

# SENATE BILL REPORT

## ESSB 5176

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As Passed Senate, March 4, 2013

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

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

**Sponsors:** Senate Committee on Human Services & Corrections (originally sponsored by Senators Hargrove, Carrell and Hewitt).

**Brief History:**

**Committee Activity:** Human Services & Corrections: 1/29/13, 2/20/13 [DPS].

Passed Senate: 3/04/13, 49-0.

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### SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

**Majority Report:** That Substitute Senate Bill No. 5176 be substituted therefor, and the substitute bill do pass.

Signed by Senators Carrell, Chair; Pearson, Vice Chair; Darneille, Ranking Member; Hargrove, Harper and Padden.

**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 to 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 has committed acts constituting a felony and, due to a mental disorder, presents a substantial likelihood of repeating similar acts. Thirty days before a person committed on this additional basis may be released, the superintendent of the mental health facility must notify the sheriff and chief of police of the area where the person will reside, and anyone specified in writing by the prosecuting attorney, if the felony is classified as a sex, violent, or felony harassment offense; or the prosecutor of the county where the criminal charges were dismissed, if the release is to occur before the expiration of the commitment period.

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

A mental disorder is any organic, mental, or emotional impairment which has substantial adverse effects on a person's cognitive or volitional functions.

The longest time period allowed by state law for civil commitment, except for persons committed under criminal insanity or sexually violent predator provisions, is 180 days. The committed person must be released at the end of the 180-day period unless the superintendent of the mental health facility files a new petition for involuntary treatment at least three days before the expiration of the current commitment period. 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 which supports the petition and explain which, if any, less restrictive alternatives to detention are available to the person. The superintendent may release the person before the expiration of the commitment period if the superintendent determines that the person no longer presents a likelihood of serious harm. The superintendent must be represented in court by the county prosecutor or, in the case of a petition for 90 days or more filed by the superintendent of a state hospital, the Attorney General.

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.

A committed person has the right not to have competency determined except pursuant to a criminal or guardianship proceeding.

In 2010, a 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 recommendations for release pertaining to those individuals. The PSRP consists of seven volunteer members representing different affiliations appointed by the Governor for renewable three-year terms. Western State Hospital and Eastern State Hospital have 750 beds designated to serve adults civilly detained for 90 days or more.

A person may be committed as criminally insane if the person is found not guilty by reason of insanity, plea bargain, or jury, and the fact-finder determines that the person presents a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court, other persons, or institutions. The maximum term of commitment is equal to the maximum possible penal sentence for any offense charged against the person committed.

A person committed as criminally insane may petition for conditional release or final release by making an application to the Secretary of DSHS, or by making a direct petition to the court.

**Summary of Engrossed Substitute 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 a felony defendant is eliminated.

When the charges of a misdemeanor defendant are dismissed based on incompetent to stand trial, a designated mental health professional (DMHP) or other professional person must be permitted to screen the defendant prior to transport to an evaluation and treatment facility and release the defendant if civil commitment criteria are not met. The requirement of a 48-hour hold before discharge for superior court notification is eliminated. Notice must be given to the prosecutor and defense attorney whenever a civil commitment petition is not filed for a felony or misdemeanor defendant after dismissal of charges based on incompetent to stand trial.

For persons facing civil commitment after dismissal of felony charges based on incompetent to stand trial on the grounds 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 whether the person committed acts constituting a violent felony. If the court so finds, the length of commitment must be until such time as the person no longer meets grounds for involuntary commitment, subject to six-month court reviews. At the court review, the court must continue the commitment if the facility presents prima facie evidence, except that the court must conduct a full evidentiary hearing if the committed person presents proof that the person's condition has so changed that the person no longer meets grounds for civil commitment. The committed person must be provided with counsel upon filing of a six-month review petition.

The PSRP must provide advice to DSHS regarding persons detained for an indefinite period under the involuntary treatment act. DSHS must notify the PSRP at least 30 days before releasing such an individual. The PSRP must report to the Legislature by December 1, 2014, on whether further changes in the law are appropriate concerning such individuals.

The superintendent must provide 30 days' advance notice to the prosecuting attorney in the county where the criminal charges were dismissed whenever the superintendent determines to release a person committed on the basis that the person has 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, or provide immediate notice to the prosecuting attorney if such a person escapes.

When a person committed as criminally insane submits a direct petition for release to the court, the petition must be served upon the court, prosecuting attorney, and Secretary of DSHS. Upon receipt of service, the Secretary must determine whether reasonable grounds exist for release using the same procedure as if the petition had been originally submitted to the Secretary, and provide the recommendation to all parties and the court.

When filing a release petition for a person committed as criminally insane who will be transferred upon release to a correctional facility to serve a sentence for a class A felony, the petitioner must show that the person's mental disease or defect is manageable within a correctional facility, but need not prove that the person does not present a substantial danger to other persons or a substantial likelihood of committing criminal acts that jeopardize public safety or security if released.

**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 on Original Bill:** PRO: The aim of this bill is to reach a small number of gap cases, which is our term for cases where persons charged with serious crimes cannot be placed on trial due to incompetency, and get recommended for release from civil commitment, only to have the dismissed charges refiled by the prosecuting attorney. The persons can bounce back and forth for years. We want to keep these cases out of the criminal justice system by increasing authority to hold patients under civil commitment. Our estimate is that less than 20 cases per year will qualify. We recommend amendments to allow misdemeanor defendants to be committed to a state hospital or evaluation and treatment facility, and to replace the intent section with language more sensitive towards persons with mental illness. The patients will have counsel and the right to a hearing. The standard for civil commitment is not reduced. The bill is not intended to avoid due process. Provisions related to persons with developmental disabilities may not be affordable. There is no single answer to solve the problem of violence in our community. This bill is one of the small things that may contribute towards making a larger difference. The bill targets persons who have a high propensity to be involved in criminal behavior. Our interest in this bill is limited to the issue of placement of misdemeanor defendants at the state hospitals. Since state hospitals recently began declining to accept misdemeanor defendants, they end up in the emergency room instead. The 48-hour hold is a problem. This exacerbates the shortage of mental health beds and is contrary to what was intended.

CON: Please amend the inflammatory language in the intent section which promotes the stereotype that all persons with mental illness are dangerous. This bill has constitutional and due process problems, and would not withstand appellate review. It does away with evidentiary hearings and shifts the burden of proof onto the defense to produce an expert, which does not happen anywhere else in mental health law. Civil commitment has been found to be a massive curtailment of liberty. Civil commitment costs will increase. The Public Safety Review Panel provisions should be removed. The Panel only meets once an month, and its participation delays the disposition of the criminal insanity cases it currently handles. Judges can make decisions without the input of a voluntary community panel. This bill could divert resources at state hospitals, leading to more backlog and delays borne by persons with mental illnesses in jail waiting for competency evaluations. The impact of jail delays on persons with mental illness is devastating.

OTHER: We are concerned about provisions related to persons with developmental disabilities. There is only a fixed number of forensic beds available, so accepting all misdemeanor defendants could require adding a state hospital ward. We are working to develop a triage strategy for the misdemeanor defendants with our community partners. We want to work together to come up with standards that will pass constitutional muster and be fundamentally fair. We are troubled by the revolving door at the state hospital. In Seattle, seven to ten demeanor defendants per month have cases that are dismissed as incompetent to stand trial, several of whom are not detained and do not get services.

**Persons Testifying:** PRO: Tom McBride, WA Assn. of Prosecuting Attorneys; Don Pierce, WA Assn. of Sheriffs and Police Chiefs; Seth Dawson, National Alliance on Mental Illness (NAMI), NAMI WA; Darcy Jaffe, Harborview Medical Center.

CON: Mike De Felice, WA Defender Assn., WA Assn. of Criminal Defense Lawyers; David Lord, Disability Rights WA.

OTHER: Jane Beyer, DSHS; Kelsey Beck, City of Seattle; Lawrence Thompson, Federation of State Employees 793.