

Date of Hearing: April 23, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2576 (Stephanie Nguyen) – As Introduced February 14, 2024

SUMMARY: Adds attempted murder to the list of crimes for which a defendant may not be placed in mental health diversion.

EXISTING LAW:

- 1) Provides that murder is the unlawful killing of a human being with malice aforethought. (Pen Code, § 187, subd. (a).)
- 2) Provides that malice may be either express or implied. (Pen Code, § 188, subd. (a).)
- 3) Provides that malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature. (Pen Code, § 188, subd. (a)(1).)
- 4) Provides that malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (Pen Code, § 187, subd. (a)(2).)
- 5) Provides that all murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or specified sex offenses, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. (Pen Code, § 189, subd. (a).)
- 6) Provides that all other kinds of murders are of the second degree. (Pen Code, § 189, subd. (b).)
- 7) Provides that the attempt to commit a crime occurs when a person attempts, but fails, or is prevented or intercepted in its perpetration. (Pen Code, § 664.)
- 8) Provides that, if the crime attempted is willful, deliberate, and premeditated murder, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. (Pen Code, § 664, subd. (a).)
- 9) Provides that all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission,

and all persons counseling, advising, or encouraging children under the age of fourteen years, or persons who are mentally incapacitated, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed. (Pen Code, § 31.)

10) Provides that the purpose of mental health diversion is all of the following:

- a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety;
- b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings;
- c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (Pen Code, § 1001.35, subd. (a)-(c).)

11) Gives the court the discretion, after considering the positions of the defense and prosecution, to grant pretrial diversion to a defendant if the defendant satisfies the eligibility requirements for pretrial diversion and the court determines that the defendant is suitable for that diversion, unless the defendant has committed a prescribed crime. (Pen Code, § 1001.36, subd. (a)-(c).)

12) A defendant is eligible for pretrial diversion if both of the following criteria are met:

- a) 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 and pedophilia; and,
- b) The defendant's mental disorder was a significant factor in the commission of the charged offense. (Pen. Code, § 1001.36, subd. (b)(1) & (2).)

13) Requires the defense to provide evidence of the defendant's mental disorder including 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. (Pen. Code, § 1001.36, subd. (b)(1).)

14) Requires the court, if the defendant has been diagnosed with a mental disorder, 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 factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. (Pen. Code, § 1001.36, subd. (b)(2).)

15) Authorizes a court, when determining whether the defendant's mental disorder was a significant factor in the commission of the offense, to 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. (Pen. Code, § 1001.36, subd. (b)(2).)

- 16) Requires the court, for any defendant who satisfies the eligibility requirements, to consider whether the defendant is suitable for pretrial diversion. (Pen. Code, § 1001.36, subd. (c).)
- 17) Provides that a defendant is suitable for pretrial diversion if all of the following criteria are met:
 - a) 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.
 - b) The defendant consents to diversion and waives the defendant's right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment and, as a result of the defendant's mental incompetence, cannot consent to diversion or give a knowing and intelligent waiver of the defendant's right to a speedy trial.
 - c) The defendant agrees to comply with treatment as a condition of diversion, unless the defendant has been found to be an appropriate candidate for diversion in lieu of commitment for restoration of competency treatment and, as a result of the defendant's mental incompetence, cannot agree to comply with treatment.
 - d) The defendant will not pose an unreasonable risk of danger to public 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 violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subd. (c)(1)-(4).)
- 18) Prohibits the placement of a defendant into a mental health diversion program for the following current charged offenses:
 - a) Murder or voluntary manslaughter;
 - b) An offense for which a person, if convicted, would be required to register as a sex offender, except as specified;
 - c) Rape;
 - d) Lewd or lascivious act on a child under 14 years of age;
 - e) Assault with intent to commit rape, sodomy, or oral copulation;
 - f) Commission of rape or sexual penetration in concert with another person;

- g) Continuous sexual abuse of a child;
 - h) A person who uses a weapon of mass destruction, as specified. (Pen. Code, § 1001.36, subd. (d).)
- 19) Defines “unreasonable risk of danger to public safety” as an unreasonable risk that the petitioner will commit a new violent felony, as specified. (Pen. Code, §§ 1170.18, subd. (c) & 667, subd. (e)(2)(C)(iv).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, “Attempted murder is a serious and violent offense that poses a significant threat to public safety. Currently, a loophole in state law allows individuals who attempt, but fail to kill someone, to be granted diversion for mental health treatment. This can result in their release into the community with minimal court supervision, and expungement of their criminal record upon completion of the program.

“AB 2576 addresses this issue by including attempted murder on the list of crimes ineligible for mental health diversion. This prioritizes public safety and ensures that individuals who try to take another person's life are held accountable for their actions. AB 2576 aims to prevent anyone from escaping the consequences of attempted murder and to uphold paramount safety of our community.”

- 2) **Mental Health Diversion:** Existing law permits pretrial diversion programs. (Pen. Code, §1001.) Pre-trial diversion suspends the criminal proceedings without requiring the defendant to enter a plea. (Pen. Code, §§ 1001.1, 1001.3.) 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. (Pen. Code, §§ 1001.7, 1001.9.)

A defendant must be both eligible and suitable for mental health diversion. A defendant is eligible for pretrial mental health diversion if they have been diagnosed with a mental disorder identified in the most recent edition of the DSM, including but not limited to bipolar disorder, schizophrenia, schizoaffective disorder, or PTSD, but excluding antisocial personality disorder and pedophilia. (Pen. Code, § 1001.36, subd. (b)(1).) The defendant's mental disorder must also have been a significant factor in the commission of the charged offense; and the court must 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. (Pen. Code, § 1001.36, subd. (b)(2).)

If eligible, the court must then consider whether the defendant is suitable for diversion. The defendant is suitable for diversion if, in the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating criminal

behavior would respond to treatment; the defendant consents to diversion, the defendant agrees to comply with treatment, and the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (Pen. Code, § 1001.36, subd. (c).) “[T]he risk of danger is narrowly confined to the likelihood the defendant will commit a limited subset of violent felonies,” specifically super strike offenses. (*People v. Moine* (2021) 62 Cal.App.5th 440, 450; see Pen. Code, § 667, subd. (e)(2)(C)(iv).) When evaluating whether a defendant poses an unreasonable risk of danger to public safety, the court may consider the opinion of the prosecutor, defense, the treatment plan, the defendant’s violence and criminal history, the opinions of qualified mental health professionals, and *any other factors that the court deems appropriate*. (Pen. Code, § 1001.36, subd. (c).) (emphasis added)

Importantly, even if eligible and suitable, the court may still in its discretion deny the defendant mental health diversion. (Pen. Code, § 1001.36, subd. (a); *People v. Gerson* (2022) 80 Cal.App.5th 1067, 1079, *People v. Qualkinbush* (2022) 79 Cal.App.5th 879, 888.) According to a recent decision,

Finally, even where defendants make a prima facie showing that they meet all the express statutory requirements, the court may still exercise its discretion to deny division. But this “residual” discretion must be exercised ““consistent with the principles and purpose of the governing law.”” That purpose includes a strong legislative preference for treatment of mental health disorders because of the benefits of such treatment to both the offending individual and the community. Where the court chooses to exercise this residual discretion to deny diversion, its statement of reasons should reflect consideration of the underlying purpose of the statute and explain why diversion would not meet those goals.

(*Sarmiento v. Superior Court* (2024) 98 Cal.App.5th 882, 892-893.)

A defendant may not be granted mental health diversion if charged with murder, rape, other specified sex crimes, or any offenses requiring sex offender registration. (Pen. Code, § 1001.36, subd. (d).)

In addition, the mental health diversion statute provides:

- The court must be satisfied that the recommended mental health treatment will meet the needs of the specialized defendant. (Pen. Code, § 1001.36, subd. (f).)
- The provider of the mental health treatment must provide regular reports to the court. (Pen. Code, § 1001.36, subd. (f).)
- The court can reinstate criminal proceedings if the defendant is engaged in criminal conduct during diversion. (Pen. Code, § 1001.36, subd. (g).)
- The court can reinstate criminal proceedings if the defendant is performing unsatisfactorily during diversion. (Pen. Code, § 1001.36, subd. (g).)

The mental health diversion statute comports with other state efforts to keep persons with serious mental illnesses, even those who have attempted acts of violence against others, out of carceral settings and in treatment. For example, in 2002, the Legislature passed Laura’s Law, which sought to authorize assisted outpatient treatment to persons with severe mental

illness, even ones who had made threats or attempts of serious violence. (See Pen Code, §§ 422 [criminal threats] and 664 [attempt to commit a crime].) Indeed, the statute expressly provides that a person is eligible for services if, among other things, “the person’s mental illness has resulted in one or more acts of serious and violent behavior toward...another, or threats, or attempts to cause serious physical harm...to another within the last 48 hours.” (Welf. & Inst. Code, § 5346, subd. (a)(4)(B).) Also similar to mental health diversion, a person must have had a “clinical determination that, in view of the person’s treatment history and current behavior...[t]he person is in need of assisted outpatient treatment in order to prevent a relapse or deterioration that would be likely to result in grave disability or serious harm...to others.” (Welf. & Inst. Code, § 5346, subd. (a)(3)(B).)

- 3) **Attempted Murder:** Murder is the unlawful killing of a human being with malice aforethought. (Pen Code, § 187, subd. (a).) Malice may be either express or implied. (Pen Code, § 188, subd. (a).) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of another. (Pen Code, § 188, subd. (a)(1).) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. (Pen Code, § 187, subd. (a)(2).)

An attempted murder is where a person attempts to kill another person with malice, but fails, or is prevented or intercepted in its perpetration from carrying out the killing. (Pen Code, § 664.)

For an attempt, the overt act must go beyond mere preparation and show that the killer is putting his or her plan into action; it need not be the last proximate or ultimate step toward commission of the crime or crimes nor need it satisfy any element of the crime. However, as we have explained, “[b]etween preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.” “[I]t is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.” ...

Although a definitive test has proved elusive, we have long recognized that “[w]henver the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.”

(*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8 [internal citations omitted] [discussing slight-acts rule]; see e.g., *People v. Morales* (1992) 5 Cal.App.4th 917, 926 [attempted murder conviction affirmed where defendant threatened to kill somebody, loaded a gun, and was found outside their house with the gun].) For example, attempting to hire somebody to kill another person is sufficient to sustain both a solicitation of murder charge and an attempted murder charge. (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 58.)

A person may be charged with attempted murder even if they are not the person made the actual attempt. Existing law provides that a person who aids and abets an attempted murder, or, not being present, has advised and encouraged its commission, is guilty of attempted murder. (Pen Code, § 31.) The California Supreme Court has observed:

Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing... [T]o be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement [by words or gestures] with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing—which means that the person guilty of attempted murder as an aider and abettor must intend to kill.

(*People v. Lee* (2003) 31 Cal.4th 613, 623-624 [internal citations omitted])

The question raised by this bill is whether courts should retain the discretion to grant mental health diversion to persons **charged** with attempted murder in limited circumstances. One might also wonder whether adding a new crime to the list of crimes for which a person is prohibited from receiving mental health diversion is a first step towards drastic limitations on the availability of mental health diversion.

- 3) **Prevalence of Mentally Ill Offenders in Jails:** According to the Los Angeles Sheriff's Department (LASD), the overall jail population decreased in 2015, while the mentally ill population was on the rise. Between 2009 and 2016, LASD reports seeing a 60% increase in its mentally ill population. In early September 2016, a quarter of L.A. County's inmates received some form of mental health treatment. Because many of the mentally ill inmates need to be housed alone, it creates a bed shortage in the general population.
(<http://www.cnn.com/2016/09/22/us/lisa-ling-this-is-life-la-county-jail-by-the-numbers/index.html>)

More recent statewide data suggests the problem is growing:

On the last day of any given month in 2009 there were roughly 80,000 people in jail custody throughout California and 15,500 people with an active mental health case. On the last day of any month in 2019 there were approximately 72,000 people in jail custody and 22,000 people with an open mental health case. This represents a 42 percent increase in the number of active mental health cases. In addition, the proportion of incarcerated people in California jails with an active mental health case rose by approximately 63 percent, rising from 19 percent in 2009 to 31 percent in 2019

(The Prevalence of Mental Illness in California Jails is Rising: An Analysis of Mental Health Cases & Psychotropic Medication Prescriptions, 2009-2019, California Health Policy Strategists (Feb. 2020) p. 1 < https://www.cdcr.ca.gov/ccjbh/wp-content/uploads/sites/172/2020/02/Jail_MentalHealth_JPSReport_02-03-2020.pdf> [last visited Apr. 16, 2024].)

The situation has not improved. According to the PPIC: “[T]he percentage of inmates with mental health needs has continued to climb, from around 20% in January 2010 to a staggering 53% in June 2023.” (Lofstrom, et al., *County Jails House Fewer Inmates, but Over Half Face Mental Health Issues*, PPIC (Oct. 25, 2023) < [County Jails House Fewer Inmates, but Over Half Face Mental Health Issues - Public Policy Institute of California \(ppic.org\)](https://ppic.org/county-jails-house-fewer-inmates-but-over-half-face-mental-health-issues)> [last viewed Apr. 16, 2024].)

Housing mentally ill inmates in a custodial setting creates other difficulties, in addition to bed shortages. Jails are often not set up to provide effective mental health treatment and are

not the best treatment option for the inmate. Mentally ill inmates are expensive to house. Mentally ill inmates cost more than other prisoners for a variety of reasons, including increased staffing needs. For example, “In Los Angeles, it costs approximately \$180 per day to provide community-based housing and clinical care for people with serious mental health needs—versus \$445-650 per day to hold them in the city’s jails.” (Bryant, *The United States Criminalizes People Who Need Health Care and Housing*, Vera Institute of Justice <https://www.vera.org/news/the-united-states-criminalizes-people-who-need-health-care-and-housing> [last visited Apr. 16, 2024].)

4) **Recommendations from Judicial Council Related to Diversion for Mentally Ill**

Defendants: The Judicial Council convened a task force to examine the issues related to mentally ill defendants within the court system. The task force published their final report in December of 2015. The report recommended the development of diversion programs for mentally ill defendants. The report stated that resources must be dedicated to identify individuals with mental illness who are involved or who are likely to become involved with the criminal justice system. The report went on to say that interventions and diversion possibilities must be developed and utilized at the earliest possible opportunity. (*Mental Health Issues Implementation Task Force: Final Report*, Judicial Council (Dec. 2015) p. 5 <<https://www.courts.ca.gov/documents/MHIITF-Final-Report.pdf>> [last visited Apr. 16, 2024].)

5) **Argument in Support:** According to the *Association for Los Angeles Deputy Sheriffs*, “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 prohibits defendants charged with specified offenses, including murder, from being placed in this diversion program.

“AB 2576 would add *attempted murder* to the list of charged offenses that prohibit a defendant from being placed in this diversion program. ALADS agrees that individuals who *attempt* to commit murder should be evaluated for diversion programs through the same lens as those who commit murder.”

6) **Argument in Opposition:** According to *Motivating Individual Leadership for Public Advancement* (MILPA), “The mental health diversion law allows a court to grant pretrial diversion if a defendant has been diagnosed with a mental disorder and the defendant’s mental disorder was a significant factor in the commission of the charged offense. The law does not mandate that a court grant diversion, it merely provides the court the ability to exercise its discretion, when appropriate, to divert a defendant for mental health treatment. In making their evaluation, courts consider the opinions of qualified mental health experts to determine if the defendant’s symptoms of the mental disorder causing the criminal behavior would respond to mental health treatment. Mental health diversion is never appropriate if the defendant will pose a risk of danger to the public safety.

“This bill would categorically exclude the offense of attempted murder from consideration for the mental health diversion program. That change would constitute an error from the standpoint of good policy. It is *unlikely* that a defendant charged with attempted murder would make an appropriate candidate for mental health diversion. However, the fact that is unlikely does not mean that there will not be some cases that present circumstances for which

mental health diversion will be an appropriate and preferable option to proceeding to a criminal conviction. Under current law, courts would only exercise their discretion to grant mental health diversion to a defendant that meets all the qualifying factors, would benefit from the provided mental health treatment, and does not present a risk to public safety.

“It is also not appropriate to add attempted murder to the list of offenses which currently exclude a defendant from consideration for mental health diversion, because the nature of an attempted murder charge reflects circumstances that are much easier to charge than other charges on the list which involve completed crimes. This bill creates the danger (and incentive) for a district attorney to add a charge of attempted murder to an assault case to preclude a court from considering the defendant for mental health diversion.”

7) Prior Legislation:

- a) AB 455 (Quirk-Silva), would have prohibited individuals in pretrial mental health diversion for a felony or specified misdemeanor charge from owning a firearm until they successfully complete diversion. AB 455 is pending in Assembly Appropriations Committee.
- b) AB 1412 (Hart), Chapter 687, Statutes of 2023, would remove borderline personality disorder (BPD) from the mental disorders excluding a defendant from eligibility for pretrial mental health diversion.
- c) SB 1223 (Becker), Chapter 735, Statutes of 2022, made changes to mental health diversion eligibility and suitability provisions.
- d) AB 1810 (Budget Committee) Chapter 34, Statutes of 2018, created mental health diversion.
- e) SB 142 (Beall), would have established the State Community Mental Health Performance Incentives Fund, which would provide monetary incentives for counties to avoid sending mentally ill offenders to prison. SB 142 was held in suspense in the Assembly Appropriations Committee.
- f) SB 215 (Beall), Chapter 1005, Statutes of 2018, made certain offenses ineligible for mental health diversion.

REGISTERED SUPPORT / OPPOSITION:

Support

Association for Los Angeles Deputy Sheriffs
California Association of Highway Patrolmen
California Police Chiefs Association
Crime Victims United of California
Los Angeles County Professional Peace Officers Association

Opposition

ACLU California Action
California Alliance for Youth and Community Justice
California Coalition for Women Prisoners
California for Safety and Justice
California Public Defenders Association
Californians United for A Responsible Budget
Children's Defense Fund - CA
Communities United for Restorative Youth Justice (CURYJ)
Felony Murder Elimination Project
Friends Committee on Legislation of California
Initiate Justice
LA Defensa
Milpa Collective
San Francisco Public Defender
Silicon Valley De-bug
Smart Justice California, a Project of Tides Advocacy
Team Justice
Uncommon Law
Vera Institute of Justice
Young Women's Freedom Center

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