SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair
2023 - 2024 Regular

Bill No:	AB 2692	**Hearing Date:**	June 25, 2024
Author:	Papan		
Version:	May 1, 2024		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Criminal procedure: diversion***

HISTORY

Source: California District Attorneys Association

Prior Legislation: SB 1223 (Becker), Ch., 735, Stats. 2022
SB 1187 (Beall), Ch. 1008, Stats. 2018
SB 215 (Beall), Ch. 1005, Stats. 2018
AB 1810 (Committee on Budget), Ch. 34, Stats. 2018

Support: Unknown

Opposition: ACLU California Action; All of Us or None Los Angeles; California Public Defenders Association; Californians United for a Responsible Budget; Disability Rights California; La Defensa; San Francisco Public Defender; Smart Justice California

Assembly Floor Vote: 58 - 0

PURPOSE

The purpose of this bill is provide that the period of time a defendant who has been found incompetent to stand trial (IST) spends waiting to enter a mental health diversion program does not count towards the statutory maximum term of diversion, but that the combined time waiting to enter treatment and the period of diversion shall not exceed 30 months.

Existing law states that a person cannot be tried or adjudged to punishment or have his or her probation, mandatory supervision, postrelease community supervision, or parole revoked while that person is mentally incompetent. (Pen. Code § 1367, subd. (a).)

Existing law requires, when counsel has declared a doubt as to the defendant's competence, the court to hold a hearing determine whether the defendant is IST. (Pen. Code § 1368, subd. (b).)

Existing law provides that, except as provided, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of whether the defendant is IST is determined. (Pen. Code § 1368, subd. (c).)

Existing law specifies how the trial on the issue of mental competency shall proceed. (Pen. Code § 1369.)

Existing law requires the court to appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. (Pen. Code, § 1369, subd. (a)(1).)

Existing law provides that if the defendant or defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. (Pen. Code, § 1369, subd. (a)(1).)

Existing law states that in a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous. (Pen. Code, §1369, subd. (f).)

Existing law states that only a court trial is required to determine competency in a proceeding for a violation of probation, mandatory supervision, postrelease community supervision, or parole. (Pen Code, § 1369, subd. (g).)

Existing law provides that if the defendant is found mentally competent, the criminal process shall resume. If the defendant has been found mentally incompetent, the trial, the hearing on the alleged violation, or the judgment shall be suspended until the person becomes mentally competent. (Pen. Code § 1370, subd. (a).)

Existing law requires the court to order an IST defendant to be delivered by the sheriff to a State Department of State Hospitals (DSH), or to any other available public or private treatment facility, including a community based residential treatment system approved by the community program director, or their designee, that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status. (Pen. Code § 1370, subd. (a)(1)(B)(i).)

Existing law provides that if, at any time after the court finds that the defendant is IST and before the defendant is transported to a facility, the court is provided with any information that the defendant may benefit from mental health diversion, the court may make a finding that the defendant is an appropriate candidate for diversion. (Pen. Code § 1370, subd. (a)(1)(B)(iv).)

Existing law states that a person who has been found to be IST may be eligible for mental health diversion. (Pen. Code, § 1001.36, subd. (b)(1)(D).)

Existing law states that the purpose of mental health diversion is to mitigate the entry and reentry of individuals with mental health disorders into the criminal justice system while protecting public safety. (Pen. Code, § 1001.35.)

Existing law states that the maximum term of treatment for a felony IST defendant who the court has found to be an appropriate candidate for diversion is the lesser of the maximum term of imprisonment for the most serious offense charged or two years. (Pen. Code, 1370, subds. (a)(1)(B)(v) & (c)(1).)

This bill specifies that the period of diversion for a felony IST defendant shall begin on the day in which mental health treatment commences according to the defendant's treatment plan, and the period of diversion shall be no longer than two years.

This bill states that in no event shall the time spent waiting to enter treatment in combination with the period of diversion exceed 30 months or the maximum term of imprisonment provided by law for the most serious offense charged, whichever is shorter.

COMMENTS

1. Need for this Bill

According to the author of this bill:

> When a defendant is found to be incompetent to stand trial due to a mental disorder, they can be placed in a diversion program. The goal of diversion is mental health treatment and charges can be dismissed if a defendant performs satisfactorily and has a plan in place for long-term health care. While these programs can be up to two years long, current law starts the clock at the determination of incompetence, not when treatment starts. It can take up to four months for a professional to determine eligibility and find a facility. That's four months that a defendant is not getting critical treatment. This bill will ensure that defendants are receiving the benefit of a full two years of mental health treatment to ensure their long-term stability.

2. Background: Mental Competency in Criminal Proceedings

The Due Process Clause of the United States Constitution prohibits the criminal prosecution of a defendant who is not mentally competent to stand trial. Existing law provides that if a person has been charged with a crime and is not able to understand the nature of the criminal proceedings and/or is not able to assist counsel in his or her defense, the court may determine that the offender is IST. (Pen. Code § 1367.) When the court issues an order for a hearing into the present mental competence of the defendant, all proceedings in the criminal prosecution are suspended until the question of present mental competence has been determined. (Pen. Code, §1368, subd. (c).)

In order to determine mental competence, the court must appoint a psychiatrist or licensed psychologist to examine the defendant. If defense counsel opposes a finding on incompetence, the court must appoint two experts: one chosen by the defense, one by the prosecution. (Pen. Code, § 11369, subd. (a).) The examining expert(s) must evaluate the defendant's alleged mental disorder and the defendant's ability to understand the proceedings and assist counsel, as well as address whether antipsychotic medication is medically appropriate. (Pen. Code, § 1369, subd. (a).)

Both parties have a right to a jury trial to decide competency. (Pen. Code, § 1369.) A formal trial is not required when jury trial has been waived. (*People v. Harris* (1993) 14 Cal.App.4th 984.) The burden of proof is on the party seeking a finding of incompetence. (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459-460.) In order to be competent to stand trial, "a defendant must have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him or

her." (*People v. Oglesby* (2008) 158 Cal.App.4th 818, 827 citing *People v. Ramos* (2004) 34 Cal.4th 494, 507.) Because a defendant is initially considered competent to stand trial (*Medina v. California* (1992) 505 U.S. 437), usually this means that the defense bears the burden of proof to establish incompetence. Therefore, defense counsel must first present evidence to support mental incompetence. However, if defense counsel does not want to offer evidence to have the defendant declared incompetent, the prosecution may. Each party may offer rebuttal evidence. Final arguments are presented to the court or jury, with the prosecution going first, followed by defense counsel. (Pen. Code, § 1369, subds. (b)-(e).)

If after an examination and hearing the defendant is found IST, the criminal proceedings are suspended and the court shall order the defendant to be referred to DSH, or to any other available public or private treatment facility, including a community-based residential treatment system if the facility has a secured perimeter or a locked and controlled treatment facility, approved by the community program director that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status, except as specified. (Pen. Code § 1368, subd. (c) and 1370, subd. (a)(1)(B).) The maximum period of commitment is two years. (Pen. Code, § 1370, subd (c)(1).)

However, no later than 90 days prior to the expiration of the defendant's maximum term of commitment, if the defendant has not regained mental competence, the defendant shall be returned to the committing court and the court shall not order the defendant returned to the custody of DSH. (Pen. Code, § 1370, subd. (c)(1).) The court may refer the defendant for conservatorship proceedings. (Pen. Code, § 1370, subd. (c)(3).) Or, with the exception of proceedings alleging a violation of mandatory supervision, the criminal action may be dismissed in the interests of justice. (Pen. Code, § 1370, subd. (d).)

If the defendant is determined to have regained mental competence after receiving treatment, the treatment provider is required to certify that fact to the court by filing a certificate of restoration with the court. (Pen. Code, § 1372, subd. (a)(1).) The court's order committing the defendant to the treatment facility shall include direction that the sheriff shall redeliver the patient to the court without any further order from the court upon receiving the copy of the certificate of restoration. (Pen. Code, § 1372, subd. (a)(2).) The defendant shall be returned to the committing court no later than 10 days following the filing of a certificate of restoration. (Pen. Code, § 1372, subd. (a)(3)(C).)

The court shall notify the treatment provider of the date of any hearing on the defendant's competence and whether or not the defendant was found by the court to have recovered competence. (Pen. Code, § 1372, subd. (c)(1).) If the court rejects a certificate of restoration, the court shall base its rejection on a written report of an evaluation conducted by a licensed psychologist or psychiatrist that the defendant is not competent. The evaluation shall be conducted after the certificate of restoration is filed with the committing court. (Pen. Code, § 1372, subd. (c)(2).)

Alternatively, after a finding that a defendant is IST, the court may make a determination that the defendant is an appropriate candidate for mental health diversion. (Pen Code, § 1370, subd. (a)(1)(B)(iv).) The maximum term of treatment for a felony IST defendant who the court has found to be an appropriate candidate for diversion is the lesser of the maximum term of imprisonment for the most serious offense charged or two years. (Pen. Code, 1370, subds. (a)(1)(B)(v) & (c)(1).) Upon dismissal of charges at the the conclusion of the period of diversion, the defendant shall no longer be deemed IST. (Pen. Code, 1370, subds. (a)(1)(B)(vi).) If during

the period of diversion, the court determines that criminal proceedings shall be reinstated for reasons including that the defendant is performing unsatisfactorily in the assigned program, the court shall appoint a psychiatrist, licensed psychologist, or any other expert the court may deem appropriate, to determine the defendant's competence to stand trial. (Pen. Code, § 1370, subd. (a)(1)(B)(v).)

3. Mental Health Diversion

Diversion is the suspension of criminal proceedings for a prescribed time period with certain conditions. A defendant may not be required to admit guilt as a prerequisite for placement in a pretrial diversion program. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested or charged for the diverted offense. If diversion is not successfully completed, the criminal proceedings resume, however, a hearing to terminate diversion is required.

In 2018, the Legislature enacted a law authorizing pretrial diversion of eligible defendants with mental disorders. Under the mental health diversion law, in order to be eligible for diversion, 1) the defendant must suffer from a mental disorder, except those specifically excluded, 2) that played a significant factor in the commission of the charged offense; 3) in the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment; 4) the defendant must consent to diversion and waive the right to a speedy trial; 5) the defendant must agree to comply with treatment as a condition of diversion; and 6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. (Pen. Code, § 1001.36, subds. (b)-(c).) The defendant is not eligible if they are charged with specified crimes. (Pen. Code, § 1001.36, subd. (d).)

In addition to the eligibility requirements of the defendant, the court must also consider whether the defendant is suitable for diversion. The law specifies that a defendant is suitable for diversion if all of the following criteria are met: 1) the defendant's symptoms would respond to mental health treatment, in the opinion of a qualified mental health expert; 2) the defendant consents to diversion and waives the right to a speedy trial; 3) the defendant agrees to comply with treatment as a condition of diversion; and 4) the defendant will not pose an unreasonable risk of danger to the public if treated in the community. (Pen. Code, § 1001.36, subd. (c).)

The law also requires the mental health treatment program to meet the following requirements: 1) the court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant; 2) the defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources; 3) and the program must submit regular reports to the court and counsel regarding the defendant's progress in treatment. (Pen. Code, § 1001.36, subd. (f).) The court has the discretion to select the specific program of diversion for the defendant. The county is not required to create a mental health program for the purposes of diversion, and even if a county has existing mental health programs suitable for diversion, the particular program selected by the court must agree to receive the defendant for treatment. (Pen. Code, § 1001.36, subd. (f)(1)(A).)

The period of diversion cannot last more than two years for a felony and cannot last for more than a year on a misdemeanor. (Pen. Code, § 1001.36, subd. (f)(1)(C).) If there is a request for

victim restitution, the court shall conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of restitution. (Pen. Code, § 1001.36, subd. (f)(1)(D).)

The stated purpose of the diversion program is "to promote all of the following: . . . Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings." (Pen. Code, § 1001.35, subd. (b).)

A felony defendant who is found IST may be found to be an appropriate candidate for mental health diversion in lieu of commitment to DSH to restore the defendant's competency. (Pen Code, § 1370, subd. (a)(1)(B)(iv).) The maximum term of treatment for a felony IST defendant who the court has found to be an appropriate candidate for diversion is the lesser of either the maximum term of imprisonment for the most serious offense charged or two years. (Pen. Code, 1370, subds. (a)(1)(B)(v) & (c)(1).)

This bill specifies that the period of diversion for an IST felony defendant who has been found by the court to be an appropriate candidate for diversion begins on the day in which mental health treatment commences according to the defendant's treatment plan. This bill provides that the time spent waiting to enter treatment in combination with the period of diversion, which under existing law may not exceed 24 months, shall not exceed 30 months. The effect of this change would allow a felony IST defendant to be incarcerated in county jail for up to six months before referral to a diversion program, without starting the clock on the maximum period of treatment required by law.

While existing law specifies that the maximum term of diversion shall not exceed two years, it is unclear when the time starts to run. Comparatively, existing law also provides that the maximum term of commitment for competency restoration is two years however it is clear that commitment begins when the court orders the defendant to be committed to DSH or other treatment facility. After the commitment order is issued, it may still take several months for the person to be transferred to an available bed.

Supporters of this bill state that persons waiting to be placed in a diversion program lose time that could have been spent receiving treatment, thus they propose separating out the time waiting for treatment from the overall two year maximum term of treatment. They argue that the purpose of diversion is different than restoration of competency so the available treatment time should be fully utilized.

Opponents of this bill argue that the changes made by this bill will lead to increased incarceration time because the time awaiting entry into a diversion program would not count towards the statutory maximum. They argue that this perpetuates existing treatment delays and runs the risk of disincentivizing those facing lesser sentences to agree to lengthier periods of diversion.

4. IST Treatment Delays and Recent Litigation

Over the last decade, the number of people in California charged with a felony offense and found IST has increased significantly, far outpacing the state's ability to provide timely services in response. Following litigation, the state was placed under a court order to reduce the time it takes to admit someone to the state hospital to restore them to competency. (See *Stiavetti v. Clendenin*

(2021) 65 Cal.App.5th 691.) In *Stiavetti*, the appellate court held that the long waitlist for competency restoration treatment violates the due process rights of people found to be IST. (*Id*. at p. 737.) The Court ordered that DSH must begin substantive restoration services within 28 days of being placed on the list. (*Id*. at p. 730.) The court's order is being implemented in phases, with the original target date being set on February 27, 2024 to meet the 28 day standard.

However, on October 6, 2023, the court modified the interim benchmarks and final target date for compliance with the 28 day standard as follows: March 1, 2024 – provide substantive treatment services within 60 days; July 1, 2024 – within 45 days; November 1, 2024 – within 33 days; and March 1, 2024 – within 28 days. (See 24-25 Governor's Budget Estimate <https://www.dsh.ca.gov/About_Us/docs/2024-25_Governors_Budget_Estimate.pdf> [as of June 18, 2024].)

5. Argument in Support

According to California District Attorneys Association:

> Normally, when a defendant is found mentally incompetent, the criminal proceedings are suspended until the defendant regains competence after mental health treatment and competency training. However, the law also provides for a diversion program opportunity for some incompetent defendants, where the goal is NOT restoration of competency but long-term psychiatric stabilization. In such IST Diversion programs, the defendants receive mental health treatment and, if they perform satisfactorily in the diversion program, the criminal charges are dismissed, their arrests are deemed never to have occurred, and the record of the proceedings are sealed.
>
> The length of IST Diversion is no more than two years, depending on the offense. AB 2692 would clarify that this diversion period provided by law begins on the day the defendant commences treatment, while also ensuring that a defendant will never spend more than 30 months (or the maximum potential term provided by law, if it is shorter) waiting for and receiving treatment. With the [Assembly] Committee amendments, AB 2692 protects a defendant's rights while also ensuring that defendants receive the full period of mental health treatment and every opportunity to gain psychiatric stability, rather than being prematurely released, without sufficient treatment, onto the streets, where they are likely to commit new crimes or become a victim themselves. AB 2692 would be an important step in addressing the mental health crisis facing our state, breaking the cycle of incarceration and homelessness, and providing much needed treatment for this vulnerable population.

6. Argument in Opposition

According to Smart Justice California:

> AB 2692 risks lengthening the amount of time someone with severe mental health spends in pretrial detention awaiting transfer to an appropriate treatment setting. First, AB 2692 extends the time a person who is incompetent to stand trial (IST) may be confined in jail by up to 30 months - without a requirement that the person be promptly placed in treatment. Second, AB 2692 extends the amount of time an

IST person can be kept in a mental health diversion program. Because the number of beds available in these programs is extremely limited, keeping individuals in these programs longer means that other people who need treatment and are on the waiting list for that program will wait in jail even longer than they do today for placement in the same program.

Taken together, these two elements combine to risk having people with severe mental illness who are placed in IST mental health diversion spending even more time in jail without treatment than they do now.

Jails are not appropriate settings for individuals with severe mental illness. Jail detention is dangerous for the individual with mental illness and extremely challenging for the institution.

Instead of lengthening the amount of time people with severe mental illness are under the control of the criminal courts, we should be expanding diversion options for people who are IST and transitioning these individuals to long-term care - and out of the criminal legal system - as quickly as possible.

-- END –