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Washington's Criminal Competency Laws: Getting From Where We Are to Where We Should Be

Michael J. Finkle[1]

The Court's authority—possessed of neither the purse nor the sword—ultimately rests on substantial public confidence in its moral sanctions.

Felix Frankfurter

In 1997, two high-profile Seattle cases involving mentally ill offenders brought to the forefront of public attention the interaction between the criminal justice system and the mental health system. In one case, a transient, whose minor theft charge had been dismissed one month earlier because he was not competent to stand trial, stabbed and killed a retired firefighter.[2] In the other, a man who had spent the previous ten years at Western State Hospital carried an un-sheathed Samurai sword through Pike Place Market.[3] As a result, the King County Executive created a task force to recommend new legislation to prevent similar future tragedies. In 1998, the Washington State Legislature, accepting the task force's recommendation, enacted Second Substitute Senate Bill 6214 (the Act). The bill brought forth a sweeping set of changes to Washington's criminal competency and civil commitment laws.[4] The overwhelming majority of changes to the competency laws relate to nonfelonies.[5]

The Act created a system of mandatory mental health treatment to restore "competency to stand trial" to those defendants charged with nonfelony crimes. The Act also carried with it the possibility, under certain circumstances, of mandatory referrals to the civil mental health system. In

spite of the large number of groups and individuals from the mental health and criminal justice systems who participated in recommending the legislation, there was no way to predict how the legislation would work in practice over the next several years. Two relatively recent cases, *Born v. Thompson*[6] and *Sell v. United States,*[7] have added yet another layer of complexity to the nonfelony competency process. Indeed, the competency process for nonfelonies is far more complex than the competency process for the most serious felonies. Now that the criminal justice and mental health systems have eight years of experience with the Act, and in light of the ever-increasing number of nonfelony cases in which competency is at issue,[8] the time has come to take a hard look at how to improve the competency process in order to ensure that it continues to serve its intended purpose.

This article identifies unresolved issues in the current statutory scheme and the policy implications of each of the issues, including policy choices inherent in the range of potential "fixes." Where possible, it proposes solutions that the legislature could adopt depending upon the policy choices the legislature makes. Some of the policy implications relate to society's choice of referring mentally ill people who commit criminal acts, and are incompetent to stand trial, to either the criminal competency system or to the civil commitment system.[9] Other policy proposals look at the tension between the mental health system and the legal system while focusing on translating mental health concepts into legal standards and determining who should define many of the legal terms. Still other policy implications relate to cost-sharing decisions, such as whether a city, county, or the state should bear the often-unrecognized costs of the criminal competency process.

Section I of the article provides a brief summary of the current competency framework, from the initial competency evaluation through the entire process. The next three sections explore the competency framework in great detail. Section II describes the initial competency evaluation process and identifies policy issues implicated by that process. Section III

walks the reader through the complicated process by which the criminal justice system attempts to render incompetent defendants competent to proceed in the criminal case, and it discusses the impact of the *Sell* and *Born* cases on that process. It also identifies inefficiencies in the system and explores how the competency process often overlaps with the process for civilly committing the mentally ill. Section IV discusses the competency process in the context of post-judgment cases, and points out issues specific to cases at the post-judgment phase. Finally, Section V proposes a series of solutions to the issues identified in the previous sections. Those solutions provide a consistent competency process that both utilizes limited resources more effectively and complements the civil commitment system.

I. AN OVERVIEW OF THE COMPETENCY PROCESS

A defendant is "incompetent" if he or she lacks the capacity to understand the nature of the proceedings, or to assist in his or her own defense *as a result of* mental disease or defect.[10] By the express language of the statute, there must be a causal connection between the defendant's mental disease or defect and the defendant's lack of capacity.

The competency process begins with the competency evaluation. Whenever there is reason to doubt a defendant's competency to stand trial, the court, on its own motion or on the motion of any party, must order a competency evaluation.[11] The evaluation may occur on an outpatient basis, *i.e.*, outside of the hospital,[12] or it may occur on an inpatient basis at one of the two state psychiatric hospitals, Western State Hospital (Western State) or Eastern State Hospital (Eastern State). [13] *If* the court commits the defendant to a hospital or other suitable secure public or private mental health facility for the competency evaluation, then the court has discretion to delay granting bail until after the defendant has been evaluated and appears before the court.[14] This provision applies equally to felony and nonfelony defendants. After the evaluation has been completed, the court

will hold a hearing at which it will make a finding that the defendant is either competent or incompetent.

If the court finds that the defendant is competent, the criminal proceedings continue. If the court finds that the defendant is incompetent, the court's actions depend upon whether the defendant is charged with a felony or a nonfelony, and upon whether the case is at the pre-judgment phase or post-judgment phase. If the case is at the pre-judgment phase, then all proceedings relating to the defendant's competency to stand trial are excluded from the legally prescribed time-for-trial period, beginning on the date the court orders the competency evaluation.[15] The time-for-trial period begins running again when the court enters a written order finding the defendant competent.[16] A defendant charged with a felony must be ordered into competency-rendering treatment. Whether a defendant charged with a nonfelony must be ordered into competency-rendering treatment, and whether that treatment occurs on an inpatient or outpatient basis, depends upon a host of factors. If competency-rendering treatment is unsuccessful for a felony or nonfelony defendant, or if a nonfelony defendant is not eligible for competency-rendering treatment, the court must dismiss the matter without prejudice and either release the defendant outright or refer the defendant for a civil commitment evaluation.[17]

II. THE INITIAL COMPETENCY EVALUATION

As noted above, a criminal defendant is incompetent to proceed[18] if, as a result of mental disease or defect, he or she lacks the capacity to understand the nature of the proceedings or to assist in his or her own defense.[19] The defendant will be presumed competent to stand trial unless the court finds by a preponderance of the evidence that the defendant is incompetent to stand trial. The burden to show incompetency rests with the party asserting it.[20] This section describes in further detail the two primary components of the initial competency assessment: the concept of "mental disease or

defect," and the process by which the initial evaluation occurs. It also identifies policy choices and who bears the cost of those choices.

A. Defining Mental Disease or Defect

1. No Current Statutory Definition

Though the phrase "mental disease or defect" is of great importance in RCW 10.77, the legislature has left the phrase undefined. A recent Washington Supreme Court decision provides some guidance, but it makes clear that, absent a legislative definition, "mental disease or defect" is judicially interpreted on a case-by-case basis, subject to an abuse of discretion standard on appeal. In *State v. Klein*,[21] the defendant challenged the trial court's findings that she suffered from a mental disease or defect. Although *Klein* involved a petition for full release following an acquittal by reason of insanity, the insanity statute contains the same "mental disease or defect" terminology as the incompetency statute, and *Klein's* reasoning should apply equally in the competency context.[22]

The court held in *Klein* that sufficient evidence supported the trial court's finding that the defendant suffered from a mental disease or defect.[23] In declining to create an across-the-board judicial definition of the term, the court explained as follows:

> Although our legislature has not further defined the term "mental disease or defect," other state legislatures have. In doing so, these legislatures have exercised a legislative prerogative to depart from a dictionary definition and have instead made policy choices to exclude specific types of mental conditions from the term. Were we to do so here by court decision, we would unduly encroach upon the legislative function, *especially since our legislature has not seen fit to further define the term*.[24]

After *Klein*, Washington trial courts must now struggle to apply a standard that contains both legal and mental health components. For example, the American Psychiatric Association's *Diagnostic and Statistical*

Manual of Mental Disorders (4th rev. ed.) (DSM IV) is a widely accepted compilation of mental disorders and is universally relied upon in the mental health field. While there might be a tendency to rely on the DSM IV to define a mental disease or defect in the legal context, "[n]ot all disorders defined therein will rise to the status of 'disease or defect' under our statutes."[25] For trial judges, the *Frye* test for scientific testimony,[26] as well as the provisions of Rule 702 of the Washington Rules of Evidence relating to expert testimony, can assure that the DSM IV does not become a de facto definition of mental disease or defect. Indeed, the *Klein* court cautioned that trial courts should not defer to mental health professionals to define what are essentially legal terms.[27]

2. Policy Implications in Defining "Mental Disease or Defect"

Considering that competency determinations begin with the threshold question of whether the defendant does or does not suffer from a mental disease or defect, the policy choice is simple: who is best suited to define what is or is not a mental disease or defect? As the supreme court noted in *Klein*, the legislative branch of government has the right of first refusal—it can choose to adopt a statutory definition or to defer to the judicial branch to define the term on a case-by-case basis.

Philosophical considerations about the division of governmental powers aside, a statutory definition is preferable on several levels. First, a uniform definition ensures that trial judges in Puyallup and Pullman apply the same definition as trial judges in Seattle and Selah. Furthermore, the legislature can exercise quality control in adopting a definition by obtaining input from mental health experts, legal experts, and the general public, and can then give appropriate consideration and weight to that input. A judicial or case-by-case interpretation, on the other hand, leaves the quality of the trial judge's decision dependent upon clinical information and the quality of the expert opinion(s) available in a particular case.

B. Determining the True Purpose of the Evaluation Process

Legislation generally involves choosing from among several alternatives, each of which has an associated fiscal and/or societal cost. In the case of Washington's current competency laws, one of the crucial choices the state must make concerns the manner in which it responds to the continuously escalating amount of bed space needed for patients at both Western State and Eastern State. The defendant certainly pays a liberty cost when his or her freedom is curtailed so that the hospital can conduct a competency evaluation. The longer it takes for the evaluation, the greater the defendant's freedom is curtailed. Society also pays an escalating cost based upon the length of time it takes for the evaluation to occur.[28] The former cost is of great consequence to specific individuals, while the latter is of great consequence to the public at large.

For defendants who are in custody at the time the court orders a competency evaluation, the court may order that the examination occur inpatient at a mental health facility or, with the agreement of the parties, in jail.[29] The relevant statutory language is:

> For purposes of the examination, the court may order the defendant committed to a hospital or other suitably secure public or private mental health facility for a period of time necessary to complete the examination, *but not to exceed fifteen days from the time of admission to the facility*. If the defendant is being held in jail or other detention facility, upon agreement of the parties, the court may direct that the examination be conducted at the jail or other detention facility.[30]

The statute is subject to interpretation regarding whether there is a time limit within which an in-jail evaluation must occur.[31] The legislature should clear up this ambiguity when it amends other provisions of the competency statutes.

1. A System Ready to Collapse From its Own Weight

While the competency evaluation process currently in place may have been sufficient to handle the caseload of ten years ago, it is most certainly overwhelmed by today's caseload. Statistics provided by the Department of Social and Health Services (DSHS) to the legislature in June 2006 show a "steep and steady rise" in the number of competency evaluations conducted over the past ten years.[32] In 1995, Western State and Eastern State conducted a combined total of 665 competency evaluations, 21 percent (140) of which were for nonfelony cases. By 2005, the number of evaluations had tripled to 1,995, and the percentage pertaining to nonfelony cases had nearly doubled to 40 percent (802). Astonishingly, the percentage of nonfelony evaluations by Eastern State actually decreased from 26 percent to 25 percent, while the percentage of nonfelony evaluations at Western State tripled from 19 percent to 56 percent.[33] Statistics available for Western State show that the percentage of outpatient evaluations increased by orders of magnitude over that same ten year period—from 4.3 percent in 1995 to *82 percent* in 2005.[34] The overwhelming majority of outpatient evaluations occur in jail.[35] Consequently, the average outpatient evaluation by Western State currently takes twenty-one days to complete for in-jail nonfelony defendants, thirty to sixty days for in-jail felony defendants, and four months for out-of-custody evaluations.[36] Although inpatient evaluations must occur within fifteen days of the defendant's admission to the hospital, [37] defendants spend an average of forty to sixty days in jail waiting to be admitted to Western State. [38]

The lengthy wait for evaluations is most likely attributable to three factors: (1) staffing levels at Western and Eastern State; (2) limited bed space in the hospitals themselves; and (3) at least for Western State, the terms of a federal court order limiting admissions to the hospital based on several factors including available bed space.[39] First, while Western State's staffing levels have increased, which helps ease the strain on conducting outpatient evaluations without increasing the hospital's physical plant, there

are limits to the number of qualified competency evaluators that the hospital can train and for whom it can provide office space. Secondly, concerning bed space, the hospital serves the needs of many other mentally ill people, including those who are undergoing competency-rendering treatment, treatment pursuant to an acquittal by reason of insanity, or treatment pursuant to civil commitment.[40] Finally, unless the state increases Western State's physical campus, it cannot increase available bed space for inpatient evaluations without also decreasing available bed space for other purposes.

2. Determining and Allocating the Cost

The state bears the monetary cost of the evaluation and, if the defendant is evaluated on an inpatient basis, the costs of the defendant's hospital stay during the course of the evaluation. Cities and counties bear the monetary cost for the amount of time the defendant spends in jail—either awaiting transport to the hospital for an inpatient evaluation or for an outpatient evaluation to occur in the jail.[41] As the length of time a defendant spends in jail for competency evaluation purposes increases, so does the cost to cities and counties. If jail costs have increased because of staffing or capacity issues at the two state-run psychiatric hospitals, then the state has essentially shifted a large portion of the cost of competency evaluations to local jurisdictions. Those jurisdictions then have less money to spend on social services for all of their citizens, some of whom are mentally ill. As social services for the mentally ill decrease, the number of mentally ill people who commit acts that result in criminal charges presumably increases. That, in turn, leads to further increases in competency evaluations, and the vicious cycle renews itself.

By the same token, using state funds to increase capacity at Western State and Eastern State reduces the amount of funding available for other social services, including social services designated for the mentally ill. The less the state spends on social services, the more likely those who would

otherwise benefit from these social services will either go without or have to depend on local jurisdictions for support.

III. THE COMPETENCY-RENDERING PROCESS

The logical next step, if the court finds the defendant incompetent to stand trial, is to try to restore the defendant's competency. The current statutory process requires far more resources than necessary—to the point where the nonfelony process far exceeds the felony process in its complexity. This section describes the current competency-rendering process[42] for defendants charged with felonies and for those charged with nonfelonies,[43] identifying aspects of each of those processes that are either difficult to apply, inefficient, or both. It also examines the concept of involuntary medication to render a defendant competent, and the interaction between the competency-rendering process and involuntary medication.

A. The Felony Process

If the court finds a felony defendant incompetent to stand trial, the process is relatively straightforward: the court must commit the defendant to DSHS for up to ninety days of competency-rendering treatment.[44] If the defendant remains incompetent at the end of ninety days, the court has the discretion to order an additional ninety days of treatment.[45] If the defendant still remains incompetent at the end of the second ninety-day period, and if certain conditions are met, the court may extend the treatment by up to an additional 180 days.[46] To extend treatment, the court or jury[47] must find that the defendant is a substantial danger to other persons or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security[48] and that there is a substantial likelihood the defendant will be rendered competent within a reasonable period.[49]

If the defendant remains incompetent to stand trial at the end of the final competency-rendering period, the court must dismiss the case without prejudice—which allows a prosecutor to refile the case at a later time—and

either institute civil commitment proceedings or order the defendant's release.[50] Unlike the nonfelony process, in which the civil commitment referral procedures are clearly set forth,[51] the felony process is silent on the referral procedures.

B. The Nonfelony Process

With legislative passage of the Act in 1998, the legislature began treating nonfelony defendants more like felony defendants by creating a competency-rendering process for eligible cases. The similarities end there; the nonfelony competency-rendering process is more complex than the felony process by orders of magnitude. The nonfelony court must determine whether the defendant is treatment-eligible, and, if eligible, the court must decide what form the competency-rendering treatment should take. As this next section graphically illustrates, what sounds like a simple determination actually takes up an inordinate amount of court and attorney resources.

1. Identifying Treatment-Eligible Nonfelony Defendants—"Violent Qualifiers"

Washington's criminal competency statute, codified as RCW 10.77.090(1)(d), is silent about the prosecution's burden of proof, but the Washington State Supreme Court held in *Born*[52] that the prosecution must prove by clear and convincing evidence that a nonfelony defendant is eligible for competency-rendering treatment. The elevated burden of proof, coupled with the procedural hoops set forth in the statute, leads to a large number of hearings just on the issue of whether a nonfelony defendant is treatment-eligible.

A "treatment-eligible nonfelony defendant" is one who: (1) has a history of, or a pending charge of, one or more violent acts; or (2) has previously been acquitted by reason of insanity, or has previously been found incompetent, with regard to an alleged offense involving actual, threatened,

or attempted physical harm to a *person*.[53] A "violent act" is behavior that (1) resulted in, or if completed as intended would have resulted in, or was threatened to be carried out by a person who had the intent and opportunity to carry out the threat and would have resulted in homicide, nonfatal injuries, or substantial damage to property; or (2) recklessly creates an immediate risk of serious physical injury to another person.[54] For purposes of defining a violent act, "nonfatal injuries" means physical pain or injury, illness, or an impairment of physical condition.[55] A "history of one or more violent acts" means violent acts committed by the defendant within the ten years prior to the date criminal charges were filed—excluding any time spent in jail, prison, or a mental health facility.[56]

a) Violent Acts

A violent act under the statute does not require a conviction; the definition of "violent act" refers to "behavior" rather than a conviction. This makes sense, especially in the context of a pending charge, which by definition will not involve a conviction. Since the "clear and convincing" standard of proof for competency-rendering treatment eligibility is less than the "beyond a reasonable doubt" standard of proof for a criminal conviction, it is possible for a court to find a violent act even if the defendant has been acquitted in the criminal case. Additionally, there are cases in which a violent act can be established other than by a conviction or a pending charge. For example, the competency evaluation report itself might refer to a past violent act by the defendant against staff members at the evaluation facility.

b) History of One or More Violent Acts

The most common form of "history" of one or more violent acts in determining treatment-eligible or non-treatment-eligible status will be a prior conviction. But how does the prosecution establish that the prior conviction involved a violent act?

(1) Statutory Presumptions

RCW 10.77.260 established several statutory presumptions to guide the courts. The presumptions are rebuttable. First, the court must presume that a past conviction, whether by guilty plea or finding, establishes the elements necessary for the crime charged.

Second, the court must also consider that the elements of the crime, in the absence of the facts of a specific case, may not be sufficient to establish that the defendant committed a violent act. For example, assault can be committed in several ways, including an unlawful and offensive touching which neither caused nor threatened to cause injury. In order to use the assault to find that the defendant is in the treatment-eligible category, the court would need to know more about the underlying facts.

Third, the court must presume that the facts underlying the elements of the crime, if un-rebutted, are sufficient to establish that the defendant committed a violent act. That begs this question: what constitutes rebuttal? Does rebuttal include a defense argument based on the very same facts relied upon by the prosecution? If a defense argument does constitute rebuttal, the court has deference in deciding any weight given to the rebuttal. The clear intent of the legislature in the 1998 amendments to RCW 10.77.260 was to expand on the court's ability to receive information on which it can make a reasonable and intelligent finding regarding whether the defendant is treatment-eligible or non-treatment-eligible. But the legislature also clearly intended that the court analyze the facts underlying the alleged violent act in making its decision.[57]

(2) Acceptable Evidence

RCW 10.77.260(3) provides that, in determining the underlying facts, the court may consider information including, but not limited to, affidavits or declarations under penalty of perjury, criminal history record information,[58] and its own or certified copies of another court's records. Examples of court records referred to by the statute are criminal complaints,

certifications of probable cause to detain, dockets, and orders on judgment and sentencing.

Note that the statute does not expressly include or exclude police reports. One could argue that the statute's language "including, but not limited to" was intended by the legislature to mean that the court could choose to accept material that is not expressly listed in the statute, such as a police report. It is left to each court, then, to interpret the meaning of the statute and to decide whether to accept police reports as evidence at the hearing. In addition, if the police report is signed under penalty of perjury under the laws of the State of Washington, one could argue that the police report meets the statutory definition of a "declaration."[59]

There is one additional caveat. As noted above, the supreme court held in *Born* that the prosecution must prove by clear and convincing evidence that a nonfelony defendant is eligible for competency-rendering treatment. There may be other issues, such as determining the appropriate level of due process at a competency-rendering hearing. Depending on how much process is required, the recent U.S. Supreme Court decision in *Crawford v. Washington*[60] may come into play. In *Crawford*, the Court held that where those "testimonial" statements that fall within certain types of hearsay exceptions are at issue, the confrontation clause of the U.S. Constitution requires a face-to-face confrontation with witnesses. The extent to which *Crawford* would apply, if at all, to a competency-rendering hearing involving RCW 10.77.260(3) is yet another issue complicating the process.

(3) How Provisions Apply in Practice

Two brief examples demonstrate how the statute works in practice. For each example, assume that the defendant pled guilty to fourth-degree assault two years ago, and that the prosecution presented a certified copy of the order on judgment and sentencing, as well as a certified copy of the certification of probable cause filed along with the original charge. Assume further that there is no *Crawford* issue.[61]

In the first example, the certification of probable cause recites that the defendant told the victim, "I want to break your neck," hit the victim on the back of the head with a two-foot-long wooden board, and yelled, "I hope you feel the pain." This presents a clear example of a past violent act. It is hard to imagine any facts in the certification of probable cause on which the defense could rely to rebut the presumption that the assault constituted a violent act. The only way the defense could rebut the underlying facts is by presenting witnesses to the prior incident.[62]

In the second example, the certification of probable cause recites that the defendant walked up to the victim and slapped him on the cheek, but that the victim was not injured. In this example, the court would be required to presume that all of the elements of assault were established by the plea. But the court would also need to consider that the plea could have been based on either a theory of offensive touching or a theory of attempt to injure. The first theory would not establish a violent act, but the second might.

The prosecution would argue that the facts establish the violent act, since the defendant intentionally hit the victim. The defense could argue that the facts in the certification of probable cause do not amount to a violent act, as defined under RCW 10.77.010(23), because they show, at most, an offensive touching. Since the defense's argument appears plausible under the facts of the example, the prosecution's version of the facts would be rebutted. The court would need to make a factual finding about whether the prior assault constituted a violent act. In this cheek-slapping example, depending on any other surrounding facts in the certification of probable cause, the court could reasonably find for either the prosecution or the defense.

There is one additional point well worth considering. The definition of "violent act" also includes behavior that "recklessly creates an immediate risk of serious physical injury to another person."[63] If the defendant's behavior in the alleged violent act was not intentional and did not result in actual nonfatal injuries, it may be possible to use the so-called reckless

prong of the definition of "violent act." Consider a DUI or reckless driving case in which the defendant's driving was especially egregious, such as driving up on a sidewalk or hitting a pedestrian without causing enough injury to justify a felony vehicular assault charge.

c) Pending Charge Involving Violent Act

The presumptions in RCW 10.77.260 do not apply to pending charges. For a pending charge, the simplest procedure is for the court to refer to the police report or certification of probable cause to see if the facts contained therein support a finding that the defendant belongs in the treatment-eligible category. For example, the parties in *Born* stipulated to the police report.

It is possible that the defense will decline to stipulate and will argue that due process requires that the prosecution present live testimony because the defendant faces possible competency-rendering treatment. Three aspects of the supreme court's holding in *Born* might make it difficult to convince a trial court otherwise. First, the court held that the proper standard for determining a defendant's eligibility for competency-rendering treatment is by clear and convincing evidence. Second, the court stated that the prosecution had a lesser interest in prosecuting nonfelonies than felonies.[64] Third, the court relied on the due process rights in civil commitment cases, which require greater process.[65]

A contrary prosecution argument is that by setting bail and detaining criminal defendants in custody pending trial, courts are permitted to rely on facts contained in a document sworn under penalty of perjury, such as a police report or the certification of probable cause. Detaining a person on bail and detaining a person for competency-rendering treatment appear to involve the same type of liberty deprivation, so one could argue that there is no reason to rely on a sworn police report for one but not for the other. Also, there is no process provided for felony defendants; any defendant charged with a felony who is incompetent must be sent for up to ninety days of competency-rendering treatment.[66] The bottom line, however, is that the

court must make the requisite findings, and has the authority to require live testimony even if the constitution does not require it. Given the supreme court's position in *Born*, the safer course of action, absent a stipulation, is to present live testimony.

d) Prior Incompetency Dismissals and Insanity Acquittals

It is axiomatic that the prosecutor, in order to rely on a prior incompetency dismissal or insanity acquittal, must be aware that it has occurred. That awareness cannot exist unless there is a record of the dismissal or acquittal. The Criminal Records Privacy Act's definition of "conviction or other disposition adverse to the subject" includes dismissals due to incompetency and acquittals by reason of insanity,[67] so the dismissal or acquittal can be entered into a defendant's criminal history. Unfortunately, many prior findings of incompetency or insanity, especially those from courts of limited jurisdiction, are not identifiable on criminal histories, so these two criteria may not be applied consistently. In some cases, Eastern State or Western State may have limited data available about a particular defendant who is being evaluated.

Assuming the defendant does have a prior incompetency dismissal or insanity acquittal, the question is how to establish that it involved a violent act. The procedures in RCW 10.77.260 do not apply to prior incompetency dismissals; the discussion of pending charges above would presumably apply. Since an insanity acquittal includes a finding that the defendant committed the acts charged,[68] the procedures in RCW 10.77.260 for prior convictions presumably apply to prior insanity acquittals.

e) When to Make the Determination

The issue of whether a nonfelony defendant is in the treatment-eligible or non-treatment-eligible category does not arise until after the court has determined that the defendant is incompetent. Once the court makes that determination, the court will need to set another hearing date, this time to

handle the issue of whether the defendant is in the treatment-eligible or non-treatment-eligible category. Depending on the timing of the initial competency evaluation and the willingness of the parties to stipulate to some or all of the issues, the court might set a single hearing for competency and for treatment-eligible/non-treatment-eligible status, or a separate hearing for each issue.

2. Different Results for Treatment-Eligible and Non-Treatment-Eligible Nonfelony Defendants

a) Competency-Rendering Treatment for Treatment-Eligible Nonfelony Defendants

So why does it matter whether a nonfelony defendant is eligible for competency-rendering treatment? A treatment-eligible nonfelony defendant, if found incompetent, *must* be placed into inpatient or outpatient treatment to restore competency. The court has discretion to require fourteen days of inpatient treatment or to require ninety days of outpatient treatment by way of a conditional release, or to require a combination of the two.[69] The treatment alternatives need not be done in any particular order, but as a practical matter there is no formal outpatient treatment program available, at least through Western State.[70] There has been some preliminary talk about setting up an outpatient competency-rendering treatment program through Western State, but that has yet to happen.

Even if outpatient competency-rendering were readily available, it might not make sense for the prosecutor to recommend, or for the court to order, that the defendant undertake such a program. For example, the defendant might have a sufficiently violent proclivity (based on criminal history or the current charge) that he or she would be dangerous to patients and staff at an unsecured outpatient treatment facility. Another consideration is if the symptoms of the defendant's mental illness are active and severe. The

prosecutor and court should be concerned about the defendant's ability to participate in the program and to get to and from an outpatient program.[71]

However, there may be circumstances where outpatient competency-rendering treatment is appropriate. For example, assume the defendant has successfully been receiving services through the civil commitment process[72] on a ninety-day Less Restrictive Order (LRO).[73] If there are no dangerousness issues and the defendant is appropriately out of custody on the criminal matter, it may be possible for Western State or Eastern State to utilize the LRO program as both the LRO and the outpatient competency-rendering treatment programs.[74]

There is one exception to the mandatory treatment requirement. If at any time during the proceeding the court finds that the defendant is not likely to be rendered competent within the applicable statutory competency-rendering treatment period, the court skips or stops the competency-rendering process. The case proceeds in the same manner as if the competency-rendering treatment was unsuccessful.[75] If, in the opinion of a professional person,[76] the defendant is rendered competent, the defendant must be returned to court for a hearing. If the court determines at that hearing that competency has been restored, the stay of proceedings must be lifted and the case will proceed.[77] The court must take care to comply with RCW 10.77.065, to the extent it applies.[78]

(1) Extending Length of Inpatient CompetencyRenderingTreatment Beyond Fourteen Days

The fourteen-day period for inpatient competency-rendering treatment includes only the time the defendant is actually at the treatment facility, and is in addition to reasonable time for transport to or from the facility. Also, bear in mind that the fourteen-day inpatient period is "*in addition to* any unused time of the [competency] evaluation under RCW 10.77.060."[79] The relevant portion of RCW 10.77.060 relating to the "time" of the competency evaluation reads as follows:

> For purposes of the examination, the court may order the defendant *committed to a hospital or other suitably secure public or private mental health facility* for a period of time necessary to complete the examination, but *not to exceed fifteen days from the time of admission* to the facility. If the defendant is being *held in jail or other detention facility*, upon agreement of the parties, the court *may direct* that the examination *be conducted at the jail or other detention facility*.[80] (emphasis added)

The statute contains a fifteen-day time limit for evaluations at a hospital or other secure mental health facility, but contains no such time limit for an in-jail evaluation.[81] The only way time spent awaiting an in-jail evaluation could count against the "unused time of the evaluation" is if the court considers a jail equivalent to a "hospital or other suitably secure public or private mental health facility."

How does one calculate the unused time for the competency evaluation in order to determine the total inpatient time available? For evaluations conducted at Western State or Eastern State, the calculation is straightforward. If the defendant stays at the hospital for the full fifteen days allowed under RCW 10.77.060(1)(a), there is no unused time to add, and the competency-rendering period would be fourteen days. If the defendant stays at the hospital for only twelve days, then the unused time would be three days, for a competency-rendering treatment period of seventeen days.

For evaluations conducted in the jail, the calculation should be just as straightforward. For example, assume that on day one, a treatment-eligible nonfelony defendant is arraigned in custody and presents a competency issue. The court issues an order for an evaluation that same day. Assume further that Western State conducts the evaluation in the jail and that the next hearing date is seven days from the arraignment. How many days of "unused time of the evaluation" remain? Recent legislation and case law support an interpretation that the "unused time of the evaluation under RCW 10.77.060" in this example would be fifteen days, because the

evaluation did not occur in the hospital, which translates to twenty-nine days of inpatient competency-rendering treatment.

The 2004 amendment to RCW 10.77.060 and the Washington Court of Appeals opinion in *Weiss v. Thompson*,[82] supports such an interpretation of RCW 10.77.060 and 10.77.090. Currently, RCW 10.77.060(1)(a) requires the parties' approval for an in-jail evaluation. If a jail were truly equivalent to a hospital or other secure mental health facility, the court would not need the parties' permission to order that the evaluation occur in the jail. The court would already have had that authority under the prior version of the statute, and thus the 2004 amendment would be unnecessary.[83] And in *Weiss*, a pre-amendment case, Division One held that time spent in jail awaiting transport to Western State for competency-rendering treatment did *not* qualify as placement in a secure mental health facility for purposes of RCW 10.77.090(1)(d)(i)(C)(I).[84] However, the phrase "secure mental health facility" is sufficiently similar to the phrase "hospital or suitably secure public or private mental health facility," as used in RCW 10.77.060(1)(a), to justify a court giving it a similar interpretation. Though *Weiss* predates the 2004 amendment to RCW 10.77.060, its reasoning is sound, and the supreme court denied review.[85] Therefore, *Weiss* remains good law unless and until a conflicting case comes out of the court of appeals.

(2) Outpatient Competency-Rendering Treatment

If the defendant remains incompetent after the inpatient competency-rendering treatment, the court may order up to ninety days of outpatient competency-rendering treatment. Outpatient treatment can only occur if the defendant is out of custody—the treatment providers are not able to provide treatment to a jail inmate. If a defendant is unsuitable for outpatient competency-rendering treatment, e.g., because he or she is far too dangerous, the court will need to balance the potential benefits of outpatient competency-rendering treatment with the public-safety risks of releasing the

defendant from custody into outpatient treatment. The court has two options. It could order outpatient competency-rendering treatment following the unsuccessful inpatient treatment. Alternatively, if the defendant is in custody, the court could dismiss the case and refer him or her to an evaluation and treatment facility for evaluation for possible civil commitment under RCW 71.05.[86]

This discussion assumes that outpatient competency-rendering treatment is available. That is not necessarily an accurate assumption, as noted previously. The statute states that for outpatient competency-rendering treatment, DSHS will place the defendant on conditional release.[87] It therefore appears to be the responsibility of DSHS to secure the treatment, though the court issues the treatment order. To date DSHS has not contracted with local providers to provide such treatment, but Western State has advised the author that DSHS would make such treatment available if ordered.[88] For that reason, the model orders direct Western State or Eastern State to provide the name(s) of the appropriate facility(ies). However, that does not answer the question of what will happen if a court orders a defendant into outpatient competency-rendering treatment.

The statute makes no clear provision for a court's alternatives if a defendant violates the terms of outpatient treatment. If the defendant is still reasonably likely to be rendered competent with the treatment, the court might decide to order the defendant back into the treatment program. If the nature of the violation makes it likely that the defendant would not or could not comply with the treatment, then the court could find, based on the violation, that the defendant is unlikely to be rendered competent with further treatment. The case would proceed in the same manner as if inpatient treatment was unlikely to restore the defendant's competency.[89] If the defendant had not previously been ordered into inpatient treatment, the court could consider inpatient treatment as an option.[90]

(3) Medication as Part of Treatment

The primary component of competency-rendering treatment is psychotropic medication. In many instances the defendant will voluntarily take medication prescribed as part of the competency-rendering treatment. But in a large number of cases the defendant is likely to refuse to take medication voluntarily, and indeed may have a history of refusing to take such medication. In that circumstance, the prosecution will want to obtain court authority for the treatment agency to administer involuntary medication as part of the treatment.

Case law sets out the conditions under which the court may authorize involuntary medication as part of competency-rendering treatment. By holding an evidentiary hearing, the court determines whether those conditions are met. The hearing can be held at the same time as the hearing that determines whether the defendant is in the treatment-eligible or non-treatment-eligible category. The prosecution must present live testimony by a psychiatrist from the treatment facility, unless all parties are willing to take testimony by telephone.

In *Sell v. United States*,[91] the U. S. Supreme Court set out the constitutional parameters of a court's authority to authorize the administration of involuntary medication as part of competency-rendering treatment. The complexity and importance of the issue of involuntary medication, as it relates to competency-rendering treatment, necessitates the detailed discussion contained in a later portion of this article.[92]

b) Unsuccessful Competency-Rendering Treatment (or Treatment Unlikely to Succeed) for Treatment-Eligible Nonfelony Defendants

If the competency-rendering treatment is unsuccessful, or if the evaluator opines that treatment is unlikely to succeed, the court must dismiss the case without prejudice.[93] What happens after that depends on the defendant's custody status at the time of the dismissal.[94]

(1) In-Custody Defendants

If the defendant is in custody at the time of dismissal, which as a practical matter means that the defendant's inpatient treatment did not succeed, then the defendant must be detained and sent to an evaluation and treatment facility for up to seventy-two hours for a civil commitment evaluation.[95] The seventy-two-hour period begins to run on the next nonholiday weekday following the court order, and runs "to the end of the last nonholiday weekday within the seventy-two hour period."[96] For example, if the court order is issued on a Monday, the seventy-two-hour period begins on Tuesday and ends on Thursday.[97] The same process applies if (1) the defendant is in custody, (2) the court finds that the defendant is not likely to regain competency, and (3) the defendant either skipped or discontinued competency-rendering treatment as required by statute.[98]

The key question is this: to which evaluation and treatment facility should the defendant be sent? The answer is somewhat complicated and affects more than just the decision of where to transport the defendant. The issue, also, is one of cost allocation between the state and the county.[99]

If the detention was considered a proceeding under RCW 10.77, then the state would be responsible for the cost of the detention, and the proper location for the detention would be Western State or Eastern State, depending on the details of the case. The Attorney General's Office would handle the commitment procedures from that point. But if the detention was considered a proceeding under RCW 71.05, then the county would be responsible for the cost of the detention, and the proper location would be a local evaluation and treatment facility unless the county contracted with Western State or Eastern State for the services. The county prosecutor would handle the commitment proceedings from that point.[100]

(2) Out-of-Custody Defendants

If the defendant is referred for civil commitment evaluation while on conditional release in the criminal case, which as a practical matter means

that the defendant's outpatient treatment did not succeed, then the evaluation will occur at any location chosen by a statutorily required designated mental health professional (DMHP).[101] That evaluation must occur within forty-eight hours of the referral.[102] Unfortunately, the statute does not provide a remedy if the defendant fails to appear for the civil commitment evaluation, nor does it specify whether the remedy would be through the criminal case or the civil commitment process.

There is one additional potential wrinkle. Consider an example in which a nonfelony defendant is out of custody at the time of his or her competency evaluation. Suppose the evaluation concludes that the defendant is incompetent to stand trial, and that neither inpatient nor outpatient competency-rendering treatment is likely to restore the defendant's competency. Suppose further that the court finds the defendant not competent and unlikely to regain competency. Under those facts, the court must dismiss the case and order that the defendant be evaluated for civil commitment.[103] Clearly the inpatient evaluation provision will not apply to our defendant, who is not in custody.[104] The issue is whether the outpatient evaluation provision applies: is the defendant "on conditional release at the time of the dismissal"?[105] Clearly the legislature would want such a defendant evaluated for possible civil commitment, but the question is how the legislature intended that to happen.

One alternative is for the court to conclude that an out-of-custody defendant is essentially equivalent to a defendant on conditional release.[106] That makes sense if there are any conditions attached to the defendant's release from custody, such as a condition that the defendant cooperate with the competency evaluation or a condition that the defendant commit no criminal law violations. Under those facts, the defendant is arguably detained for purposes of the evaluation because his or her freedom is curtailed. If the defendant is detained for a competency evaluation, whether or not the defendant was initially in custody, then the defendant is arguably

on a conditional release. If so, then the court would order the DMHP to evaluate the defendant on an out-of-custody basis.[107]

A second alternative is for the court to conclude that the defendant, though not held in jail, is in custody in the sense that he or she is subject to terms of release, and therefore his or her freedom has been curtailed by the court. This is similar to the rationale that permits a person on probation to file a personal restraint petition even though he or she is not being held in custody.[108] Under that line of logic, the court must order the defendant referred to Western State or Eastern State for an inpatient evaluation.[109]

A third alternative may be available if the competency evaluation recommends that the defendant be evaluated for civil commitment by the DMHP.[110] In that case, the court would be required to order the DMHP to conduct that evaluation pursuant to RCW 10.77.065.[111]

A fourth alternative is for the court to conclude that the mandatory referral provisions of RCW 10.77 do not apply, but that the discretionary provision for non-treatment-eligible nonfelony defendants does.[112] Under this alternative, the court, at least in theory, could choose not to refer the defendant, which runs contrary to the clear intent behind the mandatory referral provisions.[113]

(3) Transmittal of Information toTreatment Facility or DMHP

If an in-custody defendant is detained and sent to an evaluation and treatment facility, that facility will only have seventy-two hours to decide whether to file a petition for civil commitment.[114] If a defendant on conditional release is referred to the DMHP, the DMHP must examine the defendant within forty-eight hours.[115] In either case, the treatment facility or the DMHP will immediately need records from the prosecutor. Those records include the police report from the case, as well as other relevant information, including the defendant's criminal history and a certified copy of the order setting forth the court's finding that the defendant is in the treatment-eligible category. Without that information and the order, the

county prosecutor or assistant attorney general will not be able to file a civil commitment petition on a timely basis.

c) Non-Treatment-Eligible Nonfelony Defendant Who is Incompetent

If the court ultimately finds that a non-treatment-eligible nonfelony defendant is incompetent, then the court has these two alternatives: stay or dismiss the proceedings and detain the defendant for a civil commitment evaluation, or dismiss the case outright.[116] The statute does not require that the defendant be in custody in order for the court to detain. The dismissal should be without prejudice, just as for treatment-eligible nonfelony defendants.[117] The statute does not give any guidance for what happens if the court stays the proceedings, and it is unclear how that would impact the case. The statute also fails to give any guidance to the court regarding what is essentially a mental health question: whether it is appropriate in a particular case to order that the DMHP evaluate the defendant for civil commitment.

d) Illustrative Examples

The best way to understand the treatment-eligible and non-treatment-eligible provisions applicable to nonfelony defendants is to compare three hypothetical fact patterns, one of which involves a felony case. Defendant A is charged with second-degree theft for stealing a $750 overcoat in the wintertime. Defendant B is charged with second-degree criminal trespass. Defendant C is charged with fourth-degree assault by means of intentionally inflicting bodily injury on another. All three defendants have been evaluated by the staff at Western State as incompetent to stand trial. None of the defendants have any criminal history, prior dismissals due to incompetency, or acquittals by reason of insanity.[118]

Defendant A, charged with a felony, *must* be ordered into competency-rendering treatment for up to ninety days.[119] If treatment proves unsuccessful, the defendant could be ordered back for an additional ninety days of treatment, at the court's discretion.[120] If the defendant is still not

competent, and if the court or jury makes certain findings, the court may extend the treatment another six months.[121] Ultimately, if the defendant does not regain competency, the court must dismiss the case without prejudice and either begin civil commitment proceedings or release the defendant.[122]

Defendant B is a non-treatment-eligible nonfelony defendant, and the example assumes that RCW 10.77.065(1)(b) does not apply. The court has two options. It may stay or dismiss the proceedings and detain the defendant for sufficient time for the DMHP to evaluate the defendant for civil commitment. In the alternative, it may dismiss the proceedings outright.[123]

Defendant C is a treatment-eligible nonfelony defendant because the pending charge involves a violent act, namely, assault by intentionally inflicting bodily injury. The court can order that Defendant C be placed at Western State for up to fourteen days of inpatient treatment to restore competency; this period may be extended for up to an additional fifteen days.[124] At the end of that period, the defendant must return to court for a competency hearing.[125] If he or she is still not competent, but the court determines that further treatment may restore competency, the court may order Defendant C to undergo outpatient treatment of up to ninety days on a conditional release.[126] Of course, the court is also free to order outpatient treatment pursuant to a conditional release first, and then inpatient treatment if the conditional release is not successful.[127] If, at the end of the treatment period, or at any time following notice and a hearing, the court determines that Defendant C is unlikely to return to competency, the court must dismiss the charges and refer Defendant C for evaluation for possible civil commitment.[128]

C. Involuntary Medication as Part of Competency-Rendering Treatment

One cannot examine the competency-rendering process without considering the issue of involuntary medication. As a general proposition,

defendants who are found incompetent suffer from acute episodes of severe mental illness that are treated primarily with psychotropic medication.[129] When in such an acute phase of illness, many defendants lack insight into their illness and, therefore, refuse to take medication. The only feasible option available for rendering a defendant competent in such cases is involuntary medication.[130]

The circumstances under which a court may constitutionally authorize involuntary medication for the sole purpose of restoring a criminal defendant's competency to stand trial have become quite complex as a result of the Supreme Court decision in *Sell*.[131] The purpose of this section is to discuss the *Sell* decision and its potential implications for the competency-rendering process in Washington.

1. Factual Setting in *Sell*

Charles Sell and his wife were charged with fifty-six counts of mail fraud, six counts of Medicaid fraud, and one count of money laundering. The government later charged him with attempting to murder an FBI agent and a potential witness in the fraud cases. The fraud and attempted murder cases were joined for trial.[132] Sell had exhibited bizarre behavior, and eventually a federal magistrate found him incompetent to stand trial and ordered that he be hospitalized for competency-rendering treatment at a federal facility. The facility's staff recommended that Sell take anti-psychotic medication, which he refused to do. At that point, the facility sought permission to medicate Sell involuntarily.[133]

Following a review process, a psychiatrist at the facility authorized administering involuntary medication to Sell. The facility administratively reviewed and upheld the psychiatrist's determination. The federal magistrate authorized involuntary medication as well. The magistrate stayed the order so Sell could appeal the issue to the federal district court. The district court affirmed the magistrate's order authorizing involuntary medication as the only viable way to render Sell competent to stand trial.

However, the district court found the magistrate's determination—that Sell was dangerous—to be clearly erroneous. The Eighth Circuit Court of Appeals, focusing only on the fraud charges, also affirmed the district court's order authorizing forced medication to render Sell competent to stand trial. The U. S. Supreme Court granted certiorari to review the Eighth Circuit's ruling.[134]

2. Holding in *Sell*

The Supreme Court found that the orders in *Sell* did not meet the necessary test and, thus, vacated the Eighth Circuit's judgment and remanded the case. The Court phrased the issue rather narrowly: Does the U.S. Constitution permit the government to involuntarily administer anti-psychotic medication solely to render a defendant competent to stand trial for serious but nonviolent crimes?[135] In a 6–3 opinion, the Supreme Court held that under limited circumstances, the Constitution permits the government to administer psychotropic medication involuntarily to a mentally ill defendant facing serious criminal charges to render that defendant competent to stand trial.[136] The Court pointed out that "the Government may pursue its request for forced medication on the grounds discussed in this opinion, including grounds related to the danger Sell poses to himself or others."[137] The Court cautioned that since "Sell's medical condition may have changed over time, the Government should do so on the basis of current circumstances."[138]

3. What the *Sell* Opinion Means in Practice

In couching the issue, the Supreme Court noted that Sell was charged with serious but nonviolent crimes.[139] While that seems to ignore the attempted murder charges in the case, the Eighth Circuit's opinion focused "solely on the serious fraud charges,"[140] which the Supreme Court appears to have accepted as a limit to its review. As a practical matter, however, subsequent case law appears to render the distinction meaningless, as the

courts apply the *Sell* test to both violent and nonviolent charges. The *Sell* opinion strongly implies that a court may not constitutionally order involuntary medication in a criminal case that involves non-serious charges.

There are four questions that practitioners and trial courts must grapple with in the aftermath of *Sell*: (1) What is a "serious" crime? (2) How will the *Sell* test be applied in practice? (3) Can a trial court constitutionally authorize involuntary medication in a case involving a non-serious nonviolent crime solely for the purpose of restoring competency? (4) How does *Sell* impact involuntary medication for purposes other than the sole purpose of restoring competency?

a) Defining "Serious" Crimes

The *Sell* opinion seems to have accepted the Eighth Circuit's determination that the fraud charges are "serious." The opinion's lack of discussion of what constitutes a "serious" crime implies that the trial court must determine what is and what is not "serious." While the *Sell* opinion does not specify the criteria for a "serious" crime, statutory and case law have provided some guidance.[141] Remember, *unless the current charge is "serious," the court cannot authorize involuntary medication, even if the defendant is charged with a felony or is a treatment-eligible nonfelony defendant*.[142]

(1) Carries the Right to a Jury Trial

The Fourth Circuit in *United States v. Evans* focused on the constitutional right to a jury trial for guidance: a crime that is serious enough to warrant a jury trial is serious for the purpose of a *Sell* analysis. Under the Sixth and Fourteenth Amendments, a "serious" crime carries the right to a jury trial; a non-serious or "petty" crime does not.[143] For federal law purposes, any crime carrying a maximum possible sentence of more than six months carries the right to a jury trial and is therefore "serious."[144] If the Fourth Circuit's analysis—labeling as "serious" any criminal charge that affords a

right to a jury trial—was applied in Washington, any criminal case would be potentially "serious." The Washington Constitution provides greater rights to a jury trial than its federal counterpart. All persons charged with a crime carrying any potential jail term are entitled to a jury trial.[145] That seems rather broad and, as discussed below, is most likely not the standard for a "serious" crime in Washington.

(2) Designated "Serious" by State Legislature

In focusing on the maximum potential punishment to determine whether a crime is "serious" for *Sell* purposes, the *Evans* court explained that "[s]uch an approach respects legislative judgments regarding the severity of the crime."[146] In other words, a state legislature is given great latitude to define a "serious" crime. The Washington legislature has exercised its discretion by declaring certain crimes as "serious" *per se*.[147] The list includes some nonfelony crimes, such as any nonfelony domestic violence crime, harassment, and driving under the influence, or the local equivalents of these.[148]

(3) Determined "Serious" by Court

Washington's *per se* list of "serious" crimes also authorizes a court in a particular case to find that a crime is "serious" after weighing certain standards. These standards include whether the offense involves bodily or emotional harm to another person, whether the offense impacts the local citizens' basic need for security, the number of potential or actual victims or persons impacted by the alleged acts, and the maximum possible sentence for the crime.[149]

(4) Designated "Serious" by Local Legislature

Prior drafts of the *per se* statute gave city and county legislatures the authority to declare additional categories of crimes as "serious" *per se*, on the basis of standards similar to those applicable to the courts.[150] That

authority did not survive in the final version of the statute, so it appears that the state legislature intended to preempt the field except as to the extent it has delegated such authority to the courts.

b) Applying Sell in Practice

The Supreme Court in *Sell* explained that there are four requirements for constitutionally imposing involuntary medication to restore a defendant's competency to stand trial on serious charges.[151] Although the Court never stated what standard of proof the trial court should apply in determining whether those four requirements have been met, the Second Circuit recently held in *U.S. v. Gomes*[152] that the clear and convincing standard applies. In *State v. Hernandez-Ramirez*,[153] Division Two of the Court of Appeals, relying on the statutory standard for involuntary medication in the civil commitment context, adopted the same test.[154] The Ninth Circuit has not yet weighed in on this issue.[155]

The four requirements identified in the *Sell* opinion are: (1) administering involuntary medication to render the defendant competent must serve an important governmental interest in the case; (2) involuntary medication must significantly further that important governmental interest; (3) involuntary medication must be necessary to further that interest; and (4) involuntary medication must be medically appropriate for the particular defendant.[156] Each of these requirements is discussed below.

(1) Important Governmental Interest

The longer the potential sentence, or the potential for future confinement, the stronger the governmental interest in involuntary medication for competency-rendering treatment. While there is an important interest in bringing to trial a defendant charged with a serious crime against persons or property, the trial court still must consider the facts of the individual case in evaluating the importance of that interest.[157] The *Sell* opinion noted two specific considerations, namely, the potential for future confinement,

including civil commitment, and whether the defendant has already been confined for a lengthy time.[158]

With respect to the potential for future confinement, the court will look to the crime charged. For felonies, the court can calculate the potential standard sentencing range under the Sentencing Reform Act of 1981 (SRA).[159] For nonfelonies, the maximum sentence will be one year or ninety days, depending on the charge, and there may or may not be a mandatory minimum.[160]

Under Washington's civil commitment laws, there are some practical complications in estimating the potential for future civil commitment. For example, it is virtually impossible for a trial court to know whether a defendant will be civilly committed, or even to have a well-informed basis on which to predict whether civil commitment is likely and if so, under what conditions. Civil commitment proceedings are not necessarily handled by the same prosecuting agency, the same judge or court system, or the same defense attorney as the criminal case.[161]

In addition, except for limited exceptions, civil commitment proceedings are confidential.[162] However, in 2004, the legislature amended the confidentiality provisions to help open the lines of communication between the civil commitment and criminal justice systems when competency-rendering treatment is at issue.[163] Thus, civil commitment records and information under RCW 71.05 may now be disclosed to a court or its designee when there is a pending motion requesting court authority for involuntary medication as part of competency-rendering treatment under RCW 10.77.[164] Additionally, the criminal court, when considering whether to authorize involuntary medication as part of competency-rendering treatment, is now required to ask the prosecutor and defense attorney, who are required to answer to the extent they are aware, whether the defendant is the subject of civil commitment proceedings.[165]

(2) Significantly Furthers Governmental Interest

Second, the trial court must conclude that involuntary medication would *significantly further* the governmental interest. That means the court must find that the medication is *substantially likely* to restore competency, but at the same time be *substantially unlikely* to have side effects that will interfere significantly with the defendant's ability to assist in conducting a defense.[166] This test is likely to pose far more problems for prosecutors in nonfelony cases than in felony cases. With a fourteen- to twenty-nine-day competency-rendering period for nonfelony crimes,[167] it is hard to imagine a large number of cases in which a qualified mental health professional could render an opinion that there is a substantial likelihood that involuntary medication will restore competency. On the other hand, felonies carry a competency-rendering period of 90–365 days.[168] In that amount of time, there is a greater likelihood that a qualified mental health professional could opine that there is a substantial likelihood the medication could restore competency. Of course, the trial court is not bound by the opinion of the mental health professional, especially if the defense presents contradictory testimony from its own expert.[169]

From a pragmatic as well as legal standpoint, a key question is whether statistical probabilities may be used to establish a substantial likelihood of restoration. Federal case law supports the concept that the prosecution can rely upon a statistical probability that psychotropic medication will restore competency, though the cases do not specify a minimum probability that would still satisfy *Sell*.[170]

Another key question is whether the prosecution must identify the particular medication or merely the class of medication that would be administered. Unless the defendant's mental health history shows that he or she has had particular success with a specific medication, it is unlikely the court could authorize involuntary medication.[171] At the present time, Washington case law supports the proposition that the prosecution only needs to establish the class of medication to be administered. In *State v.*

Hernandez-Ramirez,[172] Division Two affirmed a trial court order authorizing involuntary medication on the basis of testimony, from two doctors, that antipsychotic medications are the typical form of treatment for the defendant's mental illness. The federal courts are divided; some require the prosecution to identify the specific medication to be administered,[173] while others require the prosecution to identify only the class of medication to be administered.[174]

(3) Necessary to Further Governmental Interest

The third *Sell* requirement for constitutionally authorizing involuntarily administered medication is that the medication must be necessary to further the important governmental interest. Demonstrating the necessity of involuntarily medicating a defendant requires a finding that less intrusive alternatives are unlikely to achieve substantially the same results.[175] In the *Sell* opinion, the Supreme Court included the troubling example of "a court order to the defendant backed by the contempt power" as a less intrusive alternative.[176] This suggestion is troubling because, with respect to the opinion's concerns about constitutional due process, it is difficult to differentiate between "involuntary medication" on the one hand and "voluntary medication" pursuant to a court order backed by contempt power on the other. Both contain an element of coercion that was a key constitutional concern for the *Sell* Court. This language runs contrary to the tenor of the majority's entire discussion of the involuntary medication issue.

Furthermore, the Court's language implies that the trial court should take into consideration the defendant's willingness to take medication voluntarily. On the surface, this suggestion appears to be a feasible possibility in felony cases because of their long restoration periods. The trial court could order the defendant to be transported to Western State or Eastern State and if the defendant takes his or her medication, nothing further needs to be done. If the defendant refuses, he or she could be returned to court for a hearing on the issue of involuntary medication, and if

the trial court authorizes this action, there would still be sufficient time left in the treatment period for the competency-rendering treatment to be successful.

This wait-and-see approach, however, creates logistical problems that are not addressed in the *Sell* opinion. For example, bed space at Western State and Eastern State is limited, and using that bed space for the sole purpose of determining whether the defendant is willing to take medication voluntarily takes that bed space away from another defendant. That, in turn, could result in longer transport times for those defendants waiting for bed space. In addition, resources expended waiting to see if a defendant will take medication voluntarily would be unavailable to other defendants who need treatment.[177] Though quite valid, these drawbacks do not relate to the specific defendant who is the subject of the "*Sell* hearing." It is unlikely that fiscal concerns and policy choices about the extent of services available at state psychiatric hospitals would satisfy *Sell's* constitutional criteria.

In nonfelony cases, by contrast, the relatively short inpatient restoration period does not lend itself to a wait-and-see approach. Waiting to see if a defendant agrees to take medication voluntarily could use up several days, or even one week, of treatment time. That would leave little, if any, time to return the defendant to court, hold an involuntary medication hearing, return the defendant to inpatient treatment, and still have a substantial likelihood of successful restoration. While the court could consider ordering outpatient treatment of up to ninety days for a nonfelony defendant in order to see if he or she voluntarily takes medication, the downside of this approach outweighs both its suitability and its usefulness. First and foremost, outpatient competency-rendering treatment may not be appropriate for the defendant because of the defendant's risk to the community. It is also possible that the defendant's level of functioning is such that the defendant is incapable of complying with outpatient treatment. Second, it is much more difficult for an outpatient treatment facility to monitor whether the defendant is voluntarily taking his or her medication,

especially if the medication is not the type that can be monitored by testing the medication levels in the defendant's blood. Although this concern can be mitigated somewhat by delivering medication through an intramuscular shot at specific intervals, not every medication can be administered in this manner.

(4) Medically Appropriate

Lastly, the trial court must find that involuntary medication is medically appropriate. That means the medication is in the defendant's best medical interest in light of the defendant's medical condition.[178] Presumably, the trial court would need to consider the potential harmful side effects of the medication, either medical or related to the defendant's ability to obtain a fair trial. It may be hard to imagine how relieving severe symptoms of a mental disorder could do anything but benefit a defendant. But consider a situation in which a defendant suffered severe emotional or psychological trauma in his or her past, and the psychiatrist testified at the "*Sell* hearing" that *involuntarily* medicating the defendant would likely trigger a severe psychological response because of that trauma, which would do far more psychological harm than good.[179] The benefits of the involuntary medication would be more than offset by the potential emotional or psychological harm to that particular defendant.

c) Authorizing Involuntary Medication in Cases Involving Non-Serious, Nonviolent Crimes Solely for the Purpose of Restoring Competency

The *Sell* case sets a very high standard for authorizing involuntary medication in cases involving serious crimes. It is unlikely that a court may constitutionally authorize involuntary medication if the defendant is not charged with a serious crime.

d) Involuntary Medication for Reasons Other Than Restoring Competency

The *Sell* opinion noted that the trial court does not have to go through the tests set out in *Sell* if the medication is warranted for a purpose other than competency-rendering treatment. The Supreme Court cited *Washington v. Harper*[180] as an example.[181] In *Harper*, the Court upheld procedures for involuntarily medicating prison inmates on the basis of potential dangerousness. The difficulty with basing involuntary medication on dangerousness considerations is that there must be some procedural scheme under which the trial court could also act. The civil commitment statute clearly states that a person suffering from a mental disorder "may not be involuntarily committed for treatment of such disorder except pursuant to provisions of [RCW 71.05], chapter 10.77 RCW, chapter 71.06 RCW, chapter 71.34 RCW, transfer pursuant to RCW 72.68.031 through 72.68.037, or pursuant to court ordered evaluation and treatment not to exceed 90 days pending a criminal trial or sentencing."[182] Unless the defendant is already engaged in the civil commitment process under RCW 71.05 or some other statutory commitment process, it seems unlikely that a trial court could order involuntary medication on the basis of dangerousness without offending principles of either statutory or constitutional procedural due process.

D. Mandatory Referrals for Civil Commitment Evaluation

The competency evaluator's report must include a recommendation to the court regarding whether the DMHP should examine the defendant for possible civil commitment, and whether the court should keep the defendant under its control.[183] The Act created a process which requires courts to refer a defendant for a civil commitment evaluation if the competency evaluation recommends it.[184] The court must make the referral even if the court ultimately finds the defendant competent.[185] Given the tragic stabbing death of a retired firefighter, which created much of the impetus behind the Act,[186] it seems likely that the legislature intended that this process serve as a catch-all

safety net for situations not covered by other provisions of the competency statutes. Unfortunately, there are some gaps in this catch-all provision.[187] However, the legislature can eliminate those gaps by amending the statute to provide for a smoother transition from the competency restoration process to the civil commitment process.[188]

IV. DEFENDANTS AT THE POST-JUDGMENT PHASE

A defendant who is competent before the judgment may become incompetent at the post-judgment phase.[189] Post-judgment competency issues may arise either at a sentencing hearing or at a probation violation hearing. The purpose of this section is to identify the complex issues involving a defendant's competency to proceed at the post-judgment phase. The section begins by discussing what constitutes a judgment and examining how that definition works in practice. After examining the similarities between the pre-judgment and post-judgment competency processes, the section concludes by exploring in great detail the differences between those two processes and illustrating the impact of those differences.

A. Defining Post-Judgment Cases Under Ch. 10.77 RCW

Any discussion of the consequences of a defendant's incompetency at the post-judgment phase presupposes that the term "judgment" in the criminal context is clearly defined; that is not the case. As explained by noted legal scholar Karl Tegland, in the felony context,[190] the "rules [of appellate procedure] make no effort to define a final judgment, and perhaps wisely so. At common law, a final judgment was one that disposed of all of the issues as to all of the parties . . . . No better definition seems to have evolved."[191] Mr. Tegland noted that in the nonfelony context, "courts have had difficulty defining a final judgment except in a circular fashion. However, final judgments in courts of limited jurisdiction will *generally* be . . . the judgment and sentence in a criminal case."[192]

One source of guidance in interpreting the meaning of "final judgment" might be the criminal court rules. For example, the procedural rules for superior and municipal/district courts provide that a "judgment of conviction" must include "the verdict . . . and the adjudication and sentence."[193] That implies that a judgment must include the sentence. But for purposes of post-judgment relief, a motion for arrest of judgment must be filed and served within ten days after the verdict or decision for felonies and five days after the verdict or decision for nonfelonies.[194] By statute, a collateral attack on a judgment and sentence in a criminal case may not "be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction."[195]

One might also look to the practical nature of the proceeding rather than its name to determine whether the case is pre- or post-judgment. The difficulty with this approach is that the distinction is not clearly spelled out, leaving the courts too little guidance, which in turn could result in courts across the state treating the same type of proceedings inconsistently. Post-judgment cases generally fall into either of two categories: cases in which there has been a guilty plea or guilty finding, and cases in which the defendant is obligated to fulfill certain conditions in order to have charges dismissed or reduced to less serious ones.

1. Guilty Plea or Finding

a) Sentencing

Before a court can reach sentencing, there must be a conviction of some sort, which can result from a guilty plea or a finding of guilt. As discussed above, the court rules require a criminal judgment to include the sentence imposed. Sentencing does not always occur at the time of conviction, so it is conceivable that a defendant could be competent at the time he or she is convicted but become incompetent at a sentencing hearing held weeks or

months later. Court rules require that the written judgment include the sentence imposed, and because a defendant cannot be sentenced while incompetent,[196] a sentencing hearing appears to have one foot in the pre-judgment camp and the other in the post-judgment camp.

b. Suspended Sentence

Suspended sentences, authorized by statute in both felony[197] and nonfelony[198] cases, provide the classic example of post-judgment matters. Stated simply, a suspended sentence occurs when the court imposes a sentence but suspends execution of all or a portion of the sentence.[199] According to the Criminal Rules, the "judgment" regarding a conviction must contain, among other things, the sentence.[200] The terms of a suspended sentence are reflected in the judgment and sentence, thereby meeting the definition of judgment. Thus, a probation violation proceeding involving a suspended sentence is clearly a post-judgment matter.

c) Deferred Sentence

Deferred sentences are creatures of municipal and district courts.[201] With a deferred sentence, the defendant pleads guilty or is found guilty at trial, but the court defers imposing sentence for a designated period of time until the defendant has completed certain prescribed conditions. If the conditions are completed, the case is dismissed.[202] If the defendant willfully violates the conditions, the court has the discretion to revoke the deferred sentence and impose either a straight sentence or a suspended sentence.

Interpreting the court rules strictly leads to the conclusion that a court order deferring sentence following a conviction would not be considered a "judgment" unless, and until, the court revoked the deferred sentence and imposed either a straight sentence or a suspended sentence. However, the Washington Supreme Court recognized the unfair position a defendant would face if a deferred sentence were not considered a "judgment." In *State v. Proctor*, the supreme court explained that such a defendant would

"be confronted with a 'Hobson's choice' between waiving his or her appeal, and serving a sentence or paying a fine or both, to secure deferment; or insisting that a judgment and sentence be imposed that he or she could exercise the constitutional guarantee of 'the right to appeal in all cases.'"[203]

In order to avoid such an unfair result, the court found that a deferred sentence is an appealable order. In other words, at least in the context of a deferred sentence, a finding or verdict of guilty need not include a judgment and sentence in order to be an appealable "judgment." The reasoning in *Proctor* makes similar sense in the competency context and, although a deferred sentence differs from a suspended sentence in the sense that the court does not "sentence" the defendant following a guilty verdict, guilty finding, or guilty plea, a deferred sentence does appear to be a post-judgment matter.

d) Dispositional Continuance and Deferred Prosecution

Dispositional continuances[204] and deferred prosecutions are also creatures of municipal and district courts. Because they have some aspects that are more like pre-judgment cases and some that are more like post-judgment cases, they pose more difficult issues than deferred or suspended sentences, which are clearly post-judgment matters. From a purely technical standpoint, dispositional continuances and deferred prosecutions are pre-judgment matters: the court does not enter a finding of guilty, either by plea or following trial. Procedurally and pragmatically, however, dispositional continuances and deferred prosecutions are more similar to post-judgment probation cases than to pre-judgment cases, and it seems more logical to treat them as post-judgment cases. The conditions imposed as part of the dispositional continuance, or deferred prosecution, are similar to conditions of probation that might be imposed as part of a suspended or deferred sentence, and are often monitored by a probation officer. And if the court finds the defendant willfully failed to comply with the terms of the dispositional continuance or deferred prosecution, the court can revoke the

agreement, read the police report and, in all likelihood, find the defendant guilty. The defendant has essentially given up his or her right to a meaningful trial, and the dispositional continuance or deferred prosecution is more along the lines of a submittal.[205]

A dispositional continuance is an agreement between the prosecution and the defendant. If the defendant fulfills the conditions of the agreement, the court either amends the charge to a less serious one or dismisses the charge outright. If the court finds the defendant willfully failed to comply with the agreement, it has discretion to revoke the dispositional continuance and determine the defendant's guilt or innocence based solely on the documents submitted as part of the agreement.[206]

Deferred prosecutions are a statutorily authorized form of dispositional continuance, and are limited to nonfelony crimes that are "the result of or caused by alcoholism, drug addiction, or mental problems for which the person is in need of treatment and unless treated the probability of future reoccurrence is great . . . ."[207] If the defendant successfully completes the conditions of the deferred prosecution, the court dismisses the case.[208] If not, the court may revoke the deferred prosecution, read the police report, and determine the defendant's guilt or innocence based solely on the police report.[209] Deferred prosecutions differ from dispositional continuances in one other respect: the court may grant a petition for deferred prosecution over the prosecution's objection.[210]

B. Proceedings Common to Pre-Judgment and Post-Judgment Competency Matters

1. Ordering the Competency Evaluation

If the court believes that the defendant's competency is at issue, even in a post-judgment matter, it seems clear that the court must order a competency evaluation and conduct a competency hearing. RCW 10.77.060, which applies to competency evaluations, does not appear by its terms to be

limited to pre-conviction matters. The court may order a competency evaluation of a defendant, "*[w]henever* . . . there is reason to doubt his or her competency."[211] If the court finds the defendant competent, then the sentencing or probation violation matter can proceed. But if the court finds the defendant incompetent, then the court must determine what options exist in the absence of clear statutory direction.

2. Proceedings Halted

Under statutory law, the court may not sentence an incompetent defendant; a defendant may not be "tried, convicted *or sentenced*" while incompetent.[212] Under case law, probation violation hearings are treated similarly. In *State v. Campbell*, the supreme court held that the trial court was powerless to alter a defendant's probation during the time he was at Western State Hospital being evaluated for competency.[213]

C. Different Proceedings for Pre-Judgment and Post-Judgment Competency Matters

The lack of statutory process for defining and handling post-judgment and quasi-post-judgment cases sets up a classic form over substance trap. The form factor, based on a literal reading of court rules, requires the court to treat many settled cases in a manner not contemplated by the competency statute or by the parties to the case. The substance factor recognizes that many cases settle in a fashion other than by straight guilty plea or guilty verdict. Yet it may not take into account some subtle nuances that arise regarding the court's jurisdictional period. Each type of resolution that is arguably post-judgment is discussed in turn below.

1. Competency-Rendering Treatment

The most significant difference between pre- and post-judgment matters is whether the court may order that the defendant undergo competency-rendering treatment. The competency-rendering provisions specify the

conditions under which a felony or nonfelony defendant at the pre-judgment stage is eligible for competency-rendering treatment;[214] there are no similar provisions for the post-judgment phase. As this section demonstrates, one can make two contrasting arguments—one of which would limit the court's authority to authorize competency-rendering treatment and the other of which would expand its authority.

The first argument is that the court lacks authority to impose competency-rendering treatment upon an incompetent defendant at the post-judgment phase. Under this view, the lack of statutory authority for competency-rendering treatment reflects the legislature's intent to limit competency-rendering treatment to pre-judgment cases.

The contrasting argument is that the court has inherent authority to order the defendant into competency-rendering treatment. The difficulty with this approach is that the few cases discussing the court's inherent authority to address competency issues apply either to ordering a competency evaluation or to holding a competency hearing.[215] In addition, the competency-rendering treatment provisions are rather comprehensive.

The extent to which the legislature intended to leave room for a court to exercise an inherent authority not granted to it by statute is certainly open to debate. Although the factual setting in *Campbell* included competency-rendering treatment for a defendant facing probation violation proceedings, the supreme court never reached the issue of whether the trial court had inherent authority to order that treatment.[216]

Even if the court has inherent authority to order competency-rendering treatment in a sentencing or probation violation matter, the issue of the extent of that authority is still problematic. It seems illogical to think that a court has broader inherent authority to order treatment in a post-judgment case than it has statutory authority to do so in a pre-judgment case. Otherwise, there would be no need for the statutory authority.

Two fact patterns illustrate the point. First, if a nonfelony non-treatment-eligible defendant is awaiting trial, the court could not order competency-

rendering treatment. Does it make sense, then, that the court could use its inherent authority to order competency-rendering treatment if the defendant were awaiting a probation violation hearing instead of a trial? Second, if a felony defendant or a nonfelony treatment-eligible defendant is awaiting trial, the court must order competency-rendering treatment. Does it make sense that the court could use its inherent authority to order competency-rendering treatment for a longer period in a post-judgment case than it could in a pre-judgment case?

Logic therefore implies that if a court has inherent authority to order competency-rendering treatment in a sentencing or probation violation matter, its authority is defined and limited, at least in part, by the pre-judgment restoration provisions. Yet, the more the court must rely on a statute to define and limit its inherent authority, the weaker the argument that the court has that inherent authority in the first place. But even if the court does have such inherent authority, the court has the discretion to exercise it or decline to exercise it.

2. Consequences if Defendant Not Competent

a) Dismissal of Charges

The competency-rendering provisions for *pre*-judgment cases expressly require the court to dismiss the case without prejudice if the defendant either remains incompetent following competency-rendering treatment or is ineligible for competency-rendering treatment.[217] Because suspended and deferred sentences are expressly *post*-judgment matters,[218] there is no danger of an absurd result, such as requiring the court to dismiss a case in which the defendant has been convicted.

b. Sentencing Hearings

Sentencing hearings occur only after a finding of guilt. The most logical interpretation is that sentencing is a post-judgment matter. However,

sentencing might arguably be called a pre-judgment matter, in that the court rules require that the judgment include an order setting out the sentence,[219] but a defendant may not be sentenced while he or she is incompetent.[220] This means that the court cannot issue an order on judgment and sentencing as required by court rule. Yet such a strict interpretation leads to an absurd result. Assume a defendant is competent to stand trial and is convicted by a jury. Assume further that between the jury verdict and the sentencing hearing the defendant becomes incompetent. If sentencing was considered pre-judgment and the defendant was incompetent, either following competency-rendering treatment or if competency-rendering treatment was not authorized, then the court *must* dismiss the case without prejudice.[221] However, there is no statutory mechanism by which the court may vacate the conviction, which means the defendant has been convicted in a case in which the charge has been dismissed.

The analysis is no simpler if one treats sentencing as a post-judgment matter. The court must still grapple with one very thorny issue: what should the court do about sentencing the defendant? Absent specific legislation, the court has three possible alternatives, though none is without drawbacks.

(1) Continue Sentencing to Re-Evaluate Competency

One alternative is to continue sentencing to re-evaluate the defendant's competency at a later date. There are some difficult questions raised by this approach. For example, how long can the court keep continuing the case? If the defendant is in custody, there are serious due process issues in continuing a case for an indeterminate time while the defendant remains in custody.[222]

Even if the defendant is not in custody, there are other difficult issues. Superior, municipal, and district courts have varying periods of probation, depending on the particular crime for which the defendant is convicted.[223] But what happens if the court cannot impose a sentence? How often can the

court order competency evaluations? At some point, continued evaluations become futile. Can the court decide not to order future evaluations? Suppose the court orders the defendant to return to be re-evaluated. Can the court order that the defendant be sent to Western State or Eastern State for an inpatient evaluation? Suppose the court orders instead that the defendant be evaluated on an outpatient basis, but the defendant fails to show for the evaluation. Does the court have authority to issue a bench warrant when the court has already found the defendant incompetent? Finally, what does the court do if the defendant is in custody? It may seem like there are a lot of questions without any obvious answers. That is why it is better to resolve competency issues before trial or a plea.

(2) Close the Case Administratively

A second alternative is to take no action for a period of time and close the case administratively, unless the court has reason to believe the defendant's mental state has changed for the better. The primary advantage of this alternative is closure on the case. It is also possible, especially in larger urban jurisdictions, that the defendant will come back into the system on a new charge and either be competent to proceed, or eligible for competency-rendering treatment.[224] But there are real dangers in this approach from a public-safety policy perspective that generally substantially outweigh the advantages. The notion of waiting for a mentally ill defendant to commit a new crime so he or she can be sentenced on an older crime is risky. Closing out a case without trying to sentence the defendant does nothing to protect public safety or stop future criminal behavior by the defendant. This approach should be used with extreme caution and only after serious consideration.

(3) Be Sure the Defendant is Competent Before Going to Trial or Taking a Guilty Plea

Some, though probably not all, sentencing competency issues can be avoided with advance planning. Sentencing often occurs shortly after conviction at trial or entry of a guilty plea. If there is any reason to doubt the defendant's competency at this earlier stage, it is better to seek a competency evaluation before the verdict or finding of guilt than to wait until sentencing to do so. First, due process precludes convicting an incompetent defendant. Second, it is much more difficult to resolve competency issues at the sentencing phase than it is at the guilt phase.

Consider *State v. Marshall*.[225] Henry Marshall pled guilty to murder, and the trial court, after a summary colloquy, found that he was competent to enter the plea. After the plea, the prosecution notified Marshall's attorney that it was seeking the death penalty.[226] Marshall moved to withdraw his guilty plea on the ground of incompetency at the time of the plea, but the trial court denied his motion.[227] The Washington Supreme Court held that, "where a defendant moves to withdraw [a] guilty plea with evidence the defendant was incompetent when the plea was made, the trial court must either grant the motion to withdraw [the] guilty plea or convene a formal competency hearing required by RCW 10.77.060."[228] Since the trial court did neither, the supreme court vacated Marshall's conviction and remanded the case to the trial court for further proceedings.[229]

In lieu of vacating Marshall's conviction, the court could have remanded the case for the trial court to conduct a retrospective competency hearing at the time of sentencing to determine the defendant's competency at the time of the guilty plea or guilty finding.[230] Because competency can change over time, the accuracy of such a retrospective hearing may be open to question, especially if a significant amount of time has passed between the plea or finding of guilt and the sentencing hearing.[231]

c) Probationary Period

(1) Suspended and Deferred Sentences

If the defendant is incompetent to proceed with the revocation hearing, does that toll the running of the probationary period? There is authority to support the conclusion that the probation jurisdiction is tolled while the defendant is incompetent. *Campbell*[232] involved a defendant on felony probation under the old indeterminate sentencing law.[233] The supreme court held that, during the time the defendant was committed to a mental hospital to determine his competency, he was beyond the supervision of the court.[234] Consequently, the defendant's term of probation was tolled during that time and re-commenced once he regained competency.[235]

In *Spokane v. Marquette*,[236] the supreme court applied *Campbell* and other cases involving tolling felony probation to the issue of tolling probation in a nonfelony case when a defendant has failed to appear at a hearing.[237] The court noted that although *Campbell* and the other cited cases involved felony probation, "the principle is the same in municipal court, so we find them persuasive."[238] It therefore appears that *Campbell* applies to municipal and district courts.[239]

Issues left unresolved include how long probation should be tolled, and what event will cause probation to re-commence. If the reasoning of *Campbell* and other cases involving tolling probation is applied, then probation is to be tolled as long as the defendant remains incompetent. If so, then what mechanism exists to restart the probation period? One alternative is to re-commence the probation period once the defendant appears before the court in which the probation matter is pending to establish that he or she is now competent. This is consistent with the time-for-trial rules when a defendant fails to appear. The time-for-trial period begins running when the defendant appears again before the court.[240] It is important to note, though, that the defendant, who might be incompetent for a long or short period before regaining competency, is likely ill-equipped to

initiate the process by which the probation period and conditions recommence.

(2) Dispositional Continuances and Deferred Prosecutions

As long as the court issues a written order for a competency evaluation, there should be no time-for-trial issues. The time-for-trial period is tolled once the court issues a written order for a competency evaluation.[241] The triggering event is the written order for an evaluation; it is not enough for the court to note that the issue has been raised.[242] The time-for-trial period re-commences when the court issues a written order finding the defendant competent.[243] If the defendant entered into a two-year dispositional continuance, the time-for-trial period would be tolled during the period of incompetency.[244]

With respect to deferred prosecutions, before the court can accept a petition for deferred prosecution, it must find that the defendant has knowingly and voluntarily waived his or her right to a speedy trial.[245] In addition, the "[d]elay in bringing a case to trial caused by a petitioner requesting deferred prosecution as provided for in this chapter shall not be grounds for dismissal."[246]

d) Modifying "Probation" Conditions

The court in *Campbell* stated in dictum that the trial court in that case was "powerless to alter defendant's probation" during the time he was being treated at Western State.[247] That makes sense because the probationary period was also tolled while the defendant was undergoing competency-rendering treatment. While the extent to which *Campbell* applies to district and municipal court probation has not been litigated, the reasoning still seems applicable, especially in light of *Marquette*.[248] Dispositional continuances are agreements between the prosecution and the defendant. Analogizing to true probation cases and *Campbell*, it would seem that the court could not modify the terms of the dispositional continuance either.

The deferred prosecution statute sets forth mandatory conditions.[249] Clearly the court could not modify mandatory conditions, whether or not the defendant is competent to stand trial. Under the reasoning of *Campbell*, the court would have no authority to modify any of the discretionary conditions either.[250]

e) Referral to Civil Commitment System

Regardless of how the court decides the issue of its inherent authority to order competency-rendering treatment in a post-judgment case, there are three situations in which the court would need to consider whether, and how, to refer the defendant for a potential civil commitment evaluation under RCW 71.05.[251] The first situation is when the court finds that it does not have inherent authority to order the defendant competent. The second is if the court finds that it does have inherent authority, but chooses not to order the competency-rendering treatment. The third is if the court orders the competency-rendering treatment, but the defendant remains incompetent.

From a public-safety standpoint, it is vital that the court consider referring the defendant to the DMHP for civil commitment evaluation under any of those three scenarios. But the mandatory referral provision does not appear on its face to require that the court order the DMHP to evaluate the defendant if he or she is awaiting sentencing or a probation violation hearing.[252] Nor do other provisions of the statutory scheme provide guidance. The court has express statutory authority to detain an incompetent defendant for civil commitment evaluation *prior to judgment*, but there is no such express authority for post-judgment cases.[253] While one might argue the old standby of inherent authority to detain the defendant for a civil commitment evaluation, there is very little support for that authority. Detaining a defendant for civil commitment evaluation is far different than committing a defendant in a criminal case for competency evaluation. The former more closely resembles a civil commitment proceeding, which is

governed by an entirely different statutory scheme; the latter is more similar to the criminal procedures applicable to nonfelony defendants at the pre-judgment state.[254]

The only practical procedure would be for the court to direct the DMHP to evaluate the defendant for possible civil commitment, but to do so prior to the court's decision to strike the sentencing or probation violation hearing because of the defendant's incompetency. If the defendant is already in custody, the court avoids having to detain the defendant in custody solely for purposes of the civil commitment evaluation. If the defendant is out of custody, the court could order the defendant to report to the DMHP at a specified location, prior to or at the hearing. If the defendant fails to appear for the evaluation before the court strikes the hearing, then the court could issue a bench warrant. This procedure is less than satisfying.

V. GETTING TO WHERE WE NEED TO BE

The issues identified above relate to all aspects of the criminal justice process, from arraignment to sentencing, and overlap the civil commitment system in many places.[255] This section proposes solutions, described in greater detail below, that resolve those issues in a global fashion; they should be instituted as a whole in order to work effectively. The starting point is the definition of mental illness in both systems. The legislature should replace the phrase "mental disease or defect" in the competency process with the phrase "mental disorder," defined by its corresponding definition in the civil commitment statute. The legislature can also increase capacity and improve the efficiency of the competency process by eliminating unnecessary components of the evaluation, thus simplifying the competency-rendering process for both pre- and post-disposition cases. Finally, there must be a smoother transition from the competency evaluation process to the civil commitment process.

A. Redefine the Mental Illness Component

One might say that the entire competency process revolves around the definition of competency: as a result of some form of mental illness, does the defendant lack the ability to understand the nature of the proceedings or to assist in his or her own defense?[256] Similarly, one might say that the civil commitment process also revolves around the definition of mental illness.[257] To the extent that the two processes overlap, it makes sense both legally and from a mental health standpoint to use the same phrase and the same definition of mental illness. To differentiate between "mental disease or defect" and "mental disorder" is to split hairs; it makes more sense to maintain a consistent definition. Although the court in *Klein* had the opportunity to incorporate the civil commitment definition of "mental disorder" into the competency statute, it did not do so; indeed, the opinion does not even mention the civil commitment statutes.[258] The legislature should exercise its prerogative by changing the phrase "mental disease or defect" in the competency statute to "mental disorder," and incorporate the definition of mental disorder contained in the civil commitment statute.[259]

B. Remove Unnecessary Complexity from the Evaluation Process

1. Limit the Competency Evaluation to its Necessary Components

The competency process involves an interrelated system rather than a collection of separate procedures. That system is collapsing from its own weight,[260] due, at least in part, to the fact that the number of evaluations[261] and the competency-rendering process[262] have changed dramatically over the years, while the basic contents of a competency evaluation report have changed little over the past thirty years.[263] This section discusses several ways to reduce the length of time and the amount of resources it takes to complete a competency evaluation without jeopardizing public safety.

a) Eliminate the "Substantial Danger" Portion of the Dangerousness Assessment

Under current law, competency evaluations must include an assessment of the defendant's dangerousness, expressed in two forms: an opinion as to whether the defendant poses a substantial danger unless kept under further control, and an opinion as to whether the defendant should be referred for a civil commitment evaluation.[264] The biggest step in safely reducing the resources devoted solely to competency evaluations is to eliminate the assessment of whether the defendant presents a substantial danger to public safety, while retaining the assessment as to whether the defendant should be evaluated for civil commitment.[265]

The opinion regarding whether the defendant is a substantial danger relates directly to whether the court may extend competency-rendering treatment for a felony defendant by an additional 180 days.[266] It also relates directly to whether the court is required to order such an evaluation, even if it finds the defendant competent.[267] However, that assessment comes with a very high price tag: time spent evaluating and reporting on a defendant's potential dangerousness is time that cannot be spent evaluating other defendants' capacity to stand trial. The result is what is currently happening: the state mental health system cannot handle the volume of competency evaluations ordered. In addition, the "substantial danger" assessment's value to the court's determination as to whether the felony competency-rendering period must be extended is dubious at best. The court does not consider the competency evaluation until months after the evaluation occurs,[268] by which time the dangerousness assessment is stale. Setting a specific competency-rendering period for felony defendants, as recommended below,[269] would eliminate the need for using the substantial danger portion of the dangerousness assessment as a tool for determining whether the court must increase the competency-rendering treatment period in felony cases.

One argument in favor of retaining the substantial-danger portion of the assessment is that it provides valuable information about the defendant's potential impact on public safety. If the court ultimately finds the defendant competent to stand trial, the assessment will undoubtedly have an impact on any ultimate resolution of the case. Without that assessment, the prosecution, out of fear of harming public safety, is more likely to recommend a harsh sentence. That will result in more cases going to trial that could have been resolved earlier, which in turn will backlog an already heavily backlogged criminal system.

That argument is not persuasive. Retaining the opinion as to whether the defendant should be referred for a civil commitment evaluation would provide similar information about any public-safety risks the defendant poses, but would do so without unduly burdening the mental health system.[270] If implemented in conjunction with the other recommended improvements to the competency process described below,[271] retaining the referral opinion would reduce unnecessary referrals to the civil commitment system, freeing up additional resources.[272] In addition, felony sentences are governed by the SRA, which specifies sentencing guidelines based on the crime charged, the defendant's criminal history, and other statutory factors.

b) Eliminate the Requirement of Two Evaluators

Eliminating the requirement that there be at least two competency evaluators would increase the number of evaluations that could be completed without adding staff to Eastern State or Western State. Under current law, the court must appoint a panel of at least two evaluators, at least one of whom must be approved by the prosecutor, unless the parties agree to rely on a single evaluator.[273] The prosecutor's approval right makes sense; the defendant may also obtain his or her own separate expert, at no cost to an indigent defendant.[274] Because most, if not all, in-jail and other outpatient evaluations are conducted with a single evaluator, eliminating the second evaluator will only impact inpatient evaluations.

Although the number of inpatient evaluations is far smaller than the number of outpatient evaluations[275]—meaning the actual capacity added would be relatively small—adding some capacity is better than none at all. For evaluations that are more complex, and therefore more difficult for a solo evaluator, Eastern State or Western State could still have the option to assign more than one evaluator.

c) Separate the Insanity and Diminished Capacity Portions of the Evaluation

Although the competency report must include an insanity or diminished capacity opinion only if ordered by the court,[276] it is still common for a jurisdiction to include insanity and diminished-capacity opinions as part of the evaluation, even if the defendant has given no indication that he or she intends to rely on either defense.[277] The time required to conduct an unnecessary insanity and/or diminished capacity evaluation as part of the competency evaluation reduces the number of other competency evaluations that can be conducted. While that may be more of a training issue, or an issue related to the particular forms a jurisdiction uses, separating out the insanity and diminished capacity evaluations would help avoid confusion and at least some inefficient use of time.

2. Integrate and Simplify the Competency-Rendering Process for Felonies and Nonfelonies

The complexities in the competency-rendering process arise in large part from what is best described as a piecemeal approach to competency-rendering treatment. The result is an increased number of hearings, each of which requires that the defendant be transported to court from the treatment facility. In many cases, the parties must present evidence so that the court can make findings of fact and conclusions of law. By adopting a consistent approach to felony and nonfelony cases that considers the practical realities of competency-rendering treatment, the legislature can eliminate

unnecessary hearings, reduce interruptions in the treatment process, and focus scarce resources within the criminal justice and mental health systems where they should be focused—on treatment. That means setting specific competency-rendering treatment periods—a longer one for serious felonies, a shorter one for non-serious felonies, one for serious nonfelonies that is tied to involuntary medication, and no treatment for non-serious nonfelonies.

a) Improving the Felony Process

The current felony process is easy to apply: if the defendant is charged with a felony, then he or she must be ordered to undergo competency-rendering treatment for ninety days, followed by an optional ninety-day period, potentially followed by another 180-day period.[278] That process requires at least two additional hearings after the initial competency hearing and, with respect to the final 180-day period, at least some evidentiary hearing and findings of fact. It also requires that the defendant's treatment be interrupted each time he or she must attend a court hearing. It is a given that treatment resources, whether for competency-rendering treatment or for civil commitment treatment, are limited—one cannot have one's proverbial cake and eat it too. That being said, the legislature can simplify the process and maximize the efficiency with which it utilizes the state's limited treatment and criminal justice resources.

This article recommends that the legislature adopt a two-tiered felony competency-rendering treatment period: a longer period for those charged with felonies defined as "serious" for purposes of the *Sell* opinion with respect to involuntary medication,[279] such as 180 or 365 days; and a shorter period for those charged with "non-serious" felonies, such as sixty or ninety days. The treatment facility should be authorized to return the defendant to court sooner if the facility concludes either that the defendant is rendered competent or is unlikely to be rendered competent within the remaining restoration period, just as it can under current law for nonfelonies.[280] That

would eliminate using bed space for a defendant who either no longer needs it or will not respond to continued treatment. The actual length of the periods must be related to the clinical likelihood of success rather than to budgetary concerns—the period must be long enough to provide a reasonable likelihood of success. Setting an appropriate period will require input from the competency-rendering treatment providers.

Society clearly has an interest in rendering competent those charged with serious felonies, but it also has an interest in rendering competent those charged with non-serious felonies.[281] While a significant number of defendants can be rendered competent within a shorter period, such as sixty or ninety days, there will be many who require longer treatment. A longer competency-rendering treatment period increases the likelihood those defendants will be rendered competent. Why not, then, simply provide a longer treatment period for all defendants charged with a felony? Because of limited resources. There are simply not enough hospital beds and treatment staff to handle all of the restoration cases. Clearly, adopting a lengthy restoration period for all felony defendants will not solve the problem.

What about limiting competency-rendering treatment to those charged with serious felony crimes? Society could focus its limited resources to those serious cases, and thus, could afford a longer restoration period. The longer period, in turn, would increase the number of felony defendants rendered competent. Using the definition of "serious" that is applicable to involuntary medication would eliminate one major element of the issue of involuntary medication and would still provide a bright-line definition for the courts to follow. It would also leave the legislature the flexibility to define or re-define a "serious" offense in response to a changing society.[282] The trade-off is that it would leave an entire class of felony defendants ineligible for competency-rendering treatment. One might argue that it is a waste of time to provide for restoration for a defendant charged with a non-serious crime; competency-rendering treatment almost always involves

medication, and a defendant charged with a non-serious crime cannot be medicated involuntarily.[283] But a shorter felony restoration period nevertheless lends itself to a wait and see approach in which the defendant is given an opportunity to take medication voluntarily. If a defendant declines to take medication voluntarily, then the treatment facility would conclude that the defendant is unlikely to be restored and would return the defendant to court rather than have the defendant unnecessarily take up bed space.

b) Improving the Nonfelony Process

Washington's competency-rendering laws predate the U.S. Supreme Court's decision in *Sell*. The result is parallel processes: one for determining whether a defendant is eligible for competency-rendering treatment, and one for determining whether the treatment facility is authorized to involuntarily administer psychotropic medication. In the nonfelony arena, these parallel processes are so labyrinthine as to defy explanation. The legislature has two options: refine the process so that it works in practice, or avoid the issue entirely by discontinuing the process. Because of public-safety concerns, the better option is to refine the process so that it works in practice by adopting a bright-line standard for competency-rendering treatment eligibility.

A nonfelony competency-rendering process serves no purpose unless it provides a *realistic* opportunity to render competent a nonfelony defendant. Assuming a sufficient restoration period, the process must also account for the fact that most, but not all, nonfelony defendants will refuse to take medication voluntarily. A defendant charged with a crime that is "serious" for *Sell* purposes is potentially eligible for court-authorized involuntary medication. As a practical matter, that means only nonfelony defendants charged with a *Sell*-defined serious offense should be eligible for competency-rendering treatment. While the court would still need to conduct hearings regarding the rest of the *Sell* criteria in those cases in

which the prosecution seeks authorization for the treatment facility to administer involuntary medication, those hearings would involve a single issue, and can often be handled, with the parties' agreement, through telephonic testimony from the psychiatrist.

Retaining the process does come with some costs. The process requires sufficient resources and treatment time to provide a meaningful opportunity for restoration, including hospital bed space, hospital staff, and criminal justice resources for conducting eligibility hearings. It will still require court hearings to determine a defendant's restoration eligibility, but that could be combined with the competency hearing itself, and some defendants who could be restored will not be ordered into competency-rendering treatment based on their charges.

Competency-rendering treatments for defendants charged with non-serious nonfelony charges is a poor use of limited treatment resources. Because involuntary medication is not an option, the only defendants who stand a reasonable chance of being rendered competent are those who agree to take medication voluntarily. But it makes little sense to set a competency-rendering treatment period long enough to adopt a wait-and-see approach to whether the defendant will agree to take medication.

One could argue that the simplest nonfelony process is no nonfelony process. However, the simplest solution is not always the best solution. The impetus for the Act was the lack of a nonfelony restoration process coupled with a gap in the civil commitment referral process.[284] Discontinuing the process transfers crime-related public-safety concerns from the criminal justice system to the mental health system, and transfers the associated mental health-related costs from the state mental health system to the local mental health system.

3. Overlap with Civil Commitment System for Pre-Judgment Defendants

At some point in the competency process, the criminal justice system intersects the mental health system. The questions from society's standpoint are how best to ensure public safety and who should be charged with that responsibility. The current competency process sets out several methods for protecting public safety by referring defendants for civil commitment,[285] but does not necessarily apportion that responsibility effectively.

a) Pre-Judgment Defendant Competent or Rendered Competent Following Treatment

If the court finds the defendant competent based on the initial evaluation or following competency-rendering treatment, one could argue that a civil commitment referral is unnecessary. Prior to resolution, the court can evaluate public-safety concerns just as it would in any other case, and impose appropriate conditions of release or continued release. If the defendant is ultimately convicted, the court can impose mental health treatment as a condition of the sentence. If the defendant is acquitted or the charges are dismissed and the competency evaluation does not recommend a civil commitment referral, it would be appropriate for the court to release the defendant outright. The only circumstance that creates difficulty is if the defendant is acquitted, or the charges are dismissed, and the evaluation recommends a civil commitment referral. Under current law, the court would be required to refer the defendant for evaluation, but there is really no mechanism to ensure that the evaluation can occur.[286] One possible solution is to create statutory authority for the court to detain the defendant for some specific period following a dismissal for the DMHP to evaluate the defendant for civil commitment. This is the current process for nonfelony defendants who are not competent to stand trial.[287] The legislature should adopt a similar approach for competent defendants where

the competency evaluation recommends a referral. It should adopt a time frame similar to that contained in the civil commitment statute: seventy-two hours, excluding weekends and holidays.[288]

b) Pre-Judgment Defendant Incompetent and Not Eligible for Competency-Rendering Treatment or Treatment is Unsuccessful

If the court finds the defendant incompetent and ineligible for competency-rendering treatment, or if the competency-rendering treatment does not render the defendant competent, one can make a strong argument that the mental health system should step in to protect public safety, and that the referral should be mandatory. That argument certainly makes sense if the competency evaluation recommends a civil commitment referral. The question becomes how best to carry out that referral. Current law is silent on the process for referring an incompetent felony defendant for civil commitment evaluation.[289] The nonfelony referral process, and whether the referral is to a state or county mental health professional, depends upon the defendant's custody status and restoration eligibility.[290] This multiplicity of referral avenues creates unnecessary confusion for both the criminal justice and mental health systems. The simplest solution is to create a single referral process that applies to felony and nonfelony defendants. The recommendation for competent defendants in the preceding section would work just as well for incompetent defendants.

But what if the competency evaluator does not recommend a civil commitment referral? The initial tragedy that led to the Act involved an incompetent nonfelony defendant who was not referred for civil commitment despite a recommendation that the referral be made.[291] A mandatory referral makes sense if the competency evaluator recommends it, since the mental health system is making a mental health-related recommendation. The referral makes no sense if the mental health system has already recommended against it, since it would burden the local mental

health system with second-guessing an assessment made by the state mental health system.

4. The Post-Judgment Process

The current process for post-judgment cases is simple to describe—there is no process. In addressing this issue, the legislature must first define "post-judgment" and then decide whether or not to provide a competency-rendering process. This article recommends that the legislature define "post-judgment" to reflect current practice—that the legislature does not provide a competency-rendering process, but that the legislature does provide a mechanism for monitoring post-judgment defendants.[292]

a) Defining "Post-Judgment"

The practical reality is that sentencings, dispositional continuances, and deferred prosecutions all bear the characteristics of traditional post-judgment matters—the case is essentially resolved, there will be no actual trial (and in the case of sentencings there may already have been a trial), and the defendant must face consequences. The legislature should amend the competency statutes to reflect this reality by expressly defining "judgment." To avoid unforeseen consequences, i.e., impacting another statutory scheme in which the definition of "judgment" has other consequences, the legislature can limit the definition to RCW 10.77. The time-for-trial period would not be at issue under the current rules.[293]

b) Monitoring the Defendant's Situation Without a Restoration Process and Overlap with the Civil Commitment System

A case does not end with the judgment; compliance with probation conditions constitutes an important part of the criminal justice process. A defendant's lack of competency at post-judgment compliance hearings blocks that important part of the process. The seemingly quick and easy response would be to authorize competency-rendering treatment for all

incompetent defendants, whether at the pre- or post-judgment stage. But that comes with a significant cost—hospital bed space allocated to competency-rendering treatment on post-judgment matters cannot be utilized for other purposes, such as competency-rendering treatment for pre-judgment defendants and/or civil commitment matters. On the other hand, not providing a competency-rendering process could threaten public safety, at least for some defendants, unless there is a process in place for the court to monitor the defendant's situation.

That system is already in place for defendants who are acquitted by reason of insanity; depending on the defendant's dangerousness, the court either orders the defendant into inpatient treatment, into outpatient treatment, or releases the defendant outright.[294] The court can require regular reports from the treatment provider and can revoke an outpatient treatment plan by ordering the defendant into outpatient treatment for violating the treatment plan.[295] Because the nature of the treatment is based on the defendant's dangerousness, public safety is protected. As a failsafe, privacy laws should be amended to allow for the criminal justice system to receive information about the civil commitment status and to monitor the defendant if, and/or when, the civil commitment process ends. The criminal court's jurisdiction over the defendant under the current statutory scheme is the maximum period a defendant can be placed into some form of treatment within the criminal justice system, and is the maximum possible sentence he or she could have received upon conviction for any one of the charges.[296] That limitation should continue so that the defendant is not subjected to the court's jurisdiction any longer than he or she would have been, absent the finding of incompetence. If the defendant becomes competent, the court's jurisdiction continues as it would in any other case.

VI. CONCLUSION

In 1998, the legislature responded to two highly publicized cases involving mentally ill offenders. Its goals were straightforward: to increase

public safety and to increase communication between the criminal justice and mental health systems.[297] The approach it took in overhauling the then-existing system included new and bold steps, especially in the nonfelony arena. The legislature's efforts were necessary at the time, but we now have eight years of experience on which to reflect, and an increasing volume of cases that did not exist in 1998.

While the revamped laws adopted in 1998 went a long way towards the two-pronged goals stated above, the time is ripe to address the changes that have occurred since then. This article has recommended a series of changes designed to create a better alignment between Washington's criminal competency laws and the practical realities of today's circumstances. These recommendations include using limited resources more efficiently, adopting a competency-rendering process with specific treatment periods tied to the likelihood the defendant will be rendered competent, providing for a smoother interaction between the criminal competency process and the civil commitment system, and clarifying the process relating to post-judgment matters. If we adopt these recommendations, we can move Washington's criminal competency laws from where they are to where they should be.

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[2] *See* Jack Broom, *Judge Finds Accused Killer Insane—Commitment for Ho in Stabbing of Retired Firefighter*, THE SEATTLE TIMES, Mar. 16, 1998, at B1.

[3] *See Sword-Wielding Man is Arraigned*, THE SEATTLE TIMES, Aug. 8, 1997, at B2.

[4] *See* Jack Broom, *Locke to Sign Bill Sought by Victim's Kin*, THE SEATTLE TIMES, Mar. 17, 1998 at B1; Hal Spencer, *Tighter Reins on Mentally Ill-Locke Signs Bill that Gives Judges More Power*, THE SEATTLE TIMES, Apr. 3, 1998 at B6. *See also* Commitment of Mentally Ill Persons Act, 1998 Wash. Sess. Laws page no. 1547, ch. 297 (codified in scattered sections of WASH. REV. CODE §§ 71.05, 10.77). Ironically, both men were found competent to stand trial and acquitted by reason of insanity.

[5] The phrase "misdemeanor" is often used as a euphemism for both misdemeanors and gross misdemeanors; a more accurate description is "nonfelony." The phrases

"misdemeanor" and "nonfelony" are used interchangeably in this paper, and include all nonfelony criminal charges, other than those involving juveniles, regardless of the maximum possible punishment. In Washington, a misdemeanor is punishable by up to ninety days in jail, and a gross misdemeanor is punishable by up to 365 days in jail. *See* WASH. REV. CODE § 9A.20.010 (2006). The phrase "felony" is used to refer to all felony charges other than those involving juvenile offenders.

[6] Born v. Thompson, 117 P.3d 1098 (Wash. 2005).

[7] Sell v. United States, 539 U.S. 166 (2003).

[8] *See infra* notes 32-40 and accompanying text.

[9] All references in this article to "civil commitment" are to proceedings under WASH. REV. CODE § 71.05, relating to involuntary mental health treatment for adults.

[10] WASH. REV. CODE § 10.77.010(14) (2006).

[11] § 10.77.060(1)(a).

[12] In most cases the outpatient evaluation occurs in a local jail in which the defendant is incarcerated. In other cases, the outpatient evaluation occurs in the community. *See infra* notes 29-30 and accompanying text.

[13] *Id*. In 2005, the legislature amended the statute to expressly authorize the parties to agree to waive the requirement of two competency examiners or to agree that the evaluation should occur in the jail. *See* Competency Examinations Act, 2004 Wash. Sess. Laws page no. 28, ch. 9 (amending WASH. REV. CODE § 10.77.060).

[14] § 10.77.060(1)(b).

[15] A criminal defendant has a right to be brought to trial within sixty days of arraignment if in custody, or ninety days if not in custody. WASH. CT. CRIM. R. 3.3 (applicable to felonies); WASH. CRIM. LTD. JURIS. 3.3 (applicable to misdemeanors and gross misdemeanors). The time-for-trial period can be extended beyond the original period in a number of ways.

[16] *See* WASH. CT. CRIM. R. 3.3(e)(1); WASH. CRIM. LTD. JURIS. 3.3(e)(1).

[17] WASH. REV. CODE § 10.77.090(4) (2006) (felony cases). The applicable nonfelony provisions, § 10.77.090(1)(d) and (e), do not expressly state that the dismissal is without prejudice. Prior to the Commitment of Mentally Ill Persons Act of 1998, former WASH. REV. CODE § 10.77.010(1)(e) (2006) stated that the dismissal was without prejudice in nonfelony cases. The portion of that section that contained the dismissal without prejudice language was broken out into a separate subsection. *Compare* former § 10.77.010(1)(e) *with* current § 10.77.010(1)(d), (e) (2006). Because the legislature did not specify that nonfelony cases should be dismissed with prejudice, it seems logical that the legislature intended that nonfelonies should continue to be dismissed without prejudice. For purposes of this article, it is presumed that the court must dismiss a nonfelony without prejudice if the defendant is or remains incompetent.

[18] As used in this context, the term "proceed" includes pre-judgment matters such as pretrial hearings and trials, as well as post-judgment matters such as sentencing or probation revocation hearings.

[19] § 10.77.010(14) (2006).

[20] *See* ROYCE A. FERGUSON, 12 WASH. PRAC., CRIMINAL PRACTICE & PROCEDURE § 907 (3rd ed. 2006). *See also* State v. Benn, 845 P.2d 289, 306 (Wash. 1993) (criminal defendant may be made to prove his/her incompetency). Although Ferguson states that

the burden is on the defendant to establish that he or she is incompetent to stand trial, it is at least theoretically possible there may be cases in which the defendant asserts that he or she is competent to stand trial and the prosecution contends the defendant is incompetent.

[21] State v. Klein, 124 P.3d 644 (Wash. 2005).

[22] Ms. Klein petitioned for full release pursuant to WASH REV. CODE § 10.77.200(3). One issue in such a petition is whether the petitioner continues to suffer from a "mental disease or defect." *See* WASH REV. CODE § 10.77.200(3), 10.77.010(14) (2006); *Klein*, *supra* note 21, at 647-48.

[23] *Klein, supra* note 21, at 156 Wash. 2d at 649-53.

[24] *Id*. at 651-52 (emphasis added; footnote deleted).

[25] *Id*.

[26] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The so-called "*Frye* test" provides that, to be admissible, an expert's opinion must be based upon a scientific theory or method that is generally accepted in the scientific community. KARL B. TEGLAND, 5D WASH. PRAC., HANDBOOK WASH. EVID. ER 702 (4th ed. 1999 & Supp. 2006).

[27] State v. Klein, 124 P.3d 644, 649-51 (Wash. 2005).

[28] This cost has both monetary and social service aspects. Increasing hospital bed space costs money, and that money cannot be spent on other social services for the mentally ill or for other members of society.

[29] Sometimes a defendant is subject to a simultaneous civil commitment, in which case the competency evaluation may take place at the civil commitment facility. If a defendant is out of custody, the evaluation can occur at any location acceptable to the hospital, including the defense attorney's office. The focus on this section of the article is on the prototypical setting of an in-custody nonfelony defendant held in a jail. *If* the court commits the defendant to a hospital or other suitable secure public or private mental health facility for the competency evaluation, then the court has discretion to delay granting bail until after the defendant has been evaluated and appears before the court. WASH. REV. CODE § 10.77.060(1)(b) (2006). This provision applies equally to felony and nonfelony defendants. As a practical matter, this discretion will have little impact in those courts of limited jurisdiction that have bail schedules. If the court has adopted a bail schedule, then bail is established as soon as a defendant is booked on charges to which the bail schedule applies. Section 10.77.060(1)(b) of the Revised Code of Washington permits the court to delay *granting* bail, but does not mention *revoking* bail after it has already been set. Thus, the effect of the option to delay the granting of bail in those jurisdictions is most likely limited to cases for which there is no bail schedule. For example, in Seattle Municipal Court there is no bail schedule for domestic violence, harassment, stalking, and indecent exposure charges. Section 10.77.060(1)(b) is not expressly limited to pending cases, so it could arguably enable a court to delay granting bail in a sentencing or probation violation matter *if* the court had not previously set bail. But as a practical matter, it is hard to imagine a defendant who is in custody, without bail having already been set, facing sentencing or a probation violation. The most likely reason a defendant facing sentencing or a probation violation would be in custody is because of a new pending charge (in which case, competency will be at issue on the new charge as well), an inability to post previously set bail, or a bench warrant (for which the court would have already set bail).

[30] § 10.77.060(1)(a) (emphasis added).

[31] The fifteen day maximum period for the examination appears by the language of the statute to apply only to an inpatient examination at a mental health facility: the period begins to run from the date of "admission to the facility," and makes no reference to the in-jail examination provision. The legislature added the second sentence of the quoted material in 2004 further clouding the issue. If one infers a fifteen day limit for in-jail examinations, then of what effect is the "date of admission to the facility" language in terms of in-jail evaluations?

[32] *See* Department of Social & Health Services, REPORT TO THE LEGISLATURE: FORENSIC COMPETENCY EVALUATION AND RESTORATION—STRATEGIES TO MINIMIZE WAITING PERIODS, 2 (2006) [hereinafter *DHSH Report*]. DSHS prepared ther report as directed by the legislature. *Id*.; Chapter 504, Laws of 2005, Sec. 506(2).

[33] *See DSHS Report supra* note 32 at Charts 1, 3. DSHS extrapolated Eastern State's 2005 statistics based on the first nine months of 2005. *Id*. at Chart 3. Western State's 2005 statistics are derived from a presentation given by Carl Redick, Psy.D with Western State Hospital at the District and Municipal Court Judges' Association's Spring 2006 Conference, entitled *A Mental Health Institution View*, slide 12. Western State's database from which the statistics were gleaned is regularly updated and refined; the statistics apply as of the date of the conference on June 13, 2006. All of the statistics presented in this article relate to adult defendants.

[34] Redick, *supra* note 33. "Outpatient" refers to evaluations other than in the hospital. It includes evaluations in a jail facility as well as evaluations that occur in locations other than a secure facility.

[35] The number of in-jail evaluations began increasing at an alarming rate in 1998, following a recommendation from the MIO Task Force that competency evaluations for in-custody defendants occur in the jail if possible. In 2005, the legislature amended § 10.77.060 to expressly authorize the parties to agree that the evaluation should occur in the jail. *See* Competency Examinations Act of 2004, *supra* note 13. That amendment was directed primarily to evaluations by Eastern State. Evaluations by Western State were, and continue to be, conducted primarily in jail, at least for nonfelony defendants.

[36] Redick, *supra* note 33, slide 51.

[37] § 10.77.060(1)(a).

[38] Redick, *supra* note 33, slide 51; *DSHS Report,* supra note 32, at 2.

[39] Cristi Rust, et al. v. W. State Hosp., et al., No. C00-5479RJB, United States District Court for the Western District of Washington at Tacoma, originally issued September 28, 2001 ("Rust Order"). (The initial order is on file with the author.)

[40] *See DSHS Report,* supra note 32, at 4-5; WASH. REV. CODE § 10.77.090 (2006) (competency); § 10.77.110 (insanity acquittals); § 71.05.

[41] For cases brought in district or superior court, the county prosecutor represents the state and therefore the county bears the jail costs for those prosecutions. WASH. REV. CODE § 36.27.020(4) (2006); § 39.34.180(1) (2006). For cases brought in municipal courts, which include courts in which the city contracts with the county for court services, the city bears responsibility for the prosecution and its attendant jail costs. § 3.46 (2006) (municipal departments within a district court); § 3.50 (2006) (municipal courts for cities with population under 400,000); ch. 35.20 (2006) (municipal courts for cities with population over 400,000, *i.e.*, the City of Seattle); § 39.34.180(1) (2006). for a detailed

discussion of the cost to the state of competency evaluations in various settings, see *DSHS Report*, *supra* note 32.

[42] A defendant whose mental illness has never been treated adequately may never have been competent to stand trial; the phrase "competency restoration" would be a misnomer for that defendant. Accordingly, this article uses the phrase "competency-rendering" to encompass either bringing about or restoring a defendant's competency.

[43] For purposes of this discussion, it is assumed that the defendant is not developmentally disabled. The procedure for developmentally disabled defendants is somewhat different. *See generally* WASH. REV. CODE § 10.77.090 (2006).

[44] § 10.77.090(1)(b).

[45] § 10.77.090(3).

[46] § 10.77.090(4).

[47] At this point in the proceedings the defendant has the right to a jury trial on the issue of his or her competency. § 10.77.090(4).

[48] The evaluation must contain an opinion about dangerousness, WASH. REV. CODE § 10.77.060(3)(f) (2006), but the judge or jury ultimately decides the issue.

[49] § 10.77.090(4).

[50] § 10.77.090(4).

[51] *See* § 10.77.090(1)(d), (e).

[52] Born v. Thompson, 117 P.3d 1098 (2005).

[53] § 10.77.090(1)(d)(i)(A). This includes insanity acquittals and incompetency dismissals under federal or non-Washington state statutes equivalent to WASH. REV. CODE § 10.77.

[54] WASH. REV. CODE § 10.77.010(23) (2006).

[55] § 10.77.010(23). The legislature added the definition of nonfatal injuries to abrogate Division One's holding in *Born*. *See Born*, 117 P.3d 1098.

[56] § 10.77.010(13). There are slightly different definitions of "violent act" and "history of one or more violent acts" under section 71.05 of the Revised Code of Washington. *See* WASH. REV. CODE § 71.05.020(18), (36) (2006).

[57] Some may argue that creating a presumption against the defendant violates the general constitutional due process principle that the burden of proof may never be shifted to the defendant in a criminal case. But keep in mind that the "process" involved in determining eligibility for competency-rendering treatment is statutorily created, not constitutionally created. There is no process provided at all for a defendant charged with a felony who is incompetent. Section 10.77.090(1)(b) automatically requires 90 days of competency-rendering treatment. In any event, this is an issue that is best left to the parties to brief and the courts to resolve.

[58] As defined in the Criminal Records Privacy Act, WASH. REV. CODE § 10.97.030(1) (2006).

[59] *See* WASH. REV. CODE § 9A.72.085 (2006). In *Born*, the parties stipulated to the facts in the police report so the Supreme Court did not reach the issue of whether the report would have been admissible without the parties' agreement. Born v. Thompson, 117 P.3d 1098, 1099 (2005).

[60] Crawford v. Washington, 541 U.S. 36 (2004).

[61] The *"Crawford* issue" refers to a defendant's Sixth Amendment right to confront witnesses. *See id.*

[62] Since the defendant is not competent to stand trial, the defense would have a difficult time convincing the judge that the defendant could testify competently at the hearing. The defense would also have to grapple with the issue of the defendant's right not to testify and right not to incriminate himself or herself.
[63] WASH. REV. CODE § 10.77.010(23)(b) (2006).
[64] Born v. Thompson, 117 P.3d 1098, 1101 (2005).
[65] *Id*. at 753-60.
[66] WASH. REV. CODE § 10.77.090(1)(b) (2006). The argument is that the question is one of statutory due process rather than constitutional due process. That process is a rather complex issue and is beyond the scope of this article.
[67] § 10.97.30(1).
[68] § 10.77.040; § 10.77.080.
[69] § 10.77.090(1)(d)(i)(C).
[70] Of course, a court can order Western State or Eastern State to provide outpatient competency-rendering treatment, in which case the hospital involved would be required to create such a program.
[71] This list is not intended to be exhaustive.
[72] This assumes that the defendant waives his or her privacy rights to allow defense counsel to provide proof to the court of the defendant's participation and progress in the Less Restrictive Order (LRO) program.
[73] An LRO means that the civil commitment court has ordered that the subject receive outpatient treatment in the community. A More Restrictive Order (MRO) means that the civil commitment court has ordered that the subject receive inpatient treatment at Eastern State or Western State.
[74] This list is not intended to be exhaustive.
[75] WASH. REV. CODE § 10.77.090(1)(d)(iv) (2006). *See infra* notes 93-113 and accompanying text.
[76] Defined in § 10.77.010(17).
[77] § 10.77.090(1)(d)(ii).
[78] *See infra* notes 183-88 and accompanying text.
[79] § 10.77.090(1)(d)(i)(C)(I) (emphasis added).
[80] § 10.77.060(1)(a) (2006) (emphasis added).
[81] The final version of the Bill as passed deleted the time limitation on in-jail evaluations. Prior versions of the legislation contained an express fifteen day limit on in-jail evaluations as well. *Compare* S.B. 5216, 58th Leg. §2(1)(a), Reg. Sess. (Wash. 2003) *with* S.B. 5216, 58th Leg. §1, Reg. Sess. (Wash. 2004).
[82] Weiss v. Thompson, 85 P.3d 944 (Wash. 2004).
[83] *See also* Competency Examinations Act of 2004, *supra* note 13 at §1. The statement of legislative intent expressly distinguishes between competency evaluations in a jail from competency evaluations in a mental health facility.
[84] *Weiss*, *supra* note 82, at 947–48.
[85] Weiss v. Thompson, 103 P.3d 202 (Wash. 2004) (Table).
[86] WASH. REV. CODE § 10.77.090(1)(d)(i)(C), (iii)(B) (2006).
[87] *See* § 10.77.090(1)(d)(i)(C)(II) (2006).

[88] Although the author is not aware of any outpatient competency-rendering programs, Western State has advised the author that it would make such treatment available if ordered. In that regard, staff have indicated to the author that Western State's competency evaluator will recommend outpatient competency-rendering treatment if the competency evaluator deems it appropriate.

[89] *See infra* notes 93-100 and accompanying text.

[90] WASH. REV. CODE § 10.77.090(1)(d)(i)(C)(III) (2006).

[91] Sell v. United States, 539 U.S. 166 (2003).

[92] *See infra* notes 129-82 and accompanying text.

[93] Although § 10.77.090(1)(d) and (e) do not specify whether dismissal of a nonfelony should be with or without prejudice, § 10.77.090(4) provides that dismissal of a felony is without prejudice. There is no logical reason to dismiss a felony without prejudice while allowing the dismissal of a nonfelony with prejudice, especially in light of the fact that the legislature amended WASH. REV. CODE § 10.77 in 1998 to treat competency and insanity issues in felony and nonfelony cases more similarly.

[94] *See* § 10.77.090(1)(d)(ii)-(iv).

[95] § 10.77.090(1)(d)(iii)(B).

[96] § 10.77.090(1)(d)(iii)(B).

[97] The phrase "the end of the last day" implies that the deadline would be midnight on Thursday, which is the actual end of the day, rather than five o'clock, which would be the end of the business day.

[98] § 10.77.090(1)(d)(iv).

[99] This cost-allocation issue is something that should be handled on a larger scale that considers all of the other issues. *See supra* note 41 and accompanying text.

[100] *Compare* WASH. REV. CODE § 10.77.250 (2006) *with* WASH. REV. CODE § 71.05.100–.130 (2006).

[101] Every county must have a DMHP, who initiates the civil commitment process under section 71.05 of the Revised Code of Washington when the statutory requirements are met. WASH. REV. CODE § 71.05.020(10) (2006). Prior to July 1, 2005, the statutory phrase was "County Designated Mental Health Professional," or CDMHP. The legislature changed the phrase to reflect that the mental health professional could be designated by either a county or any other "authority authorized in rule." § 71.05.020(10) (2006). In some counties, such as King County, the DMHP is actually a group of mental health professionals who are employed directly by the county. In other counties, the DMHP is a mental health professional (or group of them) providing services to the county on a contract basis.

[102] WASH. REV. CODE § 10.77.090 (1)(d)(iii)(A); § 71.05.235(1) (2006).

[103] § 10.77.090(1)(d)(iii), (iv).

[104] § 10.77.090(1)(d)(iii)(B).

[105] § 10.77.090 (1)(d)(iii)(A).

[106] There is a difference between being on "conditional release" and being out of custody. A "conditional release" means a modification of a court-ordered commitment. WASH. REV. CODE § 10.77.010(3). "Commitment" is a court-ordered detention for evaluation or treatment, whether inpatient or outpatient. § 10.77.010(2). Thus, a

defendant may under some circumstances be out of custody without being on a conditional release, such as a release on personal recognizance.

[107] *See* § 10.77.090 (1)(d)(iii)(A); § 71.05.235(1).

[108] *See* Wash. R. App. P. 16.4(b). A Personal Restraint Petition is a petition for relief from an unlawful restraint. Wash. R. App. P. 16.4(a). A person is under a restraint if he or she "has limited freedom because of a court decision in a civil or criminal proceeding, [he or she] is confined, [he or she] is subject to imminent confinement, or [he or she] is under some other disability resulting from a judgment or sentence in a criminal case." Wash. R. App. P. 16.4(b).

[109] *See* § 10.77.090(1)(d)(iii)(B); § 71.05.235(2).

[110] *See* WASH. REV. CODE § 10.77.060(3)(f) (2006).

[111] WASH. REV. CODE § 10.77.065(1)(b)(iii)(B) (2006). *See infra* notes 183–88 and accompanying text.

[112] *See* § 10.77.090(1)(e). *See also infra* notes 116-23 and accompanying text.

[113] There is support for this interpretation in the first sentence of WASH. REV. CODE § 10.77.090(1)(e), which applies to a defendant charged with a crime that is not a felony and "does not meet the criteria under [§ 10.77.090(1)(d)]." Given the context of the language, the reference to treatment-eligible was probably intended to mean specifically the treatment-eligible criteria under § 10.77.090(1)(d)(i). But the language quoted above at least supports an interpretation that § 10.77.090(1)(e) applies to any case that does not fit within any provision of § 10.77.090(1)(d). Because an incompetent treatment-eligible nonfelony defendant who is unlikely to regain competency does not fit within the criteria of § 10.77.090(1)(d)(iii), one could make the argument that § 10.77.090(1)(e) applies by default.

[114] This period excludes weekends and holidays. § 10.77.090(1)(d)(iii)(B); § 71.05.235(2).

[115] § 10.77.090 (1)(d)(iii)(A); § 71.05.235(1).

[116] *See* § 10.77.090(1)(e).

[117] *See supra* note 17 and accompanying text.

[118] These examples presume that Defendants A, B, and C are not developmentally disabled; there are some differences in how the competency treatment can be ordered in the case of a developmentally disabled felony defendant. The examples do not consider the provisions of WASH. REV. CODE § 10.77.065 (2006), which requires the court to order the DMHP to evaluate a defendant for civil commitment if the competency evaluation contains the opinion that the defendant should be referred for a civil commitment evaluation. *See infra* notes 183–88 and accompanying text.

[119] WASH. REV. CODE § 10.77.090(1)(b) (2006).

[120] § 10.77.090(3).

[121] The court can extend the involuntary treatment another six months if the defendant is a substantial danger to other persons or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, and there is a substantial probability that the defendant will regain competency within a reasonable period of time. § 10.77.090(4). *See also supra* notes 46-49 and accompanying text.

[122] *See* § 10.77.090(3), (4). The option of releasing the defendant is subject to any applicable requirements in § 10.77.065(1)(b). *See infra* notes 183–88 and accompanying text.
[123] WASH. REV. CODE § 10.77.090(1)(e) (2006).
[124] *See supra* notes 79-85 and accompanying text.
[125] § 10.77.090(1)(d)(ii).
[126] § 10.77.090(1)(d)(i)(C). *See also supra* notes 86-90 and accompanying text.
[127] § 10.77.090(1)(d)(i)(C).
[128] *See supra* notes 93-113 and accompanying text.
[129] *See, e.g.,* U.S. DEPT. OF HEALTH & HUMAN SERVICES, NAT'L. INST. OF HEALTH, SCHIZOPHRENIA, NIH PUBLICATION NO. 06-3517 (2006); U.S. DEP'T OF HEALTH & HUMAN SERVICES, NATI'L INST. OF HEALTH, BIPOLAR DISORDER, NIH PUBLICATION NO. 02-3679 (2006).
[130] *See id*.
[131] Sell v. United States, 539 U.S. 166 (2003).
[132] *Id.* at 170.
[133] *Id.* at 171.
[134] *Id.* at 175.
[135] *Id.* at 169.
[136] *Id.* Justice Breyer, writing for the majority, first analyzed the issue of whether the Eighth Circuit had jurisdiction to hear the appeal. The Court found that the District Court's pretrial order was an appealable "collateral order" within the exceptions to the so-called "final judgment" rule. Writing for the dissent, Justice Scalia focused entirely on the jurisdictional issue. *See Id*.
[137] *Id.* at 186.
[138] *Id*.
[139] *Id.* at 168.
[140] *Id.* at 174.
[141] *See infra* notes 143-50 and accompanying text (discussing of subsequent cases attempting to define a "serious" crime for purposes of involuntary medication).
[142] *See id*.
[143] United States v. Evans, 404 F.3d 227, 237-38 (4th Cir. 2005).
[144] *See* Duncan v. Louisiana, 391 U.S. 145 (1968).
[145] WASH. CONST. art. I, §§ 21-22; State v. Browet, Inc., 691 P.2d 691 (Ariz. 1984); Pasco v. Mace, 653 P.2d 618 (Wash. 1982).
[146] Evans, 404 F.3d at 237 (citations omitted).
[147] WASH. REV. CODE § 10.77.092 (2006).
[148] § 10.77.092(1). Interestingly, prior drafts of the enacting legislation gave city and county legislatures the authority to declare additional categories of crimes as serious *per se* on the basis of standards similar to those applicable to the courts. *See* S.B. 6274, 58th Leg. §3, Reg. Sess. (Wash. 2004) (proposed subsection 3). That authority did not survive in the final version of the bill as enacted. *See* Competency Restoration Act, 2004 Wash. Sess. Laws page no. 555, ch. 157 (amending WASH REV. CODE §§ 10.77, 71.05).

[149] § 10.77.092(2). One interesting question is whether this delegation to the courts by the legislature flies in the face of the *Evans* court's desire to respect legislative prerogative.
[150] *See* S.B. 6274, *supra* note 148.
[151] Sell v. United States, 539 U.S. 166, 179-80 (2003).
[152] United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004), *cert. denied*, 543 U.S. 1128 (2005).
[153] State v. Hernandez, 119 P.3d 880 (Wash. Ct. App. 2005).
[154] *Id*. (using phrase "clear, cogent, and convincing"). The phrases "clear, cogent, and convincing" and "clear and convincing" are used interchangeablely. For example, the supreme court has held that the equivalent standard of clear and convincing evidence applies whether a nonfelony defendant is in the treatment-eligible or non-treatment-eligible category. *See* Born v. Thompson, 117 P.3d 1098 (Wash. 2003).
[155] There is one Ninth Circuit case that came close to addressing the issue. In *United States v. Rivera-Guerrero*, 377 F.3d 1064 (9th Cir. 2004), a federal magistrate judge found that the government had provided clear and convincing evidence that all the factors for involuntary medication to restore competency had been met. The Ninth Circuit held that federal magistrate judges were not authorized to decide whether to authorize involuntary medication for competency-rendering treatment, and the court remanded the case so that the district court could review the magistrate judge's findings de novo. Thus, the Ninth Circuit did not actually reach the issue of what the burden of proof is for involuntary medication.
[156] Sell v. United States, 539 U.S. 166, 179-80 (2003).
[157] *Id*. In *State v. Adams,* 888 P.2d 1207, 1210 (Wash. Ct. App. 1995) and *State v. Lover*, 707 P.2d 1351, 1353-54 (Wash. Ct. App. 1985), the Court of Appeals held that the state can have a compelling interest in trying a defendant criminally. The charges in those two cases were felonies. After *Sell*, it appears that the trial court still must make an independent inquiry into the nature of the charges and circumstances in order to make a finding that the government has an important interest at stake in trying a particular defendant.
[158] *Sell,* 539 U.S. at 180.
[159] Sentencing Reform Act of 1981, WASH. REV. CODE § 9.94A (2006).
[160] There are some misdemeanors that carry a maximum jail sentence of less than ninety days. *See, e.g.*, SEATTLE MUN. CODE, § 22.206.290(B) (2001) (thirty-day maximum).
[161] *See* WASH. REV. CODE § 71.05.150(1)(b) (2006) (Superior Court has jurisdiction over petition); § 71.05.130 (County Prosecutor or Attorney General's Office represent petitioning agencies).
[162] WASH. REV. CODE § 71.05.390 (2006).
[163] Competency Restoration Act of 2004, *supra* note 148, at §§ 4-5.
[164] § 71.05.390(6)(b).
[165] WASH. REV. CODE § 10.77.093 (2006). This may pose some interesting issues if defense counsel's knowledge is deemed to be either a client confidence or a client secret on the basis of RPC 1.6. *See* State v. Webbe, 94 P.3d 994 (Wash. Ct. App. 2004). In *Webbe*, one of the defense attorneys sought to testify at a jury trial on the issue of the defendant's competency. The attorney's statement of his intent to testify about his impressions of the defendant's competency led to the trial court finding a waiver of the

attorney-client privilege. The attorney later decided not to testify, and prosecutors returned their unredacted copy of the defense attorney's interview notes to the defendant. After a hung jury in the first competency trial, a second jury found the defendant competent. The defendant was subsequently convicted of multiple counts of murder and burglary. Division One upheld the trial court's finding that the defense attorney had waived the attorney-client privilege, even though it was made without the defendant's consent. Division One also affirmed the convictions, finding that under the circumstances the "grievous error" did not result in a breakdown in the adversarial process such that prejudice should be presumed. Since the defendant did not allege any prejudice, Division One declined to find any either.

[166] Sell v. United States, 539 U.S. 166, 181 (2003) (emphasis added).

[167] WASH. REV. CODE § 10.77.090(1)(d)(i)(C) (2006).

[168] *See* § 10.77.090(1)(b)(3), (4).

[169] The issue of mitigating side effects is one that is also susceptible to vigorous litigation. It would not be surprising to see an increase in the number of defense experts appointed pursuant to WASH. REV. CODE § 10.77.070 (2006), specifically on this issue.

[170] *See, e.g.,* United States v. Ghane, 392 F.3d 317, 319-20 (8th Cir. 2004) (5-10 percent chance not "substantially likely"); United State v. Gomes, 387 F.3d 157, 161-62 (Conn. 2004) (70 percent chance is "substantially likely"); United States v. Weston, 255 F.3d 873, 883 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1067 (2001) (pre-*Sell* case holding 70 percent chance is "likely" to restore); United States v. Algere, 396 F. Supp. 2d 734, 741 (E.D. LA 2005) (70 percent chance or higher is "substantially likely").

[171] *See infra* notes 172-74 and accompanying text.

[172] Washington v. Hernandez-Ramirez, 119 P.3d 880 (Wash. Ct. App. 2005).

[173] *See, e.g.*, *Evans*, 404 F.3d at 240-41; *Algere*, 396 F. Supp. 2d at 741.

[174] *See, e.g.,* United States v. Bradley, 417 F.3d 1107, 1113-16 (10th Cir. 2005); *Gomes*, 387 F.3d at 161-62.

[175] Sell v. United States, 539 U.S. 166, 181 (2003).

[176] *Id*.

[177] *See also supra* notes 37-41 and accompanying text.

[178] Sell v. United States, 539 U.S. 166, 181-82 (2003).

[179] The author has handled a case involving similar facts.

[180] *See generally* Washington v. Harper, 494 U.S. 210 (1990).

[181] *Sell*, 539 U.S. at 178, 181.

[182] WASH. REV. CODE § 71.05.030 (2006).

[183] The evaluation must include:

> An opinion as to whether the defendant should be evaluated by a [DMHP] under chapter 71.05 RCW, and an opinion as to whether the defendant is a substantial danger to other persons, 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.

WASH. REV. CODE § 10.77.060(3)(f) (2006).

[184] This process is codified in WASH. REV. CODE § 10.77.065, (2006).

[185] The language of section 10.77.065(1)(b) includes a referral prior to a defendant's release from confinement if he or she is convicted and sentenced to less than twenty-four months. A defendant may not proceed to trial, plead guilty, or be sentenced while incompetent. WASH. REV. CODE § 10.77.050 (2006).

[186] *See supra* notes 1-4 and accompanying text.

[187] For example, the referral must be made prior to the defendant's release from custody if the defendant is convicted and sentenced to twenty-four months or less of confinement. § 10.77.065(1)(b). But the statute is silent about what happens if the defendant is convicted but not sentenced to jail time. For defendants who are not convicted, the referral must be made prior to charges being dismissed or the defendant being acquitted. *Id*. But there is no way for the court to know in advance that one of those events will happen and therefore no way to make the referral in advance.

[188] *See infra* notes 285-91 and accompanying text.

[189] This assumes either a guilty finding, a guilty verdict, or some other resolution of the case involving a court-monitored sanction. If the defendant is acquitted, or the case is dismissed, the case is at the post-judgment stage but competency issues are no longer implicated.

[190] *See* WASH. R. APP. P. 1.1(a); Karl B. Tegland, 2A Rules Practice, 44-45 (6th ed. 2004).

[191] Tegland, *supra* note 190, at 82.

[192] Karl B. Tegland, 4B Rules Practice, 189 (6th ed. 2002) (emphasis added).

[193] WASH. CT. CRIM. R. 7.3 (felonies); WASH. CT. CRIM. R. LTD. JURIS. 7.3 (nonfelonies).

[194] WASH. CT. CRIM. R. 7.4(b) (felonies); WASH. CT. CRIM. R. LTD. JURIS. 7.4(b) (nonfelonies).

[195] WASH. REV. CODE § 10.73.090(1) (2006).

[196] § 10.77.050.

[197] *See, e.g.*, Sentencing Reform Act of 1981, WASH. REV. CODE §§ 9.94A.505, 9.94A.634 (2006) (imposition of sentence and probation; no provision for deferral of sentence).

[198] *See* WASH. REV. CODE § 3.50.330 (2006) (applicable to municipal courts for cities with population less than 400,000); WASH. REV. CODE § 3.66.068 (2006) (applicable to district courts); WASH. REV. CODE § 35.20.255(1) (2006) (applicable to municipal courts for cities with population in excess of 400,000, *i.e.*, Seattle Municipal Court).

[199] The court could impose a straight sentence, such as a specific fine or specific amount of incarceration without any probation conditions. There are no post-judgment competency issues with a straight sentence because a straight sentence does not contain any probation conditions and therefore cannot be the subject of a probation revocation hearing.

[200] WASH. CT. CRIM. R. 7.3 (felonies); WASH. CT. CRIM. R. LTD. JURIS. 7.3 (nonfelonies).

[201] *See* § 3.50.330 (municipal courts for cities with population less than 400,000); § 3.66.068 (district courts); § 35.20.255(1) (municipal courts for cities with population in excess of 400,000, *i.e.*, Seattle Municipal Court).

[202] It should be noted that a dismissal following successful completion of a deferred sentence is still considered a "conviction record" for purposes of the Criminal Records Privacy Act. *See* WASH. REV. CODE § 10.97.030(3)-(4) (2006).
[203] State v. Proctor, 415 P.2d 634, 646 (Wash. 1966).
[204] Sometimes referred to as stipulated orders of continuance or continuances for dismissal.
[205] Indeed, a petition for deferred prosecution *must* acknowledge the sufficiency of the police report to support a finding of guilt. WASH. REV. CODE § 10.05.020(4) (2006).
[206] *See* King County Bar Association—Young Lawyers Division, Washington Lawyers Practice Manual, ch. XVII, Pt. 2, sec. V.D.4 (2004).
[207] § 10.05.020(1).
[208] WASH. REV. CODE § 10.05.120 (2006).
[209] § 10.05.020(3); § 10.05.090. If the noncompliance is based on a conviction for "a similar offense," the court "shall" revoke the deferred prosecution. § 10.05.100.
[210] State ex rel. Schillberg v. Cascade Dist. Court, 621 P.2d 115, 120 (Wash. 1980).
[211] WASH. REV. CODE § 10.77.060(1)(a) (2006) (emphasis added). Even if that section did not apply to a post-conviction matter, superior courts in Washington likely have inherent judicial powers to make determinations regarding competency to stand trial. *See* State v. Wicklund, 638 P.2d 1241 (Wash. 1982) (noting that courts relied exclusively on that inherent power prior to the adoption of § 10.77). Whether that inherent authority extends to district or municipal courts is best left for the parties to brief in a particular case.
[212] WASH. REV. CODE § 10.77.050 (2006) (emphasis added).
[213] State v. Campbell, 632 P.2d 517 (Wash. 1981) (felony probation). *See also* Spokane v. Marquette, 43 P.3d 502 (Wash. 2002) (applying *Campbell* in context of tolling nonfelony probation).
[214] WASH. REV. CODE § 10.77.090(1)-(4) (2006). *See* State v. Harris, 789 P.2d 60 (Wash. 1990) (felony case).
[215] *See Wicklund*, 638 P.2d at 1242 (including cases cited therein).
[216] *Campbell*, 632 P.2d at 519
[217] WASH. REV. CODE § 10.77.090(1)-(4) (2006). *See also supra* notes 44-51, 93-128 and accompanying text.
[218] *See supra* notes 198-203 and accompanying text.
[219] WASH. CT. CRIM. R. 7.3 (felonies); WASH. CT. CRIM. R. LTD. JURIS. 7.3 (nonfelonies).
[220] WASH. REV. CODE § 10.77.050 (2006).
[221] *See* notes 44-51, 93-102, 116-17.
[222] *See generally* Jackson v. Indiana, 406 U.S. 715 (1972).
[223] *See* Sentencing Reform Act of 1981, WASH. REV. CODE ch. 9.94A (2006) (felonies); § 3.50.320 (2006), § 3.50.330 (municipal courts for cities with population of under 400,000); §§ 3.66.067–.068 (district courts); § 35.20.255 (municipal courts for cities with population in excess of 400,000).
[224] If the defendant was competent to proceed on the new charge, he or she would undoubtedly be competent to proceed with sentencing on the old charge. If the defendant was incompetent to proceed, but was eligible for competency-rendering treatment on the

new charge, it is possible he or she could be rendered competent on both the sentencing matter and the new charge.

[225] *See generally* State v. Marshall, 27 P.3d 192 (Wash. 2001).

[226] *Id*. at 193-94.

[227] *Id*. at 194-95.

[228] *Id*. at 199 (citing *In re Fleming,* 16 P.3d 610 (Wash. 2001)).

[229] *Id.* at 200.

[230] *See, e.g*., United States v. Hutson, 821 F.2d 1015, 1018 (5th Cir. 1987) (meaningful retrospective competency hearing requires quantity and quality of available evidence such that competency assessment is more than mere speculation).

[231] *Id*.

[232] State v. Campbell, 632 P.2d 517 (1981).

[233] WASH. REV. CODE § 9.92 (2006), which has since been supplanted by the Sentencing Reform Act of 1981; § 9.94A.

[234] *Campbell*, 632 P.2d at 518.

[235] *Id*.

[236] Spokane v. Marquette, 43 P.3d 502 (Wash. 2002).

[237] *Id*. at 505 - 506.

[238] *Id*. at 505.

[239] *See* WASH. REV. CODE § 3.350.320 (2006); § 3.350.330 (municipal courts for cities with population of 400,000 and under); §§ 3.66.067-.068 (district courts); § 35.20.255 (municipal courts for cities with population in excess of 400,000).

[240] *See* WASH. CT. CRIM. R. 3.3(c)(2)(ii); WASH. CRIM. LTD. JURIS. 3.3(c)(2)(ii).

[241] *See* WASH. CT. CRIM. R. 3.3(e)(1) (applicable to felonies); WASH. CRIM. LTD. JURIS. 3.3 (e)(1) (nonfelonies).

[242] WASH. CT. CRIM R. 3.3(E)(1).

[243] *Id.*

[244] *See supra* notes 15-16 and accompanying text.

[245] WASH. REV. CODE § 10.05.020(4) (2006).

[246] § 10.05.110.

[247] State v. Campbell, 632 P.2d 517, 518 (Wash. 1981).

[248] *See supra* notes 236-38 and accompanying text.

[249] WASH. REV. CODE § 10.05.140 (2006).

[250] But if the court cannot revoke probation, and if the defendant nevertheless remains on probation, what happens to the duties and responsibilities of the probation officer? Case law has expanded the liability of probation officers when their probationers commit tortious acts. *See, e.g.,* Hertog v. City of Seattle, 979 P.2d 400 (Wash. 1999). Absent statutory guidance, probation officers face potential liability for negligent supervision even though they have no ability to bring about sanctions for noncompliance.

[251] Obviously, if the court finds the defendant competent, or if the court orders competency-rendering treatment and the treatment restores the defendant to competency, the court will not need to deal immediately with the issue of referring the defendant for a civil commitment evaluation.

[252] "The court shall order an evaluation . . . (i) Prior to release from confinement for such person who is convicted, if sentenced to confinement for twenty-four months or

less; (ii) for any person who is acquitted; or (iii) for any person whose [felony] charges are dismissed pursuant to WASH. REV. CODE § 10.77.090(4) or (B) (2006) whose nonfelony charges are dismissed." § 10.77.065(1)(b). *See supra* notes 183–88 and accompanying text for further detail. None of these three conditions relate to a person awaiting sentencing or a probation violation hearing.

[253] *See* § 10.77.090(1)(d), (1)(e). Although § 10.77.090(4) contemplates initiating civil commitment proceedings against an incompetent felony defendant, it does not expressly authorize the court to detain the defendant for that purpose.

[254] *Compare* WASH. REV. CODE § 71.05 *with* § 10.77.090(1)(d)-(e) (2006).

[255] In the Commitment of Mentally Ill Persons Act of 1998, which amended both the competency and civil commitment laws, the legislature took care to recognize that incompetence to stand criminal trial did not equate to eligibility for civil commitment. Commitment of Mentally Ill Persons Act of 1998, *supra* note 4, at §1 (statement of legislative intent).

[256] WASH. REV. CODE § 10.77.010(14) (2006). *See generally* WASH. REV. CODE ch. 10.77.

[257] WASH. REV. CODE § 71.05.020(22) (2006). *See generally* WASH. REV. CODE ch. 71.05.

[258] State v. Klein, 124 P.3d 644, 650 (Wash. 2005). The court noted that, according to the dictionary, "mental disease or defect" has the common meaning of "mental disorder" (citing Webster's third new International Dictionary 1411 (2002)). What is extraordinary is that the opinion ignores the statutory definition of "mental disorder" contained in § 71.05.020(22).

[259] A "mental disorder" is defined as "any organic, mental, or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions." § 71.05.020(22).

[260] *See supra* notes 32-41 and accompanying text.

[261] *See supra* notes 32-36 and accompanying text.

[262] *See supra* notes 42-182 and accompanying text.

[263] *Compare* WASH. REV. CODE § 10.77.060(3) (2006) *with* Laws 1974, Ex. Sess, ch. 198, § 6; Laws 1989, ch. 420, § 4; Laws 1998, ch. 297, § 34; and Laws 2000, ch. 74, § 1. Pursuant to § 10.77.060(3), a competency report must include:

> (a) A description of the nature of the examination;
> (b) A diagnosis of the mental condition of the defendant;
> (c) If the defendant suffers from a mental disease or defect, or is developmentally disabled, an opinion as to competency;
> (d) If the defendant has indicated his or her intention to rely on the defense of insanity pursuant to RCW 10.77.030, an opinion as to the defendant's sanity at the time of the act;
> (e) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged;
> (f) An opinion as to whether the defendant should be evaluated by a designated mental health professional under chapter 71.05 RCW, and an opinion as to whether the defendant is a substantial danger to other persons, 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.

§ 10.77.060(3).

[264] § 10.77.060(3)(f).

[265] The statute defines the "substantial danger" assessment as "whether the defendant is a substantial danger to other persons, 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." § 10.77.060(3)(f).

[266] *See* WASH. REV. CODE § 10.77.090(4). *See also supra* notes 44-51 and accompanying text.

[267] WASH. REV. CODE § 10.77.065 (2006). *See supra* notes 183–88 and accompanying text. One would logically assume that the mandatory referral is triggered by the opinion as to whether the defendant should be evaluated for civil commitment, yet § 10.77.065 speaks in general terms about the opinion "under RCW 10.77.060(3)(f)" that the defendant "should be kept under further control."

[268] In felony cases, competency evaluations can occur at three different stages. There is the initial evaluation (§ 10.77.060(1)(a)), the evaluation at the end of the first 90-day competency-rendering treatment period, and the evaluation at the end of the second 90-day treatment period. *See* § 10.77.060(1); § 10.77.090(2)-(4). Under current law, each evaluation is required to contain a dangerousness assessment.

[269] *See infra* notes 278-83 and accompanying text.

[270] An assessment of a defendant's future dangerousness or future criminal behavior is far more involved than an assessment of a defendant's suitability for civil commitment evaluation. *Compare* Polly Phipps & Gregg J. Gagliardi, WASH. STATE INSTITUTE FOR PUBLIC POLICY, IMPLEMENTATION OF WASHINGTON'S DANGEROUS MENTALLY ILL OFFENDER LAW: PRELIMINARY FINDINGS app. C (assessment for potential civil commitment) *with* app. A (risk assessment for future dangerousness/criminal behavior) (2002). *See also* Martin Grann, Henrik Belfrage, & Anders Tengstrom, *Actuarial Assessment of Risk for Violence: Predictive Validity of the VRAG and the Historical Part of the HCR-20*, 27 Criminal Justice & Behavior 97 (2000).

[271] *See infra* notes 278-91 and accompanying text.

[272] Without the civil commitment opinion, judges could not easily determine which defendants should be referred for civil commitment evaluation. The result is that courts will most likely err on the side of caution by referring defendants for civil commitment evaluation. Since those referrals would for the most part be made to the local DMHP rather than Eastern or Western State (*see* §§ 10.77.090(1)(d)(iii)(A), (1)(e); WASH. REV. CODE § 71.05.130), the DMHP would soon find itself inundated with inappropriate referrals, depleting already scarce resources.

[273] § 10.77.060(1)(a) (2006). In 2005, the legislature amended the statute to expressly authorize the parties to agree to waive the requirement of two competency examiners or to agree that the evaluation should occur in the jail. *See* Competency Examinations Act of 2004, *supra* note 13, at § 1(9).

[274] WASH. REV. CODE § 10.77.070 (2006). If the defendant is indigent, the state pays for the expert. *Id*. *See also* WASH. ADMIN. CODE 388-875-0030 (2006).
[275] *See supra* notes 32-40 and accompanying text.
[276] § 10.77.060(3)(d), (e) (2006).
[277] Redick, *supra* note 33.
[278] *See supra* notes 44-51 and accompanying text.
[279] *See supra* notes 129-79 and accompanying text.
[280] *See* WASH. REV. CODE § 10.77.090(1)(d)(ii) (2006).
[281] *See* State v. Adams, 888 P.2d 1207-08 (Wash. Ct. App. 1995); State v. Lover, 707 P.2d 1351, 1352 (Wash. Ct. App. 1985).
[282] WASH. REV. CODE § 10.77.092 (2006) defines serious offenses for purposes of the involuntary medication and competency-rendering processes.
[283] *See supra* notes 135-42 and accompanying text.
[284] *See supra* notes 1-4 and accompanying text.
[285] *See supra* notes 50-51, 93-117 and accompanying text.
[286] *See* WASH. REV. CODE § 10.77.065 (2006). *See also supra* notes 183–88 and accompanying text for a more detailed discussion.
[287] WASH. REV. CODE § 10.77.090(1)(e) (2006).
[288] *See* § 71.05.150; § 71.05.280.
[289] *See* § 10.77.090(4).
[290] *See* § 10.77.090(1)(d), (e). *See also supra* notes 93-128 and accompanying text for a more detailed discussion.
[291] *See supra* notes 1-4 and accompanying text. The statute in effect at the time made the referral discretionary. *See* former WASH. REV. CODE § 10.77.090(1)(e) (1999).
[292] For this purpose, "post-judgment" includes dispositional continuances, deferred prosecutions, and other similar dispositions short of trial. *See supra* notes 204-10 and accompanying text.
[293] *See supra* notes 15-17 and accompanying text.
[294] WASH. REV. CODE § 10.77.040 (2006); § 10.77.080; 10.77.110.
[295] *See* § 10.77.160–.190.
[296] § 10.77.025(1). The length of treatment under a competency process must bear a reasonable relationship to the purpose of the treatment. *Jackson*, 406 U.S. 715 (1972).
[297] *See* Commitment of Mentally Ill Persons Act of 1998, *supra* note 4, at §1.