

SENATE BILL REPORT

SB 5440

As of February 2, 2023

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.

Sponsors: Senators Dhingra, Nguyen, Saldaña, Valdez, Van De Wege and Wilson, C.; by request of Office of the Governor.

Brief History:

Committee Activity: Law & Justice: 2/02/23.

Brief Summary of Bill

- Requires a court to determine by direct observation of a defendant that there is genuine doubt as to competency before ordering a competency evaluation.
- Requires a court to order a defendant to receive outpatient competency restoration or to divert criminal charges in some circumstances.
- Allows the Department of Social and Health Services (DSHS) to place a defendant in a jail-based competency restoration program certified by DSHS, effective July 1, 2025.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Kevin Black (786-7747)

Background: Competency to Stand Trial. A defendant has a constitutional right to not be

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tried for a crime if the defendant is incompetent to stand trial. Incompetent to stand trial means the defendant has a mental disorder that causes the defendant to be incapable of understanding the nature of the proceedings against them or unable to assist in their own defense.

Competency Evaluations and Competency Restoration Treatment. When the issue of competency to stand trial is raised by any party or the court, the court must stay the proceedings for a competency evaluation. The court must appoint an expert or request a competency evaluation be performed by an evaluator employed by the Department of Social and Health Services (DSHS). After the evaluation if the court finds that the defendant is incompetent to stand trial, the case must remain stayed and the court may order the defendant to undergo competency restoration treatment.

Competency restoration treatment is involuntary mental health treatment directed at restoring legal competency to render the defendant amenable to face criminal charges. A defendant may qualify for variable periods of competency restoration treatment depending on the nature of the defendant's charges—nonserious nonfelony, serious nonfelony, nonviolent felony, or violent felony. Competency restoration is provided by DSHS at a state hospital or other facility, unless the defendant qualifies for an outpatient competency restoration program (OCRCP).

To be eligible for an OCRCP, a defendant must:

- be charged in a county within a *Trueblood* settlement region that employs forensic navigators;
- be recommended for an OCRCP by a forensic navigator with input from the parties;
- be ordered to receive outpatient competency restoration by the judge;
- be clinically appropriate;
- be willing to adhere to medications or to receive a prescribed intramuscular injection; and
- be willing to abstain from alcohol and unprescribed drugs.

Forensic Navigators. A forensic navigator is an impartial agent employed by DSHS to assist individuals referred for a competency evaluation with accessing services related to diversion and outpatient competency restoration. The forensic navigator helps defendants who are ordered to OCRPs with attending appointments, classes, and other services. Only certain counties have received state funding for forensic navigators.

The *Trueblood* Lawsuit. In 2015, Washington State was found liable in the case of *Trueblood v. DSHS* for imposing excessive wait times on in-custody criminal defendants for competency to stand trial services. The federal district court ordered Washington to provide timely competency to stand trial services, and in 2017 found the state in contempt of court for continued noncompliance. The state was assessed over \$83 million in fines before reaching a settlement agreement with the plaintiffs at the end of 2018. During the settlement period, which is ongoing, contempt fines continue to accrue, with some fines

being paid and other fines being held in suspension. The establishment of OCRPs and forensic navigators was stipulated in the *Trueblood* settlement, and enshrined in law in 2019. The state remains out of compliance with the timelines for competency services required by the *Trueblood* settlement.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (Proposed Substitute): Before ordering a competency evaluation for a defendant, the court must first make a determination based on judicial colloquy or direct observation that there is a genuine doubt as to competency.

DSHS must certify jail-based competency restoration units, called alternative therapeutic units. Effective July 1, 2025, DSHS may place a defendant ordered to receive inpatient competency restoration in a jail-based competency restoration program.

If the court orders a competency evaluation for a defendant who is charged with a serious traffic offense, or a felony version of a serious traffic offense, the prosecutor may make a motion to prohibit the defendant from driving during the pendency of the evaluation. Effective July 1, 2024, if the court finds the defendant incompetent, the court must order revocation of the defendant's driver's license for one year. The court must vacate the order of revocation if it finds the defendant's competency has been restored. The court may vacate the revocation order before the end of one year on good cause upon the petition of the defendant.

DSHS must refer an individual who is found not competent due to intellectual or developmental disability to the Developmental Disabilities Administration to be reviewed for eligibility and services.

The court must order a defendant who is incompetent to stand trial and referred for civil conversion after dismissal of charges to be committed to DSHS instead of to a state hospital.

A forensic navigator who is assisting an individual who is an American Indian or Alaska Native must notify and coordinate with any tribal or Indian health care provider services used by the individual as soon as possible.

Forensic navigators in counties with outpatient competency restoration, forensic housing, and other programs must meet with individuals who are charged with misdemeanors and have had two or more competency evaluations in the preceding 24 months on separate charges or cause numbers. The forensic navigators must meet with the individual, determine their willingness to engage, and present a diversion program plan to the defense counsel and prosecuting attorney. If the parties agree to the plan, the prosecutor may dismiss charges with or without prejudice. If not, the defendant may file a motion for a court order enrolling the defendant in the diversion plan and dismissing the charges without prejudice. The court

must grant the motion if it finds by a preponderance of the evidence that the defendant is amenable to diversion, is likely to comply with treatment recommendations, and can be safely treated in the community. If the court dismisses charges and enrolls the defendant in a diversion program, a forensic navigator must be assigned to the defendant for up to six months.

Effective July 1, 2024, if the defendant is charged with a nonfelony and a forensic navigator recommends outpatient competency restoration, the court must enter an order for outpatient competency restoration, unless the court finds the order is inappropriate or inadequate.

If the defendant is charged with a serious nonfelony and the charges are dismissed, the court must detain and transport the defendant to an evaluation and treatment facility for a civil commitment evaluation.

A requirement is removed for a developmental disabilities professional to have three years of experience directly treating or working with persons with developmental disabilities.

Appropriation: None.

Fiscal Note: Requested on January 31, 2023.

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

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony On Proposed Substitute: PRO: We are in a dire situation, worse than it's been in the last 20 years. We need to come together to figure out how to address it. I am encouraged new resources are coming online. If we can be all hands on deck for the next five years, we will be in a good place when long-term investments come online. We need to pass a bill that will make no one happy; but having defendants wait in jail nine months to a year is unconscionable. Jail-based restoration is not ideal, but if they are waiting nine months in custody it is better for them to be getting restoration services during that time. We need to be real—the status quo will not work. Adequate resources are needed to prevent failure. The state hospitals are beyond capacity. Shifting lower level cases to the community would go a long way to help. Mixing civil patients in forensic wards is not beneficial. Civil conversion timelines are too short. State hospitals have significant staffing issues.

CON: The vision of the original bill is to encourage and push the use of diversion options for people with behavioral health needs in the criminal justice system. The sub does not go far enough. The competency system is stretched beyond its capacity and does not meet the rights or needs of people with behavioral health conditions. Competency restoration is not treatment designed for the path to recovery, but to face criminal charges. We must emphasize outpatient and diversion services and reduce reliance on competency services.

Inpatient competency referrals have ballooned by 140%. Hundreds are suffering and that must change. Without a fundamental shift in the way we handle criminal justice referrals for people with behavioral health needs, the only option will be massive expenditures for poor results. The bill does not require or fund counties to procure jail-based competency units or to build them. By implying that this option is available, it creates liability for local governments. Who will pay for this? Counties are concerned about their ability to perform in the face of workforce shortages. Competency restoration should not be in jails. The *Trueblood* plaintiffs strongly oppose jail-based restoration which violates court orders. We cannot negotiate until this idea is removed. Jails are not designed to be therapeutic environments. Prosecutors stand ready to work on solutions. We need to address root causes and fund the beds and services that are required. This is a constitutional and humanitarian crisis. The state should immediately invest in community treatment facilities. We need to stop restoration for nonviolent felony offenses and convert these cases to civil detentions. Fund pretrial home detention as an alternative to jail. Having behavioral health needs is not a crime and we should not use jails to house people who need competency services. Smaller counties don't have the space to segregate forensic patients from the general population and won't be able to hire medical staff. Too many defendants are currently being found incompetent. We should return to inpatient evaluations to make more reliable competency determinations.

OTHER: Jail-based restoration may be considered as one of many options, but many questions are raised. Counties do not have the funds to service these patients without state support. We support creative strategies that open doors to person-centered care and look forward to discussions. Shuttered hospitals and skilled nursing facilities should be used. The state must stop closing beds before replacement beds are open. The system now is both inhumane and expensive. We need housing and stability to get basic needs met, not to spend millions to arrest someone for the fifteenth time. You can't engage someone in recovery while they are in a jail.

Persons Testifying: PRO: Senator Manka Dhingra, Prime Sponsor; Mike Yestramski, Washington Federation of State Employees; Anne Tarlton, Washington Federation of State Employees.

CON: Kimberly Mosolf, Disability Rights Washington; Juliana Roe, Washington State Association of Counties; Ryan Mello, Washington State Association of Counties and Pierce County; Jason Cummings, Snohomish County Prosecuting Attorney; Jason Schwarz, Washington Defender Association; Gordon Hill, King County Department of Public Defense; James McMahan, Washington Association of Sheriffs & Police Chiefs; Greg Banks, Island County Prosecutor; Amber Leaders, Office of the Governor.

OTHER: Melanie Smith, NAMI Washington; David Hackett, King County; Kelly Rider, King County Department of Community and Human Services.

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