

Staff Memorandum 2022-09
Competency to Stand Trial and Related Matters
Updates on Staff Research and Preliminary Proposals

At its May 2022 meeting, the Committee discussed competency to stand trial and related matters. This memorandum presents brief research updates and four proposals for further discussion on those topics.

Summary Updates on Staff Research

The Committee directed staff to research a number of topics, as indicated below:

1. People with developmental disabilities who are found incompetent to stand trial

The process for determining competency for a person with a developmental disability is largely the same as the process for a person with serious mental illness. A person found incompetent to stand trial with a developmental disability¹ is committed to the state Department of Developmental Services (DDS), rather than the Department of State Hospitals (DSH).²

The overall number of commitments to DDS is much smaller than DSH: between June 2021 and June 2022, DDS received about 6 commitments a month while DSH received an average of 400 referrals per month. The current average wait time to be placed at a DDS facility is 27 days.³

2. Racial disparities in the competency to stand trial population

The majority of people admitted to DSH for competency restoration are people of color. In Fiscal Year 2020–21, the incompetent to stand trial population at DSH was 33% white, 32% Latino, 26% Black, 3% Asian, 2% unknown, 1% native Hawaiian or other Pacific Islander, and less than 1% American Indian.⁴

The demographics of this population differ from the overall felony defendant population.⁵ Most notably Black people accounted for 26% of the incompetent to stand trial population at DSH yet only accounted for 18% of felony prosecutions

¹ A developmental disability is a disability that begins before a person is 18 years old and continues, or is expected to continue, for an indefinite period of time. It includes intellectual disability, cerebral palsy, epilepsy, autism, and other disabling conditions closely related to intellectual disability. It does not include a disability that is solely physical in nature. Penal Code § 1370.1(a)(1)(H); Welf. & Inst. Code § 4512(a)(1).

² Penal Code § 1370.1.

³ Data on file with Committee staff.

⁴ Department of State Hospitals, *2022–23 Governor’s Budget Proposal and Estimates*, 22 (Jan. 2022).

⁵ Staff Memorandum 2022-04 has fuller statistics at page 4.

in 2020.⁶ Statewide demographics of people referred for competency evaluations or found incompetent do not appear to exist.

Staff was also unable to locate any direct research on the cause of racial disparities in the incompetent to stand trial population. The demographic differences between the overall felony defendant and incompetent to stand trial populations may reflect differences in community rates of diagnosis and engagement with care. People of color have less access to quality mental health care.⁷ Black and Latino people have higher rates of unmet need, or needing care but not receiving it, for mental health services than white people in California.⁸ Other research has shown that Black people have higher than expected rates of schizophrenic diagnoses and are prescribed higher doses of antipsychotics, suggesting racial bias in diagnosis and treatment.⁹

3. Mental health roadmap

At the May 2022 meeting, the Committee asked staff to create a visual roadmap of the existing court processes that can address mental health issues. Committee staff are continuing to work on this project.

Preliminary Staff Proposals

After witness testimony at the May 2022 meeting, the Committee discussed several areas in which to make proposals to revise the Penal Code. Below are four preliminary staff proposals for further discussion and analysis by the Committee.

1. Require judges to determine whether restoration to competency is appropriate in felony cases.

Summary Staff Proposal

Require judges who have found defendants incompetent to stand trial in felony cases to determine whether restoration to competency is in the interests of justice. Provide guidance for how judges should make this decision.

⁶ Judicial Council of California, *Disposition of Criminal Cases According to Race and Ethnicity of the Defendant* (Nov. 2021), 5.

⁷ Oona Appel, et. al. *Differential Incarceration by Race-Ethnicity and Mental Health Service Status in the Los Angeles County Jail System*, *Psychiatric Services* 71:8 (Aug. 2020), at 845. For example, in a study of the people enrolled in Medi-Cal managed care plans in California during the 2016–17 fiscal year, white people accessed mental health treatment at about twice the rate of other groups. California DHCS, *Managed Care Performance Monitoring Dashboard Report*, 12 (June 2018).

⁸ Nicole K. Eberhart, et al., *Monitoring Californians' Mental Health: Population Surveillance Reveals Gender, Racial/Ethnic, Age, and Regional Disparities*, RAND Corporation, 5 (2018).

⁹ Appel, *Differential Incarceration by Race-Ethnicity*, at 845.

Current Law

Constitutional due process requires that every criminal defendant be competent to stand trial — meaning they understand the nature of the proceedings against them and can assist in their defense. When a court determines that someone is incompetent to stand trial, the criminal proceeding is suspended unless the person is restored to competency.

Background

Despite the substantial resources expended, the current competency restoration process does not result in any long-term benefit to public safety or an individual's mental health. It has also resulted in a court order directing the state to reduce the amount of time it takes to commit someone to the state hospital for competency restoration.

As Dr. Katherine Warburton, Medical Director for DSH told the Committee, three-quarters of patients who were restored to competency returned to their communities, either having served short sentences or having their cases dismissed upon their return to court.¹⁰ Less than a quarter went on to serve a state prison sentence.¹¹ In other words, once a person is restored to competency and their case is adjudicated after lengthy delays, they are returned to the community without any long-term treatment plan, with many left to cycle through the process again.¹² Indeed, a large majority of patients (70%) were rearrested within three years of discharge from DSH.¹³

Given the limited benefits to both public safety and long-term treatment for people found incompetent, many experts, including some at the May 2022 meeting,¹⁴ have recommended limiting the current process and requiring restoration only when there is a strong state interest in doing so.¹⁵

California recently made a similar change for misdemeanor cases. In 2021, SB 317 (Stern) eliminated competency restoration for people charged with misdemeanors and required courts to consider mental health diversion instead.

¹⁰ Incompetent to Stand Trial Solutions Workgroup, *Report of Recommended Solutions*, 11 (Nov. 2021)

¹¹ *Id.*

¹² Hallie Fader-Towe and Ethan Kelly, *Just and Well: Rethinking How States Approach Competency to Stand Trial*, Council of State Governments Justice Center, 6 (Oct. 2020).

¹³ IST Workgroup Report at 11. 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.

¹⁴ At the May 2022 meeting Judge Steven Leifman recommended that California limit competency restoration to serious offenses as they did in Miami-Dade County. The county created a community treatment program for people charged with low-level felonies, who do not have significant histories of violent felony offenses, and are unlikely to face incarceration if convicted.

¹⁵ See generally, *Just and Well: Rethinking How States Approach Competency to Stand Trial*.

If a person is not suitable for diversion or rejects it, the court may refer the individual for assisted outpatient treatment or a conservatorship.¹⁶ The new system created by SB 317 does not affect the statewide waitlist at DSH since competency restoration for misdemeanors has always been the responsibility of individual counties and not DSH.

Similarly, a recently-passed budget trailer bill requires that, beginning July 1, 2023, every person found incompetent to stand trial in a felony case must be considered for diversion or community-based restoration.¹⁷ A court may nonetheless find that the risk to community safety or a patient's clinical needs warrant placement at a DSH facility. And even if a person is restored to competency in the community, the state may continue to prosecute them once restored.¹⁸

California could take an approach similar to SB 317 in the felony context and build on the new presumption for community treatment by requiring judges to determine whether restoration to competency is in the interests of justice for almost all cases. Unlike misdemeanor cases where the court has no discretion to order restoration, however, the court would have the option to order restoration if it concluded it was appropriate. The only cases where a judge would not make this determination would be for offenses that are excluded under the existing mental health diversion statute, which includes murder and numerous sex offenses.¹⁹

When weighing the interests of justice in these cases, the court should consider whether a weapon was involved, whether an injury occurred and the nature of such injury, whether the person is likely to face incarceration if convicted, the likely length of a term of incarceration, and other relevant circumstances.

In addition, a presumption in favor of not restoring a person to competency would apply in three circumstances:

- Less serious felony offenses that result in a jail sentence (known as Penal Code § 1170(h) offenses).
- Wobbler offenses (those that can be charged as either a felony or misdemeanor).

¹⁶ See Penal Code § 1370.01(b).

¹⁷ Pen. Code § 1370(a)(2)(A)(ii) (created by SB 184 (Committee on Budget and Fiscal Review) (2022)).

¹⁸ *Id.*

¹⁹ Penal Code § 1001.36(b)(2).

- Assault and robbery offenses, two of the three most commonly charged offenses for people sent to the state hospital for competency restoration.²⁰ In California, these offenses can encompass a broad range of behavior, including conduct charged as misdemeanors in other states.²¹

If the court finds that restoration to competency is not in the interests of justice, the court would then consider whether existing mental health diversion or other interventions, such as assisted outpatient treatment or a civil conservatorship, are appropriate. If someone was not successful in these programs, prosecution could resume once the person is restored.

Restoring a felony defendant to competency only when a court has determined it serves the interests of justice would reduce the number of people committed to the state hospital and increase connections to long-term community mental health treatment through diversion, which would improve public safety and save state and local resources.

Staff Proposal

The Committee should consider recommending that judges be given discretion in felony cases to order competency restoration only when it is in the interests of justice, with guidance for certain cases provided as above.

2. Require judges to determine at the outset whether someone is unlikely to be restored to competency.

Summary Staff Proposal

Require a judge to determine — and court-appointed mental health evaluators to opine — if a person found incompetent to stand trial has a substantial probability of attaining competency within the required time frame.

Current Law

Trial courts must order competency restoration for people found incompetent to stand trial without considering the likelihood they will attain competency, even if the person has a diagnosis for a cognitive disorder such as dementia.

²⁰ 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): 226 (2020).

²¹ As the Committee has noted previously, California's robbery statute is exceedingly broad, particularly in so-called *Estes* robberies where theft from a retail establishment can be treated as robbery if there is even a minor encounter with store personnel. *2020 Annual Report*, Committee on Revision of the Penal Code (Feb. 2021), at 31-32. In some states, the same conduct would be charged as a misdemeanor theft. *Id.* at 35. And as the California Supreme Court has acknowledged, assault offenses similarly cover a wide range of conduct. *People v. Wingo*, 14 Cal.3d 169, 176 (1975).

Background

While DSH estimates that about 90% of people committed for competency restoration are ultimately restored,²² some individuals cannot be restored to competency.²³ Two groups have small chances of being restored — chronically psychotic defendants with histories of lengthy hospitalizations and defendants whose incompetence derives from irremediable cognitive disorders.²⁴ These cognitive disorders can include static or degenerative disorders, such as dementia, traumatic brain injury, or other neurocognitive disorders that cannot be treated with medication.

At least six states require courts to find *at the time of the competency hearing* whether it is reasonably foreseeable the defendant will become competent within the maximum specified timeframe. Some of these states also require the competency evaluator to opine on the likelihood of restorability. If the court determines at the competency hearing that there is no substantial probability of competency, the case is dismissed and/or the defendant is referred for a civil conservatorship.²⁵ These states have recognized that no purpose is served by a person's commitment for restoration if they are incapable of attaining competency.

But trial courts in California do not have the same power. Judges have no ability to find that someone is unlikely to be restored to competency without first requiring some attempt at restoration.²⁶ Similarly, the court-appointed evaluator is only required to provide an opinion on the person's present state of competency to stand trial and whether antipsychotic medication is medically appropriate.²⁷ In those uncommon cases where a person is unlikely or incapable of being restored, the current process results in an unnecessary restoration process and a delay in receiving appropriate treatment and care.

²² 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): 226, Table 1 (2020).

²³ Committee staff are in the process of obtaining more data from DSH, including data on common admission charges, case outcomes, and the number of people found unrestorable at the outset.

²⁴ Douglass Mossman, *Predicting Restorability of Incompetent Criminal Defendants*, *Journal of the American Academy of Psychiatry and the Law*, 35:1, 41 (Feb. 2007).

²⁵ See e.g. Co. Rev. Stat. Ann. § 16-8.5-111; Ken. Rev. Stat. § 504.110; Mich. Comp. Laws Ann. § 330.2031; Neb. Rev. St. § 29-1823(4); Nev. Rev. Stat. § 178.460(4)(d); Oh. Rev. Code § 2945.38(2).

²⁶ A judge may only consider a different outcome once a person has been committed to a treatment facility. Within 90 days after commitment to a treatment facility, the medical director makes a written report to the court concerning the defendant's progress toward recovery of mental competence. If there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future the person is returned to court. Pen. Code § 1370(b)(1).

²⁷ Pen. Code § 1369(a)(2). AB 1630 (Weber), which has not yet passed, would also require the evaluator to provide an opinion on the person's eligibility for diversion.

Staff Proposal

The Committee should consider recommending that at the time of the competency hearing, the court be required to determine whether there is a substantial probability a person will be restored to competency within the required time frame. If not, the court should discharge the defendant and initiate a conservatorship investigation. To aid the court in this determination, the court-appointed evaluator should opine whether it is substantially likely a person will be restored to competency.

3. Set a statutory timeline for the receipt of competency evaluation reports.

Summary Staff Proposal

Impose a mandatory statutory timeframe of 30 days for the court-appointed mental health evaluator to return the competency report to the court.

Current Law

A statutory deadline only exists for one minor step in the competency process.²⁸

Background

Delay is possible at multiple points during the competency process, including waiting for an evaluation, the evaluator's written report, the court hearing, and for restoration treatment to begin.²⁹ During these delays, people may not be receiving necessary and appropriate mental health treatment.

In California, there is no timeline for the completion of a competency evaluation after it is ordered by the court. A recent survey of California counties by the Judicial Council found that this can take from 1 to 12 weeks, with a 4 week average.³⁰

Unlike California, a majority of states set a specific time frame to complete the competency evaluation, with a national average of 31 days.³¹ The American Bar Association recommends a deadline of 28 days and the National Judicial College recommends anywhere between 15 and 30 days.³² California's Incompetent to Stand Trial Workgroup recently also recommended creation of a mandatory time

²⁸ Once a person is found incompetent to stand trial, the community program director (CONREP) has 15 court days to submit a report to the court recommending either inpatient (state hospital or jail-based competency program) or outpatient placement. Penal Code § 1370(a)(2)(A).

²⁹ Neil Gowensmith, *Resolution or Resignation: The Role of Forensic Mental Health Professionals Amidst the Competency Services Crisis*, Psychology, Public Policy, and Law, 25(1), 7 (2019).

³⁰ Marshall Comia, *Incompetent to Stand Trial (IST) Evaluators: Recruitment, Hiring, and Compensation Practices in California's Trial Courts: A Qualitative Analysis of California Courts*, Judicial Council of California, 16 (July 2022).

³¹ *Id.*

³² Gowensmith, *Resolution or Resignation*, at 7.

frame for the appointment of evaluators and receipt of reports.³³ While setting a time frame for this part of the process will likely require courts to hire more evaluators, it is a discrete reform in place in many states that will move people through the competency process more quickly and promote earlier access to appropriate mental health treatment.³⁴

Staff Proposal

The Committee should consider recommending that the court-appointed mental health professional return the competency report within 30 days after the court orders the examination.

4. Fund counties to share data to identify and address “frequent utilizers.”

Summary Staff Proposal

Fund counties to collaborate across multiple systems — such as jails, behavioral health, and emergency healthcare — to identify and improve outcomes for frequent utilizers of these systems.

Current Law

There is no relevant law that requires counties to share or collect information on its frequent utilizers across agencies, but several counties have begun to build this capacity with support from California’s Mental Health Services Oversight & Accountability Commission (MHSOAC).

Background

At the May 2022 meeting, Judge Steven Leifman explained that 97 people in Miami-Dade County were arrested 2,200 times and spent a combined 39,000 days in jail, emergency rooms, state hospitals, and psychiatric facilities over a period of five years, costing the county \$17 million.³⁵

This dynamic shows up across the country: a small number of highly-vulnerable people cycle repeatedly through multiple systems, including jails, emergency rooms, shelters, and other public systems due to underlying behavioral health, housing, and other needs.³⁶ The result for these people, often referred to as high

³³ IST Workgroup at 38.

³⁴ If passed, AB 1630 (Weber) would also require the evaluator to provide an opinion on the person’s eligibility for diversion with the goal of moving the person into diversion more quickly.

³⁵ Report of Criminal Mental Health Project, Eleventh Judicial Circuit, Miami-Dade County, Florida (Dec. 2021).

³⁶ Arnold Ventures, *Early Lessons from Data-Driven Justice Pilot Sites*, 1 (June 2021). Some California specific studies: Elsa Augustine and Evan White, *High Utilizers of Multiple Systems in Sonoma County*, California Policy Lab, 3, 7 (July 2020); Long Beach Justice Lab, *The Justice Lab 2019 Year End Report*, 2 (2019); Sonya Shadravan, Dustin Stephens, Oona Appel, and Kristen Ochoa, *Cross-Sectional Study of Homeless High Service Utilizers in Los Angeles County Jails: Race, Marginalization and Opportunities for Diversion*, *Ethnicity & Disease* 30:3, 505 (Summer 2020)

or frequent utilizers, is inefficient care that does not lead to stabilization, improved outcomes, or benefits to public safety.³⁷

Local data on how this group cycles through various systems is either not collected at all or collected incompletely. In 2016, a federal initiative started under the Obama Administration — Data-Driven Justice — to encourage city, county, and state governments to collect data on people with mental illness, substance use disorders, and chronic health problems in their local criminal justice and health care systems.³⁸ Arnold Ventures, a criminal-law focused philanthropy, and the National Association of Counties recently relaunched the program as the Familiar Faces Initiative.³⁹ Communities are still in the process of collecting data and reporting outcomes.⁴⁰

The biggest effort underway in California is the Innovation Incubator at the Mental Health Services Oversight & Accountability Commission (MHSOAC), which is providing technical assistance to 10 counties in California to build their capacities to link criminal justice, behavioral health, and social services data.⁴¹

Once equipped with data about their frequent utilizers, communities can take direct and coordinated actions that identify gaps in service and more effectively match frequent utilizers with appropriate services and support. Strategies have ranged anywhere from targeted outreach, linkage to services, and care coordination to the development of crisis stabilization centers.⁴²

Below are some examples where local governments have used the data to target and measure specific interventions:

- In 2011, the City of San Diego launched a program that identified the 25 most frequent users of public services, who cost taxpayers \$3.5 million in hospital and criminal justice costs, and enrolled them in a Housing First program. Three years later the rate of arrests and emergency room visits

³⁷ There is no standardized definition as to what constitutes a high or frequent utilizer. Each locality or study has defined it differently, depending on the data set and population. See e.g. *Data Driven Justice: A Playbook*, at 11-12.

³⁸ A similar effort called Stepping Up is supported by the Council of State Governments Justice Center. The Stepping Up Initiative, *Stepping Up Innovator Counties: Leading the Way in Justice System Responses to People with Behavioral Health Needs*, 1 (Aug. 2021).

³⁹ National Association of Counties, Familiar Faces Initiative.

⁴⁰ Arnold Ventures, *Early Lessons from Data-Driven Justice Pilot Sites*, at 1.

⁴¹ Findings are not yet publicly available. The first cohort comprises Sacramento, San Bernardino, Nevada, Plumas, and Yolo counties. The second cohort includes Calaveras, El Dorado, Lassen, Marin, and Modoc counties.

⁴² See generally Arnold Ventures, *Responding Better: A Collaborative Approach to Helping Those in Crisis: Key Insights and Recommendations from the Data-Driven Justice Pilot Initiative* (Nov 2020).

dropped by nearly 80%.⁴³ The program was discontinued after the three-year pilot period because it lacked sustainable funding.⁴⁴

- Florida's Pinellas County discovered that their top 30 users of crisis stabilization and jail cost \$2 million. After implementing an intensive level of treatment and services targeted at this group, jail and hospital days and costs have been cut in half.⁴⁵
- In Miami-Dade County, the cross-system collaboration resulted in the creation of several programs, such as a Crisis Intervention Team, post-booking diversion, and a state funded pilot project that places people found incompetent to stand trial in community-based treatment, that have resulted in a significant drop in the county jail population. The county has closed a jail facility and saved over \$39 million per year.⁴⁶

The research and results from across the country show that every locality in California could benefit from increased data sharing, collaboration, and targeted interventions for people who frequently come into contact with justice, health, and behavioral health systems.

Staff Proposal

The Committee should consider recommending that the state fund counties and other localities to create systems that identify high-utilizers and create effective interventions using that data.

Conclusion

Staff looks forward to discussing the research and proposals presented in this memorandum with the Committee.

Respectfully submitted,

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⁴³ Fermanian Business & Economic Institute at Point Loma Nazarene University, *Project 25: Housing the Most Frequent Users of Public Services Among the Homeless*, 12 (April 2015).

⁴⁴ Kelly Davis, *Despite Early Success, San Diego Homeless Program Struggles to Expand*, USC Annenberg Center for Health Journalism (Mar. 6, 2017).

⁴⁵ National Association of Counties, Familiar Faces Initiative, *Case Study: Pinellas County, Fla.*

⁴⁶ Report of Criminal Mental Health Project, Eleventh Judicial Circuit, Miami-Dade County, Florida (Dec. 2021).