
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 1412 **Hearing Date:** June 13, 2023
Author: Hart
Version: February 17, 2023
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Pretrial diversion: borderline personality disorder*

HISTORY

Source: California Council of Community Behavioral Health Agencies

Prior Legislation: SB 1223 (Becker), Ch. 735, Stats. 2022
SB 184 (Committee on Budget), Ch. 47, Stats. 2022
SB 666 (Stone), failed Sen. Public Safety, 2019
SB 215 (Beall), Ch. 1005, Stats. 2018
AB 1810 (Committee on Budget), Ch. 34, Stats. 2018
SB 8 (Beall), held on Suspense File in Assem. Appropriations, 2017

Support: California Attorneys for Criminal Justice; California Public Defenders Association; California State Association of Psychiatrists; Disability Rights California; Emotions Matter; National Alliance on Mental Illness - California; National Association of Social Workers, California Chapter; National Education Alliance for Borderline Personality Disorder; Pathpoint

Opposition: None known

Assembly Floor Vote: 66 - 4

PURPOSE

The purpose of this bill is to remove borderline personality disorder as an exclusion for mental health diversion.

Existing law authorizes diversion programs for specified crimes (Pen. Code, §§ 1000 et seq. for drug abuse; Pen. Code, § 1001.12 et seq. for child abuse; Pen. Code, §§ 1001.70 et seq. for contributing to the delinquency of another, Pen. Code, §§ 1001.60 et seq. for writing bad checks) and for specific types of offenders (Pen. Code, §§ 1001.80 et seq. for veterans; Pen. Code, §§ 1001.83 for caregivers; Pen. Code, §§ 1001.35 et seq. for persons with mental disorders).

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

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

- Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings; and,
- Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (Pen. Code, § 1001.35.)

Existing law authorizes a court to, after considering the positions of the defense and prosecution, grant pretrial diversion to defendant charged with a misdemeanor or felony if the defendant satisfies the eligibility requirements and the court determines that the defendant is suitable for diversion. (Pen. Code, § 1001.36, subd. (a).)

Existing law provides that a defendant is eligible for pretrial diversion if both of the following criteria are met:

- The defendant has been diagnosed with 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 diagnosis or treatment for a diagnosed mental disorder within the last five years 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; and,
- The defendant's mental disorder was a significant factor in the commission of the charged offense. If the defendant has been diagnosed with a mental disorder, the court shall find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. A court may 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. (Pen. Code, § 1001.36, subd. (b).)

Existing law states that for any defendant who satisfies the eligibility requirements, the court must consider whether the defendant is suitable for pretrial diversion. The defendant is suitable for pretrial diversion if all of the following criteria are met:

- In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment;
- The defendant consents to diversion and waives their right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of

commitment due to their mental incompetence and cannot consent to diversion or give a knowing and intelligent waiver of their right to a speedy trial;

- The defendant agrees to comply with treatment as a condition of diversion, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment for restoration of mental incompetence and cannot agree to comply with treatment; and,
- The defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. In making this determination, the court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's treatment plan, the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subds. (c).)

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

- Murder or voluntary manslaughter;
- An offense for which a person, if convicted, would be required to register as a sex offender, except for an indecent exposure violation;
- Rape;
- Lewd or lascivious act on a child under 14 years of age;
- Assault with intent to commit rape, sodomy, or oral copulation;
- Commission of rape or sexual penetration in concert with another person;
- Continuous sexual abuse of a child; and,
- Violations involving weapons of mass destruction. (Pen. Code, § 1001.36, subds. (d).)

Existing law provides that "pretrial diversion" for purposes of mental health diversion means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment, subject to all of the following:

- The court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant;
- The defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources. Before approving a proposed treatment program, the court shall consider the request of the defense, the request of the prosecution, the needs of the defendant, and the interests of the community. The treatment may be procured using private or public funds, and a referral may be made to a county mental health agency, existing collaborative courts, or assisted outpatient

treatment only if that entity has agreed to accept responsibility for the treatment of the defendant, and mental health services are provided only to the extent that resources are available and the defendant is eligible for those services;

- The provider of the mental health treatment program in which the defendant has been placed shall provide regular reports to the court, the defense, and the prosecutor on the defendant's progress in treatment;
- The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years for a felony and no longer than one year for a misdemeanor;
- Upon request, the court shall conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of diversion. However, a defendant's inability to pay restitution due to indigence or mental disorder shall not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion. (Pen. Code, § 1001.36, subd. (f).)

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

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

Existing law provides that if the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. A court may conclude that the defendant has performed satisfactorily if the defendant has substantially complied with the requirements of diversion, has avoided significant new violations of law unrelated to the defendant's mental health condition, and has a plan in place for long-term mental health care. (Pen. Code, § 1001.36, subd. (h).)

This bill removes borderline personality disorder as an exclusion for pretrial diversion.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Borderline personality disorder (BPD) affects 2-6% of the world's population with slightly higher rates among women and younger individuals. Current law allows pretrial diversion for individuals with mental health disorders but excludes those diagnosed with borderline personality disorder. Borderline personality disorder is characterized in the Diagnostic and Statistical Manual of Mental Disorders as a pervasive pattern of instability of interpersonal relationships, self-image, and marked impulsivity. The exclusion of BPD from diversion eligibility perpetuates harmful stigma about the disorder and limits access to care for people at high risk of suicide. AB 1412 will ensure that Californians living with borderline personality disorder have equitable access to pretrial diversion and strive to reduce recidivism within an often misunderstood population.

2. Mental Health Diversion Law

Diversion is the suspension of criminal proceedings for a prescribed time period with certain conditions. A defendant may not be required to admit guilt as a prerequisite for placement in a pretrial diversion program. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested or charged for the diverted offense. If diversion is not successfully completed, the criminal proceedings resume, however, a hearing to terminate diversion is required.

In 2018, the Legislature enacted a law authorizing pretrial diversion of eligible defendants with mental disorders. Under the mental health diversion law, in order to be eligible for diversion, 1) the defendant must suffer from a mental disorder, except those specifically excluded, 2) that played a significant factor in the commission of the charged offense; 3) in the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment; 4) the defendant must consent to diversion and waive the right to a speedy trial; 5) the defendant must agree to comply with treatment as a condition of diversion; and 6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. (Pen. Code, § 1001.36, subs. (b)-(c).) The defendant is not eligible if they are charged with specified crimes. (Pen. Code, § 1001.36, subd. (d).)

In addition to the eligibility requirements of the defendant, mental health treatment program must meet the following requirements: 1) the court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant; 2) the defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources; 3) and the program must submit regular reports to the court and counsel regarding the defendant's progress in treatment. (Pen.

Code, § 1001.36, subd. (f).) The court has the discretion to select the specific program of diversion for the defendant. The county is not required to create a mental health program for the purposes of diversion, and even if a county has existing mental health programs suitable for diversion, the particular program selected by the court must agree to receive the defendant for treatment. (Pen. Code, § 1001.36, subd. (f)(1)(A).)

The diversion program cannot last more than two years for a felony and cannot last for more than a year on a misdemeanor. (Pen. Code, § 1001.36, subd. (f)(1)(C).) If there is a request for victim restitution, the court shall conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of restitution. (Pen. Code, § 1001.36, subd. (f)(1)(D).)

The stated purpose of the diversion program is “to promote all of the following: . . . Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings.” (Pen. Code, § 1001.35, subd. (b).) The law gives discretion to courts to grant diversion if the minimum standards are met, and, correspondingly, refuse to grant diversion even though the defendant meets all of the requirements

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

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

This bill would remove borderline personality disorder as an exclusion for pretrial diversion. It is unclear from the legislative history of the bills that enacted the mental health diversion law why borderline personality disorder was excluded.

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 June 5, 2023].) 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.*)

3. 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.

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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.)

4. Argument in Support

According to California Council of Community Behavioral Health Agencies, the sponsor of this bill:

A study published in the *Journal of Forensic Psychiatry and Psychology* in 2020 found that individuals with [borderline personality disorder] BPD who received Dialectical Behavior Therapy (DBT) had significantly fewer arrests than those who did not receive treatment (Murray et al., 2020). The odds of engaging in criminal behavior were approximately 85% lower for individuals with BPD who received DBT compared to those who did not receive treatment. 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). Additionally, 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). These findings suggest that referring people with BPD to treatment achieves rehabilitation in ways that incarceration does not.

Excluding individuals with BPD from pretrial diversion eligibility entrenches systemic stigma, which exacerbates both public stigma and self-stigma. 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. Research also shows that BPD is no more dangerous than mental illnesses covered by the diversion program. While the data in this area are limited because BPD is almost always comorbid with other disorders, rates of recidivism associated with attention deficit hyperactivity disorder (ADHD) are similar to BPD, and substance use disorders are associated with higher rates of recidivism than personality disorders (Babinski et al., 2015; Wu et al., 2014).

BPD is treatable, highly heritable, and associated with significant neurobiological differences. The overwhelming consensus among scholars is that BPD is treatable, and psychotherapy is the first-line intervention for BPD. This is also true for many instances of other disorders. In many studies, the combination of psychotherapy and medication is the most effective. Even in the case of psychosis, psychotherapy is often necessary for addition to or as an alternative to medication. Therefore, it is essential that individuals with BPD have access to the same treatment and support as those with other mental health conditions.

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