

MOTION BY SUPERVISORS SHEILA KUEHL AND  
HOLLY J. MITCHELL

March 23, 2021

**Creating a System of Community-Based Care for the Misdemeanor Incompetent to Stand Trial Population**

Los Angeles County (LA County) is dedicated to implementing a “care first, jail last” approach as a central tenet of the Alternatives to Incarceration Initiative (ATI). As a hoped-for result, people who need help for mental health conditions, substance use disorders, or other conditions would receive treatment and services in the community before becoming deeply embroiled in the criminal justice system. As one example, those who are charged with a misdemeanor but have been found incompetent to stand trial (the MIST population), are deserving of attention as a particularly vulnerable population. These individuals usually receive competency restoration treatment in jail, which is contrary to the Board’s vision. Over the past year, momentum has built for reformation of the criminal justice system, fueled, in part, by the COVID-19 pandemic, and the Board has chosen to advance the ATI Initiative and to take immediate steps to depopulate the jails in order to maintain a lower jail population. The Board should take steps now to end the treatment of people declared MIST in the jail and to require treatment in the community first.

MOTION

MITCHELL	_____
KUEHL	_____
HAHN	_____
BARGER	_____
SOLIS	_____

Individuals who are found to be mentally incompetent cannot be tried or convicted in our criminal system. A defendant is mentally incompetent when, because of a “mental health disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.”<sup>1</sup> If an individual charged with a criminal offense is experiencing mental illness or a developmental disability and appears not to understand the criminal proceedings, doubt may be declared about their mental competency and criminal proceedings are suspended.<sup>2</sup> After an examination by a psychiatrist or a licensed psychologist, the judge determines competency.<sup>3</sup>

If the judge finds the individual to be mentally incompetent, they are sent to an appropriate treatment facility or outpatient program with an order for treatment staff to involuntarily administer antipsychotic medication, if certain conditions are met. The county mental health director is responsible for evaluating this population and making treatment recommendations.<sup>4</sup> In LA County, the MIST population is treated in three settings: the Office of Diversion and Reentry’s (ODR) MIST-CBR Program, the Department of Mental Health’s (DMH) MIST-OR Program within the Mental Health Court Linkage Program (CLP-MIST-OR Program), or in Twin Towers Correctional Facility (TTCF) by Custody Health Services (CHS).

ODR’s MIST-CBR Program began in October 2015. This program diverts the MIST population into community-based settings for services. Community-based settings

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<sup>1</sup> Pen. Code § 1367.

<sup>2</sup> Pen. Code § 1368.

<sup>3</sup> Pen. Code § 1369.

<sup>4</sup> Pen. Code § 1370.01.

include treatment and housing that are tailored to meet the needs and clinical acuity of the client. Placements can range from acute inpatient to open residential settings. The MIST-CBR program employs a harm reduction model. In this model, non-adherence to program conditions is met with clinical interventions and judicial admonishment rather than remand to jail. Since 2015, approximately 2,258 people have participated in MIST-CBR. Most of these participants were charged with quality of life crimes related to homelessness or poverty, including trespassing, loitering, and petty theft.

The second treatment program is DMH's CLP-MIST-OR Program, which exclusively serves the MIST population who are out of jail custody. These individuals are out of custody because they were released on their own recognizance or paid their bail amount. The caseload on December 10, 2020 was approximately 53. Three psychologists act as liaisons between Mental Health Court and the MIST population. The psychologists conduct evaluations, link people to treatment options, provide competency restoration services, arrange appointments, explain the intake process, check compliance, and assist with diversion. In rare cases, those MIST clients who are not suitable for unlocked placements may be remanded to TTCF, stabilized, and then sent to ODR's MIST-CBR Program. Participants in the CLP-MIST-OR Program are not sent to locked facilities, and there are insufficient housing options for participants at this time. These programmatic restrictions make medication compliance challenging.

Despite the existence of ODR's MIST-CBR Program and DMH's CLP-MIST-OR Program, competency restoration services are still provided in the jail for many people declared MIST. Competency treatment is provided in the jail because it is the default option for those who are in custody. LA County started providing competency treatment

for the MIST population in jail custody in 2002. At that time, there were only thirty people declared MIST in jail. Since that time, the MIST population in jail grew to 314 people in early 2020. The overall number of competency filings for misdemeanor and felony cases has skyrocketed over the past nine years. In 2010, there were only 944 Penal Code § 1368 filings, but in 2019, there were approximately 8,014—nearly a 750 percent increase. However, the start of the pandemic in 2020 pushed stakeholders to reduce the MIST population in jail by reforming the competency process and expanding community-based treatment. As a result, stakeholders drastically reduced the MIST population in jail to around 70 people in March 2021. Because the MIST population is so low, the Board can be more intentional in evaluating the type of treatment provided and where it is provided.

Community-based restoration is a better alternative to jail-based treatment. Treatment in the community allows clinicians to match the individual with the appropriate level of services and appropriate type of treatment bed. Community-based treatment offers a less restrictive and more hospitable environment where individuals can maintain their connections to family and supporters. There is also the added benefit of linking those served to treatment and housing that they can utilize beyond their involvement with the criminal justice system, which helps reduce recidivism and improve outcomes. Community treatment means that the individual does not serve time in jail custody until they are convicted of a crime, and has the added benefit of minimizing the spread of COVID-19 in the jails.

The Board is committed to investing in infrastructure and programming critically needed to support the MIST population in community-based restoration. The Board has

approved four motions since 2016 to understand the population experiencing serious mental illness in our criminal justice system and to expand diversion programs and services.<sup>5</sup>

Ongoing concern for this population resulted in a motion by Supervisors Sheila Kuehl and Mark Ridley-Thomas on February 12, 2019, entitled *Developing the Los Angeles County Roadmap for Expanding Alternatives to Custody and Diversion*, that established the ATI Workgroup. This workgroup embarked upon a year-long collaborative effort between dedicated community stakeholders, advocates, and County departments to create a vision for a more equitable and health-promoting justice system. The ATI Workgroup report describes how the County can prevent some of our sickest community members from entering or getting embroiled in our jail system by instead receiving care in the community. In response, the Board created the ATI Initiative, an office dedicated to implementing the workgroup recommendations. Voters affirmed this work at the polls in November 2020 when over 57 percent of voters approved Measure J to direct a portion of the County budget towards services and support in the community, which will help to advance the work of the ATI Initiative.<sup>6</sup>

Since the submission of the ATI Workgroup's Final Report in March 2020, the political landscape has significantly shifted. Due to COVID-19 and nationwide protests

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<sup>5</sup> Supervisors Sheila Kuehl and Mark Ridley-Thomas, *Expanding Countywide Diversion for Justice Involved Adults*, February 5, 2019; Supervisors Sheila Kuehl and Mark Ridley-Thomas, *Expanding Countywide Mental Health Diversion for Justice Involved Adults*, October 30, 2018; Supervisors Mark Ridley-Thomas and Kathryn Barger, *Scaling Up Diversion and Reentry Efforts for People with Serious Clinical Needs*, August 14, 2018; Supervisors Hilda L. Solis and Sheila Kuehl, *Examination of Increase in Mental Competency Cases*, March 8, 2016.

<sup>6</sup> Supervisors Kuehl and Solis, *Establishing an Inclusive and Transparent Measure J Revenue Allocation Process*, November 10, 2020.

against injustices in the criminal justice system, the Board and the justice partners have taken additional steps towards reducing the jail population and connecting people with needed resources. The justice partners have worked tirelessly to identify people in our jails who are eligible for release. In fact, the jail population decreased from about 17,400 people in February to a low of about 11,800 people in May because of these efforts.

This motion will help to further reduce the jail population. By making community-based, holistic treatment available to the entire MIST population, the Board can end the provision of mental health treatment in our jails for individuals who do not pose a serious risk to public safety. Because the MIST population in jail is so low, LA County has an opportunity to end the practice of providing mental health treatment to this population in jail and further the goal of providing “care first, jail last” by treating this population in the community from the start.

**WE, THEREFORE, MOVE** that the Board of Supervisors instruct:

1. The Director of the Department of Mental Health (DMH) to report back in two weeks with an inventory of available community-based services, beds, and funding sources to serve the existing MIST conservatorship population in jail custody;
2. The Director of the Department of Health Services (DHS) to report back in two weeks with an inventory of available community-based services, beds, and funding sources to serve the existing MIST population in jail custody who are deemed eligible for community-based restoration through the Office of Diversion and Reentry (ODR) by the Medical Director pursuant to the

“Extension of Letter of Agreement for Determining Level of Care” dated January 28, 2021;

3. The Director of the DMH, in consultation with ODR and the Chief Executive Office (CEO), to report back in 90 days with an inventory of the community-based services and beds needed on an ongoing basis for MIST clients who would otherwise be held in jail custody, an analysis of required funding and available funding sources, and an implementation plan for expanding restoration of competency treatment for people charged with misdemeanors who do not pose an unreasonable risk of danger to the public in the community in the event that the populations increase in the future;
4. The Director of the DMH, in collaboration with ODR and CEO, to consult with and gather feedback from the Public Defender, Alternate Public Defender, District Attorney, the Los Angeles Sheriff's Department, and the Los Angeles City Attorneys Association on the report back in directive three; and
5. County Counsel, in consultation with the Director of DMH and relevant departments, to report back in 60 days on the process that must be followed to rescind approval of the Los Angeles County Jail as a treatment facility for the MIST population pursuant to all applicable laws, including whether it is possible to rescind the approval as to specific portions of the MIST population in custody.

**Extension of Letter of Agreement for Determining Level of Care**

WHEREAS, California Penal Code section 1370.01 assigns the Director of Mental Health, or his/her designee, the responsibility for determining mental health clients' required levels of mental health care when those clients have been deemed Mentally Incompetent to Stand Trial ("MIST") related to a misdemeanor offense; and

WHEREAS, this delegated authority is granted to licensed clinicians within the Los Angeles County ("LA County) Department of Mental Health ("DMH"); and

WHEREAS, the Office of Diversion & Re-Entry ("ODR"), within the LA County Department of Health Services ("DHS"), has worked alongside DMH and justice partners to develop an integrated approach to evaluating the needs and level of care required for the MIST clients in the LA County jails; and

WHEREAS, in furtherance of this integrated effort, on October 28, 2015, the Director of DMH authorized the Medical Director of the ODR to act as an additional designee beyond licensed DMH clinicians under Penal Code section 1370.01 to evaluate MIST clients and make recommendations to the Superior Court concerning their level of care through and including June 30, 2016 (via a Letter of Agreement (No. H-708282)); and

WHEREAS, for the period of July 1, 2016, through October 31, 2016, the Director of the Health Agency authorized the designation to continue given the absence of a Director of Mental Health; and

WHEREAS, the parties to this Letter of Agreement wish to continue the delegation put in place on October 28, 2015, to enable the ODR Medical Director to continue to evaluate MIST clients and make level of care recommendations to the Superior Court through December 31, 2021, subject to the terms and conditions set forth herein.

NOW, THEREFORE, the undersigned to this Letter of Agreement for Determining Level of Care agree, as evidenced by their signatures, that the Medical Director of ODR may continue to act as an additional designee for the Director of DMH under Penal Code section 1370.01 to evaluate MIST clients and make recommendations to the Superior Court concerning their level of care through and including December 31, 2021. Under this Agreement: (1) All evaluations and recommendations submitted to the Superior Court shall be provided to the Director of DMH (or his DMH designee) at the time of submission to the Superior Court; and (2) To enable DHS and DMH to coordinate their services to best meet the needs of the MIST population, the ODR Medical Director (or their designee, if appropriate based on the intended subjects of discussion) will meet with the Director of DMH (or their DMH designee) as needed, during meetings called by the Director of DMH (or their DMH designee) or the Medical Director of ODR, to review the activities exercised under this delegation, including but not limited to, evaluations, recommendations, and progress of all MIST clients. As a professional courtesy and to allow for adequate preparation, the specific cases or issues that are the topic of discussion at the meeting shall be provided by the individual requesting the meeting at least three days in advance.

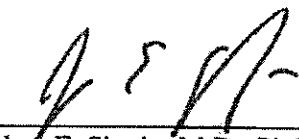
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IN WITNESS WHEREOF, the parties have executed this Extension of Letter of Agreement.

Department of Mental Health

By

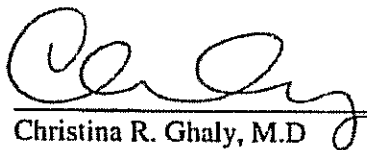
  
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Jonathan E. Sherin, M.D., Ph.D.,  
Director

Date

1/28/21

Department of Health Services

By

  
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Christina R. Ghaly, M.D.  
Director

Date

1/28/21