

## **Staff Memorandum 2022-04**

### **Competency to Stand Trial and Related Matters**

At its May 2022 meeting, the Committee on Revision of the Penal Code will address competency to stand trial — that is, whether a defendant’s mental health condition or developmental disability so impairs their understanding of the legal system that due process forbids prosecution.<sup>1</sup>

Even though the number of people affected by this problem is relatively small — the state averages more than 190,000 felony filings per year while there are only around 1,600 people found incompetent to stand trial being treated by the Department of State Hospitals<sup>2</sup> — this issue has been the focus of intense attention and litigation in California because of delays in admitting people to the state hospital for restoration to competency. The increasing strain to the system has resulted in significant delays, financial costs to the state and counties, harm to the people caught in the process, and no discernible benefit to public safety.<sup>3</sup>

#### **A. Background**

##### **1. Overview**

Competency evaluations are the most frequently ordered mental health evaluations by criminal courts.<sup>4</sup> In the last 10 years, the number of people found incompetent to stand trial in California has increased significantly, far outpacing the state’s ability to provide timely services in response. The number of people deemed incompetent to stand trial who are waiting for placement at the state hospital — which only treats people with felony charges — has increased from

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<sup>1</sup> The focus of this meeting will be on people with serious mental health conditions who are involved in the competency process. People with developmental disabilities are placed with the state Department of Developmental Services instead of the Department of State Hospitals; however, the harms to them are similar — they remain in county jails for extended periods of time while waiting for competency restoration treatment to begin. See *Stiavetti v. Clendenin*, 65 Cal.App.5th 691, 700 (Ct. App. 2021).

<sup>2</sup> Judicial Council of California, *2021 Court Statistics Report: Statewide Caseload Trends*, 82 (2021); Department of State Hospitals, *2022–23 Governor’s Budget Proposal and Estimates*, 17 (Jan. 2022) (census as of June 30, 2021).

<sup>3</sup> See, e.g., Hallie Fader-Towe and Ethan Kelly, *Just and Well: Rethinking How States Approach Competency to Stand Trial*, Council of State Governments Justice Center (Oct. 2020); Incompetent to Stand Trial Solutions Workgroup, *Report of Recommended Solutions*, 9 (Nov. 2021); Richard Schwermer, *Leading Reform: Competence to Stand Trial Systems — A Resource for State Courts*, Conference of Chief Justices and Conference of State Court Administrators (Aug. 2021).

<sup>4</sup> Neil Gowensmith, *Resolution or Resignation: The Role of Forensic Mental Health Professionals Amidst the Competency Services Crisis*, *Psychology, Public Policy, and Law*, 25(1), 2 (2019).

426 in 2014 to a projected 1,921 by the end of next month.<sup>5</sup> California is now under a court order to reduce the time it takes to admit someone to the state hospital to restore them to competency.<sup>6</sup>

The competence to stand trial process has consumed so many resources because it is perhaps the only moment in a criminal prosecution where a defendant's mental health cannot be ignored and the state, if it wants to continue to prosecute, must provide some basic level of treatment.<sup>7</sup> But that treatment is not long-term care and is only concerned with restoring a defendant to a minimal baseline that allows them to be prosecuted. As Dr. Katherine Warburton, the medical director of California's Department of State Hospitals has explained:

The most tragic aspect of this crisis is that the massive efforts to admit and restore patients are ultimately a waste of expensive clinical resources without improving the trajectory of a person's life. After returning to jail and standing trial, they are most likely worse off: either released without resources to the same circumstances that precipitated arrest or incarcerated.<sup>8</sup>

## **2. California's incompetent to stand trial population**

The below data surveys a variety of characteristics about the people admitted to the state hospital for competency restoration. This data demonstrates that the current competency restoration process is unlikely to result in any long-term benefit to public safety, the community, or an individual's mental health.

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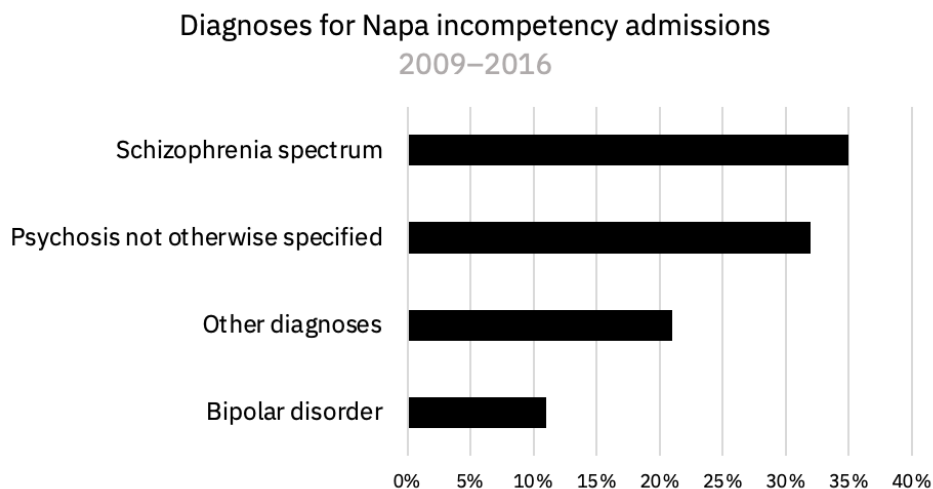
<sup>5</sup> IST Workgroup Report at 9 (2014 data); DSH, *2022–23 Governor's Budget Proposal*, at 19 (projected June 2022 numbers).

<sup>6</sup> *Stiavetti v. Clendenin*, 65 Cal.App.5th 691 (Ct. App. 2021).

<sup>7</sup> See Penal Code § 1367(a).

<sup>8</sup> Fader-Towe and Kelly, *Just and Well: Rethinking How States Approach Competency to Stand Trial* at viii.

About a quarter of the people in California’s state hospitals are there for competency restoration.<sup>9</sup> In a study of more than 3,000 people at Napa State Hospital from 2009 to 2016, researchers found that the vast majority of people admitted to the state hospital for competency restoration are diagnosed with serious mental health issues, with a large majority having a diagnosis on the schizophrenia spectrum, bipolar disorder, or other psychosis.<sup>10</sup>



Source: McDermott, Warburton, and Auletta-Young, *A Longitudinal Description of Incompetent to Stand Trial Admissions to a State Hospital*, Table 1.

The overwhelming majority of patients in the same study — 87% — were ultimately restored and returned to court as competent.<sup>11</sup> The patients who could not be restored were most likely to have a diagnosis of schizophrenic-spectrum disorder or a cognitive disorder. Over 40% of those with a cognitive disorder were found unlikely to regain competence.<sup>12</sup>

<sup>9</sup> DSH, *2022-23 Governor’s Budget Proposal*, at 19.

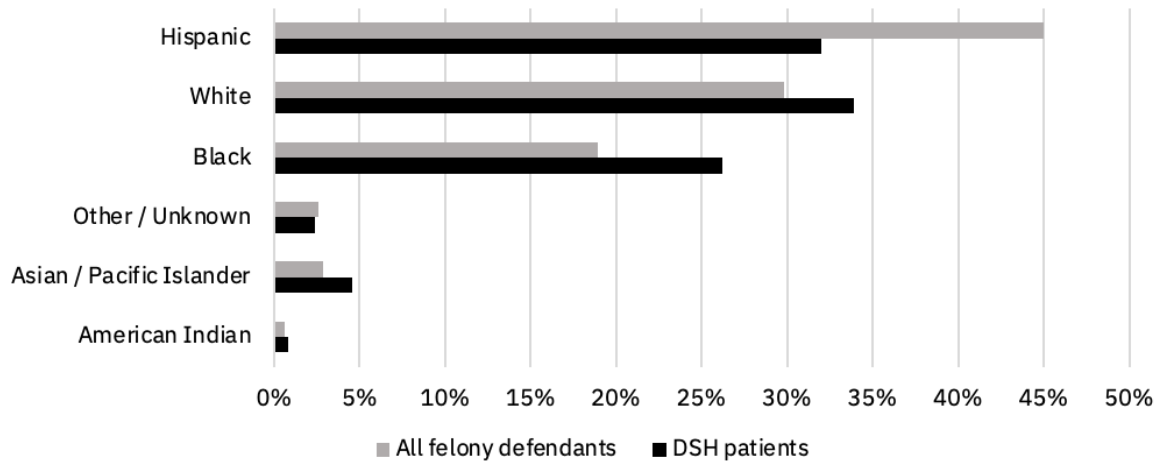
<sup>10</sup> Barbara E. McDermott, Katherine Warburton, and Chloe Auletta-Young, *A Longitudinal Description of Incompetent to Stand Trial Admissions to a State Hospital*, *CNS Spectrums*, (25): 228, Table 1 (2020).

<sup>11</sup> *Id.* at 226.

<sup>12</sup> *Id.* at 230.

The majority of people admitted to DSH for competency restoration are people of color. The demographics of this population differ from the overall felony defendant population with some groups overrepresented and others underrepresented in the competency population.

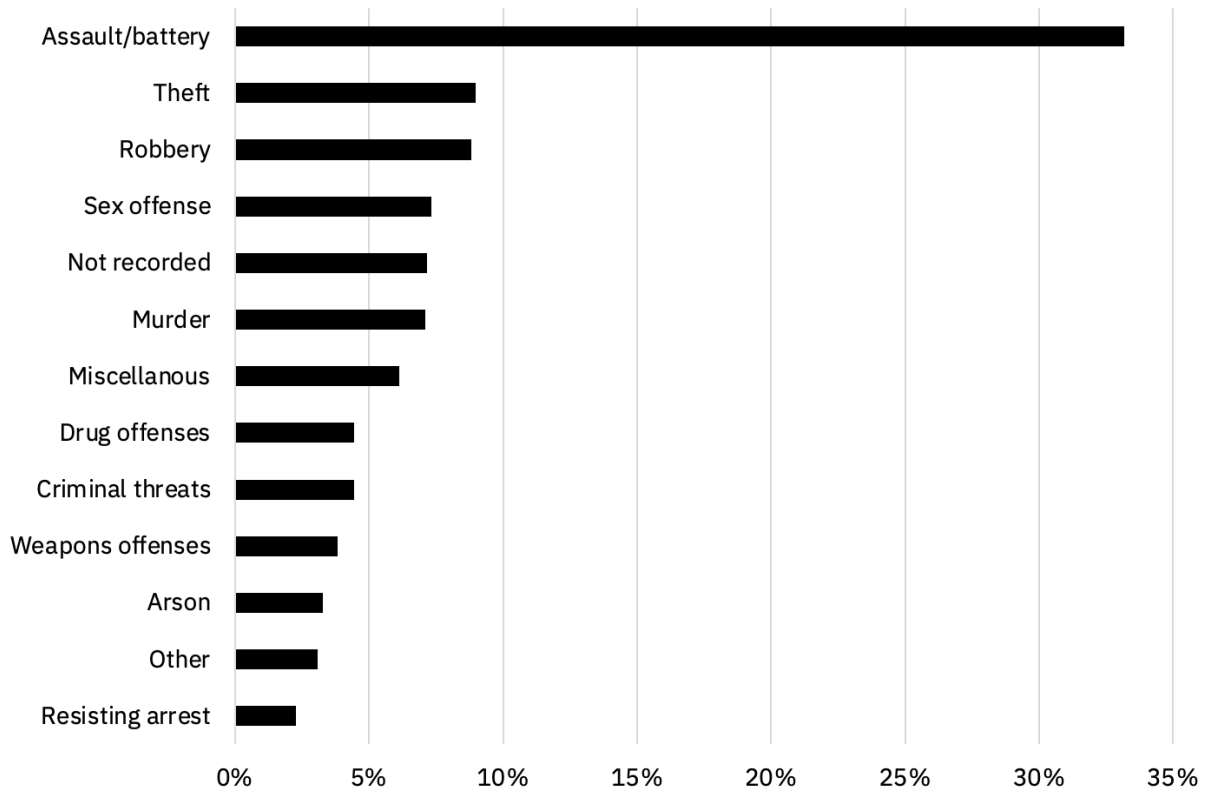
Race of felony defendants and DSH incompetency patients  
2020–21



Source: Felony defendant data is from 2020 and sourced from Judicial Council of California, *Disposition of Criminal Cases According to the Race and Ethnicity of the Defendant*. State hospital data is from DSH, *2022–23 Governor’s Budget Proposal*, at 22, and covers FY 2020–21.

Assault, theft, and robbery are the three most commonly charged offenses for people sent to the state hospital for competency restoration. People admitted with these charges were also more likely to have had extensive arrest histories.<sup>13</sup>

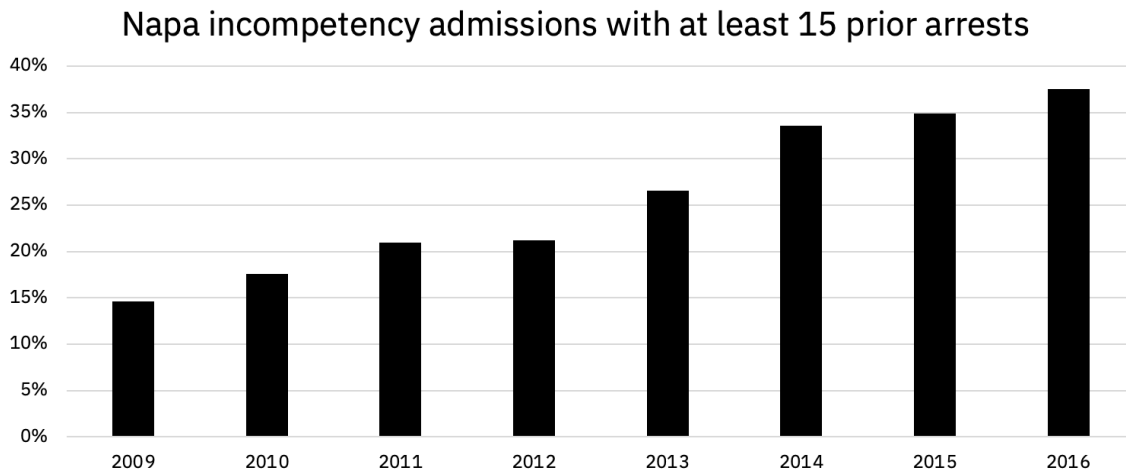
Charged offenses for Napa incompetency admissions  
2009–2016



Source: McDermott, Warburton, and Auletta-Young, *A Longitudinal Description of Incompetent to Stand Trial Admissions to a State Hospital* at 226. “Other” offenses include kidnapping, white collar crimes, major driving offenses, and escape. “Miscellaneous” offenses include vandalism and disorderly conduct.

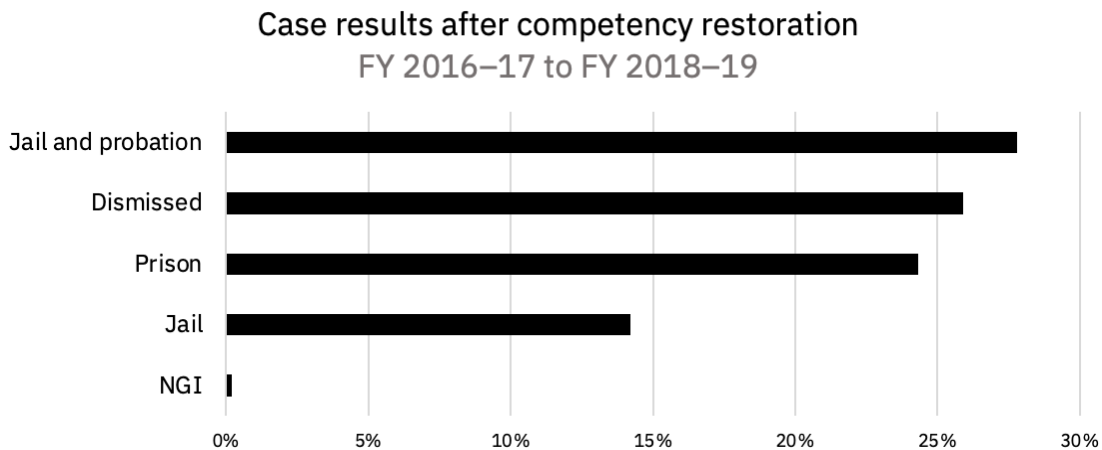
<sup>13</sup> *Id.* at 232.

The number of people admitted to the state hospital for competency restoration who have at least 15 prior arrests has increased significantly in recent years.<sup>14</sup>



Source: McDermott, Warburton, and Auletta-Young, *A Longitudinal Description of Incompetent to Stand Trial Admissions to a State Hospital*, Table 1.

Three-quarter of patients who were restored to competency returned to their communities, either having served short sentences or having their cases dismissed their return to court.<sup>15</sup> A large majority of patients (70%) were rearrested within three years of discharge from DSH.<sup>16</sup>



Source: IST Workgroup Report at 11. NGI = not guilty by reason of insanity. Committee staff confirmed that case results were unknown for approximately 8% of cases.

<sup>14</sup> *Id.* at 229.

<sup>15</sup> IST Workgroup Report at 11.

<sup>16</sup> *Id.* Using data from the California Department of Justice, DSH found that the three-year rearrest rate was 69% for patients discharged in FY 2014–15, 72% in FY 2015–16, and 71% in FY 2016–17.

### 3. California's competency process

Constitutional due process requires that every criminal defendant understand the nature of the proceedings against them and be able to assist in their defense.<sup>17</sup> People who are unable to do these things because of a mental health condition or developmental disability are incompetent to stand trial and cannot be prosecuted until they are “restored” to competency.

Competency to stand trial — whose requirements date back to at least the 1700s<sup>18</sup> — focuses solely on the defendant's present condition. Their mental state at the time of the offense is not legally relevant. A person's mental state during the crime may allow them to be eligible for mental health diversion<sup>19</sup> or to enter a plea of not guilty by reason of insanity, although this latter outcome is rare.<sup>20</sup>

A doubt about a person's competency may be raised at any time in a criminal case.<sup>21</sup> Once a doubt is raised, the court suspends the legal proceedings and the person's competency is evaluated by a mental health expert, also called an “alienist,” who submits a report to the court.<sup>22</sup> (Appendix A provides a more detailed overview of the process.)

On a felony charge, the court holds a hearing and if the person is found incompetent, the court determines whether the person should be treated in an inpatient facility run by the Department of State Hospitals or in an outpatient program in the community.<sup>23</sup> If someone cannot be restored to competency within two years on a felony charge, then the person is sent back to court and is either released or referred for a civil conservatorship investigation.<sup>24</sup> In a mental health conservatorship, a judge appoints a person (often the Public Guardian) to be responsible for an adult with serious mental health issues who cannot

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<sup>17</sup> See, e.g., *Drope v. Missouri*, 420 U.S. 162, 171–72 (1975); *People v. Superior Court (Marks)*, 1 Cal. 4th 56, 69 (1991).

<sup>18</sup> See, e.g., *Drope*, 420 U.S. at 171 (citing an influential 18th century treatise); *Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899) (same).

<sup>19</sup> See Penal Code § 1001.36.

<sup>20</sup> Under California law, a person is not guilty by reason of insanity when because of a mental disease or defect they were incapable of knowing or understanding the nature of their act or distinguishing between right and wrong at the time of the commission of the crime. Penal Code § 25(b). This core legal standard, known as the M’Naghten rule after a 19th century British defendant, was set by Proposition 8 in 1982. It cannot be changed except by a new voter initiative or a two-thirds vote in the Legislature.

<sup>21</sup> Penal Code § 1368(a).

<sup>22</sup> Penal Code § 1369(a)(1).

<sup>23</sup> Penal Code § 1370(a)(1)(B)(i).

<sup>24</sup> Penal Code § 1370 et seq. This time period begins as soon as a court concludes someone is incompetent to stand trial. Penal Code § 1370(c)(1).

adequately care for themselves, making decisions such as where the person should live and what mental health treatment they should receive.<sup>25</sup>

As noted, the goal of competency restoration is to prepare someone to participate in and understand criminal court proceedings — not to provide individualized long-term treatment.<sup>26</sup> Competency restoration includes education on a person’s criminal charges, plea bargaining, the various players in the courtroom (e.g. judge, jury, defense attorney, prosecutor), the role of evidence in a trial, and certain constitutional rights.<sup>27</sup>

## **B. Recent developments in California’s competency system**

### **1. Litigation about delays for admission to the state hospital**

States across the country report significant increases in people referred for competency evaluations and the number of people found incompetent to stand trial.<sup>28</sup> The number of people found incompetent increased 72% nationwide from 1999 to 2014.<sup>29</sup> Research suggests that 20–40% of those referred for competency evaluations are found to be incompetent.<sup>30</sup>

Experts do not agree on why there has been a sharp increase in competency evaluations, but possible explanations include an ineffective public mental health system and use of the competency process to access mental health services.<sup>31</sup>

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<sup>25</sup> In California, conservatorships are authorized under the Lanterman-Petris- Short (LPS) Act for persons with specific mental health disorders who are “gravely disabled.” Welfare & Institutions Code § 5000 et seq. A person is gravely disabled when they are no longer able to provide for their own food, clothing or shelter because of a mental health disorder. Welfare & Institutions Code § 5008(h)(1)(A). A conservatorship lasts for one year and may be renewed annually. On average, LPS patients represent 14% of the overall patient population at DSH. DSH, *2022–23 Governor’s Budget Proposal*, at 241. A person may also be considered gravely disabled and placed in a “Murphy Conservatorship” when they cannot be restored to competency and are charged with a violent felony, among other factors. Welfare & Institutions Code § 5008(h)(1)(B). On average, Murphy Conservatorship patients represent only 2% of patients at DSH. DSH, *2022–23 Governor’s Budget Proposal*, at 243.

<sup>26</sup> IST Workgroup Report at 6.

<sup>27</sup> *Id.*

<sup>28</sup> Fader-Towe and Kelly, *Just and Well: Rethinking How States Approach Competency to Stand Trial* at 2.

<sup>29</sup> Amanda Wik, Vera Hollen, and William Fisher, *Forensic Patients in State Psychiatric Hospitals: 1999–2017*, National Association of State Mental Health Program Directors, 40 (2017).

<sup>30</sup> Gowensmith, *Resolution or Resignation: The Role of Forensic Mental Health Professionals Amidst the Competency Services Crisis* at 2.

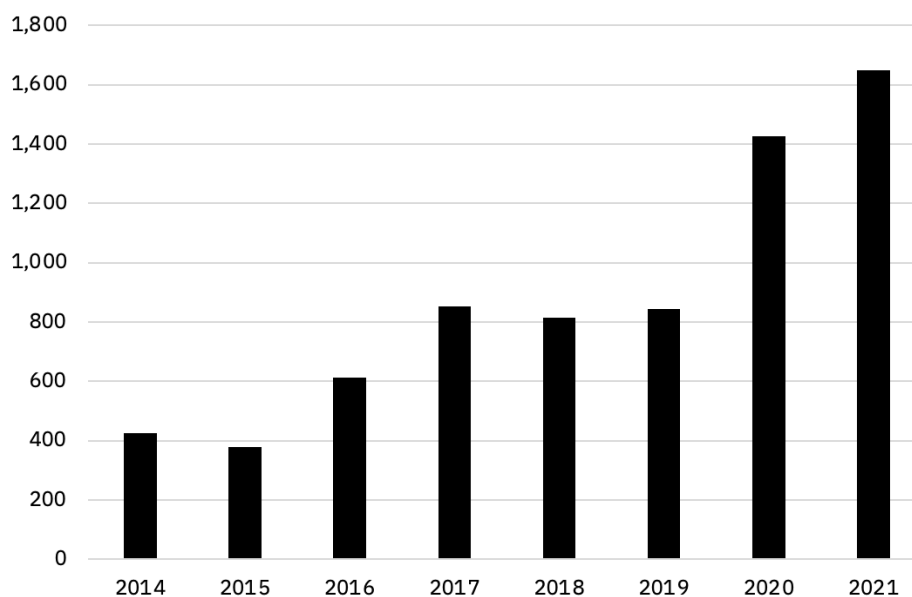
<sup>31</sup> McDermott, Warburton, and Auletta-Young, *A Longitudinal Description of Incompetent to Stand Trial Admissions to a State Hospital* at 233; Gowensmith, *Resolution or Resignation: The Role of Forensic Mental Health Professionals Amidst the Competency Services Crisis*, at 3–4.



At least a dozen states, including California, have been sued for failing to conduct the competency restoration process within a “reasonable period of time” as required by the United States constitution.<sup>32</sup> Some states have struggled to comply with court orders — for example, in Washington, despite increases in capacity, the overall number of referrals has continued to increase and the state has paid more than \$100 million in contempt fines.<sup>33</sup> In California, an appellate court recently ruled in *Stiavetti v. Clendenin* that the state’s long waitlist for competency restoration treatment violates the due process rights of people found incompetent to stand trial.<sup>34</sup>

In California, in 2014, DSH received 2,942 competency referrals and there were 426 people on the waitlist. The waitlist increase in subsequent years — with the COVID-19 pandemic exacerbating the problem — and DSH projects the waitlist will have 1,921 people by the end of next month.<sup>35</sup> The waitlist increased even as DSH added 1,380 beds between 2013 and 2021 through a combination of state hospital beds, jail-based competency beds, and community beds.<sup>36</sup>

DSH waitlist for competency restoration



Source: IST Workgroup Report at 9 (2014–2020). The 2021 waitlist is as of August 30, 2021, and is from DSH, *2022–23 Governor’s Budget Proposal and Estimates*, 15 (Jan. 2022).

<sup>32</sup> In *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), the United States Supreme Court held that due process requires that a person who is incompetent to stand trial “cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.”

<sup>33</sup> DSH, *2022–23 Governor’s Budget Proposal*, at 215.

<sup>34</sup> *Stiavetti v. Clendenin*, 65 Cal.App.5th 691, 737 (Ct. App. 2021).

<sup>35</sup> DSH, *2022–23 Governor’s Budget Proposal*, at 19.

<sup>36</sup> IST Workgroup Report at 12.

In 2017, the average number of days spent on the waitlist between the trial court's placement order and admission to a DSH facility was 86.<sup>37</sup> This time has likely increased as the number of patients on the waitlist has continued to grow. The time spent on the waitlist is in addition to the time needed for restoration; in 2015–16 the average length of stay for a person restored to competency at the state hospital was 144 days.<sup>38</sup>

In *Stiavetti*, the California Court of Appeal ordered that DSH must begin substantive restoration services within 28 days of being placed on the list.<sup>39</sup> However, the court's order is being implemented in phases, allowing DSH until February 2024 to implement the 28-day timeline.<sup>40</sup>

## 2. Ongoing efforts to solve the problem

California has taken several steps to try to reduce the waitlist for competency restoration at the state hospital:

- **Felony Mental Health Diversion Pilot:** The Budget Act of 2018 granted DSH \$100 million to establish the Felony Mental Health Diversion pilot program. Twenty-four counties have committed to serving up to 820 felony patients over the course of the three-year pilot program. As of June 30, 2021, 458 people have been diverted.<sup>41</sup> The Budget Act of 2021 allocated an additional \$17 million to expand existing contracts and \$29 million for new programs.<sup>42</sup> These diversion programs use the existing mental health diversion framework in Penal Code section 1001.36, but are targeted at people with a diagnosis of schizophrenia, schizoaffective disorder, or bipolar disorder and who have been or have the potential to be found incompetent.<sup>43</sup>
- **Expansion of Jail-Based Competency Treatment (JBCT):** Jail-based competency treatment programs have proliferated in the last decade and are active in several states, including California.<sup>44</sup> DSH contracts with 21

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<sup>37</sup> *Stiavetti v. Clendenin*, 65 Cal.App.5th 691, 700 (Ct. App. 2021).

<sup>38</sup> Department of State Hospitals, *Measures of Patient Outcomes — IST Summary* (June 2017).

<sup>39</sup> *Id.* at 730.

<sup>40</sup> DSH, *2022–23 Governor's Budget Proposal*, at 214.

<sup>41</sup> IST Workgroup Report at 18.

<sup>42</sup> *Id.*

<sup>43</sup> Welfare & Institutions Code § 4351(c)(1)(A).

<sup>44</sup> Jerry L. Jennings, Kevin Rice, and Christopher Baglio, *Jail-based Competency Treatment Comes of Age: Multi-site outcomes and Challenges to the Implementation of an Evidence-based Forensic Continuum*, Behavioral Sciences & the Law, 39(1): 86 (2021); see also Mental Health Services Oversight & Accountability Commission, *Together We Can: Reducing Criminal Justice Involvement for People with Mental Illness*, 73–75 (November 2017) (recommending expanding jail-based and community-based restoration treatment).

counties to provide restoration of competency services in county jails.<sup>45</sup> In 2020–21, 924 patients were restored to competency in JBCT programs with an average length of stay of 71 days.<sup>46</sup>

A JBCT program is designed to treat people in the jail who have a stronger likelihood of being quickly restored, although the programs and environments vary significantly. Some jails provide intensive daily treatment with individual and group-based activities in a physical setting designed to be more therapeutic, while other, smaller jails can only provide much more limited services in a traditional correctional setting.<sup>47</sup> The advantages of JBCT are quicker restoration periods and less time spent waiting for restoration treatment, while the fundamental disadvantages are the restrictive, non-therapeutic correctional setting and inability to address all of the patient's mental health needs.<sup>48</sup>

- **Creation of Community-Based Restoration in Los Angeles County:** In 2018, in collaboration with Los Angeles County Office of Diversion and Reentry, DSH created a program to restore people charged with felonies in community mental health treatment settings.<sup>49</sup> People who would otherwise be treated in a state hospital or JBCT program are instead placed in an acute hospital, locked facility, or unlocked residential facility with wraparound services. As of November 2021, the program currently contracts with DSH for 515 beds.<sup>50</sup>

According to the most recent data, 704 people have been conditionally released to community-based treatment since July 2018.<sup>51</sup> Their rearrest rate is 17%, which is much lower than the 49% for people with serious mental disorders released from jail in the same time period.<sup>52</sup>

- **Competency Re-Evaluation:** In the 2021 Budget Act, DSH received funding for a pilot project to re-evaluate the competency status and suitability for diversion or community-based treatment of people on the waitlist. In the first five months DSH re-evaluated 84 people and determined 24 of them (approximately 28%) were now competent.<sup>53</sup>

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<sup>45</sup> IST Workgroup Report at 13.

<sup>46</sup> DSH, *2022-23 Governor's Budget Proposal*, at 233.

<sup>47</sup> *Id.* at 85.

<sup>48</sup> *Id.* at 86–88.

<sup>49</sup> DSH, *2022-23 Governor's Budget Proposal*, at 186.

<sup>50</sup> *Id.*

<sup>51</sup> Office of Diversion & Reentry, *Failure to Appear and Rearrest Rates for ODR Clients Released Pretrial*.

<sup>52</sup> *Id.*

<sup>53</sup> DSH, *2022-23 Governor's Budget Proposal*, at 208.

### 3. Changes to the competency process for misdemeanor cases

Beginning in 2022, as a result of SB 317 (Stern), California no longer attempts to restore to competency people charged with misdemeanors. If a person is found to be incompetent on a misdemeanor charge, a court may now only refer the person to diversion (under Penal Code section 1001.36), refer for a conservatorship investigation or assisted outpatient treatment, or dismiss the charges.<sup>54</sup> There is no attempt to restore them to competency to allow a prosecution to continue. Before this change in the law, counties — not the state hospital — were responsible for restoring to competency people charged with misdemeanor offenses. Committee staff were unable to locate any data on how many people with misdemeanor cases are found incompetent every year.

### 4. Pending proposals

In 2021, the Legislature charged DSH and the Health and Human Services Agency to assemble a workgroup to identify solutions to the competency backlog.<sup>55</sup> Convening stakeholders from state agencies, local government, the justice system, and patient and family member organizations, the Incompetent to Stand Trial Workgroup released a report in November 2021, which identified various policy, legal, and fiscal solutions.<sup>56</sup> While the recommendations focused on advancing alternatives to inpatient placement at DSH and increasing diversion and treatment opportunities, the specific recommendations did not reflect a consensus among the various stakeholders.

DSH has recently requested additional funding to support the implementation of some solutions that were recommended by the IST Workgroup. Among others, DSH has proposed the following via budget Trailer Bill Language this year:<sup>57</sup>

- Create a presumption for community-based restoration of competency. DSH estimates that 60–70% of people found incompetent to stand trial are eligible for services in a community-based program.<sup>58</sup> If passed, the law would require that a court must first consider placing a person deemed incompetent to stand trial in an available outpatient treatment program unless the court finds that clinical needs or public safety warrant inpatient placement.

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<sup>54</sup> Penal Code § 1370.01(b). In Assisted Outpatient Treatment (AOT), also known as Laura’s Law in California, a court may order mental health treatment for people who have a history of repeated hospitalization or incarceration and have a history of failing to comply with treatment.

<sup>55</sup> Welfare and Institutions Code § 4147.

<sup>56</sup> IST Workgroup Report at 3.

<sup>57</sup> Department of Finance, Trailer Bill Language, Health & Human Services: Incompetent to Stand Trial Workgroup Proposals (March 2022) (proposed statutory amendments); Department of State Hospitals, 2022–23 IST Solutions Proposal (narrative summary of proposals).

<sup>58</sup> IST Workgroup Report at 4.

- Expand the jail-based competency program infrastructure.
- Expand community-based restoration programs beyond Los Angeles.
- Make more beds available in the state hospitals by using the state's forensic conditional release program (CONREP) more effectively. CONREP allows people committed to the state hospital as part of a criminal proceeding (e.g. not guilty by reason of insanity acquittees and offenders with a mental health disorder) to receive treatment in the community under supervision. If more people are released to CONREP, more state hospital beds would be available for competency restoration.
- Establish county-specific growth caps on referrals so that if a county exceeds their baseline rate it will be responsible for a share of costs.

In addition to these proposals from DSH, other legislation, AB 1630 (Weber), would shift the burden of proof at competency proceedings and require the prosecution to prove competence to stand trial if the alienist finds the defendant incompetent to stand trial. It would also require an alienist to evaluate a person's eligibility for diversion while making a competency determination.

Finally, the pending proposal to create CARE Courts in California — which would allow a court to order mental health treatment in some situations — would not have a direct impact on the competency process.<sup>59</sup> CARE Court is not targeted at people with a pending felony case, though if the process is successful, its focus on people with diagnoses of schizophrenia spectrum or other psychotic disorders would likely reduce that population's involvement in the criminal legal system and indirectly reduce pressure on the competency process.<sup>60</sup>

### **Areas for Further Exploration**

The Committee may wish to consider the following possible proposals to address the issues raised in this memorandum:

- **Better target resources by eliminating restoration for more cases.** In 2022 California stopped competency restoration for people charged with misdemeanor offenses and instead considers them for mental health diversion or other existing treatment options. This approach, which is

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<sup>59</sup> See California Health and Human Services Agency, *CARE Court Framework*, March 2022.

<sup>60</sup> ABC10, *Extended Interview: Dr. Ghaly Discusses CARE Court*, 14:48–17:00, April 15, 2022 (discussion of competency process and CARE Court by the Secretary of California Health and Human Services Agency); SB 1338 (Umberg); AB 2830 (Bloom). The proposed legislation would also add CARE Court as a treatment option in misdemeanor cases where someone has been found incompetent to stand trial. See, e.g., Section 3 of AB 2830.

widely recommended by national experts,<sup>61</sup> could be expanded to other types of cases so that competency restoration is reserved for cases where the state has a strong interest in pursuing prosecution.

- **Impose statutory timeframes at every step of the competency process.** Delay is possible at multiple points during the competency process, including waiting for an evaluation, waiting for the written report, waiting for a hearing, waiting for a placement decision, and waiting for restoration treatment to begin.<sup>62</sup> California does not have statutory timelines for most of these steps.<sup>63</sup>
- **Allow judges to declare certain individuals unrestorable at the outset.** Restoration to competency is impossible in some cases, such as when a defendant has a cognitive disorder like dementia. But current law does not clearly allow a court to make this determination without the expense and delay of a commitment to the state hospital. Allowing courts to have the power to determine someone cannot be restored to competency may be a way to reduce unnecessary state hospital commitments and focus on the long-term outcome for the defendant.

### Conclusion

There is widespread consensus that California's competency to stand trial process requires substantial improvements to create positive outcomes for public safety and individual health. While various entities in the state have made significant efforts to address this problem, the Committee should consider what more can be done to improve California's competency restoration process.

Respectfully submitted,

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Senior Staff Counsel

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<sup>61</sup> Fader-Towe and Kelly, *Just and Well: Rethinking How States Approach Competency to Stand Trial* at 17–18; Schwermer, *Leading Reform: Competence to Stand Trial Systems*, at 3–4.

<sup>62</sup> Schwermer, *Leading Reform: Competence to Stand Trial Systems*, at 10–11; Gowensmith, *Resolution or Resignation: The Role of Forensic Mental Health Professionals Amidst the Competency Services Crisis*, at 7.

<sup>63</sup> For example, there is no timeline for the completion of a competency evaluation after it is ordered by the court and the range in practice is anywhere between 1 and 8 weeks. A majority of states, however, set a specific time frame to complete the competency evaluation and the national average is 31 days. Gowensmith, *Resolution or Resignation: The Role of Forensic Mental Health Professionals Amidst the Competency Services Crisis*, at 8 (noting that a too-short turnaround time for completing evaluations may compromise the validity of the evaluation).

## **Appendix A**

### **The process for evaluating and restoring competency**

1. A doubt about competency is raised by defense counsel or the court:
  - A doubt may be raised at any time before judgment and also during proceedings for violations of probation, post-release community supervision, or parole.<sup>64</sup>
  - All criminal proceedings are suspended until competency is determined.
2. The court assigns a mental health expert or “alienist” to evaluate the defendant.<sup>65</sup>
  - The minimum education and training standards of alienists are set by the Department of State Hospitals.<sup>66</sup>
  - The alienist evaluates the defendant’s competency, whether treatment with antipsychotic medication is medically appropriate, and whether medication will restore the defendant to competency.<sup>67</sup> The alienist submits a written report to the court advising the court on the person’s competency to stand trial.<sup>68</sup>
  - There is no statutory timeframe for this process.
3. The court holds a competency hearing and makes a finding about competency:
  - If the person is found competent, criminal proceedings resume.<sup>69</sup>
  - If the person is found incompetent to stand trial on a *misdemeanor*:
    - The court may order that the person enter diversion for one year, dismiss the case, or refer for a conservatorship investigation or assisted outpatient treatment.<sup>70</sup>
  - If the person is found incompetent to stand trial on a *felony*:
    - The criminal case remains suspended.<sup>71</sup>
    - Within 15 court days, the community program director from the local CONREP program or other entity designated by DSH<sup>72</sup>

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<sup>64</sup> Penal Code § 1368(a).

<sup>65</sup> The court will appoint one mental health expert; however, if the defendant is contesting their competency the court will appoint two experts. Penal Code § 1369(a)(1).

<sup>66</sup> Penal Code § 1369(h)(1).

<sup>67</sup> Penal Code § 1369(a)(2).

<sup>68</sup> The contents of the report itself are guided by California Rule of Court 4.130(d)(2).

<sup>69</sup> Penal Code § 1370(a)(1)(A).

<sup>70</sup> Penal Code § 1370.01(b).

<sup>71</sup> Penal Code § 1370(a)(1)(B).

<sup>72</sup> Penal Code § 1370(f).

submits a report to the court recommending placement for restoration treatment, either inpatient (state hospital or jail-based competency program) or outpatient.<sup>73</sup>

- If inpatient restoration is recommended, the person is placed on a statewide waitlist for a DSH placement.
- The court may also grant diversion to a person deemed incompetent to stand trial pursuant to Penal Code section 1001.36.<sup>74</sup>
- There is no statutory timeframe within which a person must be placed or when restoration services must begin, although an appellate court recently set a deadline of 28 days, which will be implemented in phases.<sup>75</sup>
- The court will, however, set a maximum commitment date at the hearing, which is the maximum sentence or two years, whichever term is shorter.<sup>76</sup>

#### 4. Competency restoration for a felony:

- The medical director of the restoration program sends a written progress report to the court within 90 days.<sup>77</sup>
- The competency process ends when the person is found competent to stand trial or the person is unable to or unlikely to be restored by the maximum date (at most, two years).

#### 5. Outcomes for a felony:

- If restored to competency, the criminal case resumes; however, some people may subsequently decompensate and then cycle through the process again.
- If not restored by the maximum date, the court can dismiss charges or refer for conservatorship investigation (either a LPS or Murphy conservatorship).<sup>78</sup>

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<sup>73</sup> Penal Code § 1370(a)(2)(A).

<sup>74</sup> Penal Code § 1370(a)(1)(B)(iv).

<sup>75</sup> *Stiavetti v. Clendenin*, 65 Cal.App.5th 691, 730 (Ct. App. 2021).

<sup>76</sup> Penal Code §§ 1370(a)(3); 1370(c)(1).

<sup>77</sup> Penal Code § 1370(b)(1).

<sup>78</sup> Penal Code § 1370(c)(3); 1370(d).