

Mental Health Diversion: Psychological and Legal Perspectives

Samuel D. Berns, Attorney At Law

bernslegal.com

sam@bernslegal.com

916-226-1477

Baljit Atwal, Ph.D.

www.parcassociates.com

parcgeneral@parcassociates.com

916-877-7791

Mental Health in Criminal Defense

- Major overlap between mental health and criminal population.
- Jails and prisons have overrepresentation of those with mental illness and (44%/37%) and substance abuse (63%/58%) – per SAMHSA.
- Many areas of penal law allow for mitigation based on mental health treatment and prospects for preventing recidivism.
- Mental Health Diversion is maybe the biggest change and the biggest opportunity.

What is Mental Health Diversion?

- Defined in Penal Code 1001.36.
- In short, a suitable defendant with qualifying mental health conditions may have their case dismissed with treatment instead of getting convicted.
- A win built into the system.
- A great summary of the process: Sarmiento v. Superior Court (2024) 98 Cal.App.5th 882. Essentially holds that it is designed to give the opportunity as broadly as possible.

Diversion Defined

- (f)(1) “Pretrial diversion” means the postponement of prosecution, either temporarily or permanently . . . to allow the defendant to undergo mental health treatment.
- (h) If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant’s charges.
- (d) Virtually any defendant eligible except those charged with murder, attempted murder, or most sex offenses.

Suitability – subsection (b)(1)

- The defendant has been diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders – certain exclusions apply.
- Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis or treatment for a diagnosed mental disorder within the last five years 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.

Suitability – subsection (b)(2)

- The defendant's mental disorder was a significant factor in the commission of the charged offense.
- The court shall find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributin
- A court may consider any relevant and credible evidence, including, but not limited to . . . statements by the defendant's mental health treatment provider . . .

Eligibility – subsection (c)

- (1) In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment.
- (2) and (3) – Defendant's agreement to conditions of diversion.
- (4) The defendant will not pose an unreasonable risk of danger to public safety.
- PC1170.18 and PC667(e)(2)(C)(4) – means unreasonable risk of murder, major sex offenses, or other extremely violent offenses – superstrikes.

Attorney or Court refers client for evaluation

My steps once a referral is received in my office:

1. Brief consult with attorney to clarify the specifics of case
2. Decision to accept/reject the referral based on:
 - a) Time/schedule constraints; when is completed report needed
 - b) Funding authorization
 - c) Forensic retainer sent to attorney
 - d) Once retainer is signed and received by my office client scheduled for appointment.
In custody or out of custody, know rules for each jail.

Life Cycle Of Case: Acceptance To Testimony

- Administration staff ensures initial paperwork completed (forensic retainer signed), client contacted, appointment scheduled (in office or in jail/detention facility).
- Preference is to have client come to my office but if that is not possible then making arrangements to go to jail which involves travel time and other considerations.
- Prior to seeing client: documents reviewed, tests selected, and any collateral contacts identified so client can provide permission to contact collaterals.
- Client seen: Clinical interview, formal psychological testing conducted.

Life Cycle Of Case: Acceptance To Testimony

- Case conceptualization, opinion regarding referral question
- Verbal feedback to attorney regarding key findings
- Report writing, submission
- Prepare for testimony
- Testimony

Qualifying Mental Health Conditions

Qualifying mental health conditions include but are not limited to:

- Bipolar disorder
- Schizophrenia
- Post-traumatic stress disorder (PTSD)
- Schizoaffective disorder

Excluded Mental Health Diagnoses

Mental health conditions that do not qualify:

- Antisocial personality disorder
- Pedophilia

Only ones specified. Court cases will have to set precedents regarding other diagnoses including other personality diagnoses such as: Narcissistic Personality Disorder, Histrionic, etc.

Psychological Evaluation

To diagnose Mental health issues:

- Interview
- Collateral
- Record review
- Psychological Testing: Intelligence/cognitive, psychopathology, neurodevelopmental disorders, violence risk, treatment needs, Malingering (cognitive, psychological symptoms etc)

Constructs Measured: Comprehensive Psych

- General intellectual abilities
- Higher-level executive skills such as reasoning and problem solving
- Attention and concentration
- Language comprehension and communication

Constructs Measured (Continued)

- Visual-spatial skills and perception
- Memory impairment
- Motor and sensory skills
- Violence Risk
- Malingering
- Psychopathology: Mood, Psychoses, Personality Disorders etc.

Establish Nexus

- Diagnosed mental health condition should be a contributing factor to the alleged offense.
- Need to establish nexus between MH condition and behavior

The Hearing

- Informal Evidentiary Hearing.
- Expected for the psychologist to testify and be subject to cross-examination.
- DA tries to get you wherever they can, but your testimony is usually the only testimony and controls the narrative.
- Lawyer should be able to basically walk you through your findings based on your report.

Factors considered by the court

- The seriousness of the alleged crime
- History of violence or criminal history
- A trained mental health professional's opinion (psychologist or psychiatrist)
- Psychological Evaluation
- Evidence presented by Defense and Prosecutor

Treatment

- Specify treatment needs: inpatient, outpatient, drug rehabilitation, psychotherapy etc.
- If MH Diversion is granted:
 - Individual enters treatment
 - Lasts up to 2 years
 - Treatment paid for by private or public funds
 - Court monitors progress

Termination of Diversion

- Treatment non-compliance
- New misdemeanor charge indicating propensity for violence
- New felony charge
- Criminal conduct making individual unsuitable for diversion
- If MH Diversion is terminated, criminal proceedings are reinstated.

MH Diversion Completed

- Treatment completed and diversion requirements are met
- No new violations of law unrelated to the defendant's mental health condition.
- 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.

Specific Case Example

- Middle Aged male
- Stabbed a woman in the lung
- Homeless staying in shelter
- Alcohol/Drug involved
- Also met criteria for Major Depression & OCD

Mental Health in Criminal Defense

- Sentencing – MH Mitigating Factors in Rule of Court 4.423(b)(2)-(7).
- Probation – MH Factors in Rules of Court 4.413(c)(2) and 4.414(b)(4).
- Sex Cases – SARATSO per Penal Code 290.04, 290.06, 1203.
- Declare a Doubt – Penal Code 1368.
- NGI – Penal Code 1026.
- In indigent cases and often in retained cases, will be funded by court – Evidence Code 730, 1017.

Video LA Office Diversion

