

ASSEMBLY BILL

No. 433

Introduced by Assembly Member Krell

February 5, 2025

An act to amend Section 1001.36 of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 433, as introduced, Krell. Mental health diversion.

Existing law authorizes the court to grant pretrial diversion to a defendant diagnosed with a mental disorder if the defendant satisfies certain eligibility requirements and if the court determines that the defendant is suitable for diversion. Existing law excludes a defendant from diversion for specified charged offenses, including, among others, murder, voluntary manslaughter, rape, or continuous sexual abuse of a child, as specified.

This bill would expand those exclusions to prohibit a defendant from being placed into a diversion program if they are charged with child abuse and endangerment, inflicting cruel or inhuman corporal punishment on a child resulting in an injury, assault of a child under 8 years of age resulting in the death of the child, human trafficking, and any crime that causes great bodily injury, as specified.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1001.36 of the Penal Code is amended
2 to read:

1 1001.36. (a) On an accusatory pleading alleging the
2 commission of a misdemeanor or felony offense not set forth in
3 subdivision (d), the court may, in its discretion, and after
4 considering the positions of the defense and prosecution, grant
5 pretrial diversion to a defendant pursuant to this section if the
6 defendant satisfies the eligibility requirements for pretrial diversion
7 set forth in subdivision (b) and the court determines that the
8 defendant is suitable for that diversion under the factors set forth
9 in subdivision (c).

10 (b) A defendant is eligible for pretrial diversion pursuant to this
11 section if both of the following criteria are met:

12 (1) The defendant has been diagnosed with a mental disorder
13 as identified in the most recent edition of the Diagnostic and
14 Statistical Manual of Mental Disorders, including, but not limited
15 to, bipolar disorder, schizophrenia, schizoaffective disorder, or
16 post-traumatic stress disorder, but excluding antisocial personality
17 disorder and pedophilia. Evidence of the defendant's mental
18 disorder shall be provided by the defense and shall include a
19 diagnosis or treatment for a diagnosed mental disorder within the
20 last five years by a qualified mental health expert. In opining that
21 a defendant suffers from a qualifying disorder, the qualified mental
22 health expert may rely on an examination of the defendant, the
23 defendant's medical records, arrest reports, or any other relevant
24 evidence.

25 (2) The defendant's mental disorder was a significant factor in
26 the commission of the charged offense. If the defendant has been
27 diagnosed with a mental disorder, the court shall find that the
28 defendant's mental disorder was a significant factor in the
29 commission of the offense unless there is clear and convincing
30 evidence that it was not a motivating factor, causal factor, or
31 contributing factor to the defendant's involvement in the alleged
32 offense. A court may consider any relevant and credible evidence,
33 including, but not limited to, police reports, preliminary hearing
34 transcripts, witness statements, statements by the defendant's
35 mental health treatment provider, medical records, records or
36 reports by qualified medical experts, or evidence that the defendant
37 displayed symptoms consistent with the relevant mental disorder
38 at or near the time of the offense.

39 (c) For any defendant who satisfies the eligibility requirements
40 in subdivision (b), the court must consider whether the defendant

1 is suitable for pretrial diversion. A defendant is suitable for pretrial
2 diversion if all of the following criteria are met:

3 (1) In the opinion of a qualified mental health expert, the
4 defendant's symptoms of the mental disorder causing, contributing
5 to, or motivating the criminal behavior would respond to mental
6 health treatment.

7 (2) The defendant consents to diversion and waives the
8 defendant's right to a speedy trial, or a defendant has been found
9 to be an appropriate candidate for diversion in lieu of commitment
10 pursuant to clause (iii) of subparagraph (B) of, or clause (v) of
11 subparagraph (C), of, paragraph (1) of subdivision (a) of Section
12 1370, or subparagraph (A) of paragraph (1) of subdivision (b) of
13 Section 1370.01 and, as a result of the defendant's mental
14 incompetence, cannot consent to diversion or give a knowing and
15 intelligent waiver of the defendant's right to a speedy trial.

16 (3) The defendant agrees to comply with treatment as a condition
17 of diversion, or the defendant has been found to be an appropriate
18 candidate for diversion in lieu of commitment for restoration of
19 competency treatment pursuant to clause (iii) of subparagraph (B)
20 of, or clause (v) of subparagraph (C) of, paragraph (1) of
21 subdivision (a) of Section 1370 or subparagraph (A) of paragraph
22 (1) of subdivision (b) of Section 1370.01 and, as a result of the
23 defendant's mental incompetence, cannot agree to comply with
24 treatment.

25 (4) The defendant will not pose an unreasonable risk of danger
26 to public safety, as defined in Section 1170.18, if treated in the
27 community. The court may consider the opinions of the district
28 attorney, the defense, or a qualified mental health expert, and may
29 consider the defendant's treatment plan, the defendant's violence
30 and criminal history, the current charged offense, and any other
31 factors that the court deems appropriate.

32 (d) A defendant may not be placed into a diversion program,
33 pursuant to this section, for the following current charged offenses:

34 (1) Murder or voluntary manslaughter.

35 (2) An offense for which a person, if convicted, would be
36 required to register pursuant to Section 290, except for a violation
37 of Section 314.

38 (3) Rape.

39 (4) Lewd or lascivious act on a child under 14 years of age.

1 (5) Assault with intent to commit rape, sodomy, or oral
2 copulation, in violation of Section 220.

3 (6) Commission of rape or sexual penetration in concert with
4 another person, in violation of Section 264.1.

5 (7) Continuous sexual abuse of a child, in violation of Section
6 288.5.

7 (8) A violation of subdivision (b) or (c) of Section 11418.

8 (9) *Child abuse and endangerment, in violation of Section 273a.*

9 (10) *Inflicting cruel or inhuman corporal punishment on a child*
10 *resulting in an injury, in violation of Section 273d.*

11 (11) *Assault of a child under eight years of age resulting in the*
12 *death of the child, in violation of Section 273ab.*

13 (12) *Human trafficking.*

14 (13) *Any crime that causes great bodily injury, including, but*
15 *not limited to, spousal abuse that causes great bodily injury.*

16 (e) At any stage of the proceedings, the court may require the
17 defendant to make a prima facie showing that the defendant will
18 meet the minimum requirements of eligibility for diversion and
19 that the defendant and the offense are suitable for diversion. The
20 hearing on the prima facie showing shall be informal and may
21 proceed on offers of proof, reliable hearsay, and argument of
22 counsel. If a prima facie showing is not made, the court may
23 summarily deny the request for diversion or grant any other relief
24 as may be deemed appropriate.

25 (f) As used in this chapter, the following terms have the
26 following meanings:

27 (1) “Pretrial diversion” means the postponement of prosecution,
28 either temporarily or permanently, at any point in the judicial
29 process from the point at which the accused is charged until
30 adjudication, to allow the defendant to undergo mental health
31 treatment, subject to all of the following:

32 (A) (i) The court is satisfied that the recommended inpatient
33 or outpatient program of mental health treatment will meet the
34 specialized mental health treatment needs of the defendant.

35 (ii) The defendant may be referred to a program of mental health
36 treatment utilizing existing inpatient or outpatient mental health
37 resources. Before approving a proposed treatment program, the
38 court shall consider the request of the defense, the request of the
39 prosecution, the needs of the defendant, and the interests of the
40 community. The treatment may be procured using private or public

1 funds, and a referral may be made to a county mental health
2 agency, existing collaborative courts, or assisted outpatient
3 treatment only if that entity has agreed to accept responsibility for
4 the treatment of the defendant, and mental health services are
5 provided only to the extent that resources are available and the
6 defendant is eligible for those services.

7 (iii) If the court refers the defendant to a county mental health
8 agency pursuant to this section and the agency determines that it
9 is unable to provide services to the defendant, the court shall accept
10 a written declaration to that effect from the agency in lieu of
11 requiring live testimony. That declaration shall serve only to
12 establish that the program is unable to provide services to the
13 defendant at that time and does not constitute evidence that the
14 defendant is unqualified or unsuitable for diversion under this
15 section.

16 (B) The provider of the mental health treatment program in
17 which the defendant has been placed shall provide regular reports
18 to the court, the defense, and the prosecutor on the defendant's
19 progress in treatment.

20 (C) The period during which criminal proceedings against the
21 defendant may be diverted is limited as follows:

22 (i) If the defendant is charged with a felony, the period shall be
23 no longer than two years.

24 (ii) If the defendant is charged with a misdemeanor, the period
25 shall be no longer than one year.

26 (D) Upon request, the court shall conduct a hearing to determine
27 whether restitution, as defined in subdivision (f) of Section 1202.4,
28 is owed to any victim as a result of the diverted offense and, if
29 owed, order its payment during the period of diversion. However,
30 a defendant's inability to pay restitution due to indigence or mental
31 disorder shall not be grounds for denial of diversion or a finding
32 that the defendant has failed to comply with the terms of diversion.

33 (2) "Qualified mental health expert" includes, but is not limited
34 to, a psychiatrist, psychologist, a person described in Section
35 5751.2 of the Welfare and Institutions Code, or a person whose
36 knowledge, skill, experience, training, or education qualifies them
37 as an expert.

38 (g) If any of the following circumstances exists, the court shall,
39 after notice to the defendant, defense counsel, and the prosecution,
40 hold a hearing to determine whether the criminal proceedings

1 should be reinstated, whether the treatment should be modified,
2 or whether the defendant should be conserved and referred to the
3 conservatorship investigator of the county of commitment to initiate
4 conservatorship proceedings for the defendant pursuant to Chapter
5 3 (commencing with Section 5350) of Part 1 of Division 5 of the
6 Welfare and Institutions Code:

7 (1) The defendant is charged with an additional misdemeanor
8 allegedly committed during the pretrial diversion and that reflects
9 the defendant's propensity for violence.

10 (2) The defendant is charged with an additional felony allegedly
11 committed during the pretrial diversion.

12 (3) The defendant is engaged in criminal conduct rendering the
13 defendant unsuitable for diversion.

14 (4) Based on the opinion of a qualified mental health expert
15 whom the court may deem appropriate, either of the following
16 circumstances exists:

17 (A) The defendant is performing unsatisfactorily in the assigned
18 program.

19 (B) The defendant is gravely disabled, as defined in
20 subparagraph (B) of paragraph (1) of subdivision (h) of Section
21 5008 of the Welfare and Institutions Code. A defendant shall only
22 be conserved and referred to the conservatorship investigator
23 pursuant to this finding.

24 (h) If the defendant has performed satisfactorily in diversion,
25 at the end of the period of diversion, the court shall dismiss the
26 defendant's criminal charges that were the subject of the criminal
27 proceedings at the time of the initial diversion. A court may
28 conclude that the defendant has performed satisfactorily if the
29 defendant has substantially complied with the requirements of
30 diversion, has avoided significant new violations of law unrelated
31 to the defendant's mental health condition, and has a plan in place
32 for long-term mental health care. If the court dismisses the charges,
33 the clerk of the court shall file a record with the Department of
34 Justice indicating the disposition of the case diverted pursuant to
35 this section. Upon successful completion of diversion, if the court
36 dismisses the charges, the arrest upon which the diversion was
37 based shall be deemed never to have occurred, and the court shall
38 order access to the record of the arrest restricted in accordance
39 with Section 1001.9, except as specified in subdivisions (j) and
40 (k). The defendant who successfully completes diversion may

1 indicate in response to any question concerning the defendant's
2 prior criminal record that the defendant was not arrested or diverted
3 for the offense, except as specified in subdivision (j).

4 (i) A record pertaining to an arrest resulting in successful
5 completion of diversion, or any record generated as a result of the
6 defendant's application for or participation in diversion, shall not,
7 without the defendant's consent, be used in any way that could
8 result in the denial of any employment, benefit, license, or
9 certificate.

10 (j) The defendant shall be advised that, regardless of the
11 defendant's completion of diversion, both of the following apply:

12 (1) The arrest upon which the diversion was based may be
13 disclosed by the Department of Justice to any peace officer
14 application request and that, notwithstanding subdivision (i), this
15 section does not relieve the defendant of the obligation to disclose
16 the arrest in response to any direct question contained in any
17 questionnaire or application for a position as a peace officer, as
18 defined in Section 830.

19 (2) An order to seal records pertaining to an arrest made pursuant
20 to this section has no effect on a criminal justice agency's ability
21 to access and use those sealed records and information regarding
22 sealed arrests, as described in Section 851.92.

23 (k) A finding that the defendant suffers from a mental disorder,
24 any progress reports concerning the defendant's treatment,
25 including, but not limited to, any finding that the defendant be
26 prohibited from owning or controlling a firearm because they are
27 a danger to themselves or others pursuant to subdivision (m), or
28 any other records related to a mental disorder that were created as
29 a result of participation in, or completion of, diversion pursuant
30 to this section or for use at a hearing on the defendant's eligibility
31 for diversion under this section may not be used in any other
32 proceeding without the defendant's consent, unless that information
33 is relevant evidence that is admissible under the standards described
34 in paragraph (2) of subdivision (f) of Section 28 of Article I of the
35 California Constitution. However, when determining whether to
36 exercise its discretion to grant diversion under this section, a court
37 may consider previous records of participation in diversion under
38 this section.

39 (l) The county agency administering the diversion, the
40 defendant's mental health treatment providers, the public guardian

1 or conservator, and the court shall, to the extent not prohibited by
2 federal law, have access to the defendant's medical and
3 psychological records, including progress reports, during the
4 defendant's time in diversion, as needed, for the purpose of
5 providing care and treatment and monitoring treatment for
6 diversion or conservatorship.

7 (m) (1) The prosecution may request an order from the court
8 that the defendant be prohibited from owning or possessing a
9 firearm until they successfully complete diversion because they
10 are a danger to themselves or others pursuant to subdivision (i) of
11 Section 8103 of the Welfare and Institutions Code.

12 (2) The prosecution shall bear the burden of proving, by clear
13 and convincing evidence, both of the following are true:

14 (A) The defendant poses a significant danger of causing personal
15 injury to themselves or another by having in their custody or
16 control, owning, purchasing, possessing, or receiving a firearm.

17 (B) The prohibition is necessary to prevent personal injury to
18 the defendant or any other person because less restrictive
19 alternatives either have been tried and found to be ineffective or
20 are inadequate or inappropriate for the circumstances of the
21 defendant.

22 (3) (A) If the court finds that the prosecution has not met that
23 burden, the court shall not order that the person is prohibited from
24 having, owning, purchasing, possessing, or receiving a firearm.

25 (B) If the court finds that the prosecution has met the burden,
26 the court shall order that the person is prohibited, and shall inform
27 the person that they are prohibited, from owning or controlling a
28 firearm until they successfully complete diversion because they
29 are a danger to themselves or others.

30 (4) An order imposed pursuant to this subdivision shall be in
31 effect until the defendant has successfully completed diversion or
32 until their firearm rights are restored pursuant to paragraph (4) of
33 subdivision (g) of Section 8103 of the Welfare and Institutions
34 Code.