POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of Criminal Law Approved for Credit Toward California Criminal Law Specialization
The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider, #172

Week Of	Topic	Guest	General
July 30, 2018	New Law: Mental Health Diversion Pen. Code §1001.36, §1370	L.D. Louis	30 min

On June 27, 2018, Governor Brown signed AB 1810, the "Omnibus Health Trailer Budget Bill. Among other things, the bill created Penal Code section 1001.36, which sets forth a discretionary, pretrial diversion procedure for qualified defendants who have committed a felony or misdemeanor, if the mental disorder played a significant part in the commission of the offense. The bill also revised Penal Code section 1370.

The purpose of the program is to offer treatment for the underlying mental disorder that contributed to the defendant's involvement in the offense, and thus mitigate reentry into the criminal justice system. A finding of incompetence is not required for applicability of the program. However, as to those persons who are incompetent to stand trial, revisions to section 1370 allow then to be placed on diversion based on the same eligibility requirements for persons who are competent.

The court can decline to divert a defendant if doing so presents an unreasonable risk of danger to the public as defined by Penal Code section 1170.18.

This P&A contains highlights of this new Mental Health Diversion Statute.[1]

Penal Code section 1001.36

I. Some Basics

A. Which crimes are covered by the mental health diversion?

The diversion covers any felony or misdemeanor. No exception is made for serious or violent felonies. (§ 1001.36, subd. (a).)

[1] The author of the P&A acknowledges the excellent memorandum written by Judge J. Richard Couzens explaining this new Mental Health Diversion. His memorandum provided much information and guidance for this P&A, and Judge Couzens is quoted directly on several points. Also, information provided by Assistant District Attorney L.D. Louis of our Mental Health Unit was integral to the P&A.

B. When is the mental health diversion granted?

This is a *pretrial* diversion program.

The statute provides that it can be granted after the filing of an accusatory pleading, "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. (d).)

Thus "adjudication," by way of plea or verdict, terminates the eligibility for diversion.

C. Is the diversion program discretionary?

Yes. The statute states: "On an accusatory pleading alleging the commission of a misdemeanor 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)

D. Who has the burden establishing eligibility?

Since diversion is within the discretion of the court, it appears that defendant has the burden of proof.

As to the nature of that burden, the statute repeatedly uses the phrase "the court is satisfied."

E. How long is the diversion program?

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

However, circumstances of the defendant's conduct may result in the termination of treatment and reinstatement of criminal proceedings (discussed later in this handout.)

If the defendant performed satisfactorily on diversion, the court must dismiss the criminal charges. (§ 1001.36, subd. (e).)

II. <u>Eligibility for Mental Health Diversion: The Requirements</u>

<u>All</u> of the following requirements must be met in order for diversion to be granted. (§ 1036.1)(a.))

A. The Defendant Suffers from a Mental Disorder

The defendant must suffer from a mental disorder that is identified in the most recent edition of the DSM (Diagnostic and Statistical Manual of Mental Disorders), which under § 1036.1(b)(1) includes, but is not limited to "bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress

disorder."

Not included are "antisocial personality disorder, borderline personality disorder, and pedophilia." (§ 1036.1(b)(1).)

"Evidence of the defendant's mental disorder shall be provided by the defense." (§ 1036.1(b)(1).)

This evidence "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." (§ 1036.1(b)(1).)

[See comment at the end of the P&A, addressing the question of which professionals fall within the category of "qualified mental health expert."]

B. The Mental Disorder Played a Significant Role in the Commission of the Charged Offense

The court may conclude that a defendant's mental disorder played a significant role in the commission of the charged offense if it is able to determine "that the defendant's mental disorder *substantially contributed* to the defendant's involvement in the commission of the offense." (§ 1036.1(b)(2), emphasis added.)

"Substantially contributed" is not otherwise defined in the statute.

To reach this conclusion, the court may review "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. . . ." (§ 1036.1(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." (§ 1036.1(b)(3).)

D. "The defendant consents to diversion and waives the right to a speedy trial." (§ 1036.1(b)(4).)

However, a defendant who has been found suitable for diversion under section 1370(a)(1) (b)(IV) is not competent to consent to diversion or waive speedy trial. (§ 1036.1(b)(4).)

E. "The defendant agrees to comply with treatment as a condition of diversion." (§ 1036.1(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).)

The statute provides that the "[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." (§ 1001.36, subd. (b)(6).)

The statute incorporates the definition of "unreasonable risk of danger to public safety" contained Penal Code section 1170.18 (Proposition 47), which is: " '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).)

Judge Couzens in his 7/13/2018 memo makes this observation: "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." (Couzens 7/13/18 Memo, p. 6.) At the end of this P&A, see the list of violent felonies that Judge Couzens includes in his memo.

However, Judge Couzens also makes the observation that courts are not limited to excluding persons only because of the risk of committing a "super strike": "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." (Couzens 7/13/18 Memo, p. 3.)

III. Treatment

The mental health treatment program must meet the following requirements:

A. The program may be inpatient or outpatient to meet the specialized mental health treatment of the defendant. (§ 1001.36, subd. (c)(1)(A))

B. The program of mental health treatment may utilize existing inpatient or outpatient mental health resources**.** (§ 1001.36, subd. (c)(1)(B))

The court shall consider the requests of the defense and the prosecution, the needs of the defendant, and the interests of the community." (§ 1001.36, subd. (c)(1)(B))

Treatment may be procured using public or private 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." (§ 1001.36, subd. (c)(1)(B))

"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." (§ 1001.36, subd. (c)(1)(B))

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

IV. Termination of Treatment

After notice of hearing, the court may reinstate criminal proceedings, modify the treatment, or direct that conservatorship hearings be initiated if any of the circumstances below occur:

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

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

3. The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion. (§ 1001.36, subd. (d)(3) [i.e., a catch-all provision]

4. Based on the opinion of a mental health expert whom the court deems appropriate:

    a. the defendant is performing unsatisfactorily in the program OR

    b. The defendant is gravely disabled per W&I Code, section 5008(h)(1)(B) {Murphy Conservatorship} (§§ 1001.36, subd. (d)(4) (A)&(B)

V. Successful Completion of Diversion

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 proceedings at the time of the initial diversion. (§ 1001.36, subd. (e).)

The determination of whether the defendant has performed satisfactorily on diversion is a matter left to the discretion of the court. Section 1001.36, subd. (e) states that the court *may* conclude the defendant performed satisfactorily and then provides indicators of satisfactory performance.

These indicators are: a) the defendant has "substantially complied" with the program requirements; b) the defendant has "avoided significant new violations of the law unrelated to the defendant's mental health condition." (As Judge Couzens states, the court can, at its discretion, ignore new violations of law related to the defendant's mental health condition); the defendant has "a plan in place for long-term mental health care."

"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).)

VI. Persons Incompetent to Stand Trial (Pen. Code, § 1370)

A. Eligibility for Diversion - Felony

A person charged with a felony and found incompetent to stand trial is eligible for diversion if he or she has not yet been transported to a mental health facility. Therefore, persons who have been found incompetent to stand trial for a felony and physically placed in a treatment facility are ineligible for diversion.

To find eligibility for diversion, the court must still have information the defendant may benefit from diversion and is an appropriate candidate for diversion. (§ 1370, subd. (a)(1)(B)(iv). The defendant's eligibility will be determined pursuant to § 1001.36. [See Section II "Eligibility for Mental Health Diversion: Requirements"]

The court's determination is a discretionary one.

B. Eligibility for Diversion - Misdemeanor

The provisions are similar for misdemeanor offenses. Judge Couzens states: "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." (Couzens 7/13/18 Memo, p. 13)

Comment

There are areas of this new law that are subject to different interpretations. One of them raising confusion is section 1001.36 (b)(1).

The statute says: "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*."

Who is a "qualified mental health expert"? The term is not defined in the statute. Judge Couzens writes: "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." (Couzens 7/13/18 Memo, p. 4.) But another view expressed as to this statutory language is that persons such as marriage and family therapists or clinical social workers would not qualify as "mental health experts" as they are not permitted to diagnose mental disorders. This view would hold that only licensed psychologists (who engage under Business & Professions Code section 2903 in the "diagnosis, prevention, treatment and amelioration of psychological problems and emotional and mental disorders") and psychiatrists meet the definition of "mental health experts" as contemplated by the statute.

May other experts, other than those for the defense, offer a diagnosis of the defendant? Judge Couzens makes this additional observation about section 1001.36(b)(1): "[I]t 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." (Couzens 7/13/18 Memo, p. 5.)

From Judge Couzens Memo: Unreasonable Risk of Danger to Public Safety

"As a requirement for diversion, section 1001.36, subdivision (b)(6) states that the court must be satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.8

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."

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to the P&A author deputy district attorney Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

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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.