

This bill creates a diversion program for defendants who suffer from a mental disorder if the mental disorder played a significant role in the commission of the charged offense.

This bill authorizes a court to grant pretrial diversion pursuant to the provisions in this bill if all of the following criteria are met:

- The court is satisfied that the defendant suffers from a mental disorder, as specified, proven by evidence provided by the defense which may take the form of an opinion of a licensed psychiatrist or psychologist, records of prior psychiatric hospitalizations, evidence that the defendant receives Federal Supplemental Security Income benefits, or any other reliable evidence;
- The court is satisfied that the defendant's mental disorder played a significant role in the commission of the charged offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, or records by qualified medical experts, the court concludes that the defendant's mental disorder substantially contributed to the defendant's involvement in the commission of the offense;
- The court is satisfied that the defendant would benefit from mental health treatment; and,
- 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.

This bill requires the defense to arrange, to the satisfaction of the court, for a program of mental health treatment utilizing existing inpatient or outpatient mental health resources.

This bill states that the treatment may be procured using private or public funds, but a referral may be made to a county mental health agency 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 mental health services.

This bill requires the defense to provide reports to the court and the prosecutor from the divertee's mental health provider on the divertee's progress in the diversion program not less than every six months.

This bill provides that 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, hold a hearing to determine whether the criminal proceedings should be reinstated.

This bill specifies that that period during which criminal proceedings against the defendant may be diverted shall be no longer than two years.

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. Upon dismissal of the charges, a record shall be filed with the Department of Justice (DOJ) indicating the disposition of the case diverted pursuant to this section. Upon successful completion of a diversion program, the arrest upon which the diversion was based shall be deemed never to have occurred. 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 specified.

This bill specifies that upon successful completion of diversion, the divertee shall be advised that regardless of his or her 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.

This bill states that a finding that the defendant suffers from a mental disorder, any progress reports concerning the defendant's treatment, or any other records related to a mental disorder that were created as a result of diversion may not be used in any other proceeding without the defendant's consent.

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. (See e.g., *Estate of Duran v. Chavez* (2015) 2015 WL 8011685 [a lawsuit stemming from the death of a mentally ill inmate who died after guards pepper-sprayed him in his tracheotomy hole while he was on suicide watch]; *Brown v. Plata* (2011) 563 U.S. 493, 517 [Supreme Court finding that California's prison over-crowding has resulted in inadequate care and the cruel and unusual treatment of mentally ill incarcerated Californians].)

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, and thereby damaging their prospects for future employment and housing. For example, even where the 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, and that the defendant would benefit from mental health treatment.

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, if possible, 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.¹ Importantly, 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 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, including, but not limited to, bipolar disorder, schizophrenia, or post-traumatic stress disorder. Evidence of the defendant's mental disorder must be presented by the defense and may come in the form of an opinion by a licensed psychiatrist or psychologist, records of prior psychiatric hospitalizations, evidence that the defendant receives federal Supplemental Security Income benefits, or any other reliable evidence.

The court must also find that the defendant's mental disorder substantially contributed to the defendant's involvement in the charged offense and that the defendant would benefit from mental health treatment. The defense is responsible for arranging for a program of mental health treatment and for providing progress reports to the court not less than every six months. A defendant may not be diverted for a period of time longer than two years under this program.

¹ See <http://www.courtinnovation.org/sites/default/files/EffectivenessMentalHealthCourt.pdf> [noting that participation in mental health treatment through a court authorized diversion plan reduced recidivism rates.]

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.

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, 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 Mar. 2, 2017].)

4. Pending Litigation on the Issue of Diverting DUI Offenses

Under existing law, there is a general prohibition against diverting DUI offenses. (Veh. Code, § 23640, Pen. Code, §§ 1001.2 and 1001.51.) In 2014, the Military Diversion program was enacted. (SB 1227, Hancock, Chapter 658, Statutes of 2013.) Pursuant to the provisions of the bill, a veteran or member of the United States military could have a misdemeanor charge diverted if he or she is suffering from trauma, substance abuse, or mental health problems as a result of service in the military. (Pen. Code, § 1001.80, sub. (a).) The new law did not specifically state whether DUI offenses could be diverted under the Military Diversion program.

As a result of the conflict, there was a split of authority on whether the Legislature intended for the general prohibition against diverting DUI offenses to apply to persons in the Military Diversion program. In *People v. VanVleck* (2016) 2 Cal.App.5th 355, the Fourth District Court of Appeal held that persons charged with driving under the influence offenses cannot obtain diversion under Penal Code §1001.80. The *VanVleck* court applied the rule that a specific statute controls over a general statute and found that since the Military Diversion program applies to all misdemeanors while Vehicle Code section 23640 applies only to DUIs, the Vehicle Code section is the specific statute and controls. (*Id.* at 365.) The court stated that if the Legislature wanted to specifically include DUIs, it could have done so, but because it did not the general prohibition bars diversion of DUIs. (*Id.* at 367.)

Conversely, in *Hopkins v. Superior Court* (2016) 2 Cal. App. 5th 1275, review granted November 16, 2016, S237734, the Second District Court of Appeal held that the Military Diversion program function as an implied repeal of the prohibition in Vehicle Code section 23640 against pretrial diversion for defendants charged with DUIs, thus a person who otherwise qualifies for the program could receive pretrial diversion for a DUI. The *Hopkins* court decided that the general versus specific statute rule of statutory construction was not helpful to its analysis because either statute could be determined to be the specific depending on what is focused upon. Since, according to the court, it would be an arbitrary choice on which focus to use, the court decided that it would rely on the rule that a later enacted statute supersedes an earlier one. (*Id.* at 1283-1284). The court urged the Legislature to amend the statutes authorizing the Military Diversion program to express its intent with regard to military diversion in DUI cases. (*Id.* at 1278.)

The California Supreme Court has granted review of the conflicting cases. There is also a bill pending before this committee that would specify that, notwithstanding the prohibition in Vehicle Code section 23640, misdemeanor DUI offenses may be eligible for pretrial diversion under the Military Diversion program. (SB 725, Jackson.)

Should this bill specify whether DUIs may be eligible for pretrial diversion?

5. Support

According to the Steinberg Institute:

Under this bill, before diversion can be considered by the court, the defense must present reliable evidence regarding the underlying mental health condition, its connection to the charged offense, and the likelihood that the defendant will benefit from treatment in a suitable program. Research shows that Californians who participate in diversion programs are less likely to re-offend, and more likely to access housing, find employment, and contribute to their communities.

We believe this bill furthers the Governor and Legislatures goals of reducing jail and prison populations, while simultaneously improving outcomes for this vulnerable population. Given the stigma around mental illness and lack of community treatment options, many individuals first recognition of their mental illness and opportunity for treatment is during their interaction with the criminal justice system. This bill would ensure that we prioritize treating the underlying problem, and not the symptoms, and better ensure that individuals receive the care they need.

6. Opposition

The California District Attorneys Association argues:

[L]eaving the “proof” of such mental illness to whomever the defense wishes to pay to render such an opinion invites a cottage industry and potential abuse. While the bill says nothing about whether the prosecution may attempt to rebut the claim, even if it could, the cost to the counties would be tremendous. In Los Angeles County alone, there were 284,433 misdemeanors filed in FY 2014-15. SB 8 would allow every one of those defendants (plus a sizeable cohort of 1170(h) felons) to make the case for diversion

based on any of the mental disorders listed in the DSM. 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 two years while the defendant participates in the program.

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

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