SENATE BILL REPORT
SB 5440

As of February 21, 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, 2/16/23 [DPS-WM, DNP].
Ways & Means: 2/21/23.

Brief Summary of First Substitute 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 the Department of Social and Health Services (DSHS) to contract with willing jails to establish clinical intervention units to provide enhanced behavioral health services to defendants waiting for competency to stand trial services.
- Prohibits jails from substituting or discontinuing an individual's medication for a serious mental health disorder when the individual is medically stable on the medication.
- Requires courts to dismiss nonfelony charges and refer the defendant for services recommended in a diversion program recommended by a forensic navigator if the court finds the defendant is amenable to the

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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 part of the legislation nor does it constitute a statement of legislative intent.

services and can safely receive services in the community.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5440 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.
Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Padden, Ranking Member; Kuderer, Pedersen, Salomon, Valdez and Wagoner.

Minority Report: Do not pass.
Signed by Senators McCune, Torres and Wilson, L..

Staff: Kevin Black (786-7747)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Monica Fontaine (786-7341)

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

To be eligible for an OCRP, a defendant must:

- be charged in a county within a *Trueblood* settlement region that employs forensic

navigators;
- be recommended for an OCRP 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 (First 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.

A jail or juvenile detention facility may not discontinue prescribing or substitute an antipsychotic, antidepressant, antiepileptic, or other drug prescribed to an individual to treat a serious mental illness by a state hospital, other state facility, behavioral health agency, or medical provider if the individual is medically stable on the drug. This requirement includes situations in which the individual returns to the jail or juvenile detention facility directly after undergoing treatment in a state hospital, behavioral health agency, outpatient competency restoration program, or prison. The jail or juvenile detention facility may substitute a generic version of a name brand drug if the generic version is chemically identical to the name brand drug, or may substitute a drug if the drug cannot be prescribed for reasons of drug recall or removal from the market, or medical evidence indicating no therapeutic effect of the drug. .

DSHS must contract with willing jails to fund construction and operational costs for clinical intervention units, which are discrete units in a jail or other facility designed to house

pretrial defendants with behavioral health disorders who have been referred for services related to competency to stand trial. Jails which contract with DSHS must allow access to program participants by clinical intervention specialists employed by or contracted with DSHS. Clinical support specialists are licensed professionals with prescribing authority employed by or contracted with DSHS to provide enhanced oversight and monitoring of defendants' behavioral health status. The clinical intervention specialists must work collaboratively with jail health services to ensure appropriate prescriptions, medication compliance monitoring, and access to supportive behavioral health services. Clinical intervention specialists must assist forensic navigators in making recommendations for appropriate placements for the defendants, which may include an outpatient competency restoration program or a diversion program. A clinical intervention specialist must notify DSHS if a participating defendant appears to have stabilized such that a new competency evaluation is appropriate to reassess the defendant's need for competency restoration treatment. To participate in a clinical intervention unit, a defendant must agree to take prescribed psychotropic medication and to engage with a clinical intervention specialist. DSHS may establish other requirements for clinical intervention units by contract or rule.

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 modify the defendant's conditions of release to include a condition prohibiting the defendant from driving during the pendency of the evaluation. If the court finds the defendant incompetent, the court may order revocation of the defendant's driver's license for one year. The court must order reinstatement of the license 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.

A competency evaluator must refer a defendant whom the evaluator finds to be not competent due to intellectual or developmental disability to the Developmental Disabilities Administration for review for eligibility for services. DSHS must provide information about the availability of services to the evaluator and to the forensic navigator, if any.

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

A forensic navigator must assess an individual who is referred for competency evaluation for appropriateness for assisted outpatient treatment if the individual is out of custody or appropriate for diversion. The forensic navigator must provide updates to the court and parties concerning the status of an individual's participation in diversion services. 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.

A competency restoration order for a defendant in custody must indicate whether the court's

commitment order includes the authority for DSHS to modify the defendant's conditions of release by transferring the defendant to a step-down or outpatient competency restoration facility if DSHS determines that such placement is clinically appropriate.

The court must appoint a forensic navigator for every defendant referred for a competency evaluation whose most serious charge is a nonfelony, if the defendant has had two or more competency evaluations in the preceding 24 months on separate charges, and the current charges are filed in a county that has a forensic navigator program. The forensic navigators must meet with the individual and determine their willingness to engage with services, and present a recommendation for a diversion program to the defense counsel and prosecuting attorney. If the parties agree to the plan, the prosecutor must request dismissal of the charges. If not, defense counsel may move for a court order dismissing the criminal charges without prejudice and referring the defendant to the services described in the diversion program. The court must grant the motion if it finds by a preponderance of the evidence that the defendant is amenable to the services described in the diversion program, and can safely receive services in the community. Individuals who receive dismissal of charges and referral to services described in a diversion program must have a forensic navigator assigned to them for up to six months. The forensic navigator must provide monthly status updates to the court and parties regarding the individual's status in the diversion program.

If the defendant is charged with a serious nonfelony, the court finds there is a compelling state interest in pursuing competency restoration for the defendant, and a forensic navigator recommends outpatient competency restoration from an available program, the court must enter an order for outpatient competency restoration, unless the court finds the order is clearly inappropriate considering the health and safety of the defendant, risks to public safety, and other relevant factors.

Criminal trespass in the first and second degree are excluded from the definition of serious nonfelony offenses for the purpose of nonfelony competency restoration and involuntary medication.

Subject to funding, DSHS must develop a program for individuals who have been involved with the criminal justice system and who are diagnosed with a developmental disability or dementia disorder, which involves wraparound services and housing supports appropriate to the needs of the individual. If a person with this diagnosis is committed to the custody of DSHS after dismissal of felony charges due to incompetency to stand trial, DSHS must place the person in the program either directly from the jail or as soon thereafter as may be practicable, without maintaining the person at an inpatient facility for longer than is clinically necessary.

DSHS must coordinate with cities, counties, hospitals, and other private and public entities to identify locations that may be commissioned or renovated for use in treating clients committed to DSHS for competency evaluation, competency restoration, civil conversion, or treatment following acquittal by reason of insanity.

DSHS must configure its data systems related to forensic mental health services so the systems can retrieve data about unique individual defendants.

Subject to funding, HCA must increase the compensation for staff in outpatient competency restoration programs to ensure compensation is provided at competitive levels to improve recruitment and allow for the full implementation of outpatient competency restoration programs.

The staff of an outpatient competency restoration program must include a prescriber.

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

EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (First Substitute):

- Removes references to alternative therapeutic units and jail-based competency restoration, and instead requires DSHS to contract with willing jails to fund construction and operational costs for clinical intervention units which use clinical intervention specialists employed by or contracted with DSHS to provide enhanced oversight, monitoring, and behavioral health support to in-custody defendants who are waiting for services related to competency to stand trial.
- Requires jails and juvenile detention facilities to continue prescribing antipsychotic and other drugs prescribed to treat a serious mental illness when the individual is medically stable on the drug without substitution of a different drug in the same class.
- Expands duties of forensic navigators by requiring them to assess an individual's appropriateness for assisted outpatient treatment and provide updates to the court about the individual's participation in diversion services.
- Requires DSHS to coordinate with cities, counties, and other public and private entities to identify locations that may be commissioned or renovated to provide inpatient services for forensic patients.
- Requires a court to indicate in a competency restoration order whether the order includes authority for DSHS to modify the defendant's conditions of release by transferring the defendant to a step-down or outpatient competency restoration program if DSHS determines that such placement is clinically appropriate.
- Allows a court discretion whether to order revocation of a defendant's driver's license if the court finds that the defendant is incompetent to stand trial and the defendant is charged with a serious traffic offense.
- Excludes criminal trespass in the first and second degree from the definition of a serious nonfelony offense for the purpose of competency restoration and involuntary medication orders.
- Requires DSHS to develop a program for individuals with connections to criminal justice who have been found incompetent to stand trial due to a developmental

disability or dementia disorder.

- Requires the HCA to increase compensation for staff in outpatient competency restoration programs.
- Requires the staff of an outpatient competency restoration program to include a prescriber.
- Requires DSHS to configure its data systems related to competency to stand trial to allow retrieval of data about unique defendants and their history.
- Makes other substantive and technical changes.

Appropriation: The bill contains a section or sections to limit implementation to the availability of amounts appropriated for that specific purpose.

Fiscal Note: Available.

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 (Law & Justice): *The committee recommended a different version of the bill than what was heard.* 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 (Law & Justice): 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 (Law & Justice): No one.

Staff Summary of Public Testimony (Ways & Means): PRO: These are some of the worst wait times for felony restorations. This bill allows courts to refer individuals to step-down facilities. The Legislature has invested significant funds in response to the Trueblood Contempt Settlement Agreement, and has found that changing capacity alone is not going to resolve the issues at hand. There has been a 145% increase in the number of cases to the state hospitals. This bill focuses on earlier interventions for individuals and providing

mental health and wraparound services.

CON: This bill will not improve wait times. We need to focus on reducing cases going to the hospitals for competency restoration. Jails are not the setting to conduct competency restorations because it is not therapeutic enough. Jails cannot substitute for like drugs that are available to them, which can result in a large expense for jails. Cities will be responsible for costs of the medical treatment plans. This bill also allows judges to use their opinion in determining whether the defendant is competent.

OTHER: Constituents appreciate the DSHS coordination in locating additional facilities to provide restoration and step-down services. King county is unable to implement the crisis intervention units as detailed in the bill due to understaffing of corrections officers. The language in statute directs civil conversion patients to be committed to state hospitals, so striking the language "state hospitals" would commit patients to DSHS but does not specify which facilities. Clarifying language should be added to direct civil conversion patients to DSHS facilities rather than the emergency department.

Persons Testifying (Ways & Means): PRO: Senator Manka Dhingra, Prime Sponsor; Amber Leaders, Governor's Office.

CON: Lindsey Hueer, Association of Washington Cities; Kari Reardon, WDA/WACDL; Jason Schwarz, WDA/WACDL; Taylor Gardner, WA Assn of Sheriffs and Police Chiefs.

OTHER: Juliana Roe, Washington State Association of Counties; Katie Kolan, Washington State Hospital Association (WSHA); Michael White, King County.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.