

RESOLUTION 06-01-2017 (REVISED)

DIGEST

Criminal Law: Pretrial Diversion for Military Personnel

Amends Penal Code section 1001.80 to clarify that military diversion includes non-combatants and encompasses misdemeanor charges of driving under the influence (DUI).

RESOLUTIONS COMMITTEE ANALYSIS

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 1001.80 to clarify that military diversion includes non-combatants and encompasses misdemeanor charges of driving under the influence (DUI).

Currently, there is a split of authority regarding whether military diversion applies to DUIs. In *People v. VanVleck* (2016) 2 Cal.App.5th 355, the Fourth District held that Vehicle Code section 23640 bars diversion as a matter of statutory construction. The Second District took the opposite view in *Hopkins v. Superior Court* (2016) 2 Cal.App.5th 1275. This resolution clarifies the Legislature’s intent in a manner consistent with the fact that military diversion is already permitted for such crimes as vehicular manslaughter, child molestation, distribution of child pornography, domestic violence, sexual battery, and willful animal cruelty.

This resolution is related to Resolution 10-02-2017 and Senate Bill No. 725 (Jackson). The enactment of SB 725, which permits military diversion for misdemeanor DUI offenses, largely addresses the concerns noted in the resolution, except that SB 725 does not include military personnel and veterans who never experienced combat but nevertheless may suffer from PTSD.

The Resolutions Committee initially recommended disapproval of this resolution. The full Conference voted to approve.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1001.80 to read as follows:

- 1 §1001.80
- 2 (a) This chapter shall apply whenever a case is before a court on an accusatory pleading
- 3 alleging the commission of a misdemeanor offense, including, but not limited to alleged
- 4 violations of Vehicle Code sections 23152, 23153, and both of the following apply to the
- 5 defendant:
- 6 (1) The defendant was, or currently is, a member of the United States military, regardless
- 7 if the defendant engaged in, or currently engages in, combat during military service.

8 (2) The defendant may be suffering from sexual trauma, traumatic brain injury, post-
9 traumatic stress disorder, substance abuse, or mental health problems as a result of his or her
10 military service. The court may request, using existing resources, an assessment to aid in the
11 determination that this paragraph applies to a defendant, including, but not limited to appointing
12 a physician to evaluate the defendant. The court may use any and all evidence to evaluate the
13 defendant's assertions that he or she may be suffering from sexual trauma, traumatic brain injury,
14 post-traumatic stress disorder, substance abuse, or mental health problems, including the
15 defendant's oral representations.

16 (b) If the court determines that a defendant charged with an applicable offense under this
17 chapter is a person described in subdivision (a), the court, with the consent of the defendant and
18 a waiver of the defendant's speedy trial right, may place the defendant in a pretrial diversion
19 program, as defined in subdivision (k).

20 (c) If it appears to the court that the defendant is performing unsatisfactorily in the
21 assigned program, or that the defendant is not benefiting from the treatment and services
22 provided under the diversion program, after notice to the defendant, the court shall hold a
23 hearing to determine whether the criminal proceedings should be reinstated. If the court finds
24 that the defendant is not performing satisfactorily in the assigned program, or that the defendant
25 is not benefiting from diversion, the court may end the diversion and order resumption of the
26 criminal proceedings. If the defendant has performed satisfactorily during the period of
27 diversion, at the end of the period of diversion, the criminal charges shall be dismissed.

28 (d) If a referral is made to the county mental health authority as part of the pretrial
29 diversion program, the county shall be obligated to provide mental health treatment services only
30 to the extent that resources are available for that purpose, as described in paragraph (5) of
31 subdivision (b) of Section 5600.3 of the Welfare and Institutions Code. If mental health
32 treatment services are ordered by the court, the county mental health agency shall coordinate
33 appropriate referral of the defendant to the county veterans service officer, as described in
34 paragraph (5) of subdivision (b) of Section 5600.3 of the Welfare and Institutions Code. The
35 county mental health agency shall not be responsible for providing services outside its traditional
36 scope of services. An order shall be made referring a defendant to a county mental health agency
37 only if that agency has agreed to accept responsibility for all of the following:

38 (1) The treatment of the defendant.

39 (2) The coordination of appropriate referral to a county veterans service officer. (3) The
40 filing of reports pursuant to subdivision (h).

41 (e) When determining the requirements of a pretrial diversion program pursuant to this
42 chapter, the court shall assess whether the defendant should be ordered to participate in a federal
43 or community based treatment service program with a demonstrated history of specializing in the
44 treatment of mental health problems, including substance abuse, post- traumatic stress disorder,
45 traumatic brain injury, military sexual trauma, and other related mental health problems.

46 (f) The court, in making an order pursuant to this section to commit a defendant to an
47 established treatment program, shall give preference to a treatment program that has a history of
48 successfully treating veterans who suffer from sexual trauma, traumatic brain injury, post-
49 traumatic stress disorder, substance abuse, or mental health problems as a result of military
50 service, including, but not limited to, programs operated by the United States Department of
51 Defense or the United States Department of Veterans Affairs.

52 (g) The court and the assigned treatment program may collaborate with the Department
53 of Veterans Affairs and the United States Department of Veterans Affairs to maximize benefits
54 and services provided to the veteran.

55 (h) The period during which criminal proceedings against the defendant may be diverted
56 shall be no longer than two years. The responsible agency or agencies shall file reports on the
57 defendant's progress in the diversion program with the court and with the prosecutor not less
58 than every six months.

59 (i) A record filed with the Department of Justice shall indicate the disposition in those
60 cases diverted pursuant to this chapter. Upon successful completion of a diversion program, the
61 arrest upon which the diversion was based shall be deemed to have never occurred. The
62 defendant may indicate in response to a question concerning his or her prior criminal record that
63 he or she was not arrested or diverted for the offense, except as specified in subdivision (j). A
64 record pertaining to an arrest resulting in successful completion of a diversion program shall not,
65 without the defendant's consent, be used in any way that could result in the denial of any
66 employment, benefit, license, or certificate.

67 (j) The defendant shall be advised that, regardless of his or her successful completion of
68 diversion, the arrest upon which the diversion was based may be disclosed by the Department of
69 Justice in response to a peace officer application request and that, notwithstanding subdivision
70 (i), this section does not relieve him or her of the obligation to disclose the arrest in response to a
71 direct question contained in a questionnaire or application for a position as a peace officer, as
72 defined in Section 830.

73 (k)(1) As used in this chapter, "pretrial diversion" means the procedure of postponing
74 prosecution, either temporarily or permanently, at any point in the judicial process from the point
75 at which the accused is charged until adjudication.

76 (2) A pretrial diversion program shall utilize existing resources available to current or
77 former members of the United States military to address and treat those suffering from sexual
78 trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health
79 problems as a result of military service.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Allows pretrial diversion program for current and former members of the U.S. military who are charged with a misdemeanor offense(s). Meaning, defendants who are current or former members of the military currently facing misdemeanor charges --who may be may be suffering from sexual trauma, traumatic brain injury, post- traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service -- can temporarily suspend their criminal matter to seek assistance from a mental health program. Upon successful completion of that program, the pending criminal matter will be dismissed.

Often times, Prosecutors will not agree to the imposition of military diversion, thereby forcing the criminal defense attorneys to file a motion seeking an order from the court, allowing military members or veterans to participate in military diversion. In opposing this motion, Prosecutors

assert several arguments, including the fact that a veteran or current military member has not participated in combat and therefore should not benefit from military diversion. These assertions are harmful and counter to the legislative history of military diversion.

Participation in combat was never a prerequisite for military members or veterans to participate in military diversion. This assertion also ignores the fact that more than half of military members attempt suicide before they ever see combat. (See NBC News - Military Suicide: Most Attempts Come Before Soldiers Ever See Combat; available at <http://www.nbcnews.com/health/health-news/military-suicides-most-attempts-come-soldiers-ever-see-combat-n580276>; see also JAMA Psychiatry - Risk Factors, Methods, and Timing of Suicide Attempts Among US Army Soldiers; available at <http://jamanetwork.com/journals/jamapsychiatry/article-abstract/2524845>).

Prosecutors also oppose these motions on the basis that military diversion does not apply to charges involving a violation of Vehicle Code sections 23152 and 23153 (commonly referred to as a D.U.I.). This again is harmful and counter to the legislative history of veterans' diversion. There is no explicit exclusion of DUI misdemeanor offenses in this statute. Additionally, this argument ignores the fact that 20% of Veterans with PTSD also have Substance Abuse Disorder, which includes alcohol abuse. (See U.S. Department of Veterans Affairs – PTSD: National Center for PTSD, available at http://www.ptsd.va.gov/PUBLIC/PROBLEMS/PTSD_SUBSTANCE_ABUSE_VETERANS.ASP).

Military members and veterans have done so much for this country. Unfortunately, at times, they become involved in the criminal judicial system. It is in everyone's best interest to assist military members or veterans throughout the criminal process, especially if they may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems. By clarifying who qualifies for military diversion as well as which charges, military professionals have more access to helpful programs that can ultimately allow them to seek treatment and avoid a criminal conviction.

The Solution: Amends Penal Code section 1001.80, to clarify which person and charges qualify for military diversion, a program that would temporarily suspend criminal proceedings and allow military members or veterans to seek assistance through the Department of Veterans Affairs, or a like program.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

SB 1227 (Hancock) Diversion: Members of Military (Filed with Secretary of State September 27, 2014)

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