

ASSEMBLY THIRD READING

AB 3234 (Ting)

As Amended August 3, 2020

Majority vote

SUMMARY:

Creates a court-initiated misdemeanor diversion program and lowers the minimum age limitation for the Elderly Parole Program to inmates who are 50 years of age and who have served a minimum of 20 years.

Major Provisions

- 1) Authorizes a superior court judge to offer diversion to a person charged with a misdemeanor over the objection of a prosecuting attorney.
- 2) Provides that a judge may continue a diverted case for a period not to exceed 24 months and order the defendant to comply with terms, conditions, or programs that the judge deems appropriate based on the defendant's specific situation.
- 3) States that if the defendant has complied with the imposed terms and conditions, at the end of the diversion period, the judge shall dismiss the action against the defendant.
- 4) Requires the court to provide the defendant notice and hold a hearing to determine whether criminal proceedings should be reinstated if it appears to the court that the defendant is not complying with the terms and conditions of diversion. If the court finds that the defendant has not complied with the terms and conditions of diversion, the court may end the diversion and order resumption of the criminal proceedings.
- 5) Provides that in order for a defendant who is diverted pursuant to this provision to have their action dismissed, the defendant must complete all conditions ordered by the court, make full restitution, and comply with any court-ordered protective order, stay-away order, or order prohibiting firearm possession. However, a defendant's inability to pay restitution due to indigence shall not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion.
- 6) States that upon successful completion of the court-ordered terms, conditions, or programs of diversion, the arrest upon which diversion was imposed shall be deemed to never have occurred. The defendant may indicate in response to any question concerning their prior criminal record that they were not arrested.
- 7) Prohibits, without the defendant's consent, using a record pertaining to an arrest resulting in successful completion of diversion in any way that could result in the denial of any employment, benefit, license, or certificate.
- 8) Requires that the defendant be advised that, regardless of their successful completion of diversion, the arrest on which the diversion was based may be disclosed by the Department of Justice in response to a peace officer application request and that, notwithstanding the foregoing provisions, the defendant is not relieved of the obligation to disclose the arrest in response to a direct question contained in a questionnaire or application for a position as a peace officer, as defined.

- 9) Lowers the minimum age limitation for the Elderly Parole Program to inmates who are 50 years of age instead of 60 years of age and who have served a minimum of 20 years of continuous incarceration instead of a minimum of 25 years of continuous incarceration.
- 10) Provides that by December 31, 2022, the board shall complete all elderly parole hearings for individuals who were sentenced to determinate or indeterminate terms and who, on the effective date of the bill that added this subdivision, are or will be entitled to have their parole suitability considered at an elderly parole hearing before January 1, 2023.

COMMENTS:

Diversion as Compared to Deferred Entry of Judgment

Existing law permits pretrial and posttrial diversion programs. (Penal Code, Section 1001.) The latter is typically referred to as deferred entry of judgment (DEJ).

Pre-trial diversion suspends the criminal proceedings without requiring the defendant to enter a plea. The defendant must successfully complete a program or other conditions imposed by the court. If a defendant does not successfully complete the diversion program, criminal proceedings resume but the defendant, having not entered a plea, may still proceed to trial or enter a plea. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that they have never been arrested or charged for the diverted offense.

With DEJ, a defendant must enter a guilty plea and entry of judgment on the defendant's guilty plea is deferred pending successful completion of a program or other conditions. If a defendant placed in a DEJ program fails to complete the program or comply with conditions imposed, the court may resume criminal proceedings and the defendant, having already pleaded guilty, would be sentenced.

This bill contemplates a pre-trial diversion program. Accordingly, the proposed Committee amendments replace language that would apply to a deferred-entry of judgment program and replace it with language applicable to a diversion program.

General Misdemeanor Diversion

There are multiple diversion programs under existing law, including one for misdemeanors generally. (Penal Code, Section 1001 et. seq.) The Legislature has authorized the prosecution to approve a local misdemeanor diversion program. (See Penal Code, Sections 1001-1001.9, 1001.50-1001.55.) No program can continue without the approval of the prosecution. And no person can be diverted under a diversion program unless it has been approved by the prosecution. (Pen. Code, Sections 1001.2, subdivision (b), 1001.50, subdivision (b); *People v. Marroquin* (2017) 15 Cal.App.5th Supplement 1, 37 ["the Legislature has not conferred 'a general grant of authority to trial courts to grant diversion to a defendant, outside a diversion program mandated by the state or by local government, and over the objection of the prosecuting attorney ...' [citation omitted].] However, the prosecution is not authorized to determine whether a particular defendant shall be diverted. (Penal Code, Section 1001.2.)

Existing misdemeanor diversion has a number of exclusions. (Pen. Code, Section 1001.51, subdivision (c).) Misdemeanor offenses ineligible for diversion include those which require

registration as a sex offender and involve use of force other than simple assault and battery. Also ineligible are offenses for which probation is prohibited and for which incarceration is mandatory, as well as certain Vehicle Code offenses. (*Ibid.*) There are also requirements in order to be eligible, including that the defendant has not been granted misdemeanor diversion within five years of the current charges filed, the defendant has never been convicted of a felony or convicted of a misdemeanor within the preceding five years, and the defendant has never had their probation or parole revoked without thereafter successfully completing it. (Penal Code, Section 1001.51, subdivision (a).)

This bill would create a court-initiated misdemeanor diversion program. A superior court judge would be authorized to divert a misdemeanor defendant over the objection of the prosecution. Unlike existing general misdemeanor diversion, this bill would have no statutory requirements for the defendant to satisfy in order to be eligible nor would any misdemeanors be statutorily excluded. Whether or not to divert a misdemeanor defendant would be in the trial court's discretion. However, judicial discretion is not without limits. "[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 195.) A trial court abuses its discretion when it exceeds the bounds of reason, all of the circumstances before it being considered. (*Id.*, at p. 194.)

Elderly Parole Program

In response to the Three-judge Court order to reduce the prison population (*Coleman v. Brown* (ED Cal. Feb. 10, 2014, No. 2:90-cv-0520 LKK DAD (PC), No. C01-1351 THE) 2014 U.S. Dist. Lexis 86855), the California Department of Corrections and Rehabilitation "implement[ed] a new parole process whereby inmates who are 60 years of age or older and have served a minimum of twenty-five years of their sentence [are] referred to the Board of Parole Hearings (BPH) to determine suitability for parole." The program does not apply to inmates who are sentenced to death or life without the possibility of parole. (<https://www.cdcr.ca.gov/bph/elderly-parole-hearings-overview/> [as of 8/4/2020].)

In 2017, the Legislature passed AB 1448 (Weber), which established the Elderly Parole Program to be administered by the BPH. (Penal Code, Section 3055.) Under the Elderly Parole Program, inmates who are 60 years of age or older and have served 25 years of continuous incarceration on their current sentence are to have their parole suitability considered. (Penal Code, Section 3055, subdivision. (a).) This program does not apply to a prisoner who has been sentenced under the "Three Strikes" Law, who has been sentenced to life in prison without the possibility of parole or death, or who has been convicted of first-degree murder of a peace officer, as specified. (Penal Code, Section 3055, subdivision. (g) & (h).) When considering release of an inmate, the BPH must "give special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate's risk for future violence." (Penal Code, Section 3055, subdivision. (c).)

This bill would lower the minimum age limitation for the Elderly Parole Program under Penal Code section 3055 to inmates who are 50 years of age instead of 60 years of age and who have served a minimum of 20 years of their sentence instead of a minimum of 25 years of their sentence. This bill would also require that by December 31, 2022, the BPH complete all elderly parole hearings for individuals who, on the effective date of this bill, are or will be entitled to have their parole suitability considered before January 1, 2023.

According to the Author:

"AB 3234 provides judges with the discretion to provide diversion to individuals charged with misdemeanors they deem appropriate for such a program. Diversion programs that are successfully completed allow a person to avoid the lifelong collateral consequences associated with a criminal record when they are seeking employment or housing. Diversion programs typically require individuals to fulfill strict requirements, including participating in a rehabilitation program. This proactive approach has shown to yield better recidivism rates than merely prosecuting and jailing an individual.

"AB 3234 also changes the age for elderly parole eligibility from 60 to 50 and time served from 25 to 20 years. This bill only allows for the opportunity to go to the parole board—it is not automatic release. The bill excludes strikers and estimates from Board of Parole Hearings show that of the total prison population, fewer than 240 individuals would have the opportunity to have a hearing and based on average grant rates, fewer than 50 people would even likely be released. The current Covid-19 pandemic requires thoughtful and urgent measures to reduce the risk of harm inside the state's prisons. This provides a deliberative process with safeguards for consideration for release for this high risk population."

Arguments in Support:

According to Californians for Safety and Justice, "While reforming elderly parole in this manner always makes sense, there has never been a more pressing time to expand and expedite elderly parole: COVID-19 is ripping through our prisons, with elderly people being the most vulnerable to serious medical consequences, including death. The virus also increases the need for space in our prisons to effectively quarantine, making every safe release an important step toward containing and mitigating the virus. Given the evidence of significant costsavings, positive public safety outcomes, *and* the increased risk of serious illness or even death due to the pandemic, these commonsense reforms to elder parole are not only critical but will result in saving a number of lives.

...

"Incarceration and prosecution are intensely traumatic and damaging processes that harm individuals, families and communities, and often increase recidivism and exacerbate the underlying causes of crime. Judge-granted diversion is a tool that can reduce the direct and collateral consequences of mass incarceration and prosecution and promote racial justice in our criminal legal system. AB 3234 also decreases the taxpayer cost of traditional criminal case proceedings, while increasing accountability through rigorous rehabilitative programming, encouraging familial relationships and growth by avoiding familial separation that occurs with incarceration, and making us all safer by reducing recidivism."

Arguments in Opposition:

According to the California District Attorneys Association, "[T]he key provisions of this bill have been lifted from AB 88, the Public Safety Trailer bill which CDAA and Cal Chiefs opposed – and which was pulled from the floor before it could be voted on - in large measure because of the provisions that are now the thrust of AB 3234.

"The bill is based on an LA County pilot program, AB 2124 from 2014, which expired in 2018. That pilot program applied generally to first time offenders and included multiple exclusions – including sex crimes, DUIs, weapons charges, crimes against elders and minors, including

possession of child pornography and annoying or molesting a child, weapons charges, defendants who had prior diversion and defendants with prior violence within the last 10 years.

...

"The bill also includes language from the rejected budget trailer bill that changes the Elderly Parole Program. Currently, the bill authorizes a review of the parole suitability of inmates who are 60 years of age or older and who have served a minimum of 25 years of continuous incarceration. Under the terms of this proposal *elderly* would now be considered 50 years of age and available to an inmate who had served 20 years of continuous incarceration.

"If given a little more time than has been available under the dramatically accelerated hearing of this bill, CDAA could cite hundreds of examples of dangerous and violent criminals who committed heinous crimes after age 50."

FISCAL COMMENTS:

Unknown.

VOTES:

ASM LOCAL GOVERNMENT: Vote not relevant

YES:

ASM APPROPRIATIONS: Vote not relevant

YES:

ASSEMBLY FLOOR: Vote not relevant

YES:

NO:

ABS, ABST OR NV:

ASM PUBLIC SAFETY: 5-3-0

YES: Jones-Sawyer, Kamlager, Quirk, Santiago, Mark Stone

NO: Lackey, Bauer-Kahan, Diep

UPDATED:

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