

AMENDED IN ASSEMBLY MAY 5, 2025

AMENDED IN ASSEMBLY MARCH 10, 2025

CALIFORNIA LEGISLATURE—2025–26 REGULAR SESSION

ASSEMBLY BILL

No. 46

Introduced by Assembly Member Nguyen

(Principal coauthor: Senator Hurtado)

~~(Coauthor: Assembly Member Michelle Rodriguez)~~

*(Coauthors: Assembly Members Krell, Petrie-Norris,
Michelle Rodriguez, and Blanca Rubio)*

(Coauthor: Senator Ashby)

December 2, 2024

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

LEGISLATIVE COUNSEL'S DIGEST

AB 46, as amended, Nguyen. Diversion.

Existing law authorizes a court to grant pretrial diversion to a defendant suffering from a mental disorder, on an accusatory pleading alleging the commission of a misdemeanor or felony offense, in order to allow the defendant to undergo mental health treatment. Existing law provides that a defendant is eligible for diversion if they have been diagnosed with certain mental disorders and the court finds that the mental disorder was a significant factor in the commission of the charged offense, unless there is clear and convincing evidence that the disorder was not a motivating, causal, or contributing factor to the defendant's involvement in the alleged offense. Existing law prohibits defendants charged with specified offenses, including murder, from being placed in this diversion program.

~~This bill would add attempted murder to the list of charged offenses that prohibit a defendant from being placed in this diversion program. The bill would disqualify a defendant from diversion if the defendant has been diagnosed, as specified, with a conduct disorder that causes or threatens physical harm to people and animals. The bill would delete the provision requiring the court to find a defendant, diagnosed with a mental disorder, eligible for diversion unless there is clear and convincing evidence that the disorder was not a motivating, causal, or contributing factor to the defendant's involvement in the alleged offense.~~

This bill would, if the defendant has been diagnosed with a mental disorder within 5 years prior to the current offense, as specified, require the court to 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, causal, or contributing factor to the defendant's involvement in the alleged offense.

Existing law makes a defendant eligible for this diversion program if, among other criteria, the defendant will not pose an unreasonable risk of danger to public safety if treated in the community, as specified.

The bill would instead require that the defendant ~~not pose a risk of danger to public safety~~ *endanger public safety, as defined*, if treated in the community.

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:
- 3 1001.36. (a) On an accusatory pleading alleging the
- 4 commission of a misdemeanor or felony offense not set forth in
- 5 subdivision (d), the court may, in its discretion, and after
- 6 considering the positions of the defense and prosecution, grant
- 7 pretrial diversion to a defendant pursuant to this section if the
- 8 defendant satisfies the eligibility requirements for pretrial diversion
- 9 set forth in subdivision (b) and the court determines that the
- 10 defendant is suitable for that diversion under the factors set forth
- 11 in subdivision (c). Diversion pursuant to this section is
- 12 discretionary in all cases.
- 13 (b) A defendant is eligible for pretrial diversion pursuant to this
- 14 section if both of the following criteria are met:

(1) The defendant has been diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, ~~conduct disorder that causes or threatens physical harm to people or animals,~~ *disorder* and pedophilia. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence.

(2) The defendant's mental disorder was a significant factor in the commission of the charged offense. *If the defendant has been diagnosed with a mental disorder within five years prior to the current offense, based on the evidence offered in paragraph (1), 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.* A court may consider any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense.

(c) For any defendant who satisfies the eligibility requirements in subdivision (b), the court shall consider whether the defendant is suitable for pretrial diversion. A defendant is suitable for pretrial diversion if all of the following criteria are met:

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

(2) The defendant consents to diversion and waives the defendant's right to a speedy trial, or a defendant has been found to be an appropriate candidate for diversion in lieu of commitment

1 pursuant to clause (iii) of subparagraph (B) of, or clause (v) of
2 subparagraph (C) of, paragraph (1) of subdivision (a) of Section
3 1370 or subparagraph (A) of paragraph (1) of subdivision (b) of
4 Section 1370.01 and, as a result of the defendant's mental
5 incompetence, cannot consent to diversion or give a knowing and
6 intelligent waiver of the defendant's right to a speedy trial.

7 (3) The defendant agrees to comply with treatment as a condition
8 of diversion, or the defendant has been found to be an appropriate
9 candidate for diversion in lieu of commitment for restoration of
10 competency treatment pursuant to clause (iii) of subparagraph (B)
11 of, or clause (v) of subparagraph (C) of, paragraph (1) of
12 subdivision (a) of Section 1370 or subparagraph (A) of paragraph
13 (1) of subdivision (b) of Section 1370.01 and, as a result of the
14 defendant's mental incompetence, cannot agree to comply with
15 treatment.

16 (4) The defendant will not pose a risk of danger to public safety
17 if treated in the community. The court may consider the opinions
18 of the district attorney, the defense, or a qualified mental health
19 expert, and may consider the defendant's treatment plan, the
20 defendant's prior history in a pretrial diversion program, the
21 defendant's prior response to rehabilitation or counseling programs
22 in the community, the degree of danger posed to the community
23 as evidenced by the defendant's prior violence and criminal history,
24 the current charged offense, the severity of injuries to victims,
25 records of the defendant's conduct while in custody in any state
26 or county facility while medication compliant, and any other factors
27 that the court deems appropriate. *not endanger public safety if*
28 *treated in the community. "Endanger public safety" for purposes*
29 *of this section means that the person's treatment in the community*
30 *would likely result in physical injury or other serious danger to*
31 *others. The court may consider any factors that the court deems*
32 *appropriate in making this determination, including, but not limited*
33 *to, the opinions of the district attorney, the defense, or a qualified*
34 *mental health expert, and may consider the defendant's treatment*
35 *plan, the defendant's violence and criminal history, and the current*
36 *charged offense. The court shall consider the victim's rights under*
37 *subdivision (b) or Section 28 of Article I of the California*
38 *Constitution.*

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

1 (1) ~~Murder, attempted murder, or~~ *Murder* or voluntary
2 manslaughter.

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

6 (3) Rape.

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

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

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

12 (7) Continuous sexual abuse of a child, in violation of Section
13 288.5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 prior criminal record that the defendant was not arrested or diverted
2 for the offense, except as specified in subdivision (j).

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

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

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

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

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

38 (l) The county agency administering the diversion, the
39 defendant's mental health treatment providers, the public guardian
40 or conservator, and the court shall, to the extent not prohibited by

1 federal law, have access to the defendant's medical and
2 psychological records, including progress reports, during the
3 defendant's time in diversion, as needed, for the purpose of
4 providing care and treatment and monitoring treatment for
5 diversion or conservatorship.

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

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

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

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

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

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

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