SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair
2023 - 2024 Regular

Bill No:	AB 3077	**Hearing Date:**	June 11, 2024
Author:	Hart		
Version:	March 11, 2024		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Criminal procedure: borderline personality disorder***

HISTORY

Source: California Council of Community Behavioral Health Agencies

Prior Legislation: AB 1412 (Hart), Ch.687, Stats. 2023
SB 81 (Skinner), Ch. 721, Stats. 2021
SB 215 (Beall), Ch. 1005, Stats. 2018
AB 1810 (Committee on Budget), Ch. 34, Stats. 2018

Support: California Access Coalition; California Attorneys for Criminal Justice; California Public Defenders Association; Emotions Matter INC.; Erzule Paul Foundation; National Alliance on Mental Illness; National Education Alliance for Borderline Personality Disorder; Pathpoint; PRC Baker Places / Black Leadership Council; Steinberg Institute

Opposition: None known

Assembly Floor Vote: 63 - 7

PURPOSE

The purpose of this bill is remove exclusions in existing law that prevent a criminal defendant with a diagnosis of borderline personality disorder (BPD) from participating in a county mental health diversion program after they are deemed incompetent to stand trial (IST), and from having their mental illness considered for purposes of dismissing a sentencing enhancement in the furtherance of justice.

Existing law states that a person cannot be tried or adjudged to punishment or have his or her probation, mandatory supervision, postrelease community supervision, or parole revoked while that person is mentally incompetent. (Pen. Code § 1367, subd. (a).)

Existing law states that if, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, the judge shall state that doubt on the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. (Pen. Code, § 1368, subd. (a).)

Existing law requires, when counsel has declared a doubt as to the defendant's competence, the court to hold a hearing determine whether the defendant is incompetent to stand trial (IST). (Pen. Code § 1368, subd. (b).)

Existing law provides that, except as provided, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of whether the defendant is IST is determined. (Pen. Code § 1368, subd. (c).)

Existing law specifies how the trial on the issue of mental competency shall proceed. (Pen. Code § 1369.)

Existing law requires the court to appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. (Pen. Code, § 1369, subd. (a)(1).)

Existing law specifies the process for the commitment and treatment of defendants found IST. (Pen. Code, § 1370.)

Existing law requires defendants found IST to be committed to the Department of State Hospitals (DSH), a treatment facility, or on outpatient treatment for restoration of competency. (Pen. Code, § 1370, subd. (a).)

Existing law allows the court to make a finding that an IST defendant is the appropriate candidate for mental health diversion, in lieu of commitment for restoration of competency. (Pen. Code, § 1370, subd. (a)(1)(B)(iv)(I).)

Existing law requires, if an IST defendant is found by the court to be an appropriate candidate for mental health diversion, the defendant's eligibility shall be determined pursuant to the mental health diversion statue, Penal Code section 1001.36. (Pen. Code, § 1370, subd. (a)(1)(B)(v).)

Existing law states that the purpose of mental health diversion is to mitigate the entry and reentry of individuals with mental health disorders into the criminal justice system while protecting public safety. (Pen. Code, § 1001.35.)

Existing law sets forth the eligibility criteria for mental health diversion, including among other things, that the defendant has been diagnosed with a mental disorder as identified in the most recent edition of the DSM, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder and pedophilia. (Pen. Code, § 1001.36.)

Existing law allows DSH, subject to appropriation by the Legislature, to solicit proposals and contract with counties to help fund the development or expansion of pretrial mental health diversion for individuals with serious mental illnesses and who have been found IST and committed to DSH for restoration of competency, that meets all of the following criteria:

- Participants are individuals diagnosed with a mental disorder as identified in the most recent edition of the DSM, including, but not limited to, bipolar disorder, schizophrenia, and schizoaffective disorder, but excluding a primary diagnosis of antisocial personality

disorder, BPD, and pedophilia, and who are presenting non-substance-induced psychotic symptoms, who have been found IST;

- There is a significant relationship between the individual's serious mental disorder and the charged offense, or between the individual's conditions of homelessness and the charged offense; and,

- The individual does not pose an unreasonable risk of danger to public safety if treated in the community. (Welf. & Inst. Code, § 4361, subd. (c)(1).)

This bill removes the exclusion of BPD from the description of eligible participants for DSH contracted county mental health diversion programs.

Existing law requires DSH to implement a growth cap program for all counties for IST individuals committed to DSH and requires DSH to charge counties penalty payments as to implement the growth cap program. (Welf. & Inst. Code, § 4336.)

Existing law creates the Mental Health Diversion Fund in the State Treasury to receive the penalty payments from each county. The fund shall be used to support county activities that will divert individuals with serious mental illnesses away from the criminal justice system and lead to the reduction of felony IST determinations. (Welf. & Inst. Code, § 4336, subd. (c)(1).)

Existing law provides that activities supported by the Mental Health Diversion Fund shall include one or more of the following:

- Prebooking mental health diversion to serve those with serious mental illness and prevent their felony arrest. The target population that shall be served are individuals demonstrating psychosis manifesting as hallucinations, delusions, disorganized thoughts, or disorganized behavior at the time of the interaction;

- Postbooking mental health diversion to serve those with serious mental illness and who are likely to be found IST, to prevent the IST determination and divert the individual from incarceration. The target population that shall be served are individuals diagnosed with a mental disorder as identified in the most recent edition of the DSM, including, but not limited to, bipolar disorder, schizophrenia, and schizoaffective disorder but excluding a primary diagnosis of antisocial personality disorder, BPD, and pedophilia, and who are presenting non-substance-induced psychotic symptoms; and,

- Reentry services and support to serve those who have been restored to competency following a felony IST commitment and directly released to the community from jail. (Welf. & Inst. Code, § 4336, subd. (c)(2).)

This bill removes the exclusion of BPD from the target population that is to be served by the Mental Health Diversion Fund received by counties that support diverting individuals with serious mental illnesses away from the criminal justice system.

Existing law requires a court to dismiss an enhancement if it is in the furtherance of justice to do so, except if prohibited by any initiative statute. (Pen. Code, § 1385, subd. (c)(1).)

Existing law requires the court, when dismissing an enhancement, to consider and afford great weight to evidence offered by the defendant to prove if any specified mitigating circumstances are present, including among others, whether the current offense is connected to mental illness. (Pen. Code, § 1385, subd. (c)(2).)

Existing law provides that, proof of one or more of the specified mitigating circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety. "Endanger public safety" means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others. (Pen. Code, § 1385, subd. (c)(2).)

Existing law specifies, for the purposes of dismissing a sentence enhancement, a mental illness is a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder but excluding antisocial personality disorder, BPD, and pedophilia. (Pen. Code, § 1385, subd. (c)(5).)

This bill removes the exclusion of BPD as a qualifying mental illness for purposes of dismissing an enhancement in the interests of justice.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> BPD is a psychiatric disorder found in approximately 1.6-5.9% of the population, with slightly higher rates among women and younger individuals. BPD is characterized by a pervasive pattern of instability in behavior, mood, identity and interpersonal relationships. People with BPD have high rates of suicide. The overwhelming consensus among professionals is that BPD is treatable with a combination of psychotherapy and medication.
>
> Despite the availability of effective treatment, individuals with BPD are not eligible to be declared IST and cannot have their enhancements dismissed by a court.
>
> AB 3077 ensures that defendants with borderline personality disorder are eligible for mental health treatment if it determined that they are IST. This bill also allows a court to dismiss sentencing enhancements if a court determines that doing so serves the interests of justice and public safety. The bill will increase equity within the justice system for individuals living with BPD and help reduce recidivism rates.

2. Incarceration of Offenders with Mental Disorders

According to a 2019 study, more than 30% of the state's prison and 23 % of the jail populations have a mental illness. (Stanford Justice Advocacy Project, *Confronting California's Continuing Prison Crisis: The Prevalence And Severity Of Mental Illness Among California Prisoners On*

The Rise <https://law.stanford.edu/wp-content/uploads/2017/05/Stanford-Report-FINAL.pdf> [as of June 2, 2023].) Not only have the numbers of inmates with mental illness increased, the severity of psychiatric symptoms among inmates is also on the rise. (*Id*. at p. 2.) This population tends to serve longer sentences than the general population (*Id*. at p. 1.) and have a higher recidivism rate.

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

> To avoid incarceration, individuals with serious mental illness need to be diverted from the legal system and offered rehabilitative resources. The homeless comprise a significant share of individuals who come to the attention of law enforcement. A recent review revealed that lifetime arrest rates of homeless individuals with serious mental illness ranged from 62.9% to 90.0%, compared with approximately 15.0% in the general population. For this population, stable housing is a major issue. A recent randomized trial comparing housing first with assertive community treatment with treatment as usual demonstrated significantly decreased rates of arrest among those receiving assertive community treatment at 2 years. These results suggest that efforts to provide stable, affordable, and safe shelter for homeless individuals may lead to lower rates of involvement in the justice system.
>
> . . . .
>
> When individuals with serious mental illness are brought to court attention, several models have demonstrated positive outcomes, including mental health courts, drug courts, and Veterans Treatment Courts. Although they serve different populations, the common goal of all these court formats is to address the causes of behavior that brought an offender to police attention. Mental health courts are becoming more common in different communities, each with slight variations; however, common features include a specialized court docket that emphasizes problem solving, community-based treatment plans that are designed and supervised by judicial and clinical staff, regular follow-up with incentives and sanctions related to treatment adherence, and clearly defined "graduation" criteria. A recent prospective study of 169 individuals showed that the likelihood of perpetrating violence during the following year was significantly lower among participants processed through a mental health court than among individuals in a matched comparison group who were processed through traditional courts (odds ratio, 0.39; 95% CI, 0.16-0.95; P = .04).

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

3. Treatment of BPD

According to the National Institute of Mental Health, borderline personality disorder "severely impacts a person's ability to manage their emotions. This loss of emotional control can increase impulsivity, affect how a person feels about themselves, and negatively impact their relationships with others." (https://www.nimh.nih.gov/health/topics/borderline-personality-disorder [as of May 29, 2024].) Signs or symptoms may include:

- Efforts to avoid real or perceived abandonment, such as plunging headfirst into relationships—or ending them just as quickly.
- A pattern of intense and unstable relationships with family, friends, and loved ones.
- A distorted and unstable self-image or sense of self.
- Impulsive and often dangerous behaviors, such as spending sprees, unsafe sex, substance misuse, reckless driving, and binge eating. However, if these behaviors happen mostly during times of elevated mood or energy, they may be symptoms of a mood disorder and not borderline personality disorder.
- Self-harming behavior, such as cutting.
- Recurring thoughts of suicidal behaviors or threats.
- Intense and highly variable moods, with episodes lasting from a few hours to a few days.
- Chronic feelings of emptiness.
- Inappropriate, intense anger or problems controlling anger.
- Feelings of dissociation, such as feeling cut off from oneself, observing oneself from outside one's body, or feelings of unreality.

Symptoms from borderline personality disorder may be improved through evidence-based treatment which can help individuals experience fewer and less severe symptoms and improve functioning. Psychotherapy, which typically occurs with a licensed, trained mental health professional in one-on-one sessions or with other people in group settings, is the main treatment for people with borderline personality disorder. In particular, dialectical behavior therapy (DBT), which was developed specifically for people with borderline personality disorder, teaches skills to help people manage intense emotions, reduce self-destructive behaviors, and improve relationships. (*Ibid*.)

4. Competency in Criminal Trials and Mental Health Diversion

The Due Process Clause of the United States Constitution prohibits the criminal prosecution of a defendant who is not mentally competent to stand trial. Existing law provides that if a person has been charged with a crime and is not able to understand the nature of the criminal proceedings and/or is not able to assist counsel in his or her defense, the court may determine that the offender is incompetent to stand trial [IST]. (Pen. Code § 1367.) When the court issues an order for a hearing into the present mental competence of the defendant, all proceedings in the criminal prosecution are suspended until the question of present mental competence has been determined. (Pen. Code, §1368, subd. (c).)

In order to determine mental competence, the court must appoint a psychiatrist or licensed psychologist to examine the defendant. If defense counsel opposes a finding on incompetence, the court must appoint two experts: one chosen by the defense, one by the prosecution. (Pen. Code, § 11369, subd. (a).) The examining expert(s) must evaluate the defendant's alleged mental disorder and the defendant's ability to understand the proceedings and assist counsel, as well as address whether antipsychotic medication is medically appropriate. (Pen. Code, § 1369, subd. (a).)

Both parties have a right to a jury trial to decide competency. (Pen. Code, § 1369.) A formal trial is not required when jury trial has been waived. (*People v. Harris* (1993) 14 Cal.App.4th 984.) The burden of proof is on the party seeking a finding of incompetence. (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459-460.) Because a defendant is initially considered competent to stand trial (*Medina v. California* (1992) 505 U.S. 437), usually this means that the defense bears

the burden of proof to establish incompetence. Therefore, defense counsel must first present evidence to support mental incompetence. However, if defense counsel does not want to offer evidence to have the defendant declared incompetent, the prosecution may. Each party may offer rebuttal evidence. Final arguments are presented to the court or jury, with the prosecution going first, followed by defense counsel. (Pen. Code, § 1369, subds. (b)-(e).)

If after an examination and hearing the defendant is found IST, the criminal proceedings are suspended and the court shall order the defendant to be referred to DSH, or to any other available public or private treatment facility, including a community-based residential treatment system 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, or placed on outpatient status, except as specified. (Pen. Code § 1368, subd. (c) and 1370, subd. (a)(1)(B).) The court may also make a determination as to whether the defendant is an appropriate candidate for mental health diversion pursuant to Penal Code section 1001.36.

The stated purpose of the diversion program is "to promote all of the following: . . . Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings." (Pen. Code, § 1001.35, subd. (b).)

To be diverted, an IST defendant must meet the eligibility requirements specified in the mental health diversion statute. (Pen. Code, § 1370, subd. (a)(1)(B)(iv).) Last year, BPD was removed as an exclusion for mental health diversion. (AB 1412 (Hart), Ch. 687, Stats. 2023.)

To address the growing waitlist for DSH commitments, the Legislature authorized DSH to contract with counties to help fund the development and expansion of pretrial mental health diversion. (Welf. & Inst. Code, § 4361, subd. (a).) This would also "promote the diversion of individuals with serious mental disorders" and to "assist counties in providing diversion for individuals with serious mental illnesses who have been found IST and committed to DSH." (*Ibid*.)

However, the statute provides that DSH may only contract with a county to help fund the development or expansion of pretrial mental health diversion that meets specified criteria, including: (1) that the diversion is for individuals "diagnosed with a mental disorder as identified in the most recent edition of the [DSM], including, but not limited to, bipolar disorder, schizophrenia, and schizoaffective disorder, ***but excluding a primary diagnosis of*** antisocial personality disorder, ***borderline personality disorder***, and pedophilia, and who are presenting non-substance-induced psychotic symptoms, who have been found IST"; (2) that "there is a significant relationship between the individual's serious mental disorder and the charged offense, or between the individual's conditions of homelessness and the charged offense"; and, (3) that the "individual does not pose an unreasonable risk of danger to public safety […] if treated in the community." (Welf. & Inst. Code, § 4361, subd. (c), emphasis added.)

Under existing law, DSH is required to implement a growth cap program for all counties for committed IST defendants. (Welf. & Inst. Code, § 4336.) DSH is required to charge counties penalty payments to implement the growth cap program. (*Ibid*.) For each IST determination that exceeds a specified baseline, a county must pay a specified penalty amount. (Welf. & Inst. Code, § 4336, subd. (b).) The penalty funds are deposited into the state Mental Health Diversion Fund. (*Ibid*.) The fund is used to support county activities that will divert individuals with serious mental illnesses away from the criminal justice system and lead to the reduction of felony IST

determinations, including pre-and-post booking mental health diversion and reentry services for those who have been restored to competency. (Welf. & Inst. Code, § 4336, subd. (c).)

This statute specifies that the Mental Health Diversion Fund monies can be used for mental health diversion to serve those with serious mental illness and who are likely to be found IST, to prevent the IST determination and divert the individual from incarceration. (Welf. & Inst. Code, § 4336, subd. (c)(2)(B).) "The target population that shall be served are individuals diagnosed with a mental disorder as identified in the most recent edition of the [DSM], including, but not limited to, bipolar disorder, schizophrenia, and schizoaffective disorder ***but excluding a primary diagnosis*** of antisocial personality disorder, ***borderline personality disorder***, and pedophilia, and who are presenting non-substance-induced psychotic symptoms." (Welf. & Inst. Code, § 4336, subd. (c)(2)(B), emphasis added.)

This bill would remove the exclusion of BPD from

5. Dismissals of Enhancements the Furtherance of Justice

Existing law authorizes a court to dismiss an action or to strike or dismiss an enhancement in the interests of justice. (Pen. Code, § 1385.) Existing law requires the court to consider and afford great weight to evidence offered by the defendant to prove specified mitigating circumstances are present, including when the offense is connected to a mental illness, as specified, but excluding antisocial personality disorder, BPD, and pedophilia. (Pen. Code, § 1385, subd. (c)(5).)

When SB 81 (Skinner), Ch. 721, Statutes of 2021 added mitigating factors that the court must consider and afford great weight to in Penal Code Section 1385, the mental health diversion law had already been enacted several years prior. In order to remain consistent with the definition of mental illness, SB 81 adopted the definition in the existing mental health diversion law. Since then the mental health diversion law has been amended to remove the exclusion of BPD. (AB 1412 (Hart), Ch. 687, Stats. 2023.)

This bill removes the exclusion of BPD as a qualifying mental illness for purpose of the court's evaluation of mitigating circumstances for purposes of dismissing an enhancement in the furtherance of justice.

6. Argument in Support

According to National Education Alliance for Borderline Personality Disorder:

> This legislation is essential because it recognizes people diagnosed with BPD are unfairly excluded from California's judicial options for people with mental health conditions, despite evidence showing that BPD treatment reduces criminal behavior, arrests, and recidivism in this population.
>
> - A study published in the Journal of Forensic Psychiatry and Psychology in 2020 found that individuals with BPD who received Dialectical Behavior Therapy (DBT) had significantly fewer arrests than those who did not receive treatment (Murray et al., 2020).

- A review of 33 treatment trials for BPD analyzed data from 2,256 participants and discovered that treatment positively reduced BPD symptoms, self-harm, suicidality, and general psychopathology (Cristea et al., 2017).
- The Holloway Skills Therapy Program (HoST) was created in the UK specifically for incarcerated women with BPD. Those who finished the 8-week treatment saw a remarkable 88.2% decrease in disciplinary actions (Gee & Reed, 2013).

The exclusion of BPD from the list of eligible psychiatric diagnosis that are eligible for a determination of IST and the dismissal of penalty enhancements is not data driven, perpetuates harmful stigma about the disorder, and limits access to the necessary rehabilitative mental health treatment that both helps individuals recover their mental health and protect public safety. People with BPD make important contributions to society and deserve equitable and just treatment, and compassion. Treatment is essential for reducing the risk of suicide among people with BPD, as self-harming behaviors are common in BPD, and 10% of people with BPD die by suicide, a higher rate than any other psychiatric disorder.

The overwhelming consensus among scholars is that BPD is treatable, and psychotherapy is the first-line intervention for BPD. People with BPD deserve the judicial options that are currently available to people with other mental health diagnoses.

-- END –