



SUPERIOR COURT OF CALIFORNIA COUNTY OF FRESNO

MENTAL HEALTH DIVERSION PROCESS FOR MISDEMEANOR AND FELONY CASES

Effective September 14, 2020

Governor Brown signed **AB 1810** on June 27, 2018 (Pen. Code, §§ 1001.35 & 1001.36). The law created Mental Health Diversion (MHD), a diversion opportunity for participants with mental disorders.

Governor Brown signed **SB 215** on September 30, 2018, amending MHD. The amended law took effect on January 1, 2019. The amendments (a) exclude certain crimes from eligibility (murder; voluntary manslaughter; any 290 registrable crime except Pen. Code, § 314; rape; other sex crimes; possession or use of a weapon of mass destruction), (b) allow the court to require the participant to make a prima facie showing of eligibility, and (c) require the court to hold a restitution hearing and order restitution.

Penal Code section 1001.36 creates a discretionary pretrial diversion procedure for a participant charged with a misdemeanor or felony, who suffers from a mental disorder listed in the current *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), the symptoms of which can respond to treatment, if the mental disorder played a significant part in the commission of the charged offense.

A. To be granted diversion, ALL of the following requirements must be met:

1. The court is satisfied the defendant suffers from a mental disorder 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.
2. The court is satisfied the defendant's mental disorder played a significant role in the commission of the charged offense; that the mental disorder substantially contributed to the defendant's involvement in the commission of the offense (a nexus connects the mental disorder and the charged offense(s)).
3. In the opinion of a qualified mental health expert (QMHE), the defendant's symptoms motivating the criminal behavior would respond to mental health treatment.
4. The defendant consents to diversion and commits to entering a time waiver upon entry into MHD. (Note that in some cases the application process may itself require a time waiver if the preliminary hearing or trial date is imminent.)
5. The defendant agrees to comply with treatment as a condition of diversion.
6. The court is satisfied the defendant will not pose an unreasonable risk of danger to public safety as defined in Penal Code section 1170.18, if treated in the community.
7. The court is satisfied the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant.

B. Offenses NOT eligible for MHD:

1. Murder or voluntary manslaughter.
2. An offense that requires registration per Penal Code section 290, except for a violation of Penal Code section 314.
3. Rape.
4. Lewd or lascivious act on a child under 14 years of age.
5. Assault with intent to commit rape, sodomy, or oral copulation in violation of Penal Code section 220.

6. Commission of rape or sexual penetration in concert with another, in violation of section 264.1.
7. Continuous sexual abuse of a child, in violation of Penal Code section 288.5.
8. A violation of subdivision (b) or (c) of Penal Code section 11418.

C. Mental Health Diversion accomplishes its goals by adhering to the following guiding principles:

- **Individualized Treatment Programs:** Identify a defendant’s treatment needs based on current diagnosis, diagnostic history, treatment history, trauma history, substance-use history, criminal history, current charges, available treatment resources in Fresno, and any other relevant consideration. Modify a defendant’s treatment program based on performance and needs while in MHD.
- **Promote Defendant Accountability:** Monitor compliance with the treatment program on a clinically recommended and court-approved basis with regular reports by treatment staff. Require a defendant’s personal appearance in court unless waived in the court’s discretion. Provide clear consequences for noncompliance.
- **Evidence-based Programming:** Promote the use of evidence-based practices for mental health treatment by clinical staff, attorneys, and other community providers. Evidence-based practice refers to the use of research and scientific studies to determine the best practices in the field.
- **Engage with Respect:** Treat defendants with dignity and respect; protect their due process rights.
- **Foster Collaboration:** Encourage cooperation among government agencies and community organizations to find creative solutions to local problems.
- **Program Flexibility:** Evaluate and reevaluate the practices and policies of MHD. Be open to change, understanding that experience teaches what programs and practices are working effectively and when and what changes are advisable.
- **Education:** Justice partners (private and public attorneys and Probation) agree to become knowledgeable about the basics of mental health disorders, their treatment, and privacy protocols.

MENTAL HEALTH DIVERSION – FELONY and MISDEMEANOR PROCESS FLOW

I. PARTIES IDENTIFY CASES FOR MHD - PHASE 1
<p>The court will rule on each application based on moving papers, declarations, reports, and exhibits submitted by counsel. The prosecution is entitled to respond to each application, also with declarations, reports, and exhibits. Only in rare circumstances, with a compelling showing, will the court take testimony related to an application. The defense bears the burden of showing the applicant will meet the MHD eligibility requirements, and that the applicant and the charged offense are suitable for MHD. Any hearing may proceed on offers of proof, reliable hearsay, and argument of both counsel. The court aims to make a decision whether to accept an applicant within one to three appearances in Department 61.</p> <p>THE MHD TEAM</p> <p>Mental Health Diversion is the collaborative effort of governmental and community agencies. The MHD Team includes the court, District Attorney, Defense Attorney (public or private), Probation, Fresno County Department of Behavioral Health (DBH), and service providers (DBH-contracted and private providers).</p>

STEPS AND REQUIREMENTS TO APPLY FOR MHD

1. Defense counsel informs the judge in the home court (felony or misdemeanor) of the intention to apply for MHD. Unless defense counsel represents an intention to provide the court with a completed application, the court will continue the matter with appropriate waivers in order to present a completed application. The completed application (see section c., below) is **to be filed at the Fourth Floor Clerk's Office** and routed to Mental Health Desk.
 - a. **IN CUSTODY:** The home court continues the matter for defense counsel to prepare the application for MHD. Once properly filed, the court's Mental Health Desk will route the application and attachments to the District Attorney, Probation, DBH, and the service provider; a date for the hearing will also be provided at this time. The application and documents must address all components of Penal Code section 1001.36. A hearing will be scheduled in Department 61 within two to three weeks of filing the completed application.
 - b. **OUT OF CUSTODY:** The home court continues the matter for defense counsel to prepare the application for MHD. Once properly filed, the court's Mental Health Desk will route the application and attachments to the District Attorney, Probation, DBH, and the service provider; a date for the hearing will also be provided at this time. The application and documents must address all components of Penal Code section 1001.36. A hearing will be scheduled in Department 61 within three to four weeks of filing the completed application.
 - c. **EACH APPLICATION MUST CONTAIN FIVE PARTS AND BE DIRECTED TO THE MENTAL HEALTH DESK:**
 - i. application on pleading paper;
 - ii. release of information;
 - iii. QMHE report (which is to be attached as **Exhibit A** and will be confidential per Cal. Rules of Court, rule 2.550);
 - iv. CV of QMHE;
 - v. police reports.
 - d. A date is set in Department 61 on the second or fourth Thursday of the month. The home court orders defendant to appear in Department 61 on the predetermined date with necessary time waivers given.
 - e. The District Attorney may file a response in every case where the District Attorney opposes the application and explain the reason(s) for the opposition. The response, if any, shall be **filed on the Fourth Floor Clerks' Office** directed to the Mental Health Desk two calendar days prior to the hearing date. Questions may be posed to experts by either the District Attorney or defense counsel and should be provided two calendar days prior to the hearing date.
 - f. Defendant must sign a Health Insurance Portability and Accountability Act of 1996 (HIPAA) Authorization to Release Private Health Information which allows the sharing of information among parties during the application process and progress reports once in MHD. This is signed and presented with the initial application. (A sample form is available on the Court website.)
 - g. At the first appearance in Department 61, the MHD Team will informally discuss whether the defendant is an eligible candidate for MHD. Defense counsel and prosecutors may ask

questions of experts on the record. If the MHD Team is unable to reach a consensus, hearings may be held on offers of proof, reliable hearsay, and argument of both counsel. **Only in rare circumstances with compelling circumstances will the court hold an evidentiary hearing.**

- h. If the defendant is deemed eligible at a Phase 1 hearing for MHD by the court, the matter will then be screened for a Phase 2 suitability assessment to determine the specific program that will be available for the defendant. Usually, the Fresno County DBH will perform this screening process for Phase 2 suitability, and will be also present at the Phase 1 hearing to provide guidance to the parties as to the defendant's amenability to treatment. **Eligibility hearings (Phase 1) will usually be held at 8:30 a.m.** The Phase 2 hearing will be scheduled two weeks after the court determines eligibility.
- i. The defendant's custodial status may be considered if the defendant has been deemed eligible for MHD but has not yet been screened for suitability. The MHD Team will determine any terms and conditions of such a pre-admittance release from custody.
- j. If the defendant is deemed ineligible for MHD by the court, the case will be reset to be heard in the assigned home court. Alternatively, the parties may discuss other potential resolutions, including BHC or Veterans' Treatment Court.

RESTITUTION ORDERS/VICTIM PARTICIPATION

Upon request, the court shall conduct a hearing to determine whether restitution, as defined in Penal Code section 1202.4, subdivision (f), is owed to any victim as a result of the diverted offense and, if owed, order payment during the diversion period. However, a defendant's inability to pay restitution due to indigence or mental disorder shall not be grounds for denial of diversion or finding the defendant has failed to comply with the terms of MHD. (Pen. Code, § 1001.36, subd. (c)(4).)

Victims are encouraged to participate in the process and will be able to address the court at hearings involving eligibility, suitability, reviews, and/or termination hearings.

II. TREATMENT PLAN AND SUITABILITY - PHASE 2

A. STATUS HEARING FOR TREATMENT PLAN

1. The service provider shall submit a copy of the list of treatment services available that are customized for the defendant's individualized needs and are to be provided to the MHD Team **prior** to the Phase 2 suitability/status hearing. The Fresno County Department of Behavioral Health-contracted provider or private provider shall submit a list of services available in treatment, if a treatment plan has not been developed.
2. The participants' identified service provider must create a treatment plan that targets an individual's mental health treatment needs, substance use/abuse disorder needs (as indicated), and addresses the behavior(s) related to the underlying offense. Treatment plans are flexible, individualized, trauma informed, and based on principles of harm reduction and recovery.
3. **Suitability hearings (Phase 2) will usually be heard at 1:30 p.m.**

4. The MHD Team reviews the proposed services and the treatment plan, if one is available, and decides as follows:
 - a. If the proposed services and plan are suitable (treatment plan that targets an individual's mental health treatment needs, substance use/abuse disorder needs (as indicated), and addresses the behavior(s) related to the underlying offense), the court shall grant the motion for MHD and stay the criminal proceedings. The participant shall have up to two years from this date to complete treatment. *The participant shall agree to the terms of MHD.*
 - b. If the court accepts participant, the participant must then continue to waive the speedy-trial right, and the participant shall be ordered to return for a progress review hearing as directed.
 - c. The final version of the approved treatment plan must be submitted to the MHD Team at the initial progress review hearing.
 - d. If the court determines the proposed plan is not sufficient for MHD participation, or there are other suitability concerns, the court will either give more time to augment the proposed services and treatment plan or determine that the defendant is not suitable and return the matter to the referring home court.

Any major changes to the treatment plan requirements over the course of the diversion period will usually require an MHD Team member to submit a proposed revised treatment plan that includes the terms and conditions sought to be modified, or the modifications may be discussed and agreed upon informally by the MHD Team.

B. PROGRESS REPORTS/REVIEW HEARINGS AND APPEARANCES

1. The court, in its discretion, may order a participant to appear at any scheduled progress report/review hearing. **Progress reviews will usually be heard at 1:30 p.m.**
2. The treatment provider shall submit a copy of the progress report to the MHD Team **prior** to the hearing. Documents are due no later than two court days prior to the hearing.
3. At the hearing, the court shall review the progress report for compliance:
 - (a) IF the participant is making progress, set another progress report date;
 - (b) IF the participant is not making progress, the Court may:
 - Give the participant additional time to comply and continue the progress hearing to another date.
 - Indicate an intention to terminate the participant from the program and reinstate criminal proceedings. If requested, the court may consider scheduling a noticed hearing to hear further evidence on why MHD should be terminated and criminal proceedings resumed.
 - Recommend that participant apply for an alternative specialty court (i.e., Behavioral Health Court or Veteran's Treatment Court) and enter into negotiated settlements.
 - Refer the participant for conservatorship proceedings (pursuant to Welf. & Inst. Code, §§ 5350, et seq.).
 - At any time, a member of the MHD Team may provide information to the court that may determine the need for a hearing.

SUCCESSFUL COMPLETION OF MHD

If the participant successfully performs in MHD, at the end of the period of diversion, the court shall dismiss the criminal charges that were the subject of criminal proceedings at the time of the initial diversion.

The court may conclude the participant has performed satisfactorily if he/she has substantially complied with diversion requirements, has avoided significant new violations of law unrelated to the mental health condition, and has a plan in place for long-term mental health care (Pen. Code, § 1001.36, subd. (e).) In making its conclusion, the court shall consider input from the MHD Team.

III. TERMINATION OF MHD, MODIFICATION, OR REFERRAL FOR CONSERVATORSHIP

1. If any of the following circumstances exist, the court shall, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether criminal proceedings should be reinstated, whether treatment should be modified, or whether the defendant should be conserved and referred to the conservatorship investigator to initiate conservatorship proceedings:
 - a) The defendant is charged with an additional misdemeanor allegedly committed during the MHD and that reflects the defendant's propensity for violence.
 - b) The defendant is charged with an additional felony allegedly committed during the MHD.
 - c) The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion.
 - d) Based on the opinion of a QMHE that either (1) the defendant is performing unsatisfactorily in the assigned program, or (2) the defendant is gravely disabled as defined by Welfare and Institutions Code section 5008, subdivision (h)(1)(B).

2. The court may do any of the following:
 - a) allow diversion to proceed;
 - b) modify and/or increase the required treatment based on progress reports of the service provider or other MHD Team members;
 - c) order an investigation regarding conservatorship to commence;
 - d) terminate diversion and reinstate criminal proceedings and return the case to the home court;
 - e) terminate diversion and negotiate a settlement of the charges; the MHD Team also will have the discretion to request that new cases involving a defendant already accepted to MHD be brought to the MHD Court for a global resolution.

Confidentiality, Release of Information (ROI), and Confidential Envelopes:

A defendant must sign Consent and Authorization to Release Private Health Information forms (see approved Public Defender form), before any of his/her health information can be disclosed to the court and the parties. The judicial officer and court staff must adhere to the privacy and security regulations of HIPAA when receiving medical information and records and when referring to their contents for Penal Code section 1001.36 purposes. The HIPAA requires the judicial officer to be proactive in protecting medical information and records. Additionally, agencies providing information to the judge will likely have their own privacy and records management requirements and will usually require the defendant to sign an Authorization for Release of Information before they will provide information to the judge. Documents that must be filed with the court shall be placed in a confidential envelope and filed in the court file. **No**

statement, or information procured from statements, made by the defendant to any Probation Officer, MHD staff, program case manager, service provider, or any member of the MHD Team, including the judge and District Attorney, during the course of referral to or participation in MHD, shall be admissible in any subsequent action or criminal proceeding in this jurisdiction or shared with any individual, agency, or entity outside of the MHD court. Additionally, urinalysis or other test results shall not be used in any subsequent action or criminal proceeding in this jurisdiction or shared with any individual, agency, or entity outside of the MHD Team. Disclosures required under the law (*Tarasoff* warnings) are exempted from this provision. (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425.)