

Mental Health Diversion: An Overview of the Legal Guidelines and Requirements

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The criminal justice system in California has undergone several reforms over the past decade. As part of these reforms, there has been more emphasis on providing care and treatment to defendants with mental illness rather than incarcerating them in jail or prison.

In 2018, Governor Jerry Brown signed into law [Senate Bill 215](#), which created a pre-trial diversion program for defendants with a mental disorder that has been accused of committing specific crimes. If they successfully complete treatment, the criminal charges will be dismissed and the record of the arrest will be sealed.

The goal of this blog post is to provide an overview of the guidelines regarding [mental health diversion \(PC 1001.36\)](#) and how we evaluate individuals to determine if they meet the criteria for pre-trial diversion.

How does a defendant qualify for Mental Health Diversion?

In order to qualify for mental health diversion, there are several requirements that have to be met. A defendant that is **charged with either a felony or misdemeanor would be able to qualify**; however, there are certain crimes that are not eligible for mental health diversion.

[PC 1001.36](#) states that the following crimes are not eligible for diversion:

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

[PC 1001.36](#) also outlines the mental disorders that would qualify for mental health diversion. The defendant must suffer from a mental disorder as specified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM). Any diagnosis can qualify except for the ones that are prohibited by statute, which include the following:

While any mental health condition that is listed in the DSM (except the three listed above) can qualify for mental health diversion, some of the most common conditions include:

Why do I need a psychological evaluation?

PC 1001.36 states that the court may grant mental health diversion, for a period no longer than 2 years, to a defendant if they meet the following criteria:

1. The defendant suffers from a mental health disorder.
2. The mental health disorder played a significant role in the crime for which the defendant is charged with.
3. A qualified mental health professional must evaluate and conclude that the defendant will benefit from seeking mental health treatment.
4. The defendant must agree to participate in the mental health diversion program and waive their right to a speedy trial. During the mental health diversion program, the trial process is put on hold until they complete the mental health treatment program.
5. The defendant agrees to comply with all the requirements of the mental health treatment program.
6. The court determines that the individual will not pose “an unreasonable risk” to public safety, as defined in Section 1170.18. This will be determined by the judge after reviewing the opinions of medical experts, mental health professionals, the attorneys involved in the case, medical records, or any other factors that they believe are relevant.

PC 1001.36 requires that the defendant be evaluated by a qualified mental health professional. This will either be a forensic psychologist or psychiatrist that has the experience and training necessary to answer these questions for the court.

The mental health expert is retained by the defense attorney to complete the evaluation and provide the report to the attorney so they can present it to the court. A comprehensive evaluation is important because it will help the court in its decision-making process. A poorly written report will likely cause the prosecutor to object to the request and the court will likely deny your request for mental health diversion.

A typical evaluation will usually include the following to help answer these questions for the court:

- A clinical interview with the defendant and close members of their family. The interview will help us understand important psychological, medical, and social background information, and their current cognitive and psychological functioning.
- Consultation with the defendant’s attorney to determine the legal questions that need to be answered.
- A review of medical, psychological, legal, and other collateral documents that help us have a better understanding of the client’s psychological and emotional functioning.

- If necessary, we will administer psychological and neuropsychological tests to objectively assess for mental health diagnoses and cognitive abilities. We will administer and interpret paper and computer-based tests to assess for:
 - General intellectual abilities
 - Higher-level executive skills such as reasoning and problem solving
 - Attention and concentration
 - Language comprehension and communication
 - Visual-spatial skills and perception
 - Memory impairment
 - Motor and sensory skills
 - Mood and personality
 - Psychological diagnoses
- After we complete the evaluation, we will write a comprehensive report that integrates our findings and give it to the defense attorney.

How do you determine if a defendant possesses an unreasonably high risk of danger to the community?

PC 1001.36 requires that the court takes into consideration if the defendant will pose an “unreasonable” risk of danger to the community, pursuant to Section 1170.18.

This is an important decision because the defendant is going to be allowed to be in the mental health diversion program for up to two years. This means that they will be in the community rather than in jail or prison. The court does not want to risk having the defendant in the community if they will pose a high risk of danger or violence to the public. The court uses its discretion and considers the following when making this determination:

- The defendant’s criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes.
- The defendant’s disciplinary record and record of rehabilitation while incarcerated. Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.

As part of our evaluation, we will also complete a violence risk assessment using a structured professional judgment tool (SPJ) like the Historical, Clinical, Risk-20 (HCR-20). This is important because the court will also review the mental health expert’s report and opinion when considering if the defendant poses a risk of danger to the community.

Various risk and protective factors are taken into consideration to provide a risk formulation (low, moderate, or high) regarding future violence risk, the risk for serious physical harm, and the risk for imminent violence. We have a detailed blog post that goes over how violence risk assessments are completed in criminal cases. The risk formulation will identify the situations where they have become violent in the past and the circumstances that potentially caused violent behavior. The formulation will also identify ways to help mitigate violence risk.

For example, a recommendation to help lower violence risk might be to refer the defendant to an inpatient treatment facility as part of their mental health diversion program rather than outpatient treatment. The defendant would spend several weeks in the treatment facility where their medication compliance can be closely monitored and supervised. If there is a co-occurring history of substance use, the program can also help them detox and stay sober. Based on their progress in the inpatient treatment program, they can then be referred to a partial hospitalization program then eventually to outpatient treatment.

What happens if a defendant is granted Mental Health Diversion?

If the court grants mental health diversion, the defendant is referred to a diversion program that cannot take more than two years. The two-year rule is based on PC 1001.36.

The treatment program can consist of either inpatient or outpatient treatment and if needed, can also include alcohol or drug treatment. The court needs to be satisfied that the recommended inpatient or outpatient program will meet the specialized mental health treatment needs of the defendant.

The treatment program can be paid for by either private or public funds. If the defendant cannot afford to pay for treatment, the court can refer them to the county mental health department. **The treatment program must be willing to provide regular reports to the court, the defense, and the prosecutor on the defendant's progress in treatment.**

If the defendant does not comply with the treatment program the mental health diversion program can be terminated and criminal proceedings would be reinstated.

Additional situations that can result in the reinstatement of criminal proceedings include:

- The defendant is charged with a new misdemeanor that reflects a propensity for violence.
- The defendant is charged with a new felony.
- The defendant engages in criminal conduct that makes them unsuitable for diversion.

If the defendant is able to complete the treatment program, the court will dismiss the charges. The court may conclude that the defendant has performed satisfactorily if the defendant has:

1. Substantially complied with the requirements of diversion.
2. Has avoided significant new violations of law unrelated to the defendant's mental health condition.
3. Has a plan in place for long-term mental health care.

After the mental health diversion program is completed, the arrest related to the original charges will be sealed and destroyed. It will be as if the arrest and prosecution never happened. The arrest cannot be used to deny the defendant any employment, benefit,

license, or certificate.

There are several exceptions when sealed arrest records and records of successful participation in the diversion program can be used:

- The defendant must disclose the arrest if they apply to be a peace officer. The California Department of Justice will also disclose the arrest if they apply for a peace officer position.
- Criminal justice agencies may access and use sealed arrest records in the ordinary course of their duties.
- The court may use past records in determining whether to grant mental health diversion in any future criminal cases.
- The records may be used as necessary to provide continued care and treatment to the defendant.

Conclusion

Mental health diversion allows defendants with a mental disorder that have been accused of committing specific crimes to receive treatment rather than go to jail or prison.

A qualified mental health expert, such as a forensic psychologist or psychiatrist, will complete an evaluation to help the court determine mental health diversion should grant diversion.

In order to be granted mental health diversion, the defendant has to meet the following criteria:

1. The defendant suffers from a mental health disorder.
2. The mental health disorder played a significant role in the crime for which the defendant is charged with.
3. A qualified mental health professional must evaluate and conclude that the defendant will benefit from seeking mental health treatment.
4. The defendant must agree to participate in the mental health diversion program and waive their right to a speedy trial. During the mental health diversion program, the trial process is put on hold until they complete the mental health treatment program.
5. The defendant agrees to comply with all the requirements of the mental health treatment program.
6. The court determines that the individual will not pose “an unreasonable risk” to public safety, as defined in Section 1170.18.

If the defendant meets these criteria and the court agrees to grant diversion, the defendant will be referred to a treatment program that cannot be longer than two years. If the defendant successfully completes the program, the arrest related to the original charges will be sealed and destroyed.

The laws regarding mental health diversion can be complicated and confusing. We're hoping that this overview helped you understand how we evaluate a defendant to determine if they meet the legal criteria for mental health diversion.