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## Civil Rights & Judiciary Committee

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### HB 1218

**Brief Description:** Concerning persons referred for competency evaluation and restoration services.

**Sponsors:** Representatives Farivar, Macri, Reed, Simmons, Wylie, Pollet, Street, Ormsby, Scott, Salahuddin, Parshley and Hill; by request of Governor Inslee.

#### Brief Summary of Bill

- Addresses provisions relating to competency evaluation and restoration services, including appointment of forensic navigators, outpatient competency restoration orders, failure to appear for scheduled admissions, and involuntary medication determinations.
- Requires the Department of Social and Health Services to establish a growth cap program to manage inpatient competency evaluation and restoration orders.

**Hearing Date:** 1/15/25

**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, the person 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.

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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.*

When a defendant's competency to stand trial is in question, if there are sufficient facts to form a genuine doubt as to competency, 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.

A defendant may qualify for variable periods of competency restoration treatment depending on the defendant's criminal charges. For defendants charged with a serious nonfelony or certain class C felonies, the court must first consider all available and appropriate alternatives to inpatient competency restoration, and must dismiss charges without prejudice upon agreement of the parties if the forensic navigator has found an appropriate diversion program willing to accept the defendant. Competency restoration is provided in a facility operated or contracted by the DSHS unless the defendant qualifies for an outpatient competency restoration program.

#### Outpatient Competency Restoration.

A court may commit a person to outpatient competency restoration upon recommendation of a forensic navigator if there is an appropriate program available and the defendant is clinically appropriate for outpatient competency restoration. To be eligible 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 if needed. The DSHS must place the person into approved housing affiliated with a contracted outpatient competency restoration program. An outpatient competency restoration program may be terminated and the defendant transferred to inpatient restoration if the defendant fails to comply with program requirements or the defendant is no longer clinically appropriate for outpatient competency restoration.

#### 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. This includes coordinating access to mental health services and housing, and assisting the person with obtaining prescribed medication and attending appointments and classes. A forensic navigator must be appointed for defendants whose highest charge is for a misdemeanor or certain class C felonies and who have had two or more cases dismissed based on incompetency within the prior 24 months.

#### Involuntary Medication.

In *Sell v. United States* the United States Supreme Court held that, under certain circumstances, a mentally ill defendant facing serious criminal charges may be involuntarily medicated in order to

restore competency to stand trial. The Sell test requires a case-by-case inquiry that weighs the government's interest in prosecution against the individual's rights. Involuntary medication may be ordered only where the proposed medication is medically appropriate and likely to restore competency, and there are no alternative, less intrusive treatments likely to restore competency. Washington has statutorily identified certain offenses that qualify as per se serious offenses for the purposes of ordering competency restoration, and in addition, outlined factors the court must consider in deciding whether a non-listed offense qualifies as a serious offense in a particular case.

#### 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, and is being implemented in three phases in different parts of Washington. The creation of forensic navigators and outpatient competency restoration programs are components of the settlement agreement and were enacted into law in 2019.

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

##### Competency to Stand Trial Provisions.

Forensic navigators may be appointed for level B and level C felonies and all misdemeanors, and will not be referred for level A felonies unless requested by the court.

To be eligible for outpatient competency restoration, a defendant must be willing to adhere to all rules of the outpatient competency restoration program. The specific requirement that a defendant must be willing to abstain from alcohol and drugs and comply with urinalysis and breathalyzer monitoring is removed. If a defendant is on personal recognizance waiting for competency services in a county with an outpatient competency restoration program that has adequate space, the DSHS must provide a recommended services plan to the court. If restoration is still required, the court must order outpatient competency restoration for the defendant.

The DSHS must promptly notify the court and parties when it appears that the condition of a defendant ordered to inpatient competency restoration is such that a transfer to outpatient competency restoration is appropriate. The notice must provide pertinent information concerning the change in condition or the reasons supporting the transfer. The court must schedule a hearing within 5 days of receipt of the notice to review the information, conditions of release of the defendant, and anticipated release date from inpatient treatment. The court must issue appropriate orders if it finds the defendant's condition has so changed that the defendant is suitable for outpatient competency restoration.

If the DSHS is unable to schedule or admit a defendant who is on personal recognizance after two attempts, the DSHS must submit a report to the court and parties and include a date and time for another evaluation at least two weeks later. The court must provide the defendant with notice of the date and time of the admission, and if the defendant fails to appear, the court must recall the order for competency evaluation or restoration and may issue a warrant for failure to appear.

If inpatient competency restoration is ordered for a defendant charged with a felony offense, the court must determine if involuntary medication is authorized for the purpose of competency restoration if the court has sufficient information to determine that the criteria under *Sell. V. United States* has been established.

#### Competency Order Growth Cap Program.

The DSHS must implement a growth cap program to manage inpatient competency orders. The DSHS must establish a baseline cap and incentive cap of referrals for each county. The baseline cap is based on the average number of inpatient competency orders from courts within the county's jurisdiction in fiscal years 2024 and 2025, and the incentive cap is based on the average of such orders in fiscal years 2018 and 2019. For any county with an average of less than two inpatient competency orders, the baseline and incentive caps are set at one.

The DSHS must notify relevant county agencies and courts on a quarterly basis of the total number of inpatient competency restoration orders for the current fiscal year compared to the baseline for that county.

Beginning in fiscal year 2026, a county must pay a penalty for each inpatient competency order that exceeds the baseline number. The penalty is calculated based on the per day individual rate for state hospital treatment for individuals referred for inpatient competency services and applies as follows:

- Twenty-five percent of the rate for the third and fourth inpatient competency orders over the baseline; 50 percent of the rate for the fifth through seventh inpatient competency orders over the baseline; 75 percent of the rate for the eighth and ninth inpatient orders over the baseline; and 100 percent of the rate for the tenth and all inpatient competency orders over the baseline.
- Beginning in fiscal year 2027 and each fiscal year thereafter, penalty amounts are dependent on whether the county has created a behavioral health diversion plan that meets certain standards. A county with a behavioral health diversion plan must pay a penalty equal to 100 percent of the rate for the third and subsequent inpatient competency orders over the baseline. A county that has not created a behavioral health diversion plan must pay a penalty equal to 150 percent of the rate for the third and subsequent inpatient competency orders over the baseline.

Penalty payments must be deposited into a newly created Behavioral Health Diversion Fund (Diversion Fund), which is subject to appropriation and to be used only for services designed to keep persons with behavioral health needs out of the criminal justice system. A county that reduces total annual inpatient competency referrals below the incentive cap or reduces its overall

orders for any competency services by at least 40 percent for a given fiscal year may request an appropriation from the Diversion Fund. Any amounts the county receives must be used toward services or supports that prevent individuals with behavioral health needs from entering the criminal justice system or that divert them from the criminal justice system once incarcerated.

The DSHS and the HCA must convene a taskforce to develop rules, policies, and protocols for implementation of the growth cap program for inpatient competency services, including eligibility requirements on the necessary elements of county behavioral health diversion plans. The taskforce must include partners from local government, the criminal justice system, behavioral health providers, tribes, people with lived experience, and Disability Rights Washington or a designee. The taskforce must report to the Governor and Legislature by June 1, 2026.

**Appropriation:** None.

**Fiscal Note:** Requested on January 09, 2025.

**Effective Date:** The bill contains multiple effective dates. Please see the bill.