



**SUPERIOR COURT OF
CALIFORNIA
COUNTY OF FRESNO**

**MENTAL HEALTH DIVERSION
PROCESSES FOR MISDEMEANOR
AND FELONY CASES**

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

Governor Brown signed Senate Bill 215 on September 30, 2018, amending MHD. The amended law took effect January 1, 2019, and made the following changes:

- excludes certain crimes from eligibility (murder; voluntary manslaughter; any Pen. Code, § 290, registrable crime, except Pen. Code, § 314; rape; other sex crimes; possession or use of a weapon of mass destruction);
- allows the court to require defendants to make prima facie showings of eligibility; and,
- requires the court to hold a restitution hearing and order restitution.

Penal Code (PC) section 1001.36 creates a discretionary pretrial diversion procedure for defendants charged with misdemeanors or felonies who suffer from mental disorders listed in the current Diagnostic and Statistical Manual of Mental Disorders (DSM), the symptoms of which can respond to treatment, if the mental disorder played a significant part in the commission of the charged offense.

Legislature again amended section 1001.36 to allow for entry into diversion where a “diagnosis or treatment for a diagnosed mental disorder within the last five years (has been made) by a qualified mental health expert.” Also, the amendment modifies the nexus requirement. “If the defendant has been diagnosed with a mental disorder, 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 contributing factor to the defendant’s involvement in the alleged offense. “See section 1001.36(b)(2) (emphasis added) Also, misdemeanor diversion is limited to one year.

(1) To be granted diversion, ALL of the following requirements must be met:

ELIGIBILITY REQUIREMENTS

- a. The court is satisfied defendant suffers from a mental disorder identified in the most current edition of the DSM, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder and pedophilia.
- b. The court is satisfied defendant’s mental disorder played a significant role 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 contributing factor to the defendant’s involvement in the alleged offense.

SUITABILITY REQUIREMENTS

- c. In the opinion of a qualified mental health expert (QMHE), defendant's symptoms motivating the criminal behavior would respond to mental health treatment.
- d. Defendant consents to diversion and commits to entering a time waiver upon entry into MHD. (Note: In some cases, the application process may itself require a time waiver if the preliminary hearing or trial date is imminent.)
- e. Defendant agrees to comply with treatment as a condition of diversion.
- f. The court is satisfied defendant will not pose an unreasonable risk of danger to public safety as defined in section PC section 1170.18, if treated in the community.
- g. The court is satisfied the recommended inpatient or outpatient program of mental health treatment will meet defendant's specialized mental health treatment needs.

(2) Offenses NOT eligible for MHD include:

- a. murder or voluntary manslaughter;
- b. any offense that requires registration per PC 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 PC section 220;
- f. commission of rape or sexual penetration in concert with another in violation of PC section 264.1;
- g. continuous sexual abuse of a child in violation of PC section 288.5;
- h. a violation of subdivision (b) or (c) of PC section 11418.

MENTAL HEALTH DIVERSION – FELONY and MISDEMEANOR PROCESS FLOW

PHASE I: IDENTIFICATION OF CASES SUITABLE FOR MHD

A. STEPS TO APPLY FOR MHD

1. Defense counsel informs the judge in the home court (felony or misdemeanor) of the intention to apply for MHD. The court will continue the matter with appropriate waivers in order to present a completed application. The completed application is to be filed online and routed to MHD desk.
 - a. IN-CUSTODY: The home court will continue the matter for defense counsel to prepare the application for MHD. Once properly filed, the court's MHD desk will route the application and attachments, along with a hearing date, to the District Attorney, Probation, the Department of Behavioral Health (DBH), and the service provider. The application and documents must address all components of PC section 1001.36. A hearing will be scheduled in the

appropriate department within two to three weeks of filing the completed application.

- b. **OUT-OF-CUSTODY:** The home court will continue the matter for defense counsel to prepare the application for MHD. Once properly filed, the court’s MHD desk will route the application and attachments, along with a hearing date, to the District Attorney, Probation, DBH, and the service provider. The application and documents must address all components of PC section 1001.36. A hearing will be scheduled in the appropriate department within three to four weeks of filing the completed application.

2. **NO CASE MAY BE SET FOR MHD HEARING WITHOUT THE FILING OF A COMPLETED APPLICATION.**
3. Once a date is set in the appropriate department, the home court will order defendant to appear on the predetermined date with necessary time waivers given.
4. Oppositions, if any, shall be filed and directed to the MHD desk.
5. Defendant must sign an “Authorization to Release Private Health Information” Health Insurance Portability and Accountability Act of 1996 (HIPAA) waiver (ROI) which allows for the sharing of information among parties during the application process and the sharing of progress reports once defendant is in MHD. This is signed and presented with the initial application. (A sample form is available on the court’s website.)
6. If defendant is deemed ineligible for MHD by the court, the case will be reset and heard in the assigned home court. Alternatively, the parties may discuss other potential resolutions, including Behavioral Health Court or Veterans Court.

B. APPLICATION CONTENTS - WITH CORRESPONDING TITLES FOR EACH PART

1.	Motion (Application)	Filing of request for diversion
2.	Exhibit A <i>(See below for details on contents of report)</i>	QMHE report (Confidential per California Rules of Court [CRC], rule 2.550).
3.	Exhibit B	Release of information.
4.	Exhibit C	Curriculum Vitae of QMHE.
5.	Exhibit D	Police reports.

**QMHE Report (Exhibit A):
Report should contain the following information**

Summary of Facts:	A very short summary of the charges and facts of each case for which MHD is sought; do not simply cut and paste the police report.
DSM V Diagnosis:	The mental disorder at issue, including diagnostic and treatment history of said disorder. If defendant suffers from multiple or co-occurring disorders, they shall be specified in the application.
Nexus between DSM V MHDO and committing Offense	A description of the nexus between defendant's mental disorder(s) and the charged offense(s).
Treatment is Possible	An opinion of a QMHE indicating that defendant's symptoms motivating the criminal behavior would respond to mental health treatment.
Consent to Diversion:	A statement that defendant consents to diversion and waives the right to a speedy trial.

Agreement to comply with Treatment	A statement that defendant agrees to comply with treatment as a condition of diversion.
Proposed Treatment:	
<p>At least FIVE COURT DAYS prior to the eligibility hearing, defense counsel shall submit a suitability statement. If it is anticipated that treatment shall occur through DBH supervision, the statement will indicate whether defendant will be directed to Department of State Hospitals (DSH)-funded treatment, AB 109 Full Service Partnership (FSP) treatment, or other FSP or other treatment. If it is anticipated treatment will occur through a private or non-DBH provider, then the suitability statement shall be submitted by that provider. The statement will be submitted confidentially pursuant to CRC rule 2.550.</p> <ul style="list-style-type: none"> a. the anticipated provider (e.g., Turning Point DSH funding, Turning Point FSP, other DBH treatment, private provider); b. the plan for housing; c. the medication anticipated to be needed and how it will be provided; d. any plan for substance abuse disorder treatment; and, e. that the proposed provider has provisionally agreed to accept defendant and has agreed to provide necessary updates to the court as to defendant’s participation for review hearings. f. It is understood that these initial plans may change if there is supplemental information provided; however, the court expects this document to reflect that the attorney and the provider have consulted and that they understand what is being proposed to the court. It is also noted that the first review hearing is to address suitability in more detail once the provider has evaluated defendant in more detail. g. If a suitability statement as outlined above is not submitted, the application may be denied as insufficient. 	

C. OPPOSITION/HEARING/RULING

1. Opposition papers, if any, shall be filed no later than TWO COURT DAYS prior to the hearing. The court will rule on each application based on moving papers, declarations, reports, and exhibits submitted by counsel. The defense bears the burden of showing that defendant meets the MHD eligibility requirements and that defendant and the charged offense(s) are suitable for MHD. Any hearing may proceed on offers of proof, reliable hearsay, and argument of both counsel. Only in rare circumstances with a compelling showing will the court take testimony related to an application.
2. Any hearing may proceed on offers of proof, reliable hearsay, and argument of both counsel.

D. RESTITUTION ORDERS/VICTIM PARTICIPATION

Upon request, the court shall conduct a hearing to determine whether restitution, as defined in PC 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, participant’s inability to pay restitution due to indigence or mental disorder shall not be grounds for denial of diversion or finding participant 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.

PHASE II: TREATMENT PLAN AND REVIEW HEARINGS

A. REVIEW HEARING FOR TREATMENT PLAN

1. At the review hearing one month after acceptance into MHD, the service provider shall submit a list of customized treatment services available for participant's needs. The provider shall either confirm that the original anticipated level of services is being provided or that, based on a personalized evaluation of participant's needs, a different level of care will be provided and describe in detail that level of care.
2. Participant's identified service provider must create a treatment plan that targets participant's mental health treatment needs, substance use/abuse disorder needs (as indicated), and addresses the behavior(s) related to the underlying offense. Treatment plans must be flexible, individualized, trauma-informed, and based on principles of harm reduction and recovery, as follows:
 - a. Participant shall have up to two years from the date of acceptance into MHD to complete treatment; those that are charged with misdemeanors will have up to one year from the date of acceptance to complete treatment.
 - b. If the court accepts defendant into MHD, participant must then continue to waive the speedy-trial right and shall be ordered to return for progress review hearings as directed.
3. Any **major** changes to the treatment plan requirements over the course of the diversion period will 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. PHASES/PROGRESS REPORTS/REVIEW HEARINGS AND APPEARANCES

1. A participant that has been accepted into MHD shall have review hearings on a regularly scheduled basis. During the first six months after being found eligible (Phase I), the hearings shall be monthly. During the second six months (Phase II), the hearings shall be bimonthly. During the second year (Phase III), the hearings shall be set every three months. The court, in its discretion, may order participants to appear at any progress report/review hearing and may shorten time periods between hearings as determined appropriate.
2. The treatment provider shall submit copies of the progress report to the MHD team members at least **three court days prior** to any hearing.

3. At the hearings, the court shall review the progress reports for compliance, as follows:
 - a. If participant is making progress, set another progress report date.
 - b. If participant is not making progress, the court may:
 - (i) give participant additional time to comply and continue the progress hearing to another date;
 - (ii) indicate an intention to terminate participant from the program and, if requested, schedule a noticed hearing to hear further evidence of why MHD should be terminated and criminal proceedings resumed;
 - (iii) if the Court determines that a participant is performing unsatisfactorily in the assigned program, the participant may admit to performing unsatisfactorily and be given an opportunity to remedy their performance. If the participant is able to remedy their performance, they will thereafter be permitted to withdraw their admission and continue to participate in MHD, however, if the Court determines that they have not remedied their performance in the program the Court may terminate their participation in MHD without a further hearing;
 - (iv) refer participant for conservatorship proceedings pursuant to Welfare and Institutions Code section 5350 et seq.
 - c. At any time, a member of the MHD team may provide information to the court that may determine the need for a hearing.

C. SUCCESSFUL COMPLETION OF MHD

1. If 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 the criminal proceedings at the time of the initial diversion. The court will not generally consider motions to dismiss for successful completion any earlier than 18 months after admission to the program.
2. The court may conclude that participant has performed satisfactorily if participant 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 pursuant to PC section 1001.36, subdivision (e). In making its conclusion, the court shall consider input from the MHD team.

PHASE III: TERMINATION OF MHD, MODIFICATION, OR REFERRAL FOR CONSERVATORSHIP

A. TERMINATION/MODIFICATION/CONSERVATORSHIP

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

2. The court may also do any of the following at any time:
 - a. Allow diversion to proceed.
 - b. Modify and/or increase required treatment based on progress reports of service provider or other MHD team members.
 - c. Order the commencement of an investigation into conservatorship.
 - d. Terminate diversion, reinstate criminal proceedings, and return the case to the home court.
 - e. Terminate diversion and negotiate a settlement of the charges. The MHD team will also have the discretion to request that new cases involving a participant already accepted into MHD be brought to the MHD court for a global resolution.
 - f. Accept an admission to performing unsatisfactorily in MHD per II(B)(3)(b)(iii).

B. CONFIDENTIALITY, ROI, AND CONFIDENTIAL ENVELOPES

Defendant/Participant must sign ROI forms (see approved Public Defender form), before any of his or 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 PC section 1001.36 purposes. HIPAA requires the judicial officer to be proactive in protecting medical information and records. Additionally, agencies providing information to the judicial officer will likely have their own privacy and records management requirements and will usually require defendant/participant to sign an ROI before they will provide information to the judicial officer. Documents that must be filed with the court shall be placed in a confidential envelope and filed in the court file.

No information procured from statements made by participant to any Probation Officer, MHD staff, program case manager, service provider, or any member of the MHD team, including the judicial officer and District Attorney, and that is made 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 are exempted from this provision. (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425.)

DISQUALIFICATION UNDER CAL. PENAL CODE 170.6:

Cal. Penal Code 170.6 states: "If the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to, or who is scheduled to try, the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date." Mental health diversion matters are heard by the judge regularly assigned to 97B and set a minimum of 14 days prior to the hearing. To minimize calendaring issues and hearing delays, the court will strictly adhere to the 5-day notice requirement for disqualification matters.