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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair  
2019 - 2020 Regular

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**Bill No:** SB 666                      **Hearing Date:** April 23, 2019  
**Author:** Stone  
**Version:** February 22, 2019  
**Urgency:** No                                      **Fiscal:** No  
**Consultant:** SC

**Subject:** *Mental Health Diversion*

## HISTORY

**Source:** Author

**Prior Legislation:** SB 215 (Beall), Ch. 1005, Stats. 2018  
AB 1810 (Comm. on Budget), Ch. 34, Stats. 2018  
SB 8 (Beall), 2017, held on Suspense File in Assembly Appropriations

**Support:** California District Attorneys Association; California Police Chiefs Association

**Opposition:** American Civil Liberties Union of California; California Attorneys for Criminal Justice; Ella Baker Center on Human Rights; Legal Services for Prisoners with Children; San Francisco Public Defender's Office

## PURPOSE

***The purpose of this bill is to exclude specified crimes from being considered for mental health diversion.***

*Existing law* states that pretrial diversion refers to the procedure of postponing prosecution of an offense filed as a misdemeanor either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication. (Penal Code Section 1001.1.)

*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, §§ 1001.35 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 the court, after considering the positions of the defense and prosecution, to grant pretrial diversion to a defendant pursuant to this section if the defendant meets all of the following criteria:

- The court is satisfied that the defendant suffers from a mental disorder and evidence of the defendant's mental disorder is provided by the defense and must include a recent diagnosis by a qualified mental health expert;
- The court is satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense, as provided;
- In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment;
- The defendant consents to diversion and waives 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 due to their mental incompetence and cannot consent to diversion or give a knowing and intelligent waiver of his or her right to a speedy trial;
- The defendant agrees to comply with treatment as a condition of diversion; and,
- The court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. In making this determination, the court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subs. (a)-(b).)

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

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

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

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

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

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

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

*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.

*This bill* would additionally exclude defendants charged with the following offenses from mental health diversion eligibility:

- Robbery, if the person was armed with a weapon at the time of the perpetration of the crime;
- Assault with a deadly weapon;
- Elder abuse; and,
- Specified crimes of child abuse.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

When the original mental health diversion bill was passed by the Legislature, it was severely flawed. As passed, it allowed any defendant to become eligible to be diverted to a mental health diversion program, regardless of the crime committed.

After passage, it became clear that those accused of certain crimes, such as murder and rape, should not be allowed to be diverted into a mental health program. The Legislature passed a clean-up bill, SB 215 (Beall) which received near unanimous support.

However, SB 215 did not go far enough, and left several very dangerous crimes still left open for potential diversion. SB 666 closes that loophole by adding armed robbery, assault with a deadly weapon, child abuse, and elder abuse to the

list of ineligible crimes for mental health diversion. These are very serious crimes, and those accused of such crimes should stand trial, not diverted to a mental health program to escape potential punishment.

## 2. Recently Enacted Mental Health Diversion

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.

Last year, the Legislature enacted provisions authorizing pretrial diversion of eligible defendants with mental disorder. In order to be eligible for diversion, 1) the defendant must suffer from a mental disorder that 2) played a significant role in the commission of the charged offense; 3) in the opinion of a qualified mental health expert, the defendant's symptoms motivating the criminal behavior would respond to mental health treatment; 4) the defendant must consent to diversion and waive the right to a speedy trial; 5) the defendant must agree to comply with treatment as a condition of diversion; and 6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. (Pen. Code, § 1001.36, subd. (b)(1).) The defendant may not be charged with specified crimes. (Pen. Code, § 1001.36, subd. (b)(2).)

In addition to the eligibility requirements of the defendant, mental health treatment program must meet the following requirements: 1) the court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant; 2) the defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources; 3) the program must submit regular reports to the court and counsel regarding the defendant's progress in treatment; and 4) the program must submit regular reports to the court and counsel regarding the defendant's progress in treatment. (Pen. Code, § 1001.36, subd. (c)(1).) The court has the discretion to select the specific program of diversion for the defendant. The county is not required to create a mental health program for the purposes of diversion, and even if a county has existing mental health programs suitable for diversion, the particular program selected by the court must give its consent to receive the defendant for treatment. (Pen. Code, § 1001.36, subd. (c)(1)(B).)

The diversion program cannot last more than two years and if there is a request for victim restitution, the court shall conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of restitution. (Pen. Code, § 1001.36, subd. (c)(1)(3)-(4).)

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

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

(J. Couzens, *Memorandum RE: Mental Health Diversion (Penal Code §§ 1001.35-1001.36) (AB 1810 & SB 215)* [revised] (Nov. 14, 2018), p. 4, original italics.) As described above, even if the defendant is technically eligible for mental health diversion, the law does not require creation of new mental health programs nor does it require the existing programs, and assuming that the program is suitable to treat the defendant, the law only allows the defendant to be diverted into the program if the program consents to treating the defendant.

This bill makes the following crimes ineligible to be considered for mental health diversion: robbery, if the person was armed with a weapon at the time of the crime; assault with a deadly weapon; elder abuse; and specified types of child abuse. These crimes cover a vast array of criminal conduct with varying degrees of harm or potential harm. For example, assault with a deadly weapon can include situations where a person is armed with a gun and can include situations where a person is not using a traditional weapon. The facts and circumstances of each case will differ and some may warrant diversion while others will not. This takes away the court's discretion to consider any case that involves these offenses from being diverted.

### 3. Incarceration of Mentally Ill Offenders

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 Apr. 8, 2019.]) 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 (see below).

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 the California Police Chiefs Association:

The California Police Chiefs is proud to support SB 666, which would make defendants charged for certain crimes ineligible for pretrial diversion.

Crimes ineligible for diversion include charges of armed robbery, assault with a deadly weapon, elder abuse, and child abuse. Defendants charged with these crimes are violent and should be held accountable for their actions.

#### **5. Argument in Opposition**

According to San Francisco Public Defender’s Office:

Toughly a third of inmates in California’s jails suffer from serious mental illness. Too often, untreated mental illness is the reason individuals become involved with law enforcement in the first place. The vast overcriminalization of the mentally ill has led to jail and prison overcrowding, repeated and costly lawsuits, and the warehousing of the mentally ill in facilities not designed to treat or rehabilitate them.

In June 2018, Governor Brown and the Legislature took steps to address this problem when they enacted Penal Code section 1001.36. Section 1001.36 allows, but does not require trial courts to divert mentally ill defendants into pre-existing treatment programs, where the proposed treatment program is consistent with the needs of the defendant and the safety of the community. By granting courts the ability to divert those suffering from mental illness into treatment at an early stage in the proceedings, section 1001.36 protects the community by reducing recidivism rates for mentally ill defendants, and avoids the unnecessary and unproductive costs of trial and incarceration.

**-- END --**