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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

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**Author:** Stern  
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**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Criminal procedure: competence to stand trial*

## HISTORY

**Source:** Author

**Prior Legislation:** SB 349 (Roth), held Assem. Public Safety, 2023  
SB 1187 (Beall), Ch. 1008, Stats. 2018  
AB 1529 (Murphy), Ch. 1511, Stats. 1974

**Support:** California District Attorney Association

**Opposition:** Disability Rights California

## PURPOSE

*The purpose of this bill is to toll the running of the maximum term of commitment for defendants found to be incompetent to stand trial upon the issuance of a certificate of restoration of competency.*

*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 incompetent to stand trial (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* 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* 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 upon a filing of a certificate of restoration to competence, the court shall order the defendant to be returned to court in accordance with Penal Code section 1372. (Pen. Code § 1370, subd. (a)(1)(C).)

*Existing law* states that when the court orders the defendant to be committed to DSH or other public or private treatment facility, the court shall provide copies of the following documents prior to the admission of the defendant:

- The commitment order, which shall include specification of charges, an assessment of whether involuntary treatment with antipsychotic medications is warranted, and any other orders by the court authorizing involuntary treatment with antipsychotic medications;
- A computation or statement setting forth the maximum term of commitment;

- A computation or statement setting forth the amount of credit for time served, if any, to be deducted from the maximum term of commitment. (Pen. Code § 1370, subd. (a)(3).)

*Existing law* provides that if a certificate of restoration of competency was filed with the court and the court subsequently rejected the certification, a copy of the court order or minute order rejecting the certification shall be provided. The court order shall include a new computation or statement setting forth the amount of credit for time served, if any, to be deducted from the defendant's maximum term of commitment based on the court's rejection of the certification. (Pen. Code § 1370, subd. (a)(3)(C)(ii).)

*This bill* deletes the above provision.

*Existing law* states that at the end of two years from the date of commitment or a period of commitment equal to the maximum term of imprisonment provided by law for the most serious offense charged, whichever is shorter, but no later than 90 days prior to the expiration of the defendant's term of commitment, a defendant who has not recovered mental competence shall be returned to the committing court, and custody of the defendant shall be transferred without delay to the committing county. The court shall not order the defendant returned to the custody of DSH. (Pen. Code, §1370, subd. (c)(1).)

*Existing law* states that if the medical director of a state hospital or designated person at an entity contracted by DSH to provide services to a defendant prior to placement in a treatment program or other facility to which the defendant is committed, or the community program director, county mental health director, or regional center director providing outpatient services, determines that the defendant has regained mental competence, the director or designee shall immediately certify that fact to the court by filing a certificate of restoration with the court by certified mail, return receipt requested, or by confidential electronic transmission. (Pen. Code, § 1372, subd. (a)(1).)

*Existing law* provides that the court's order committing an individual to a DSH facility or other treatment facility shall include direction that the sheriff shall redeliver the patient to the court without any further order from the court upon receiving from the state hospital or treatment facility a copy of the certificate of restoration. (Pen. Code, § 1372, subd. (a)(2).)

*Existing law* states that the defendant shall be returned to the committing court no later than 10 days after the filing of a certificate of restoration of competency as follows:

- A patient who remains confined in a state hospital or other treatment facility shall be redelivered to the sheriff of the county from which the patient was committed. The sheriff shall immediately return the person from the state hospital or other treatment facility to the court for further proceedings.
- The patient who is on outpatient status shall be returned by the sheriff to court through arrangements made by the outpatient treatment supervisor. (Pen. Code, § 1372, subd. (a)(3).)

*Existing law* states that when a defendant is returned to court with a certification that competence has been regained, including upon reevaluation by DSH, the court shall notify either the community program director, the county mental health director, DSH, or the regional center director and the Director of Developmental Services, as appropriate, 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).)

*Existing law* states that 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 as specified. A copy of the report as well as a copy of the court order or minute order rejecting the certificate of restoration to DSH, including any order continuing the hearing for the court's determination. (Pen. Code, § 1372, subd. (c)(2).)

*Existing law* provides that if the committing court approves the certificate of restoration to competency as to a person in custody, the court shall notify DSH by providing a copy of the court order or minute order approving the certificate of restoration to competence. The court shall hold a hearing to determine whether the person is entitled to be admitted to bail or released on own recognizance pending conclusion of the proceedings. (Pen. Code, § 1372, subd. (d).)

*Existing law* states that if the court approves the certificate of restoration to competency on outpatient status, unless it appears that the person has refused to come to court, that person shall remain on outpatient status, or, in the case of a developmentally disabled person, either on the defendant's promise or on the promise of a responsible adult to secure the person's appearance in court for further proceedings. If the person has refused to come to court, the court shall set bail and may place the person in custody until bail is posted. (Pen. Code, § 1372, subd. (d).)

*Existing law* states that a person who has been restored to competence who is not admitted to bail or released on own recognizance may, at the discretion of the court, upon recommendation of the director of the facility where the defendant is receiving treatment, be returned to the hospital or facility of their original commitment in order to receive continued treatment to maintain competence to stand trial. (Pen. Code, § 1372, subd. (e).)

*This bill* states that the issuance of a certificate of restoration of competence shall toll the running of the period of commitment.

*This bill* provides that the procedure for defendant's restoration of competency hearing after the issuance of a certificate of restoration shall proceed as follows:

- The question of defendant's mental competence shall be determined by a court trial;
- If the defendant's counsel informs the court that the defense is not seeking a finding of mental incompetence, the court may approve a certificate of restoration;
- If the defendant's counsel informs the court that the defense is seeking a finding of mental incompetence, the court shall appoint a licensed psychologist or psychiatrist to examine the defendant. The examining licensed psychologist or psychiatrist shall evaluate: 1) the nature of the defendant's mental disorder, if any, 2) the defendant's ability or inability to understand the nature of the criminal proceedings, and 3) the defendant's ability to assist counsel in the conduct of a defense in a rational manner as a result of a mental disorder. This evaluation shall be a prerequisite to the court approving or rejecting a certificate of restoration.
- If the court, in its discretion, believes that the defendant may not be competent, regardless of whether the defense is seeking a finding of mental incompetence, the court shall appoint a licensed psychologist or psychiatrist to examine the defendant. This evaluation shall be a prerequisite to the court rejecting a certificate of restoration.

- Any licensed psychologist or psychiatrist appointed pursuant to this section shall meet the existing established guidelines.
- The defense shall offer evidence in support of the allegation of mental competence;
- The prosecution may present its case or may submit on the certificate of restoration or present additional evidence;
- Each party may offer rebutting testimony, unless the court, for good cause in the furtherance of justice, also permits other evidence in support of the original contention;
- When the evidence is concluded, unless the case is submitted without final argument, the prosecution shall make its final argument and the defense shall conclude with its final argument to the court;
- It shall be presumed that the defendant has been restored to competence unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent.

*This bill* provides that the procedure described above does not preclude the defense and prosecution from submitting on the certificate of restoration nor does it preclude the parties from privately retaining an evaluator at their own expense.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

SB 1392 ensures that incompetent defendants receive the full two years of mental health and competency treatment they are entitled to under the law. By creating a tolling provision for restoration of competency proceedings, SB 1392 provides that any hearings after the issuance of a certificate of restoration do not chip away at this two-year treatment period. The bill also codifies the procedure by which restoration hearings are conducted, consistent with existing statutes and case law. This change will benefit criminal defendants and society at large by ensuring incompetent defendants get as much help as possible.

### 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 court may also make a determination as to whether the defendant is an appropriate candidate for mental health diversion pursuant to Penal Code section 1001.36.

The maximum term of commitment for an IST defendant charged with a felony is two-years, however, no later than 90 days prior to the expiration of the defendant's term of commitment, if the defendant has not regained mental competence 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).) 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).)

This bill states that the issuance of a certificate of restoration of competency shall toll the running of the maximum period of commitment and deletes an existing provision that requires the court, after rejecting a certificate of restoration, to include within the court order a new computation of the amount of credit for time served deducted from the defendant's maximum term of commitment. Currently, Penal Code section 1372 does not specify that tolling is permitted, however, recent case law which will be discussed in Note 3 ruled that the issuance of the certificate and any determination by the court on the certificate is included within the maximum term of commitment.

This bill also specifies the process by which a court trial on the question of defendant's competency is to proceed which is similar to the process by which a court can find that a person is IST, except there is not a guarantee of a jury trial. Currently, there is not a specified procedure for how the court should determine a defendant's competency after the filing of a certificate of restoration.

### **3. Tolling of Maximum Period of Commitment**

The maximum period of commitment due to incompetency for a defendant charged with a felony is no more than 2 years. (Pen. Code, § 1370, subd. (c)(1).) If the treatment provider determines that the defendant has 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 sheriff is then required to deliver the defendant back to court no later than 10 days after filing of the certificate and the court is required to have a hearing to determine whether to approve the certificate.

The California Supreme Court recently ruled that the filing of the certificate of competency and the court's ruling on the certificate is included in the two-year maximum term of commitment. (*Rodriguez v. Superior Court of Santa Clara County* (2023) 15 Cal.5th 472, 487.) In *Rodriguez*, the defendant who was charged with multiple felonies was found to be IST and ordered to be committed to the state hospital. The maximum term of his commitment was 2 years, which statutorily requires the defendant to be returned to court no later than 90 days from when the commitment term is set to expire. After a few months of commitment, a certificate of restoration was filed and the defendant was returned to court. However, the court subsequently declared a new doubt as to the defendant's competency and he was again found IST and returned to the state hospital. After another period of commitment at the state hospital, the medical director certified that the defendant was restored to competency and he was returned to court. The court set a hearing date to determine whether to approve the certificate, but due to COVID-19 the court suspended almost all of its operations and the competency hearing did not take place until after the two-year maximum period of commitment had expired. The defendant filed a motion to dismiss which was denied by the trial court and the Court of Appeal rejected his claim as well. The California Supreme Court disagreed with the Court of Appeal.

In coming to its conclusion, the *Rodriguez* court first reviewed the history of the IST process: Prior to 1974, California law provided that persons charged with criminal conduct but found IST were committed to state hospitals until they became competent. Because attainment of competence was the sole standard for release the commitments could be indefinite, even permanent, so long as incompetence persisted. In 1972, the United States Supreme Court held that “indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial” offends constitutional guarantees of equal protection and due process. (*Rodriguez, supra*, 15 Cal.5th at p. 491, citing *Jackson v. Indiana* (1972) 406 U.S. 715, 731.) In 1973, the California Supreme Court adopted the rule in *Jackson*, and delegated to trial courts the discretion to decide whether sufficient progress is being made to justify continued commitment and held that “if there exists no reasonable likelihood that the person will recover his competence to stand trial in the foreseeable future, then the court should either order him released from confinement or initiate appropriate alternative commitment proceedings under the Lanterman-Petris-Short Act. (*Id.*, citing *In re Davis* (1973) 8 Cal. 3d 798, 801.)

In 1974, the Legislature specified that an IST defendant could not be committed for more than three years and imposed an obligation by the state hospitals and other treatment facilities to report to the court within 90 days of commitment, and at six-month intervals, the defendant’s progress towards recovery of competence. If any report indicated that there was not a substantial likelihood that the defendant would regain his mental competence in the foreseeable future, the committing court was required to order the defendant to be returned to court. However, the law also provided that if the defendant was still IST after 18 months, the defendant must be returned to determine competency. The law also created a new type of conservatorship, referred to as a “Murphy” conservatorship after the author of the 1974 law, allowing for a one-year renewable commitment of IST defendants charged with violent felonies who have reached their maximum term of commitment. These provisions “resolve the conflicting concerns of protecting society from dangerous individuals who are not subject to criminal prosecution ... and safeguarding the freedom of incompetent criminal defendants who present no threat to the public.” (*Rodriguez, supra*, 15 Cal.5th at p. 492, citing Parker, *California's New Scheme for the Commitment of Individuals Found Incompetent to Stand Trial* (1975) 6 Pacific L.J. 484, 485.)

In 1980, the Legislature extended the courts' role in overseeing competency procedures by making them responsible for determining whether a defendant has regained competency when the defendant is returned to court following the filing of a certificate of restoration. In 2018, the Legislature shortened the maximum commitment term from three years to two years. As part of the same bill, the Legislature eliminated the requirement that a defendant who remains committed for 18 months be returned to court for a redetermination of competency. (*Rodriguez, supra*, 15 Cal.5th at pp. 492-493.)

The *Rodriguez* court concluded that this history shows that the Legislature intended for the court to play a central role in making competency assessments, before and after the filing of the certificate of restoration, thus ending the period of commitment when the certificate is filed is inconsistent with this scheme. (*Id.* at p. 497.) The statutory procedures suggest that the two-year time frame does not end with the filing of the certificate. The defendant is required to be returned to court no later than 90 days prior to the expiration of the term of commitment which would allow the time for necessary subsequent judicial proceedings to be completed before reaching the maximum period of commitment. (*Id.* at p. 498.)



Additionally, from a fairness standpoint, the Court pointed out that a defendant who has been certified as competent, is ineligible for bail consideration until the court determines the defendant has regained competency and cannot otherwise challenge the underlying charges because the criminal proceedings remain suspended. (*Id.* at p. 506, see also § 1372, subd. (d) and 1370, subd. (a)(1).) This state of limbo is contrary to the entire statutory scheme and would eliminate any urgency in reaching a determination of competency. (*Ibid.*)

The Court rejected the People's contention that their conclusion allows defendants to evade prosecution. Such individuals may be civilly committed, including long-term conservatorships, including a Murphy conservatorship (discussed above), or may have their charges dismissed which the People may refile even if the defendant was previously committed for the maximum period of commitment. (*Id.* at p. 516.)

As noted by the Court in *Rodriguez*, the delay in that particular case was due to COVID-19. DSH acknowledges that the average time for treatment to restore competency is well within the two-year maximum period, usually sometime between 6 to 9 months. (*Rodriguez, supra*, 15 Cal. 5th at p. 515.) The tolling of the time period is also not necessary to continue treatment of a defendant when they are returned to court after the filing of a certificate of restoration. A defendant may continue to receive treatment if necessary which may include involuntary administration of antipsychotic medication. (Pen. Code Section § 1370, subd. (a)(2)(B)(iii).)

#### 4. Argument in Support

According to California District Attorneys Association:

Often, the certificate of restoration is disputed by defense counsel upon the defendant's return to court. Upon such a dispute, defense counsel will hire experts to review the defendant's records and examine the defendant, and the court will hold a contested hearing, often several months later. In a recent California Supreme Court ruling in *Rodriguez v. Superior Court of Santa Clara County* (2023) 15 Cal.5th 472, the court held that the period between when the doctor tells the court a defendant is competent and the court's ruling on competency is part of the two-year time limit. This means that the period of delay for the contested hearing, where a potentially incompetent defendant is not receiving appropriate treatment, counts towards the two-year period of mental health treatment provided by law. Given this situation, courts have been placed in the untenable situation of choosing between a defendant's right to effective counsel and his (and society's) interest in ensuring he receives the full period of treatment with every opportunity to regain competence. The *Rodriguez* opinion was the Court's attempt to fill in the blanks where current statutes remained silent.

#### 5. Argument in Opposition

According to Disability Rights California:

SB 1392 tolls the two-year maximum commitment period for competency. This could create an indefinite period of detention as a defendant challenges their certificate of restoration of competency.