SENATE COMMITTEE ON PUBLIC SAFETY
Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	SB 684	**Hearing Date:**	April 18, 2017
Author:	Bates		
Version:	February 17, 2017		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Incompetence to Stand Trial: Conservatorship: Treatment***

HISTORY

Source: San Diego District Attorney's Office
California District Attorneys Association

Prior Legislation: SB 1412 (Nielsen) Ch. 759, Stats. 2014
AB 2626 (Achadjian) Ch. 742, Stats. 2014
AB 2186 (Lowenthal) Ch. 783, Stats. 2014
SB 2858 (Leno) Ch. 799, Stats. 2006
SB 570 (Migden) Ch. 265, Stats. 2005

Support: California Catholic Conference; Crime Victims United; National Alliance on Mental Illness California

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association (opposed unless amended); County Behavioral Health Directors Association of California

PURPOSE

The purpose of this bill is to (1) clarify how persons who are committed to a state hospital based on a finding of incompetence to stand trial accrue pre-commitment credits; (2) codify that certain persons may be conserved under either a Murphy conservatorship or Lanterman-Petris-Short (LPS) conservatorship, (3) authorize a prosecutor to request at any time a determination of probable cause to believe the defendant committed the offense or offenses alleged in the complaint when the defendant is charged with a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person; and (4) authorize a court, on its own, or by motion of either party, to order a competence examination, hold a status hearing, or order the county mental health director to reinitiate a conservatorship investigation on any defendant released from confinement at any time, based on new information.

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 requires the trial on the issue of mental competency to proceed as follows:

- The court appoints a psychiatrist or licensed psychologist to examine the defendant and to appoint two psychiatrists or licensed psychologists if the defendant is not seeking a finding of mental incompetence. The examining psychiatrist or licensed psychologist evaluates the nature of the defendant's mental disorder, if any; the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner; and whether treatment with antipsychotic medications is medically appropriate for the defendant and whether antipsychotic medication is likely to restore the defendant to competency.

- The defendant's attorney offers evidence in support of the allegation of mental incompetence.

- The prosecution presents its case regarding the issue of the defendant's present mental competence.

- Each party is allowed to present rebutting testimony, unless the court, for good reason in furtherance of justice, also permits other evidence in support of the original contention. (Pen. Code § 1369.)

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, if the defendant is found IST, to order the defendant be delivered by the sheriff to a state hospital for the care and treatment of the mentally disordered, any other available public or private treatment facility that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status, as specified. Provides, however, that if the offense for which the defendant was charged with and found to be mentally incompetent to stand trial for is a felony specified in the Sex Offender Registration Act, the prosecutor is to determine if the defendant had previously been found to be incompetent to stand trial for an offense listed in the Sex Offender Registration Act or is pending such a hearing, and if so, after notification to the court and defendant in writing and opportunity for a hearing, the court is to order the defendant be delivered by the sheriff to a state hospital or other secure treatment facility for the care and treatment of the mentally disordered unless the court makes specific findings on the record that an alternative placement would provide more appropriate treatment for the defendant and would not pose a danger to the health and safety of others. (Pen. Code § 1370, subd. (a)(1)(B)(i) & (ii).)

Existing law prohibits a defendant charged with a violent felony, as specified, who is found to be IST, to be delivered to a state hospital or treatment facility unless that hospital or facility has a secured perimeter or a locked and controlled treatment facility and the judge determines that the public safety will be protected. (Pen. Code § 1370, subd. (a)(1)(D).)

Existing law states when the court orders a defendant to be committed to the Department of State Hospitals, the court must provide specified information prior to admission including 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)(C).)

Existing law requires a medical director of the state hospital or other treatment facility to which the defendant is confined, or the outpatient treatment staff if the defendant is on outpatient status, to make a written report to the court and the community program director for the county or region of commitment concerning the defendant's progress toward recovery of mental competence within 90 days of the order of commitment, or placement on outpatient status, made pursuant to the above provisions and at 6-month intervals thereafter or until the defendant becomes mentally competent. A copy of these reports shall be provided to the prosecutor and defense attorney by the court. (Pen. Code § 1370, subd. (b)(1).)

Existing law requires the committing court to order the defendant to be returned to the court for conservatorship proceedings, as specified, if the report indicates that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future. (Pen. Code § 1370, subd. (b)(1).)

Existing law requires a defendant who has not recovered mental competence to be returned to the committing court within 90 days prior to the end of 3 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 in the information, indictment, or misdemeanor complaint, or the maximum term of imprisonment for violation of probation or mandatory supervision, whichever is shorter. (Pen. Code § 1370, subd. (c)(1).)

Existing law states that whenever a defendant is returned to court and it appears to the court that the person is gravely disabled, as defined, the court shall order the conservatorship investigator of the county of commitment of the defendant to initiate "Murphy" conservatorship proceedings. (Pen. Code § 1370, subd. (c)(2).)

Existing law defines gravely disabled to include persons who are found mentally incompetent to stand trial and all of the following exist:

- The person is facing felony charges involving death, great bodily injury, harm or a serious threat to the physical well-being of another person;
- The charge or charges have not been dismissed;
- As a result of the mental health disorder, the person is unable to understand the nature and purpose of the proceedings taken against him or her and to assist counsel in the conduct of his or her defense in a rational manner. (Welf. & Inst. Code § 5008, subd. (h)(1).)

Existing law states if the criminal action against the defendant is dismissed, the defendant shall be released from commitment, but without prejudice to the initiation of any proceedings that may be appropriate under the LPS Act. (Pen. Code § 1370, subd. (e).)

Existing law provides that if a person is gravely disabled as a result of mental illness, or is determined to be a danger to self or others, then a peace officer, the staff of designated treatment facility or crisis team, or other professional person designated by the county, may, upon probable cause, take that person into custody for a period of up to 72 hours for assessment, evaluation, crisis intervention, or placement in a designated treatment facility. (Welf. & Inst. Code § 5150.)

Existing law provides that the person who has been detained for 72 hour, pursuant to the above, may be detained for up to14 days of intensive treatment if the person continues to pose a danger to self or others, or to be gravely disabled, and the person has been unwilling or unable to accept voluntary treatment. A person who has been detained for 14 days of intensive treatment may be detained for up to 30 days of intensive treatment if the person remains gravely disabled and is unwilling or unable to accept treatment voluntarily. (Welf. & Inst. Code §§ 5250, 5270.15.)

Existing law allows the person in charge of a facility providing 72-hour, 14-day, or 30-day treatment to recommend a LPS conservatorship to the county conservatorship investigator for a person who is gravely disabled and is unwilling or unable to accept voluntary treatment. Requires the conservatorship investigator, if he or she concurs with the recommendation, to petition the superior court to establish an LPS conservatorship. (Welf. & Inst. Code § 5350 *et seq.*)

This bill specifies that the calculation of custody credits earned in calculating the maximum term of commitment shall be as follows:

- A defendant charged with a crime or a violation of probation or mandatory supervision for which the maximum term of imprisonment is greater than three years shall begin to accrue credit toward the three-year maximum commitment on the date of the commitment order;

- A defendant charged with a crime or a violation of probation or mandatory supervision for which the maximum term of imprisonment is three years or less shall begin to accrue credit toward the maximum term of commitment on the date of the commitment order and is also entitled to credit for custody prior to commitment;

- A defendant shall cease to accrue credit toward his or her maximum term of commitment upon the filing of a certificate of restoration of competency; and,

- A defendant shall continue to accumulate credit toward the maximum term of commitment on a subsequent finding of incompetency on the same case or a refiling of the case involving the same criminal offense.

This bill specifies that an LPS conservatorship may be initiated if it appears to the court that the defendant is gravely disabled, as defined.

This bill provides if the defendant has been charged with a felony involving death, great bodily harm, or serious threat to the physical well-being of another person and is returned to court and is determined to be ineligible for conservatorship the following apply:

- The county mental health director shall, pending the defendant's release from confinement, refer the defendant to the local mental health department, which shall allow defendant to participate in a mental health treatment plan voluntarily.

- Within 60 days of the referral, the county mental health director, or his or her designee, shall file a report to the court indicating the mental health treatment provider to whom the defendant was referred and whether the defendant has agreed to cooperate with the proposed treatment plan; and

- The county mental health director, or his or her designee, shall annually report changes in the treatment status and competency status of the defendant, if any, to the court, the prosecutor, and the defense counsel.

- The court may, on its own motion, or pursuant to a petition by the prosecutor or defense, order a competence examination, hold a status hearing, or order the county mental health director to reinitiate a conservatorship investigation on any defendant released from confinement pursuant to this paragraph at any time, based on new information.

- At a hearing held pursuant to this paragraph, the court may order an examination to be conducted by a court-appointed psychiatrist, licensed psychologist, or any other expert the court deems appropriate, of whether the defendant's mental competence to stand trial has been restored.

- If after a hearing conducted pursuant to this subparagraph, the examining mental health expert determines that the defendant has regained mental competence, the expert shall immediately certify that fact to the court for further proceedings.

This bill allows, if the action is on a complaint charging a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person, the prosecuting attorney, at any time before or after a defendant is determined incompetent to stand trial, to request a determination of probable cause to believe the defendant committed the offense or offenses alleged in the complaint.

This bill allows for the initiation of a Murphy conservatorship upon a criminal complaint if there has been a finding of probable cause on the complaint.

This bill specifies that for a Murphy conservatorship, there must be a showing that the person represents a danger of physical harm to himself or others by reason of mental disease, defect, or disorder.

COMMENTS

1. Need for This Bill

According to the author:

> If, after a hearing, a criminal defendant is found incompetent to stand trial, the court must order the defendant committed to a state hospital for the mentally-disordered or to any other public or private treatment facility approved by the community program director that will promote speedy restoration or mental

competence, or placed on outpatient status. A criminal defendant may be committed for competency restoration for a period of three years or less. If it is determined during the applicable restoration period that a defendant's competence to stand trial cannot be restored within the maximum period of time, he is sent back to court for further proceedings.

Unfortunately, courts do not currently have sufficient legal options to handle a mentally-ill defendant who has been declared incompetent to stand trial and his or her competence has not been restored within the permitted period of time. Under some circumstances, the court can order the initiation of conservatorship proceedings to determine if a person qualifies for a "Murphy" conservatorship. However, if County Mental Health Department, the civil court, or a jury, determines that a Murphy conservatorship is unwarranted, the criminal court has no option but to release the defendant from confinement on the criminal case, despite the existence of criminal charges, including murder.

In a recent court case, *Jackson v. Superior Court of Riverside*, the Fourth District Court of Appeal asked the legislature to provide more guidance on handling these individuals. Additionally, there are procedural roadblocks that exist that may interfere with someone otherwise eligible for a conservatorship from getting one. First, under the current competency statutory scheme, the criminal court is only statutorily-authorized to refer the defendant for a "Murphy" conservatorship, but not the less restrictive "LPS" conservatorship available for all individuals who are unable to care for themselves. Second, in cases where a defendant is found incompetent to stand trial prior to his preliminary hearing, the criterion of a probable cause determination, necessary for a "Murphy" conservatorship, cannot be met without a costly and inefficient grand jury proceeding.

Additionally, the proposed legislation would provide clarity and transparency in the method of calculation of credits to permit all stake holders in the criminal justice system (court, prosecution, defense counsel and Department of State Hospitals) the opportunity to review the computation of credits for any discrepancies in the calculations.

2. Mental Competency

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 an offender 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.) If after an examination and hearing the defendant is found IST, the defendant is referred to the Department of State Hospitals or other treatment facility and the criminal proceedings are suspended. (Pen. Code §§ 1368, subd. (c) and 1370, subd. (a)(1)(B).) The treating agency shall submit reports to the court periodically on the offender' status. The initial report must be made within 90 days of the offender's commitment. (Pen. Code § 1370, subd. (b)(1).) A defendant who is committed to a state hospital or other treatment facility after being found IST may be committed for no more than three years. (Pen Code §1370, subd. (c).) If the defendant has not recovered mental competence by the end of the three-year period, and the medical staff reports that the defendant is not likely to regain

competency in the foreseeable future, then the defendant must be returned to the committing court where a conservatorship may be ordered. (Penal Code Section 1370(c)(2).)

3. Conservatorships

If the offender has not regained competence after the statutory three years where the treating agency finds that there is no reason to believe the offender will regain competence, the court may release the person or initiate conservatorship proceedings. (*In re Davis* (1973) 8 Cal.3rd 798.) Pursuant to the LPS Act, a civil commitment hearing may be held to hold the defendant in a mental health facility until it is determined he or she is no longer a threat to him or herself or others. (Welf. & Inst. Code § 50000 et seq.) However, if the offender is charged with a felony involving death, great bodily injury or serious threat to another and the statutory three years has past, the court may initiate a Murphy conservatorship. The criminal charges must still be pending against the criminal defendant for the court to initiate a Murphy conservatorship.

In order to initiate a Murphy conservatorship, the court must make certain findings, namely that the defendant is "gravely disabled" and that "by reason of a mental disease, defect, or disorder, the person represents a substantial danger of physical harm to others." (*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 176-77.) The following conditions are required for the court to find a defendant "gravely disabled": (i) the indictment or information pending against the person at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person; (ii) the indictment or information has not been dismissed; and (iii) as a result of a mental health disorder, the person is unable to understand the nature and purpose of the proceedings taken against him or her and to assist counsel in the conduct of his or her defense in a rational manner. (Welf. & Inst. Code § 5008, subd. (h)(1)(B).) Once these findings have been made by the court, it may order the conservatorship investigator of the committing county to initiate conservatorship proceedings. (Pen. Code § 1370, subd. (c)(2).)

If the defendant becomes mentally competent after a conservatorship has been established, the conservator must certify that fact to the sheriff, district attorney, committing court, and defendant's attorney of record (Pen. Code § 1372, subd. (b).), as failure to resume court proceedings promptly after the defendant regains competency may result in the deprivation of the constitutional right to a speedy trial. (See *People v. Simpson* (1973) 30 Cal.App.3d 177.)

4. Effect of this Legislation

- Calculation of Credits: This bill specifies the manner in which a person is to accrue credits prior to commitment to a state hospital or other treatment facility. A defendant whose maximum term of imprisonment provided for in statute is three years or less would be entitled to credit for custody prior to commitment, while a defendant whose maximum term of imprisonment provided for in statute is greater than three years would not. The Legislature has declared that three years is the maximum period of commitment for persons who are found to be IST. This provision would circumvent the maximum period by stating that pre-commitment credits do not count toward this maximum period for certain groups of defendants.

- Probable Cause Hearing to Support Murphy Conservatorships: This bill authorizes a district attorney, in felony cases involving alleged death, great bodily harm, or a serious threat to the physical well-being of another person, to request a probable cause hearing at

any time before or after a defendant is determined to be IST in order to establish probable cause that the defendant committed the crime would later be eligible for a Murphy conservatorship. Under current practice, if a person is determined to be IST prior to the probable cause hearing, it is difficult to prove that the person is eligible for a Murphy conservatorship.

- Codification of Current Practice that Authorizes LPS Conservatorships when Murphy Conservatorship Cannot be Established: Under existing law there is no statutory authority for a court to refer a defendant for an LPS conservatorship when the defendant has been charged with a felony case involving alleged death, great bodily harm, or a serious threat to the physical well-being of another person. But courts currently refer persons who do not qualify for a Murphy conservatorship for an LPS conservatorship. This bill codifies that practice.

- New Authority When a Person is not Eligible for Either Types of Conservatorships: Under existing law, when a defendant is found IST and it is unlikely that he or she will be restored to sanity within the three year maximum period allowed, the person is referred back to court and the court can either release the person or refer him or her to be conserved. If a person does not qualify for a Murphy conservatorship, then he or she can be referred for an LPS conservatorship which is much less restrictive. Both conservatorships require the person to be gravely disabled, as defined. This bill states that if a person is ineligible for either type of conservatorship, he or she may be referred to voluntary mental health treatment and the county mental health director is required to report to the court if there are any changes to the person's competency status. This bill also provides that if a person is released rather than conserved, than the court can at any time order a competence examination, hold a status hearing, or order the county mental health director to reinitiate a conservatorship investigation on any defendant released from confinement, based on new information. This bill also authorizes the court to rely on any expert it deems appropriate to make the determination as to whether the person is competent to stand trial.

5. Arguments in Support

According to the National Alliance on Mental Illness California:

> Unfortunately, courts do not have sufficient legal options to handle a defendant living with mental illness who has been declared incompetent to stand trial and his or her competence has not been restored within the permitted period of time. Currently, the court can order conservatorship proceedings to determine if a person qualifies for a "Murphy" conservatorship. If the Department of Health Care Services, the civil court, or a jury, however determines that such a conservatorship is unwarranted, the criminal court has no option to release the defendant from all forms of confinement, despite the existence of criminal charges, including murder.
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> In a recent court case, *Jackson v. Superior Court of Riverside*, the Fourth District Court of Appeal asked the legislature to provide more guidance with incompetence to stand trial assistance. SB 684 offers defendants that are living with mental illness and or incompetent who are charged with serious and violent felonies, who don't qualify for conservatorships, the opportunity to voluntarily

> continue their mental health treatment while in the community. Further, the proposed legislation requires any changes in treatment and competency status to be reported to the court, by treatment providers, annually. This will allow the court and counsel to assess the defendant's status while providing a vehicle to re-evaluate the defendant's competency to stand trial and/or an opportunity to re-initiate a conservatorship investigation, if appropriate.
>
> In addition, the bill provides the court with a procedure to follow if an expert determines the defendant's mental competence has been restored. SB 684 authorizes the court to order evaluations for "LPS" conservatorships, which determine whether an individual can take care of their daily needs, in addition to "Murphy" conservatorship, which are already authorized.
>
> Finally, SB 684 allows the court to make probable cause determinations on those cases where defendants were found incompetent to stand trial before their preliminary hearings, thus avoiding inefficient and costly grand jury proceedings now required in order to make sure the probable cause criterion for "Murphy" conservatorship are met, with affecting the right of the defendant to request a full preliminary hearing if so desired.

6. Arguments in Opposition

The County Behavioral Health Directors Association of California writes:

> This bill establishes requirements related to defendants living with mental illness who have been declared incompetent to stand trial and competence has not been restored according to required timelines. Under current law, these individuals may choose to pursue treatment through a county MHP [mental health plan]. However, all information related to such treatment remains protected by stringent privacy protections. This bill would violate privacy protections by mandating MHPs to report to the court about treatment.

The California Public Defenders Association (CPDA) is opposed to this bill unless amended stating,

> As written, the new Section 1368.1(a)(2) would authorize a prosecutor to request a probable cause hearing "at any time before or after a defendant is determined incompetent to stand trial." This would mean that such a hearing could be held when a defendant is not mentally fit for criminal proceedings to continue, and may even be held in the defendant's absence. In order to preserve a defendant's due process rights to an adequate preliminary hearing, this s section should be amended to add that "the finding of probably cause may be used solely for purposes of establishing the criteria found in Welfare & Institutions Code section 5008(h)(1). The defendant shall be entitled to a new preliminary hearing upon their restoration to competence and the resumption of criminal proceedings." This would make the new section consistent with current case law in People v. Duncan (2000) 78 Cal.App.4th 765, 772.

As to the new Sections 1370(a)(3)(C)(i)-(iv), we urge that these be removed from the bill. They are a codification of case law in People v. Reynolds (2011) 196 Cal.App.4th 801 and People v. G.H. (2014) 230 Cal.App.4th 1548. Both cases were decided by the same court, and neither case has been reviewed, cited, or followed by the California Supreme Court, or in any other published opinion. This bill would foreclose any challenge to these holdings. Pre-commitment confinement credits are addressed only in section 1370, subdivision (a)(2)(iii)(C), which requires the committing court, upon making a commitment order, to provide the Department of State Hospitals with a "computation or statement setting forth the amount of credit for time served, if any, to be deducted from the maximum term of commitment." Nothing in Section 1370 indicates that the computation need be made in cases charging felonies carrying a sentence in excess of three years. Pre-confinement credits should not be denied to anyone, regardless of the manner in which their case is charged.

. . . .

Further, we are greatly concerned about a procedure by which the court or prosecutor can "order a competence examination, hold a status hearing, or order the county mental health director to initiate a conservatorship investigation" at "any time, based on new information" for "any defendant released from confinement pursuant to this paragraph." Moreover, such a hearing the court can order the examination of a defendant's competence be conducted by someone other than a psychiatrist or psychologist; rather this examination can be done by "any other expert the court deems appropriate." The sweeping language of this proposal means that a prosecutor can continually ask for a defendant's competence to be re-evaluated by someone who is not a psychiatrist or psychologist, based on undefined new information, in the hopes that criminal proceedings can be reinstated. This is a recipe for constant monitoring and harassment of individuals how have already been "released from confinement" and are deemed "ineligible for conservatorship pursuant to subparagraph (A) or (B) of paragraph (1) of subdivision (h) of Section 5008 of the Welfare and Institutions Code." CPDA cannot support such a broad provision. We urge you to delete Section 1370(c)(5)(B) from the bill.

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