

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 944

INTRODUCER: Health Policy Committee and Senator Sobel

SUBJECT: Mental Health Treatment

DATE: March 28, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Lloyd	Stovall	HP	Fav/CS
2.	Cellon	Cannon	CJ	Pre-meeting
3.			JU	
4.			CA	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 944 amends certain statutes that govern mental health issues for criminal defendants and juveniles charged with delinquent acts.

The bill:

- Allows defendants and forensic clients who have received psychotropic drugs in jail to continue to receive the drugs, under limited circumstances, prior to relocation to a Department of Children and Families (DCF) facility;
- Provides the court with discretion to reduce the period of time under which certain charges against a defendant adjudicated incompetent due to mental illness will be dismissed, under specified conditions and exceptions, from 5 years to between 3 and 5 years; and,
- Provides additional parameters for how incompetency is determined in juvenile cases.

The bill has no fiscal impact on the DCF and may reduce the workload on the state courts system by an indeterminate amount.

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 Defendants (including 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. 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 the defendant is found to be incompetent to proceed, the proceeding may not resume unless competency is restored.⁴

Restoration of Competency

Competency restoration is designed to help defendants meaningfully participate in their own defense. In Florida, the DCF has oversight of felony defendants who are found incompetent to proceed due to mental illness, while the Agency for Persons with Disabilities (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 forensic step-down beds. The four secure facilities have a capacity of 1,108 beds and the civil facilities have 435 designated, forensic, non-secure step-down beds.⁶ Of the four forensic facilities, two are publicly-operated and two are privately contracted.⁷ During fiscal year 2012-2013, 1,537 adult forensic individuals were committed to the care of the DCF. Of those, 1,473 were adjudicated incompetent to proceed and needed competency restoration services.⁸

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.⁹ The DCF has outsourced competency restoration training by contract in both the community and

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 E-Mail Correspondence with Department of Children and Families (Mar. 14, 2014), on file with Senate Health Policy Committee.

⁷ *Id.*

⁸ *Id.*

⁹ s. 985.19(4), F.S.

secure residential settings. The DCF served 407 incompetent-to-proceed children in fiscal year 2012-2013.¹⁰

If a court determines that the defendant is a danger to himself or others, the court may commit the defendant to a secure forensic facility.¹¹ 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.¹²

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.¹³ 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.¹⁴

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.

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.¹⁵ As in the adult system, the DCF provides the court a list of experts who have completed a DCF-approved program.

The APD conducts evaluations and makes reports to the court regarding juveniles who meet the definition of "retardation" or "autism."¹⁶ Although there is a requirement in s. 916.301(2)(b)1., F.S., that the expert appointed to examine adult defendants who are intellectually disabled or autistic 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

¹⁰ Department of Children and Families, *2014 Agency Legislative Bill Analysis - SB 944* (Feb. 13, 2014), 2, on file with the Senate Health Policy Committee.

¹¹ s. 916.13, F.S.

¹² s. 916.17, F.S.

¹³ Rule 3.212, Fla.R.Crim.P.

¹⁴ *Id.*

¹⁵ s. 985.19(1)(b), F.S.

¹⁶ s. 985.19(1)(e), F.S.

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 6 months after the date of admission;
- At the end of any extended period of commitment;
- At any time the facility administrator communicates 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 5 years.¹⁹ However, the charges will not be dropped if the court specifies in its order reasons for believing that the defendant will become competent to proceed in the foreseeable future and specifies a timeframe in which the defendant is expected to become competent to proceed.²⁰ The DCF data shows that for the past 15 years (fiscal year 1998-1999 through fiscal year 2012-2013, encompassing 15,610 individuals), 99.6 percent of the individuals restored to competency were restored in 3 years or less.²¹

Psychotropic Medication

The DCF is responsible for providing treatment deemed necessary to fulfill its obligation under the statutes governing competency restoration and mental illness. 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.

When treatment is needed, forensic clients are asked to give express and informed consent.²² When treatment is refused, treatment 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.²³

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 of transfer to the forensic or civil facility and lacks informed decision-making capacity with

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

²⁰ s. 916.145, F.S.

²¹ Department of Children and Families, *2014 Agency Legislative Bill Analysis - SB 944* (Feb. 13, 2014), on file with the Senate Health Policy Committee.

²² s. 916.107(3), F.S.

²³ *Id.*

respect to mental health treatment, the admitting physician at the facility may order continued administration of these medications if the physician 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 5 business days after admission of the client. The jail physician must also have 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 does not provide a timeframe for when a hearing on the petition must be held.

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.

Section 3 substantially rewords s. 916.145, F.S., to state that charges against any defendant adjudicated mentally incompetent may be dismissed if he or she remains incompetent between 3 and 5 years after such determination, rather than to require dismissal after 5 years which is current law, 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 5 years. Such crimes or situations that would exclude the defendant from the reduced time period 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;
- Aggravated stalking;
- Any forcible felony as defined in s. 776.08, F.S., not listed above;
 - Specifically, these crimes are treason, carjacking, home-invasion robbery, burglary, aggravated assault, aircraft piracy, and any other felony that involves the use or threat of physical force or violence against an individual;
- Any offense involving the possession, use, or discharge of a firearm;

- An attempt to commit any of the offenses listed above;
- The crime was committed by a defendant who has had a forcible or violent felony conviction within the 5 years preceding the date of arrest for the non-violent felony²⁴ sought to be dismissed;
- The crime was committed by a defendant who, after having been found incompetent and under court supervision in a community based program, is formally charged by a state attorney with a new felony offense; or,
- Where there is an identifiable victim and such victim has not consented.

The state is not prohibited from refileing dismissed charges if the defendant is declared to be competent to proceed in the future.

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 provide 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.²⁵

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;
- 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

²⁴ "Nonviolent felony" is defined in s. 948.08(6)(a), F.S., as a *third degree felony violation of chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08*. Chapter 810, F.S., is the Burglary and Trespass law. Third degree felony violations of chapter 810, F.S., would include armed trespass within an unoccupied structure or conveyance, possession of burglary tools and burglary of an unoccupied structure or conveyance. Crimes that are not forcible felonies as defined in s. 776.08, F.S., would be any felony crime except treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

²⁵ This definition is very similar to how competency and incompetency are described in s. 916.12(1), F.S., governing adults.

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, 2014.

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 is likely to reduce the workload of the judiciary and the state court system, as the criminal courts have to monitor and hold status hearings for these defendants until their charges are dismissed or competency is restored.²⁶ The majority of these defendants are non-violent and on conditional release in community placements. In particular, by allowing the criminal court to dismiss the charges between 3 to 5 years after the incompetency determination, the bill will potentially reduce the need for monitoring and status hearings by the criminal court in the fourth and fifth year.

Requiring the courts to hold competency and commitment hearings within 30 days after the court receives the notice that the defendant is competent to proceed or no longer meets the criteria for continued commitment will have no impact as this is the current standard under the Florida Rules of Criminal Procedure.²⁷

The DCF reports no fiscal impact.

VI. Technical Deficiencies:

The definitions or categorization of crimes and circumstances in Section 3 of the bill may benefit from some clarification.

This Section of the bill provides the possibility that certain charges may be dismissed by a court if the defendant has not become competent to proceed *between 3 to 5 years* of the finding of incompetency. Current law requires charges to be dismissed *5 years after* such finding.

It appears that the intent is to limit the types of crimes that may qualify for early dismissal to *nonviolent felonies* (Line 172 of the bill speaks to “the nonviolent felony sought to be dismissed”). “Nonviolent felony” is defined in s. 948.08(6)(a), F.S., as a third degree felony violation of chapter 810²⁸ or any other felony offense that is *not* a forcible felony as defined in s. 776.08.²⁹

²⁶ Office of the State Courts Administrator, *2014 Judicial Impact Statement – SB 944* (Mar. 3, 2014), on file with the Senate Health Policy Committee.

²⁷ *Id.*

²⁸ Chapter 810, F.S., is the Burglary and Trespass law. Third degree felony violations of chapter 810, F.S., would include such crimes as armed trespass within an unoccupied structure or conveyance, possession of burglary tools and burglary of an unoccupied structure or conveyance.

²⁹ Crimes that are *not* forcible felonies as defined in s. 776.08, F.S., would be *any felony crime except* treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

The crimes for which early dismissal is not an option would appear to be those listed on lines 146-167 and any attempt to commit those crimes. The crimes for which early dismissal may be an option would appear to be nonviolent felonies (based upon the language on Line 172).

The potential confusion arises on Lines 170-172 because there is no clear statutory definition of “violent felony” conviction (see Line 171)³⁰.

It is suggested that Lines 170-172 could be clarified as follows: (s) Committed by a defendant who has been convicted of a felony offense listed in paragraphs (a)-(p) within 5 years preceding the date of arrest for the nonviolent felony charges sought to be dismissed;

An additional suggestion for clarification is to re-state Lines 143-145 as: become competent to proceed. The court may dismiss nonviolent felony charges, as defined in s. 948.08(6)(a), between 3 and 5 years after such determination, unless the charge is: if this suggestion fulfills the bill sponsor’s intent.

VII. Related Issues:

During the 2013 Session, CS/SB 1420 passed the Legislature using similar language as CS/SB 944. The Governor vetoed the bill stating:

While the bill maintains the current 5-year requirement for defendants charged with most violent crimes, it does not maintain this requirement for attempted violent crimes or other serious crimes. The additional time provides an opportunity for the defendant to regain competency under state supervision in order to stand trial. Dismissal of criminal charges for individuals deemed incompetent after only 3 years who have been charged with attempting to commit violent crimes, could pose a serious public safety risk.³¹

CS/SB 944 provides the court with discretion on the dismissal of charges rather than require dismissal, expands the types of crimes excluded from consideration, and adds situations for which the 5-year period would continue to apply.

VIII. Statutes Affected:

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

³⁰ The crimes listed on Lines 146 – 163 appear to have been pulled from the list of crimes that qualify a defendant for habitual violent felony offender sentencing enhancements. s. 775.084(b)1.a.-o., F.S.

³¹ Governor Rick Scott, *Veto Message -CS/SB 1420* (June 12, 2013), <http://www.flgov.com/wp-content/uploads/2013/06/Veto-Letter-SB-1420.pdf> (last visited: Mar. 14, 2014).

IX. 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 19, 2014:

The CS removes the mandatory dismissal of charges in certain situations after 3 years and provides the court discretion to dismiss limited charges against a defendant adjudicated incompetent to proceed due to mental illness without prejudice if the defendant remains incompetent 3 to 5 years after such determination.

The CS also expands the list of specific charges and situations for which the reduced time period for dismissal of charges against a defendant adjudicated incompetent to proceed due to mental illness would not be an option. The expanded circumstances where the reduced time would not be applicable include:

- Commission of any of the additional non-violent felonies;
- An attempt to commit any of the listed crimes;
- If the defendant had been previously charged with a forcible felony in the preceding 5 years;
- If the defendant is formally charged with a new felony while under court supervision in a community based program; or
- If an identifiable victim does not consent to such dismissal.

- B. **Amendments:**

None.