

Memorandum



Date: Oct 1, 2018

To: All DDAs

From: Mag Nicola, Chief Deputy District Attorney
Cindy Gresser, Chief Deputy District Attorney
John Savrnoch, Chief Deputy District Attorney

Subject: UPDATED Mental Health Diversion (P.C. 1001.36): Guidelines

Overview

Penal Code § 1001.36 sets forth a discretionary pre-trial diversion procedure for any defendant charged with a misdemeanor or a felony, who suffers from a mental disorder listed in the DSM (*except pedophilia, antisocial personality disorder, and borderline personality disorder*), where the symptoms can be abated with treatment, if the mental disorder *was* a significant factor in the commission of the charged offense.

Exclusions were added by new legislation that prohibits diversion for:

- (A) *Murder or voluntary manslaughter.*
- (B) *An offense for which a person, if convicted, would be required to register pursuant to Section 290, except for a violation of Section 314.*
- (C) *Rape.*
- (D) *Lewd or lascivious act on a child under 14 years of age.*
- (E) *Assault with intent to commit rape, sodomy, or oral copulation, in violation of Section 220.*
- (F) *Commission of rape or sexual penetration in concert with another person, in violation of Section 264.1.*
- (G) *Continuous sexual abuse of a child, in violation of Section 288.5.*
- (H) *A violation of subdivision (b) or (c) of Section 11418.*

The burden of proof is on the defendant, who must prove by a preponderance of the evidence, and to the court's satisfaction, all of the following:

- 1) The defendant suffers from a mental disorder as identified in the most recent DSM, 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,

- 2) The court is satisfied that the defendant's mental disorder was 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 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,
 - 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, and,
 - 7) The court is satisfied that the defendant's proposed/recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant. 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. A referral to a treatment program may not be made unless 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.
- (These determinations must be made in the trial court by direction of our Presiding Judge.)

Restitution is now statutorily authorized pursuant to 1001.36(c)(4):

"Upon request, the court shall conduct a hearing to determine whether restitution, as defined in subdivision (f) of Section 1202.4, is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of diversion. However, a defendant's inability to pay restitution due to indigence or mental disorder shall not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion."

Procedures & Guidelines

While this is a permissive statute, [i.e., there is no 'right' to being diverted], it is the position of the District Attorney's Office that individuals who qualify and are likely to benefit from mental health treatment should be given the opportunity to participate to the extent that victim and public safety is not endangered.

All cases where the defendant seeks diversion under this statute must first be evaluated in the trial courts to determine eligibility under elements 1- 7 above. DDAs should, in the appropriate case, request that the defense make a prima facie showing once they announce an intent to seek diversion. ["At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." PC 1001.36(b)(3).]

If the DDA assigned is satisfied (after reviewing the evidence presented by the defense, the crime reports, criminal history, and victim input) that the defendant can meet their burden of proof, and after

consultation and approval of their Chief Deputy, the DDA may stipulate to eligibility. The court must still make any required findings and approve the recommended treatment plan. The mental health treatment courts will conduct the reviews for defendants thereafter.

In any case where a victim requests to be heard during this determination process, no stipulation will be made prior to the victim being afforded the opportunity to be heard.

In any case where the DDA determines that any element of PC1001.36 above is lacking, that case should proceed to a prima facie or a formal hearing for the appropriate judicial findings. The court may consider any relevant and credible evidence (PC 1001.36(b)(1)(B)) including crime reports, and witness and expert testimony during a formal hearing.

In any case where the primary concern is public safety due to a defendant's prior history or circumstances of the current offense, a formal written brief shall be filed detailing the nature of the current offense or criminal history evidencing the threat to victim or public safety.

* - IST defendants qualify for diversion provided they have not been transported to DSH, see PC 1370/1370.1 for specific rules. These defendants pose certain ethical challenges for defense attorneys, therefore, this policy memo will be updated when more of this issue is resolved over time.