

FINAL BILL REPORT

E2SSB 5440

C 453 L 23
Synopsis as Enacted

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).

Senate Committee on Law & Justice
Senate Committee on Ways & Means
House Committee on Civil Rights & Judiciary
House Committee on Appropriations

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

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.

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: Before ordering a competency evaluation for a defendant, the court must first make a determination whether sufficient facts have been provided to form a genuine doubt as to competency, based upon information provided by counsel, judicial colloquy, or direct observation of the defendant. Defense counsel may meet this requirement by filing a declaration stating they have reason to believe a competency evaluation is necessary, and stating the basis they believe the defendant to be incompetent. The competency evaluator must be given access to long-term services or supports facility records relating to the defendant.

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 establish a program to reimburse jails and juvenile detention facilities for the costs of any drugs they do not otherwise have available.

A court must first consider available and appropriate alternatives to inpatient competency restoration for a defendant whose highest charge is a serious nonfelony or a class C felony other than an assault with bodily harm, hit and run resulting in injury, or a hate crime, domestic violence, or sex offense, or a felony with a sexual motivation designation. The court must dismiss charges without prejudice upon the agreement of the parties if the forensic navigator finds an appropriate and available diversion program. If such a defendant is admitted for inpatient competency restoration treatment with an accompanying order for involuntary medication and remains incompetent to stand trial at the end of that competency restoration period, the defendant may not qualify for a subsequent period of competency restoration treatment.

A felony defendant is not eligible for a second or third period of competency restoration if their incompetence is determined to be solely the result of an intellectual disability, traumatic brain injury, or dementia. If a court enters an order to dismiss charges without prejudice based on incompetency to stand trial for a defendant who is already in a facility operated by or contracted with DSHS, the time period for filing a civil commitment petition must not begin until DSHS receives the court order.

Subject to security and background investigation requirements, jails must allow clinical interventions specialists to have access to defendants who are referred to receive competency services and to all records relating to the health and conduct of these defendants while incarcerated. Clinical intervention specialists must be licensed professionals with prescribing authority who are employed or contracted by DSHS. Clinical intervention specialists must support jail health services in providing direct services and enhanced oversight and monitoring of the behavioral health status of defendants. The clinical intervention specialist must notify DSHS if a defendant appears to have stabilized in their behavioral health such that a new competency evaluation is appropriate to reassess the defendant's need for competency restoration treatment. DSHS must establish a memorandum of understanding and any necessary contracts with participating jails.

Beginning October 1, 2023, 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 an intellectual or developmental disability, dementia, or traumatic brain injury to the Developmental Disabilities Administration (DDA) or Aging and Long-Term Support Administration for review for eligibility for services. DSHS must inform the forensic navigator about the availability of services.

DSHS must submit a report to the court when a competency evaluator is not able to complete an evaluation after two attempts at scheduling with the defendant, and include a date and time for an evaluation at least four weeks later. The court must provide notice of the date and time to the defendant and must recall the order for competency evaluation if the defendant does not appear and may issue a warrant for failure to appear.

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 for placement in a facility operated or contracted by 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. The forensic navigator must provide updates to the court and parties concerning the status of an individual's participation in outpatient or diversion services and be responsive to inquiries from the parties. 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. The forensic navigator must conduct regular classes on the educational components of competency to stand trial related to having a factual and rational understanding of courtroom roles and procedures.

In counties with a forensic navigator program, a forensic navigator must meet, interview, and observe all defendants who have had two or more cases dismissed in the preceding 24 months based on competency to stand trial if the most serious charge is a nonfelony or specified class C felony. The forensic navigator must determine the defendant's 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:

- a defendant charged with a nonfelony may move for a court order referring them to a diversion program, and may move for an order dismissing the criminal charges without prejudice upon engagement with the diversion program.
- a defendant charged with a specified class C felony who is currently subject to a civil commitment order under the Involuntary Treatment Act then the defense may move for dismissal which the court must grant upon confirmation of an available treatment

plan.

A rebuttable presumption is created that there is no compelling state interest in ordering competency restoration treatment for a nonfelony defendant if the defendant is subject to a current order for involuntary behavioral health treatment, or proceedings for involuntary treatment against the defendant have been initiated under the Involuntary Treatment Act.

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. Any time a petition for involuntary medication is filed for the purpose of use during competency restoration treatment, the petition must also seek authorization to continue involuntary medication for the purpose of maintaining the level of restoration in the jail or juvenile detention facility following the competency restoration treatment period.

Subject to funding, DSHS must develop a program for individuals who have been involved with the criminal justice system and who are diagnosed with an intellectual or developmental disability, traumatic brain injury, or dementia, which involves wraparound services and housing supports appropriate to the needs of the individual. Before a defendant is referred to this program, DSHS must attempt to connect the defendant to available wraparound services and supports in community settings, which may include residential supports or services designated for *Trueblood* class members, whether the defendant is a current client of DDA or an unfamiliar individual in need of a service eligibility assessment.

The University of Washington must implement a pilot program in collaboration with DSHS to provide short-term stabilization and transition support for individuals found incompetent to stand trial due to an intellectual or developmental disability who are or have been *Trueblood* class members, using an interdisciplinary approach with three-phase implementation starting December 1, 2023, with a report required by November 30, 2026.

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

Subject to funding, HCA must require the programs it contracts with to increase compensation for staff in outpatient competency restoration programs to provide compensation at competitive levels to improve recruitment and allow for the full implementation of outpatient competency restoration programs.

An outpatient competency restoration program must include access to 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.

Votes on Final Passage:

Senate	44	5	
House	61	34	(House amended)
Senate			(Senate refused to concur)
House	79	18	(House receded/amended)
Senate	43	6	(Senate concurred)

Effective: July 23, 2023

May 15, 2023 (Sections 7 and 9)

December 1, 2023 (Section 13)