SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	SB 1095	**Hearing Date:**	April 10, 2018
Author:	Anderson		
Version:	February 13, 2018		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Criminal Proceedings: Mentally Incompetent Offenders***

HISTORY

Source: San Diego District Attorney's Office

Prior Legislation: SB 684 (Bates), Ch. 246, Stats. 2017
AB 103 (Comm. on Budget), Ch. 17, Stats. 2017
AB 720 (Eggman), Ch. 347, Stats. 2017
SB 1412 (Nielsen), Ch. 759, Stats. 2014
AB 2625 (Achadjian), Ch. 742, Stats. 2014
AB 2190 (Maienschein), Ch. 734, Stats. 2014
AB 2186 (Lowenthal), Ch. 733, Stats. 2014
AB 1907 (Lowenthal), Ch. 814, Stats. 2012
SB 1789 (Perata), Ch. 486, Stats. 2004

Support: California District Attorneys Association

Opposition: American Civil Liberties Union of California; California Public Defenders Association; Disability Rights California

PURPOSE

The purpose of this bill is to delete the requirement under existing law that a court must dismiss a pending revocation matter and return a defendant to supervision when the defendant is found mentally incompetent to stand trial (IST) and to authorize the placement of the defendant in a treatment facility for up to an additional 180 days and order involuntary medication.

Existing law specifies procedures to revoke, modify or terminate parole or postrelease community supervision (PRCS). (Pen. Code, §§ 3000.08; 3455.)

Existing law limits confinement for a PRCS or parole violation to 180 days in county jail. (Pen. Code, §§ 3000.08, subd. (g); 3455, subd. (d).)

Existing law specifies certain conditions that PRCS must include. (Pen. Code, § 3453.)

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

Existing law provides that a person is mentally incompetent if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (*Id*.)

Existing law requires, when a doubt been declared as to the defendant's mental competence, the court to hold a trial determine the mental competence of the defendant. (Pen. Code § 1368, subds. (a) & (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 provides that in order to determine whether a defendant is IST, the court shall order a trial on the question of the defendant's mental competence and requires the court to appoint a psychiatrist or licensed psychologist to examine the defendant. Among the evaluations that the psychiatrist or licensed psychologist must conduct is whether or not treatment with antipsychotic medication is medically appropriate and whether antipsychotic medication is likely to restore the defendant to mental competence. The examining psychiatrist or licensed psychologist shall also address the issues of whether the defendant has the capacity to make decisions regarding antipsychotic medication and whether the defendant is a danger to self or others. (Pen. Code, § 1369, subd. (a).)

Existing law requires the court to hear and determine whether the defendant lacks capacity to make decisions regarding the administration of antipsychotic medication and if the court determines any of the following conditions to be true, the court shall issue an order authorizing involuntary medication:

- The defendant lacks capacity to make decisions regarding antipsychotic medication, the defendant's mental disorder requires medical treatment with antipsychotic medication, and if the defendant's mental disorder is not treated with antipsychotic medication, it is probable that serious harm to the physical or mental health of the defendant will result;

- The defendant is a danger to others, in that the defendant has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm on another while in custody, or the defendant had inflicted, attempted to inflict , or made serious threat of inflicting substantial physical harm on another that resulted in the defendant being taken into custody, and the defendant presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm on others; or,

- The defendant has been charged with a serious crime against the person or property, involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial, the medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner, less intrusive treatments are unlikely to have substantially the same results, and antipsychotic medication is in the patient's best medical interest in light of his or her medical condition. (Pen. Code, § 1370, subd. (a)(2)(B)(i).)

This bill adds language that mirrors the above conditions that the court shall consider when determining whether to issue an order authorizing involuntary medication, except the third condition concerning new charges.

Existing law provides that if the defendant is found mentally competent during a PRCS or parole revocation hearing, the revocation proceedings shall resume. The formal hearing on the revocation shall occur within a reasonable time after resumption of the proceedings, but in no event may the defendant be detained in custody for over 180 days from the date of arrest. (Pen. Code, § 1370.02, subd. (a).)

Existing law states that if the defendant is found IST, the court shall dismiss the pending revocation matter and return the defendant to supervision. Pen. Code, § 1370.02, subd. (b).)

This bill deletes the authority of the court to dismiss the pending revocation matter when the defendant is found IST.

Existing law provides that if the revocation matter is dismissed, the court may, using the least restrictive option to meet the mental health needs of the defendant, also do any of the following:

- Modify the terms and conditions of supervision to include appropriate mental health treatment;

- Refer the matter to any local mental health court, reentry court, or other collaborative justice court available for improving the mental health of the defendant;

- Refer the matter to the public guardian of the county of commitment to initiate conservatorship proceedings only if there are no other reasonable alternatives to the establishment of a conservatorship to meet the mental health needs of the defendant. (Pen. Code, § 1370.02, subd. (b).)

This bill deletes the restriction that the court may only refer the matter to the public guardian if there are no other reasonable alternatives to the establishment of the conservatorship to meet the mental health needs of the defendant.

This bill provides that the court may, when a defendant is found IST during a revocation hearing, order the defendant to be delivered to a public or private treatment facility, including a jail restoration of competency program or the 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, to promote the defendant's restoration to mental competence as

soon as possible, for up to an additional 180 days from the day the defendant is found by the court to be IST, or up to the parolee's date of discharge, whichever comes first.

This bill requires the court to set a review hearing prior to the expiration of the additional 180 day period to review the progress in restoring the defendant's competency.

This bill states that if, at the review hearing, the defendant is found mentally competent, the defendant shall be returned to supervision.

This bill provides that if, at the review hearing, the defendant's mental competency has not been restored, the court shall dismiss the pending revocation matter and return the defendant to supervision. If the revocation matter is dismissed, the court may, using the least restrictive option to meet the mental health needs of the defendant, proceed with any of the following:

- Modify the terms and conditions of supervision to include appropriate mental health treatment;

- Refer the matter to any local mental health court, reentry court, or other collaborative justice court available for improving the mental health of the defendant; or,

- Refer the matter to the public guardian of the county of commitment to initiate conservatorship proceedings.

COMMENTS

1. Need for This Bill

According to the sponsor of this bill:

> Currently, when an offender on parole or PRCS is returned to court on a parole violation and a "doubt" regarding their mental competency is raised by the Court of their attorney, revocation proceedings are suspended and the offender is referred for a mental competency examination by a court appointed psychologist. If the court appointed psychologist finds the offender to be mentally incompetent, current law dictates that the court must dismiss the revocation petition and release the offender from custody, without treatment, to supervision.
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> In addition, current law limits the time a parolee or PRCS offender can be detained on a parole violation to up to 180 days. During those 180 days, the offender continues to accrue "good conduct credits" per penal code 4019, therefore only giving the curt the ability to hold the individual for up to 90 actual days for evaluation or treatment. This means that parolees who are considered "high-risk" for reoffending in a violent or sexual manner, and who pose an added risk to themselves and to the public due to their acute mental health condition, are back on the streets within 90 days, regardless of whether they received a mental health evaluation or treatment. Without being restored to competency, these offenders, oftentimes suffering from delusions, pose an extreme danger to themselves and the public. It is only after they commit a new crime that they are

likely to be referred to seek mental health restoration and treatment. This may very well add to the already lengthy waiting list for a bed at Patton State Hospital, or alternatively a lengthy and costly, jail or prison term.

2. Population of Inmates Suffering from a Mental Disorder is Growing

According to several reports, the population of inmates in county jails and in state prisons has increased over the years. A Los Angeles Times article from June 2016 reported that "the number of mentally ill inmates has grown in both county jails and state prisons, although overall inmate populations have shrunk. In L.A. County jails, the average population of mentally ill inmates in 2013 was 3,081. As of mid-May it was 4,139, a 34% increase.

"In the state prison system, the mentally ill inmate population was 32,525 in April 2013, making up 24.5% of the overall population. As of February [2016], according to a recently released monitoring report, the overall population had fallen by 5,230 while the mental health population had grown by 4,275, and made up 29% of the total population." (Sewell, *Mentally ill inmates are swamping the state's prisons and jails. Here's one man's story.* (June 19, 2016) Los Angeles Times see full article at < http://www.latimes.com/local/california/la-me-mentally-ill-inmate-snap-story.html > [as of Apr. 2, 2018].)

Studies have found that persons with mental disorders tend to spend more time in jail and prison than similarly situated persons who do not have a mental disorder. (Stanford Justice Advocacy Project, *Confronting California's Continuing Prison Crisis: The Prevalence and Severity of Mental Illness Among California Prisoners on the Rise* (2017) p. 2; Treatment Advocacy Center Office of Research and Public Affairs, *Serious Mental Illness Prevalence in Jails and Prisons* (Sept. 2016) pp. 2-3.) Part of this can be attributed to mental competency evaluations and restoration of competency, however, it has been found that the main reason mentally ill inmates are incarcerated longer than other prisoners is that many find it difficult to understand and follow jail and prison rules. (*Ibid*.) The same rationale could be applied to persons who have a mental disorder making them likely to violate their terms of probation or parole more often than those who do not have a mental disorder.

Under existing law, a person who has violated a condition of parole of PRCS can be confined in county jail for up to 180 days. (Pen. Code, §§ 3000.08, subd. (g); 3455, subd. (d).) Existing law specifies procedures for a person who has had a doubt declared regarding their mental competency during a revocation matter. (Pen. Code, § 1370.02.) If, after an evaluation, a person is found mentally competent, the revocation matter resumes. (Pen. Code, § 1370.02, subd. (a).) At that point, the court may revoke PRCS or parole and order the person to serve up to 180 days in jail, which amounts to a maximum of 90 days when credits are applied. Any time that the person spent confined to county jail awaiting the resolution of the matter would also be credited toward the maximum confinement time. The court could choose to place the person back on supervision with additional terms and conditions. If the person is found IST, the court is required to dismiss the revocation matter and return the person to supervision. (Pen. Code, § 1370.02, subd. (b).)

This bill would require the court, instead of dismissing the revocation matter, to place a person in a public or private treatment facility, including a jail restoration of competency program or the

community-based residential treatment system for up to an additional 180 days to restore the person's mental competency and also authorize involuntary medication. The 180 days in treatment would not be reduced by credits that would be earned by someone confined in county jail. Once restored, the person could face up to 180 days of confinement for the actual violation. This means that a person who is found IST would likely be confined for a longer period of time than someone who is mentally competent for the same conduct.

Considering that a person with a mental disorder is more likely to violate his or her supervision conditions and that parole or PRCS violations typically do not rise to the level of a new crime (a new crime would be subject to longer periods of competency restoration and confinement under existing Penal Code section 1370), is the longer period of a person's loss of liberty proposed by this bill justified?

3. Legislative History

Penal Code section 1370.02 was enacted by SB 1412 (Nielsen), Chapter 759, Statutes of 2014. The purpose of the bill was to create a mental competency process for persons under PRCS and mandatory supervision, which were categories of supervision created through Criminal Justice Realignment in 2011.

Prior to realignment, individuals released from prison were placed on parole and supervised in the community by parole agents of the California Department of Corrections and Rehabilitation (CDCR). Realignment shifted the supervision of some released prison inmates from CDCR parole agents to local probation departments. Parole under the jurisdiction of CDCR for inmates released from prison on or after October 1, 2011 is limited to those defendants whose term was for a serious or violent felony; were serving a Three-Strikes sentence; are classified as high-risk sex offenders; who are required to undergo treatment as mentally disordered offenders; or who, while on certain paroles, commit new offenses. (Pen. Code, §§ 3000.08, subd. (a) and (c), and 3451, subd. (b).) All other inmates released from prison are subject to up to three years of PRCS under supervision by county probation departments. (Penal Code Sections 3000.08, subd. (b) and 3451, subd. (a).)

Earlier versions of SB 1412 did not require dismissal of the pending revocation matter once a person was found IST, but the version of the bill ultimately signed into law required dismissal. This language, amended into the bill on August 19, 2014, was added to address concerns regarding capacity of the State Hospitals that already had long wait lists, as well as concerns about the 180 day time period being insufficient to restore a person to competency.

4. Addressing the Growing IST Population

Limited state hospital beds and an increasing IST population have led to long waitlists to be transferred to a state hospital. Although beds have been increased in the past few years, the number of patients on the IST waitlist continues to grow. As of February 2018, there were 933 patients on the waitlist, which is about 41 percent higher than the waitlist in August of 2017. (*2018-19 Budget: Analysis of the Health and Human Services Budget*, Legislative Analyst's Office (LAO) (Feb. 2018).)

According to LAO's report:

> Patients on the waitlist are typically housed in county jails while they wait to be transferred to a [Department of State Hospitals] DSH program, which is problematic for two reasons. First, due to limited access to mental health treatment in some jails, these patients' condition can worsen ("decompensate") while they are in jail, potentially making eventual restoration of competency more difficult. Second, long waitlists can result in increased court costs and a higher risk of DSH being found in contempt of court orders to admit patients. This is because courts in some counties have required DSH to admit patients within certain time frames and DSH can be ordered to appear in court or be held in contempt when it fails to do so.(*Ibid*.)
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> In addition to increasing beds in state hospitals, DSH has been authorized to contract with counties to provide jail-based competency programs to address this population. Under such programs, counties provide restoration treatment in county jails to persons who have been declared IST but do not require the intensive level of inpatient treatment provided in state hospitals. The most recent information provided by DSH shows that the jail based competency programs also have waitlists, although not as long as those for the state hospital beds. As of March 26, 2018, there were 252 persons pending placement in a jail based competency program as compared to the 743 on the waitlist for a state hospital bed. It has been noted by LAO, however, that the waitlist does not only include patients who cannot be served due to lack of available capacity; the waitlist also includes patients who are being processed by the department to determine where to treat them as well as those who are waiting a short period of time to be physically transferred to an available bed. (*Ibid*.)

The Governor's budget for 2018-19 includes $87.4 million to expand IST capacity and reduce the waitlist. The budget also proposes a one-time $100 million to DSH to contract with counties to create diversion programs to treat offenders before they are declared IST. (*Ibid*.)

5. Additional Considerations

Earlier this year, this committee heard and approved SB 1187 (Beall) which, among other provisions, conformed the IST involuntary medication procedures with the procedures applicable to all county jail inmates pursuant to Penal Code section 2603. This bill conflicts with SB 1187 in that it requires a different process for involuntary medications.

This bill deletes the restriction that the court may only refer the matter to the public guardian if there are no other reasonable alternatives to the establishment of the conservatorship to meet the mental health needs of the defendant. Would this authorize persons to be referred for conservatorship that currently would not be eligible, creating additional strains on resources available for conservatorships?

6. Argument in Support

The California District Attorneys Association writes in support:

> Currently, when an offender on parole or PRCS is returned to court on a parole violation and a doubt regarding their mental competency is raised by the Court of by their attorney, revocation proceedings are suspended and the offender is referred for a mental competency examination by a court appointed psychologist. If the court appointed psychologist finds the offender to be mentally incompetent, current law dictates that the court must dismiss the revocation petition and release the offender from custody back to supervision, without receiving treatment.

7. Argument in Opposition

The California Public Defenders Association opposes this bill and writes:

> SB 1095, if adopted, would allow for "competency restoration" commitments of individuals whose criminal charges have been adjudicated, who have been to prison and have served their entire prison sentence, who have been thereafter released from prison (without being subject to commitment as a mentally disordered offender), and who are under the supervision of the Probation Department, whenever such individuals come before the superior court, not with charges of new criminal misconduct, but with one or more allegations that they have violated terms and conditions of supervision.
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> If adopted, this bill would add this population of individuals, who are already eligible to receive comprehensive mental health services in the community of be made the subject of conservatorships under the [Lanterman-Petris-Short Act] LPSA, to the ever-mounting waitlist (n=920) of criminal defendants who are psychiatrically decompensating in our county jails, waiting for months on end for a competency restoration placement bed to become available so they may begin receiving psychiatric treatment and, hopefully, eventually be able to address their criminal charges.

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