Pre-Trial Mental Health Diversion

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DISCLAIMERS

- ✓ I'm not a lawyer
  - ✓ I'm not a cop
    - ✓ A judge
      - ✓ Or a teacher
- ✓ I have no business or commercial interest in any of this except being paid to do evaluations
- ✓ I'm usually wrong about something at least a couple times a day

CLAIMERS

- ✓ I'm a California licensed psychologist (PSY14333) for 30 years
- ✓ I've been practicing forensic psychology for a couple dozen years, mostly in Mendocino County
- ✓ I've presented workshops at previous FMHAC conferences on competency to stand trial and LPS mental health conservatorships. This one taps me out.

State Of The Art In Mental Health

- ✓ Same number of U.S. psychiatric beds per capita as in 1850.
- ✓ Approximately 90% filled via the criminal justice system.
- ✓ Largest mental health treatment facilities in the U.S. are jails and prisons.

“The Impact of Incarceration on Mental Health”

Michelle Adams, PhD FMHAC 2024 Annual Conference

Prevalence of mental illness in prison: 56% (12% on admission, 44% acquired in prison)

“To facilitate the ***successful reintegration*** of the individuals in our care back to their communities … by providing education, treatment, rehabilitative, and restorative justice programs.”

California Department of Corrections and Rehabilitation, 2024

Prisons “increase psychiatric symptoms, create increased risks for first episodes of severe mental illness, and contribute to the clinical presentations of inmates.” *Galanek, 2013*

“Prisons are fraught with danger, dehumanization, and deprivation ... They are the very antithesis of a treatment-oriented milieu.” *Haney, 2017*

RECIDIVISM: U.S. 61-81%, CA 67-75%

California Assembly Bill 1810

- Signed into Law in 2018
- Penal Code Sections 1001.35 & 1001.36
- Provides for *discretionary* diversion of *qualified* persons who have committed a crime because of a mental disorder

“**Pretrial Diversion**”: *The postponement of prosecution, either temporarily or permanently, prior to adjudication, to allow the defendant to undergo mental health treatment.*

The burden of proof that a defendant meets the qualifications rests with the defense.

“Reliable hearsay” is permitted.

The defense motions the court and hires a qualified mental health expert to conduct the examination/evaluation.

Prosecution may have its own expert examine the defendant

Court may appoint its own expert

“Pretrial mental health diversion *may* be granted by the judge if *all* the following criteria are met …”

(”qualify” + “suitable”)

*"(1) The defendant has been **diagnosed with a mental disorder** as identified in the most recent 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. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis within the last five years by a qualified mental health expert."*

PC1001.36(b)(1)

Includes freestanding substance use disorders

CASE STUDY:

THE DRUGGIE

* 44 male, charged with bear-spraying random victims
  "They were robbing people's vibrations"
* Prior conviction for attempted murder
  "He thrust his pelvis at me"
* Wearing tinfoil hat when arrested
  "To protect me from rays bombarding me"
* Hx methamphetamine and alcohol abuse since 12
  Diagnosed with Amphetamine-Induced Psychosis
* Evaluator: *"Serious irreversible meth brain-damage"*

DSM-5 Diagnosis And ….

"(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, unless there is clear and convincing evidence that it was not* ***a motivating, causal, or contributing factor*** *to the defendant's involvement in the alleged offense."*

PC1001.36(b)(2)

CASE STUDY:

THE MARTYR

- 55-year old Caucasian socially isolated divorcee
- Raised by fundamentalist preacher and wife:
  - *God says a woman's job is to quietly serve*
  - *No matter how difficult the task,*
    put your head down and get it done
- Punished and publicly shamed for speaking up for self
  - *Sent to prayer camp to be cured of sins*
- Tortured by brothers: Mother, *"Boys will be boys"*
- Describes herself as *"A survivor of religious abuse"*

- Married young, physically and psychologically abused
- Withdrawn, depressed, socially isolated
- Became payroll manager for 1100-employee county
- New software, banking deposit, and covid regulations
- No backup, requests for help denied
- Work day/night/wknds: no overtime, CTO maxed, no vacation or no payroll
- Stress, sleeplessness, anxious; Dx Major Depressive DO
- Referred for 3 EAP counseling sessions; can’t afford licensed therapist, worked with “personal counselor”

- Boss: “outstanding” reviews, “extreme dedication”
- Boss’ boss suggests/approves her to use “misc” code for uncompensated hrs
- DA discovers: charges with fraud (“theft of public funds”)
- Public Defender applies for diversion, refers eval to me
- I find her qualified; Special Prosecutor challenges link

PSYCHOLOGIST'S REPORT UNDER FIRE IN MENDOCINO COUNTY PAYROLL FRAUD CASE

Categories: Crime •• News

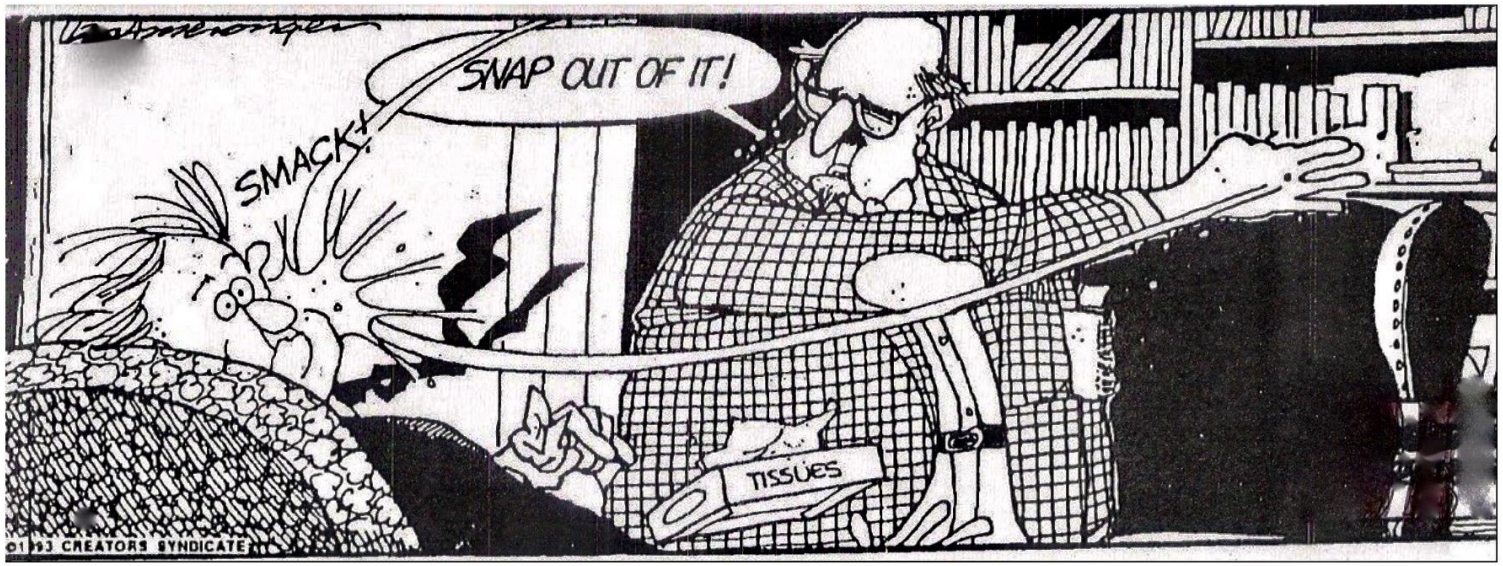
Mike Geniella August 16, 2024 10

[Stock photo by Matt LaFever]

Prosecutors want to question a psychologist who prepared a report supporting the mental health diversion of Mendocino County's former Payroll Manager, a veteran employee facing a felony charge of misappropriation of public funds.

#3 …. *“Defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment”*

PC1001.36(c)(1)



SINGLE SESSION PSYCHOTHERAPY

TREATMENT PLAN

- Recommended treatment must be available and meet the treatment needs of the defendant
- Provider may be public or private, inpatient or outpatient
- Provider must consent to receive defendant for treatment
- Provider must submit regular progress reports
- Treatment program must last no longer than two years and must include a post-release treatment plan.

Qualifier #4

"The defendant consents to diversion and waives the defendant's right to a speedy trial"

PC1001.36(c)(2)

Qualifier #5

“The defendant agrees to comply with treatment as a condition of diversion”

PC1001.36(c)(3)

CASE STUDY

The Delusional Defendant

- 57-year-old Caucasian homeless woman
- RAP: DUIs, Meth Possessions, Trespass, Thefts
- Bipolar Dx, frequent med noncompliance
- Multiple psychiatric hospitalizations
- Couple home from vacation, find her baking a pie
- Stated it was her house because of the address
- “If I think something is mine, it is”

Qualifier #6

"The defendant will not pose an unreasonable risk of danger to public safety 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 treatment plan, the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate"

PC 1001.36(c)(4)

"Unreasonable risk of danger to public safety" means an unreasonable risk that the petitioner will commit a new violent felony while being treated in the community.

PC 1170.18(c)

PC section 1001.36(c)(4) defines a qualifying future violent felony as needing to be “within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667”: *i.e., a* ***Super Strike*** *offense.*

A common defense motion for diversion adds that this dangerousness criterion "is not to be treated as just *any* risk of danger, nor is it to be treated as an unreasonable risk of committing future *felonies*. It is not even meant to be treated as an unreasonable risk of committing future *strikes*. In codifying the applicable statues, the Legislature has spoken, and when is said super strikes, it meant super strikes only”

“Super Strike” Offenses

- *Sexually violent offenses*
- *Child (under 14) molestation or lewd act*
- *Homicide or attempted homicide, incl.DUI*
- *Solicitation to commit murder*
- *Assault with a machine gun on a peace officer*
- *Possession of a weapon of mass destruction*
- *Any felony punishable by life imprisonment or death.*

People v Jefferson (2016)

And qualifier #7 ….

"The ***current*** *charges do not include murder or voluntary manslaughter, sex offender per PC290, rape, lewd or lascivious act on a child under 14, assault with intent to commit rape or sodomy or oral copulation, rape or sexual penetration in concert with another person, continuous sexual abuse of a child, or manufacture or possession of a weapon of mass destruction"*

PC 1001.36(d)

CASE STUDY:

THE DANGEROUS DUDE

- ✓ 30-year-old Mex-Amer male
- ✓ Felony stalking, criminal threat, drugs, vandalism, felon possessing firearm, DV, vandalism; 2 prior felony convictions
- ✓ “I have anger problems”; drinks “a lot” since age 10, multiple suicide attempts; avoid Dx and Tx
- ✓ MCMI-IV: PTSD, SUD, Delusional DO

"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 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."*

PC 1001.36(h)

"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 …in any questionnaire or application for a position as a peace officer."

PC1001.36(g)(e)

"Mental Health Diversion Evaluations and Reports"

Morgan Shaw, PsyD *Christian Garnica, PsyD*

MY TYPICAL REPORT FORMAT

- **Referral Background**: *from defense attorney, eval per PC1001.36*
- **Evaluation Methodology**: *documents, examination, collateral info*
- **Documentary Data**: *charges, arrest report, rap sheet, mh history/records*
- **Examination Data**: *interview responses, (test results)*
- **Summary**: *qualification criterion-by-criterion data summaries*
- **Conclusion**: "*under penalty of perjury", opine "with reasonable degree of clinical certainty" Def does/doesn't meet all criteria*

SUMMARY OF DIVERSION ELIGIBILITY CRITERIA

- Defendant Has DSM Mental Disorder
- Disorder Played Significant Role In Crime
- Symptoms Would Respond To Treatment
- Defendant Consents To Diversion
- Defendant Waives Right To Speedy Trial
- Defendant Agrees To Comply With Treatment
- Defendant Not Unreasonable Risk Of Danger To Public
- Recommended Treatment Will Meet Treatment Needs

Case Study: The Exhibitionist

- 61, hard-working, proud, self-sufficient mechanic
- 35-year family man, clean record
- Outstanding member of community
- Car falls on him, spinal injury, chronic pain
- Aging, disabled, broke, depressed, reclusive
- Children grown and gone
- Wife having affair and threatening to leave
- Diagnosed by PCP with MDD and Adjustment DO
- Exposes himself to neighbor, arrested

MENTAL HEALTH DIVERSION, BOTTOM LINE

"A Statewide Look at Mental Health Diversion: Recommendations to California's Council on Criminal Justice and Behavioral Health"

Council of State Governments Justice Center, June 2024

"85% of California counties have a diversion program, and each county manages diversion somewhat differently"

*"**Participation in diversion has also been shown to reduce the risk of recidivism for people with mental health needs** ... {For example], out of the 669 people who graduated from LA County's Diversion Program since it began five years ago, 91% have avoided having a new criminal case filed."*

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The End