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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

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**Bill No:** SB 1400                      **Hearing Date:** April 23, 2024  
**Author:** Stern  
**Version:** April 11, 2024  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Criminal procedure: competence to stand trial*

## HISTORY

**Source:** Author

**Prior Legislation:** SB 317 (Stern), Ch. 559, Stats. 2021

**Support:** California District Attorneys Association

**Opposition:** Disability Rights California

## PURPOSE

***The purpose of this bill is to remove express statutory authority for a court to dismiss a case where a misdemeanor defendant has been found incompetent to stand trial and instead require the court to determine if defendant is eligible for other programs or treatment.***

*Existing law* states that a person cannot be tried or adjudged to punishment or have his or her probation, mandatory supervision, postrelease community supervision, or parole revoked while that person is mentally incompetent. (Pen. Code § 1367, subd. (a).)

*Existing law* requires, when counsel has declared a doubt as to the defendant's competence, the court to hold a hearing determine whether the defendant is incompetent to stand trial (IST). (Pen. Code § 1368, subd. (b).)

*Existing law* provides that, except as provided, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of whether the defendant is IST is determined. (Pen. Code § 1368, subd. (c).)

*Existing law* states that a person who has been found to be IST may be eligible for mental health diversion. (Pen. Code, § 1001.36, subd. (b)(1)(D).)

*Existing law* specifies how the trial on the issue of mental competency shall proceed. (Pen. Code § 1369.)

*Existing law* requires the court to appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. (Pen. Code, § 1369, subd. (a)(1).)

*Existing law* provides that if the defendant or defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. (Pen. Code, § 1369, subd. (a)(1).)

*Existing law* states that in a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous. (Pen. Code, § 1369, subd. (f).)

*Existing law* states that only a court trial is required to determine competency in a proceeding for a violation of probation, mandatory supervision, postrelease community supervision, or parole. (Pen Code, § 1369, subd. (g).)

*Existing law* provides that if a defendant is found mentally competent, the criminal process shall resume and the trial on the offense charged or the hearing on the alleged violation shall proceed. (Pen. Code, § 1370.01, subd. (a).)

*Existing law* states that a person who has been found to be IST may be eligible for mental health diversion. (Pen. Code, § 1001.36, subd. (b)(1)(D).)

*Existing law* states that if the defendant is found mentally incompetent, the trial, or judgement, or hearing on the alleged violation shall be suspended and the court may do either of the following:

- Conduct a hearing to determine if the defendant is eligible for mental health diversion and grant diversion for a period not to exceed one year from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the misdemeanor complaint, whichever is shorter; or,
- Dismiss the charges pursuant to Penal Code section 1385. In this case, the court shall dismiss a copy of the order to the county behavioral health director or the director's designee. (Pen. Code, § 1370.01, subd. (b).)

*Existing law* authorizes a judge or magistrate, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, to order an action to be dismissed, as specified. (Pen. Code, § 1385, subd. (a).)

*Existing law* provides that if the court opts to conduct a hearing to determine whether the defendant is eligible for mental health diversion, the hearing shall be held no later than 30 days after the finding of incompetence. If the hearing is delayed beyond 30 days, the court shall order the defendant to be released on their own recognizance pending the hearing. (Pen. Code, § 1370.01, subd. (b)(1)(B).)

*Existing law* states that if the court finds the defendant ineligible for diversion, the court may, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether to do any of the following:

- Order modification of the treatment plan in accordance with a recommendation from the treatment provider;
- Refer the defendant to assisted outpatient treatment (AOT) only if in a county where services are available and the agency agrees to accept responsibility for the treatment of the defendant. If the defendant is accepted into AOT, the charges shall be dismissed in the interests of justice;
- Refer the defendant to county conservatorship investigator for possible conservatorship proceedings. If the outcome of the conservatorship proceedings results in the establishment of conservatorship, the charges shall be dismissed in the interests of justice;
- Refer the defendant to the CARE program. If the defendant is accepted into CARE, the charges shall be dismissed in the interests of justice. (Pen. Code, § 1370.01, subd. (b)(1)(D).)

*This bill* requires the court to hold a hearing to determine whether a misdemeanor IST defendant is eligible for mental health diversion.

*This bill* states that if the court determines that the defendant is ineligible or unsuitable for mental health diversion, or if the defendant is charged with a new offense as specified or is not performing satisfactorily in the program, the court shall hold a hearing to determine whether to order modification of an mental health diversion treatment plan, refer the defendant to AOT, refer the defendant to the county conservatorship investigator for possible conservatorship proceedings, or refer the defendant to the CARE program.

*This bill* deletes the express authority of the court to dismiss the charges in the interests of justice but clarifies that nothing in the provisions of this bill limits a court's discretion pursuant to Penal Code Section 1385.

*Existing law* states that if the defendant is found IST and is on a grant of probation for a misdemeanor offense, the court shall dismiss the pending revocation matter and may return the defendant to supervision. If the revocation matter is dismissed, the court may modify the terms and conditions of supervision to include appropriate mental health treatment. (Pen. Code, § 1370.01, subd. (c).)

*This bill* instead provides that if the defendant is found IST on a misdemeanor offense and a felony offense and committed to treatment, the misdemeanor offense shall be dismissed.

*This bill* states that notwithstanding any other law, a misdemeanor offense for which a defendant may be placed in a mental health diversion program includes a misdemeanor violation of driving under the influence. However, this does not limit the authority of the Department of Motor Vehicles to take administrative action concerning the driving privileges of a person arrested for misdemeanor driving under the influence.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

Senate Bill 1400 aims to close the gaps in treatment for our M.I.S.T. population. This bill would prevent over a thousand individuals a year from falling into the prison-to-street pipeline by removing the option to dismiss cases without diversion or a warm handoff. SB 1400 represents a critical step in ensuring that individuals deemed incompetent to stand trial receive the support and treatment they need to prevent further involvement in the criminal justice system.

### 2. Background: Mental Competency in Criminal Proceedings

The Due Process Clause of the United States Constitution prohibits the criminal prosecution of a defendant who is not mentally competent to stand trial. Existing law provides that if a person has been charged with a crime and is not able to understand the nature of the criminal proceedings and/or is not able to assist counsel in his or her defense, the court may determine that the offender is IST. (Pen. Code § 1367.) When the court issues an order for a hearing into the present mental competence of the defendant, all proceedings in the criminal prosecution are suspended until the question of present mental competence has been determined. (Pen. Code, §1368, subd. (c).)

In order to determine mental competence, the court must appoint a psychiatrist or licensed psychologist to examine the defendant. If defense counsel opposes a finding on incompetence, the court must appoint two experts: one chosen by the defense, one by the prosecution. (Pen. Code, § 11369, subd. (a).) The examining expert(s) must evaluate the defendant's alleged mental disorder and the defendant's ability to understand the proceedings and assist counsel, as well as address whether antipsychotic medication is medically appropriate. (Pen. Code, § 1369, subd. (a).)

Both parties have a right to a jury trial to decide competency. (Pen. Code, § 1369.) A formal trial is not required when jury trial has been waived. (*People v. Harris* (1993) 14 Cal.App.4th 984.) The burden of proof is on the party seeking a finding of incompetence. (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459-460.) Because a defendant is initially considered competent to stand trial (*Medina v. California* (1992) 505 U.S. 437), usually this means that the defense bears the burden of proof to establish incompetence. Therefore, defense counsel must first present evidence to support mental incompetence. However, if defense counsel does not want to offer evidence to have the defendant declared incompetent, the prosecution may. Each party may offer rebuttal evidence. Final arguments are presented to the court or jury, with the prosecution going first, followed by defense counsel. (Pen. Code, § 1369, subds. (b)-(e).)

For defendants charged with a felony, if after an examination and hearing the defendant is found IST, the criminal proceedings are suspended and the court shall order the defendant to be referred to DSH, or to any other available public or private treatment facility, including a community-based residential treatment system if the facility has a secured perimeter or a locked and controlled treatment facility, approved by the community program director that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status, except as specified. (Pen. Code § 1368, subd. (c) and 1370, subd. (a)(1)(B).) The court may also make a

determination as to whether the defendant is an appropriate candidate for mental health diversion pursuant to Penal Code section 1001.36.

The maximum term of commitment for an IST defendant charged with a felony is two-years, however, no later than 90 days prior to the expiration of the defendant's term of commitment, if the defendant has not regained mental competence shall be returned to the committing court and the court shall not order the defendant returned to the custody of DSH. (Pen. Code, § 1370, subd. (c)(1).) With the exception of proceedings alleging a violation of mandatory supervision, the criminal action may be dismissed in the interests of justice. (Pen. Code, § 1370, subd. (d).)

For defendants charged with a misdemeanor, if the defendant is found IST, the proceedings shall be suspended and the court may do either of the following: 1) conduct a hearing to determine whether the defendant is eligible for mental health diversion; or 2) dismiss the charges pursuant to Penal Code section 1385. If the charges are dismissed, the court shall transmit a copy of the order to county behavioral health director or the director's designee. (Pen. Code, § 1370.01, subd. (b).)

If a misdemeanor defendant is found eligible for diversion, the court may grant diversion for a period not to exceed one year from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the complaint, whichever is shorter. (Pen. Code, § 1370.01, subd. (b)(1)(A).)

If the court finds that the defendant is not eligible for diversion, the court may, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether to do any of the following: 1) order modification of the treatment plan in accordance with a recommendation from the treatment provider; 2) refer the defendant to assisted outpatient treatment (AOT); if the defendant is accepted into AOT, the charges shall be dismissed; 3) refer the defendant to the county conservatorship investigator for possible conservatorship if the defendant appears to be gravely disabled, as defined; if a conservatorship is established, the charges shall be dismissed; or 4) refer the defendant to the CARE program; if the defendant is accepted into CARE the charges shall be dismissed. (Pen. Code, § 1370.01, subd. (b)(1)(D).)

This bill requires that upon a finding that a misdemeanor defendant is IST, the court shall hold a hearing to determine whether the defendant is eligible for mental health diversion. The bill states that if the defendant is ineligible for diversion, the court must take one of three actions which include modification of the treatment plan, referral to AOT, or referral for possible conservatorship. This bill removes the express authority for the court to dismiss the misdemeanor charges against a defendant who is ineligible for diversion. Additionally, the bill removes the provision of law that states that if the defendant is on a grant of probation for a misdemeanor offense, the court shall dismiss the pending revocation matter and may return the defendant to supervision.

According to information provided by the author of this bill, since July 2022, approximately 80 individuals per month were found IST on a misdemeanor charge in Los Angeles County and assessed by the Office of Diversion and Reentry team. Of those assessed, about 75% were found to be suitable and released to the misdemeanor IST diversion program.

As noted above, existing law states that if a misdemeanor defendant is found ineligible for diversion, the court may order different treatment including referral to AOT or conservatorship, or the court may dismiss the case. Thus, while 25% of those assessed may not be suitable for

diversion, it is unclear how many of those cases are being dismissed versus first being referred to other treatment options.

### 3. Dismissals in the Interest of Justice

Penal Code section 1385 gives discretion to judges to strike or dismiss a prior conviction or added punishment in the interests of justice. The California Supreme Court has ruled that even if a statute prescribing a particular sentence uses the term "shall," this is insufficient to evidence an intent that the trial court was precluded from exercising such discretionary powers. (See *People v. Williams* (1981) 30 Cal.3d 470.) In *Williams*, the Court reviewed the history and purpose of Penal Code section 1385:

The trial court's power to dismiss an action has been recognized by statute since the first session of the Legislature in 1850. The rules of criminal procedure enacted in that session included the provision that "[the] Court may, either of its own motion, or upon the application of the District Attorney, and in furtherance of justice, order any action, after indictment, to be dismissed; but in such case the reasons of the dismissal shall be set forth in the order, which must be entered on the minutes." (Stats. 1850, ch. 119, § 629, p. 323.) With slight changes, this provision became section 1385 when the Penal Code was enacted in 1872.

....

"A determination whether to dismiss in the interests of justice after a verdict involves a balancing of many factors, including the weighing of the evidence indicative of guilt or innocence, the nature of the crime involved, the fact that the defendant has or has not been incarcerated in prison awaiting trial and the length of such incarceration, the possible harassment and burdens imposed upon the defendant by a retrial, and the likelihood, if any, that additional evidence will be presented upon a retrial. When the balance falls clearly in favor of the defendant, a trial court not only may but should exercise the powers granted to him by the Legislature and grant a dismissal in the interests of justice." (*People v. Superior Court of Marin County (Howard)* (1968) 69 Cal. 2d 491, 505.)

The court also discussed the policy served by [the section at issue in the case]. "Mandatory, arbitrary or rigid sentencing procedures invariably lead to unjust results. Society receives maximum protection when the penalty, treatment or disposition of the offender is tailored to the individual case. Only the trial judge has the knowledge, ability and tools at hand to properly individualize the treatment of the offender. Subject always to legislative control and appellate review, trial courts should be afforded maximum leeway in fitting the punishment to the offender." (*People v. Dorsey* (1972) 28 Cal.App3d 15, 18.)

(*People v. Williams, supra*, 30 Cal.3d at 479-482.) The Court then looked to the legislative intent and found that there was no indication of contrary legislative intent and thus held that absent a clear expression of legislative intent in this regard, a sentencing statute will not be construed to abrogate a trial court's general section 1385 power to strike. (*Id.* at p. 482.)

Likewise, striking the express authority in a separate statute for a court to dismiss charges pursuant Penal Code 1385 does not abrogate the court's power to exercise its discretion to do so

when the court finds that this would be in furtherance of justice. This bill clarifies that nothing in the bill's provisions limit a court's discretion pursuant to Penal Code Section 1385.

#### 4. Mental Health Diversion

Diversion is the suspension of criminal proceedings for a prescribed time period with certain conditions. A defendant may not be required to admit guilt as a prerequisite for placement in a pretrial diversion program. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested or charged for the diverted offense. If diversion is not successfully completed, the criminal proceedings resume, however, a hearing to terminate diversion is required.

In 2018, the Legislature enacted a law authorizing pretrial diversion of eligible defendants with mental disorders. Under the mental health diversion law, in order to be eligible for diversion, 1) the defendant must suffer from a mental disorder, except those specifically excluded, 2) that played a significant factor in the commission of the charged offense; 3) in the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment; 4) the defendant must consent to diversion and waive the right to a speedy trial; 5) the defendant must agree to comply with treatment as a condition of diversion; and 6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. (Pen. Code, § 1001.36, subs. (b)-(c).) The defendant is not eligible if they are charged with specified crimes. (Pen. Code, § 1001.36, subd. (d).)

In addition to the eligibility requirements of the defendant, mental health treatment program must meet the following requirements: 1) the court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant; 2) the defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources; 3) and the program must submit regular reports to the court and counsel regarding the defendant's progress in treatment. (Pen. Code, § 1001.36, subd. (f).) The court has the discretion to select the specific program of diversion for the defendant. The county is not required to create a mental health program for the purposes of diversion, and even if a county has existing mental health programs suitable for diversion, the particular program selected by the court must agree to receive the defendant for treatment. (Pen. Code, § 1001.36, subd. (f)(1)(A).)

The diversion program cannot last more than two years for a felony and cannot last for more than a year on a misdemeanor. (Pen. Code, § 1001.36, subd. (f)(1)(C).) If there is a request for victim restitution, the court shall conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of restitution. (Pen. Code, § 1001.36, subd. (f)(1)(D).)

The stated purpose of the diversion program is "to promote all of the following: . . . Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings." (Pen. Code, § 1001.35, subd. (b).)

Under existing law, when a misdemeanor defendant is found to be IST, the court may opt to conduct a hearing to determine whether a defendant is eligible for mental health diversion. This

bill requires the court to conduct this hearing. If the defendant is not eligible or suitable, the defendant is not performing satisfactorily in the program, or the defendant is charged with a new offense as specified, this bill requires the court to hold a hearing to determine whether to order modification of an existing mental health diversion treatment plan, refer the defendant to AOT, refer the defendant to the county conservatorship investigator for possible conservatorship proceedings, or refer the defendant to the CARE program.

This bill also codifies the recent ruling in *Persiani v. Superior Court*, (2024) 100 Cal. App. 5th 48, where the Court of Appeal ruled that trial court has authority under Penal Code section 1370.01, subdivision (b)(1)(A) to order treatment through mental health diversion for a mentally incompetent misdemeanor defendant charged with driving under the influence. Specifically, the court found that Vehicle Code section 23640 does not prohibit a court from exercising its discretion under the misdemeanor IST statute (Penal Code section 1370.01) to order treatment through mental health diversion for an IST defendant charged with misdemeanor driving under the influence. The court also noted that misdemeanor driving under the influence is not one of the excluded offenses in the mental health diversion statute. (*Id.* at pp. 62-63.)

## 5. Argument in Support

According to California District Attorneys Association:

Since the passage of SB 317 (Stern), thousands of defendants who have been charged with a misdemeanor and declared incompetent to stand trial (IST) have had their cases dismissed with no treatment plan, only furthering the revolving door, and doing nothing to combat the mental health crisis in our communities. Removing the dismissal option from misdemeanor IST cases will ensure that defendants receive the benefits of mental health treatment, rather than being prematurely released onto the streets.

## 6. Argument in Opposition

According to Disability Rights California:

SB 1400 would remove the option for the court to dismiss misdemeanor charges against defendants deemed incompetent to stand trial (IST). According to the Stepping Up Initiative, people with mental illness are incarcerated in jails approximately 2 million times each year across the nation.<sup>1</sup> The Los Angeles County Sheriff recently reported that 42% of individuals incarcerated in Los Angeles County Jail have a mental illness. Incarceration can trigger and worsen symptoms of mental illness.

SB 1400 would increase the number of individuals with mental illness stuck in jail for low-level criminal charges by eliminating options for the court to dismiss misdemeanor charges for individuals deemed IST.