are dismissed based on incompetent to stand trial must be sent to a state hospital for civil commitment. Court discretion to release an incompetent felony defendant is eliminated.

When a person whose felony charges are dismissed based on incompetency to stand trial faces civil commitment pursuant to an allegation that the person committed acts constituting a felony and, due to a mental disorder, is likely to commit similar acts, the court must determine whether the person was charged with a violent felony and, if so, whether the person committed acts constituting a violent felony. If the court so finds, for subsequent civil commitment petitions, the court must continue the civil commitment for an additional 180 days whenever the petition presents prima facie evidence, unless the person presents proof through admissible expert opinion that the person's condition has so changed that civil commitment criteria are not met. This additional commitment period may involve transfer to a specialized program of intensive support and treatment, either inside or outside the state hospital.

The PSRP must provide advice to DSHS regarding persons civilly detained on the basis of commission of a violent felony and likelihood to commit similar acts following dismissal of charges based on incompetency to stand trial. DSHS must notify the PSRP at least 30 days before releasing such an individual. The PSRP must have access to any records held by DSHS that it deems necessary.

The prosecuting attorney in the county where the criminal charges were dismissed must receive 30 days' notice of release and immediate notice of escape of a person committed on the basis that the person committed a felony classified as a sex, violent, or felony harassment offense, and, due to a mental disorder, presents a substantial likelihood of repeating similar acts.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: There was great, bipartisan work done on this bill. This bill concerns persons who committed violent crimes but cannot be prosecuted and do not receive the help they need from the civil system. We do not object to adding provisions from the Senate bill related to persons committed as criminally insane. We can do a better job treating the mental illnesses of persons whose violent felony charges were dismissed based on incompetent to stand trial and provide them with more continuity of care. The bill provides for a full civil trial at the outset of the commitment process. Please amend the bill to allow misdemeanor defendants whose criminal charges are dismissed based on incompetent to stand trial to be transported to state hospitals or evaluation and treatment facilities. The fiscal impact of the bill is likely to be lower than stated. This bill takes a small but important step in the direction toward preventing violence.

CON: Please restore provisions that would provide community services to persons with developmental disabilities. This bill would substantially impact an already overburdened system, increasing risk of harm. The bill must be amended to avoid due process violations. The state cannot shift the burden of proof onto committed persons to establish a change in their condition. The best way to enhance public safety is to adequately fund mental health treatment. Do not waste public money on appellate litigation by passing a constitutionally flawed bill. Psychiatric drugs have terrible side effects and neither cure mental illness nor prevent violence.

OTHER: There is significant confusion about responsibility for misdemeanor defendants whose charges are dismissed based on incompetent to stand trial. The emergency room at Harborview admitted over 30 patients for whom neither the regional support network or the state hospital claim responsibility. We do not have adequate facilities for this and funding must be provided for the care of these patients. There are limited involuntary treatment beds in the community and state hospitals. We appreciate the language added in the House that

would authorize use of the Offender Re-entry Community Safety program for patients to provide intensive treatment and supervision after release. The lack of state hospital beds means any increases in state hospital responsibility requires opening and staffing an additional ward.

**Persons Testifying:** PRO: Representative Pedersen, prime sponsor; Tom McBride, WA Assn. of Prosecuting Attorneys; Mark Lindquist, Pierce County Prosecutor; Don Pierce, WA Assn. of Sheriffs and Police Chiefs.

CON: Emily Cooper, Disability Rights WA; Bob Cooper, WA Assn. of Criminal Defense Lawyers, WA Defender Assn.; Shankar Narayan, American Civil Liberties Union of WA; Ruth Martin, Citizens Commission on Human Rights.

OTHER: Darcy Jaffe, Harborview Medical Center; Jane Beyer, DSHS.