
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 1630 **Hearing Date:** June 21, 2022
Author: Akilah Weber
Version: May 19, 2022
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Competence to stand trial: statewide application*

HISTORY

Source: Team Justice
California Public Defender's Office

Prior Legislation: SB 1187 (Beall), Ch. 1008, Stats. 2018
SB 317 (Stern), Ch. 991, Stats. 2018
AB 1810 (Comm. on Budget), Ch. 34, Stats. 2018
AB 1214 (Stone), Ch. 472, Stats. 2018
SB 1412 (Nielsen), Ch. 759, Stats. 2014

Support: Asian Solidarity Collective; Californians for Safety and Justice; Californians United for a Responsible Budget; Community Advocates for Just and Moral Governance; Democratic Club of Vista; Depression and Bipolar Support Alliance California; Disability Rights California; Dr. Martin Luther King, Jr. Democratic Club of San Diego County; Ella Baker Center for Human Rights; Friends Committee on Legislation of California; Indivisible 45; Indivisible Ca-33; Indivisible California; Indivisible Sacramento; Indivisible San Francisco; Initiate Justice; Pillars of The Community; Progressive Democrats of America, California; Reimagine Richmond; San Diego County Young Democrats; San Diego Participatory Defense; San Diego Progressive Democratic Club; San Francisco Participatory Defense; San Mateo County Participatory Defense; Showing Up for Racial Justice (SURJ) San Diego; Showing Up for Racial Justice North County San Diego; Silicon Valley De-bug; Think Dignity; Universidad Popular; University City Democratic Club; Uprise Theatre; We the People - San Diego

Opposition: California District Attorneys Association; County Behavioral Health Directors Association of California

Assembly Floor Vote: 47 - 21

PURPOSE

The purpose of this bill is to shift the burden of proof to the prosecution to prove a finding of competence to stand trial when a court-appointed psychiatrist or licensed psychologist indicates that the defendant is incompetent and require the inclusion of a finding of incompetence to stand trial (IST) in a person's state summary criminal history 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 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 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).)

This bill deletes the requirement that the court appoint two psychiatrists, licensed psychologists, or a combination thereof if the defendant or defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence and instead provides that the court shall make such an appointment if the defendant or defendant's counsel informs the court that the defendant objects to an evaluation of mental incompetence and requests an evaluation by two-court appointed experts.

Existing law requires the examining psychiatrists or licensed psychologists to evaluate 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 and whether or not treatment with antipsychotic medication is medically appropriate for the defendant and whether antipsychotic medication is likely to restore the defendant to mental competence. (Pen. Code, § 1369, subd. (a)(2).)

This bill additionally requires the examining psychiatrists or licensed psychologists to evaluate whether the defendant is eligible for mental health diversion.

Existing law states that the counsel for the defendant shall offer evidence in support of the allegation of mental incompetence. If the defense declines to offer any evidence in support of mental incompetence, the prosecution may do so. (Pen. Code, § 1369, subd. (b).)

This bill changes the requirement that counsel for the defendant be required to offer evidence in support of the allegation of mental incompetence and instead states that counsel may do so.

Existing law requires the prosecution to present its case regarding the issue of the defendant's present mental competence. (Pen. Code, § 1369, subd. (c).)

Existing law states that each party may offer 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, subd. (d).)

Existing law states that in a jury trial, 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).)

This bill instead provides that the presumption of competence only applies when any report from a court-appointed psychiatrist or licensed psychologist indicate the defendant is mentally competent.

This bill states that if any report from a court-appointed psychiatrist or licensed psychologist indicates that the defendant is incompetent to stand trial, the defendant shall be presumed incompetent. The prosecution may offer evidence in support of the allegation of mental competence. At the conclusion of the prosecution's case, the defense may present its case regarding the issue of the defendant's present mental incompetence.

This bill states that in a jury trial, when any report from a court-appointed psychiatrist or licensed psychologist indicates that the defendant is incompetent, it shall be presumed that the defendant is mentally incompetent unless it is proved a preponderance of the evidence that the defendant is mentally competent. The verdict of the jury shall be unanimous.

This bill provides that if all reports from the court-appointed psychiatrists or licensed psychologists indicate the defendant is mentally competent, the defendant shall be presumed competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent.

This bill describes the procedure for a jury trial on the issue of competency proceedings, with the order of presentation of evidence and closing arguments dependent on who bears the burden of proof, consistent with existing procedures.

Existing law requires the Department of Justice (DOJ) to maintain state summary criminal history information. (Pen. Code, § 11105, subd. (a).)

Existing law defines "state summary criminal history information" as "the master record of information compiled by the Attorney General pertaining to the identification and criminal history of a person, such as name, date of birth, physical description, fingerprints, photographs, dispositions, sentencing information, and similar data about the person." (Pen. Code, § 11105,

subd. (a)(2)(A.)

Existing law requires DOJ to furnish state summary criminal history information to specified entities, including if needed in the course of their duties, provided that when information is furnished to assist an agency, officer, or official of state or local government, a public utility, or any other entity in fulfilling employment, certification, or licensing duties, specified restrictions in the Labor Code are followed. (Pen. Code, § 11105, subd. (b).)

Existing law allows DOJ to furnish state summary criminal history information to specified entities and, when specifically authorized, federal-level criminal history information upon a showing of a compelling need, provided that when information is furnished to assist an agency, officer, or official of state or local government, a public utility, or any other entity in fulfilling employment, certification, or licensing duties, specified restrictions in the Labor Code are followed. (Pen. Code, § 11105, subd. (c).)

Existing law states that the state summary criminal history information shall include any finding of mental incompetence arising out of a criminal complaint charging a felony offense requiring sex offender registration. (Pen. Code, § 11105, subd. (k).)

This bill requires the clerk of the court to notify DOJ of a finding of mental incompetence for inclusion in the defendant's state summary criminal history information.

This bill provides that when a person is determined to be restored to competency, the clerk of the court shall notify DOJ for inclusion of that information in the defendant's state summary criminal history information.

This bill states that the state summary criminal history information shall include any finding of mental incompetence reported to DOJ by the courts pursuant to this bill.

This bill provides that if a person has been deemed IST in any jurisdiction, and there has been no official restoration of competence other than in cases where the defendant participated in mental health diversion and had the charges dismissed or if the case involved misdemeanor charges, any court before which a defendant is appearing on a new charge shall presume that the defendant is IST and shall inquire of the attorney for the defendant whether the defendant is mentally competent.

This bill states that if, after meeting with the defendant, counsel informs the court that they believe the defendant is or may be IST, the court shall proceed with the process of determining whether the defendant is IST.

This bill states that if the prosecution elects to dismiss and refile charges after a defendant has been returned to court at the end of commitment or upon a finding that the defendant is unlikely to be restored to mental competence in the foreseeable future, the court shall find that the defendant is IST.

This bill provides that if it appears to the court that the defendant is gravely disabled, as defined in existing law, the court shall order a conservatorship investigator to initiate conservatorship proceedings for the defendant.

This bill states that if the prosecution provides the court with substantial evidence that the defendant's psychiatric symptoms have changed to create doubt in the mind of the judge as to the defendant's current mental incompetence, the court shall appoint a psychiatrist or a licensed psychologist to opine as to whether the defendant has regained mental competence.

This bill provides that if, in the opinion of that expert, the defendant has regained mental competence, the court shall proceed as if a certificate of restoration of competence has been returned, except that a presumption of competency does not apply and a hearing shall be held to determine whether competency has been restored.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Due process prohibits the criminal prosecution of an individual who is not competent to stand trial. When the court is presented with substantial evidence of incompetency, the court must suspend proceedings and appoint an expert to provide an opinion regarding the individual's current competency to stand trial.

Under existing law, if the court-appointed expert opines that the defendant is *not competent*, the court must presume that the defendant *is competent* and the defendant must prove that they are not. Because there are no statutory timelines for conducting competency hearings, these individuals often wait months, if not years, for a trial to affirm the expert's opinion that they are, in fact, not competent to stand trial.

If the defendant is never restored to competency and is later charged with a new offense, the court must still presume competency. Existing law places no obligation on the court to inquire into the individual's current competency to stand trial even where previous efforts to restore the individual proved futile.

To promote early access to treatment, AB 1630 requires the court to appoint an expert to provide an opinion regarding the individual's current competency *and* eligibility for mental health diversion when presented with evidence of current incompetency.

Where one or more court-appointed experts conclude that the individual is not competent to stand trial, this bill shifts the burden of proof to the State in circumstances where the State chooses to contest the expert opinion. If the experts opine that the individual is competent to stand trial, then the presumption of competency remains and the defendant bears the burden to prove otherwise.

For those individuals who are never restored to competency, this bill requires the court to inquire as to the person's current competency at the beginning of proceedings in any subsequent case. Because this bill also requires the court to transmit to the Department of Justice, a finding that an individual was not restored to competency, courts will have greater access to information regarding an

individual's mental status but will still maintain the discretion to suspend proceedings and initiate a competency evaluation when presented with evidence of current incompetency.

2. 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.) 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 the Department of State Hospitals, 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.

This bill makes several changes to the procedure of trials to determine competence and shifts the burden of proof, depending on the findings of the court-appointed psychiatrists or licensed psychologists.

Specifically, when any report from a court-appointed psychiatrist or licensed psychologist indicates that the defendant is incompetent, the defendant is presumed incompetent unless it is proved by a preponderance of the evidence that the defendant is mentally competent. The prosecution may offer evidence in support of a finding of competency and at the end of the prosecution's case, the defense may present evidence of the defendant's incompetency.

When, however, all reports indicate that the defendant is mentally competent, this bill retains the current presumption that the defendant is competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. Defense counsel may offer evidence in support of an allegation of competence; if the defense declines to present evidence, the prosecution may present evidence of the defendant's present mental competence.

In both scenarios, each party may offer rebuttal evidence and when presentation of the evidence has concluded, each side may make its final arguments to the jury. The bill retains the current requirement that the verdict by the jury shall be unanimous.

3. Mental Health Diversion

Existing law requires the court-appointed examining psychiatrists or licensed psychologists to evaluate 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 and whether or not treatment with antipsychotic medication is medically appropriate for the defendant and whether antipsychotic medication is likely to restore the defendant to mental competence. (Pen. Code, § 1369, subd. (a)(2).) This bill would require a psychiatrist or psychologist examining a defendant's competence to stand trial to additionally evaluate whether the defendant is eligible for mental health diversion.

Mental health diversion allows trial courts to grant pretrial diversion to a defendant suffering from a mental disorder when the person's mental disorder was a significant factor in the commission of certain charged offenses and a qualified mental health expert opines the person's condition would respond to mental health treatment. (Pen. Code, § 1001.36.)

Existing law specifies that a person who has been found IST may be eligible for mental health diversion. (See Pen. Code, § 1001.36, subd. (b)(1)(D).) Upon the dismissal of charges at the conclusion of the period of diversion a defendant shall no longer be deemed IST. (Pen. Code, § 1370, subd. (a)(1)(B)(vi).)

4. Criminal History Information

DOJ is tasked with maintaining state summary criminal history information, which is the master record of information pertaining to the identification and criminal history of an individual. Existing law requires the Attorney General to furnish state summary criminal history information only to statutorily authorized entities or individuals for specified purposes of employment, licensing, volunteering etc. (Penal Code § 11105.) In addition to the specified entities authorized to receive state summary criminal history information, DOJ may furnish state summary criminal history information to other specified employers upon a showing of compelling need for the information and to any person or entity when they are required by statute to conduct a criminal to comply with requirements or exclusions expressly based upon specified criminal conduct. (Pen. Code, § 11105, subs. (a)(13) and (c).)

State summary criminal history information includes name, date of birth, physical description, fingerprints, photographs, arrests, dispositions and similar data. (Pen. Code, § 11105, subd. (a).) State summary criminal history information must also include any finding that a defendant charged with a felony offense requiring sex offender registration has been found IST. (Pen. Code, § 11105, subd. (k).)

This bill would also require the state summary criminal history information to include a finding of IST in any criminal case. Additionally, if a defendant's mental competency has been restored, this information would also be included in the state summary criminal history information.

This bill also creates a presumption that if a person has been deemed IST in any jurisdiction, and there has been no official certificate of restoration, the person continues to be IST for purposes of any new charges. The court would still be required to assess whether competency has been restored by ordering a hearing on the question of the defendant's mental competence, except in cases where no certificate of restoration can be issued.

5. Argument in Support

According to California Public Defenders Association, a co-sponsor of this bill:

Due Process guarantees prohibit the State from conducting criminal proceedings against a person who, because of a mental illness and/or developmental disability, is unable to rationally assist with their defense or understand the charges and proceedings against them. Under current law, a criminal defendant, under all circumstances, is presumed to be competent. In other words, when the court is presented with substantial evidence of incompetency, suspends criminal proceedings, and orders that the defendant be examined by a qualified psychologist or psychiatrist, the defendant is presumed competent. And even if that expert, after examining the defendant, opines that they are not competent to stand trial, California law still requires that the defendant prove to a judge or jury their own incompetence.

This bill would shift the burden of proof to the State in circumstances where one or more independent experts conclude that the defendant is not competent to stand trial.¹ If the experts opine that the defendant is competent to stand trial, then the presumption of competency would remain in place, and the defendant would still bear the burden of overcoming it.

Currently, competency proceedings are the only California civil commitment proceedings where the person subject to involuntary commitment must prove that they are mentally ill in order to receive necessary treatment. AB 1630 would align competency proceedings with other involuntary commitment procedures by shifting the burden to the State to prove that the defendant is competent to stand trial when an independent expert opines that they are not.

Providing criminal defendants with the same due process protections afforded to individuals in other civil commitment proceedings will not only increase judicial efficiency by encouraging resolution in cases where the overwhelming evidence supports a judicial determination of incompetency but will also promote speedy access to treatment. Because there are no statutory timelines for conducting

competency trials, it is not uncommon for severely and acutely ill individuals to remain in jail cells for months, if not years, awaiting a trial to affirm what independent experts have already determined, that they are in fact, not competent to stand trial.

The second component of AB 1630, which would add section 1370.7 to the Penal Code, requires the court, when a person is found incompetent to stand trial and released without having attained competency, to transmit that information to the Department of Justice for inclusion in the person's state summary criminal history information.² In a subsequent criminal case, the fact that the person could not be restored to competency within a reasonable time would be relevant in determining the person's current mental competency. A prior commitment and release without restoration to competency would displace the otherwise-applicable presumption of competency.

If it appears to the court that the mentally incompetent person is gravely disabled as defined in Welfare & Institutions Code section 5008(h)(1)(a) or (b), then the court shall refer the person for conservatorship proceedings pursuant to the applicable provisions of the Lanterman-Petris-Short Act.

6. Argument in Opposition

According to County Behavioral Health Directors Association of California:

When an individual is determined incompetent to stand trial for a felony or misdemeanor, the clerk of the court will notify the Department of Justice of the finding of mental incompetence to include in the defendant's state summary criminal history information. When a person is determined to be restored to competency, the clerk of the court will notify the Department of Justice for inclusion of that information in the defendant's state summary criminal history information.

If a person has been deemed incompetent to stand trial in any jurisdiction and there has been no official restoration of competence, a court before which a defendant is appearing on a new charge will presume that the person is incompetent to stand trial and will assess whether competence has been restored. This will require a trial by court or jury on the question of mental competence.

Under the bill, these individuals are presumed incompetent, and competency must be established through a court proceeding FIRST regardless of jurisdiction or crime or the amount of time between criminal charges. CBHDA Criminal Justice committee recommended an oppose position because this bill seems to ignore that treatment can lead to recovery.

As this bill is not a recovery-oriented, the CBHDA is concerned with the precedent being put forward in this bill, which as it is currently written, determines that a previously diagnosed incompetent individual may always be labeled as incompetent. We believe every individual has the right to be reevaluated at the time of the arrest and not presumed to be incompetent.