
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: SB 1223 **Hearing Date:** March 29, 2022
Author: Becker
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Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Criminal procedure: mental health diversion*

HISTORY

Source: ACLU California Action

Prior Legislation: SB 666 (Stone), failed Sen. Public Safety, 2019
SB 215 (Beall), Ch. 1005, Stats. 2018
AB 1810 (Committee on Budget), Ch. 34, Stats. 2018
SB 8 (Beall), held on Suspense File in Assem. Appropriations, 2017

Support: California Public Defenders Association; Disability Rights California; Initiate Justice; Smart Justice California

Opposition: None known

PURPOSE

The purpose of this bill is require a court to consider granting a defendant mental health diversion if the defendant has been diagnosed with a mental disorder, as described, and states that the court shall find the mental disorder was a significant factor in the commission of the offense, as defined, unless there is clear and convincing evidence that it was not.

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, §§ 1001.83 for caregivers; Pen. Code, §§ 1001.35 et seq. for persons with mental disorders).

Existing law states that the purpose of mental health diversion is to promote the following:

- Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety;
- 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; and,

- Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (Pen. Code, § 1001.35.)

Existing law authorizes a court to, after considering the positions of the defense and prosecution, grant pretrial diversion to defendant charged with a misdemeanor or felony if the defendant meets all of the following requirements:

- 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, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia, and the defense produces evidence of the defendant's mental disorder which must include a recent diagnosis by a qualified mental health expert;
- The court is satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense, as provided;
- In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment;
- The defendant consents to diversion and waives their right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment due to their mental incompetence and cannot consent to diversion or give a knowing and intelligent waiver of their right to a speedy trial;
- The defendant agrees to comply with treatment as a condition of diversion; and,
- 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. In making this determination, the court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subds. (a)-(b).)

This bill changes the eligibility criteria that requires the court to be satisfied that the defendant suffers from a mental disorder and instead requires the defendant to have been diagnosed with a mental disorder and removes the requirement that the diagnosis be recent.

This bill provides that a defendant's mental disorder was a significant factor in the commission of the charged offense if the disorder or its symptoms were a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense.

This bill states that if the defendant has been diagnosed with a mental disorder, the court shall find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not.

This bill includes the defendant's treatment plan among the things the court may consider when making the determination that the defendant will not pose an unreasonable risk of danger to public safety if treated in the community.

This bill defines "qualified mental health expert" to include, but not be limited to, "a psychiatrist, psychologist, a person licensed to provide mental health services, as provided, or a person whose knowledge, skill, experience, training, or education qualifies them as an expert.

Existing law excludes defendants charged with the following offenses from mental health diversion eligibility:

- Murder or voluntary manslaughter;
- An offense for which a person, if convicted, would be required to register as a sex offender, except for an indecent exposure violation;
- Rape;
- Lewd or lascivious act on a child under 14 years of age;
- Assault with intent to commit rape, sodomy, or oral copulation;
- Commission of rape or sexual penetration in concert with another person;
- Continuous sexual abuse of a child; and,
- Violations involving weapons of mass destruction.

Existing law provides that "pretrial diversion" for purposes of mental health diversion means 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 all of the following:

- 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;
- The defendant may be referred to 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 request of the defense, the request of the prosecution, the needs of the defendant, and the interests of 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 entity 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;
- The provider of the mental health treatment program in which the defendant has been placed shall provide regular reports to the court, the defense, and the prosecutor on the defendant's progress in treatment;

- The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years;
- 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 during the period of diversion. 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 has failed to comply with the terms of diversion. (Pen. Code, § 1001.36, subd. (c).)

This bill specifies that for a defendant charged with a misdemeanor who is granted mental health diversion, the period of diversion to limited to one year.

Existing law states that if any of the following circumstances exists, the court shall, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether the criminal proceedings should be reinstated, whether the treatment should be modified, or whether the defendant should be conserved and referred to the conservatorship investigator of the county of commitment to initiate conservatorship proceedings for the defendant:

- The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence;
- The defendant is charged with an additional felony allegedly committed during the pretrial diversion;
- The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion;
- Based on the opinion of a qualified mental health expert whom the court may deem appropriate, either of the following circumstances exists:
 - The defendant is performing unsatisfactorily in the assigned program.
 - The defendant is gravely disabled, as defined. (Pen. Code, § 1001.36, subd. (d).)

Existing law provides that if the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. A court may conclude that the defendant has performed satisfactorily if the defendant has substantially complied with the requirements of diversion, 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. (Pen. Code, § 1001.36, subd. (e).)

This bill provides that a decision by any judge to deny mental health diversion shall not be binding on any other judge subsequently assigned to the same case at a later stage.

This bill makes other conforming changes.

COMMENTS

1. Need for This Bill

According to the author of this bill:

The Committee on Revision of the Penal Code (CRPC) concluded that the mental health diversion law has been substantially underutilized due, in part, to its narrow eligibility requirements

The report states, “For example, LA County has only diverted a few hundred people using the law. Yet an estimated 61% of people in the LA County jail system’s mental health population were found to be appropriate for release into a community-based diversion program, according to a recent study by the RAND Corporation.”

Other more specialized mental health diversion statutes in California do not require such a specialized showing, including military pre-trial diversion and veteran diversion, nor do several other states with mental health diversion statutes (namely, Florida and Illinois). Instead, these statutes recognize that in most cases, a person’s diagnosed mental disorder is connected to the offense.

2. Incarceration of Offenders with Mental Disorders

According to a 2019 study, more than 30% of the state’s prison and 23 % of the jail populations have a mental illness. (Stanford Justice Advocacy Project, *Confronting California’s Continuing Prison Crisis: The Prevalence And Severity Of Mental Illness Among California Prisoners On The Rise* <<https://law.stanford.edu/wp-content/uploads/2017/05/Stanford-Report-FINAL.pdf>> [as of Mar. 21, 2022.]) Not only have the numbers of inmates with mental illness increased, the severity of psychiatric symptoms among inmates is also on the rise. (*Id.* at p. 2.) This population tends to serve longer sentences than the general population (*Id.* at p. 1.) and have a higher recidivism rate.

Promoting treatment over incarceration has shown positive results in reducing recidivism:

To avoid incarceration, individuals with serious mental illness need to be diverted from the legal system and offered rehabilitative resources. The homeless comprise a significant share of individuals who come to the attention of law enforcement. A recent review revealed that lifetime arrest rates of homeless individuals with serious mental illness ranged from 62.9% to 90.0%, compared with approximately 15.0% in the general population. For this population, stable housing is a major issue. A recent randomized trial comparing housing first with assertive community treatment with treatment as usual demonstrated significantly decreased rates of arrest among those receiving assertive community treatment at 2 years. These results suggest that efforts to provide stable, affordable, and safe shelter for homeless individuals may lead to lower rates of involvement in the justice system.

....

When individuals with serious mental illness are brought to court attention, several models have demonstrated positive outcomes, including mental health courts, drug courts, and Veterans Treatment Courts. Although they serve different populations, the common goal of all these court formats is to address the causes of behavior that brought an offender to police attention. Mental health courts are becoming more common in different communities, each with slight variations; however, common features include a specialized court docket that emphasizes problem solving, community-based treatment plans that are designed and supervised by judicial and clinical staff, regular follow-up with incentives and sanctions related to treatment adherence, and clearly defined “graduation” criteria. A recent prospective study of 169 individuals showed that the likelihood of perpetrating violence during the following year was significantly lower among participants processed through a mental health court than among individuals in a matched comparison group who were processed through traditional courts (odds ratio, 0.39; 95% CI, 0.16-0.95; P = .04).

(Hirschtritt & Binder, *Interrupting the Mental Illness–Incarceration–Recidivism Cycle* (Feb. 21, 2017) 317 JAMA 695-696, fn. omitted.)

3. Mental Health Diversion Law

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. In order to be eligible for diversion, 1) the defendant must suffer from a mental disorder that 2) played a significant role in the commission of the charged offense; 3) in the opinion of a qualified mental health expert, the defendant’s symptoms 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, subd. (b)(1).) The defendant is not eligible if they are charged with specified crimes. (Pen. Code, § 1001.36, subd. (b)(2).)

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) the program must submit regular reports to the court and counsel regarding the defendant’s progress in treatment; and 4) the program must submit regular reports to the court and counsel regarding the defendant’s progress in treatment. (Pen. Code, § 1001.36, subd. (c)(1).) 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 give its consent to receive the defendant for treatment. (Pen. Code, § 1001.36, subd. (c)(1)(B).)

The diversion program cannot last more than two years and 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. (c)(1)(3)-(4).)

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).) The law gives discretion to courts to grant diversion if the minimum standards are met, and, correspondingly, refuse to grant diversion even though the defendant meets all of the requirements:

There may be times, because of the defendant’s circumstances, where the interests of justice do not support diversion of the case. The defendant’s criminal or mental health history may reflect a substantial risk the defendant will commit dangerous crimes beyond the “super strikes” identified in section 1001.36, subdivision (b)(6). It may be that because of the defendant’s level of disability there is no reasonably available and suitable treatment program for the defendant. The defendant’s treatment history may indicate the prospect of successfully completing a program is quite poor. Conduct in prior diversion programs may indicate defendant is now unsuitable. (See § 1001.36, subd. (h) [the court may consider past performance on diversion in determining suitability].) The court may consider the defendant and the community will be better served by the regimen of mental health court. (See §1001.36, subd. (c)(1)(B) [the court may consider interests of the community in selecting a program].) Clearly the court is not limited to excluding persons only because of the risk of committing a “super strike” – the right to exclude because of dangerousness goes well beyond that limited list. In short, the court may consider *any* factor relevant to whether the defendant is suitable for diversion.

(J. Couzens, *Memorandum RE: Mental Health Diversion (Penal Code §§ 1001.35-1001.36) (AB 1810 & SB 215)* [revised] (Nov. 14, 2018), p. 4, original italics.)

This bill changes the eligibility requirements for a defendant to be considered for mental health diversion by removing the requirement that the court is satisfied that the defendant suffers from a mental disorder and instead requires that the defendant have been diagnosed with a mental disorder. This bill also provides that the court shall find that the defendant’s mental disorder was a significant in the commission of the offense unless there is clear and convincing evidence that it was not. This bill separates out the current eligibility factors based on the defendant’s mental disorder from the factors the court shall consider when determining whether the defendant is suitable for diversion – i.e. the defendant’s symptoms of the mental disorder would respond to mental health treatment and the defendant will not pose an unreasonable risk to public safety if treated in the community. In making a determination on the suitability factors, the bill retains the court’s discretion to grant or deny mental health diversion to a person who is otherwise eligible.

4. Committee on the Revision of the Penal Code's Recommendation

On January 1, 2020, the Committee on the Revision of the Penal Code (“Committee”) was established within the Law Review Commission to study the Penal Code and recommend statutory reforms. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) The Committee’s objectives are as follows:

- (1) Simplify and rationalize the substance of criminal law;
- (2) Simplify and rationalize criminal procedures;
- (3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders; and,
- (4) Improve the system of parole and probation.

(Gov. Code, § 8290.5, subd. (a).) In making recommendations to achieve these objectives, the Committee may recommend adjustments to the length of sentence terms. (Gov. Code, § 8290.5, subd. (b).) The Committee is required to prepare an annual report that describes its work in the prior calendar year and its expected work for the subsequent calendar year. (Gov. Code, § 8293, subd. (b).)

In December of 2021, the Committee released its second annual report with seven recommendations. (*Annual Report and Recommendations 2021*, Committee on Revision of the Penal Code < http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf > [as of Mar. 21, 2022].) The Committee’s recommendations are unanimous and build on exhaustive research and testimony from 23 expert witnesses who addressed the Committee this year, including California Chief Justice Tani Cantil-Sakauye, Attorney General Rob Bonta, crime victims, law enforcement leaders, judges, and criminal defense experts and advocates.

One of the Committee’s recommendations is to strengthen the mental health diversion law. Specifically, the Committee recommended that the law be changed to simplify the procedural process for obtaining diversion by presuming that a defendant’s diagnosed “mental disorder” has a connection to their offense. A judge could deny diversion if that presumption was rebutted or for other reasons currently permitted under the law, including finding that the individual would pose an unreasonable risk to public safety if placed in a diversion program. (*Id.* at p. 17.)

According to the report:

While there is limited data on the use of mental health diversion, it appears that the law could be used much more frequently. For example, Los Angeles County has only diverted a few hundred people using the law. Yet an estimated 61% of people in the Los Angeles County jail system’s mental health population were found to be appropriate for release into a community-based diversion program, according to a recent study by the RAND Corporation.

To increase the use of mental health diversion in appropriate cases, the procedural process for obtaining diversion could be simplified by presuming that a defendant’s diagnosed “mental disorder” has a connection to their offense. A judge could deny diversion if that presumption was rebutted or for other reasons

currently permitted under the law, including finding that the individual would pose an unreasonable risk to public safety if placed in a diversion program.

This modification of the mental health diversion statute would harmonize the law with other more specialized mental health diversion statutes that do not require showing such a connection, including Penal Code sections 1170.9 (post-conviction probation and mental health treatment for veterans) and 1001.80 (military pre-trial diversion program). And research into the related area of drug courts has shown that “tight eligibility requirements” are the most important reason that drug courts have not contributed to a meaningful drop in incarceration.

(Annual Report and Recommendations 2021, Committee on Revision of the Penal Code, p. 17, fn. omitted.) This bill would codify the Committee’s recommendation and make additional changes including providing a definition for “qualified health expert,” specify that the maximum term of diversion for persons diverted for a misdemeanor offense is one year, and provide that a decision by any judge to deny mental health diversion shall not be binding on any other judge subsequently assigned to the same case at a later stage.

5. Argument in Support

According to Disability Rights California:

In 2018, California enacted AB 1810, which authorized courts to divert people with mental health conditions who committed misdemeanors and low-level felonies out of the carceral system and into treatment. By ensuring that these people are connected to meaningful, long-term mental health treatment instead of simply jailed and released, the diversion statute protects public safety by lowering recidivism rates, saves taxpayer money, and leads to better outcomes for these individuals and their families. In addition, increasing the availability of mental health diversion and linking people to community-based services and supports will help to address the cycle of homelessness, disengagement from treatment, and criminal legal system involvement that the Department of State Hospitals has identified as a primary driver of California’s current Felony Incompetent to Stand Trial waiting list crisis.

In its most recent report, however, the Committee on Revision of the Penal Code (CRPC) concluded that the mental health diversion law has been substantially underutilized due, in part, to its narrow eligibility requirements. Under existing law, an individual can only qualify for diversion if he or she proves that their mental disorder “substantially contributed” to the commission of the charged offense. Noting that other states and similar mental health diversion statutes, including California’s Veteran and Regional Center diversion laws, do not require such a showing, the CRPC recommended removing this barrier.

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