

THIRD READING

Bill No: AB 46
Author: Nguyen (D), et al.
Amended: 2/13/26 in Senate
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 4-0, 7/8/25

AYES: Arreguín, Seyarto, Caballero, Wiener

NO VOTE RECORDED: Gonzalez, Pérez

SENATE PUBLIC SAFETY COMMITTEE: 5-0, 3/17/26

AYES: Arreguín, Seyarto, Caballero, Reyes, Wiener

NO VOTE RECORDED: Pérez

SENATE APPROPRIATIONS COMMITTEE: 7-0, 5/14/26

AYES: Cervantes, Seyarto, Cabaldon, Dahle, Grayson, Richardson, Wahab

ASSEMBLY FLOOR: 56-7, 5/19/25 - See last page for vote

SUBJECT: Diversion

SOURCE: California District Attorney's Association
El Dorado County District Attorney's Office
Marin County District Attorney's Office
Orange County District Attorney's Office
Placer County District Attorney's Office
Riverside County District Attorney's Office
Sacramento County District Attorney's Office
Santa Cruz County District Attorney's Office
San Diego County District Attorney's Office
San Joaquin County District Attorney's Office
Yolo County District Attorney's Office

DIGEST: This bill makes various changes to the mental health diversion law, including changing the public safety standard for finding a particular defendant suitable for diversion.

ANALYSIS:

Existing law:

- 1) Enumerates a number of rights to victims of crime, including the right to have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant, and restitution, among others. (California Constitution, article I, § 28.)
- 2) Allows a court, in its discretion, and after considering the positions of the defense and prosecution, to grant pretrial mental health diversion to a defendant charged with a misdemeanor or a felony if the defendant specified eligibility and suitability requirements. (Penal (Pen.) Code, § 1001.36, subd. (a).)
- 3) Provides that a defendant is eligible for mental health diversion if both of the following criteria are met:
 - a) The defendant suffers from 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. Requires the defense to produce evidence of the defendant's mental disorder which must include a diagnosis or treatment by a qualified mental health expert within the last five years.
 - b) The defendant's mental disorder was a significant factor in the commission of the charged offense, as provided. (Pen. Code, § 1001.36, subd. (b).)
- 4) Requires the court, for any defendant who meets the eligibility criteria, to consider whether the defendant is suitable for mental health diversion. (Pen. Code, § 1001.36, subd. (c).)
- 5) Provides that a defendant is suitable for mental health 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 their right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment due to their mental incompetence and cannot consent to diversion or give a knowing and intelligent waiver of their right to a speedy trial;
 - c) 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 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. In making this determination, 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, violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subs. (c)(1)-(4).)
- 6) Contains a presumption that the defendant's diagnosed 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).)
- 7) Excludes defendants from mental health diversion eligibility if they are charged with murder, voluntary manslaughter, an offense requiring sex offender registration (except for indecent exposure), or offenses involving weapons of mass destruction. (Pen. Code, § 1001.36, subd. (d).)
- 8) States that at any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. Authorizes the court to summarily deny the request for diversion or grant any other relief as may be deemed appropriate if a prima facie showing is not made. (Pen. Code, § 1001.36, subd. (e).)
- 9) Defines "pretrial diversion" for purposes of mental health diversion as the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment, subject

to the following conditions: the court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant; the provider of the mental health treatment program in which the defendant has been placed must provide regular reports to the court, the defense, and the prosecutor on the defendant's progress in treatment; and, a defendant may be diverted no longer than two years if it is a felony, and one year if it is a misdemeanor. (Pen. Code, § 1001.36, subd. (f).)

- 10) Requires the court to hold a hearing, after proper notice, to determine whether the criminal proceedings should be reinstated, the treatment should be modified, or the defendant should be conserved, if any of the following circumstances exist:
 - a) The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence;
 - b) The defendant is charged with an additional felony allegedly committed during the pretrial diversion;
 - c) The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion; or,
 - d) A qualified mental health expert opines that: the defendant is performing unsatisfactorily in the assigned program; or the defendant is gravely disabled, as defined. (Pen. Code, § 1001.36, subd. (g).)

- 11) Requires the court to dismiss the criminal charges if the defendant has performed satisfactorily in diversion. Provides that a court may conclude that the defendant has performed satisfactorily if the defendant has substantially complied with the requirements of diversion, has avoided significant new violations of law unrelated to the defendant's mental health condition, and has a plan in place for long-term mental health care. (Pen. Code, § 1001.36, subd. (h).)

- 12) Provides that upon successful completion of diversion, if the court dismisses the charges, the arrest upon which the diversion was based shall be deemed never to have occurred. (Pen. Code, § 1001.36, subds. (h) & (j).)

This bill:

- 1) Provides that the court has discretion to grant or deny diversion in all cases when exercised consistently with the eligibility and suitability provisions of the statute.
- 2) Provides that the defendant must have been diagnosed with a mental disorder within five years prior to the offense for the presumption that the mental disorder was a significant factor in the commission of the offense to apply.
- 3) Requires that the qualified mental health expert opine that the proposed mental health diversion plan is clinically appropriate to address the symptoms of the defendant's mental disorder that caused, contributed to, or motivated the charged offense.
- 4) Changes the public safety standard when determining a defendant's suitability for mental health diversion to require that the defendant will not pose a substantial and undue risk to the physical safety of another person, if treated in the community.
- 5) Requires the court to consider the victim's rights, as specified.
- 6) Requires a court to orally state the reasons for a denial of mental health diversion on the record.
- 7) Requires that the court is satisfied that the recommended mental health treatment is consistent with the underlying purpose of mental health diversion.

Background

In 2018, the Legislature enacted Penal Code sections 1001.35 and 1001.36 which created a pretrial diversion program for certain defendants with mental health disorders. (Com. on Budget, Ch. 34, Stats. of 2018.) Pretrial diversion “allows for the suspension of criminal proceedings and potential dismissal of charges upon successful completion of mental health treatment.” (*Sarmiento v. Superior Court* (2024) 98 Cal.App.5th 882, 890 (*Sarmiento*)). The statute expressly states the purpose of this legislation was to “[i]ncrease[] diversion of [such] individuals” based on concerns that “incarceration only serves to aggravate [their] preexisting conditions and does little to deter future lawlessness.” (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended Jan. 3,

2018, p. 4.) Certain offenses are ineligible for pretrial diversion, including murder, rape, and registerable sex offenses, among others. (Pen. Code, § 1001.36, subd. (d).)

Under current law, Penal Code section 1001.36, subdivision (b), provides that a defendant is eligible for mental health diversion if both of the following criteria are met: the defendant suffers from a qualifying mental disorder, as evidenced by a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert; and, the disorder played a significant role in the commission of the charged offense. The second prong is presumptively satisfied unless there is clear and convincing evidence that the disorder was “not a motivating factor, causal factor, or contributing factor to the defendant’s involvement in the alleged offense.” (Pen. Code, § 1001.36, subd. (d).)

Once eligibility is established, a trial court must consider whether the defendant is suitable for pretrial diversion. (Pen. Code, § 1001.36, subd. (c).) A defendant is suitable if: (1) in the opinion of a qualified mental health expert, the defendant’s mental health disorder would respond to treatment; (2) the defendant consents to diversion and agrees to waive their speedy trial rights; (3) the defendant agrees to comply with treatment requirements; and (4) the defendant will not pose an unreasonable risk of danger to public safety as defined in Penal Code section 1170.18 (i.e., an unreasonable risk of committing certain violent felonies known as super strikes), if treated in the community. (Pen. Code, § 1001.36, subd. (c)(1)-(4).)

The maximum period of diversion is two years if the defendant is charged with a felony, and one year if the defendant is charged with a misdemeanor. (Pen. Code, § 1001.36, subd. (f).) If the defendant performs satisfactorily in diversion, the trial court must dismiss the criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. (Pen. Code, § 1001.36, subd. (h).)

Existing law gives the trial court discretion to grant diversion if the minimum standards are met, and, correspondingly, to refuse to grant diversion even though the defendant meets all of the requirements. (J. Richard Couzens, *Mental Health Diversion Under Penal Code Sections 1001.35 and 1001.36* (May 2024), p. 14 <<https://capcentral.org/wp-content/uploads/2023/12/Judge-Couzens-Mental-Health-Diversion-MAY-2024.pdf> ; see also *Vaughn v. Superior Court* (2024) 105 Cal.App.5th 124, 134.) But this “residual” discretion must be exercised “consistent with the principles and purpose of the [mental health diversion].” (*People v. Qualkinbush* (2022) 79 Cal.App.5th 879, 891, quoting *Wade v. Superior*

Court (2019) 33 Cal.App.5th 694, 710; see also *Sarmiento, supra*, 98 Cal.App.5th at p. 892.)

A court abuses its discretion when it makes an arbitrary or capricious decision by applying the wrong legal standard. (*Vaughn, supra*, 105 Cal.App.5th at p. 135.) For example, in *People v. Whitmill* (2022) 86 Cal.App.5th 1138, 1151, the Court of Appeal reversed the denial of mental health diversion because substantial evidence did not support finding that the defendant posed an unreasonable risk to public safety. The Court of Appeal reasoned it was “unclear” how the trial court determined that the expert opinion did not find a low risk for future dangerousness when the doctor expressly concluded that the appellant fit the mental health eligibility criteria. (*Ibid.*) In *People v. Pacheco* (2022) 75 Cal.App.5th 207, on the other hand, the Court of Appeal held the trial court properly denied mental health diversion to a defendant who started a brush fire. The court concluded the defendant, who suffered from schizophrenia and was addicted to methamphetamine, posed an unreasonable risk of danger to public safety. A clinical psychologist opined that if the defendant returned to using methamphetamine, he would become unstable and psychotic and be likely to reoffend, and the record supported that he would not refrain from using methamphetamine if treated in the community.

This bill makes several changes to the mental health diversion statute. First, this bill states that the court has discretion to grant or deny diversion in all cases when exercised consistently with the eligibility and suitability provisions of the statute. Second, this bill provides that the defendant must have been diagnosed with a mental disorder within five years of the offense for the presumption that the mental disorder was a significant factor in the commission of the offense to apply. While a defendant would still be eligible for mental health diversion if the diagnosis was not within five years of the current offense, the presumption that the mental disorder was a significant factor in commission of the offense would only apply if that diagnosis was in the five years preceding the offense.

This bill additionally amends the standard of risk to public safety for purposes of determining a defendant’s suitability for diversion. Under existing law, the standard is “unreasonable risk of public safety” which currently requires a showing that there is a likelihood that if the defendant is granted diversion, the defendant will commit one of the enumerated “super strike” violent felonies. This bill instead provides that a defendant could be found unsuitable for diversion if that person’s treatment in the community would “pose a substantial and undue risk to the physical safety of another person.” By providing a redefined risk to public safety

standard, the bill gives courts more discretion to determine unsuitability of a person who otherwise meets the statutory eligibility requirements.

This bill also makes changes to another suitability factor by requiring that the qualified mental health expert opine that the proposed mental health diversion plan is clinically appropriate to address the symptoms of the defendant's mental disorder that caused, contributed to, or motivated the charged offense. This bill refines a third suitability factor by requiring the defendant to agree to comply with the *proposed* treatment plan as a condition of diversion. This bill additionally requires that the court is satisfied that the recommended mental health treatment is consistent with the underlying purpose of mental health diversion.

Finally, this bill requires a court to orally state the reasons for a denial of mental health diversion on the record, and requires the court to consider the victim's rights under Marsy's Law.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee:

This bill could result in additional cost pressures (Trial Court Trust Fund, General Fund) to the courts due to additional court time needed to determine eligibility for diversion. In addition, to the extent that it decreases the number of defendants deemed eligible and suitable for mental health diversion, defendants would go through typical criminal court proceedings instead, which are generally longer and more resource-intensive for courts than diversion proceedings. While the courts are not funded on the basis of workload, increased pressure on the Trial Court Trust Fund may create a demand for increased funding for courts from the General Fund. See Staff Comments.

This bill could result in additional incarceration costs (local funds, General Fund) to counties and the California Department of Corrections and Rehabilitation to the extent that it decreases the number of defendants deemed eligible and suitable for mental health diversion. The actual costs will depend on the number of defendants excluded from diversion who would instead be convicted and incarcerated as a result of this bill. The annual cost to incarcerate one person in county jail varies by county but can range from \$70,000 to \$90,000 per year, and the estimated 2026-27 average annual cost to incarcerate one person in state prison is \$138,000 (General

Fund) based on an average daily population of 87,760 inmates. County incarceration costs are not subject to reimbursement by the state. However, overcrowding in county jails creates cost pressure on the General Fund because the state has historically granted new funding to counties to offset overcrowding resulting from public safety realignment.

SUPPORT: (Verified 5/14/26)

California District Attorney's Association (co-source)
El Dorado County District Attorney's Office (co-source)
Marin County District Attorney's Office (co-source)
Orange County District Attorney's Office (co-source)
Placer County District Attorney's Office (co-source)
Riverside County District Attorney's Office (co-source)
Sacramento County District Attorney's Office (co-source)
Santa Cruz County District Attorney's Office (co-source)
San Diego County District Attorney's Office (co-source)
San Joaquin County District Attorney's Office (co-source)
Yolo County District Attorney's Office (co-source)
Arcadia Police Officers' Association
Brea Police Association
Burbank Police Officers' Association
California Association of School Police Chiefs
California Coalition of School Safety Professionals
California Narcotic Officers' Association
California Police Chiefs Association
California Reserve Peace Officers Association
California State Sheriffs' Association
Chief Probation Officers' of California
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association
Fullerton Police Officers' Association
Los Angeles School Police Management Association
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association
Palos Verdes Police Officers Association
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association

Riverside County District Attorney
Riverside Police Officers Association
Riverside Sheriffs' Association
Sacramento County Sheriff Jim Cooper

OPPOSITION: (Verified 5/14/26)

ACLU California Action
California Attorneys for Criminal Justice
California Public Defenders Association
Californians for Safety and Justice
Californians United for a Responsible Budget
Center for Empowering Refugees and Immigrants
Communities United for Restorative Youth Justice
Community Works West
County of Los Angeles Board of Supervisors
County Behavioral Health Directors Association
Courage California
Drug Policy Alliance
Ella Baker Center for Human Rights
Empowering Women Impacted by Incarceration
Fresno County Public Defender
Friends Committee on Legislation of California
Immigrant Legal Resource Center
Initiate Justice
Initiate Justice Action
Justice2Jobs Coalition
La Defensa
LA County Public Defenders Union, Local 148
Los Angeles County Public Defender's Office
New Light Wellness
San Francisco Public Defender
Silicon Valley De-Bug
South Bay People Power
Vera Institute of Justice
An individual

ASSEMBLY FLOOR: 56-7, 5/19/25

AYES: Addis, Aguiar-Curry, Ahrens, Alanis, Alvarez, Arambula, Ávila Farías,
Bains, Bauer-Kahan, Bennett, Berman, Boerner, Calderon, Carrillo, Castillo,

Chen, Davies, DeMaio, Ellis, Fong, Gabriel, Gallagher, Gipson, Mark González, Hadwick, Haney, Harabedian, Hoover, Irwin, Krell, Lackey, Lowenthal, Macedo, Muratsuchi, Nguyen, Pacheco, Patel, Patterson, Petrie-Norris, Ramos, Michelle Rodriguez, Blanca Rubio, Sanchez, Schiavo, Schultz, Solache, Soria, Stefani, Ta, Tangipa, Valencia, Wallis, Wicks, Wilson, Zbur, Rivas
NOES: Bryan, Elhawary, Garcia, Jackson, McKinnor, Ortega, Ransom
NO VOTE RECORDED: Bonta, Caloza, Connolly, Dixon, Flora, Jeff Gonzalez, Hart, Kalra, Lee, Papan, Pellerin, Quirk-Silva, Celeste Rodriguez, Rogers, Sharp-Collins, Ward

Prepared by: Stephanie Jordan / PUB. S. /
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**** END ****