SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	AB 2013	**Hearing Date:**	June 28, 2016
Author:	Jones-Sawyer		
Version:	February 16, 2016		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Criminal Procedure: Arraignment Pilot Program***

HISTORY

Source: California Public Defenders Association

Prior Legislation: AB 1106 (Jones-Sawyer) not heard Assem. Public Safety 2016
AB 696 (Jones-Sawyer) Vetoed 2015

Support: American Civil Liberties Union of California; California Attorneys for Criminal Justice; Conference of California Bar Associations

Opposition: California District Attorneys Association; Judicial Council of California

Assembly Floor Vote: 63 - 14

PURPOSE

The purpose of this bill is to establish a five year pilot program in six counties, requiring the judge to make a finding of probable cause that a crime has been committed when an out of custody defendant is facing a misdemeanor charge, upon request by the defendant.

Existing law requires that if the defendant is in custody at the time they appear before the magistrate for arraignment and, if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate, on motion of counsel for the defendant or the defendant, shall determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty thereof. (Penal Code, § 991 (a).)

Existing law requires the determination of probable cause to be made immediately unless the court grants a continuance for good cause not to exceed three court days. (Penal Code, § 991(b).)

Existing law provides that in determining the existence of probable cause, the magistrate shall consider any warrant of arrest with supporting affidavits, and the sworn complaint together with any documents or reports incorporated by reference thereto, which, if based on information and belief, state the basis for such information, or any other documents of similar reliability. (Penal Code § 991 (d).)

Existing law provides that if, after examining these documents, the court determines that there exists probable cause to believe that the defendant has committed the offense charged in the complaint, it shall set the matter for trial. (Penal Code § 991(e).)

Existing law requires the court dismiss the complaint and discharge the defendant if it determines that no probable cause exists. (Penal Code, § 991 (f).)

Existing law allows the prosecution to refile the complaint within 15 days of the dismissal of a complaint pursuant to Penal Code section 991. (Penal Code, § 991 (g).)

Existing law states that a second dismissal pursuant to this section is a bar to any other prosecution for the same offense. (Penal Code, § 991 (h).)

Existing law requires that when a defendant is arrested, they are to be taken before the magistrate without unnecessary delay, and, in any event, within 48 hour, excluding Sundays and holidays. (Penal Code § 825 (a)(1).)

Existing law requires that the 48 hour limitation for arraignment be extended when:

- The 48 hours expire at a time when the court in which the magistrate is sitting is not in session, that time shall be extended to include the duration of the next court session on the judicial day immediately following.
- The 48-hour period expires at a time when the court in which the magistrate is sitting is in session, the arraignment may take place at any time during that session. However, when the defendant's arrest occurs on a Wednesday after the conclusion of the day's court session, and if the Wednesday is not a court holiday, the defendant shall be taken before the magistrate not later than the following Friday, if the Friday is not a court holiday. (Penal Code, § 825 (a)(2).)

Existing law allows after the arrest, any attorney at law entitled to practice in the courts of record of California, at the request of the prisoner or any relative of the prisoner, visit the prisoner. Any officer having charge of the prisoner who willfully refuses or neglects to allow that attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow the attorney to visit the prisoner when proper application is made, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction. (Penal Code § 825 (b).)

Existing law requires the time specified in the notice to appear be at least 10 days after arrest when a person has been released by the officer after arrest and issued a citation. (Penal Code, § 853.6(b).)

This bill establishes a Pilot Program for five years in six counties to be selected by five-member committee.

This bill specifies the members of the committee will be selected as follows:
a) One member selected by the California Public Defenders Association.
b) One member selected by the California District Attorneys Association.
c) One member selected by the Judicial Council.
d) Two members selected by the Governor.

This bill specifies that the County of Los Angeles shall be included in the pilot project.

This bill specifies that the following arraignment procedures will apply in the pilot project counties:

a) When the defendant is out of custody at the time he or she appears before the magistrate for arraignment and the defendant has plead not guilty to a misdemeanor charge, the magistrate, on motion of counsel for the defendant or the defendant's own motion, shall determine whether there is probable cause to believe that the defendant committed a criminal offense.
b) The determination of probable cause shall be made immediately, unless the court grants a continuance for a good cause not to exceed three court days.
c) In determining the existence of probable cause, the magistrate shall consider any warrant of arrest with supporting affidavits, and the sworn complaint together with any documents or reports incorporated by reference, or any other documents of similar reliability.
d) If the court determines that no probable cause exists, it shall dismiss the complaint and discharge the defendant.

This bill specifies that if the charge is dismissed, the prosecution may refile the complaint within 15 days of the dismissal.

This bill states that a second dismissal based on lack of probable will bar any further prosecution for the same offense.

This bill requires the Department of Justice (DOJ) to provide information to the Assembly Committee on Budget, The Senate Committee on Budget and Fiscal Review, and the appropriate policy committees of the Legislature regarding implementation of the pilot program, including the number of instances that a prompt probable cause determination made to an out of custody defendant facing a misdemeanor charge resulted in the defendant's early dismissal.

This bill has a sunset date of July 1, 2022.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December

2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> In 1975, the United States Supreme Court decided, in Gerstein v. Pugh 420 U.S 103, that the 5th amendment right to due process required that a person arrested without a warrant receive a "prompt" probable cause determination from an impartial magistrate. That same year, the California Supreme Court decided, in the case of In re Walters 15 Cal3d 738, that Gerstein was binding on California and applied to misdemeanors as well as felonies. The U.S Supreme Court refined its Gerstein v. Pugh decision by holding, in County of Riverside v. McLaughlin, that "prompt" means within 48 hours, with no exception for weekends or holidays. In 1980, after Gerstein and Walters, but before McLaughlin, this case law was codified as to misdemeanants in custody, in Penal Code § 991. This does not cover misdemeanants at liberty. Misdemeanor defendants who are out of custody are in a uniquely disadvantageous position in the judicial system because they have no means of challenging "groundless or unsupported charges" by way of a "prompt probable cause determination" before an "impartial magistrate." Being that they are not in custody, they cannot ask for a probable cause hearing under Gerstein-Walters-McLaughlin or under PC § 991. Being that they are not charged with a felony, they are not entitled to a preliminary hearing or a PC § 995 motion. Being

> that they are not a civil litigant, they cannot bring a motion for summary judgment or a nonsuit.
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> Such a person must live under the cloud of such charges for a prolonged period, expending time and resources to prepare a defense. Only after they proceed to trial, and after the prosecution completes its case, can they ask the judge to dismiss the case for insufficient evidence under Penal Code § 1118 and § 1118.1. By then, not only has the defendant expended almost all of the necessary time and resources for mounting a defense, but the court also has expended its time and resources, including the time, attention, and personal sacrifice of jurors who put their lives on hold to attend the trial.

2. Prompt Probable Cause Hearing

In 1975, the United States Supreme Court decided, in *Gerstein v. Pugh* (1975) 420 U.S 103, that the 5th amendment right to due process required that a person arrested without a warrant receive a "prompt" probable cause determination from an impartial magistrate. That same year, the California Supreme Court decided, in the case of *In re Walters* (1975) 15 Cal.3d 738, that Gerstein was binding on California and applied to misdemeanors as well as felonies. The U.S Supreme Court refined its *Gerstein v. Pugh* decision by holding, in *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, that "prompt" means within 48 hours, with no exception for weekends or holidays. In 1980, after Gerstein and Walters, but before McLaughlin, this case law was codified as to misdemeanants in custody, in Penal Code section 991. Penal Code section 991 does not cover misdemeanants who are out of custody.

3. Veto Message AB 696

Last year, AB 696 (Jones-Sawyer) allowed all out of custody defendants to ask for a determination of probable cause at arraignment. Governor Brown vetoed that bill saying:

> I am returning Assembly Bill 696 without my signature.
>
> This bill would allow an out-of-custody misdemeanor defendant to ask the court at arraignment rather than at trial to determine whether or not probable cause exists.
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> I understand the potential benefits to a defendant in having the court make this determination earlier in the process. However, the impact on the courts is unclear and could well be significant. I would welcome a small, carefully crafted pilot to assess the impact of this proposal.

4. Pilot Project

This bill will set up a five year pilot project to evaluate the impact of probable cause determinations at arraignment for out of custody defendants. The pilots will take place in Los Angeles County and five other counties which shall be selected by a Committee. DOJ will report on the implementation of the piolet projects.

5. Support

The sponsors of this bill the California Public Defenders Association believes:

> AB 2013 would save money and time for county governments who fund prosecutors' and public defense for indigents. Preparation for a misdemeanor trial requires investigation, subpoenaing of witnesses, extensive discovery of the opposing party's evidence and often the filing of legal motions and analysis of physical evidence and the employment of expert witnesses. The time and expense for this preparation could be obviated if the court could make a probable cause determination washing out weak and baseless cases at an early stage.
>
> AB 2013 would prevent jurors from sitting through an entire misdemeanor trial only to feel that their time has been wasted by a baseless case. Even if the misdemeanor trial judge suspects that the case may be weak, the judge has not power to make that determination before trial. The judge must wait for the prosecution to conclude its case at trial before it may rule on the sufficiency of evidence under the authority granted to the court under Penal Code section 1118 .1. By then the court has expended virtually all the resources involved in a full trial.
>
> AAB 2103 will provide the courts with the authority to efficiently handle thousands, perhaps tens of thousands of new misdemeanors created by Proposition 47. It will amend Penal Code section 991 to allow courts to make probable determination for out of custody misdemeanors as well as custody misdemeanors.
>
> Finally, AB 2013 will prevent unnecessary stress, oppression and expense for innocent people who have wrongly arrested and charged with misdemeanors. The disruption of an individual's life when under the shadow of a criminal charge can be enormous. They must take time from their work, school or other activities. They face the anxiety of being charge with a crime. In the face of such demands, some innocent defendants are forced to take a "deal" rather than risk losing a ob or failing their school work.

6. Opposition

The California District Attorneys Association opposes this bill stating;

> In vetoing a substantively similar bill last year (AB 696), Governor Brown noted that he "would welcome a small, carefully crafted pilot to assess the impact of this proposal."
>
> Unfortunately, the pilot program envisioned by AB 2013 is neither small, nor carefully crafted. Instead, this is simply a policy change affecting six counties (including the largest single unified trial court in the United States) with a five year sunset date, after which the Legislature would ostensibly seek to impose the policy on the entire state, as was the intent of AB 696. While the bill requires the Department of Justice to report to the Legislature on the number of dismissals resulting from this new procedure, it is our understanding that the

Department of Justice does not currently track this information, nor do they have a mechanism by which to do so.

Even if those logistical hurdles could be cleared, we believe that this expansion of PC 991 is unnecessary.

In *Gerstein v. Pugh* (1975) 420 U.S. 103, the United States Supreme Court held that the Fourth Amendment provides in-custody defendants with the right to a prompt post-arrest determination of whether there is probable cause to believe that he or she has committed a crime.

Following *Gerstein*, Penal Code section 991 was enacted "to be a safeguard against the hardship suffered by a misdemeanant who is detained in custody, by providing that a probable cause hearing will be held immediately, at the time of arraignment…" (*People v. Ward* (1986) 188 Cal.App.3d Supp. 11, 15, 17.) This is evident from the plain language of PC 991 which begins with "If the defendant is in custody…" The deprivation of liberty for a confined defendant is the hardship that PC 991 exists to protect against. For an out-of-custody defendant, there is no such hardship.

To expand PC 991 to apply to out-of-custody defendants is to misunderstand the entire purpose of PC 991, and would result in additional trial court resources being spent to remedy a hardship that arguably does not exist.

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