

SENATE BILL REPORT

SB 5444

As of February 5, 2019

Title: 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.

Brief Description: 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.

Sponsors: Senators Dhingra, O'Ban, Darneille, Wagoner, Frockt, Kuderer and Nguyen; by request of Office of the Governor.

Brief History:

Committee Activity: Behavioral Health Subcommittee to Health & Long Term Care: 1/25/19.

Brief Summary of Bill

- Establishes forensic navigators approved by the Department of Social and Health Services who may be appointed by a court to investigate a defendant referred for competency evaluation or restoration services and report information about the defendant and the options of the defendant for treatment and competency restoration.
- Expands police authority to divert an individual to treatment instead of criminal prosecution to include individuals believed to have committed serious nonfelonies, class C felonies, and class B felonies which are not classified as violent offenses or sex offenses.
- Requires local police and prosecutors to adopt standards defining when diversion from prosecution is permissible that must allow participation of individuals with outstanding warrants.
- Restricts nonfelony competency restoration to circumstances where the prosecutor moves for a competency restoration order and proves the existence of a compelling state interest in nonfelony competency restoration.

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.

SENATE COMMITTEE ON BEHAVIORAL HEALTH SUBCOMMITTEE TO HEALTH & LONG TERM CARE

Staff: Kevin Black (786-7747)

Background: Competency to Stand Trial. Court decisions establish a person cannot constitutionally be tried for a criminal offense unless they are competent to stand trial. A person is incompetent to stand trial if they lack the current capacity to understand the proceedings against them or do not have the ability to assist in their own defense. If any party to a criminal case raises doubts about a defendant's competency to stand trial, the criminal proceedings must be stayed for a competency evaluation to assist the court in determining if the defendant is competent to stand trial. If the court determines a defendant is incompetent to stand trial, the defendant may be eligible for a period of competency restoration treatment. Washington State has established statutory performance targets for timeliness of competency services, which include a seven-day target for completion of a competency evaluation in jail and a seven-day target to be transported from jail to a facility for inpatient competency evaluation or restoration.

Competency Restoration Treatment. Competency restoration treatment is involuntary mental health treatment administered for the purpose of rendering the defendant amenable to criminal prosecution. Eligibility for competency restoration treatment is based on the defendant's current charges:

Classification of Charge	Eligibility for Competency Restoration
Nonfelony—non-serious	None
Nonfelony—serious	14 to 29 days
Felony—nonviolent	45 days + 90 days + 180 days
Felony—violent	90 days + 90 days + 180 days

The competency restoration treatment period for a defendant charged with a nonfelony serious offense is 14 days plus any unused time from the 15-day inpatient competency evaluation period. Felony competency restoration treatment is provided in three periods, separated by court review to determine whether the defendant remains incompetent to stand trial. A third 180-day felony competency restoration treatment period may not be ordered unless the court or a jury finds the defendant is a substantial danger to other persons or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, and that there is a substantial probability the defendant will regain competency within a reasonable period of time.

Competency restoration may be provided at an inpatient or outpatient facility that is operated by, or under contract with, Department of Social and Health Services (DSHS). An overwhelming majority of competency restoration treatment in Washington State is delivered inpatient, typically at a state hospital.

The Trueblood Litigation. In 2014, the state was sued in federal district court in the case of *Trueblood v. DSHS*, and in 2015 it was found liable for imposing excessive wait times on in-custody defendants who are ordered to receive competency evaluation and restoration

services. The court found the state in contempt for continued noncompliance in 2017, and subsequently assessed over \$83 million in fines before the state reached a settlement with plaintiffs, approved in December 2018. The settlement obligates the state to take numerous actions calculated to speed the delivery of competency evaluation and restoration services. During the 2019 legislative session, the settlement obligates the state to work to achieve changes to reduce the number of people ordered to receive competency evaluation and restoration services. The most recent court monitoring report posted by DSHS, dated January 31, 2019, indicates a statewide average wait time for in-custody defendants of 13.0 days for completion of a competency evaluation in jail, 28.5 days for transportation to a facility for competency evaluation, and 42.8 days for transportation to a facility for competency restoration.

Classification of Criminal Offenses. A nonfelony is a misdemeanor or gross misdemeanor. A nonfelony is non-serious offense when it is not a serious traffic offense, crime against persons, domestic violence offense, or harassment offense. Felonies may be class A, class B, or class C. All class A felonies and some class B felonies are classified as violent offenses. Certain felonies are classified as sex offenses.

Rights of a Criminal Defendant. Criminal defendants have a panoply of constitutional rights including the right to remain silent, the right to counsel, the right to be presumed innocent until guilt is proved beyond a reasonable doubt, the right to confront witnesses, and the right to a speedy trial. A defendant must be competent to make a valid waiver of their constitutional rights. The right to counsel includes protection from any state interrogation which is not initiated by the defendant.

Summary of Bill: Forensic Navigators. If available, a court may appoint an impartial forensic navigator approved by DSHS to help defendants who have been referred for competency evaluation or restoration, navigate the forensic process and to access available behavioral health resources. The navigator is an officer of the court. The navigator must investigate relevant information about the background and medical history of the defendant, including the circumstances that led to the current charges. The navigator must interview and observe the defendant and report information to the court and any views expressed by the defendant about their pending court options. The navigator must monitor compliance with court orders and report any change in the defendant's circumstances to the court.

The navigator may make nonclinical recommendations to the court regarding treatment and restoration options available to the defendant. When contacted by the navigator, all state and local agencies, law enforcement, health care and behavioral health providers, hospitals, and schools must provide the navigator with records relating to the defendant without the consent of the defendant.

Diversion Authority. The authority of a police officer to divert an individual known to suffer from a behavioral health disorder to a crisis stabilization unit, triage facility, or facility for civil commitment, instead of arresting the individual, is expanded from individuals believed to have committed a nonfelony, non-serious offense to individuals believed to have committed any nonfelony, a class C felony, or a class B felony which is not classified as a violent offense or sex offense. Police agencies must adopt standards in conjunction with the prosecuting attorney that allow an officer to refer an individual believed to have committed a

crime for treatment notwithstanding the existence of outstanding warrants. These standards must address the circumstances in which such referrals are permissible and provide an opportunity for comment by the defense bar and disability community prior to local adoption.

Competency Restoration. Authority is removed for the parties to stipulate that a defendant is unlikely to regain competency without a factual determination made by the court.

Outpatient Competency Restoration. When a court revokes the conditional release of a defendant who is undergoing outpatient competency restoration, the court may place the defendant in an inpatient competency restoration program for only the time remaining on the current competency restoration order, not counting periods in which the defendant was absent from the treatment program, plus any additional period of competency restoration for which the defendant is eligible. A court may not order outpatient competency restoration unless an appropriate outpatient restoration program is available which has adequate space for the defendant.

Nonfelony Competency Restoration. When a nonfelony defendant is found to be incompetent to stand trial, the court must dismiss the charges without prejudice following 24 hours notice to the parties unless the prosecutor requests a hearing for a competency restoration order. To grant a prosecutor's motion for nonfelony competency restoration, the court must find by a preponderance of the evidence there is a compelling state interest in pursuing competency restoration, considering the defendant's prior criminal history, prior history in treatment, prior history of violence, the nature of the pending charges, and any available indications as to whether competency restoration treatment is likely to be successful.

Appropriation: None.

Fiscal Note: Requested on January 20, 2019.

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 is about ensuring that defendants have access to competency evaluation services, and I am excited about beefing up outpatient competency restoration services. The *Trueblood* settlement was reached in February 2018 and approved after a long stakeholder process. It is phased into regions. This bill represents the items in the settlement agreement that are believed to require statutory change. It will keep people out of the criminal justice system and in treatment where they will be better served. The settlement has been very collaborative. This is a historic opportunity to better serve and safeguard the rights of persons with mental illness who are caught up in the criminal justice system. We should look beyond the number of forensic beds at the reasons why we put so many people into the system. Forensic navigators should have a case management role that emphasizes diversion and treatment. Protections are needed for confidentiality. Aspect of outpatient restoration and nonfelony competency restoration should be clarified. Class members experience time in custody as confusing, scary, unending, lonely, dirty, and feel everyone is against them. They are isolated and do not get

clear answers about what will happen to them. They need someone who has the time to talk to them and create something productive and positive from a terrible experience. Please ensure navigators have the tools needed to work for class members, not against them. We support expanding diversion flexibility for law enforcement and the use of outpatient restoration treatment. Please add language providing residential supports for unstably housed defendants who need support to be eligible for outpatient restoration. Forensic navigators should help people get in and stay in treatment. Incompetent defendants need more assistance than just a referral. Appropriate support will reduce recidivism and improve recovery. Persons in the justice system experience significant trauma. Family members struggle to know how to help a loved one find supportive housing, find a provider, or motivate them to take medication. They need support. Housing and intensive case management can make a difference. There must be protection from negative use of confidential information. How much help a person needs should not be determined by the level of the crime.

OTHER: The processes in the bill need to be better defined so that the bill creates a set of rules the courts can work with. The forensic navigator function may be better applied upstream, such as by screening everyone admitted to jail like in Snohomish County. Law enforcement diversion statutes should never prevent an officer from diverting a person. We are uncomfortable with the language instructing officers to disregard warrants. We are concerned what will happen to nonfelony defendants who do not receive competency restoration. Prosecutors are concerned about being able to prove a compelling state interest, especially in a 24 hour time frame, which should be extended. People exiting the justice system need intensive wraparound services. A navigator will be little help if services don't exist.

Persons Testifying: PRO: Senator Manka Dhingra, Prime Sponsor; Rashi Gupta, Policy Advisor to Governor Inslee; Melanie Smith, NAMI Washington; Joan Miller, Washington Council for Behavioral Health; Kimberly Mosolf, Disability Rights Washington; Heather Dornberger, Consumer Voices Are Born; Darya Farivar, Disability Rights Washington; Laura Van Tosh, citizen; Jerri Clark, Mothers of the Mentally Ill.

OTHER: James McMahan, Washington Association of Sheriffs and Police Chiefs; Russell Brown, Washington Association of Prosecuting Attorneys; Stephen Warning, Superior Court Judges Association.

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