
ENGROSSED SECOND SUBSTITUTE SENATE BILL 5444

State of Washington

66th Legislature

2019 Regular Session

By Senate Ways & Means (originally sponsored by Senators Dhingra, O'Ban, Darneille, Wagoner, Frockt, Kuderer, and Nguyen; by request of Office of the Governor)

READ FIRST TIME 03/01/19.

1 AN ACT Relating to providing timely competency evaluations and
2 restoration services to persons suffering from behavioral health
3 disorders within the framework of the forensic mental health care
4 system consistent with the requirements agreed to in the Trueblood
5 settlement agreement; amending RCW 10.31.110, 10.77.086, and
6 10.77.088; adding a new section to chapter 10.77 RCW; and creating a
7 new section.

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

9 NEW SECTION. **Sec. 1.** The legislature recognizes that there has
10 been a nationwide increase in the number of individuals with
11 behavioral health disorders in the criminal justice system. The
12 legislature also recognizes that reforms must be made to our own
13 behavioral health systems and services to meet the increasing demands
14 in our state, to provide timely competency evaluations and
15 restoration services, and to comply with federal court orders issued
16 in *A.B., by and through Trueblood, et al., v. DSHS, et al.*, No.
17 15-35462 ("Trueblood"). The legislature acknowledges that these
18 reforms will require the support of a broad range of stakeholders,
19 including local law enforcement, prosecuting attorneys, defense
20 attorneys, community members, and health care providers. The
21 legislature further acknowledges the significant efforts of the

1 parties to the Trueblood litigation to establish a roadmap and
2 framework within their settlement agreement for proposed systemic
3 reforms to the forensic mental health care system. It is the intent
4 of the legislature to enact appropriate reforms consistent with the
5 goals agreed to in the Trueblood settlement agreement, to continue to
6 engage with stakeholders and community partners to address the needs
7 of this vulnerable population, and to ensure that the public safety
8 needs of our communities are met.

9 NEW SECTION. **Sec. 2.** A new section is added to chapter 10.77
10 RCW to read as follows:

11 (1) Subject to the limitations described in this section, a court
12 may appoint an impartial forensic navigator authorized by the
13 department to assist individuals who have been referred for
14 competency evaluation.

15 (2) A forensic navigator must assist the individual to access
16 services related to diversion and community outpatient competency
17 restoration. The forensic navigator must assist the individual,
18 prosecuting attorney, defense attorney, and the court to understand
19 the options available to the individual and be accountable as an
20 officer of the court for faithful execution of the responsibilities
21 outlined in this section.

22 (3) The duties of the forensic navigator include, but are not
23 limited to, the following:

24 (a) To collect relevant information about the individual,
25 including behavioral health services and supports available to the
26 individual that might support placement in outpatient restoration,
27 diversion, or some combination of these;

28 (b) To meet with, interview, and observe the individual;

29 (c) To present information to the court in order to assist the
30 court in understanding the treatment options available to the
31 individual to support the entry of orders for diversion from the
32 forensic mental health system or for community outpatient competency
33 restoration, and to facilitate that transition; and

34 (d) When the individual is ordered to receive community
35 outpatient restoration, to provide services to the individual
36 including:

37 (i) Assisting the individual with attending appointments and
38 classes relating to outpatient competency restoration;

39 (ii) Coordinating access to housing for the individual;

- 1 (iii) Meeting with the individual on a regular basis;
- 2 (iv) Providing information to the court concerning the
3 individual's progress and compliance with court-ordered conditions of
4 release, which may include appearing at court hearings to provide
5 information to the court;
- 6 (v) Coordinating the individual's access to community case
7 management services and mental health services;
- 8 (vi) Assisting the individual with obtaining prescribed
9 medication and encouraging adherence with prescribed medication;
- 10 (vii) Planning for a coordinated transition of the individual to
11 a case manager in the community behavioral health system;
- 12 (viii) Attempting to follow up with the individual to check
13 whether the meeting with a community-based case manager took place;
- 14 (ix) When the individual is a high utilizer, attempting to
15 connect the individual with high utilizer services; and
- 16 (x) Attempting to check up on the individual at least once per
17 month for up to sixty days after coordinated transition to community
18 behavioral health services, without duplicating the services of the
19 community-based case manager.
- 20 (4) Forensic navigators may submit nonclinical recommendations to
21 the court regarding treatment and restoration options for the
22 individual, which the court may consider and weigh in conjunction
23 with the recommendations of all of the parties.
- 24 (5) Forensic navigators shall be deemed officers of the court for
25 the purpose of immunity from civil liability.
- 26 (6) The signed order for competency evaluation from the court
27 shall serve as authority for the forensic navigator to be given
28 access to all records held by a behavioral health, educational, or
29 law enforcement agency or a correctional facility that relates to an
30 individual. Information that is protected by state or federal law,
31 including health information, shall not be entered into the court
32 record without the consent of the individual or their defense
33 attorney.
- 34 (7) Admissions made by the individual in the course of receiving
35 services from the forensic navigator may not be used against the
36 individual in the prosecution's case in chief.
- 37 (8) A court may not issue an order appointing a forensic
38 navigator unless the department certifies that there is adequate
39 forensic navigator capacity to provide these services at the time the
40 order is issued.

1 **Sec. 3.** RCW 10.31.110 and 2014 c 225 s 57 are each amended to
2 read as follows:

3 (1) When a police officer has reasonable cause to believe that
4 the individual has committed acts constituting a (~~nonfelony~~) crime
5 (~~that is not a serious offense as identified in RCW 10.77.092~~), and
6 the individual is known by history or consultation with the
7 behavioral health organization, managed care organization, behavioral
8 health administrative services organization, crisis hotline, or local
9 crisis services providers to suffer from a mental disorder, in
10 addition to existing authority under state law, as an alternative to
11 arrest, the arresting officer (~~may~~) is authorized and encouraged
12 to:

13 (a) Take the individual to a crisis stabilization unit as defined
14 in RCW 71.05.020(~~(+6)~~). Individuals delivered to a crisis
15 stabilization unit pursuant to this section may be held by the
16 facility for a period of up to twelve hours. The individual must be
17 examined by a mental health professional within three hours of
18 arrival;

19 (b) Take the individual to a triage facility as defined in RCW
20 71.05.020. An individual delivered to a triage facility which has
21 elected to operate as an involuntary facility may be held up to a
22 period of twelve hours. The individual must be examined by a mental
23 health professional within three hours of arrival;

24 (c) Refer the individual to a mental health professional for
25 evaluation for initial detention and proceeding under chapter 71.05
26 RCW; or

27 (d) Release the individual upon agreement to voluntary
28 participation in outpatient treatment.

29 (2) If the individual is released to the community, the mental
30 health provider shall make reasonable efforts to inform the arresting
31 officer of the planned release (~~(within a reasonable period of time~~
32 ~~after the)~~) prior to release if the arresting officer has
33 specifically requested notification and provided contact information
34 to the provider.

35 (3) In deciding whether to refer the individual to treatment
36 under this section, the police officer (~~shall~~) must be guided by
37 (~~standards~~) local law enforcement diversion guidelines for
38 behavioral health developed and mutually agreed upon with the
39 prosecuting authority(~~, which~~) with an opportunity for consultation
40 and comment by the defense bar and disability community. These

1 guidelines must address, at a minimum, the length, seriousness, and
2 recency of the known criminal history of the individual, the mental
3 health history of the individual, ~~((where))~~ if available, the
4 opinions of a mental health professional, if available, and the
5 circumstances surrounding the commission of the alleged offense. The
6 guidelines must include a process for clearing outstanding warrants
7 or referring the individual for assistance in clearing outstanding
8 warrants, if any, and issuing a new court date, if appropriate,
9 without booking or incarcerating the individual or disqualifying him
10 or her from referral to treatment under this section, and define the
11 circumstances under which such action is permissible.

12 (4) Any agreement to participate in treatment shall not require
13 individuals to stipulate to any of the alleged facts regarding the
14 criminal activity as a prerequisite to participation in a mental
15 health treatment alternative. The agreement is inadmissible in any
16 criminal or civil proceeding. The agreement does not create immunity
17 from prosecution for the alleged criminal activity.

18 (5) If an individual violates such agreement and the mental
19 health treatment alternative is no longer appropriate:

20 (a) The mental health provider shall inform the referring law
21 enforcement agency of the violation; and

22 (b) The original charges may be filed or referred to the
23 prosecutor, as appropriate, and the matter may proceed accordingly.

24 (6) The police officer is immune from liability for any good
25 faith conduct under this section.

26 **Sec. 4.** RCW 10.77.086 and 2015 1st sp.s. c 7 s 5 are each
27 amended to read as follows:

28 (1)(a)(i) If the defendant is charged with a felony and
29 determined to be incompetent, until he or she has regained the
30 competency necessary to understand the proceedings against him or her
31 and assist in his or her own defense, but in any event for a period
32 of no longer than ninety days, the court(~~(÷~~

33 ~~(A))~~) shall commit the defendant to the custody of the secretary
34 ~~((who shall place such defendant in an appropriate facility of the~~
35 ~~department for evaluation and treatment; or~~

36 ~~(B) May alternatively order the defendant to undergo evaluation~~
37 ~~and treatment at some other facility or provider as determined by the~~
38 ~~department, or under the guidance and control of a professional~~
39 ~~person. The facilities or providers may include community mental~~

1 ~~health providers or other local facilities that contract with the~~
2 ~~department and are willing and able to provide treatment under this~~
3 ~~section. During the 2015-2017 fiscal biennium, the department may~~
4 ~~contract with one or more cities or counties to provide competency~~
5 ~~restoration services in a city or county jail if the city or county~~
6 ~~jail is willing and able to serve as a location for competency~~
7 ~~restoration services and if the secretary determines that there is an~~
8 ~~emergent need for beds and documents the justification, including a~~
9 ~~plan to address the emergency. Patients receiving competency~~
10 ~~restoration services in a city or county jail must be physically~~
11 ~~separated from other populations at the jail and restoration~~
12 ~~treatment services must be provided as much as possible within a~~
13 ~~therapeutic environment.)) for competency restoration. The court may~~
14 ~~order the defendant to receive inpatient competency restoration or~~
15 ~~outpatient competency restoration based on the recommendation in the~~
16 ~~competency evaluation.~~

17 (A) To be eligible for an order for outpatient competency
18 restoration, a defendant must be clinically appropriate and be
19 willing to:

20 (I) Adhere to medications or receive prescribed intravenous
21 medication; and

22 (II) Abstain from alcohol or unprescribed drugs.

23 (B) If the court orders inpatient competency restoration, the
24 department shall place the defendant in an appropriate facility of
25 the department for competency restoration.

26 (C) If the court orders outpatient competency restoration, the
27 court shall modify conditions of release as needed to authorize the
28 department to place the person in approved housing, which may include
29 access to supported housing, affiliated with a contracted outpatient
30 competency restoration program. The department must establish
31 conditions of participation in the outpatient competency restoration
32 program which must include the defendant being subject to medication
33 monitoring and regular urinalysis. The outpatient competency
34 restoration program shall monitor the defendant during the
35 defendant's placement in the program and report any noncompliance or
36 significant changes with respect to the defendant to the department
37 and, if applicable, the forensic navigator.

38 (D) If a defendant fails to comply with the restrictions of the
39 outpatient restoration program such that restoration is no longer
40 appropriate in that setting or the defendant is no longer clinically

1 appropriate for outpatient competency restoration, the department
2 shall remove the defendant from the outpatient restoration program
3 and place the defendant instead in an appropriate facility of the
4 department for inpatient competency restoration. The department shall
5 notify the court and parties of the change in placement before the
6 close of the next judicial day. The court shall schedule a hearing
7 within five days to review the placement and conditions of release of
8 the defendant and issue appropriate orders. The standard of proof
9 shall be a preponderance of the evidence, and the court may in its
10 discretion render its decision based on written submissions, live
11 testimony, or remote testimony.

12 (E) The court may not issue an order for outpatient competency
13 restoration unless the department certifies that there is an
14 available appropriate outpatient competency restoration program that
15 has adequate space for the person at the time the order is issued.

16 (ii) The ninety day period for ~~((evaluation and treatment))~~
17 competency restoration under this subsection (1) includes only the
18 time the defendant is actually at the facility and is in addition to
19 reasonable time for transport to or from the facility.

20 (b) For a defendant whose highest charge is a class C felony, or
21 a class B felony that is not classified as violent under RCW
22 9.94A.030, the maximum time allowed for the initial period of
23 commitment for competency restoration is forty-five days. The forty-
24 five day period includes only the time the defendant is actually at
25 the facility and is in addition to reasonable time for transport to
26 or from the facility.

27 (c) If the court determines ~~((or the parties agree))~~ that the
28 defendant is unlikely to regain competency, the court may dismiss the
29 charges without prejudice without ordering the defendant to undergo
30 restoration treatment, in which case the court shall order that the
31 defendant be referred for evaluation for civil commitment in the
32 manner provided in subsection (4) of this section.

33 (2) On or before expiration of the initial period of commitment
34 under subsection (1) of this section the court shall conduct a
35 hearing, at which it shall determine whether or not the defendant is
36 incompetent.

37 (3) If the court finds by a preponderance of the evidence that a
38 defendant charged with a felony is incompetent, the court shall have
39 the option of extending the order of commitment or alternative
40 treatment for an additional period of ninety days, but the court must

1 at the time of extension set a date for a prompt hearing to determine
2 the defendant's competency before the expiration of the second
3 restoration period. The defendant, the defendant's attorney, or the
4 prosecutor has the right to demand that the hearing be before a jury.
5 No extension shall be ordered for a second or third restoration
6 period as provided in subsection (4) of this section if the
7 defendant's incompetence has been determined by the secretary to be
8 solely the result of a developmental disability which is such that
9 competence is not reasonably likely to be regained during an
10 extension. The ninety-day period includes only the time the defendant
11 is actually at the facility and is in addition to reasonable time for
12 transport to or from the facility.

13 (4) For persons charged with a felony, at the hearing upon the
14 expiration of the second restoration period or at the end of the
15 first restoration period in the case of a defendant with a
16 developmental disability, if the jury or court finds that the
17 defendant is incompetent, or if the court or jury at any stage finds
18 that the defendant is incompetent and the court determines that the
19 defendant is unlikely to regain competency, the charges shall be
20 dismissed without prejudice, and the court shall order the defendant
21 be committed to a state hospital as defined in RCW 72.23.010 for up
22 to seventy-two hours starting from admission to the facility,
23 excluding Saturdays, Sundays, and holidays, for evaluation for the
24 purpose of filing a civil commitment petition under chapter 71.05
25 RCW. The criminal charges shall not be dismissed if the court or jury
26 finds that: (a) The defendant (i) is a substantial danger to other
27 persons; or (ii) presents a substantial likelihood of committing
28 criminal acts jeopardizing public safety or security; and (b) there
29 is a substantial probability that the defendant will regain
30 competency within a reasonable period of time. In the event that the
31 court or jury makes such a finding, the court may extend the period
32 of commitment for up to an additional six months. The six-month
33 period includes only the time the defendant is actually at the
34 facility and is in addition to reasonable time for transport to or
35 from the facility.

36 **Sec. 5.** RCW 10.77.088 and 2016 sp.s. c 29 s 411 are each amended
37 to read as follows:

1 (1) ~~((a))~~ If the defendant is charged with a nonfelony crime
2 which is a serious offense as identified in RCW 10.77.092 and found
3 by the court to be not competent, then the court:

4 (a) Shall dismiss the proceedings without prejudice and detain
5 the defendant for sufficient time to allow the designated crisis
6 responder to evaluate the defendant and consider initial detention
7 proceedings under chapter 71.05 RCW, unless the prosecutor objects to
8 the dismissal and provides notice of a motion for an order for
9 competency restoration, in which case the court shall schedule a
10 hearing to determine whether to enter an order of competency
11 restoration.

12 (b) At the hearing, the prosecuting attorney must establish that
13 there is a compelling state interest to order competency restoration
14 treatment for the defendant. The court may consider prior criminal
15 history, prior history in treatment, prior history of violence, the
16 quality and severity of the pending charges, any history that
17 suggests whether or not competency restoration treatment is likely to
18 be successful, in addition to the factors listed under RCW 10.77.092.
19 If the prosecuting attorney proves by a preponderance of the evidence
20 that there is a compelling state interest in ordering competency
21 restoration, then the court shall order competency restoration in
22 accordance with subsection (2) (a) of this section.

23 (2) (a) If a court finds pursuant to subsection (1) (b) of this
24 section that there is a compelling state interest in pursuing
25 competency restoration treatment, then the court ~~((i))~~ shall commit
26 the defendant to the custody of the secretary ~~((who shall place such~~
27 defendant in an appropriate facility of the department for evaluation
28 and treatment;

29 ~~(ii) May alternatively order the defendant to undergo evaluation~~
30 ~~and treatment at some other facility or provider as determined by the~~
31 ~~department, or under the guidance and control of a professional~~
32 ~~person. The facilities or providers may include community mental~~
33 ~~health providers or other local facilities that contract with the~~
34 ~~department and are willing and able to provide treatment under this~~
35 ~~section. During the 2015-2017 fiscal biennium, the department may~~
36 ~~contract with one or more cities or counties to provide competency~~
37 ~~restoration services in a city or county jail if the city or county~~
38 ~~jail is willing and able to serve as a location for competency~~
39 ~~restoration services and if the secretary determines that there is an~~
40 ~~emergent need for beds and documents the justification, including a~~

1 ~~plan to address the emergency. Patients receiving competency~~
2 ~~restoration services in a city or county jail must be physically~~
3 ~~separated from other populations at the jail and restoration~~
4 ~~treatment services must be provided as much as possible within a~~
5 ~~therapeutic environment.))~~ for competency restoration. The court may
6 order the defendant to receive inpatient competency restoration or
7 outpatient competency restoration based on the recommendation in the
8 competency evaluation.

9 (i) To be eligible for an order for outpatient competency
10 restoration, a defendant must be clinically appropriate and be
11 willing to:

12 (A) Adhere to medications or receive prescribed intravenous
13 medication; and

14 (B) Abstain from alcohol or unprescribed drugs.

15 (ii) If the court orders inpatient competency restoration, the
16 department shall place the defendant in an appropriate facility of
17 the department for competency restoration under (b) of this
18 subsection.

19 (iii) If the court orders outpatient competency restoration, the
20 court shall modify conditions of release as needed to authorize the
21 department to place the person in approved housing, which may include
22 access to supported housing, affiliated with a contracted outpatient
23 competency restoration program. The department shall establish
24 conditions of participation in the outpatient competency restoration
25 program which must include the defendant being subject to medication
26 monitoring and regular urinalysis. The outpatient competency
27 restoration program shall monitor the defendant during the
28 defendant's placement in the program and report any noncompliance or
29 significant changes with respect to the defendant to the department
30 and, if applicable, the forensic navigator.

31 (iv) If a defendant fails to comply with the restrictions of the
32 outpatient competency restoration program such that restoration is no
33 longer appropriate in that setting or the defendant is no longer
34 clinically appropriate for outpatient competency restoration, the
35 department shall remove the defendant from the outpatient restoration
36 program and place the defendant instead in an appropriate facility of
37 the department for inpatient competency restoration. The department
38 shall notify the court and parties of the change in placement before
39 the close of the next judicial day. The court shall schedule a
40 hearing within five days to review the placement and conditions of

1 release of the defendant and issue appropriate orders. The standard
2 of proof shall be a preponderance of the evidence, and the court may
3 in its discretion render its decision based on written submissions,
4 live testimony, or remote testimony.

5 (v) The court may not issue an order for outpatient competency
6 restoration unless the department certifies that there is an
7 available appropriate outpatient restoration program that has
8 adequate space for the person at the time the order is issued.

9 (b) The placement under (a) (~~(i) and (ii)~~) of this subsection
10 shall not exceed (~~fourteen~~) twenty-nine days (~~in addition to any~~
11 unused time of the evaluation under RCW 10.77.060. The court shall
12 compute this total period and include its computation in the order.
13 The ~~fourteen-day period plus any unused time of the evaluation under~~
14 RCW 10.77.060 shall)) if the defendant is ordered to receive
15 inpatient competency restoration, or shall not exceed ninety days if
16 the defendant is ordered to receive outpatient competency
17 restoration. The court may order any combination of this subsection.
18 This period must be considered to include only the time the defendant
19 is actually at the facility and shall be in addition to reasonable
20 time for transport to or from the facility(~~(~~

21 ~~(iii) May alternatively order that the defendant be placed on~~
22 ~~conditional release for up to ninety days for mental health treatment~~
23 ~~and restoration of competency; or~~

24 ~~(iv) May order any combination of this subsection))~~.

25 ~~((b))~~ (c) If the court has determined (~~or the parties agree~~)
26 that the defendant is unlikely to regain competency, the court may
27 dismiss the charges without prejudice without ordering the defendant
28 to undergo restoration treatment, in which case the court shall order
29 that the defendant be referred for evaluation for civil commitment in
30 the manner provided in (~~(e)~~) (d) of this subsection.

31 ~~((e))~~ (d)(i) If the proceedings are dismissed under RCW
32 10.77.084 and the defendant was on conditional release at the time of
33 dismissal, the court shall order the designated crisis responder
34 within that county to evaluate the defendant pursuant to chapter
35 71.05 RCW. The evaluation may be conducted in any location chosen by
36 the professional.

37 (ii) If the defendant was in custody and not on conditional
38 release at the time of dismissal, the defendant shall be detained and
39 sent to an evaluation and treatment facility for up to seventy-two
40 hours, excluding Saturdays, Sundays, and holidays, for evaluation for

1 purposes of filing a petition under chapter 71.05 RCW. The seventy-
2 two hour period shall commence upon the next nonholiday weekday
3 following the court order and shall run to the end of the last
4 nonholiday weekday within the seventy-two-hour period.

5 ~~((2))~~ (3) If the defendant is charged with a nonfelony crime
6 that is not a serious offense as defined in RCW 10.77.092:

7 The court may stay or dismiss proceedings and detain the
8 defendant for sufficient time to allow the designated crisis
9 responder to evaluate the defendant and consider initial detention
10 proceedings under chapter 71.05 RCW. The court must give notice to
11 all parties at least twenty-four hours before the dismissal of any
12 proceeding under this subsection, and provide an opportunity for a
13 hearing on whether to dismiss the proceedings.

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