
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 215 **Hearing Date:** January 9, 2018
Author: Beall
Version: January 3, 2018
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Diversion: Mental Disorders*

HISTORY

Source: California Public Defenders Association

Prior Legislation: SB 8 (Beall), 2017, held on Suspense File in Assembly Appropriations
SB 725 (Jackson), Chapter 179, Statutes of 2017
SB 1227 (Hancock), Chapter 658, Statutes of 2013

Support: American Civil Liberties Union of California; California Attorneys for Criminal Justice; California Council of Community Behavioral Health Agencies; California Psychiatric Association; Californians for Safety and Justice; Disability Rights California; Drug Policy Alliance; Friends Committee on Legislation of California; Mental Health America of California; National Association of Social Workers, California Chapter; Western Regional Advocacy Project

Opposition: None known

PURPOSE

The purpose of this bill is to create a pretrial diversion program for defendants who commit a misdemeanor or jail-eligible felony who suffer from a mental disorder if the mental disorder played a significant role in the commission of the charged offense.

Existing law states that pretrial diversion refers to the procedure of postponing prosecution of an offense filed as a misdemeanor either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication. (Pen. Code, § 1001.1.)

Existing law provides for diversion of misdemeanors when the defendant is a person with cognitive disabilities. (Pen. Code, § 1001.20 et seq.)

Existing law provides for diversion of non-driving under the influence (DUI) misdemeanor offenses. (Pen. Code, § 1001 et seq., Pen. Code, § 1001.50 et seq.)

Existing law provides for diversion of bad check cases. (Pen. Code, § 1001.60 et seq.)

Existing law establishes the Law Enforcement Assisted Diversion program for offenses related to controlled substances, alcohol and prostitution. (Pen. Code, § 1001.85 et seq.)

Existing law provides pretrial diversion for veterans who commit misdemeanors who are suffering from service-related trauma or substance abuse, as specified. (Pen. Code, § 1001.80 et seq.)

This bill authorizes the court, notwithstanding any other law and except as specified, in any case charging a misdemeanor offense or felony offense punishable in county jail, after considering the positions of the defense and prosecution, to grant pretrial diversion to a defendant who meets all of the specified requirements.

This bill provides that diversion is not available without the consent of the prosecution for the following offenses:

- Any felony, with the exception of specified property and drug offenses;
- Any offense involving the unlawful use or unlawful possession of a firearm;
- Manslaughter or vehicular manslaughter;
- An offense for which a person, if convicted, would be required to register as a sex offender, except for indecent exposure;
- Driving under the influence (DUI) offenses, as specified;
- A violent felony as defined in subdivision (c) of Penal Code section 667.5;
- Child endangerment, corporal injury on a spouse or cohabitant, elder abuse, animal cruelty, and stalking;
- An offense resulting in damages of more than \$5,000;
- An offense that occurs within 10 years of three separate referrals to diversion under the provisions of this bill. A grant of diversion on multiple charges filed under the same case number, or stemming from the same incident, shall constitute a single referral to diversion.

This bill states that it is the intent of the Legislature that the consent of the prosecution be required prior to a court granting diversion for the specified offenses listed above. If the provisions in this bill requiring the consent of the prosecutor are invalidated for any reason, the offenses listed above shall not be eligible for diversion.

This bill provides that pretrial diversion may be granted if all of the following criteria are met:

- The court is satisfied that the defendant suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis by a qualified expert. In opining that a defendant suffers from a qualifying disorder, the expert may rely on an examination of the defendant, medical records, evidence that the defendant receives federal supplemental security income benefits, arrest records, or any other reliable evidence.

- The court is satisfied that the defendant's mental disorder played a significant role in the commission of the charge offense.
- The court is satisfied that the defendant would benefit from mental health treatment.
- The defendant consents to diversion and waives his or her right to a speedy trial.

This bill defines "pretrial diversion" to mean "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication to allow the defendant to undergo mental health treatment, subject to the following:

- The defense shall arrange, to the satisfaction of the court, for a program of mental health treatment utilizing existing inpatient or outpatient mental health resources. Before approving a proposed treatment program, the court shall consider the requests of the defense and prosecution, the needs of the divertee and the community.
- The treatment may be procured using private or public funds, and a referral may be made to a county mental health agency, existing collaborative courts, or assisted outpatient treatment only if that agency has agreed to accept responsibility for the treatment of the defendant, and mental health services are provided only to the extent that resources are available and the defendant is eligible for those services.
- Reports shall be provided to the court, the defense, and the prosecutor by the divertee's mental health provider on the divertee's progress in treatment not less than every month if the offense is a felony, and every three months if the offense is a misdemeanor. A court shall consider setting more frequent progress report dates upon request of the prosecution or defense, or upon the recommendation of the divertee's mental health treatment provider.
- If it appears to the court that the divertee is performing unsatisfactorily in the assigned program, or that the divertee is not benefiting from the treatment and services provided pursuant to the diversion program, the court shall, after notice to the divertee, the defense counsel and prosecution, hold a hearing to determine whether the criminal proceedings should be reinstated or whether the treatment program should be modified.
- The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years.
- If it would be required as a condition of probation for the diverted offense, a grant of diversion shall include a requirement that the divertee install an ignition interlock device, as specified.
- Upon request, 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. However, a defendant's inability to pay restitution due to indigence or mental disorder shall not be grounds for denial of diversion or a finding that the defendant failed to comply with the terms of diversion.

This bill states that if the divertee has performed satisfactorily during the period of diversion, at the end of the period of diversion, the criminal charges shall be dismissed.

This bill states that a court may conclude that a divertee has performed satisfactorily if, in the court's judgement, the divertee:

- Has substantially complied with the requirements of the treatment program;
- Has avoided significant new violations of law unrelated to the defendant's mental health condition; and,
- Has a plan in place for long-term mental health care.

This bill provides that upon dismissal of the charges, a record shall be filed with the Department of Justice indicating the disposition of the case diverted. Upon successful completion of the diversion program, the arrest upon which the diversion was based shall be deemed never to have occurred, and the court shall order access to the records of arrest restricted, except as specified. The divertee who successfully completes the diversion program may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or diverted for the offense, except as required for a peace officer application request. The divertee shall be advised of the requirements to disclose the arrest when applying for a position as a peace officer.

This bill states that any finding that the defendant suffers from a mental disorder, any progress reports concerning the defendant's treatment, or any other records created as a result of diversion or for use at a hearing on the defendant's eligibility for diversion may not be used in any other proceeding without the defendant's consent. However, when determining whether to exercise its discretion to grant diversion under the provisions of this bill, a court may consider previous records of arrest for which the defendant was granted diversion under the provisions of this bill.

This bill states the following Legislative findings and declarations:

- Despite never being designed for the treatment or housing of those with mental health needs, jails have become de facto mental health facilities in many communities across the country;
- Untreated mental health conditions frequently result in chronic homelessness and an inability to find stable employment or housing, increasing the likelihood that those suffering from mental illness come into contact with law enforcement;
- For many people suffering from mental disorders, incarceration only serves to aggravate preexisting conditions and does little to deter future lawlessness;
- For people who commit offenses as a direct consequence of a mental disorder, diversion into treatment is often not only more cost effective, but also more likely to protect public safety by reducing the likelihood that a person suffering from a mental health disorder reoffends in the future; and,
- Courts, as one of the first points of contact between the mentally ill and the state, can serve as a useful function in identifying defendants with mental disorders and connecting them to existing services, thereby reducing recidivism.

COMMENTS

1. Need for This Bill

According to the author:

Roughly a third of inmates in California's jails suffer from serious mental illness. At least one study has concluded that California's jail system has become de facto the largest mental health service provider in the United States, despite being ill-equipped to do so. In the last decade alone, lawsuits resulting from jail overcrowding and inmate death or injuries relating to inadequate mental health care or mistreatment of the mentally ill have cost California hundreds of millions of dollars. (Footnotes omitted.)

One reason for the constant jailing of mentally ill Californians is that under current law, trial courts have little ability to rehabilitate mentally ill Californians charged with even minor criminal offenses, without first convicting them of the underlying offense, thereby damaging their prospects for future employment and housing. For example, even where a defendant's offense is clearly a product of mental illness, a court cannot order mental health treatment, relevant counselling, or adherence to a medication regime unless the person suffering from mental illness is first convicted, and then placed on probation or sent to jail at county expense.

....

The proposed bill would grant trial courts the discretion to offer diversion to defendants who suffer from mental illness when charged with low level offenses, after a showing that mental illness played a significant role in the commission of the underlying offense, that the defendant would benefit from mental health treatment AND that there is an available treatment program or programs available for the defendant.

In essence, if appropriate, a court may (but is not required to) impose the same rehabilitative probationary conditions on a defendant it would have imposed had the defendant been convicted (including that the defendant comply with a mental health treatment plan, obey all laws and make restitution to any victims), with the added incentive that successful completion of diversion would result in dismissal of the criminal case, without the permanent detriment of a criminal record.

Because such diversionary sentences take advantage of existing community resources for the mentally ill, research suggests that such sentences will save counties money in the short-term on reduced trial and incarceration costs, and in the long-term based on reduced recidivism rates.
(<http://www.courtinnovation.org/sites/default/files/EffectivenessMentalHealthCourt.pdf> [participation in mental health treatment through a court authorized diversion plan reduced recidivism rates.])

Importantly, a court will not be authorized to grant diversion where no treatment program for the defendant exists. Thus, because the diversionary sentence authorized under this bill relies entirely on pre-existing and available space in community based mental health treatment programs, counties will not be required to create or pay for new treatment facilities or programs.

2. Diversion of Defendants with Mental Disorders

Diversion is the suspension of criminal proceedings for a prescribed period of time 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.

This bill creates a diversion program for defendants whose mental disorder played a significant role in the commission of the charged offense. The eligible offenses are misdemeanors and jail-eligible felonies. When considering diversion for a jail-eligible felony, other than specified property and drug offenses, the court may only divert the defendant with the prosecutor's consent. These offenses, as specified by a list in the bill, include DUIs, manslaughter and vehicular manslaughter, firearms-related offenses, child endangerment, corporal injury on a spouse or cohabitant, elder abuse, animal cruelty, and stalking. Additionally, the bill specifies that any offense resulting in damages of more than \$5,000 requires the prosecutor's consent as well as any grant of diversion for an offense that occurs within 10 years of three separate referrals to diversion.

The list that requires prosecutorial consent also includes any violent felony as defined in subdivision (c) of Penal Code section 667.5. Violent felonies are not jail-eligible felonies. Including these offenses listed in Penal Code section 667.5, subdivision (c) in the list that requires the prosecutor's consent for certain offenses to be diverted conflicts with the overall restriction that the diversion created by this bill is only for misdemeanors and jail-eligible felonies.

In determining eligibility, the court must be satisfied that the defendant suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis by a qualified expert. In opining that a defendant suffers from a qualifying disorder, the expert may rely on an examination of the defendant, medical records, evidence that the defendant receives federal supplemental security income benefits, arrest records, or any other reliable evidence.

The court must also find that the defendant's mental disorder played a significant role in the commission of the charged offense and that the defendant would benefit from mental health treatment. The defendant must also consent to diversion and waive his or her right to a speedy trial. The defense is responsible for arranging for a program of mental health treatment using

existing inpatient or outpatient mental health resources and the agency must agree to accept responsibility for the treatment of the defendant. Before approving a proposed treatment program, the court shall consider the requests of the defense and prosecution, the needs of the divertee and the community.

The defense is also responsible for providing progress reports to the court not less than every month if the offense is a felony, and every three months if the offense is a misdemeanor. A defendant may not be diverted for a period of time longer than two years under this program.

If a defendant successfully completes the diversion program then the arrest will be deemed never to have occurred and he or she can say she was never arrested or diverted, unless he or she is applying to be a peace officer. If it appears that the defendant is not performing satisfactorily in the diversion program, the court must hold a hearing to determine whether criminal proceedings should be reinstated or whether the treatment program should be modified in some way.

The goal of the diversion program created by this bill is to address the population of jail inmates who suffer from a mental disorder whose incarceration often leads to worsening of their condition and in some cases suicide. This bill authorizes the court to order treatment early in the process rather than waiting for the disposition of the case where the defendant may be facing the possibility of prolonged incarceration or re-arrest upon release. Because diversion does not result in a conviction, once a defendant completes diversion he or she would not be foreclosed from housing and employment opportunities.

3. Population of Inmates Suffering from a Mental Disorder is Growing

According to several reports, the population of inmates in county jails and in state prisons has increased over the years. A Los Angeles Times article from June 2016 reported that “the number of mentally ill inmates has grown in both county jails and state prisons, although overall inmate populations have shrunk. In L.A. County jails, the average population of mentally ill inmates in 2013 was 3,081. As of mid-May it was 4,139, a 34% increase.

“In the state prison system, the mentally ill inmate population was 32,525 in April 2013, making up 24.5% of the overall population. As of February [2016], according to a recently released monitoring report, the overall population had fallen by 5,230 while the mental health population had grown by 4,275, and made up 29% of the total population.” (Sewell, *Mentally ill inmates are swamping the state's prisons and jails. Here's one man's story* (June 19, 2016) Los Angeles Times see full article at < <http://www.latimes.com/local/california/la-me-mentally-ill-inmate-snap-story.html> > [as of Dec. 18, 2017].)

4. Author's Amendments

The author plans to amend this bill to exclude driving under the influence offenses from the diversion authorized under the bill. This amendment will be adopted prior to the bill's next committee hearing.

5. Arguments in Support

According to *Disability Rights California*:

There is an urgent need for specific and targeted efforts to reduce the rates of incarceration of people with mental illness, and to facilitate successful diversion and reentry. The current situation is dire. Jails are not therapeutic environments. They are not designed to be mental health treatment centers. Prisoners with mental illness are significantly more likely than those without mental illness to be abused. Further, it costs significantly more to incarcerate prisoners with mental illness than prisoners without this condition.

....

SB 215 provides a tool for trial courts to use in appropriate cases when diversion is the best option and treatment resources are available. It is crafted in a manner to ensure that treatment resource will be available and the best interests of the community are considered. Further, the bill recognizes that a crucial part of successful treatment is one that diverts individuals who can safely and effectively be treated and supervised outside of jail and prison settings. The diversion of criminal defendants with mental illness can improve both mental health and criminal justice outcomes.

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