

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 1420

INTRODUCER: Health Policy Committee and Senator Sobel

SUBJECT: Mental Health Treatment

DATE: March 27, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davlantes</u>	<u>Stovall</u>	<u>HP</u>	Fav/CS
2.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	Favorable
3.	_____	_____	<u>AP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

CS/SB 1420 amends certain statutes that govern mental health issues of criminal defendants and juveniles charged with delinquent acts. Defendants whose competency to proceed is in question or found by a court to be lacking, are committed to the Department of Children and Family Services (DCF) for “competency training” in an effort to restore them to competency. If a defendant meets the definition of mental retardation or autism, the Agency for Persons with Disabilities (APD) generally serves their needs in this process. Defendants who are found not guilty by reason of insanity are likewise committed to the DCF.

The bill provides for the continuation of treatment with psychotherapeutic drugs, under limited circumstances, by the DCF for defendants and forensic clients that have been administered such treatment in a jail prior to relocation to a department facility.

The bill provides for the dismissal of charges against any defendant adjudicated mentally incompetent if he or she remains incompetent three (rather than five) years after the initial competency decision was made, unless the court believes that he or she will become competent in the future. If the defendant was committed in relation to an allegation of certain specified crimes, the period before charge dismissal remains five years.

The bill also provides additional details for how incompetency is determined in juvenile delinquency cases. It provides a definition for when a child is considered competent and specifies certain components which must be included in a competency evaluation report. Concerning competency evaluations related to mental retardation or autism, the bill requires the evaluator to provide a clinical opinion as to whether the child is competent to proceed with delinquency hearings.

The bill provides an effective date of July 1, 2013.

This bill amends sections 916.107, 916.13, 916.145, 916.15, and 985.19 of the Florida Statutes.

II. Present Situation:

The Due Process Clause of the 14th Amendment prohibits the states from trying and convicting defendants who are incompetent to stand trial.¹ The states must have procedures in place that adequately protect the defendant's right to a fair trial, which includes his or her participation in all material stages of the process.² Specifically, defendants (and juveniles charged with having committed felony-level delinquent acts) must be able to appreciate the range and nature of the charges and penalties that may be imposed, and must be able to understand the adversarial nature of the legal process and disclose to counsel facts pertinent to the proceedings at issue. Defendants also must manifest appropriate courtroom behavior and be able to testify relevantly.³

If a defendant is suspected of being incompetent, the court or counsel for the defendant or the state may file a motion for examination to have the defendant's cognitive state assessed. If the motion is well-founded the court will appoint experts to evaluate the defendant's cognitive state. The defendant's competency is then determined by the judge in a subsequent hearing. If the defendant is found to be competent, the criminal proceeding resumes. If, however, the defendant is found to be incompetent to proceed, competency must be restored before the criminal proceeding may resume.⁴

Restoration of Competency

Competency restoration is designed to help defendants meaningfully participate in their own defense. The DCF has oversight of felony defendants who are found incompetent to proceed due to mental illness, while the APD is charged with oversight of felony defendants who are incompetent to proceed due to developmental disabilities.⁵ Competency restoration training and mental health services are provided in four state forensic facilities, that have a total of 1,108 beds (two facilities are state-operated and two are operated under contract with a private provider).⁶

¹ See *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed. 815 (1966); *Bishop v. U.S.*, 350 U.S.961, 76 S.Ct. 440, 100 L.Ed. 835 (1956); *Jones v. State*, 740 So.2d 520 (Fla. 1999).

² *Id.* See also Rule 3.210(a)(1), Fla.R.Crim.P., Rule 8.095(d)(1), Fla.R.Juv.P.

³ *Id.* See also s. 916.12, 916.3012, and 985.19, F.S.

⁴ Rule 3.210(b), 3.211, 3.212, Fla.R.Crim.P.; Rule 8.095(a)(1)-(6), Fla.R.Juv.P.

⁵ Ch. 916, F.S.

⁶ DCF Analysis of SB 1420 dated March 7, 2013. On file with Health Policy Committee staff.

The DCF served 2,531 adults who were committed for competency restoration services during fiscal year 2011-2012.⁷

The DCF is directed by statute to provide competency training for juveniles who have been found incompetent to proceed to trial as a result of mental illness, mental retardation or autism.⁸ The DCF contracts with a provider who provides competency restoration training in both the community and secure residential settings. The DCF served a total of 405 incompetent to proceed children in FY 2011-12.⁹

If the court determines that a defendant is a danger to himself or others, it may involuntarily commit the defendant to a secure forensic facility.¹⁰ Defendants may be placed on conditional release to receive competency restoration training in the community if the court finds they do not pose a risk to public safety.¹¹

Once a defendant is determined to have regained his or her competence to proceed, the court is notified and a hearing is set for the judge to determine the defendant's competency.¹² If the court finds the defendant to be competent, the criminal proceeding resumes. If, however, the court finds the defendant incompetent to proceed, the defendant is returned to a forensic facility or community restoration on conditional release until competency is restored.¹³

Qualifications of Competency Experts

Section 916.115 (1)(a), F.S., provides that experts appointed by the court to conduct competency evaluations shall, to the extent possible, have completed forensic evaluator training approved by the DCF and each shall be a psychiatrist, licensed psychologist, or physician. The DCF is required by s. 916.115 (1)(b), F.S., to maintain and annually provide the courts with a list of available mental health professionals who have completed the approved training as experts. However, current law does not require attendance at a department-authorized training or training renewal.

In the juvenile system, the court appoints mental health experts to conduct competency evaluations although there does not appear to be a specific requirement in the juvenile competency statute that the expert be a psychiatrist, licensed psychologist, or physician as is the case in the adult system.¹⁴ As in the adult system, the DCF provides the court a list of experts who have completed a department-approved training program but there is no statute that requires any attendance or on-going forensic training for the purpose of competency evaluation and reporting.¹⁵ The APD conducts the evaluations and makes the reports to the court regarding juveniles who meet the definition of "retardation" or "autism."¹⁶ Although there is a requirement

⁷ *Id.*

⁸ s. 985.19(4), F.S.

⁹ DCF Analysis of SB 1420 dated March 7, 2013. On file with Health Policy Committee staff.

¹⁰ s. 916.13, F.S.

¹¹ s. 916.17, F.S.

¹² Rule 3.212, Fla.R.Crim.P.

¹³ *Id.*

¹⁴ s. 985.19(1)(b), F.S.

¹⁵ s. 985.19(1)(d), F.S.

¹⁶ s. 985.19(1)(e), F.S.

in s. 916.301(2)(b)1., F.S., that the expert appointed to examine adult defendants be a psychologist, the juvenile statute does not make such a specification.

Hearing to Determine Restoration of Competency or Need for Continued Commitment

When the court adjudicates a defendant incompetent to proceed and the defendant is committed to the DCF to be restored to competency, or if the defendant has been found not guilty by reason of insanity and committed to the DCF, the defendant is returned to court periodically for a review and report on his or her condition.¹⁷ Generally, a review is conducted:

- No later than six months after the date of admission;
- At the end of any extended period of commitment;
- At any time upon the facility administrator's communication to the court that the defendant no longer meets commitment criteria; or
- Upon counsel's Motion for Review having been granted.

Rules of Criminal and Juvenile Procedure require that a hearing be held within 30 days of the court's receiving the administrator's pre-hearing report.¹⁸ There is no corresponding statutory time constraint on the court conducting a hearing.

The court also retains jurisdiction for purposes of dismissing charges if a defendant has not become competent within five years.¹⁹

Psychotropic Medication

Forensic clients of the DCF, which includes defendants who have been committed to the DCF for competency restoration or because they have been found not guilty by reason of insanity, must be treated with dignity and respect. The DCF, however, is responsible for providing treatment deemed necessary to fulfill its obligation under the statutes governing competency restoration and mental illness.

Forensic clients are, therefore, asked to give express and informed consent for treatment.²⁰ When treatment is refused, it may nonetheless be provided in an emergency situation for periods of up to 48 hours (excluding weekends and holidays, subject to review in 48-hour increments by a physician until a court rules) unless or until the DCF obtains a court order authorizing continued treatment.²¹

III. Effect of Proposed Changes:

Section 1 amends s. 916.107, F.S., concerning administration of psychotherapeutic medications to forensic clients. If a client has been receiving psychotherapeutic medications in jail at the time

¹⁷ ss. 916.13(2), 916.15(3) and 916.302(2)(a), F.S. See also s. 985.19(4)(e), (5) and (6), F.S., related to the court's jurisdiction and reporting requirements in juvenile cases.

¹⁸ Rules 3.212 and 3.218, Fla.R.Crim.P.; Rule 8.095(a)(5), Fla.R.Juv.P. See also Rule 8.095(e), Fla.R.Juv.P.

¹⁹ s. 916.145, 916.303, F.S. Regarding dismissal of charges of juvenile delinquency, see s. 985.19(5)(c), F.S.

²⁰ s. 916.107(3), F.S.

²¹ *Id.*

of transfer to the forensic or civil facility and lacks informed decision-making capacity with respect to mental health treatment, the admitting physician at the facility may order continued administration of these medications if he or she judges that abrupt cessation could jeopardize the health or safety of the client during the period before acquisition of a court order for medication administration. To continue the psychotherapeutic medication, the facility administrator or his or her designee must petition the committing court or the local circuit court for an authorization order. This petition must be made within five business days after admission of the client. The jail physician must also provide a current therapeutic medication order for the client at the admitting physician's request or at the time of transfer to the facility.

The bill also makes some technical changes to s. 916.107(3)(a), F.S.

Section 2 amends s. 916.13, F.S., to require the court to hold a competency hearing within 30 days after receiving notification that any facility client adjudicated mentally incompetent no longer meets the criteria for continued commitment. The bill also makes some technical changes.

Section 3 amends s. 916.145, F.S., to state that charges against any defendant adjudicated mentally incompetent will be dismissed without prejudice, which allows for refiling the case, if he or she remains incompetent three (rather than five) years after the initial competency decision was made, unless the court believes that he or she will become competent in the future. If the defendant was committed in relation to an allegation of certain crimes, the period before charge dismissal is five years. Such crimes include arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; aggravated assault with a deadly weapon; murder; manslaughter; aggravated manslaughter of an elderly person or disabled adult; aggravated manslaughter of a child; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary; aggravated battery; or aggravated stalking.

Section 4 amends s. 916.15, F.S., to require the court to hold a competency hearing within 30 days after receiving notification that any facility client adjudicated not guilty by reason of insanity no longer meets the criteria for continued commitment.

Section 5 amends s. 985.19, F.S., to change references to the Department of Children and Family Services to the Department of Children and Families. The bill also provides additional details for how incompetency is determined in juvenile delinquency cases. A child is considered competent to proceed if he or she has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and has a rational and factual understanding of the proceedings.²²

A child's competency evaluation report must specifically state the basis for the determination of his or her mental condition and must also include written findings that:

- Identify the specific matters referred for evaluation;
- Identify the sources of information used by the expert;

²² This definition is very similar to how competency and incompetency are described in s. 916.12(1), F.S., governing adults.

- Describe the procedures, techniques, and diagnostic tests used in the examination to determine the basis of the child’s mental condition;
- Assess the child’s capacity to:
 - Appreciate the charges or allegations against him or her;
 - Appreciate the range and nature of possible penalties that may be imposed in proceedings against him or her, if applicable;
 - Understand the adversarial nature of the legal process;
 - Disclose to counsel facts pertinent to the proceedings at issue;
 - Display appropriate courtroom behavior; and
 - Testify relevantly.

The evaluation report must also include a summary of findings which presents the factual basis for the expert’s clinical findings and opinions of the child’s mental condition; this factual basis must be supported by the diagnostic criteria found in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association. The summary of findings must include:

- The day, month, year, and length of time of the face-to-face diagnostic clinical interview to determine the child’s mental condition;
- A statement that identifies the DSM clinical name and associated diagnostic code for the specific mental disorder that forms the basis of the child’s incompetency;
- A statement of how the child would benefit from competency restoration services in the community or in a secure residential treatment facility;
- An assessment of the probable duration of the treatment to restore competence and the probability that the child will attain competence to proceed in the foreseeable future; and
- A description of recommended treatment or education appropriate for the mental disorder.

If the evaluator finds the child to be incompetent to proceed to trial, he or she must report on the mental disorder that forms the basis of the incompetency.

The bill also changes the term “incompetency evaluations” to “competency evaluations” in this section.

Concerning competency evaluations related to mental retardation or autism, the bill requires the evaluator to provide a clinical opinion as to whether the child is competent to proceed with delinquency hearings.

Section 6 provides an effective date of July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Adults and children with mental illness will be evaluated and treated differently in the justice system. Some adults with mental illness may be released from facilities earlier.

C. Government Sector Impact:

The Office of the State Courts Administrator reports that the bill should significantly reduce the workload of the judiciary and the state court system. The bill's amendment to s. 916.145, F.S., allows for the dismissal of charges against nonviolent defendants found incompetent to proceed after 3 years instead of the current 5 years. The bill maintains the current 5 year period for alleged violent crimes specifically enumerated in the bill. The criminal courts have to monitor and hold status hearings for these defendants until their charges are dismissed or competency is restored. The majority of these defendants are non-violent and on conditional release in community placements. Reducing the period to 3 years would eliminate 2 years of monitoring and status hearings by the criminal courts. The amendments to current law requiring the courts to hold competency and commitment hearings within 30 days will have no impact because the courts are already required to do so pursuant to the Florida Rules of Criminal Procedure 3.212 and 3.218.²³ However, as it is difficult to accurately quantify any effect on judicial workload without data that incorporates changes made by the bill, any judicial workload impact in the future as a result of legislation that passes this session will be reflected in the Supreme Court's annual opinion *In re: Certification of Need for Additional Judges*.

The DCF reports no fiscal impact.²⁴

VI. Technical Deficiencies:

The bill is entitled "an act relating to mental health treatment." However, since the bill could also be read to relate to the mental health *evaluation* of patients within the justice system, it may be subject to challenge as a single-subject violation.

²³ Office of the State Courts Administrator, Analysis of CS/SB 1420, March 26, 2012. On file with Senate Criminal Justice Committee staff.

²⁴ DCF Analysis of SB 1420 dated March 7, 2013. On file with Senate Health Policy Committee staff.

VII. Related Issues:

Lines 52-70 of the bill, which amend s. 916.107, F.S., refer frequently to administration of psychotherapeutic medications to facility clients. However, ch. 916, F.S., provides no definition for “psychotherapeutic medications.” This chapter does, however, provide a detailed definition for “psychotropic medications” in s. 916.12(5), F.S. Perhaps “psychotherapeutic medications” could be changed to “psychotropic medications” in the bill to create greater congruency with existing statute.

Lines 54-56 state that a client who has been receiving psychotherapeutic medications in jail and “lacks the capacity to make an informed decision regarding mental health treatment at the time of admission” may continue to receive psychotherapeutic medications upon court order. However, there is no provision in the bill as to who determines that the client lacks decision-making capacity or how this determination is made.

Lines 60-61 could be clarified by providing a timeframe for pursuing court orders for continued medication and limits on the amount of time a medication may be continued while awaiting the order. Similar constraints are provided for in emergency situations under s. 916.107(3)(a)1., F.S.

The term “mental disorder” is found nowhere in ch. 985, F.S., but is found frequently in lines 208-255, which amend a section of this chapter. Perhaps this term could be changed to “mental condition” or “psychological or psychiatric disorder” to provide congruity with terms in existing statute.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Policy on March 20, 2013:

The CS specifies the crimes for which the period before charge dismissal for a defendant adjudicated mentally incompetent is five years.

- B. **Amendments:**

None.