SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
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Bill No:	SB 394	**Hearing Date:**	April 9, 2019
Author:	Skinner		
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Urgency:	No	**Fiscal:**	No
Consultant:	SC		

Subject: ***Criminal Procedure: Diversion for Primary Caregivers of Minor Children***

HISTORY

Source: #cut50

Prior Legislation: SB 215 (Beall), Ch. 658, Stats. 2018
SB 1227 (Hancock), Ch. 658, Stats. 2013
SB 513 (Hancock), Ch. 798, Stats. 2013
AB 2124 (Lowenthal), Ch. 732, Stats. 2014
AB 994 (Lowenthal), Vetoed, 2013
AB 2199 (Harman), never heard in committee, 2006
AB 1956 (Wolk), Chapter 290, Statutes of 2004
SB 599 (Perata), Chapter 792, Statutes of 2003

Support: California Attorneys for Criminal Justice; California Public Defenders Association; Drug Policy Alliance; Ella Baker Center for Human Rights; Initiate Justice; San Francisco Public Defender's Office

Opposition: California District Attorneys Association

PURPOSE

The purpose of this bill is to authorize the superior court, in agreement with the district attorney and the public defender of the county, to establish a pretrial diversion program for primary caregivers of minor children as specified.

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. (Penal Code Section 1001.1.)

Existing law excludes specified driving under the influence offenses from pretrial diversion eligibility. (Pen. Code, § 1001.2, subd. (a).)

Existing law provides that the district attorney of each county shall review annually any diversion program adopted by the county, and no program shall continue without the approval of the district attorney. No person shall be diverted under a program unless it has been approved by the district attorney. Nothing in this subdivision shall authorize the prosecutor to determine whether a particular defendant shall be diverted. (Pen. Code, § 1001.2, subd. (b).)

Existing law specifies that at no time shall a defendant be required to make an admission of guilt as a prerequisite for placement in a pretrial diversion program. (Pen. Code, § 1001.3.)

Existing law provides that a divertee is entitled to a hearing, as set forth by law, before their pretrial diversion can be terminated for cause. (Pen. Code, § 1001.4.)

Existing law states that if the divertee has performed satisfactorily during the period of diversion, the criminal charges shall be dismissed at the end of the period of diversion. (Pen. Code, § 1001.7.)

Existing law provides that any record filed with the Department of Justice (DOJ) shall indicate the disposition in those cases diverted pursuant to these provisions. Upon successful completion of a diversion program, the arrest upon which the diversion was based shall be deemed to have never occurred. The divertee 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 specified. A record pertaining to an arrest resulting in successful completion of a diversion program shall not, without the divertee's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate. (Pen. Code, § 1001.9, subd. (a).)

Existing law requires that the divertee be advised that, regardless of their successful completion of diversion, the arrest upon which the diversion was based may be disclosed by DOJ in response to any peace officer application request and that this section does not relieve him or her of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined. (Pen. Code, § 1001.9, subd. (b).)

Existing law authorizes a person who has successfully completed pretrial diversion to petition a court to issue an order to seal the arrest records for the diverted offense. (Pen. Code, § 851.87.)

Existing law authorizes diversion programs for specified crimes (Pen. Code, §§ 1000 *et seq*. for drug abuse; Pen. Code, § 1001.12 et seq. for child abuse; Pen. Code, §§ 1001.70 et seq. for contributing to the delinquency of another, Pen. Code, §§ 1001.60 et seq. for writing bad checks) and for specific types of offenders (Pen. Code, §§ 1001.80 et seq. for veterans; Pen. Code, §§ 1001.35 et seq. for persons with mental disorders).

This bill authorizes the presiding judge of the superior court, or a judge designated by the presiding judge, together with the district attorney and the public defender or the contracted criminal defense office that provides the services of a public defender, to agree in writing to establish and conduct a pretrial diversion program for primary caregivers.

This bill specifies that the program shall include, but not be limited to, all of the following components:

1) Parenting classes;
2) Family and individual counseling;
3) Mental health screening, education, and treatment;
4) Family case management services;
5) Drug and alcohol treatment;
6) Domestic violence education and prevention;
7) Physical and sexual abuse counseling;
8) Anger management;
9) Vocational and educational services;

10) Job training and placement;
11) Affordable and safe housing assistance; and,
12) Financial literacy courses.

This bill provides that the court may, after considering the positions of the defense and prosecution, grant pretrial diversion to a defendant if the defendant meets all of the following requirements:

1) The defendant is a custodial parent or legal guardian of a child under the age of 18 years, presently resides in the same household as that child, and either alone or with the assistance of other household members, presently provides a significant portion of the necessary care or financial support of that child;

2) The defendant has been advised of and waived the right to a speedy trial, a speedy preliminary hearing, and to a trial by jury;

3) The defendant has been informed and agrees to comply with the requirements of the program;

4) The court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, or to the child in their custody, if allowed to remain in the community. In making this determination, the court may consider the recency of any criminal history that would indicate a risk to public safety. The court may consider the opinions of the district attorney and the defense, and may consider the defendant's violence and criminal history, the recency of the defendant's criminal history, the defendant's history of behavior towards minors, the risk of the dependent minor's exposure to or involvement in criminal activity, the current charged offense and any other factors that the court deems appropriate; and,

5) The defendant is not being placed into a diversion program for any serious felony or violent felony.

This bill states that if it appears that the defendant is performing unsatisfactorily in the assigned program, or if the defendant is, subsequent to entering the program, convicted of a felony or any offense that reflects a propensity for violence, the prosecuting attorney, the court on its own, or the probation department may make a motion to reinstate criminal proceedings.

This bill requires the court, after notice to the defendant, to hold a hearing to determine whether to reinstate criminal proceedings and if the court finds that the defendant is not performing satisfactorily in the assigned program or has been convicted of a felony or any offense that reflects a propensity for violence, the court shall schedule the matter for further proceedings.

This bill provides that if the defendant has performed satisfactorily in diversion, at the end of diversion, the court shall dismiss the defendant's criminal charges.

This bill states that if the court dismisses the charges, the clerk of the court shall file a record with Department of Justice indicating the disposition of the case diverted.

This bill provides that upon successful completion of diversion, if the court dismisses the charges, the arrest upon which the diversion was based shall be deemed to never have occurred and the court shall order access to the arrest record restricted.

This bill prohibits the use of a record pertaining to the arrest or any record generated as a result of the defendant's application for or participation in diversion without the defendant's consent in any way that could result in the denial of any employment, benefit, license or certificate.

This bill provides that the defendant shall be advised that, regardless of the defendant's completion of diversion, the arrest upon which the diversion was based may be disclosed by DOJ in response to any peace officer application request and that this section does not relieve them of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined.

This bill requires the defendant to be advised that an order to seal records of an arrest after successfully completing diversion has no effect on a criminal justice agency's ability to access and use those sealed records and information regarding sealed records.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> Nearly half of all people behind bars in the United States were living with minor children prior to their incarceration. It is estimated that 10 million minors in this country experience parental incarceration at some point in their childhood and half of all children have a parent with a criminal record. The most recent data collected by California, which remains over a decade old, estimated that nearly 900,000 children in California had a parent in the adult criminal justice system.
>
> This is particularly concerning given the generational effects of criminal convictions. Children in the US with system-impacted parents are affected on all five pillars of family well-being: children with parents who have a criminal conviction, even for a minor offense, live in families who experience significant barriers to 1) income; 2) savings and assets; 3) education; 4) housing; and 5) family strength and stability. Studies show that having an arrest record was the single best predictor of diminished job prospects (more so than long term unemployment, receipt of public assistance, or obtaining a GED instead of a high school diploma).
>
> The distinct decrease in employment prospects as a result of a parent's criminal conviction is particularly concerning given the impact of poverty on children in developing stages, which is associated with a slower rate of vocabulary development and a reduction of overall language skills; lower educational achievement; and higher rates of child absenteeism, bullying, and withdrawal.
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> Given that half of all children in this country have system-impacted parents, the ramifications of saddling a primary caregiver with incarceration or a criminal conviction, cannot be understated.
>
> SB 394 also builds upon California's effective use of collaborative courts. California has seen encouraging and significant results from the use of collaborative and alternative courts that move away from this singular focus on punishment, and center instead on data-supported alternative methods to

encourage rehabilitation. Collaborative justice courts, also aptly referred to as "problem-solving courts," promote accountability by combining judicial supervision with rigorously monitored, data-driven rehabilitation and treatment services in lieu of incarceration. As of 2017, California had more than 420 collaborative justice courts, operating in all but three small jurisdictions, with many jurisdictions utilizing more than 4 different types of collaborative courts. SB 394 recognizes the impressive success of California's growing use of problem-solving courts, builds upon the dearth of data documenting the often-insurmountable hardships children face when their parents suffer convictions, and draws upon successful legislation in other states.

States, such as Louisiana, Massachusetts, and Washington have all instituted similar models, and Florida, Oklahoma, Tennessee, and Texas have proposed similar laws this session.

SB 394 is in line with this national trend of recognizing the insidious effects of incarceration on dependent minors, and recognizes the new, compelling data related to the detrimental impact of a criminal conviction.

2. Diversion Generally

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.

As a condition of diversion, the court may require the defendant to pay an administrative fee to cover the cost of enrollment in a diversion program. (Pen. Code, § 1001.15, subd. (a).) This fee may not exceed $300 in misdemeanor cases, $500 in felony cases, and may not exceed the actual cost of the program. (Pen. Code, § 1001.16.) Additionally, the court shall impose a diversion restitution fee on diverted defendants, except diversion of developmentally disabled defendants. (Pen. Code, § 1001.90, subd. (a).) This fee is set at the court's discretion according to the seriousness of the offense, but it may not be less than $100 or more than $1,000. (Pen. Code, § 1001.90, subd. (b).) In setting the amount of the restitution fee in excess of the $100 minimum, the court must consider any relevant factors, including, but not limited to, the defendant's ability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, and the extent to which any person suffered losses as a result of the crime. (Pen. Code, § 1001.90, subd. (d).) The imposition of this fee is mandatory, however, the court may waive the fee for compelling and extraordinary reasons. (Pen. Code, § 1001.90, subd. (c).)

This bill authorizes courts, in concurrence with the district attorney and the public defender of the county to establish a pretrial diversion program diversion program for primary caregivers of minor children. The defendant must meet specified eligibility criteria including that the defendant is a custodial parent or legal guardian of a minor child, presently resides in the same household as that child, and either alone or with the assistance of other household members, presently provides a significant portion of the necessary care or financial support of that child.

The goal of this diversion program is to avoid the detrimental impacts that parental incarceration and a criminal convictions have on minor children, which may include loss of the caregiver's employment, the child's displacement from the home, emotional distress and social stigma.

3. Collaborative Courts

Collaborative courts "combine judicial supervision with rehabilitation services that are rigorously monitored and focused on recovery to reduce recidivism and improve offender outcomes." (*Collaborative Justice Courts*, California Courts website, <https://www.courts.ca.gov/programs-collabjustice.htm> [as of Mar. 27, 2019].) Collaborative courts generally follow the same core principals but vary in certain ways such as eligibility criteria, length, services and treatment provided, sanctions and graduation criteria. Some operate under a pre-plea model and some on a post-plea model:

> California currently has more than 425 collaborative courts in all but three small jurisdictions, with many jurisdictions having four or more court types. The most numerous types of collaborative courts include adult drug courts (85), juvenile drug courts (33), dependency drug courts (37), adult mental health courts (44), juvenile mental health courts (12), veterans' courts (34), homeless courts (13), adult reentry courts (17), DUI courts (16), community courts (12), and peer/youth courts (72). Newer courts such as girls' courts and CSEC courts for commercially sexually exploited children are also growing. The balance of collaborative courts includes dual diagnosis courts, family law drug courts, truancy courts, prop 36 courts, and unique courts, as well as veterans' stand-down programs. Most drug court caseloads average between 75 and 100 participants per court, depending on court type; however, caseload sizes vary across different case types and jurisdictions.

(<https://www.courts.ca.gov/documents/CollaborativeCourts_factsheet.pdf> [as of Mar. 27, 2019.) Studies on collaborative courts have found that these courts are successful at reducing recidivism while saving the state money in collateral costs of avoiding rearrests, new court cases, jail, prison, probation time served, new treatment episodes and victimization costs arising from property crimes or crimes against the person. (Lyman, *The Role of Collaborative Courts in California's Criminal Justice System* (2016) 51 U.S.F. L.Rev. 1, 16-17.)

4. Equal Protection Considerations

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The California Constitution has a similar provision. (Cal. Const., art. I, § 7.) An equal protection challenge is a claim that a law discriminates against a person by unequal treatment or unequal results.

This bill establishes a separate diversion program for primary caregivers which is not available to a defendant who is not a primary caregiver. A state law that provides favorable treatment to one class of defendants based solely on their status, while denying all other classes of defendants the same treatment, may have equal protection implications. If an equal protection challenge were raised to the diversion program created by this bill, the rational basis test that would be used to determine its validity rather than strict scrutiny because diversion is not a fundamental right, nor does the classification of primary caregivers affect a protected class. (*People v. Edwards* (1991) 235 Cal. App. 3d 1700, 1706 citing *Sledge v. Superior Court* (1974) 11 Cal.3d 70, 76.)

Rational basis only requires that the legislative classification is rationally related to a legitimate state interest. (*People v. Edwards*, *supra*, 235 Cal. App. 3d at 1706.) Rational basis is a deferential standard. If a law advances a legitimate state interest, it will be sustained as long as there is reasonable basis for it. (*Id*. at 1709.) "State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (*McGowan v. Maryland* (1961) 366 U.S. 420, 425-46.) "[T]he Legislature may proceed to provide benefits on a step-by-step basis and need not provide, for all possible beneficiaries, the benefits offered to a particular group." (*People v. Superior Court (Skoblov)* (1987) 195 Cal. App. 3d 1209, 1217 citing *McDonald v. Board of Election* (1969) 394 U.S. 802, 810-811; *Semler v. Dental Examiners* (1935) 294 U.S. 608, 610; *Saal v. Workmen's Comp. Appeals Bd.* (1975) 50 Cal.App.3d 291, 300.)

A legitimate state interest is at the very least anything that advances a traditional police power: "Public safety, public health, morality, peace and quiet, law and order, these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not limit it. (*Berman v. Parker* (1954) 348 U.S. 26, 32.) The purpose of this bill is to protect minor children from the negative societal impacts of incarceration and a criminal conviction on a family unit. This presumably is a legitimate state interest. The classification drawn by this bill authorizes a diversion program for primary caregivers of minor children. Defendants who successfully complete the diversion program would avoid criminal prosecution and incarceration. This classification does bear a reasonable relationship to the stated purpose of this bill. Thus, it is unlikely that an equal protection challenge would be successful.

5. This Legislation is Permissive Not Mandatory

This bill authorizes the court, jointly with the district attorney and the public defender of the county, to establish a pretrial diversion program for primary caregivers of minor children. The agreement to create a diversion program must be in writing which would necessitate coming to an agreement on specific policies and parameters in the implementation of such programs in each local jurisdiction that chooses to do so. The bill prohibits diverting defendants who are charged with a serious or violent felony and also provides a catch-all provision prohibiting diversion of persons who pose an unreasonable risk to public safety or a danger to the child in the defendant's custody based on enumerated factors and any other factors that the court may deem appropriate.

This bill's prohibitions place outer limits on what cases may be eligible for diversion, but each local jurisdiction is free to implement more restrictive policies, or to not implement a diversion program at all.

6. Argument in Support

According to Ella Baker Center for Human Rights:

> The Center for American Progress (CAP) issued a report finding that children in the US with system-impacted parents are affected on all five pillars of family well-being: Children with parents who have a criminal conviction, even for a minor offense, live in families who experience significant barriers to 1) income; 2) savings and assets; 3) education; 4) housing; and 5) family strength and stability. For example, a study by the National Institute of Justice found that having an arrest record was the single best predictor of diminished job prospects

(more so than long term unemployment, receipt of public assistance, or obtaining a GED instead of a high school diploma). The distinct decrease in employment prospects as a result of a parent's criminal conviction is particularly concerning given the impact of poverty and unemployment on children in developmental stages, which is correlated with higher rates of child absenteeism, bullying, and withdrawal. Given that half of all children in this country have system-impacted parents, the ramifications of saddling a primary caregiver with a criminal conviction cannot be understated.

Further, the barriers created by a criminal conviction for or incarceration of the primary caregiver extend beyond just the caregiver and the dependent child, and implicate other family members, who often have to step in to care for the minor, as well as the foster care system.

7. Argument in Opposition

According to the California District Attorneys Association:

In Los Angeles County alone, there were 284,433 misdemeanors filed in FY 2014-15. SB 394 would allow many of those defendants (plus a sizable cohort of 1170(h) felons) to make the case for diversion based on a claim that he or she is the primary caregiver, whether financially or through emotional support and care. In addition to the time this would take up front, because this is pre-plea diversion, the court would have to leave all of these cases open for up to two years while the defendant participates in the program.

This pre-plea diversion makes the case difficult and potentially impossible to prosecute years later, when witnesses move, lose interest, or suffer memory loss as the case ages with no movement toward resolution if the person fails the diversion program. In fact, the amount of time since the crime's commission could actually be far greater than two years, given the amount of time it may take to get a defendant to court to answer for the crime, the amount of time it takes for the defendant to convict the court to grant the diversion, and the length of the diversion program.

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