

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)
(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: attempted murder. 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 state the intent of the Legislature to add attempted murder to the list of specified offenses that would prohibit a defendant 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.

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 if treated in the community.

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-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:

15 (1) The defendant has been diagnosed with a mental disorder
16 as identified in the most recent edition of the Diagnostic and
17 Statistical Manual of Mental Disorders, including, but not limited
18 to, bipolar disorder, schizophrenia, schizoaffective disorder, or
19 post-traumatic stress disorder, but excluding antisocial personality
20 ~~disorder~~ *disorder, conduct disorder that causes or threatens*
21 *physical harm to people or animals, and pedophilia. Evidence of*

1 the defendant's mental disorder shall be provided by the defense
2 and shall include a diagnosis or treatment for a diagnosed mental
3 disorder within the last five years by a qualified mental health
4 expert. In opining that a defendant suffers from a qualifying
5 disorder, the qualified mental health expert may rely on an
6 examination of the defendant, the defendant's medical records,
7 arrest reports, or any other relevant evidence.

8 (2) The defendant's mental disorder was a significant factor in
9 the commission of the charged offense. ~~If the defendant has been~~
10 ~~diagnosed with a mental disorder, the court shall find that the~~
11 ~~defendant's mental disorder was a significant factor in the~~
12 ~~commission of the offense unless there is clear and convincing~~
13 ~~evidence that it was not a motivating factor, causal factor, or~~
14 ~~contributing factor to the defendant's involvement in the alleged~~
15 ~~offense.~~ A court may consider any relevant and credible evidence,
16 including, but not limited to, police reports, preliminary hearing
17 transcripts, witness statements, statements by the defendant's
18 mental health treatment provider, medical records, records or
19 reports by qualified medical experts, or evidence that the defendant
20 displayed symptoms consistent with the relevant mental disorder
21 at or near the time of the offense.

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

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

30 (2) The defendant consents to diversion and waives the
31 defendant's right to a speedy trial, or a defendant has been found
32 to be an appropriate candidate for diversion in lieu of commitment
33 pursuant to clause (iii) of subparagraph (B) of, or clause (v) of
34 subparagraph ~~(C)~~; (C) of, paragraph (1) of subdivision (a) of
35 Section ~~1370~~; 1370 or subparagraph (A) of paragraph (1) of
36 subdivision (b) of Section 1370.01 and, as a result of the
37 defendant's mental incompetence, cannot consent to diversion or
38 give a knowing and intelligent waiver of the defendant's right to
39 a speedy trial.

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

(4) The defendant will not pose ~~an unreasonable~~ *a* risk of danger to public ~~safety, as defined in Section 1170.18,~~ *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 prior history in a pretrial diversion program, the defendant's prior response to rehabilitation or counseling programs in the community, the degree of danger posed to the community as evidenced by the defendant's prior violence and criminal history,* the current charged offense, *the severity of injuries to victims, records of the defendant's conduct while in custody in any state or county facility while medication compliant,* and any other factors that the court deems appropriate. *The court shall consider the victim's rights under subdivision (b) or Section 28 of Article I of the California Constitution.*

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

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

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

(3) Rape.

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

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

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

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

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

1 (e) At any stage of the proceedings, the court may require the
2 defendant to make a prima facie showing that the defendant will
3 meet the minimum requirements of eligibility for diversion and
4 that the defendant and the offense are suitable for diversion. The
5 hearing on the prima facie showing shall be informal and may
6 proceed on offers of proof, reliable hearsay, and argument of
7 counsel. If a prima facie showing is not made, the court may
8 summarily deny the request for diversion or grant any other relief
9 as may be deemed appropriate.

10 (f) As used in this chapter, the following terms have the
11 following meanings:

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

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

20 (ii) The defendant may be referred to a program of mental health
21 treatment utilizing existing inpatient or outpatient mental health
22 resources. Before approving a proposed treatment program, the
23 court shall consider the request of the defense, the request of the
24 prosecution, the needs of the defendant, and the interests of the
25 community. The treatment may be procured using private or public
26 funds, and a referral may be made to a county mental health
27 agency, existing collaborative courts, or assisted outpatient
28 treatment only if that entity has agreed to accept responsibility for
29 the treatment of the defendant, and mental health services are
30 provided only to the extent that resources are available and the
31 defendant is eligible for those services.

32 (iii) If the court refers the defendant to a county mental health
33 agency pursuant to this section and the agency determines that it
34 is unable to provide services to the defendant, the court shall accept
35 a written declaration to that effect from the agency in lieu of
36 requiring live testimony. That declaration shall serve only to
37 establish that the program is unable to provide services to the
38 defendant at that time and does not constitute evidence that the
39 defendant is unqualified or unsuitable for diversion under this
40 section.

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

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

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

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

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

18 (2) "Qualified mental health expert" includes, but is not limited
19 to, a psychiatrist, psychologist, a person described in Section
20 5751.2 of the Welfare and Institutions Code, or a person whose
21 knowledge, skill, experience, training, or education qualifies them
22 as an expert.

23 (g) If any of the following circumstances exists, the court shall,
24 after notice to the defendant, defense counsel, and the prosecution,
25 hold a hearing to determine whether the criminal proceedings
26 should be reinstated, whether the treatment should be modified,
27 or whether the defendant should be conserved and referred to the
28 conservatorship investigator of the county of commitment to initiate
29 conservatorship proceedings for the defendant pursuant to Chapter
30 3 (commencing with Section 5350) of Part 1 of Division 5 of the
31 Welfare and Institutions Code:

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

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

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

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

4 (A) The defendant is performing unsatisfactorily in the assigned
5 program.

6 (B) The defendant is gravely disabled, as defined in
7 subparagraph (B) of paragraph (1) of subdivision (h) of Section
8 5008 of the Welfare and Institutions Code. A defendant shall only
9 be conserved and referred to the conservatorship investigator
10 pursuant to this finding.

11 (h) If the defendant has performed satisfactorily in diversion,
12 at the end of the period of diversion, the court shall dismiss the
13 defendant's criminal charges that were the subject of the criminal
14 proceedings at the time of the initial diversion. A court may
15 conclude that the defendant has performed satisfactorily if the
16 defendant has substantially complied with the requirements of
17 diversion, has avoided significant new violations of law unrelated
18 to the defendant's mental health condition, and has a plan in place
19 for long-term mental health care. If the court dismisses the charges,
20 the clerk of the court shall file a record with the Department of
21 Justice indicating the disposition of the case diverted pursuant to
22 this section. Upon successful completion of diversion, if the court
23 dismisses the charges, the arrest upon which the diversion was
24 based shall be deemed never to have occurred, and the court shall
25 order access to the record of the arrest restricted in accordance
26 with Section 1001.9, except as specified in subdivisions (j) and
27 (k). The defendant who successfully completes diversion may
28 indicate in response to any question concerning the defendant's
29 prior criminal record that the defendant was not arrested or diverted
30 for the offense, except as specified in subdivision (j).

31 (i) A record pertaining to an arrest resulting in successful
32 completion of diversion, or any record generated as a result of the
33 defendant's application for or participation in diversion, shall not,
34 without the defendant's consent, be used in any way that could
35 result in the denial of any employment, benefit, license, or
36 certificate.

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

39 (1) The arrest upon which the diversion was based may be
40 disclosed by the Department of Justice to any peace officer

1 application request and that, notwithstanding subdivision (i), this
2 section does not relieve the defendant of the obligation to disclose
3 the arrest in response to any direct question contained in any
4 questionnaire or application for a position as a peace officer, as
5 defined in Section 830.

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

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

26 (l) The county agency administering the diversion, the
27 defendant's mental health treatment providers, the public guardian
28 or conservator, and the court shall, to the extent not prohibited by
29 federal law, have access to the defendant's medical and
30 psychological records, including progress reports, during the
31 defendant's time in diversion, as needed, for the purpose of
32 providing care and treatment and monitoring treatment for
33 diversion or conservatorship.

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

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

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

4 (B) The prohibition is necessary to prevent personal injury to
5 the defendant or any other person because less restrictive
6 alternatives either have been tried and found to be ineffective or
7 are inadequate or inappropriate for the circumstances of the
8 defendant.

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

12 (B) If the court finds that the prosecution has met the burden,
13 the court shall order that the person is prohibited, and shall inform
14 the person that they are prohibited, from owning or controlling a
15 firearm until they successfully complete diversion because they
16 are a danger to themselves or others.

17 (4) An order imposed pursuant to this subdivision shall be in
18 effect until the defendant has successfully completed diversion or
19 until their firearm rights are restored pursuant to paragraph (4) of
20 subdivision (g) of Section 8103 of the Welfare and Institutions
21 Code.

22 ~~SECTION 1. It is the intent of the Legislature to draft~~
23 ~~legislation to add attempted murder, as defined, to the list of crimes~~
24 ~~that would make a defendant ineligible for mental health diversion.~~