

# SENATE BILL REPORT

## SB 6466

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As of January 26, 2018

**Title:** An act relating to standardizing practices relating to the commitment and release of persons committed to a state institution after committing acts of felony violence.

**Brief Description:** Standardizing practices relating to the commitment and release of persons committed to a state institution after committing acts of felony violence.

**Sponsors:** Senators O'Ban and Conway.

**Brief History:**

**Committee Activity:** Human Services & Corrections: 1/23/18.

### Brief Summary of Bill

- Allows a prosecutor to file for civil commitment of a person charged with a violent felony whose charges are dismissed based on incompetency to stand trial under the same commitment terms as a forensic patient committed under criminal insanity laws.
- Consolidates and expands provisions related to notification of the impending release of a state hospital patient committed following dismissal of felony charges and allowing intervention by local officials.
- Establishes fair share provisions requiring discharge of patients committed following dismissal of violent felony charges to their county of origin.
- Expands the Offender Reentry Community Safety Program to include long-term forensic patients at a state hospital.

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### SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

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

**Background:** Washington's two adult state hospitals treat civil patients and forensic patients.

Involuntary Civil Treatment. Civil patients at a state hospital are committed for treatment under the Involuntary Treatment Act (ITA), based on a civil finding that, due to a mental disorder, the person presents a likelihood of serious harm or is gravely disabled. The

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maximum term for civil treatment is 180 days. Involuntary civil treatment is based on the present condition of the patient and may only continue as long as the person meets civil commitment criteria, is not willing in good faith to comply with voluntary treatment, and there is no less restrictive alternative available that is in the best interest of the patient or others. A patient may be conditionally released or released pursuant to a less restrictive alternative treatment order establishing conditions, which may not include community supervision by a community corrections officer.

Involuntary Forensic Treatment. Forensic patients at a state hospital are committed pursuant to a criminal case in which the patient's mental condition so impairs their functioning that the person cannot be held criminally responsible for their actions. Short-term forensic patients are committed during the pendency of a criminal case for evaluation or treatment related to incompetency to stand trial. A person is incompetent to stand trial if they are charged with a crime and do not have the capacity to understand the proceedings against them or sufficient ability to assist in their own defense. A criminal case may not be adjudicated while a defendant is incompetent to stand trial.

Long-term forensic patients are committed for treatment on the basis of criminal insanity. Criminal insanity means that a person has been adjudicated not guilty by reason of insanity because, at the time of the commission of an alleged criminal offense, because of a mental disease or defect, the mind of the person was unable to perceive the nature and quality of the act with which they are charged, or the person was unable to tell right from wrong with reference to the act charged. To be committed for treatment related to criminal insanity, the person must be found by a court or jury:

- to be competent to stand trial; and
- to present a substantial danger to other persons; or
- to present a substantial likelihood of committing criminal acts jeopardizing public safety or security.

Long-term forensic commitments focus less on the present mental state of the patient and more on whether the person presents a substantial danger to the community. The maximum term of commitment is five years if the underlying offense is a class C felony; ten years if the underlying offense is a class B felony; and life if the underlying offense is a class A felony. A person committed as criminally insane may apply for conditional release at least once every six months to the court which ordered their commitment. The court must release the person if the person may be released conditionally without substantial danger to other persons, or substantial likelihood of committing criminal acts jeopardizing public safety or security. Conditional release may continue for up to the maximum term of commitment; however, the person may apply for and the court may grant a final release at a later time. When granting an application for conditional release, a court may require the person to be supervised by a community corrections officer.

Forensic Flips. Certain patients who begin as forensic patients may convert, or "flip," to civil patients if they are incompetent to stand trial and cannot be restored to competency within the statutory time periods allowed for competency restoration treatment. In this event, the criminal court must dismiss the criminal charges without prejudice and refer the person for civil commitment. A forensic flip patient who was charged with a felony may receive a civil commitment under a special commitment ground that the patient has committed acts

constituting a felony and, due to a mental disorder, presents a substantial likelihood of repeating similar acts. To commit a person under this ground, it is necessary to prove by clear and convincing evidence that the person committed the criminal acts charged; however, it is not necessary to prove intent or state of mind as an element of the crime.

In 2013, the Legislature passed E2SHB 1114 which created a special designation for felony flip patients when the court makes a special finding that the person committed acts constituting a felony classified as violent under the Sentencing Reform Act (SRA). If this finding is made, the patient loses certain procedural rights, such as being prohibited from presenting evidence on their behalf at a recommitment hearing if the state hospital files a facially sufficient commitment petition, unless the patient first presents proof through admissible expert opinion that their condition has changed since their last commitment hearing. The standard for commitment and commitment terms are otherwise the same for these patients as for other civil patients. A violent felony under the SRA is any class A felony or an attempt, conspiracy, or solicitation to commit a class A felony, or one of the following 12 class B felonies: manslaughter 1 or 2, indecent liberties by forcible compulsion, kidnapping 2, arson 2, assault 2, assault of a child 2, extortion 1, robbery 2, drive by shooting, or a vehicular homicide or vehicular assault committed while under the influence of intoxicating liquor or drugs.

Public Safety Review Panel. In 2010, the Legislature established an independent Public Safety Review Panel (PSRP) consisting of seven members appointed by the Governor, for the purpose of advising the courts and the Department of Social and Health Services (DSHS) relating to the release of persons committed under criminally insanity laws. E2SHB 1114 expanded the role of the PSRP to include advice about the release of civil patients who are found to have committed acts constituting a violent felony. The members of the PSRP include a psychiatrist, psychologist, representative of the Department of Corrections (DOC), prosecutor, representative of law enforcement, representative who advocates for consumers and families, and representative of criminal defense attorneys.

Offender Reentry Community Safety Program. The Offender Reentry Community Safety Program (ORCSP) is a program established in 1999, under the name Dangerous Mentally Ill Offender Program. ORCSP involves a collaboration between DSHS and DOC to provide intensive support services to offenders releasing from DOC confinement or partial confinement who are reasonably believed to be dangerous to themselves or others and who have a mental disorder. Offenders are selected for participation in ORCSP by a committee convened by DOC that reviews known information about the offender, including criminal history, medical records, and behavior while in custody. Offenders who are selected for the program and consent to participate receive case management and other supplemental services as determined by DSHS over a five-year period beginning six months before the offender's release from custody. The services may not supplant the public benefits to which the offender may otherwise be eligible, but may include coordination of mental health services, assistance with unfunded medical expenses, obtaining chemical dependency treatment, housing, employment services, educational or vocational training, independent living skills, parenting education, anger management services, or other services deemed necessary by the case manager. DSHS contracts directly with community mental health agencies around the state to provide ORCSP services; however, in some regions ORCSP services are not available due to the inability to contract with local providers.

The Washington State Institute for Public Policy (WSIPP) reviewed the ORCSP program in 2002, 2003, 2005, 2007, 2008, and 2009, and updated its literature review in 2012 and its benefit-cost analysis in 2017. In its four-year felony recidivism and cost effectiveness study published in 2009, WSIPP found that ORCSP reduces new felony recidivism rates by 42 percent and new violent felony recidivism rates by 36 percent for participants in the program. In its current benefit-cost analysis, WSIPP finds that ORCSP produces \$69,950 of benefits per participant compared to a total program cost of \$36,726, for a ratio of \$1.90 returned for every \$1 spent on the program. The estimated benefits of the program are split between taxpayers and crime victims.

Notifications Upon Release from a State Hospital. Four sections of the ITA provide obligations for a state hospital to provide notice to the county prosecutor of the county of commitment when the state hospital proposes to release a felony flip patient, either by failing to refile the civil commitment, filing a petition requesting an order for treatment in a less restrictive alternative, or by executing a conditional release order for the patient. Notice of intention to not refile the civil commitment must be provided at least 45 days prior to the expiration of commitment; other notifications must be provided at least 30 days before the release date. If the civil patient committed acts constituting a violent felony, sex offense, or felony harassment offense, the state hospital must additionally provide notice to the chief of police of the city in which the person will reside and the sheriff of the county in which the person will reside. If notice of the release of such patient has been requested in writing with respect to the specific patient, the state hospital must provide notice to any victims, witnesses, or other persons identified in writing by the prosecuting attorney. Three different sections of the ITA allow a county prosecutor from the county of commitment to intervene in court to request review of the proposed release, under varying conditions and terms.

Behavioral Health Organizations and Fully-Integrated Managed Care Entities. A behavioral health organization (BHO) is a county or group of counties under contract with DSHS to provide a comprehensive network of behavioral health services to qualified persons in a regional service area. A fully-integrated managed care entity (FIMC) is an entity which shares responsibility to provide for the integrated physical health and behavioral health needs of qualified persons within a regional services area. Services that may or must be provided by BHOs and FIMCs are specified by law and in the state Medicaid plan. By January 1, 2020, services in all nine regional service areas in Washington must be provided by FIMCs.

Adult Family Homes. An adult family home is a licensed residential home in which persons provide personal care, special care, room, and board to one to six adults not related by blood or marriage to the persons providing the services.

**Summary of Bill:** Commitment of Persons Charged With a Violent Felony. When a court dismisses felony charges classified as violent based on incompetency to stand trial, the prosecutor may immediately provide notice of intent to pursue the forensic commitment of the defendant based on an allegation that:

- the defendant committed acts constituting a violent felony and, due to a mental disorder, presents a substantial likelihood of repeating similar acts; and

- the defendant either (1) presents a substantial danger to other persons; or (2) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security.

If such notice is given, the court must stay the order of dismissal and schedule a commitment hearing within 14 days. The proceeding may be continued for a longer period of time only for good cause. The prosecutor must bear the burden of proof by clear and convincing evidence; however, it is not necessary to show intent, willfulness, or state of mind as an element of the crime. The defendant may request a jury determination within seven days of receiving the notice. If the court or jury finds that the state has met its burden, the court must lift the stay on the order of dismissal and enter an order committing the defendant to a state mental health hospital under the same commitment terms which apply to forensic patients committed under criminal insanity laws, unless the court or jury finds that it is in the best interest of the defendant and others for the defendant to receive less restrictive alternative treatment. If the state does not meet its burden, the court must lift the stay and order that the defendant be committed to a state hospital for further civil commitment proceedings under the ITA.

During the report concerning the last period of competency restoration treatment, if the expert report concludes that the defendant remains incompetent to stand trial, DSHS must provide an opinion as to whether a defendant who is charged with a violent felony meets the commitment criteria outlined above.

The PSRP must review state hospital release recommendations relating to persons committed under this act. A process is established whereby the state hospital may petition superior court to convert the commitment of current civil patients with a special finding that they committed acts constituting a violent felony into a forensic commitment under this act at the patient's next commitment hearing. Such patients who stipulated to their commission of acts constituting a violent felony at the time of their original commitment must be permitted to withdraw this stipulation. Provisions limiting the procedural rights of such patients are repealed.

Standardizing Notice of Release from a State Hospital and Opportunity to Intervene. Provisions under the ITA requiring the state hospital to provide notice to the county prosecutor of the county of commitment when the state hospital proposes to release a forensic flip patient are consolidated in one section of the ITA. When the patient has been committed following a violent felony, sex offense, or felony harassment offense, these notice provisions are expanded to include the city attorney in the city in which the person will reside and the county prosecutor in the county where the person will reside.

Provisions under the ITA allowing a county prosecutor to intervene after receiving notice of the proposed release are consolidated into one section and expanded to include the city attorney of the city where the person will reside and the county prosecutor of the county where the person will reside. The intervening party must file a petition in the court of the county of commitment at least ten days prior to release requesting to review the terms of the proposed release. The court must hold a hearing within ten days. At the hearing, the state hospital must present evidence establishing that the committed person may be released without substantial danger to other persons, or substantial likelihood of committing criminal

acts jeopardizing public safety or security. The intervening party may question the witnesses and present evidence. The committed person must have the right to counsel and other due process rights, excluding the right to a jury trial.

Fair Share. A provision under existing law which provides that a state hospital is not permitted to support an application for condition release on behalf of a person committed under criminal insanity laws which would permit the person to reside outside the state hospital and outside the person's county of origin is expanded to include persons who are committed under this act. County of origin is defined to mean the county which ordered the commitment.

The secretary of DSHS is prohibited from releasing a person committed under this act to an adult family home.

Expansion of the Reentry Community Safety Program. ORCSP is renamed the Reentry Community Safety Program (RCSP) and expanded to include forensic patients committed under criminal insanity laws and under this act. DOC must collaborate with DSHS to provide training, consultation, and support during the expansion and must ensure that community corrections officers who supervise persons released under RCSP receive appropriate training relating to: (1) monitoring and engagement of persons with behavioral health disorders; and (2) collaboration with available community behavioral health and state hospital resources to support the recovery of the person, ensure compliance with conditions of release, and protect the safety of the person and the public. DSHS must identify forensic patients who are recommended by their treatment teams as potentially ready for conditional release within six months if an appropriate placement and services can be found for participation in the RCSP. DSHS must notify the PSRP when this identification is made, and forward full placement and discharge plan information to the PSRP when it is available. Contracts under the RSCP must ensure that the contractors provide information to the PSRP and to the courts charged with reviewing the patient's conditional release application. DSHS must provide training for its staff how to collaborate effectively and appropriately share information with DOC personnel and other RCSP partners.

BHOs and FIMCs must ensure that adequate capacity exists in their regional service areas to support the operation of the RCSP. Permitted elements of the mental health and substance use disorder programs within each regional service area are expanded to include reentry services.

**Appropriation:** None.

**Fiscal Note:** Requested on January 17, 2018.

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

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

**Staff Summary of Public Testimony:** PRO: This relates to a small subgroup of patients which, under E2SHB 1114, have been found to have a propensity for violence which has been the subject of a court finding. We are not attending to public safety risks as we should.

There is no apparent qualitative difference in terms of condition or threat level with the criminally insane population, so both should be treated similarly. It is not a closed door; the patients must be released if they can prove they no longer present a danger of repeating the violent behavior. Fair share is important for Pierce County, which has more than its share of released persons. Last September, Western State Hospital tried to release an accused killer into an adult family home in a residential neighborhood who was never convicted because he was found incompetent to stand trial. He was civilly committed, instead of a forensic commitment for criminal insanity. Adult family homes contain other residents who would be vulnerable. We would like to see the PSRP review all releases for patients committed after an act of felony violence. We support expansion of ORCSP if it gets results. I have reservations because I am uncomfortable equating 1114 patients with criminal insanity patients, because not guilty by reason of insanity involves both proof of the violent act beyond a reasonable doubt and the consent of the individual to agree there is a nexus between the mental illness and the violent act. Because it is an affirmative defense the defendant agrees that mental illness should be put on the table for civil commitment. I do not think you can turn this into a civil commitment without going all the way to guilty but mentally ill without risking an adverse court ruling. It may be appropriate to increase the length of the civil commitment, but I am not sure the statutory maximum is the appropriate term. This population raises unique concerns that are beyond the scope of an ordinary civil commitment. It is important to provide continuing jurisdiction for monitoring after conditional release. The pieces of this bill which allow DOC to participate in supervision and extend ORCSP resources are important. Proceedings for these patients should be placed in open court so that PSRP advisements are accessible to the public.

CON: There are important differences between the 1114 population and criminal insanity population. The 1114 patients are not competent to proceed. The criminal insanity population are capable of assisting in their own defense and have decided that insanity is a defense they want to pursue. Adjudicatory hearings under this act would be much more intensive. A person could be committed for far longer than their standard range. Adequate representation for a defendant with expert witnesses would take much more than 14 days, extending the time in county jail.

**Persons Testifying:** PRO: Senator Steve O'Ban, Prime Sponsor; John Caulfield, City Manager, City of Lakewood; Tom McBride, Washington Association of Prosecuting Attorneys; David Hackett, Public Safety Review Board, King County.

CON: Kari Reardon, Washington Defender Association, Washington Association of Criminal Defense Lawyers.

**Persons Signed In To Testify But Not Testifying:** No one.