



# CPDA

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IST Work Group  
Department of State Hospitals  
Forensic Services Division  
1215 O St.  
Sacramento, CA 95814

VIA ELECTRONIC MAIL  
ISTolutionsWorkgroup@dsh.ca.gov

**RE: Comments of California Public Defenders Association Regarding Draft Solutions Matrix Report**

To Whom This May Concern:

The California Public Defenders Association, including more than 4,000 public defenders and criminal defense attorneys, appreciates the State's continued efforts toward resolving what others refer to as "the IST problem," but what we refer to as an outdated and wasteful (in terms of both fiscal impact and human cost) competency restoration system, predicated on the idea that, if we can get human beings to the point of minimal constitutional competency (the ability to recite answers to the key questions) in order to convict them of criminal charges, then they will become someone else's problem, ... until we see them again. And again.

The only *real* solution to the problem we are all trying to solve is to stop using the criminal legal system as a repository for unsheltered adults, who are severely and acutely mentally ill, and build up systems along the continuum of care that actually help these people improve their quality of life and manage the symptoms of their chronic illnesses in the long term.

While we recognize that the State must act swiftly to provide treatment to the 1700-incarcerated people on DSH's waitlist, continuing to focus resources on competency restoration "treatment" is not the answer. DSH will *never* eliminate its "waitlist problem," absent fully resourced, well-managed, long-term services geared to solving California's homelessness crisis and mitigating its impact on the mentally ill.

The goal should not be limited to "solving the wait list problem." The goal, our collective goal, should be to permanently disentangle these people from a criminal legal system that is not designed for them. The goal should not be on competency restoration "treatment," but on providing housing, case management, and other supportive services that will provide sustained change.

With that goal in mind, and with immeasurable and invaluable hands-on experience working within the criminal legal system with clients who are mentally incompetent, CPDA writes separately, to highlight aspects of the draft short term strategy matrix which continue to raise serious concerns for its members and our clients.

### **Stop Using Jails As Treatment Facilities (M.1 and M11)**

Jail-based Competency Treatment Facilities (“JBCTs”) are designed to medicate and restore people to competency as quickly as possible, so they can be returned to court. They perform this function relatively well. And the low-level offenders who attain mental competency through these programs, upon their return to court, routinely plead guilty, are released, and return to whatever circumstances gave rise to their arrest in the first place.

But JBCT’s do not advance DSH’s goal of reducing its waitlist for scarce state hospital beds, in the short term or in the long term. Most of those who are returned to court and then released will be rearrested in short order, either for a new offense, due to acute psychosis resulting in police intervention, or due to their inability to report to Probation within forty-eight hours of release. CPDA does not support on-going reliance on JBCTs as a strategy for reducing the wait list.

### **Expanding the Use of Involuntary Medication in Jails Should Not Be Part of Any Proposed Solution Endorsed by this Work Group (S.1, S.3, M.7)**

Jails have become California’s de facto crisis centers and will continue to operate as such, should the State continue endorsing policies and focusing its resources on the expansion of involuntary medication administration in jails. Each dollar spent towards such expansion is a dollar wasted, one which could *and should* be spent on building up mobile crisis response teams, crisis stabilization centers, case managers, short and long-term housing, and therapeutic treatment for California’s mentally ill men and women. CPDA does recognize that some people locked up in our jails are too sick to make medication decisions. However, forced medication must be used only where absolutely necessary to protect the health and welfare of the individual and should never occur in jail.

### **Earlier Identification of Those Who Have Attained Competency While Awaiting Placement MUST Be Informed By an Understanding of What Trial Competency Actually Means (S.4, S.6)**

Trial competency requires more than the ability to parrot answers to basic questions. It requires “the mental acuity to see, hear, and digest the evidence, and the ability to communicate with counsel in helping prepare and effective defense.”<sup>1</sup> As the United States Supreme Court has observed, “defense counsel will often have the best-informed view of defendant’s ability to participate in his defense.”<sup>2</sup>

According to research conducted by the University of California - Davis, very few court-appointed alienists contact defense counsel (whose observations and concerns gave rise to the competency proceedings) to inquire about their observations and concerns regarding their client’s ability to

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<sup>1</sup> *People v. Jackson* (2018) 22 Cal.App.5th 374, 394.

<sup>2</sup> *People v. Easter* (2019) 34 Cal.App.5th 226, 244, quoting *Medina v. California* (1992) 505 U.S. 435, 450.

participate rationally in their defense. This occurs even less often when evaluations are done by DSH forensic staff.<sup>3</sup>

Providing additional training for court-appointed experts and expanding DSH remote evaluations *may* reduce the waitlist, but only if the training encompasses best practices and is geared toward assessing trial competency, *in accordance with the law*. Drive-by tele-evaluations, that do not consider input from the defense attorney, undermine our goals, because when the person is returned to court, it is too often clear that they actually cannot participate rationally in their defense and that criminal proceedings cannot constitutionally be reinstated. This results in protracted hearings, rejected certificates of restoration, and/or successive competency proceedings during the pendency of a single case. The person may be removed from the waitlist, for the moment, but without treatment and with continued confinement in jail, he or she is certain to return.

### **CONREP (Under the Umbrella of DSH) Must Refer More People for Outpatient Treatment (M.11)**

Consistently, DSH and the Conditional Release Program (CONREP) recommend treatment in a secured facility for nearly all people charged with a felony who are found to be incompetent to stand trial. Each recommendation adds another person to the waitlist. This is inconceivable, given that CONREP staff do not personally interview or assess each patient before making such a recommendation, but rather, rely on incomplete records and risk assessment tools known to overpredict dangerousness when used with socio-economically disadvantaged people and, in particular, people of color.<sup>4</sup>

CONREP must change the way placement evaluations and recommendations are made, by examining the patient, considering not only placement, but also unrestoreability (and grave disability) and amenability to diversion. DSH must also modify its regulations regarding criteria for outpatient treatment for individuals found incompetent to stand trial as well as 1026 and MDO commitments, so that medically stabilized individuals who are perfectly safe to treat in the community can be released, freeing up a much-needed hospital bed.

### **Mental Health Diversion Is Only an Effective Strategy if Accompanied by A Multi-Disciplinary Commitment to Developing Adequate Housing and Community-Based Treatment**

Diversion is the post-arrest, post-arraignment, post-appointment of counsel and post-not guilty plea vehicle for reducing the waitlist. Some might say that we've failed at several points along the sequential intercept model by the time diversion is even an option.

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<sup>3</sup> Dr. Charles Scott, "Persistent, poor quality competency to stand trial reports," DSH IST Workgroup Presentation (September 17, 2021), available at <https://www.chhs.ca.gov/wp-content/uploads/2021/09/Key-Factors.pdf>.

<sup>4</sup> Marlowe, D. B., Ho, T., Carey, S. M., & Chadick, C. D. (2020). *Employing standardized risk assessment in pretrial release decisions: Association with criminal justice outcomes and racial equity*. *Law and Human Behavior*, 44(5), 361–376. <https://doi.org/10.1037/lhb0000413>; *Can Racist Algorithms Be Fixed?* Marshall Project, <https://www.themarshallproject.org/2019/07/01/can-racist-algorithms-be-fixed>; *Risk Assessments Biased Against African Americans, Study Finds*, Equal Justice Initiative, <https://eji.org/news/risk-assessments-biased-against-african-americans/>.

Diversion is not taking off, as hoped. Defense practitioners and other patient advocates cannot single-handedly shift a longstanding view of mentally ill people as “dangerous,” nor can we single-handedly shift decades of prosecution-and-punishment-based philosophy to one which embraces rehabilitation and fosters treatment. The State can help by increasing and extending grant opportunities, providing additional funds to local governments to expand its housing and treatment efforts, and by endorsing amendments to existing law which would reduce judicial discretion in terms of denying opportunities for diversion whenever a prosecutor objects.

## **Conclusion**

The IST workgroup recommendations are, for the most part, in line with CPDA’s goal of ending mass incarceration, in particular for those who are system-involved solely due to their inability to manage symptoms of a treatable behavioral health disorder and/or substance abuse disorder. The workgroup has been thoughtful, creative, and precise. However, CPDA must speak out against suggested strategies which will serve to continue the cycle of incarceration for people with mental illness

Respectfully submitted,

s//STEPHANIE REGULAR//

Chairperson of Mental Health/Civil Commitment Committee  
California Public Defenders Association

s//LAURA ARNOLD//

President  
California Public Defenders Association