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## Civil Rights & Judiciary Committee

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### E2SSB 5440

**Brief Description:** Providing timely competency evaluations and restoration services to persons suffering from behavioral health disorders.

**Sponsors:** Senate Committee on Ways & Means (originally sponsored by Senators Dhingra, Nguyen, Saldaña, Valdez, Van De Wege and Wilson, C.; by request of Office of the Governor).

#### **Brief Summary of Engrossed Second Substitute Bill**

- Makes a number of changes to provisions governing competency evaluation and competency restoration procedures and requirements.
- Expands the duties of forensic navigators, and requires appointment of a forensic navigator for a defendant charged with a nonfelony who has had two or more competency evaluations in 24 months on separate charges.
- Requires jails to allow clinical intervention specialists access to persons referred for competency evaluation or restoration services, and specifies the duties of clinical intervention specialists.
- Prohibits jails or juvenile detention facilities from discontinuing or substituting a person's medications for a serious mental health disorder if the person is medically stable on the drug, with limited exceptions.
- Requires the Department of Social and Health Services (DSHS) to develop a program for persons who have been found incompetent to stand trial based on an intellectual or developmental disability or dementia, subject to funding.
- Requires the Health Care Authority to take steps to increase compensation of staff in outpatient competency restoration programs, subject to funding.

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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.*

- Requires the DSHS to engage in certain data collection and to identify locations that may be commissioned or renovated for use in treating persons committed for competency evaluation or restoration or civil conversion, or following acquittal by reason of insanity.

**Hearing Date:** 3/14/23

**Staff:** Edie Adams (786-7180).

**Background:**

Competency to Stand Trial.

A person is incompetent to stand trial if, due to a mental disease or defect, he or she lacks the capacity to understand the nature of the proceedings or is unable to assist in his or her own defense. A person who is incompetent to stand trial may not be tried, convicted, or sentenced for a criminal offense as long as the incompetency continues.

Competency Evaluation and Restoration.

When a defendant's competency to stand trial is in question, the court must either appoint, or ask the Department of Social and Health Services (DSHS) to designate, a qualified expert to evaluate and report on the defendant's mental condition. If a defendant is found incompetent to stand trial, the court must stay the criminal proceedings and, depending on the charged offense, either order a period of treatment for restoration of competency, or dismiss the charges without prejudice. A court may order a period of competency restoration treatment for a defendant who is charged with a felony or a serious nonfelony offense, but not for a defendant charged with a nonfelony that is not a serious offense.

*Felony Offenses.* If a defendant charged with a felony is found incompetent to stand trial, the court must order a period of competency restoration treatment not to exceed 90 days, except if the highest charge is a class C felony or a nonviolent class B felony, the maximum time for the first restoration period is 45 days for inpatient competency restoration or 90 days for outpatient competency restoration. A second period of restoration treatment for up to 90 days may be ordered if necessary and reasonably likely to restore competency. In limited circumstances, the court may order a third period of restoration treatment for up to six months. The court must commit the person for inpatient competency restoration treatment at a state hospital or other DSHS competency restoration facility, or the court may order outpatient competency restoration treatment based on a recommendation from a forensic navigator and input from the parties.

*Nonfelony Offenses.* Where a defendant charged with a nonfelony offense is found incompetent to stand trial, the court must dismiss the charges without prejudice unless the prosecutor objects and provides notice of a motion for an order of competency restoration, which must be scheduled for a hearing within seven days. A court may order competency restoration if the prosecutor

establishes that there is a compelling state interest in ordering nonfelony restoration. The court may order inpatient competency restoration for a period not to exceed 29 days, or based on a recommendation from the forensic navigator and input of the parties, the court may order outpatient competency restoration for a period not to exceed 90 days.

*Outpatient Competency Restoration.* A court may commit a person to outpatient competency restoration if there is an appropriate program available and the defendant is clinically appropriate for outpatient competency restoration. The defendant must be willing to adhere to medications or receive intramuscular medication, abstain from alcohol and prescribed drugs, and comply with urinalysis or breathalyzer monitoring. The DSHS must place the person into approved housing affiliated with a contracted outpatient competency restoration program (OCRP). The OCRP must monitor the defendant and report any noncompliance or significant changes to the DSHS or forensic navigator.

*Dismissal of Charges.* If a defendant is found incompetent to stand trial, charges are dismissed without prejudice, and the person must be detained for evaluation under the Involuntary Treatment Act (ITA) for specified time periods depending on whether the person engaged in inpatient competency restoration services. Where a court dismisses nonfelony charges and the person was on conditional release at the time of dismissal, the court will refer the defendant for evaluation by a designated crisis responder.

#### Forensic Navigators.

A forensic navigator is an impartial person employed by the DSHS and appointed as an officer of the court to assist individuals referred for competency evaluation. A forensic navigator assists parties in understanding options available to the person that may allow diversion from the forensic system or for community outpatient competency restoration, and to facilitate the person's transition to those options, including by coordinating access to mental health services and housing, and assisting the person with obtaining prescribed medication and attending appointments and classes.

#### Trueblood Lawsuit and Timelines for Competency Services.

In *Trueblood v. the Department of Social and Health Services* (2015), a federal district court found that the State of Washington was violating the constitutional rights of in-jail defendants for excess wait times for competency evaluation and restoration services. As a result, the DSHS was ordered to provide in-jail competency evaluations within 14 days of a court order and inpatient competency evaluation and restoration services within seven days of a court order. In 2017 the court found the state in contempt for continued noncompliance, and in 2018 the state reached a contempt settlement agreement. The settlement requires the state to take numerous actions to meet the timeframes set forth by the court. The creation of forensic navigators and OCRPs are components of the settlement agreement and were enacted into law in 2019. The state remains out of compliance with the timeframes for providing competency services established in *Trueblood*.

#### **Summary of Bill:**

### Competency Evaluation and Restoration.

In a criminal proceeding where there is a doubt as to the defendant's competency to stand trial, the court may order a competency evaluation only if the court first reviews the allegations of incompetency and makes a determination that there are sufficient facts to form a genuine doubt as to competency based on information provided by counsel, judicial colloquy, or direct observation of the defendant.

If an evaluation is ordered for a defendant charged with a serious traffic offense or felony version of a serious traffic offense, the prosecutor may move to modify the defendant's conditions of release to prohibit the defendant from driving during the pendency of the competency evaluation period. If the charges are stayed based on the defendant's incompetency, the court may enter an order for the Department of Licensing (DOL) to revoke the defendant's driver's license for one year. When the court finds that competency has been restored, the court must enter an order for the DOL to reinstate the defendant's driver's license. Upon motion of the defendant, the court may order reinstatement of the defendant's driver's license before the end of one year for good cause.

If an individual is found incompetent due to an intellectual or developmental disability, the evaluator must notify the DSHS, which must refer the individual to the Developmental Disabilities Administration for review of eligibility for services, and any information about availability of services must be provided to the forensic navigator.

If an expert or professional person is unable to complete a competency evaluation after two scheduling attempts with a defendant, the DSHS must submit a report to the court and parties and include a date and time for another evaluation at least four weeks later. The court must provide the defendant with notice of the date and time of the evaluation, and if the defendant fails to appear, the court must issue a warrant for failure to appear and recall the order for competency evaluation.

If the court orders inpatient competency restoration, the court's order must specify whether the DSHS has authority to change the defendant's placement to a step-down facility or OCRP if clinically appropriate given the defendant's progress in restoration services.

If a defendant charged with a nonfelony that is a serious offense is found incompetent to stand trial, and the defendant is subject to an order under the ITA or proceedings under the ITA have been initiated, there is a rebuttable presumption that the state's compelling interest in competency restoration has been satisfied. If a defendant charged with a nonfelony that is a serious offense is found incompetent and the court finds a compelling state interest in pursuing competency restoration, the court must order outpatient competency restoration consistent with the forensic navigator's recommendations unless the court finds outpatient competency restoration inappropriate.

When a court orders a commitment for competency restoration or civil conversion, the commitment is to the DSHS for placement in a facility operated by or contracted by the DSHS,

rather than to a state hospital.

Outpatient competency restoration programs must include access to a prescriber.

Criminal Trespass in the first and second degree are excluded from the definition of a serious nonfelony offense for the purpose of eligibility for competency restoration and entry of involuntary medication orders.

#### Forensic Navigators.

The duties of a forensic navigator are expanded to include: assessing the individual for appropriateness for assisted outpatient treatment (AOT); and providing regular updates to the court and parties on the status of the individual's participation in diversion services, and responding to inquiries of the parties about treatment status. When an individual is ordered to receive community outpatient restoration, the forensic navigator must assess the individual for the appropriateness of AOT under the ITA, and coordinate the initiation of an AOT order if appropriate as part of a diversion program plan. If the individual is an American Indian or Alaska Native who receives medical, behavioral health, or other supportive services from a Washington tribe, the forensic navigator must notify and coordinate with the tribe and Indian health care providers.

A court must appoint a forensic navigator for any defendant charged with a nonfelony who has had two or more competency evaluations in the preceding 24 months on separate charges or cause numbers. The forensic navigator must meet, interview, and observe the defendant and determine the defendant's willingness to engage with diversion services. In cases that include a recommendation for a diversion program, the forensic navigator must provide a diversion program plan to the parties, which may include a referral for AOT under the ITA. If the parties agree on the diversion program, the prosecutor must request dismissal of the criminal charges. If the parties do not agree, the defense may move for an order dismissing the criminal charges and referring the defendant to services described in the diversion plan. The court must hold a hearing within 10 days and must grant the motion if it finds that the defendant is amenable to the services and can safely receive services in the community. A forensic navigator must be assigned to assist the person for up to six months while engaging in the services, and the forensic navigator must provide monthly status updates to the court and the parties.

#### Clinical Intervention Specialists.

Jails must allow clinical intervention specialists to have access to individuals who are referred to receive competency evaluation or restoration services, and to all records related to the health or conduct of the person while incarcerated. A clinical intervention specialist is a licensed professional with prescribing authority who is employed or contracted by the DSHS to provide direct services, oversight, and monitoring of the behavioral health status of in-custody defendants referred for competency evaluation or restoration services.

Clinical intervention specialists must work collaboratively with jail health services to ensure appropriate prescriptions, medication compliance monitoring, and access to supportive

behavioral health services for the person. Clinical intervention specialists must also coordinate with forensic navigators and the DSHS to assist in making recommendations for appropriate placements, including participation in an OCRP or diversion program. A clinical intervention specialist must notify the DSHS if an individual appears to have stabilized such that a new competency evaluation is appropriate to reassess the individual's need for competency restoration treatment.

A jail or juvenile detention facility may not discontinue any drug prescribed to a person 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. The jail may not substitute a different drug in the same therapeutic class unless: the drug is a generic version of a name brand drug which is chemically identical to the name brand drug; or the drug cannot be prescribed due to a drug recall or removal from the market, or medical evidence indicating the drug has no therapeutic effect. This includes situations in which the person returns to a jail or juvenile detention facility directly after undergoing treatment in a state hospital, behavioral health agency, OCRP, or prison.

Other.

Subject to specific funding for this purpose, the DSHS must develop a program with wraparound services and housing supports for persons who have had involvement in the criminal justice system and been found incompetent to stand trial based on an intellectual or developmental disability or dementia. If a court orders the commitment of such person following dismissal of felony charges, the DSHS must place the person in the program directly from jail or as soon thereafter as practicable without keeping the person in an inpatient facility for longer than clinically necessary. If appropriate, the DSHS may return the person to their home or another less restrictive setting, which may include provision of supportive services to help the person remain stable.

Subject to specific funding for this purpose, the Health Care Authority must require programs it contracts with to increase compensation for staff in OCRPs to provide competitive compensation levels to improve recruitment and allow for full implementation of OCRPs.

The DSHS must coordinate with cities, counties, hospitals, and other entities to identify locations that may be commissioned or renovated for use in treating persons committed to the DSHS for competency evaluation or restoration, civil conversion, or treatment following acquittal by reason of insanity. The DSHS may provide capital grants to entities to accomplish these purposes, subject to funding provided for this specific purpose.

The DSHS must collect data so that information can be retrieved based on unique individuals, their complete Washington criminal history, and referrals for forensic services.

**Appropriation:** None.

**Fiscal Note:** Requested on March 9, 2023.

**Effective Date:** Sections 6 through 8 of the bill contain an emergency clause and take effect immediately. The remainder of the bill takes effect 90 days after adjournment of the session in which the bill is passed.