Contra Costa
Health Services

CONTRA COSTA COUNTY
MENTAL HEALTH
COMMISSION

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To work through families and interagency collaborations to ensure that individuals, with mental illness in the justice system, are given respect, dignity and human rights.

Justice Systems Committee Meeting

Wednesday, February 26, 2020 ♦ 1:30pm to 3:00pm

At: 1220 Morello Ave, Suite 100 Conference Room, Martinez

AGENDA

I. **Call to Order / Introductions - Chair**

II. **Public Comments**

III. **Commissioner Comments**

IV. **APPROVE minutes from the November 26, 2019 meeting**

V. **DISCUSS Mental Health Programs at County Detention Facilities, with invited Dr. Matthew White, Behavioral Health Services Medical Director and David Seidner, Mental Health Program Chief, Detention Health Services:**
a. Per AB 1810, the new clinical entity of QMHE (Qualified Mental Health Expert) will be created. Where will QMHE be housed? Will any be housed at Public Defender Office?
b. Who will determine how many QMHE to hire? What is the budget? Who is responsible for paying QMHE and evaluating the efficacy?
c. The new policy relating to diversion efforts is calling for judges and criminal lawyers to be trained on pertinent subjects related to mental illness and its impact on criminal cases. Who will train? How often? How will the training be paid for? Who will oversee the training? Will it be possible to collect the data to see the effects of trainings?
d. The process of giving psychiatric medications/treatments involuntarily to the needed jail population

VI. **Adjourn**

MEMORANDUM

FROM: **J. RICHARD COUZENS**
Judge of the Placer County Superior Court (Ret.)

DATED: July 13, 2018

RE: **MENTAL HEALTH DIVERSION (PENAL CODE §§ 1001.35-1001.36)(AB 1810)**

AB 1810, an omnibus mental health bill, was signed by the governor on June 27, 2018, as a budget trailer bill; it became effective on signing. The legislation includes the addition of Penal Code[1] sections 1001.35 and 1001.36[2] for the discretionary diversion of qualified persons who have committed a crime because of a mental disorder. This memorandum will provide a review of the new diversion procedures and related legislation as it currently exists.

I. Crimes eligible for diversion

All crimes, felony or misdemeanor, are potentially eligible for diversion. (§ 1001.36, subd. (a).)

II. When diversion may be granted

Diversion may be granted at any time after the filing of an accusatory pleading: "On an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court may, after considering the positions of the defense and prosecution, grant pretrial diversion to a defendant pursuant to this section. . . ." (§ 1001.36, subd. (a).) "Pretrial 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. . . ." (§ 1001.36, subd. (c).) It seems clear the statute was drafted to permit pre-plea diversion of the defendant. The phrase "until adjudicated" appears to indicate there is no ability to request diversion once the defendant has been found to have committed the crime, whether by plea or verdict.

The diversion program is not dependent on whether the defendant is competent to stand trial. Neither counsel nor the court are required to make a declaration or

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.
[2] The full text of sections 1001.35 and 1001.36 is set forth in Attachment A.

finding as to incompetence before the diversion process may be initiated. The purpose of the program is not to secure the defendant's trial competency, but to offer treatment for an underlying mental disorder. However, sections 1370, subdivision (a)(1)(B)(iv) and 1370.01, subdivision (a)(2), permit the court to place an incompetent defendant on diversion if deemed "suitable."[3]

III. Persons eligible for diversion

Discretion of the court

Diversion is a discretionary disposition available to the court and defendant if certain requirements are met. "On an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court *may, after considering the positions of the defense and prosecution, grant pretrial diversion* to a defendant pursuant to this section. . . ." (§ 1001.36, subd. (a); emphasis added.) "Pretrial diversion *may be granted pursuant to this section* if all of the following criteria are met. . . ." (§ 1001.36, subd. (b); emphasis added.)

"Ordinarily, the word 'may' connotes a discretionary or permissive act; the word 'shall' connotes a mandatory or directory duty. This distinction is particularly acute when both words are used in the same statute." (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 432; footnotes omitted.) In enacting section 1001.36, the Legislature appears to understand this distinction. When addressing the authority of the court to grant diversion, the statute uses the permissive "may." (See, *e.g.*, §§ 1001.36, subd. (a) and (b).) When addressing the court's duty upon the defendant's successful completion of diversion, the statute uses the directory "*shall* dismiss the defendant's criminal charges." (§ 1001.36, subd. (e); emphasis added.) Section 1001.36, subdivision (h), expressly acknowledges the discretionary nature of the court's decision: "when determining whether to *exercise its discretion to grant diversion* under this section, a court may consider previous records of participation in diversion under this section." (Emphasis added.) Finally, the court having full discretion to grant diversion appears consistent with a stated purpose of the act to give local discretion for the creation and implementation of a diversion program: "The purpose of this chapter 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." (§ 1001.35, subd. (b).)

Accordingly, it seems clear the court can grant diversion if the minimum standards are met, and, correspondingly, can refuse to grant diversion even though the defendant meets the technical requirements of the program.

[3] For a full discussion of the placement of incompetent persons on diversion, see Section VII, *infra*.

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.

Burden of establishing eligibility

Because the ability to participate in diversion is not a matter of statutory right, but a matter of discretion with the court, it seems likely the defendant will carry the burdens of proof and persuasion regarding eligibility and suitability for diversion. Diversion under section 1001.36 is quite different than the qualified "right" to resentencing and reclassification in Propositions 36 and 47, which, depending on the issue, have shifting burdens of proof. (See, generally, *People v. Romanowski* (2017) 2 Cal.5th 903, 916 [Proposition 47 – defendant has burden of proof of eligibility]; *People v. Frierson* (2017) 4 Cal.5th 225, 239 [Proposition 36 – People have burden of proof of dangerousness].)

***Prima facie* determination of eligibility**

It is suggested that when the defendant requests mental health diversion, the court conduct a hearing to determine whether the defendant can offer a *prima facie* basis for diversion.[4] At that time the court can receive information about the crime, the defendant's criminal and mental health history, and potential treatment options. If the defendant demonstrates the crime is generally suitable for diversion and the defendant has at least an arguable chance of meeting the other requirements for diversion, the court may proceed with appointment of any necessary experts and exploration of placement options. On the other hand, if the case is unsuitable for diversion, even assuming the defendant would otherwise qualify, the court could deny the request without further incurring unnecessary time and expense in obtaining forensic evaluations.

[4] For a complete outline of the suggested procedure for granting diversion, see Attachment B

It is suggested that this hearing be informal in nature, with counsel making offers of proof as to the details of the offense and the defendant's criminal and mental health history. It would seem entirely appropriate to consider "reliable hearsay." Indeed, sections 1001.36, subd. (b)(1) and (2), contemplate the use of such evidence by permitting the court to consider police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, and records or reports by qualified medical experts.

Requirements for diversion

The court may grant diversion if **all** of the following requirements are met:

A. **"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** [currently the DSM V], 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." (§ 1001.36, subd. (b)(1); emphasis added.) Accordingly, while the statute permits diversion based on nearly every mental disorder, it expressly excludes persons who are diagnosed with antisocial personality disorder, borderline personality disorder, and pedophilia.

The DSM V also includes as a mental disorder certain developmental disabilities such as autism, neurocognitive disorder due to traumatic brain injury, and intellectual disability (intellectual developmental disorder). Even if a particular developmental disability is not included in the DSM V definition of mental disorder, it would seem that persons suffering from a recognized disorder caused by the developmental disability also would be entitled to diversion.

The defense is directed to provide evidence of the disorder, which must include a diagnosis by a "qualified mental health expert." There are three points to observe about this requirement. First, "qualified mental health expert" is not further defined in the statute. Likely the intent of the legislation is to allow the court to determine in any particular circumstance whether a person is qualified to express an opinion on the defendant's diagnosis.[5]

Second, the statue only requires a "recent diagnosis" of the disorder. Depending on the defendant's circumstances, the diagnosis could come from a psychiatrist or psychologist in a full report ordered by the court, or it could come from recent medical records regarding the defendant's mental health treatment. If after the preliminary review of the *prima facie* basis for granting diversion the court determines it is appropriate to

[5] It seems unlikely the expert must meet the standards set forth in section 1369, subdivision (h); if it had wanted that level of expertise, the Legislature could have said so.

proceed with diversion, the court should explore the availability of relevant information regarding the defendant's diagnosis and the other requirements of eligibility before ordering an expensive and time-consuming full psychological report. Particularly if the defendant is engaged in on-going treatment, any number of persons engaged in the defendant's treatment would likely be qualified to render an opinion as to the defendant's diagnosis and the other issues to be addressed by the court.

Third, it is unlikely section 1001.36, subdivision (b)(1), should be read as limiting the diagnosis to the one offered by the defense expert. The provision establishes a duty of disclosure by the defense, not a limitation on what the court may consider. The prosecution would not be precluded from having its own expert examine the defendant. (See § 1054.3, subd. (b)(1); see also *Sharp v. Superior Court* (2012) 54 Cal.4th 168, 173-174 [interpreting section 1054.3(b)(1)].) Furthermore, nothing precludes the court from appointing its own expert pursuant to Evidence Code, section 730.

In reaching an opinion as to whether the defendant has a qualifying disorder, the expert is expressly permitted to consider "the defendant's medical records, arrest reports, or any other relevant evidence." (§ 1001.36, subd. (b)(1).)

B. **"The court is satisfied that the defendant's mental disorder played a significant role in the commission of the charged offense."** (§ 1001.36, subd. (b)(2).) "A court may conclude that a defendant's mental disorder played a significant role in the commission of the charged offense if . . . the court concludes that the defendant's mental disorder substantially contributed to the defendant's involvement in the commission of the offense." (*Id*.) In reaching its conclusion on this requirement, the court is permitted to consider "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, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense. . . ." (*Id*.)

C. **"In the opinion of a qualified mental health expert, the defendant's symptoms motivating the criminal behavior would respond to mental health treatment."** (§ 1001.36, subd. (b)(3).)

D. **The defendant consents to diversion and waives the right to a speedy trial.** (§ 1001.36, subd. (b)(4). The only exception to this requirement is when the defendant has actually been found incompetent and suitable for diversion under sections 1370, subdivision (a)(1)(B)(iv), or 1370.01, subdivision (a)(2). In such circumstances the defendant is not competent to consent to diversion or waive the right to a speedy trial. (§ 1001.36, subd. (b)(4).) For a discussion of diversion of persons who are incompetent to stand trial, see Section VII, *infra*.

E. **"The defendant agrees to comply with treatment as a condition of diversion."** (§ 1001.36, subd. (b)(5).)

F. **"The court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community."** (§ 1001.36, subd. (b)(6).) In determining dangerousness, "[t]he 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." (*Id*.)

The reference to section 1170.18 incorporates the definition of "unreasonable risk of danger to public safety" contained in Proposition 47: "'Unreasonable risk of danger to public safety' means an unreasonable risk that the [defendant] will commit a new violent felony within the meaning of" section 667(e)(2)(C)(iv)." (§ 1170.18, subd. (c).)

In considering this factor, the court must determine whether there is an unreasonable risk the defendant will commit one of the "super strikes," not whether there is an unreasonable risk that the defendant will commit other serious or violent felonies such as a robbery, kidnapping or arson. (For a complete table of the listed violent felonies, see Attachment C.)

Specifically, the court must determine whether there is an unreasonable risk that the defendant will commit any of the following offenses:

> (a) A "sexually violent offense" as defined in Welfare and Institutions Code, section 6600(b) [Sexually Violent Predator Law]: " 'Sexually violent offense' means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code."
>
> (b) Oral copulation under section 288a, sodomy under section 286, or sexual penetration under section 289, if these offenses are committed with a person who is under 14 years of age, and who is more than 10 years younger than the defendant.

(c) A lewd or lascivious act involving a child under 14 years of age, in violation of section 288.

(d) Any homicide offense, including any attempted homicide offense, defined in sections 187 to 191.5, inclusive. Potential conviction for voluntary manslaughter under section 192, subdivision (a), involuntary manslaughter under section 192, subdivision (b), and vehicular manslaughter under section 192, subdivision (c), are not "super strikes."

As noted, the determination of dangerousness includes the potential of committing gross vehicular manslaughter while intoxicated, in violation of section 191.5, subdivision (a). In that regard, likely the court will be able to consider the person's history of substance abuse and driving as it relates to the person's potential of killing someone while operating a vehicle while under the influence of alcohol or drugs.

(e) Solicitation to commit murder as defined in section 653f.

(f) Assault with a machine gun on a peace officer or firefighter, as defined in section 245, subdivision (d)(3).

(g) Possession of a weapon of mass destruction, as defined in section 11418, subdivision (a)(1).

(h) Any serious or violent offense punishable in California by life imprisonment or death.

G. **"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."** (§ 1001.36, subd. (c)(1)(A).) Although this requirement is listed as part of the definition of "pretrial diversion" in subdivision (c), the identification of a suitable program clearly is a prerequisite to the court granting diversion. Certainly one of the principal purposes of diversion is to treat the defendant sufficiently that he does not commit further crimes. Even though the court may be unable to find the defendant likely to commit a "super strike" if treated in the community as discussed above, the court must nevertheless be satisfied the program will address the needs of the defendant to prevent the commission of *any* serious crime because of the mental disorder. If the court cannot identify a program that will meet the "specialized mental health treatment needs of the defendant," diversion cannot be granted. Finally, even if a suitable program is identified, the program must be willing to accept the defendant.

Responsibility for the cost of psychological reports

The responsibility for the payment of forensic evaluations was discussed at length in an Opinion of the California Attorney General. The opinion concluded, except in limited circumstances, the court generally is responsible for the cost of the reports utilized by the courts in criminal proceedings. "[T]he state is obligated to pay the costs of '[c]ourt-appointed expert witness fees (for the court's needs)' and 'court-ordered forensic evaluations and other professional services (for the court's own use).' ([Cal. Rules of Court,] Rule 810[6], subd. (d), Function 10.)" (Ops. Cal. Atty Gen. No. 03-902, p. 4 (2004).)

The need of a report arises, if at all, in the determination of eligibility for diversion under section 1001.36, subdivision (b)(1), and when diversion is terminated for a person previously declared incompetent to stand trial under section 1370, subdivision (a)(1)(B)(v). Section 1001.36, subdivision (b)(1), for example, provides that "[e]vidence of the defendant's mental disorder shall be provided by the defense and shall include a recent diagnosis by a qualified mental health expert." If a report is ordered, it would then be available to the court to determine whether the defendant suffers from a qualified mental disorder (§ 1001.36, subd. (b)(1)), whether the court is satisfied the mental disorder played a significant role in the commission of the charged offense (§ 1001.36, subd. (b)(2)), whether the defendant's symptoms would respond to treatment (§ 1001.36, subd. (b)(3)), and whether the defendant would pose an unreasonable risk of danger to public safety if treated in the community (§ 1001.36, subd. (b)(6)).

While the defendant has an initial burden to supply evidence of a mental disorder, including a recent diagnosis from a mental health professional, it appears the substance of the report, if one is needed by the court, assists the court in determining four of the six eligibility requirements for diversion. While the report in some instances will be helpful to the defendant, its primary purpose is to assist the court in making its decision to grant diversion. The report is for the court's needs and the court's own use. The court has the duty to pay for the reports under Rule 10.810, subdivision (d), Function 10, as part of "court operations" (Gov. Code § 77200). Similarly, the court has the obligation to pay for reports requested by the court pursuant to Evidence Code, section 730. It is unlikely the court has the obligation to pay for reports requested by the prosecution.

Not all courts agree with the attorney general's opinion. At least one court has taken the position that since it is the defendant's burden to establish eligibility for diversion, the defendant bears the financial burden of addressing the medical issues identified in sections 1001.36, subd. (b)(1), (b)(2), (b)(3), and (b)(6).

[6] This rule was renumbered as Cal. Rules of Court, rule 10.810, but the content is identical to the old rule.

IV. Program requirements

The mental health treatment program must meet the following requirements:

A. **"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."** (§ 1001.36, subd. (c)(1)(A).)

B. **The defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources.** (§ 1001.36, subd. (c)(1)(B).) "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." (*Id*.) The statute gives the court broad discretion in the selection of the specific program of diversion for the defendant. Nothing in the legislation requires a court or county to create a mental health program for the purposes of diversion. Furthermore, 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.

C. **The program must submit regular reports to the court and counsel regarding the defendant's progress in treatment.** (§ 1001.36, subd. (c)(2).) Nothing in the statute indicates the specific frequency of the reports. For persons committed to a residential program for restoration of competency, for example, there is an initial 90-day report, then a progress report every six months thereafter (§ 1370, subd. (b)(1).) See also section 1605, subdivision (d),which requires a progress report every 90 days for a person on outpatient treatment. There should be a final report calculated to correspond with the anticipated termination of the defendant's program in two years. The final report should address the defendant's overall performance in the program and any long-term plans for mental health care. (See § 1001.36, subd. (e).)

D. **The diversion program is to last no longer than two years.** (§ 1001.36, subd. (c)(3).)

V. Termination or modification of treatment

If any of the following circumstances occur, the court is directed to hold a hearing to determine whether criminal proceedings should be reinstated, whether treatment should be modified, or whether the defendant should be referred for conservatorship proceedings in accordance with Welfare and Institutions Code, sections 5350, *et seq*. (§ 1001.36, subd. (d).) The court is to give notice to the defendant and counsel. Nothing in the statute precludes either party from requesting the hearing.

A. The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence. (§ 1001.36, subd. (d)(1).)

B. The defendant is charged with an additional felony allegedly committed during the pretrial diversion. (§ 1001.36, subd. (d)(2).)

C. The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion. (§ 1001.36, subd. (d)(3).)

D. Based on the opinion of a qualified mental health expert whom the court may deem appropriate, either of the following circumstances exist: (§ 1001.36, subd. (d)(4).)

    1. The defendant is performing unsatisfactorily in the assigned program. (§ 1001.36, subd. (d)(4)(A).)

    2. The defendant is gravely disabled, as defined in Welfare and Institutions Code, section 5008, subdivision (h)(1)(B). A defendant may only be conserved and referred to the conservatorship investigator pursuant to this finding. (§ 1001.36, subd. (d)(4)(B).)

Section 1001.36, subdivision (i), provides full access to the defendant's records of treatment during diversion: "The county agency administering the diversion, the defendant's mental health treatment providers, the public guardian or conservator, and the court shall, to the extent not prohibited by federal law, have access to the defendant's medical and psychological records, including progress reports, during the defendant's time in diversion, as needed, for the purpose of providing care and treatment and monitoring treatment for diversion or conservatorship."

If criminal proceedings are reinstated, it still may be necessary for the court to address traditional competency issues. The defendant's treatment received during

diversion is not primarily designed to restore trial competence. Depending on the procedural posture of the case when the defendant requested diversion, it may be necessary for the court or defense counsel to declare a doubt as to the defendant's competency to stand trial and pursue the traditional process for these individuals. (See §§ 1368, *et seq*.) It also seems clear that if the defendant does regain trial competence during diversion, that fact has no bearing on whether the defendant is entitled to continue on diversion and, if the program is successfully completed, obtain a dismissal of the criminal charges. (See next section.)

VI. Successful completion of diversion

Dismissal of criminal charges

"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." (§ 1001.36, subd. (e).) Whether the defendant has performed "satisfactorily" on diversion is a matter left to the discretion of the court. However, the court *may* conclude the defendant has performed satisfactorily if:

- The defendant has "substantially complied" with the program requirements.
- The defendant has "avoided significant new violations of law *unrelated* to the defendant's mental health condition." (Emphasis added.) The statute gives the court authority to ignore new law violations that are *related* to the defendant's mental disorder. The court is not required to do so.
- The defendant has "a plan in place for long-term mental health care."

Duties of the court

If the court dismisses the charges, the clerk must notify the Department of Justice of the dismissal pursuant to this section. (§ 1001.36, subd. (e).)

The court must order access to the record of the arrest restricted in accordance with Section 1001.9, except as specified in subdivisions (g) and (h). (§ 1001.36, subd. (e).)

Section 1001.36, subdivision (g), provides that "the defendant shall be advised that, regardless of his or her completion of diversion, both of the following apply:

(1) The arrest upon which the diversion was based may be disclosed by the Department of Justice to any peace officer application request and that, notwithstanding subdivision (f), this section does not relieve the defendant 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 in Section 830.

(2) An order to seal records pertaining to an arrest made pursuant to this section has no effect on a criminal justice agency's ability to access and use those sealed records and information regarding sealed arrests, as described in Section 851.92."

Section 1001.36, subdivision (h), provides 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 participation in, or completion of, diversion pursuant to this section or for use at a hearing on the defendant's eligibility for diversion under this section may not be used in any other proceeding without the defendant's consent, unless that information is relevant evidence that is admissible under the standards described in paragraph (2) of subdivision (f) of Section 28 of Article I of the California Constitution." Article I, Section 28, subdivision (f)(2), the "Right to Truth in Evidence", provides in part that "relevant evidence shall not be excluded in any criminal proceeding, including pretrial and postconviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court."

Section 1001.36, subdivision (h), further provides "when determining whether to exercise its discretion to grant diversion under this section, a court may consider previous records of participation in diversion under this section."

What the defendant may disclose

"Upon successful completion of diversion, if the court dismisses the charges, the arrest upon which the diversion was based shall be deemed never to have occurred . . . . The defendant who successfully completes diversion 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 in subdivision (g)." (§ 1001.36, subd. (e).)

VII. Persons incompetent to stand trial

The provisions permitting diversion of persons found incompetent to stand trial are found in sections 1370, subdivision (a)(1)(B) and 1370.01, subdivision (a)(2).[7]

[7] The full statutory provisions of sections 1370, subdivision (a)(1)(B) and 1370.01, subdivision (a)(2), are set forth in Attachment A.

Eligibility for diversion - felony

Even though a defendant has been found incompetent to stand trial, the defendant may be diverted as provided in section 1001.36 if the defendant has not been "transported to a facility" pursuant to section 1370, the court has been provided with "any information that the defendant may benefit from diversion," and the court finds the defendant is "an appropriate candidate for diversion." (§ 1370, subd. (a)(1)(B)(iv).) Like section 1001.36, the transfer of a person not competent to stand trial to diversion is a matter of discretion by the court: "the court *may* make a finding that the defendant is an appropriate candidate for diversion." (Emphasis added.) Determining whether a person is an "appropriate candidate" for diversion undoubtedly includes issues discussed in Section III, above.

"Transported to a facility" likely means a facility as described in section 1370, subdivision (a)(1)(B)(i): "The court shall order that the mentally incompetent defendant be delivered by the sheriff to a State Department of State Hospitals facility, as defined in Section 4100 of the Welfare and Institutions Code, for the care and treatment of the mentally disordered, as directed by the State Department of State Hospitals, or to any other available public or private treatment facility, including a community-based residential treatment system established pursuant to Article 1 (commencing with Section 5670) of Chapter 2.5 of Part 2 of Division 5 of the Welfare and Institutions Code if the facility has a secured perimeter or a locked and controlled treatment facility, approved by the community program director that will promote the defendant's speedy restoration to mental competence. . . ." "Treatment facility" includes jail based competency treatment programs. Such programs are identified in Welfare and Institutions Code, section 4100, subdivision (g): "The department [of State Hospitals] has jurisdiction over the following facilities: . . . A county jail treatment facility under contract with the State Department of State Hospitals to provide competency restoration services."

Accordingly, persons adjudicated as incompetent to stand trial for a felony and physically placed in a treatment facility are ineligible for diversion.

Eligibility for diversion - misdemeanor

Section 1370.01, subdivision (a)(2), provides similar provisions for diversion of misdemeanor offenses. Eligibility is determined in accordance with section 1001.36. Unlike the felony provisions, diversion of a person charged with a misdemeanor violation apparently need not occur prior to the defendant being transported to a treatment facility. Persons placed in a jail-based competency program, for example, still may be eligible for diversion.

Procedures by the court

If a defendant is found by the court to be an appropriate candidate for diversion, the defendant's eligibility is be determined pursuant to section 1001.36. (§§ 1370, subd. (a)(1)(B)(v), 1370, subd. (a)(2).) Although not expressly provided by statute, if the defendant is deemed unsuitable or ineligible for diversion, the defendant presumably would be returned to the point in the competency proceedings when first referred for diversion.

A defendant granted felony diversion may participate for the lesser of the period specified in section 1370, subdivision (c)(1), the normal period for restoration of competency, or two years. The period of diversion of a misdemeanor is not to exceed one year as provided in section 1370.01(c)(1).

If, during the treatment period for a felony, the court determines that criminal proceedings should be reinstated pursuant to section 1001.36, subdivision (d), the court must, pursuant to Section 1369, appoint a psychiatrist, licensed psychologist, or any other expert the court may deem appropriate, to determine the defendant's competence to stand trial. (§ 1370, subd. (a)(1)(B)(v).) Although the provisions governing diversion of misdemeanors do not include a specific reference to reinstatement under section 1001.36, subdivision (d), presumably the same procedure will be used. Although not expressly provided by statute, if the defendant is terminated from diversion and criminal proceedings are reinstituted, the defendant presumably would be returned to the point in the competency proceedings when diversion was first requested. If the defendant is determined to be competent to stand trial and is terminated from diversion pursuant to section 1001.36, subdivision (d), the defendant will be reinstated to the full criminal trial process. If the defendant is determined to be incompetent to stand trial, and is terminated from diversion, the normal restoration procedures provided by sections 1370 and 1370.01 will apply.

If the defendant successfully completes diversion, the defendant will be entitled to a dismissal of the charges pursuant to section 1001.36, subdivision (e), and the "defendant shall no longer be deemed incompetent to stand trial pursuant to this section." (§§ 1370, subd. (a)(1)(B)(vi), 1370.01, subd. (a)(2).)

Nothing in sections 1370 and 1370.01 connect continuance on diversion with the defendant's competence. Accordingly, even though the defendant regains trial competence during diversion, the defendant is entitled to remain in the program so long as criminal proceedings are not reinstituted pursuant to section 1001.36, subdivision (d).

VIII. Funding for diversion

SB 840, the Budget Act of 2018, appropriated $100 million to the Department of State Hospitals for support of county mental health diversion programs.

ATTACHMENT A: PENAL CODE §§ 1001.35, 1001.36, 1370, and 1370.01

1001.35.

The purpose of this chapter is to promote all of the following:

(a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety.

(b) 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.

(c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders.

1001.36.

(a) On an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court may, after considering the positions of the defense and prosecution, grant pretrial diversion to a defendant pursuant to this section if the defendant meets all of the requirements specified in subdivision (b).

(b) Pretrial diversion may be granted pursuant to this section if all of the following criteria are met:

(1) 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. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a recent diagnosis by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence.

(2) The court is satisfied that the defendant's mental disorder played a significant role in the commission of the charged offense. A court may conclude that a 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, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense, the court concludes that the defendant's mental disorder substantially contributed to the defendant's involvement in the commission of the 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 consents to diversion and waives his or her right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment pursuant to clause (iv) of subparagraph (B) paragraph (1) of subdivision (a) of Section 1370 and, as a result of his or her mental incompetence, cannot consent to diversion or give a knowing and intelligent waiver of his or her right to a speedy trial.

(5) The defendant agrees to comply with treatment as a condition of diversion.

(6) The court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community. 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.

(c) As used in this chapter, "pretrial 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:

(1) (A) 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.

(B) 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.

(2) 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.

(3) The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years.

(d) 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 pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code:

(1) The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence.

(2) The defendant is charged with an additional felony allegedly committed during the pretrial diversion.

(3) The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion.

(4) Based on the opinion of a qualified mental health expert whom the court may deem appropriate, either of the following circumstances exists:

(A) The defendant is performing unsatisfactorily in the assigned program.

(B) The defendant is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008 of the Welfare and Institutions Code. A defendant shall only be conserved and referred to the conservatorship investigator pursuant to this finding.

(e) 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. If the court dismisses the charges, the clerk of the court shall file a record with the Department of Justice indicating the disposition of the case diverted pursuant to this section. Upon successful completion of diversion, if the court dismisses the charges, the arrest upon which the diversion was based shall be deemed never to have occurred, and the court shall order access to the record of the arrest restricted in accordance with Section 1001.9, except as specified in subdivisions (g) and (h). The defendant who successfully completes diversion 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 in subdivision (g).

(f) A record pertaining to an arrest resulting in successful completion of diversion, or any record generated as a result of the defendant's application for or participation in diversion, shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.

(g) The defendant shall be advised that, regardless of his or her completion of diversion, both of the following apply:

(1) The arrest upon which the diversion was based may be disclosed by the Department of Justice to any peace officer application request and that, notwithstanding subdivision (f), this section does not relieve the defendant 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 in Section 830.

(2) An order to seal records pertaining to an arrest made pursuant to this section has no effect on a criminal justice agency's ability to access and use those sealed records and information regarding sealed arrests, as described in Section 851.92.

(h) 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 participation in, or completion of, diversion pursuant to this section or for use at a hearing on the defendant's eligibility for diversion under this section may not be used in any other proceeding without the defendant's consent, unless that information is relevant evidence that is admissible under the standards described in paragraph (2) of subdivision (f) of Section 28 of Article I of the California Constitution. However, when determining whether to exercise its discretion to grant diversion under this section, a court may consider previous records of participation in diversion under this section.

(i) The county agency administering the diversion, the defendant's mental health treatment providers, the public guardian or conservator, and the court shall, to the extent not prohibited by federal law, have access to the defendant's medical and psychological records, including progress reports, during the defendant's time in diversion, as needed, for the purpose of providing care and treatment and monitoring treatment for diversion or conservatorship.

1370, subdivisions (a)(1)(B)(iv)-(vi)

(iv) If, at any time after the court finds that the defendant is mentally incompetent and before the defendant is transported to a facility pursuant to this section, the court is provided with any information that the defendant may benefit from diversion pursuant to Chapter 2.8A (commencing with Section 1001.35) of Title 6, the court may make a finding that the defendant is an appropriate candidate for diversion.

(v) If a defendant is found by the court to be an appropriate candidate for diversion pursuant to clause (iv), the defendant's eligibility shall be determined pursuant to Section 1001.36. A defendant granted diversion may participate for the lesser of the period specified in paragraph (1) of subdivision (c) or two years. If, during that period, the court determines that criminal proceedings should be reinstated pursuant to subdivision (d) of Section 1001.36, the court shall, pursuant to Section 1369, appoint a psychiatrist, licensed psychologist, or any other expert the court may deem appropriate, to determine the defendant's competence to stand trial.

(vi) Upon the dismissal of charges at the conclusion of the period of diversion, pursuant to subdivision (e) of Section 1001.36, a defendant shall no longer be deemed incompetent to stand trial pursuant to this section.

1370.01, subdivision (a)(2)

(2) If the defendant is found mentally incompetent, the court may make a finding that the defendant is an appropriate candidate for diversion pursuant to Chapter 2.8A (commencing with Section 1001.35) of Title 6, and may, if the defendant is eligible pursuant to Section 1001.36, grant diversion for a period not to exceed that set forth in paragraph (1) of subdivision (c). Upon the dismissal of charges at the conclusion of the period of diversion, pursuant to

subdivision (e) of Section 1001.36, a defendant shall no longer be deemed incompetent to stand trial pursuant to this section.

ATTACHMENT B: PROCEDURAL CHECKLIST FOR MENTAL HEALTH DIVERSION (P.C. §§ 1001.35 AND 1001.36)

I. DEFENDANT REQUESTS DIVERSION

A. Determine *prima facie* basis for diversion

1. Informal hearing to review facts of crime, defendant's criminal and mental health history
    a. Is request timely – between filing of complaint and adjudication
    b. Does defendant have reasonable chance at meeting requirements in Section II, *infra*
    c. Is the defendant and/or crime reasonably suitable for diversion
2. Court to consider offers of proof and reliable hearsay
3. If *prima facie* basis not established, deny request and continue with criminal case
4. If *prima facie* basis is established, proceed to full determination of eligibility, suitability and placement

II. DETERMINATION OF ELIGIBILITY

To be eligible for diversion, **ALL** of the following requirements must be met:

A. **"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." (§ 1001.36, subd. (b)(1).)

1. Has defendant submitted evidence of a mental disorder
2. Court to order any additional reports as needed

B. **"The court is satisfied that the defendant's mental disorder played a significant role in the commission of the charged offense."** (§ 1001.36, subd. (b)(2).)

C. **"In the opinion of a qualified mental health expert, the defendant's symptoms motivating the criminal behavior would respond to mental health treatment."** (§ 1001.36, subd. (b)(3).)

D. **The defendant consents to diversion and waives the right to a speedy trial.** (§ 1001.36, subd. (b)(4).

E. **"The defendant agrees to comply with treatment as a condition of diversion."** (§ 1001.36, subd. (b)(5).)

F. **"The court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community."** (§ 1001.36, subd. (b)(6).)

G. **"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."** (§ 1001.36, subd. (c)(1)(A).)

III. PROGRAM REQUIREMENTS

The program selected by the court must meet the following requirements:

A. **"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."** (§ 1001.36, subd. (c)(1)(A).)

B. **The defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources.** (§ 1001.36, subd. (c)(1)(B).)

1. Has the program agreed to accept the defendant on diversion

C. **The program must submit regular reports to the court and counsel regarding the defendant's progress in treatment.** (§ 1001.36, subd. (c)(2).)

1. Set the frequency of the reports
2. Set final report near end of diversion period to determine:
    a. Whether defendant has substantially complied with treatment program
    b. Whether defendant has committed any new law violations, and whether the violations were related or unrelated to defendant's mental disorder
    c. Whether defendant has a long-term plan for mental health care

D. **The diversion program is to last no longer than two years.** (§ 1001.36, subd. (c)(3).)

IV. TERMINATION OR MODIFICATION OF TREATMENT

Termination of diversion and reinstatement of criminal proceedings, modification of treatment, or referral for conservatorship may occur after noticed hearing if:

A. The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence. (§ 1001.36, subd. (d)(1).)

B. The defendant is charged with an additional felony allegedly committed during the pretrial diversion. (§ 1001.36, subd. (d)(2).)

C. The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion. (§ 1001.36, subd. (d)(3).)

D. Based on the opinion of a qualified mental health expert whom the court may deem appropriate, either of the following circumstances exists: (§ 1001.36, subd. (d)(4).)

   1. The defendant is performing unsatisfactorily in the assigned program. (§ 1001.36, subd. (d)(4)(A).)

   2. The defendant is gravely disabled, as defined in Welfare and Institutions Code, section 5008, subdivision (h)(1)(B). A defendant shall only be conserved and referred to the conservatorship investigator pursuant to this finding. (§ 1001.36, subd. (d)(4)(B).)

E. If diversion terminated, consider status of defendant's competence to stand trial and whether to commence or continue proceedings under §§ 1368, *et seq.*

V. SUCCESSFUL COMPLETION OF DIVERSION

If the defendant has performed satisfactorily on diversion, the court must dismiss the criminal charges. (§ 1001.36, subd. (e).) The court *may* conclude the defendant performed satisfactorily if:

A. The defendant has "substantially complied" with the program requirements

B. The defendant has "avoided significant new violations of law *unrelated* to the defendant's mental health condition." (Emphasis added.) The court can, in its discretion, ignore new violations of law related to the defendant's mental health condition.

C. The defendant has "a plan in place for long-term mental health care"

D. Duties of the court if case dismissed:

1. Clerk to notify Dept. of Justice of disposition
2. Court to order access to records of arrest restricted per § 1001.9
3. Court to advise defendant:
    a. The arrest upon which the diversion was based may be disclosed by the Department of Justice to any peace officer application request and that, notwithstanding subdivision (f), this section does not relieve the defendant 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 in Section 830.
    b. An order to seal records pertaining to an arrest made pursuant to this section has no effect on a criminal justice agency's ability to access and use those sealed records and information regarding sealed arrests, as described in Section 851.92."

VI. PERSONS INCOMPETENT TO STAND TRIAL

A. Persons charged with felony and found incompetent to stand trial are eligible for diversion if:
1. Person not transported to a mental health facility
2. Court receives information that defendant may benefit from diversion
3. Court determines defendant appropriate for diversion
4. Two year maximum program

B. Persons charged with misdemeanor and found incompetent to stand trial are eligible for diversion if:
1. Court determines appropriate for diversion
2. One year maximum program

C. Consider whether defendant appropriate for diversion considering all relevant factors
1. If not appropriate, resume criminal proceedings
2. If appropriate, determine eligibility in accordance with § 1001.36

D. If diversion terminated under § 1001.36, subdivision (d):
1. Appoint mental health expert to determine status of competency
2. If not competent, resume procedures under §§ 1368, *et seq*.
3. If competent, resume full criminal proceedings

E. If diversion successfully completed
    1. Dismiss criminal charges
    2. Court to follow duties in Section V (D), *supra*.

ATTACHMENT C: Offenses listed in P.C. § 667(e)(2)(C)(iv)

The following table was prepared by Hon. John "Jack" Ryan, Orange County Superior Court (Ret.)

TABLE OF CRIMES LISTED IN P.C. § 667(e)(2)(C)(iv) – "Super Strikes"

Prior Conviction	*Description*	*Pen C Sections*
Any Serious or Violent Felony	Punishable in California by life imprisonment or death.	667(e)(2)C)(iv)(VIII)
187	Murder or attempt. (Any homicide or attempt from 187 to 191.5	667(e)(2)C)(iv)(IV)
191.5	Vehicular manslaughter while intoxicated or attempt.	667(e)(2)C)(iv)(IV)
207	Kidnap to ... §261, 262, 264.1, 286, 288, 288a, or 289. (Kidnap, as defined in Pen C §207 does not include attempts to commit a defined sex offense.)	667(e)(2)C)(iv)(I)
209	Kidnap to violate §261, 262, 264.1, 286, 288, 288a, or 289.	667(e)(2)C)(iv)(I)
220	Assault to violate 261, 262, 264.1, 286, 288, 288a, or 289. (Pen C § 220 specifies *rape* as a designated offense. It does not use a section number, 261 (rape) or 262 (spousal rape).	667(e)(2)C)(iv)(I)
245(d)(3)	Assault with a machine gun on a peace officer or firefighter	667(e)(2)C)(iv)(VI)
261(a)(2)	Rape by force.	667(e)(2)C)(iv)(I)
261(a)(6)	Rape by threat to retaliate.	667(e)(2)C)(iv)(I)
262(a)(2)	Spousal rape by force.	667(e)(2)C)(iv)(I)
262(a)(4)	Spousal rape by threat to retaliate.	667(e)(2)C)(iv)(I)
264.1	Rape in concert by force or violence	667(e)(2)C)(iv)(I)
269	Aggravated sexual assault of a child.	667(e)(2)C)(iv)(I)
286(c)(1)	Sodomy with child <14 + 10 years age differential.	667(e)(2)C)(iv)(II)
286(c)(2)(A)	Sodomy by force.	667(e)(2)C)(iv)(I)
286(c)(2)(B)	Sodomy by force upon child <14	667(e)(2)C)(iv)(I)
286(c)(2)(C)	Sodomy by force upon child >14	667(e)(2)C)(iv)(I)
286(c)(3)	Sodomy with threat to retaliate	667(e)(2)C)(iv)(I)
286(d)(1)	Sodomy in concert by force…., threat to retaliate.	667(e)(2)C)(iv)(I)
286(d)(2)	Sodomy in concert by force upon child <14	667(e)(2)C)(iv)(I)

Prior Conviction	*Description*	*Pen C Sections*
286(d)(3)	Sodomy in concert by force upon child >14	667(e)(2)C)(iv)(I)
288(a)	Lewd act upon a child under the age of 14	667(e)(2)C)(iv)(III)
288(b)(1)	Lewd act upon a child by force…	667(e)(2)C)(iv)(I)
288(b)(2)	Lewd act by caretaker by force…	667(e)(2)C)(iv)(I)
288a(c)(1)	Oral copulation upon a child <14 + 10 years…	667(e)(2)C)(iv)(III)
288a(c)(2)(A)	Oral copulation by force	667(e)(2)C)(iv)(I)
288a(c)(2)(B)	Oral copulation by force… force upon child <14.	667(e)(2)C)(iv)(I)
288a(c)(2)(C)	Oral copulation by force… force upon child >14.	667(e)(2)C)(iv)(I)
288a(d)	Oral copulation in concert by force.	667(e)(2)C)(iv)(I)
288.5(a)	Continuous sexual abuse of a child with force…	667(e)(2)C)(iv)(I)
289(a)(1)(A)	Sexual penetration by force, etc.	667(e)(2)C)(iv)(I)
289(a)(1)(B)	Sexual penetration upon a child <14 by force…	667(e)(2)C)(iv)(I)
289(a)(1)(C)	Sexual penetration upon a child >14 by force…	667(e)(2)C)(iv)(I)
289(a)(2)(C)	Sexual penetration by threat to retaliate.	667(e)(2)C)(iv)(I)
289(j)	Sexual penetration upon a child <14 + 10 years…	667(e)(2)C)(iv)(II)
653f	Solicitation to commit murder.	667(e)(2)C)(iv)(V)
664/191.5	Attempt vehicular manslaughter while intoxicated	667(e)(2)C)(iv)(IV)
664/187	Attempt murder	667(e)(2)C)(iv)(IV)
11418(a)(1)	Possession of a weapon of mass destruction	667(e)(2)C)(iv)(VII)

Senate Bill No. 215

CHAPTER 1005

An act to amend Section 1001.36 of the Penal Code, relating to diversion.

[Approved by Governor September 30, 2018. Filed with
Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 215, Beall. Diversion: mental disorders.

Existing law authorizes a court to grant pretrial diversion, for a period no longer than 2 years, to a defendant suffering from a mental disorder, on an accusatory pleading alleging the commission of a misdemeanor or felony offense, in order to allow the defendant to undergo mental health treatment. Existing law conditions eligibility on, among other criteria, a court finding that the defendant's mental disorder played a significant role in the commission of the charged offense. Existing law requires, if the defendant has performed satisfactorily in diversion, that the court dismiss the defendant's criminal charges, with a record filed with the Department of Justice indicating the disposition of the case diverted, that the arrest is deemed never to have occurred, and requires the court to order access to the record of the arrest restricted, except as specified.

This bill would make defendants ineligible for the diversion program for certain offenses, including murder, voluntary manslaughter, and rape. The bill would authorize a court to require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion, as specified. The bill would also require the court, upon request, to conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, to order its payment during the period of diversion. The bill would provide that a defendant's inability to pay restitution due to indigence or mental disorder would not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion. The bill would also make technical changes.

The people of the State of California do enact as follows:

SECTION 1. Section 1001.36 of the Penal Code is amended to read:

1001.36. (a) On an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court may, after considering the positions of the defense and prosecution, grant pretrial diversion to a defendant pursuant to this section if the defendant meets all of the requirements specified in paragraph (1) of subdivision (b).

(b) (1) Pretrial diversion may be granted pursuant to this section if all of the following criteria are met:

(A) 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. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a recent diagnosis by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence.

(B) The court is satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense. A court may conclude that a defendant's mental disorder was a significant factor 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, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense, the court concludes that the defendant's mental disorder substantially contributed to the defendant's involvement in the commission of the offense.

(C) 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.

(D) The defendant consents to diversion and waives his or her right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment pursuant to clause (iv) of subparagraph (B) paragraph (1) of subdivision (a) of Section 1370 and, as a result of his or her mental incompetence, cannot consent to diversion or give a knowing and intelligent waiver of his or her right to a speedy trial.

(E) The defendant agrees to comply with treatment as a condition of diversion.

(F) The court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community. 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.

(2) A defendant may not be placed into a diversion program, pursuant to this section, for the following current charged offenses:

(A) Murder or voluntary manslaughter.

(B) An offense for which a person, if convicted, would be required to register pursuant to Section 290, except for a violation of Section 314.

(C) Rape.

(D) Lewd or lascivious act on a child under 14 years of age.

(E) Assault with intent to commit rape, sodomy, or oral copulation, in violation of Section 220.

(F) Commission of rape or sexual penetration in concert with another person, in violation of Section 264.1.

(G) Continuous sexual abuse of a child, in violation of Section 288.5.

(H) A violation of subdivision (b) or (c) of Section 11418.

(3) At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate.

(c) As used in this chapter, "pretrial 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:

(1) (A) 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.

(B) 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.

(2) 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.

(3) The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years.

(4) Upon request, the court shall conduct a hearing to determine whether restitution, as defined in subdivision (f) of Section 1202.4, 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.

(d) 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 pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code:

(1) The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence.

(2) The defendant is charged with an additional felony allegedly committed during the pretrial diversion.

(3) The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion.

(4) Based on the opinion of a qualified mental health expert whom the court may deem appropriate, either of the following circumstances exists:

(A) The defendant is performing unsatisfactorily in the assigned program.

(B) The defendant is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008 of the Welfare and Institutions Code. A defendant shall only be conserved and referred to the conservatorship investigator pursuant to this finding.

(e) 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. If the court dismisses the charges, the clerk of the court shall file a record with the Department of Justice indicating the disposition of the case diverted pursuant to this section. Upon successful completion of diversion, if the court dismisses the charges, the arrest upon which the diversion was based shall be deemed never to have occurred, and the court shall order access to the record of the arrest restricted in accordance with Section 1001.9, except as specified in subdivisions (g) and (h). The defendant who successfully completes diversion 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 in subdivision (g).

(f) A record pertaining to an arrest resulting in successful completion of diversion, or any record generated as a result of the defendant's application for or participation in diversion, shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.

(g) The defendant shall be advised that, regardless of his or her completion of diversion, both of the following apply:

(1) The arrest upon which the diversion was based may be disclosed by the Department of Justice to any peace officer application request and that, notwithstanding subdivision (f), this section does not relieve the defendant 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 in Section 830.

(2) An order to seal records pertaining to an arrest made pursuant to this section has no effect on a criminal justice agency's ability to access and use those sealed records and information regarding sealed arrests, as described in Section 851.92.

(h) 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 participation in, or completion of, diversion pursuant to this section or for use at a hearing on the defendant's eligibility for diversion under this section may not be used in any other proceeding without the defendant's consent, unless that information is relevant evidence that is admissible under the standards described in paragraph (2) of subdivision (f) of Section 28 of Article I of the California Constitution. However, when determining whether to exercise its discretion to grant diversion under this section, a court may consider previous records of participation in diversion under this section.

(i) The county agency administering the diversion, the defendant's mental health treatment providers, the public guardian or conservator, and the court shall, to the extent not prohibited by federal law, have access to the defendant's medical and psychological records, including progress reports, during the defendant's time in diversion, as needed, for the purpose of providing care and treatment and monitoring treatment for diversion or conservatorship.

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CALIFORNIA HEALTH POLICY STRATEGIES, L.L.C.

Policy Brief

Shifting the Paradigm for Mental Health Diversion: The Impact & Opportunity of AB 1810 and SB 215

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The enactment of AB 1810 and SB 215[1] (2018) creates the opportunity for a fundamental paradigm shift that could dramatically improve care and reduce homelessness for Californians who have a mental illness and are arrested and prosecuted in the criminal justice system. These new laws establish a process for diversion by placing them into mental health treatment programs in lieu of prosecution. The new law incorporates three unique processes into the early stages of a criminal case:

- **Targeting.** People who have mental disorders identified in the Diagnostic and Statistical Manual of Mental Disorders whose illnesses were a significant factor in the commission of a felony or misdemeanor offense may be diverted into treatment. Charges of intentional homicide and certain sex crimes are excluded from diversion.

- **Public Safety Risk Assessment.** If the accused is not an unreasonable risk to public safety and with his or her consent, it allows the criminal case judge to postpone the prosecution for up to two years while the accused voluntarily engages in an assigned and supervised program of inpatient or outpatient mental health treatment.

- **Disposition Tied to Treatment Success.** If the defendant is successful in the treatment program, the court must dismiss the criminal case. If he or she is unsuccessful, criminal proceedings are reinstated.

Diversion is not a new criminal justice concept, and people who have mental illnesses have never been barred from existing diversion laws. However, the new statute specifically targets

[1]California Penal Code sections 1001.35 and 1001.36

these individuals with mental illness for treatment in lieu of punishment. At a fundamental level, it shifts the onus of care from the ill-equipped criminal justice system to community systems of care. This is a clear and unequivocal policy shift in California for which neither county behavioral health care nor criminal justice systems are prepared. The potential benefits of the new law include more effective treatment, better outcomes and reduced homelessness.

This policy brief highlights the implementation issues presented for both the criminal justice and mental health systems.

I. Background and Legislative History

The mental health diversion statute (AB 1810) was a product of negotiations related to the 2018-19 state budget. The budget proposal included $100 million to address a bed space crisis at the Department of State Hospitals (DSH). This crisis stemmed from an increase in the number of incompetence to stand trial (IST) filings, and a growing waitlist for DSH placements. Moreover, the state also recognized the value of connecting individuals with serious mental health issues to community treatment.

The mental health diversion statute (AB 1810) was incorporated into a broader "budget trailer bill and authored by the Committee on the Budget. It was signed into law on June 27, 2018. The language received a mixed reception from some judges and prosecutors. However, that statute was effective only during the limited period of July 1, 2018 to December 31, 2018. Subsequent legislation, SB 215 (Beall) was enacted in August to address some of these concerns. For example, those charged with homicide crimes and sex crimes were barred from diversion. In addition, provision was made for hearings to determine whether restitution to the crime victim would be ordered.

II. Why is the New Diversion Law a "Paradigm Shift?

Existing diversion and deferred entry of judgment statutes are sparingly used in California courts. Generally, they are "plea bargain" vehicles used when both prosecutors and defenders conclude, from their disparate views, that litigation will yield suboptimal results. These existing statutes, however, are strictly procedural devices and are not statements of policy. They do not of themselves promote the use of diversion.

The new mental health diversion statute is different. The new law specifies its purpose as promoting the following:

a) *"Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety.*

b) *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.*

c) *Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders."*[2]

The purpose set forth in the law is indeed a call to action. It promotes the increased the use of criminal justice system diversion, encourages counties to develop continuum of care settings for diverted individuals, and recommends specifically tailored diversion programs to the unique treatment and support needs of mentally ill offenders.

The immediacy and size of this policy transformation is a product of the rapid growth during the last decade of mentally ill individuals in the criminal justice system. This growth has significantly burdened all elements of that system. The criminal justice system is not designed or equipped to deal with mental illness; it lacks both the flexibility and resources to address the treatment needs for justice-involved individuals. This is especially so because offenders who have a mental illness are disproportionately treatment resistant and homeless. Whatever the causes and effects, no one anticipated that courts and jails would become a primary venue for mental health treatment and housing. Consequently, the criminal justice system has had few safety valves with which to cope with the growing problem of offenders who have mental illnesses. The palpable result has been an immense pressure within the criminal justice system to somehow deal with people who do not fit a punishment paradigm.

For community mental health, the policy transfer also promises to become a major entry point to services and a significant addition to the scope and costs of care for counties. As experience with diversion and the growth in the availability of programs increase, these pressures could easily overwhelm both the courts and community treatment resources.

III. The Challenge of Implementation

The mental health diversion statute works in broad strokes. While the statute's objectives are clear, many operational details are undefined or vague. Consequently, as courts, local criminal justice agencies and county behavioral health providers plan for implementation, they must address the many operational gaps apparent in the statute. These ambiguities and gaps include:

- Unclear linkages between the courts and mental health treatment providers.
- Unknown access to funding from existing public mental health funding sources.

[2]California Penal Code sections 1001.35

- Questions related to consents by participants who are competent to stand trial but have impaired capacity.
- The role of law enforcement and probation in oversight of persons diverted.
- The nature and extent of oversight of the person diverted.
- The role and application of short-term "5150" holds in diversion pursuant to the Lanterman Petris Short Act.
- The application of due process principles in findings of unsatisfactory performance or failed success in diversion programs.

There are, however, promising models that support mental health interventions in criminal justice proceedings. California's collaborative courts, including dedicated mental health courts, reduce the role of adversary processes and encourage coordination among various entities working with the defendant. These mental health courts include judges, lawyers, care providers and a variety of government agencies that work with criminal defendants. The legal, health care and public safety entities involved in these courts collaborate on potential solutions to the underlying issues and problems that brought the defendant into the criminal justice system. Collaborative justice is a relatively new addition to the justice system, and, by design, its processes continue to evolve. But it is uniquely prepared to accommodate the requirements of mental health diversion. It is likely, however, that the limited number of California collaborative courts would have to be increased to meet the need for diversion services.

Mental health diversion under Penal Code §1001.36 is a process that occurs after a criminal case is filed by the prosecuting agency. However, highly successful pre-filing diversion exists in many places across California and the entire nation. A primary resource that can be used to emulate success with respect to diversion is the Stepping Up initiative sponsored by the Council on State Governments. This national resource has been highly successful in its California implementation and the techniques of its projects and programs offer a rich source of planning information.

Implementation challenges of the new diversion law can be anticipated by considering the issues related to Los Angeles County's experience with its misdemeanor incompetence to stand trial (MIST) project. Initiated as a pilot project in 2015, MIST experimented with the effectiveness and costs of community treatment of incompetent to stand trial defendants as opposed to hospital or jail treatment. It also tested the notion that release to community treatment would ameliorate jail overcrowding. Led by a courageous and creative judge, an amalgam of county and non-profit agencies initially dedicated existing resources to reduce a jail-based MIST treatment backlog of thirty jail inmates. Results validated improvements in both treatment outcomes and costs. However, the results also had an unanticipated and unintended outcome. Judges and lawyers quickly learned that MIST was an effective tool to divert individuals from criminal justice to community care. It also gave them the promise of long-term care from community mental health agencies once the criminal case terminated. Referrals for MIST proceedings increased rapidly as a consequence. The criminal justice players learned that

MIST would, effectively, transfer mentally ill offenders to community mental health care. Due to its success, by 2017 MIST evolved from a project to a permanent program that continues to grow rapidly.

The experience with the Los Angeles County MIST program suggests that community treatment services may experience dramatic increases in demand for services for individuals participating in the diversion program. There is also a reinforcing cycle of success if the treatment system effectively engages the diversion population. As the criminal courts, law enforcement and community players learn that mental health diversion effectively provides mental health care for treatment resistant and homeless individuals, demand will grow.

In the short term, however, an intense planning effort must be undertaken to coordinate community treatment resources with elements of the criminal justice system.

The mental health diversion law creates the opportunity for a fundamental policy shift, but implementation will be challenging, and will require an "all hands-on deck" approach to do so. But the results may be worth it.

To begin the process, we suggest that the following issues should be addressed first.

- **Coordination & Integration with County-based Agencies**. Probation services, community mental health, law enforcement and the court system will need to work together actively to find ways to rationalize their respective strengths to service a mental health diversion population. Without collaborative efforts, conflicting goals, cultures and methods will inhibit program development. For example, existing county behavioral health programs tend to encompass only treatment and prevention interventions. Direct involvement with the criminal justice system is relatively rare for them. By contrast and by design, the courts operate with an adversarial model, and with the notable exception of collaborative courts, the litigants do legal battle as a matter of course. In addition, courts largely employ punitive approaches to behavior modification. Each of these features is fundamentally incompatible with modern approaches to mental health care. The new diversion statute challenges the various agencies to develop and consistently apply new methods to identify, oversee and shift persons diverted into community care. An example would be the permanent attachment of mental health clinicians to the judicial proceedings, in the fashion of probation officers and child protection personnel in juvenile courts. Another would be the hiring or designation of clinicians to act as "diversion officers" to assure program effectiveness and oversight.

- **Gauging the Demand.** Studies of jails and prisons show that roughly 30 percent of prisoners and 20 percent of jail inmates have a mental illness. As noted above, during the past decade coping with this population of offenders has become a crisis for the

courts and custody institutions. One product of this crisis has been legal action initiated by both private and governmental entities based on deprivations of civil rights. Actions taken by the United States Department of Justice under the Civil Rights of Incarcerated People Act have capped the populations of many jails and prisons and have forced the initiation of custodial mental health treatment programs. Mental health diversion is among the potential solutions to these pressures. Undetermined, however, is the size of the population that may be eligible for diversion. This estimate is based on an assessment of mental health acuity and public safety risk. It also is contingent on the capacity of the treatment system and the rapidity with which diversion services can be established to meet the demand.

- **Divining Qualified Mental Health Expertise**. The mental health diversion statute is in part dependent on clinical interventions and analysis. For this purpose, the statute creates a new clinical entity called a qualified mental health expert (QMHE) who has multiple responsibilities in the diversion process. For the defendant to qualify for diversion, QMHEs must provide the court with a recent mental illness diagnosis. In addition, the QMHE must opine whether the defendant's mental disorder would respond to mental health treatment. Other specified roles for the QMHE are to opine whether the defendant would be an unreasonable risk of danger to public safety if treated in the community, whether he or she is performing unsatisfactorily in the treatment program and whether or not he or she is gravely disabled and eligible for mental health conservatorship. Presumably, in addition, the QMHE will have to assess the quality and effectiveness of the treatment provider and whether or not there are suitable alternatives to conservatorship. It's a broad set of tasks for this new resource in both the criminal justice and clinical worlds and it is unclear how issues of training and scope of practice might impact a given putative expert.

  While, the statute does not specify which disciplines meet the requirements for a QMHE. This ambiguity allows for creative approaches to the subject. It also comports with the broad experience within the criminal court system that insufficient numbers of forensic psychiatrists and psychologists exist to service even traditional criminal case mental issues (e.g. insanity, incompetency, unconsciousness and sentence mitigation).

  The statutory vagueness regarding QMHEs allows courts latitude to identify which professionals and what procedures might fulfill the need. For example, ancillary providers such as psychiatric nurses, certified nurse practitioners and licensed clinical social workers might fulfill some limited aspects of QMHE responsibilities. Psychiatrists and psychologists already employed or contracted to local mental health departments to provide treatment might be used for limited parts of QMHE responsibilities. Medical residents and psychology trainees might be engaged, as well. As suggested above, while scope of practice limitations may restrain some providers, combinations of profession skills and innovative procedures could fill the gap. A detailed analysis of this challenge

supported by data is necessary before large-scale diversion implementation is started. Careful analyses of potential processes and assignment of personnel may permit the various QMHE tasks specified in the statute to be broken out among a variety of clinicians and paraprofessionals. The results of these tasks would then be aggregated before the judge who, from among the various assessments and opinions submitted, would determine the issues specified in the statute.

- **Competence to be Diverte**d. In the 1950s, California forwent the use of the term "incompetence" in civil law proceedings and replaced it with the term "incapacity." The term incompetence in California, therefore, is limited to criminal cases and it has a special meaning related to the defendant's mental state. Incompetence is the inability of the defendant, due to a mental condition, to understand the nature of the criminal proceedings taken against him or her or to meaningfully cooperate with his or her attorney in defending the case. Because civil capacity and criminal incompetence can coexist, a variety of problems have arisen in criminal cases. Among them is the fact that once incompetence proceedings are initiated by the judge "declaring a doubt," those proceedings must continue and be completed, notwithstanding months-long delays before treatment or a defendant's positive response to short-term care. Further, if the defendant is "unrestorable" to competence, he or she can remain in some form of involuntary custodial treatment for their entire life.

  The new statute stretches to solve these and other long-standing problems by permitting mental health diversion for defendants found incompetent to stand trial prior to his or her being transported to a treatment facility for restoration of competence. Once removed from incompetence status in this fashion, the defendant's suitability for diversion is determined in the same way as other individuals to be diverted. Hence, individuals who are both incompetent and have capacity to volunteer for diversion and who also waive some statutory rights can be treated in the community and transitioned into long-term mental health care.

- **Integrating the Courts into Care & Treatment**. Criminal courts and criminal proceedings usually are fundamentally incompatible with a modern approach to mental health care. The recovery model, mobile crisis response, wrap-around care, assisted living and supported decision-making are a tough sell to criminal case participants. Most criminal case judges and litigators vigorously apply the adversary model of determining guilt or innocence and punishment. In addition, court personnel generally lack knowledge and experience with mentally ill individuals and mental health programs.

  The traditional criminal case mental issues referenced above allow judges and lawyers to simply hand-off care to treatment providers. However, in mental health diversion cases, the judge and the lawyers remain tightly engaged in the process. Progress and success or failure while individuals are diverted will remain a feature of the criminal

case. For example, the diverted person's progress under care is subject to review hearings that can be initiated by virtually anyone involved. These features require special knowledge of the substance of clinical care and the symptoms of mental illness needed by legal specialists. A few such legal specialists exist in dedicated courts such as collaborative mental health courts. The mental health diversion procedures will, however, be available in all California criminal courts. There is an immediate need to train judges and criminal lawyers on pertinent subjects related to mental illness and its impact on criminal cases.

IV. Conclusion

California's bold new diversion laws are an opportunity to shift responsibility for care and oversight from criminal courts and penal institutions to mental health treatment providers. For too long, law enforcement and criminal justice have been the default mechanisms for dealing with mentally ill individuals who get into trouble. Once through that entryway they suffer confinement in lieu of care. That begins a cycle of homelessness, recidivism and re-offense, frequently resulting in mentally ill individuals becoming long-term wards of penal institutions. The diversion laws are aimed at foreclosing that cycle and creating a gateway to the separate civil system of mental health care. While the new statutes have operation gaps and funding must be sought to achieve their legislative goals, they should help remove individuals from the criminal justice system who should not be there.

About the Authors

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About the Reentry Health Policy Project

- This brief is part of the Reentry Health Policy Project, which seeks to identify state and county level policies and practices that impede the delivery of effective health and behavioral health care services for formerly incarcerated individuals who are medically fragile (MF) and living with serious mental illness (SMI), as they return to the community. The report also offers specific recommendations and best practices for addressing these barriers. The Reentry Health Policy Project was managed by California Health Policy Strategies LLC with support provided by the California Health Care Foundation.

About California Health Policy Strategies (CalHPS), LLC

- CalHPS is a mission-driven health policy consulting group based in Sacramento. For more information, visit www.calhps.com.