

SENATE BILL REPORT

SB 5415

As Reported by Senate Committee On:
Law & Justice, February 2, 2023

Title: An act relating to public defense services for persons committed as not guilty by reason of insanity.

Brief Description: Concerning public defense services for persons committed as not guilty by reason of insanity.

Sponsors: Senators Trudeau, Pedersen, Dhingra, Saldaña, Valdez and Wilson, C..

Brief History:

Committee Activity: Law & Justice: 1/31/23, 2/02/23 [DPS-WM].

Brief Summary of First Substitute Bill

- Transfers responsibility to provide representation for persons acquitted by reason of insanity and committed to state psychiatric care to the Washington State Office of Public Defense (OPD).
- Directs OPD to contract with attorneys and other entities for legal representation for such persons throughout their term of commitment, and to pay costs related to expert witnesses, investigation, and litigation.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5415 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Padden, Ranking Member; Kuderer, McCune, Pedersen, Salomon, Torres, Valdez and Wilson, L..

Staff: Kevin Black (786-7747)

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.

Background: Acquittal by Reason of Insanity. A criminal defendant can be acquitted by reason of insanity if the court finds, pursuant to a plea agreement, jury verdict, or bench trial, that at the time of the commission of an offense, as the result of a mental disease or defect, the defendant's mind was affected to such an extent that they were unable to perceive the nature and quality of the acts with which they were charged, or were unable to tell right from wrong with reference to the particular acts.

When a person is acquitted by reason of insanity, the court or jury must make a special determination whether the person presents a substantial danger to other persons unless kept under further control by the court or other persons or institutions, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court or other persons or institutions. If both of these determinations are no, the person must be released. If either of these determinations are yes, the court or jury must make a final determination whether it is in the best interests of the person and others for the person to be placed in treatment that is less restrictive than detention in a state mental hospital. If the answer is yes, the defendant must be conditionally released by the court under conditions established by the court, such as to participate in outpatient treatment and take medications as directed by a physician. If the answer to this is no, the person must be committed to a locked psychiatric facility contracted with or operated by the state Department of Health Services (DSHS) for further treatment.

Commitment to a State Psychiatric Facility by Reason of Criminal Insanity. The maximum term of confinement for a person acquitted by reason of insanity for an offense which is a class C felony is five years. For a class B felony, the maximum term of confinement is ten years. For a class A felony, the maximum term of confinement is for life.

A person committed by reason of insanity may apply for conditional release to the superior court of the county of acquittal no less than once every six months. The person's application for conditional release must be reviewed by DSHS and an entity called the Public Safety Review Panel, which provide the court with their own recommendations respecting release. The court must determine whether the person may be released conditionally to less restrictive alternative treatment under the supervision of a multidisciplinary transition team without substantial danger to other persons, or substantial likelihood of committing criminal acts jeopardizing public safety or security.

A person acquitted by reason of insanity who obtains conditional release to the community may apply for final release. To order final release the court or jury must find the person no longer has a mental disease or defect that, with reasonable medical probability, will occasionally become active and, when active, render the person a substantial danger to other persons or cause them to commit criminal act jeopardizing public safety or security.

There are currently 201 individuals in Washington State committed to inpatient treatment following acquittal by reason of insanity; 121 at Western State Hospital in Lakewood, Washington, and 80 at Eastern State Hospital in Medical Lake, Washington. In fall of 2023,

a 30-bed ward for treating persons committed following acquittal by reason of insanity is projected to open at Maple Lane School in Centralia, Washington.

Washington State Office of Public Defense. The Washington State Office of Public Defense (OPD) is an independent office in the judicial branch of government established in 1996 to implement the constitutional and statutory guarantees of counsel and ensure the effective and efficient delivery of indigent defense services funded by the state. OPD contracts with attorneys, local governments, and law firms to provide representation for indigent client appeals, indigent parents in dependency cases, persons committed as sexually violent predators, and initial consultations for youth who are stopped or arrested by law enforcement.

OPD was directed by proviso in the 2022 supplemental state operating budget to develop a proposal for OPD to assume statewide responsibility for indigent defense for post-commitment individuals who are acquitted by reason of insanity. Its report was published on December 8, 2022.

Summary of Bill (First Substitute): OPD must administer all state-funded services related to representation of indigent persons who are acquitted by reason of insanity and committed to state psychiatric care. OPD must contract with lawyers to provide the representation throughout the term of commitment, including any periods of conditional release until legal termination of commitment and final unconditional release, either directly or through local governments or nongovernment organizations. Within appropriated amounts, OPD must establish annual fees for the representation that ensure counsel is appointed for every qualified person. OPD must pay for costs for expert witnesses and other professional, investigative, and litigation costs. OPD must review caseload standards and periodically submit reports to the Chief Justice, Governor, and Legislature to communicate information regarding public defense services for this population.

County government powers and duties related to this representation are transferred to OPD. OPD may request and must timely receive records relating to these individuals from county governments and the Department of Social and Health Services (DSHS) Behavioral Health Administration, including personally identifying information relating to persons acquitted by reason of insanity, which shall not require the consent of the committed person. OPD must maintain the confidentiality of personal information contained in these records. DSHS must transfer funds, credits, or assets associated with this work to OPD.

The definition of indigent for the purpose of persons acquitted by reason of insanity is updated to include anyone who:

- receives public assistance;
- is involuntarily committed to a public health facility;
- receives an annual income of less than or equal to 125 percent of the federal poverty level; or
- has insufficient funds available to pay any amount for retention of counsel.

Courts must notify OPD of the need for representation at the time an individual is acquitted and committed. Expert witnesses must be compensated in a manner consistent with the Rules of Professional Conduct, standards for indigent defense, and policies and procedures of OPD. The superintendent of a state facility must notify the attorney of record of a person acquitted by reason of insanity committed to state psychiatric care's escape or disappearance from conditional release, and must notify the attorney of record when a person on conditional release is detained on the grounds they are failing to adhere to the conditions of release.

EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (First Substitute):

- Clarifies that OPD's representation includes any periods of conditional release until legal termination of commitment and final unconditional release.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: This bill was brought to me as a technical fix to promote client rights and cut state and local costs. It follows up on OPD's legislatively-directed report. Public defense is decentralized in Washington State, which presents logistical challenges OPD is well positioned to address based on its experience. Standard public defenders are too busy and lack needed special knowledge. Many committed individuals are ready to move on but are stuck because of lack of counsel. A two-year delay in a recent case after all parties and the Public Safety Review Panel agreed the person was ready for release cost the state \$750,000. I hear complaints from patients and state hospital staff about access to attorneys in this area. A silent population has been allowed to linger without access to counsel. This is a long time coming. Many patients are not even aware of their right to counsel. I have had to file contempt motions to convince the hospital to comply with the law. Patients need lawyers to progress through the state hospital level system and sometimes to even get access treatment for issues necessary for release like substance use and sexual offending disorders.

Persons Testifying: PRO: Senator Yasmin Trudeau, Prime Sponsor; Sonja Hardenbrook; Kari Reardon, Washington Defender Association/Washington Association of Criminal Defense Lawyers; Chloe Merino, Disability Rights Washington; Jason Schwarz, Washington Defender Association; Shoshana Kehoe-Ehlers, Washington State Office of

Public Defense; Jennifer Bartlett.

Persons Signed In To Testify But Not Testifying: No one.