NEW RULES OF PROFESSIONAL CONDUCT

Additional slides

Rule 5.1(a)

Managing attorneys must make reasonable efforts to assure lawyers comply with RPC and State Bar Act

3.8: No absolute immunity for evidence innocence when no longer assigned to case

- Houston v. Partee (D. Ill. 1991) 758 F. Supp. 1228, affirmed by Houston v. Partee (7th Cir. 1992) 978 F.2d 362

Rule 1.1 (old rule 3-100) Competence

- Duty to act competently
- Apply learning, skill, mental/ emotional/physical ability reasonably necessary to perform service
- Can associate/consult with another lawyer

Rule 4.2

- Current officer, director, partner, or managing agent
- Current employee, manager, agent if act or omission may be binding on or imputed to organization
- Communication with public official or body is okay

Rule 4.2

- 75 Ops. Cal. Atty. Gen 223 (1992) – okay for DA to talk to represented person during investigation
- Cf. *Triple A Machine Shop v. State of California* (1989) 213 Cal.App.3d 131 – rule 2-100 applies to prosecutors
- Inquisitive Prosecutors Guide 2018-IPG-37

NEW LEGISLATION

Michael D. Schwartz
Chief Assistant District Attorney
October 8, 2018

Text of new legislation is on Westlaw

Also available at leginfo.legislature.ca.gov

- Select Today's Law as Amended to get redline version

SB 1391
Welf. & Inst. Code § 707
Juveniles

- Crime committed when juvenile 14 or 15 years old cannot be prosecuted in adult court
- Unless apprehended after end of juvenile court jurisdiction

In re Estrada (1965) 63 Cal.2d 740; *People v. Rossi* (1976) 18 Cal.3d 295: statute eliminating crime or reducing punishment is retroactive to cases not yet final on appeal

People v. Vela (2018) 21 Cal.App.5th 1099: Prop. 57, eliminating direct adult filings for juveniles, retroactive to cases not yet final on appeal

SB 1437
Penal Code §§ 188, 189, 170.95
Felony murder (copy provided)

- **First degree felony-murder rule still applies to the actual killer**
- **Also applies to aider/abbetor with intent to kill**
- **Also applies if defendant knew victim a peace officer in course of duties**

SB 1437, continued

- **Also applies to "major participant" with reckless indifference to human life**
  - "major participant" means defendant's participation in criminal activities known to carry a grave risk of death (*People v. Clark* (2016) 63 Cal.4th 522, 611, construing PC 190.2(d))

SB 1437, continued

Petition to vacate first or second degree murder if:

- Convicted on theory of felony-murder or natural and probable consequences
- Could not be convicted under new statute

SB 1437, continued

- If prima facie case, DA has 60 days to file response
- Hearing
- Burden of proof on the DA
- If vacated, is resentenced on remaining counts

SB 1393
Penal Code § § 667(a), 1385
Serious felony priors

Court may dismiss 667(a) five-year prior under PC 1385

Probably retroactive to cases not final on appeal

AB 2942
Penal Code § 1170
Recall of sentence

- Allows court to recall sentence at any time on recommendation of DA
- New sentence may not exceed original sentence
- Sponsored by Santa Clara DA's Office

AB1793
Health & Safety Code § 11361.9
Cannabis convictions (copy provided)

- Furthers Prop 64 of 11/9/16 (HSC 11361.8)
- By 7/1/19, DOJ to identify convictions potentially eligible for recall of sentence, dismissal, or sealing
- DA has until 7/1/20 to challenge resentencing if does not meet criteria or unreasonable risk to public safety
- DA has until 7/1/20 to challenge dismissal and sealing
- If no DA challenge, court grants relief

AB 748
Gov. Code § 6254(f)
Public records

- Public records include video or audio recording of "critical incident" (discharge of firearm at a person by a peace officer, or use of force by peace officer resulting in death or GBI)
- May be withheld during active criminal or administrative investigation, or to protect privacy

SB 1421
Penal Code §§ 832.7, 832.8
Peace officer records
(copy provided)

- Certain peace officer records not confidential, are available for public inspection:
  - discharge of firearm by officer
  - use of force resulting in death or GBI
  - sustained finding of sexual assault by officer on member of the public

SB 1421, continued

- sustained finding of dishonesty relating to: reporting, investigation or prosecution of crime; or reporting or investigation of misconduct by another peace officer

- Includes all materials presented to prosecutor or administrative reviewer

SB 1421, continued

- Limitations on disclosure of:
  - information regarding other officers
  - personal information
  - anonymity of complainants and witnesses
  - danger to physical safety, public interest
  - active criminal or administrative investigation

SB 1187
Penal Code §§ 1369, 1370, 1370.1, 1375.5, 4019
Incompetence to stand trial

- Incompetent defendant shall be returned to court after 2 (rather than 3) years.
- 50% credits for time spent in county jail

SB10
Penal Code § 1320.6 et seq.
Bail

- Eliminates cash bail
- Effective Oct. 1, 2019
- If bail industry gets 365,880 signatures for referendum by 11/26/18, goes onto 2020 ballot, delays implementation

SB 10, continued

- Upon arrest, pretrial assessment conducted by entity to be assigned
- Pretrial Assessment Services may release low or medium risk arrestee OR
- DA to give notice to V, opportunity to be heard

SB 10, continued

- Misdemeanor arrestees shall be released OR unless:
  - DV, stalking, 3rd DUI w/in 10 years, DUI with injury, DUI w/ BA .20, violation restraining order, arrested while pending trial or sentencing, threatening witness, serious or violent felony w/in 5 years, etc.

SB 10, continued

- Presumption of release by court on least restrictive conditions reasonable to assure public safety and return to court
- Presumption of detention if violent felony, or if convicted of violent felony within 5 years

SB 10, continued

- On motion of DA, court can detain pending trial if substantial likelihood that no conditions would reasonably assure public safety and appearance in court
- Preventative detention hearing within 3 days

AB 1810, SB 215
Penal Code §1001.26
Mental Health Diversion
(copy provided)

- Inpatient or outpatient mental health services
- Treatment using private or public funds
- Maximum 24 months
- Case dismissed at end of period, record sealed

AB 1810, SB 215, continued

- Participation at discretion of court
- Restitution shall be ordered, but inability to pay not grounds to deny or violate diversion

AB 1810, SB 215, continued

- Requirements:

  (A) Mental disorder in DSM, diagnosed by mental health expert, excluding anti-social personality disorder, borderline personality disorder, or pedophilia

  (B) Mental disorder was a significant factor in commission of the charged offense

AB 1810, SB 215, continued

- Requirements:
  (C) Mental health expert opinion that would respond to treatment
  (D) Consents to diversion and waives speedy trial UNLESS too incompetent to consent

AB 1810, SB 215, continued

- Not eligible if unreasonable risk to public safety
- Applies to any misdemeanor or felony <u>except</u>: murder, voluntary manslaughter, 290 offenses (except 314), 11418 (weapons of mass destruction)

AB 1810, SB 215, continued

- Can "fall off" diversion if:
  - Charged with additional misd. reflecting propensity for violence
  - Charged with additional felony
  - Unsatisfactory performance in program
  - Gravely disabled (→ conservatorship)

NEW RULES OF PROFESSIONAL CONDUCT

Michael D. Schwartz
Chief Assistant District Attorney
October 8, 2018

Where does it say I can't do that?

ABA Model Rules of Professional Conduct






New rules effective Nov. 1, 2018

- Text on State Bar of California web site under "What's New" and "Attorneys"
- Also on California Courts website, Supreme Court, including Administrative Order of 9/26/18, adding rule 1.2.1 (advising violation of the law) and some minor amendments

Rule 3.8 (old rule 5-110, as amended 11/2/17) Special Responsibilities of a Prosecutor

(a) Not institute or continue to prosecute charge unless supported by probable cause

- NDAA/VCDA standard: sufficient admissible evidence to warrant conviction by trier of fact (i.e., BRD)

Rule 3.8, continued

(b) Make reasonable efforts to assure accused advised of, and reasonable opportunity to obtain, counsel

(c) Not seek waivers from unrepresented defendant unless court has approved pro per status

- Allows questioning of uncharged subject who waives *Miranda*

Rule 3.8, continued

(d) Timely disclose to defense all evidence or information prosecutor knows or reasonably should know tends to negate guilt, or mitigate the offense or sentence

Rule 3.8 (d), comment 3

- Not limited to *material* evidence (goes beyond *Brady v. Maryland*)
- Includes impeachment evidence
- Not require disclosure of info "protected from disclosure" by courts
- Not inconsistent with statutory, constitutional requirements
- Not impose new timing requirements

Rule 3.8 (d), comment 4

- Can seek protective order if disclosure to defense could result in substantial harm to an individual or the public interest
  - Compare PC 1054.7, which allows denial or delay of discovery only if threats or possible danger to safety of victim or witness, possible loss or destruction of evidence, or possible compromise of other investigation

Rule 3.8, continued

(e) Reasonable care to prevent persons under supervision or direction of prosecutor, including investigators and law enforcement, from improper trial publicity under rule 3.6

- Comment 6: ordinarily sufficient if "issues the appropriate cautions"

Rule 3.8, continued

(f) & (g) New evidence creating reasonable likelihood that D did not commit offense: disclose to court or authority, disclose to defense, investigate, and (if clear & convincing evidence that did not commit the crime) seek to remedy

Rule 1.11 (new) Conflicts for Gov't Employees

- Limitations on former gov't lawyer representing client in case in which lawyer substantially participated
- Limitations on use of use of confidential info acquired while gov't lawyer
- Gov't lawyer cannot negotiate for employment with party or their lawyer in case which gov't lawyer is handling

Rule 1.13 (old rule 3-600) Organization as a Client

- If know that acting or intend to act in violation of law, refer to "higher authority" in the organization
- May need to resign (see rule 1.16)
- Comment 2: must ordinarily accept decisions re utility, prudence, policy, operations

Rule 3.2 (new)

A lawyer shall not use means that have no substantial purpose other than to delay or prolong proceeding or cause needless expense

Rule 3.3 (old rule 5.200(A)-(D)) Candor toward Tribunal

- Knowingly make/fail to correct false statement of fact or law
- Misquote law or fail to disclose directly adverse legal authority
- Offer evidence lawyer knows to be false. If learn of falsehood, must take reasonable remedial measures

Rule 3.4 (a)(c)(e) (old rule 5-310(E)) Fairness to Opposing Party & Counsel

- Unlawfully obstruct access to evidence or witness
- Alter, destroy or conceal document
- Falsify evidence
- Advise or cause witness to secrete themselves or leave the jurisdiction to be unavailable as witness

Rule 3.4 (b) (old rule 5-220) Fairness to Opposing Party & Counsel

- Suppress evidence the attorney has a duty to reveal or produce
  - Comment 2: violation of discovery rule "does not of itself establish a violation of this rule."

Rule 3.4 (f) (new) Fairness to Opposing Party & Counsel

- Attorney shall not knowingly disobey an obligation under the rules of a tribunal, except for open refusal based on assertion that no valid obligation exists

Rule 3.4 (g) (old rule 5-200(E)) Fairness to Opposing Party & Counsel

- In trial, attorney shall not assert personal knowledge of facts at issue, or
- state personal opinion as to guilt or innocence of the accused

Rule 3.5 (b)(c) (old rule 5-300)

Prohibits ex parte communications with judge re merits of contested matter pending before judge, except:

- in open court
- with consent of all other counsel
- in writing with copy to all, or
- "in ex parte matters"

(see Code of Jud. Ethics, Canon 3(B)(7))

Rule 3.5 (d)-(*l*) (old rule 5-320) Communications with Jurors

(d) No communications with members of venire from which jury will be selected

(e)(f) No communications with jurors during trial

(g) OK after trial, only after whole panel discharged, but not misrepresent, harass, embarrass, or influence future jury service

(j) Must promptly disclose to court improper conduct by or towards a juror

Rule 3.6 (old rule 5-120) Trial Publicity

Not make extrajudicial statement likely to be publicly disseminated and likely to prejudice proceedings

- Can make comment to protect client by mitigating recent adverse publicity (Talk to your supervisor before you do this!)

Rule 3.7 (old rule 5-210) Lawyer as Witness

- Lawyer cannot act as advocate in jury trial or court trial in which the lawyer is likely to be a witness, unless:
  - Relates to uncontested matter, or
  - Relates to nature and value of legal services rendered, or
  - Informed written consent from client (head of the office for government)
- OK for another lawyer in firm to testify

Rule 4.1 (new)

In course of representing a client, not knowingly make a false statement of material fact or law to a third person

Rule 4.2 (old rule 2-100)

Prohibits direct or indirect communication with represented party regarding the subject of the representation

- Comment 8: exception for prosecutors in investigations AS LIMITED BY LAW. (Research this before you act!)

Rule 4.3 (new) Communications with Unrepresented Person

- Not state or imply that lawyer disinterested
- If interests of person conflict with interests of client, do not give legal advice. Can advise to secure counsel.
- Not seek to obtain privileged or confidential information

Rule 4.4 (new)

Receipt of inadvertently produced privileged document:

- refrain from examining
- notify the sender

Rules 5.1, 5.3 (new) Responsibility of Supervisors for Lawyers and Nonlawyer Assistants

- Make reasonable efforts to ensure compliance with RPC and State Bar Act
- Responsible for subordinate's violations if:
  - (1) orders or, with knowledge of facts, ratifies the conduct, or
  - (2) Knows of conduct when consequences could be avoided or mitigated but fails to take reasonable remedial action

Rule 5.2 (new) and comments Responsibility of Subordinate Lawyer

Lawyer must comply with RPC and State Bar Act, notwithstanding that acting at direction of another lawyer or person – if question can reasonably be answered only one way.

No violation if act in accordance with supervisor's reasonable resolution of an arguable question of professional duty.

Rule 8.4 (mostly new) Misconduct

- Solicit or induce others to violate RPC or State Bar Act
- Engage in dishonesty, fraud, deceit, or reckless or intentional misrep.
- Engage in conduct prejudicial to administration of justice
- State or imply ability to improperly influence a governmental official

Rule 8.4.1 Discrimination, Harassment, Retaliation

- Prohibits discrimination, harassment or retaliation in representing a client, or in operating the office, based on protected characteristics

TEXT OF SELECTED LEGISLATION

SB 1437 Felony murder

AB 1793 Cannabis convictions

SB 1421 Peace officer records

SB 215 Mental Health Diversion (amending AB 1810)

Senate Bill No. 1437

CHAPTER 1015

An act to amend Sections 188 and 189 of, and to add Section 1170.95 to, the Penal Code, relating to murder.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1437, Skinner. Accomplice liability for felony murder.

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. Existing law defines malice for this purpose as either express or implied and defines those terms.

This bill would require a principal in a crime to act with malice aforethought to be convicted of murder except when the person was a participant in the perpetration or attempted perpetration of a specified felony in which a death occurred and the person was the actual killer, was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree, or the person was a major participant in the underlying felony and acted with reckless indifference to human life.

Existing law defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies, including arson, rape, carjacking, robbery, burglary, mayhem, and kidnapping. Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. Existing law defines 2nd degree murder as all murder that is not in the first degree and imposes a penalty of imprisonment in the state prison for a term of 15 years to life.

This bill would prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or the person was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer, or the person was a major participant in the underlying felony and acted with reckless indifference to human life, unless the victim was a peace officer who was killed in the course of performing his or her duties where the defendant knew or should reasonably have known the victim was a peace officer engaged in the performance of his or her duties.

This bill would provide a means of vacating the conviction and resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder, and the defendant could not be charged with murder after the enactment of this bill. By requiring the participation of district attorneys and public defenders in the resentencing process, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

SB-1437 Accomplice liability for felony murder. (2017-2018)

SECTION 1. *The Legislature finds and declares all of the following:*

(a) The power to define crimes and fix penalties is vested exclusively in the Legislative branch.

(b) There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.

(c) In pursuit of this goal, in 2017, the Legislature passed Senate Concurrent Resolution 48 (Resolution Chapter 175, 2017–18 Regular Session), which outlines the need for the statutory changes contained in this measure.

(d) It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability.

(e) Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.

(f) It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.

(g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea.

SEC. 2. Section 188 of the Penal Code is amended to read:

188. *(a) For purposes of Section 187, malice may be express or implied.*

(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.

~~Such~~ *(2)* ~~malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when~~ *Malice is implied when* no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

(3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.

~~When~~ *(b) If* it is shown that the killing resulted from ~~the intentional doing of an~~ *an intentional* act with express or implied ~~malice~~ *malice,* as defined ~~above,~~ *in subdivision (a),* no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite ~~such~~ *that* awareness is included within the definition of malice.

SEC. 3. Section 189 of the Penal Code is amended to read:

189. *(a)* 'All murder ~~which~~ *that* is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or ~~which~~ *that* is committed in the

perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or ~~any~~ murder ~~which~~ *that* is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. ~~All other kinds of murders are of the second degree.~~

(b) All other kinds of murders are of the second degree.

(c) As used in this section, the following definitions apply:

(1) "Destructive device" has the same meaning as in Section 16460.

~~As~~ *(2)* ~~used in this section, "destructive device" means any destructive device as defined in Section 16460, and "explosive" means any explosive as defined in Section~~ *"Explosive" has the same meaning as in Section* 12000 of the Health and Safety Code.

~~As~~ *(3)* ~~used in this section, "weapon~~ *"Weapon* of mass destruction" means any item defined in Section 11417.

(d) To prove the killing was "deliberate and premeditated," it ~~shall~~ *is* not ~~be~~ necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:

(1) The person was the actual killer.

(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

SEC. 4. *Section 1170.95 is added to the Penal Code, to read:*

1170.95. *(a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:*

(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.

(b) (1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:

(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).

(B) The superior court case number and year of the petitioner's conviction.

(C) Whether the petitioner requests the appointment of counsel.

(2) If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and

advise the petitioner that the matter cannot be considered without the missing information.

(c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.

(d) (1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause.

(2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.

(3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

(e) If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.

(f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.

(g) A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence.

SEC. 5. *If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.*

AB-1793 Cannabis convictions: resentencing. (2017-2018)

Date Published: 10/01/2018 09:00 PM

Assembly Bill No. 1793

CHAPTER 993

An act to add Section 11361.9 to the Health and Safety Code, relating to cannabis.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1793, Bonta. Cannabis convictions: resentencing.

Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), enacted by the voters at the November 8, 2016, statewide general election, regulates the cultivation, distribution, and use of cannabis for nonmedical purposes by individuals 21 years of age and older. Under AUMA, a person 21 years of age or older may, among other things, possess, process, transport, purchase, obtain, or give away, as specified, up to 28.5 grams of cannabis and up to 8 grams of concentrated cannabis. Existing law authorizes a person to petition for the recall or dismissal of a sentence, dismissal and sealing of a conviction, or redesignation of a conviction of an offense for which a lesser offense or no offense would be imposed under AUMA.

This bill would require the Department of Justice, before July 1, 2019, to review the records in the state summary criminal history information database and to identify past convictions that are potentially eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to AUMA. The bill would require the department to notify the prosecution of all cases in their jurisdiction that are eligible for recall or dismissal of a sentence, dismissal and sealing, or redesignation. The bill would require the prosecution to, on or before July 1, 2020, review all cases and determine whether to challenge the resentencing, dismissal and sealing, or redesignation. The bill would authorize the prosecution to challenge the resentencing, dismissal and sealing, or redesignation if the person does not meet the eligibility requirements or presents an unreasonable risk to public safety. The bill would require the prosecution to notify the public defender and the court when they are challenging a particular resentencing, dismissal and sealing, or redesignation, and would require the prosecution to notify the court if they are not challenging a particular resentencing, dismissal and sealing, or redesignation. By imposing additional duties on local entities, this bill would create a state-mandated local program. The bill would require the court to automatically reduce or dismiss the conviction pursuant to AUMA if there is no challenge by July 1, 2020. The bill would require the department to modify the state summary criminal history information database in conformance with the recall or dismissal of sentence, dismissal and sealing, or redesignation within 30 days and to post specified information on its Internet Web site.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 11361.9 is added to the Health and Safety Code, to read:

11361.9. (a) On or before July 1, 2019, the Department of Justice shall review the records in the state summary criminal history information database and shall identify past convictions that are potentially eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to Section 11361.8. The department shall notify the prosecution of all cases in their jurisdiction that are eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation.

(b) The prosecution shall have until July 1, 2020, to review all cases and determine whether to challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation.

(c) (1) The prosecution may challenge the resentencing of a person pursuant to this section when the person does not meet the criteria established in Section 11361.8 or presents an unreasonable risk to public safety.

(2) The prosecution may challenge the dismissal and sealing or redesignation of a person pursuant to this section who has completed his or her sentence for a conviction when the person does not meet the criteria established in Section 11361.8.

(3) On or before July 1, 2020, the prosecution shall inform the court and the public defender's office in their county when they are challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation. The prosecution shall inform the court when they are not challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation.

(4) The public defender's office, upon receiving notice from the prosecution pursuant to paragraph (3), shall make a reasonable effort to notify the person whose resentencing or dismissal is being challenged.

(d) If the prosecution does not challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation by July 1, 2020, the court shall reduce or dismiss the conviction pursuant to Section 11361.8.

(e) The court shall notify the department of the recall or dismissal of sentence, dismissal and sealing, or redesignation and the department shall modify the state summary criminal history information database accordingly.

(f) The department shall post general information on its Internet Web site about the recall or dismissal of sentences, dismissal and sealing, or redesignation authorized in this section.

(g) It is the intent of the Legislature that persons who are currently serving a sentence or who proactively petition for a recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to Section 11361.8 be prioritized for review.

SEC. 2. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

Date Published: 10/01/2018 09:00 PM

Senate Bill No. 1421

CHAPTER 988

An act to amend Sections 832.7 and 832.8 of the Penal Code, relating to peace officer records.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1421, Skinner. Peace officers: release of records.

The California Public Records Act requires a state or local agency, as defined, to make public records available for inspection, subject to certain exceptions. Existing law requires any peace officer or custodial officer personnel records, as defined, and any records maintained by any state or local agency relating to complaints against peace officers and custodial officers, or any information obtained from these records, to be confidential and prohibits the disclosure of those records in any criminal or civil proceeding, except by discovery. Existing law describes exceptions to this requirement for investigations or proceedings concerning the conduct of peace officers or custodial officers, and for an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

This bill would require, notwithstanding any other law, certain peace officer or custodial officer personnel records and records relating to specified incidents, complaints, and investigations involving peace officers and custodial officers to be made available for public inspection pursuant to the California Public Records Act. The bill would define the scope of disclosable records. The bill would require records disclosed pursuant to this provision to be redacted only to remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace officers and custodial officers, to preserve the anonymity of complainants and witnesses, or to protect confidential medical, financial, or other information in which disclosure would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct by peace officers and custodial officers, or where there is a specific, particularized reason to believe that disclosure would pose a significant danger to the physical safety of the peace officer, custodial officer, or others. Additionally the bill would authorize redaction where, on the facts of the particular case, the public interest served by nondisclosure clearly outweighs the public interest served by disclosure. The bill would allow the delay of disclosure, as specified, for records relating to an open investigation or court proceeding, subject to certain limitations.

The California Constitution requires local agencies, for the purpose of ensuring public access to the meetings of public bodies and the writings of public officials and agencies, to comply with a statutory enactment that amends or enacts laws relating to public records or open meetings and contains findings demonstrating that the enactment furthers the constitutional requirements relating to this purpose.

This bill would make legislative findings to that effect.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

SB-1421 Peace officers: release of records. (2017-2018)

SECTION 1. *The Legislature finds and declares all of the following:*

(a) Peace officers help to provide one of our state's most fundamental government services. To empower peace officers to fulfill their mission, the people of California vest them with extraordinary authority — the powers to detain, search, arrest, and use deadly force. Our society depends on peace officers' faithful exercise of that authority. Misuse of that authority can lead to grave constitutional violations, harms to liberty and the inherent sanctity of human life, as well as significant public unrest.

(b) The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

SEC. 2. Section 832.7 of the Penal Code is amended to read:

832.7. (a) ~~Peace officer or custodial officer personnel records and~~ *Except as provided in subdivision (b), the personnel records of peace officers and custodial officers and* records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

(b) (1) Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency shall not be confidential and shall be made available for public inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code):

(A) A record relating to the report, investigation, or findings of any of the following:

(i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.

(ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.

(B) (i) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

(ii) As used in this subparagraph, "sexual assault" means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.

(iii) As used in this subparagraph, "member of the public" means any person not employed by the officer's employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency.

(C) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

(2) Records that shall be released pursuant to this subdivision include all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

(3) A record from a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to this subdivision.

(4) If an investigation or incident involves multiple officers, information about allegations of misconduct by, or the analysis or disposition of an investigation of, an officer shall not be released pursuant to subparagraph (B) or (C) of paragraph (1), unless it relates to a sustained finding against that officer. However, factual information about that action of an officer during an incident, or the statements of an officer about an incident, shall be released if they are relevant to a sustained finding against another officer that is subject to release pursuant to subparagraph (B) or (C) of paragraph (1).

(5) An agency shall redact a record disclosed pursuant to this section only for any of the following purposes:

(A) To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.

(B) To preserve the anonymity of complainants and witnesses.

(C) To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers.

(D) Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person.

(6) Notwithstanding paragraph (5), an agency may redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.

(7) An agency may withhold a record of an incident described in subparagraph (A) of paragraph (1) that is the subject of an active criminal or administrative investigation, in accordance with any of the following:

(A) (i) During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the use of force occurred or until the district attorney determines whether to file criminal charges related to the use of force, whichever occurs sooner. If an agency delays disclosure pursuant to this clause, the agency shall provide, in writing, the specific basis for the agency's determination that the interest in delaying disclosure clearly outweighs the public interest in disclosure. This writing shall include the estimated date for disclosure of the withheld information.

(ii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer who used the force. If an agency delays disclosure pursuant to this clause, the agency shall, at 180-day intervals as necessary, provide, in writing, the specific basis for the agency's determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. The writing shall include the estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner.

(iii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against someone other than the officer who used the force. If an agency delays disclosure under this clause, the agency shall, at 180-day intervals, provide, in writing, the specific basis why disclosure could reasonably be expected to interfere with a criminal enforcement proceeding, and shall provide an estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner, unless extraordinary circumstances warrant continued delay due to the ongoing criminal investigation or proceeding. In that case, the agency must show by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation or proceeding outweighs the public interest in prompt disclosure of records about use of serious force by peace officers and custodial officers. The agency shall release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available.

(iv) In an action to compel disclosure brought pursuant to Section 6258 of the Government Code, an agency may justify delay by filing an application to seal the basis for withholding, in accordance with Rule 2.550 of the California Rules of Court, or any successor rule thereto, if disclosure of the written basis itself would impact a privilege or compromise a pending investigation.

(B) If criminal charges are filed related to the incident in which force was used, the agency may delay the disclosure of records or information until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time to withdraw the plea pursuant to Section 1018.

(C) During an administrative investigation into an incident described in subparagraph (A) of paragraph (1), the agency may delay the disclosure of records or information until the investigating agency determines whether the use of force violated a law or agency policy, but no longer than 180 days after the date of the employing agency's discovery of the use of force, or allegation of use of force, by a person authorized to initiate an investigation, or 30 days after the close of any criminal investigation related to the peace officer or custodial officer's use of force, whichever is later.

(8) A record of a civilian complaint, or the investigations, findings, or dispositions of that complaint, shall not be released pursuant to this section if the complaint is frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the complaint is unfounded.

~~(b)~~ *(c)* Notwithstanding ~~subdivision (a),~~ *subdivisions (a) and (b),* a department or agency shall release to the complaining party a copy of his or her own statements at the time the complaint is filed.

~~(c)~~ *(d)* Notwithstanding ~~subdivision (a),~~ *subdivisions (a) and (b),* a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.

~~(d)~~ *(e)* Notwithstanding ~~subdivision (a),~~ *subdivisions (a) and (b),* a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement he or she knows to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or his or her agent or representative.

~~(e)~~ *(f)* (1) The department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition.

(2) The notification described in this subdivision shall not be conclusive or binding or admissible as evidence in any separate or subsequent action or proceeding brought before an arbitrator, court, or judge of this state or the United States.

~~(f)~~ *(g)* ~~Nothing in this section shall~~ *This section does not* affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code.

(h) This section does not supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with Section 1054) of Title 6 of Part 2, or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in Pitchess v. Superior Court (1974) 11 Cal.3d 531.

(i) Nothing in this chapter is intended to limit the public's right of access as provided for in Long Beach Police Officers Association v. City of Long Beach (2014) 59 Cal.4th 59.

SEC. 3. Section 832.8 of the Penal Code is amended to read:

832.8. *As used in Section 832.7, the following words or phrases have the following meanings:*

~~As~~ *(a)* ~~used in Section 832.7, "personnel~~ *"Personnel* records" means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:

~~(a)~~ *(1)* Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.

~~(b)~~ *(2)* Medical history.

~~(c)~~ *(3)* Election of employee benefits.

~~(d)~~ *(4)* Employee advancement, appraisal, or discipline.

~~(e)~~ *(5)* Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.

~~(f)~~ *(6)* Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

(b) "Sustained" means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy.

(c) "Unfounded" means that an investigation clearly establishes that the allegation is not true.

SEC. 4. *The Legislature finds and declares that Section 2 of this act, which amends Section 832.7 of the Penal Code, furthers, within the meaning of paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the purposes of that constitutional section as it relates to the right of public access to the meetings of local public bodies or the writings of local public officials and local agencies. Pursuant to paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the Legislature makes the following findings:*

The public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society.

SEC. 5. *No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district under this act would result from a legislative mandate that is within the scope of paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution.*

SB-215 Diversion: mental disorders. (2017-2018)

Date Published: 10/01/2018 09:00 PM

Senate Bill No. 215

CHAPTER 1005

An act to amend Section 1001.36 of the Penal Code, relating to diversion.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 215, Beall. Diversion: mental disorders.

Existing law authorizes a court to grant pretrial diversion, for a period no longer than 2 years, to a defendant suffering from a mental disorder, on an accusatory pleading alleging the commission of a misdemeanor or felony offense, in order to allow the defendant to undergo mental health treatment. Existing law conditions eligibility on, among other criteria, a court finding that the defendant's mental disorder played a significant role in the commission of the charged offense. Existing law requires, if the defendant has performed satisfactorily in diversion, that the court dismiss the defendant's criminal charges, with a record filed with the Department of Justice indicating the disposition of the case diverted, that the arrest is deemed never to have occurred, and requires the court to order access to the record of the arrest restricted, except as specified.

This bill would make defendants ineligible for the diversion program for certain offenses, including murder, voluntary manslaughter, and rape. The bill would authorize a court to 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, as specified. The bill would also require the court, upon request, to conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, to order its payment during the period of diversion. The bill would provide that a defendant's inability to pay restitution due to indigence or mental disorder would not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion. The bill would also make technical changes.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

SB-215 Diversion: mental disorders. (2017-2018)

SECTION 1. Section 1001.36 of the Penal Code is amended to read:

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 *paragraph (1) of* subdivision (b).

(b) *(1)* Pretrial diversion may be granted pursuant to this section if all of the following criteria are met:

~~(1)~~ *(A)* 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)~~ *(B)* The court is satisfied that the defendant's mental disorder ~~played~~ *was* a significant ~~role~~ *factor* in the commission of the charged offense. A court may conclude that a defendant's mental disorder ~~played~~ *was* a significant ~~role~~ *factor* 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)~~ *(C)* 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)~~ *(D)* 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)~~ *(E)* The defendant agrees to comply with treatment as a condition of diversion.

~~(6)~~ *(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. 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.

(2) A defendant may not be placed into a diversion program, pursuant to this section, for the following current charged offenses:

(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.

(3) 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.

(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.

(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.

(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.