# MEMORANDUM

**FROM:** **J. RICHARD COUZENS**
Judge of the Placer County Superior Court (Ret.)

**DATED:** **November 6, 2018**

**RE:** **MENTAL HEALTH DIVERSION (PENAL CODE §§ 1001.35-1001.36)(AB 1810 & SB 215) [REVISED MEMORANDUM]**

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Assembly Bill No. 1810 (AB 1810), an omnibus mental health bill, was signed by the governor on June 27, 2018, as a budget trailer bill; it became effective on signing. The legislation includes the addition of Penal Code[1] sections 1001.35 and 1001.36[2] for the discretionary diversion of qualified persons who have committed a crime because of a mental disorder. Thereafter, the Legislature amended section 1001.36 with the passage of Senate Bill 215 (SB 215), which will become effective January 1, 2019. This revised memorandum discusses the mental health diversion statutes now in effect and those that will take effect on January 1, 2019, because of the amendments made by SB 215.[3]

## I. Crimes eligible for diversion

Until December 31, 2018, all crimes, felony or misdemeanor, are potentially eligible for diversion. (§ 1001.36, subd. (a) [effective until Dec. 31, 2018].) After SB 215 becomes effective on January 1, 2019, the following crimes will be ineligible for diversion:

(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 [indecent exposure].

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

[2] The full text of sections 1001.35 and 1001.36 is set forth in Attachment A.

[3] The SB 215 amendments also renumbered the paragraphs in subdivision (b) in section 1001.36. For ease of reference, this memorandum will cite to the paragraphs as renumbered in the version of section 1001.36 which will become effective in 2019. Where there is a difference between the current and future paragraph numbering, the memorandum also will list the paragraph number effective until December 31, 2018, in brackets with the notation "fmr."

(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 [weapons of mass destruction].

(§ 1001.36, subd. (b)(2) [effective Jan. 1, 2019].)

## II. When diversion may be granted

Diversion may be granted at any time after the filing of an accusatory pleading: "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. . . ." (§ 1001.36, subd. (a).) "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. . . ." (§ 1001.36, subd. (c).) It seems clear the statute was drafted to permit pre-plea diversion of the defendant. The phrase "until adjudicated" appears to indicate there is no ability to request diversion once the defendant has been found to have committed the crime, whether by plea or verdict.

### Relationship between diversion and trial competence

The diversion program is not dependent on whether the defendant is competent to stand trial. Neither counsel nor the court are required to make a declaration or finding as to incompetence before the diversion process may be initiated. The purpose of the program is not to secure the defendant's trial competency, but to offer treatment for an underlying mental disorder. However, sections 1370, subdivision (a)(1)(B)(iv) and 1370.01, subdivision (a)(2), permit the court to place an incompetent defendant on diversion if deemed "suitable."[4]

[4] For a full discussion of the placement of incompetent persons on diversion, see Section VII, *infra*.

### Retroactivity of the diversion statutes

*People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*) conditionally reversed a conviction and sentence to allow the court to consider whether a defendant whose case was pending appeal when AB 1810 was enacted should be granted diversion. Applying *In re Estrada* (1965) 63 Cal.2d 740, *Frahs* determined that mental health diversion was available to a defendant whose case was not final when AB 1810 was enacted on June 27, 2018. *Frahs* discussed the relief available to the defendant: "In this case, similar to our disposition in [*People v. Vela* (2018) 21 Cal.App.5th 1099], we conditionally reverse Frahs' convictions and sentence. On remand, the trial court is to conduct a mental health diversion eligibility hearing under the applicable provisions of section 1001.36. When conducting the eligibility hearing, the court shall, to the extent possible, treat the matter as though Frahs had moved for pretrial diversion after the charges had been filed, but prior to their adjudication. (§ 1001.36, subd. (c).) ¶ If the trial court finds that Frahs suffers from a mental disorder, does not pose an unreasonable risk of danger to public safety, and otherwise meets the six statutory criteria (as nearly as possible given the postconviction procedural posture of this case), then the court may grant diversion. If Frahs successfully completes diversion, then the court shall dismiss the charges. However, if the court determines that Frahs does not meet the criteria under section 1001.36, or if Frahs does not successfully complete diversion, then his convictions and sentence shall be reinstated." (*Frahs*, at p. ___.)

## III. Persons eligible for diversion

### Discretion of the court

Diversion is a discretionary disposition available to the court and defendant if certain requirements are met. "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. . . ." (§ 1001.36, subd. (a); emphasis added.) "Pretrial diversion *may be granted pursuant to this section* if all of the following criteria are met. . . ." (§ 1001.36, subd. (b)(1) [fmr. (b)]; emphasis added.)

"Ordinarily, the word 'may' connotes a discretionary or permissive act; the word 'shall' connotes a mandatory or directory duty. This distinction is particularly acute when both words are used in the same statute." (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 432; footnotes omitted.) In enacting section 1001.36, the Legislature appears to understand this distinction. When addressing the authority of the court to grant diversion, the statute uses the permissive "may." (See, *e.g.*, §§ 1001.36, subd. (a) and (b).) When addressing the court's duty upon the defendant's successful completion of diversion, the statute uses the directory "*shall* dismiss the defendant's criminal charges." (§ 1001.36, subd. (e); emphasis added.)

Section 1001.36, subdivision (h), expressly acknowledges the discretionary nature of the court's decision: "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." (Emphasis added.) Finally, the court having full discretion to grant diversion appears consistent with a stated purpose of the act to give local discretion for the creation and implementation of a diversion program: "The purpose of this chapter is to promote all of the following: . . . Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings." (§ 1001.35, subd. (b).)

Accordingly, it seems clear the court can grant diversion if the minimum standards are met, and, correspondingly, can refuse to grant diversion even though the defendant meets the technical requirements of the program.

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.

**Prima facie showing of eligibility and suitability for diversion**

SB 215 grants the court the explicit right to request the defendant to make a prima facie showing of eligibility and suitability for 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.

(§ 1001.36, subd. (b)(3) [effective Jan. 1, 2019].)

**Burden of establishing eligibility**

Because the ability to participate in diversion is not a matter of statutory right, but a matter of discretion with the court, it seems likely the defendant will carry the burdens of proof and persuasion regarding eligibility and suitability for diversion. Diversion under section 1001.36 is quite different than the qualified "right" to resentencing and reclassification in Propositions 36 and 47, which, depending on the issue, have shifting burdens of proof. (See, generally, *People v. Romanowski* (2017) 2 Cal.5th 903, 916 [Proposition 47 – defendant has burden of proof of eligibility]; *People v. Frierson* (2017) 4 Cal.5th 225, 239 [Proposition 36 – People have burden of proof of dangerousness].)

The statute also specifies that "[e]vidence of the defendant's mental disorder be provided by the defense and shall include a recent diagnosis by a qualified mental health expert." (§ 1001.36, subd. (b)(1).) This explicitly places the burden of production on the defendant for the first eligibility criterion. The amendments made by SB 215 also clarify that the judge can require the defendant to make a prima facie showing of eligibility and suitability for diversion. (§ 1001.36, subd. (b)(3) [effective Jan. 1, 2019].)

**Prima facie determination of eligibility**

It is suggested that when the defendant requests mental health diversion, the court conduct a hearing to determine whether the defendant can offer a prima facie basis for diversion.[5] At that time the court can receive information about the crime, the defendant's criminal and mental health history, and potential treatment options. If the defendant demonstrates the crime is generally suitable for diversion and the defendant has at least an arguable chance of meeting the other requirements for diversion, the court may proceed with appointment of any necessary experts and exploration of placement options. On the other hand, if the case is unsuitable for diversion, even assuming the defendant would otherwise qualify, the court could deny the request without further incurring unnecessary time and expense in obtaining forensic evaluations.

It is suggested that this hearing be informal in nature, with counsel making offers of proof as to the details of the offense and the defendant's criminal and mental health history. It would seem entirely appropriate to consider "reliable hearsay." Indeed, sections 1001.36, subdivision (b)(1) (A) and (B) [fmr. (b)(1) and (2)], contemplate the use of such evidence by permitting the court to consider police reports, preliminary

[5] For a complete outline of the suggested procedure for granting diversion, see Attachment B

hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, and records or reports by qualified medical experts.

The amendments made by SB 215 explicitly allow a court to require a defendant to make a "prima facie showing that the defendant will meet the minimum requirements for diversion and that the defendant and the offense are suitable for diversion." (§ 1001.36, subd. (b)(3) [effective Jan. 1, 2019].) Furthermore, the hearing on the "showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel." (*Ibid.*) Nothing in the original diversion statute or in SB 215 preclude the court from requesting the prima facie showing prior to January 1, 2019.

**Requirements for diversion**[6]

The court may grant diversion if **all** of the following requirements are met:

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** [currently the DSM-5], 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." (§ 1001.36, subd. (b)(1)(A) [fmr. (b)(1)]; emphasis added.) Accordingly, while the statute permits diversion based on nearly every mental disorder, it expressly excludes persons who are diagnosed with antisocial personality disorder, borderline personality disorder, and pedophilia.

   The DSM-5 also includes as a mental disorder certain developmental disabilities such as autism, neurocognitive disorder due to traumatic brain injury, and intellectual disability (intellectual developmental disorder). Even if a particular developmental disability is not included in the DSM-5 definition of mental disorder, it would seem that persons suffering from a recognized disorder caused by the developmental disability also would be eligible for diversion.

   The defense is directed to provide evidence of the disorder, which must include a diagnosis by a "qualified mental health expert." There are three points to observe about this requirement. First, "qualified mental health expert" is not

[6] For a chart showing requirements of eligibility, see Appendix D.

further defined in the statute. 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.[7]

Second, the statue only requires a "recent diagnosis" of the disorder. Depending on the defendant's circumstances, the diagnosis could come from a psychiatrist or psychologist in a full report ordered by the court, or it could come from recent medical records regarding the defendant's mental health treatment. Either way, the statute requires that the evidence "shall be provided by the defense." (§ 1001.36, subd. (b)(1)(A) [fmr. (b)(1)].) If after the preliminary review of the prima facie basis for granting diversion the court determines it is appropriate to proceed with diversion, the court should explore the availability of relevant information regarding the defendant's diagnosis and the other requirements of eligibility before ordering an expensive and time-consuming full psychological report. Particularly if the defendant is engaged in on-going treatment, any number of persons engaged in the defendant's treatment would likely be qualified to render an opinion as to the defendant's diagnosis and the other issues to be addressed by the court.

Third, it is unlikely section 1001.36, subdivision (b)(1)(A), 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.

In reaching an opinion as to whether the defendant has a qualifying disorder, the expert is expressly permitted to consider "the defendant's medical records, arrest reports, or any other relevant evidence." (§ 1001.36, subd. (b)(1)(A) [fmr. (b)(1)].)

B. **"The court is satisfied that the defendant's mental disorder played a significant role in the commission of the charged offense."** (§ 1001.36, subd. (b)(2) [effective until Dec. 31, 2018].) Section 1001.36, subdivision (b)(2), effective January 1, 2019, will be modified slightly to specify that the court must be "satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense." (§ 1001.36, subd. (b)(1)(B) [effective Jan. 1, 2019].) "A court may conclude that a defendant's mental disorder was a significant factor in the commission of the charged offense if . . . the court

[7] It seems unlikely the expert must meet the standards set forth in section 1369, subdivision (h); if it had wanted that level of expertise, the Legislature could have said so.

concludes that the defendant's mental disorder substantially contributed to the defendant's involvement in the commission of the offense." (*Ibid.*) In reaching its conclusion on this requirement, the court is permitted to consider "any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense. . . ." (§ 1001.36, subd. (b)(1)(B) [fmr. (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."** (§ 1001.36, subd. (b)(1)(C) [fmr. (b)(3)].)

D. **The defendant consents to diversion and waives the right to a speedy trial.** (§ 1001.36, subd. (b)(1)(D) [fmr. (b)(4)]). The only exception to this requirement is when the defendant has actually been found incompetent and suitable for diversion under sections 1370, subdivision (a)(1)(B)(iv), or 1370.01, subdivision (a)(2). In such circumstances the defendant is not competent to consent to diversion or waive the right to a speedy trial. (§ 1001.36, subd. (b)(1)(D) [fmr. (b)(4)].) For a discussion of diversion of persons who are incompetent to stand trial, see Section VII, *infra*.

E. **"The defendant agrees to comply with treatment as a condition of diversion."** (§ 1001.36, subd. (b)(1)(E) [fmr. (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)(1)(F) [fmr. (b)(6)].) In determining dangerousness, "[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." (*Ibid.*)

The reference to section 1170.18 incorporates the definition of "unreasonable risk of danger to public safety" contained in Proposition 47: "'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).)

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. (For a complete table of the listed violent felonies, see Attachment C.)

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."
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> 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.

G. **"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."** (§ 1001.36, subd. (c)(1)(A).) Although this requirement is listed as part of the definition of "pretrial diversion" in subdivision (c), the identification of a suitable program clearly is a prerequisite to the court granting diversion. Certainly one of the principal purposes of diversion is to treat the defendant sufficiently that he does not commit further crimes. Even though the court may be unable to find the defendant likely to commit a "super strike" if treated in the community as discussed above, the court must nevertheless be satisfied the program will address the needs of the defendant to prevent the commission of *any* serious crime because of the mental disorder. If the court cannot identify a program that will meet the "specialized mental health treatment needs of the defendant," diversion cannot be granted. Finally, even if a suitable program is identified, the program must be willing to accept the defendant.

**Need for a psychological report**

The need of a report arises, if at all, in the determination of eligibility for diversion under section 1001.36, subdivision (b)(1), and when diversion is terminated for a person previously declared incompetent to stand trial under section 1370, subdivision (a)(1)(B)(v). Note that the statue only requires a "recent diagnosis" of the disorder and dictates that the evidence of the recent diagnosis "shall be provided by the defense." (§ 1001.36, subd. (b)(1)(A) [fmr. (b)(1)].) Depending on the defendant's circumstances, the diagnosis could come from a psychiatrist or psychologist in a full report ordered by the court, or it could come from recent medical records regarding the defendant's mental health treatment. If after the preliminary review of the prima facie basis for granting diversion the court determines it is appropriate to proceed with diversion, the court should explore the availability of relevant information regarding the defendant's diagnosis and the other requirements of eligibility before ordering an expensive and time-consuming full psychological report. Particularly if the defendant is engaged in on-going treatment, any number of persons engaged in the defendant's treatment would likely be qualified to render an opinion as to the defendant's diagnosis and the other issues to be addressed by the court.

While the defendant has an initial burden to supply evidence of a mental disorder, including a recent diagnosis from a mental health professional, it appears the substance of a report, if one is needed, can be of assistance to the court in determining four of the six eligibility requirements for diversion noted above.

**Responsibility for the cost of psychological reports**

The county generally is responsible for paying for experts in a criminal case, but the court is responsible for paying for any expert appointed for the "court's needs" or "court's use." Generally, experts for mental health diversion will be experts for the defense and, as such, will be a cost payable by the county.

The state, rather than the county, funds court operations. (See Gov. Code, § 77003.) Court operations include "Court-appointed expert witness fees (for the court's needs)" and "Court-ordered forensic evaluations and other professional services (for the court's own use)" but exclude indigent criminal defense and the district attorney services which are funded by the county. (See Gov. Code, §77003, subd. (a); see also Cal. Rules of Court, rule 10.810, subd. (d), Function 10; see also Evid. Code §§ 730, 731, subd. (a)(2).)

Of the six eligibility criteria for mental health diversion specified in section 1001.36, subdivision. (b)(1), only two require evidence from a "qualified mental health expert." (§ 1001.36(b)(1)(A), (C) [fmr. (b)(1), (3)].) The statute puts the burden of producing evidence of a diagnosed mental disorder squarely on the defense. (§ 1001.36(b)(1)(A) [fmr. (b)(1)] ["Evidence of the defendant's mental disorder shall be provided by the defense".].) The provisions of section 1001.36, subdivision (b)(3), added by SB 215 regarding the prima facie showing of eligibility for diversion, place the burden of production of evidence on the defense for all of the criteria listed in section 1001.36, subd. (b)(1). Even under current law, the discretionary nature of the diversion program, coupled with the "general rule of practice [that] any moving party bears the burden of producing evidence, as well as the burden of persuasion," seem to place the burden of producing any required evidence of eligibility or suitability for diversion on the defense. (See *People v. Manning* (1973) 33 Cal.App.3d 586, 596; see also *People v. Sherow* (2015) 239 Cal.App.4th 875, 879 ["[a]s an ordinary proposition: " 'A party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.' "].) If the defense has the burden of production, the expert report is primarily for the defense's purpose rather than the court's and the cost would not be part of court operations or payable by the court.

The Attorney General has issued an opinion concerning the responsibility of the court to pay for seven types of forensic examinations (87 Ops.Cal.Atty.Gen. 62 (2004).) The opinion is relevant in determining the responsibility for paying the cost of reports prepared pursuant to section 1001.36. The opinion addresses the

payment for reports for trial competency under section 1368 and sanity under section 1026. (*Id.*, at pp. 5-6, 9-10.) The Attorney General's opinion concludes that expert reports evaluating competency are court expenses, largely because the court has an independent duty to suspend proceedings and assess competency when there is a doubt about the mental competency of the defendant. (*Id.*, at pp. 5-6 [*citing People v. Koontz* (2002) 27 Cal.4th 1041, 1064; *People v. Maxwell* (1981) 115 Cal.App.3d 807, 811); and *People v. Stewart* (1979) 89 Cal.App.3d 992, 996.].)

In contrast, the opinion concludes that reports assessing a sanity defense under section 1026 are expenses to be borne by the county rather than the court. (*Id.*, at pp. 9-10.) This makes sense because, unlike competency, the court has no independent constitutional duty to assess whether a defendant is not guilty by reason of insanity. The California Supreme Court has found that the insanity defense is not really a "defense" equated with innocence, but rather a finding that a defendant is not amenable to punishment. (See *People v. Ceja* (2003)106 Cal.App.4th 1071, 1079 [citing *People v. Hernandez* (2000) 22 Cal.4th 512, 522].) Mental health diversion seems more like the section 1026 context than the competency context (except in the case where a defendant is diverted after a finding of incompetency under section 1370 or 1370.01) in that it is assessing whether a defendant is amenable to punishment or suitable for a non-punitive program of mental health treatment. There is no independent duty of the court to determine suitability for diversion.

The court can order its own expert for its own needs under Evidence Code section 730 – such an expert would be at court expense. (See Evid. Code, §§ 730, 731.) Given the amount of information that will be produced by the defense and prosecution, it is likely that the need for such independent reports will be rare.[8]

## IV. Program requirements

The mental health treatment program must meet the following requirements:

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."** (§ 1001.36, subd. (c)(1)(A).)

B. **The defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources.** (§ 1001.36, subd. (c)(1)(B).) "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

[8] For a chart showing payment for reports, see Appendix E.

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." (*Id.*)

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.

C. **The program must submit regular reports to the court and counsel regarding the defendant's progress in treatment.** (§ 1001.36, subd. (c)(2).) Nothing in the statute indicates the specific frequency of the reports. For persons committed to a residential program for restoration of competency, for example, there is an initial 90-day report, then a progress report every six months thereafter. (§ 1370, subd. (b)(1).) See also section 1605, subdivision (d), which requires a progress report every 90 days for a person on outpatient treatment. There should be a final report calculated to correspond with the anticipated termination of the defendant's program in two years. The final report should address the defendant's overall performance in the program and any long-term plans for mental health care. (See § 1001.36, subd. (e).)

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

E. **The court shall conduct a restitution hearing upon request.** (§ 1001.36, subd. (c)(3) [effective Jan. 1, 2019.) SB 215 added language empowering the court to order restitution. "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 restitution." (*Ibid.*) But "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." (*Ibid.*) Subdivision (f) of section 1202.4 dictates that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." Restitution is usually ordered only after a conviction. (See § 1202.4, subd. (a)(1).) Here restitution is being ordered without a determination of responsibility for the

underlying crime. It is a good practice to advise a defendant of the possibility of restitution before obtaining their consent to participate in diversion and waiver of speedy trial rights. (See § 1001.36, subd. (b)(1)(D) [fmr. (b)(4)]).

## V. Termination or modification of treatment

If any of the following circumstances occur, the court is directed to hold a hearing to determine whether criminal proceedings should be reinstated, whether treatment should be modified, or whether the defendant should be referred for conservatorship proceedings in accordance with Welfare and Institutions Code, sections 5350, *et seq*. (§ 1001.36, subd. (d).) The court is to give notice to the defendant and counsel. Nothing in the statute precludes either party from requesting the hearing.

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

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

C. The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion. (§ 1001.36, subd. (d)(3).)

D. Based on the opinion of a qualified mental health expert whom the court may deem appropriate, either of the following circumstances exist:

    1. The defendant is performing unsatisfactorily in the assigned program. (§ 1001.36, subd. (d)(4)(A).)

    2. The defendant is gravely disabled, as defined in Welfare and Institutions Code, section 5008, subdivision (h)(1)(B). A defendant may only be conserved and referred to the conservatorship investigator pursuant to this finding. (§ 1001.36, subd. (d)(4)(B).)

    (§ 1001.36, subd. (d)(4).)

Section 1001.36, subdivision (i), provides full access to the defendant's records of treatment during diversion: "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."

If criminal proceedings are reinstated, it still may be necessary for the court to address traditional competency issues. The defendant's treatment received during diversion is not primarily designed to restore trial competence. Depending on the procedural posture of the case when the defendant requested diversion, it may be necessary for the court or defense counsel to declare a doubt as to the defendant's competency to stand trial and pursue the traditional process for these individuals. (See §§ 1368, *et seq.*) It also seems clear that if the defendant does regain trial competence during diversion, that fact has no bearing on whether the defendant is entitled to continue on diversion and, if the program is successfully completed, obtain a dismissal of the criminal charges. (See next section.)

## VI. Successful completion of diversion

### Dismissal of criminal charges

"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." (§ 1001.36, subd. (e).) Whether the defendant has performed "satisfactorily" on diversion is a matter left to the discretion of the court. However, the court *may* conclude the defendant has performed satisfactorily if:

- The defendant has "substantially complied" with the program requirements.
- The defendant has "avoided significant new violations of law *unrelated* to the defendant's mental health condition." (Emphasis added.) The statute gives the court authority to ignore new law violations that are *related* to the defendant's mental disorder. The court is not required to do so.
- The defendant has "a plan in place for long-term mental health care."

### Duties of the court

If the court dismisses the charges, the clerk must notify the Department of Justice of the dismissal pursuant to this section. (§ 1001.36, subd. (e).)

The court must order access to the record of the arrest restricted in accordance with Section 1001.9, except as specified in subdivisions (g) and (h). (§ 1001.36, subd. (e).)

Section 1001.36, subdivision (g), provides that "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."

Section 1001.36, subdivision (h), provides that "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." Article I, Section 28, subdivision (f)(2), the "Right to Truth in Evidence", provides in part that "relevant evidence shall not be excluded in any criminal proceeding, including pretrial and postconviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court."

Section 1001.36, subdivision (h), further provides "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."

**What the defendant may disclose**

"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).)

## VII. Persons incompetent to stand trial

The provision permitting diversion of persons found incompetent to stand trial are found in sections 1370, subdivision (a)(1)(B) and 1370.01, subdivision (a)(2).[9]

**Eligibility for diversion - felony**

Even though a defendant has been found incompetent to stand trial, the defendant may be diverted as provided in section 1001.36 if the defendant has not been "transported to a facility" pursuant to section 1370, the court has been provided with "any information that the defendant may benefit from diversion," and the court finds the defendant is "an appropriate candidate for diversion." (§ 1370, subd. (a)(1)(B)(iv).) Like section 1001.36, the transfer of a person not competent to stand trial to diversion is a matter of discretion by the court: "the court *may* make a finding that the defendant is an appropriate candidate for diversion." (Emphasis added.) Determining whether a person is an "appropriate candidate" for diversion undoubtedly includes issues discussed in Section III, above.

"Transported to a facility" likely means a facility as described in section 1370, subdivision (a)(1)(B)(i): "The court shall order that the mentally incompetent defendant be delivered by the sheriff to a State Department of State Hospitals facility, as defined in Section 4100 of the Welfare and Institutions Code, for the care and treatment of the mentally disordered, as directed by the State Department of State Hospitals, or to any other available public or private treatment facility, including a community-based residential treatment system established pursuant to Article 1 (commencing with Section 5670) of Chapter 2.5 of Part 2 of Division 5 of the Welfare and Institutions Code if the facility has a secured perimeter or a locked and controlled treatment facility, approved by the community program director that will promote the defendant's speedy restoration to mental competence. . . ." "Treatment facility" includes jail-based competency treatment programs. Such programs are identified in Welfare and Institutions Code, section 4100, subdivision (g): "The department [of State Hospitals] has jurisdiction over the following facilities: . . . A county jail treatment facility under contract with the State Department of State Hospitals to provide competency restoration services."

Accordingly, persons adjudicated as incompetent to stand trial for a felony and physically placed in a treatment facility are ineligible for diversion.

**Eligibility for diversion - misdemeanor**

[9] The full statutory provisions of sections 1370, subdivision (a)(1)(B) and 1370.01, subdivision (a)(2), are set forth in Attachment A.

Section 1370.01, subdivision (a)(2), provides similar provisions for diversion of misdemeanor offenses. Eligibility is determined in accordance with section 1001.36. 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.

**Procedures by the court**

If a defendant is found by the court to be an appropriate candidate for diversion, the defendant's eligibility is be determined pursuant to section 1001.36. (§§ 1370, subd. (a)(1)(B)(v), 1370, subd. (a)(2).) Although not expressly provided by statute, if the defendant is deemed unsuitable or ineligible for diversion, the defendant presumably would be returned to the point in the competency proceedings when first referred for diversion.

A defendant granted felony diversion may participate for the lesser of the period specified in section 1370, subdivision (c)(1), the normal period for restoration of competency, or two years. The period of diversion of a misdemeanor is not to exceed one year as provided in section 1370.01(c)(1).

If, during the treatment period for a felony, the court determines that criminal proceedings should be reinstated pursuant to section 1001.36, subdivision (d), the court must, 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. (§ 1370, subd. (a)(1)(B)(v).) Although the provisions governing diversion of misdemeanors do not include a specific reference to reinstatement under section 1001.36, subdivision (d), presumably the same procedure will be used. Although not expressly provided by statute, if the defendant is terminated from diversion and criminal proceedings are reinstituted, the defendant presumably would be returned to the point in the competency proceedings when diversion was first requested. If the defendant is determined to be competent to stand trial and is terminated from diversion pursuant to section 1001.36, subdivision (d), the defendant will be reinstated to the full criminal trial process. If the defendant is determined to be incompetent to stand trial, and is terminated from diversion, the normal restoration procedures provided by sections 1370 and 1370.01 will apply.

If the defendant successfully completes diversion, the defendant will be entitled to a dismissal of the charges pursuant to section 1001.36, subdivision (e), and the "defendant shall no longer be deemed incompetent to stand trial pursuant to this section." (§§ 1370, subd. (a)(1)(B)(vi), 1370.01, subd. (a)(2).)

Nothing in sections 1370 and 1370.01 connect continuance on diversion with the defendant's competence. Accordingly, even though the defendant regains trial competence during diversion, the defendant is entitled to remain in the program so long as criminal proceedings are not reinstituted pursuant to section 1001.36, subdivision (d).

## VIII. Funding for diversion

SB 840, the Budget Act of 2018, appropriated $100 million to the Department of State Hospitals for support of county mental health diversion programs. The money will be provided for the diversion of felony defendants who have been found incompetent or are likely to be found incompetent to stand trial (Welf. & Inst. Code § 4361, subd. (c).)

**ATTACHMENT A: 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 [effective on Jan. 1, 2019].**

(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:

(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.

(B) The court is satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense. A court may conclude that a defendant's mental disorder was a significant 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.

(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.

(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.

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

(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.

**1001.36 [effective until Dec. 31, 2018].**

(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.

## ATTACHMENT B: PROCEDURAL CHECKLIST FOR MENTAL HEALTH DIVERSION (P.C. §§ 1001.35 AND 1001.36)

### I. DEFENDANT REQUESTS DIVERSION

A. Determine prima facie basis for diversion

1. Informal hearing to review facts of crime, defendant's criminal and mental health history
    a. Is request timely – between filing of complaint and adjudication (or was the defendant's case not final as of June 27, 2018)
    b. Does defendant have reasonable chance at meeting requirements in Section II, *infra*
    c. Is the defendant and/or crime reasonably suitable for diversion
2. Court to consider offers of proof and reliable hearsay
3. If prima facie basis not established, deny request and continue with criminal case
4. If prima facie basis is established, proceed to full determination of eligibility, suitability and placement

### II. DETERMINATION OF ELIGIBILITY

To be eligible for diversion, **ALL** of the following requirements must be met:

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." (§ 1001.36, subd. (b)(1)(A) [fmr. (b)(1)].)

1. Has defendant submitted evidence of a mental disorder
2. Court to order any additional reports as needed

B. **"The court is satisfied that the defendant's mental disorder played a significant role in the commission of the charged offense."** (§ 1001.36, subd. (b)(1)(B) [fmr. (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."** (§ 1001.36, subd. (b)(1)(C) [fmr. (b)(3)].)

D. **The defendant consents to diversion and waives the right to a speedy trial.** (§ 1001.36, subd. (b)(1)(D) [fmr. (b)(4)].) It is good practice to advise of the possibility of restitution before obtaining this consent and waiver from the defendant.

E. **"The defendant agrees to comply with treatment as a condition of diversion."** (§ 1001.36, subd. (b)(1)(E) [fmr. (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)(1)(F) [fmr. (b)(6)].)

G. **"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."** (§ 1001.36, subd. (c)(1)(A).)

## III. PROGRAM REQUIREMENTS

The program selected by the court must meet the following requirements:

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."** (§ 1001.36, subd. (c)(1)(A).)

B. **The defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources.** (§ 1001.36, subd. (c)(1)(B).)

1. Has the program agreed to accept the defendant on diversion

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

1. Set the frequency of the reports
2. Set final report near end of diversion period to determine:
   a. Whether defendant has substantially complied with treatment program
   b. Whether defendant has committed any new law violations, and whether the violations were related or unrelated to defendant's mental disorder
   c. Whether defendant has a long-term plan for mental health care

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

## IV. TERMINATION OR MODIFICATION OF TREATMENT

Termination of diversion and reinstatement of criminal proceedings, modification of treatment, or referral for conservatorship may occur after noticed hearing if:

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

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

C. The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion. (§ 1001.36, subd. (d)(3).)

D. Based on the opinion of a qualified mental health expert whom the court may deem appropriate, either of the following circumstances exists: (§ 1001.36, subd. (d)(4).)

1. The defendant is performing unsatisfactorily in the assigned program. (§ 1001.36, subd. (d)(4)(A).)

2. The defendant is gravely disabled, as defined in Welfare and Institutions Code, section 5008, subdivision (h)(1)(B). A defendant shall only be conserved and referred to the conservatorship investigator pursuant to this finding. (§ 1001.36, subd. (d)(4)(B).)

E. If diversion terminated, consider status of defendant's competence to stand trial and whether to commence or continue proceedings under §§ 1368, *et seq.*

## V. SUCCESSFUL COMPLETION OF DIVERSION

If the defendant has performed satisfactorily on diversion, the court must dismiss the criminal charges. (§ 1001.36, subd. (e).) The court *may* conclude the defendant performed satisfactorily if:

A. The defendant has "substantially complied" with the program requirements

B. The defendant has "avoided significant new violations of law *unrelated* to the defendant's mental health condition." (Emphasis added.) The court can, in its discretion, ignore new violations of law related to the defendant's mental health condition.

C. The defendant has "a plan in place for long-term mental health care"

D. Duties of the court if case dismissed:

1. Clerk to notify Dept. of Justice of disposition
2. Court to order access to records of arrest restricted per § 1001.9
3. Court to advise defendant:
    a. "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."
    b. "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."

## VI. PERSONS INCOMPETENT TO STAND TRIAL

A. Persons charged with felony and found incompetent to stand trial are eligible for diversion if:

1. Person not transported to a mental health facility
2. Court receives information that defendant may benefit from diversion
3. Court determines defendant appropriate for diversion
4. Two-year maximum program

B. Persons charged with misdemeanor and found incompetent to stand trial are eligible for diversion if:

1. Court determines appropriate for diversion
2. One-year maximum program

C. Consider whether defendant appropriate for diversion considering all relevant factors

1. If not appropriate, resume criminal proceedings
2. If appropriate, determine eligibility in accordance with § 1001.36

D. If diversion terminated under § 1001.36, subdivision (d):
   1. Appoint mental health expert to determine status of competency
   2. If not competent, resume procedures under §§ 1368, *et seq*.
   3. If competent, resume full criminal proceedings

E. If diversion successfully completed
   1. Dismiss criminal charges
   2. Court to follow duties in Section V (D), *supra*.

**ATTACHMENT C: Offenses listed in P.C. § 667(e)(2)(C)(iv)**

**The following table was prepared by Hon. John "Jack" Ryan, Orange County Superior Court (Ret.)**

**TABLE OF CRIMES LISTED IN P.C. § 667(e)(2)(C)(iv) – "Super Strikes"**

| *Prior Conviction* | *Description* | *Pen C Sections* |
|---|---|---|
| Any Serious or Violent Felony | Punishable in California by life imprisonment or death. | 667(e)(2)C)(iv)(VIII) |
| 187 | Murder or attempt. (Any homicide or attempt from 187 to 191.5 | 667(e)(2)C)(iv)(IV) |
| 191.5 | Vehicular manslaughter while intoxicated or attempt. | 667(e)(2)C)(iv)(IV) |
| 207 | Kidnap to ... §261, 262, 264.1, 286, 288, 288a, or 289. (Kidnap, as defined in Pen C §207 does not include attempts to commit a defined sex offense.) | 667(e)(2)C)(iv)(I) |
| 209 | Kidnap to violate §261, 262, 264.1, 286, 288, 288a, or 289. | 667(e)(2)C)(iv)(I) |
| 220 | Assault to violate 261, 262, 264.1, 286, 288, 288a, or 289.<br>(Pen C § 220 specifies *rape* as a designated offense. It does not use a section number, 261 (rape) or 262 (spousal rape). | 667(e)(2)C)(iv)(I) |
| 245(d)(3) | Assault with a machine gun on a peace officer or firefighter | 667(e)(2)C)(iv)(VI) |
| 261(a)(2) | Rape by force. | 667(e)(2)C)(iv)(I) |
| 261(a)(6) | Rape by threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 262(a)(2) | Spousal rape by force. | 667(e)(2)C)(iv)(I) |
| 262(a)(4) | Spousal rape by threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 264.1 | Rape in concert by force or violence | 667(e)(2)C)(iv)(I) |
| 269 | Aggravated sexual assault of a child. | 667(e)(2)C)(iv)(I) |
| 286(c)(1) | Sodomy with child <14 + 10 years age differential. | 667(e)(2)C)(iv)(II) |
| 286(c)(2)(A) | Sodomy by force. | 667(e)(2)C)(iv)(I) |
| 286(c)(2)(B) | Sodomy by force upon child <14 | 667(e)(2)C)(iv)(I) |
| 286(c)(2)(C) | Sodomy by force upon child >14 | 667(e)(2)C)(iv)(I) |
| 286(c)(3) | Sodomy with threat to retaliate | 667(e)(2)C)(iv)(I) |
| 286(d)(1) | Sodomy in concert by force...., threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 286(d)(2) | Sodomy in concert by force upon child <14 | 667(e)(2)C)(iv)(I) |

| *Prior Conviction* | *Description* | *Pen C Sections* |
|---|---|---|
| 286(d)(3) | Sodomy in concert by force upon child >14 | 667(e)(2)C)(iv)(I) |
| 288(a) | Lewd act upon a child under the age of 14 | 667(e)(2)C)(iv)(III) |
| 288(b)(1) | Lewd act upon a child by force... | 667(e)(2)C)(iv)(I) |
| 288(b)(2) | Lewd act by caretaker by force... | 667(e)(2)C)(iv)(I) |
| 288a(c)(1) | Oral copulation upon a child <14 + 10 years... | 667(e)(2)C)(iv)(III) |
| 288a(c)(2)(A) | Oral copulation by force | 667(e)(2)C)(iv)(I) |
| 288a(c)(2)(B) | Oral copulation by force... force upon child <14. | 667(e)(2)C)(iv)(I) |
| 288a(c)(2)(C) | Oral copulation by force... force upon child >14. | 667(e)(2)C)(iv)(I) |
| 288a(d) | Oral copulation in concert by force. | 667(e)(2)C)(iv)(I) |
| 288.5(a) | Continuous sexual abuse of a child with force... | 667(e)(2)C)(iv)(I) |
| 289(a)(1)(A) | Sexual penetration by force, etc. | 667(e)(2)C)(iv)(I) |
| 289(a)(1)(B) | Sexual penetration upon a child <14 by force... | 667(e)(2)C)(iv)(I) |
| 289(a)(1)(C) | Sexual penetration upon a child >14 by force... | 667(e)(2)C)(iv)(I) |
| 289(a)(2)(C) | Sexual penetration by threat to retaliate. | 667(e)(2)C)(iv)(I) |
| 289(j) | Sexual penetration upon a child <14 + 10 years... | 667(e)(2)C)(iv)(II) |
| 653f | Solicitation to commit murder. | 667(e)(2)C)(iv)(V) |
| 664/191.5 | Attempt vehicular manslaughter while intoxicated | 667(e)(2)C)(iv)(IV) |
| 664/187 | Attempt murder | 667(e)(2)C)(iv)(IV) |
| 11418(a)(1) | Possession of a weapon of mass destruction | 667(e)(2)C)(iv)(VII) |

## APPENDIX D: MENTAL HEALTH DIVERSION – P.C. § 1001.36

[Effective 1/1/19]

| Criterion | Party to provide evidence | Need expert opinion? | Examples of evidence |
|---|---|---|---|
| **DSM-5 diagnosis** (except antisocial personality disorder, borderline personality disorder, pedophilia) PC 1001.36(b)(1)(A) | **Defense** "Evidence of the defendant's mental disorder shall be provided by the defense" | **Yes** Evidence "shall include a recent diagnosis by a qualified mental health expert" | Pre-existing treatment records<br>jail treatment records<br>expert report or testimony |
| **Disorder was significant factor in** the commission of **the charged offense** PC 1001.36(b)(1)(B) | Court may require defense to make prima facie showing PC 1001.36(b)(3) | **No** Court may consider any "relevant and credible evidence" | Police report<br>PX transcript<br>Witness statements<br>Treatment records<br>Expert report |
| Symptoms **would respond to mental health treatment** PC 1001.36(b)(1)(C) | Court may require defense to make prima facie showing PC 1001.36(b)(3) | **Yes** "In the opinion of a qualified mental health expert" | Expert report<br>Treatment provider report<br>Treatment provider testimony |
| Defendant **consents to diversion & waives speedy trial** (if not incompetent to stand trial) - PC 1001.36(b)(1)(D)<br>Defendant **agrees to comply with treatment** - PC 1001.36(b)(1)(E) | | | |
| Will **not** pose an **unreasonable risk of danger to public safety if treated in the community** PC 1001.36(b)(1)(F) | Court may require defense to make prima facie showing PC 1001.36(b)(3) | **No** Court may consider opinion of mental health expert and opinions of district attorney and the defense (b)(1)(F) | Opinion of DA<br>Opinion of defense<br>Opinion of mental health expert<br>Criminal history<br>Current charge |
| Not charged with ineligible offense PC 1001.36(b)(2) | **Defense** to make a prima facie showing | | |

## APPENDIX E: PAYMENT FOR EXPERT REPORT