Date of Hearing: April 29, 2025
Deputy Chief Counsel: Stella Choe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Nick Schultz, Chair

AB 46 (Nguyen) – As Amended March 10, 2025

As Proposed to be Amended in Committee

SUMMARY: Makes various changes to mental health diversion program including modifying the public safety consideration in determining suitability of a particular defendant for diversion. Specifically, **this bill**:

1) Amends the suitability criteria that a court must consider when determining whether to grant diversion in existing law that requires a court to find that the defendant will not pose an unreasonable risk of danger to public safety, as defined, and instead requires that the defendant will not endanger public safety, as defined.

2) Defines "endanger public safety" to mean that the person's treatment in the community would likely result in physical injury or other serious danger to others.

3) Clarifies that a defendant shall have been diagnosed with a mental disorder within the prior 5 years in order for the presumption to apply that the defendant's diagnosed mental disorder was a significant factor in the commission of the offense.

4) Specifies that the court shall consider the victim's rights under Marsy's Law.

5) Restates that diversion is discretionary in all cases.

EXISTING LAW:

1) States that the purpose of mental health diversion is to promote 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; and,

    c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (Pen. Code, § 1001.35.)

2) Authorizes a court to, after considering the positions of the defense and prosecution, grant pretrial mental health diversion to defendant charged with a misdemeanor or a felony if the defendant meets the following eligibility and suitability requirements:

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, borderline personality disorder, and pedophilia, and the defense produces evidence of the defendant's mental disorder which must include a diagnosis 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;

c) In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment;

d) 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 the their mental incompetence and cannot consent to diversion or give a knowing and intelligent waiver of their right to a speedy trial;

e) The defendant agrees to comply with treatment as a condition of diversion; and,

f) The defendant will not pose an unreasonable risk of danger to public safety, as defined, 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, subds. (a)-(c).)

3) Contains a presumption that the defendant's mental disorder was a significant factor in the commission of the offense, which can be rebutted with clear and convincing evidence. (Pen. Code § 1001.36, subd. (b)(2).)

4) 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).)

5) 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. (Pen. Code, § 1001.36, subd. (e).)

6) Provides that the hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate. (*Ibid*.)

7) 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:

    a) 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;

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

    c) The provider of the mental health treatment program in which the defendant has been placed shall provide regular reports to the court, the defense, and the prosecutor on the defendant's progress in treatment. (Pen. Code, § 1001.36, subd. (f).)

8) States that an offense 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)(1)(C).)

9) States that if any of the following circumstances exists, the court shall, after proper notice, hold a hearing to determine whether the criminal proceedings should be reinstated, whether the treatment should be modified, or whether the defendant should be conserved and referred to the conservatorship investigator of the county of commitment to initiate conservatorship proceedings for the defendant:

    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:

        i) The defendant is performing unsatisfactorily in the assigned program; or

        ii) The defendant is gravely disabled, as defined. (Pen. Code, § 1001.36, subd. (g).)

10) Requires the court to dismiss the criminal charges if the defendant has performed satisfactorily in diversion. 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).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "AB 46 is about restoring balance to the court's decision-making process. Judges should have the discretion to decide when mental health diversion is appropriate in each case, especially in serious cases where public safety is at stake. Right now, the law ties their hands.

   "In *People v. Whitmill* (2022), the court of Appeal made it clear:

   'The statute clearly limits the discretion of courts to find in any particular case that mental health diversion creates a public safety risk… Our decision is compelled by the policy decision made by our elected representatives. We are duty-bound to enforce the law as written, whether or not we agree with the public safety risk the law accepts as permissible.'

   "As it stands, even if a judge believes diversion is not appropriate, they may still be forced to grant it. That's not justice. It's not fair to victims, and it's not fair to communities who expect the courts to keep them safe. I support mental health treatment and second chances, but I also believe judges need the ability to look at the facts, consider the seriousness of the case, and make a decision that reflects both accountability and rehabilitation.

   "AB 46 puts that trust back in the courts. It says we believe in judicial discretion, and it says that when the stakes are this high, we need to make sure judges are equipped to do their job."

2) **Incarceration of Offenders with Mental Disorders**: Studies show that people with mental disorders are overrepresented in jails and prisons.[1] According to a 2019 study, more than 30% of the state's prison and 23 % of the jail populations have a mental illness.[2] Not only have the numbers of inmates with mental illness increased, the severity of psychiatric symptoms among inmates is also on the rise.[3] This population tends to serve longer sentences than the general population[4] and have a higher recidivism rate. Promoting treatment over incarceration has shown positive results in reducing recidivism:

   "To avoid incarceration, individuals with serious mental illness need to be diverted from the legal system and offered rehabilitative resources. The homeless comprise a significant share of individuals who come to the attention of law enforcement. A recent review revealed that lifetime arrest rates of homeless individuals with serious mental illness ranged from 62.9% to 90.0%, compared with approximately 15.0% in the general population. For this population,

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[1] Seth J. Prins, *The Prevalence of Mental Illnesses in U.S. State Prisons: A Systemic Review* (Jul. 2015).
[2] Stanford Justice Advocacy Project, *Confronting California's Continuing Prison Crisis: The Prevalence And Severity Of Mental Illness Among California Prisoners On The Rise* https://law.stanford.edu/wp-content/uploads/2017/05/Stanford-Report-FINAL.pdf [accessed Feb. 26, 2025].)
[3] *Id*. at p. 2.
[4] *Id*. at p. 1.

stable housing is a major issue. A recent randomized trial comparing housing first with assertive community treatment with treatment as usual demonstrated significantly decreased rates of arrest among those receiving assertive community treatment at 2 years. These results suggest that efforts to provide stable, affordable, and safe shelter for homeless individuals may lead to lower rates of involvement in the justice system...

"When individuals with serious mental illness are brought to court attention, several models have demonstrated positive outcomes, including mental health courts, drug courts, and Veterans Treatment Courts. Although they serve different populations, the common goal of all these court formats is to address the causes of behavior that brought an offender to police attention. Mental health courts are becoming more common in different communities, each with slight variations; however, common features include a specialized court docket that emphasizes problem solving, community-based treatment plans that are designed and supervised by judicial and clinical staff, regular follow-up with incentives and sanctions related to treatment adherence, and clearly defined "graduation" criteria. A recent prospective study of 169 individuals showed that the likelihood of perpetrating violence during the following year was significantly lower among participants processed through a mental health court than among individuals in a matched comparison group who were processed through traditional courts (odds ratio, 0.39; 95% CI, 0.16-0.95; P = .04)."[5]

3) **Mental Health Diversion**: Diversion is the suspension of criminal proceedings for a prescribed time period with certain conditions. A defendant may not be required to admit guilt as a prerequisite for placement in a pretrial diversion program. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested or charged for the diverted offense. If diversion is not successfully completed, the criminal proceedings resume, however, a hearing to terminate diversion is required.

In 2018, the Legislature enacted a law authorizing pretrial diversion of eligible defendants with mental disorders. Under the mental health diversion law, in order to be eligible for diversion, 1) the defendant must suffer from a mental disorder, except those specifically excluded, 2) that played a significant factor in the commission of the charged offense; 3) 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; 4) the defendant must consent to diversion and waive the right to a speedy trial; 5) the defendant must agree to comply with treatment as a condition of diversion; and 6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. (Pen. Code, § 1001.36, subds. (b)-(c).) The law also states that a defendant is not eligible if they are charged with specified crimes, including murder, voluntary manslaughter, specified sex crimes and any crime requiring sex offender registration. (Pen. Code, § 1001.36, subd. (d).)

In 2022, the Legislature amended the mental health diversion law to, among other things restate that granting diversion is in the trial court's discretion in subdivision (a) (the original law provided the court's discretion in subdivision (h)) and to require the court to find that the

[5] Hirschtritt & Binder, Interrupting the Mental Illness–Incarceration-Recidivism Cycle (Feb. 21, 2017) 317 JAMA 695-696, fn. omitted.

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.[6] The cited reason for this change was a recommendation from the Committee on the Revision of the Penal Code.[7] One of the Committee's recommendations, after staff's exhaustive research and receiving public testimony from expert witnesses including crime victims, law enforcement leaders, judges, and criminal defense experts and advocates, was to strengthen the mental health diversion law by increasing its use in appropriate cases, with include consideration of risk to public safety. Specifically, the Committee recommended that the law be changed to simplify the procedural process for obtaining diversion by presuming that a defendant's diagnosed "mental disorder" has a connection to their offense. A judge could deny diversion if that presumption was rebutted or for other reasons currently permitted under the law, including finding that the individual would pose an unreasonable risk to public safety if placed in a diversion program.[8]

In addition to the eligibility requirements of the defendant, mental health treatment program must meet the following requirements: 1) 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; 2) the defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources; 3) and the program must submit regular reports to the court and counsel regarding the defendant's progress in treatment. (Pen. Code, § 1001.36, subd. (f).) The court has the discretion to select the specific program of diversion for the defendant. The county is not required to create a mental health program for the purposes of diversion, and even if a county has existing mental health programs suitable for diversion, the particular program selected by the court must agree to receive the defendant for treatment. (Pen. Code, § 1001.36, subd. (f)(1)(A).)

The diversion program cannot last more than two years for a felony and cannot last for more than a year on a misdemeanor. (Pen. Code, § 1001.36, subd. (f)(1)(C).) If there is a request for victim restitution, the court shall conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of restitution. (Pen. Code, § 1001.36, subd. (f)(1)(D).)

The stated purpose of the diversion program is "to promote all of the following: . . . 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." (Pen. Code, § 1001.35, subd. (b).) The law states that courts have discretion to grant diversion if the minimum standards are met, and, correspondingly, refuse to grant diversion even though the defendant meets all of the requirements[9]:

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[6] SB 1223 (Becker), Ch. 735, Stats. 2022.
[7] The Committee on the Revision of the Penal Code was established within the Law Review Commission through SB 94, Ch. 25, Stats. 2019 to study the Penal Code and recommend statutory reforms.
[8] *Annual Report and Recommendations 2021*, Committee on Revision of the Penal Code, http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf, p. 17 (accessed Apr. 9, 2025).
[9] J. Couzens, *Memorandum RE: Mental Health Diversion Under Penal Code Sections 1001.35-1001.36* [revised] (May 2024), p. 14.

> There may be times because of the defendant's circumstances, where the interests of justice do not support diversion of the case. The defendant's criminal or mental health history may reflect an unsuitability of the crime or the defendant for diversion. It may be that because of the defendant's level of disability there is no reasonably available and suitable treatment program for the defendant. The defendant's treatment history may indicate the prospect of successfully completing a program is quite poor. Conduct in prior diversion programs may indicate the defendant is now unsuitable. (See § 1001.36, subd. (k) [the court may consider past performance on diversion in determining suitability].) The court may consider whether the defendant and the community will be better served by the regimen of mental health court. (See §1001.36, subd. (f)(1)(A)(ii)) [the court may consider interests of the community in selecting a program].) The court is not limited to excluding persons only because of the risk of committing a "super strike." (*Qualkinbush*, *supra*, 79 Cal.App.5th at pp. 888-889.) In exercising its discretion to grant or deny mental health diversion under subdivision (a), the court may consider any factor relevant to whether the defendant is suitable for diversion.4 (See *Qualkinbush*, *supra*, 79 Cal.App.5th at pp. 889-890.)

(J. Couzens, *Memorandum RE: Mental Health Diversion* (Penal Code §§ 1001.35-1001.36) (AB 1810 & SB 215) [revised] (May 2024), p. 4, fn. omitted.) While the court retains discretion to deny or grant diversion even where the defendant meets the threshold requirements for diversion (Pen. Code, § 1001.36, subd. (a)), this discretion must be exercised "consistent with the principles and purpose of the governing law." (*Sarmiento v. Superior Court* (2024) 98 Cal.App.5th 882, 892.)

In *Sarmiento*, the defendant requested mental health diversion after she was charged with attempted robbery. (*Id*. at p. 886.) Although the trial court found defendant met many of the requirements for diversion, it denied her request, finding her inability to remain drug free after prior treatment indicated she would not respond well to mental health treatment. (*Id*. at pp. 887, 890.) However, the undisputed evidence indicated the defendant never received any coordinated treatment for her two primary mental health diagnoses (PTSD and major depressive disorder from childhood sexual abuse), and the doctor's report submitted in support of her request for diversion made clear that defendant was unable to remain sober because her underlying mental health conditions were never addressed. The prosecutor presented no evidence to the contrary. (*Id*. at pp. 887-889.) Thus, there was insufficient evidence to conclude defendant's symptoms would not respond to treatment. The evidence was also insufficient to support the trial court's finding that defendant's recommended treatment plan would not meet her "specialized mental health treatment needs" (§ 1001.36, subd. (f)(1)(A)(i)) because she had a history of receiving prior substance abuse treatment and then reoffending. The court found that this does not rationally support a conclusion that mental health treatment coupled with substance abuse treatment would not be sufficient, and the alleged failure of prior *drug* treatment plans says nothing about the adequacy of the current proposed treatment plan. (*Id*. at p. 893-895.)

The trial court in *Sarmiento* also relied on its discretion to find that the defendant posed an "unreasonable risk to public safety," although it recognized that the term was expressly defined in the statute to mean a likelihood that if the defendant is granted diversion, she will commit one of the enumerated "super strike" violent felonies. (*Id*. at 895.) The court did not make a finding of such a likelihood and instead relied purely on its discretion without any further analysis. (*Ibid*.) In defining the parameters of the court's discretion, the court held:

> [W]hile it is clear a trial court retains "residual" discretion to deny diversion even if all the threshold requirements are met, that does not mean, as the court suggested here, that it could reject a request for diversion based on an alternative meaning of "public safety" inconsistent with the specific statutory definition in section 1001.36, subdivision (c)(4). In the guise of exercising its "residual" discretion, a court is not permitted to redefine public safety in a manner inconsistent with the Legislature's expressed intent.

(*Id*. at p. 896.) Thus, when exercising its discretion to deny diversion, the court's conclusion that a defendant is not suitable for diversion must be supported by substantial evidence based on the individual facts of the case. If the facts do not support such a conclusion, the court's denial may be overturned under an abuse of discretion standard which is a deferential standard: "A court abuses its discretion when it makes an arbitrary or capricious decision by applying the wrong legal standard, or bases its decision on express or implied factual findings that are not supported by substantial evidence." (*Id*. at pp. 901-901, citing *People v. Moine* (2021) 62 Cal.App.5th 440, 449.)

4) **Effect of this bill**: This bill would amend 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, they will commit one of the enumerated "super strike" violent felonies. This bill would instead provide that a defendant could be found unsuitable for diversion if that the person's treatment in the community would "endanger public safety" which is defined to mean that the person's treatment in the community would "likely result in physical injury or other serious danger to others." By providing a redefined risk to public safety standard, the bill will give courts more discretion to determine suitability of a person who otherwise meets the statutory eligibility requirements.

   This bill would also provide that the defendant must have been diagnosed with a mental disorder within 5 years prior to the offense for the presumption to apply that the mental disorder was a significant factor in the commission of the offense. This is intended to align the presumption with the requirement in existing law that in order to be eligible for diversion, the defendant must have been diagnosed with a mental disorder, as specified, and evidence in support of that shall be provided by the defendant that includes a diagnosis or treatment for a diagnosis within the last five years by a qualified mental health expert.

   This bill provides that that the court shall consider the victim's rights under Marsy's Law. Under Marsy's Law, the California Constitution article I, § 28, section (b), victims are provided with enumerated rights, such as the right to be informed of proceedings, the right to restitution, and the right to be heard upon request at proceedings. Since Marsy's Law is enshrined in the California Constitution, courts are already required to consider victim's rights.

   This bill also restates that the court has discretion to grant or deny diversion in all cases, which is already expressly included in the statute, as amended in 2022.[10] Because this is

[10] *Supra*, footnote 1.

already stated in the law, it is unclear what the effect of adding this to the statute will be or if it will cause confusion with the courts.

As stated by the proponents of this bill, these changes are intended to make denying diversion easier for judges, which may ultimately result in less people being diverted.

5) **Competency in Criminal Proceedings and Growing Incompetent to Stand Trial (IST) Population**: The Due Process Clause of the United States Constitution prohibits the criminal prosecution of a defendant who is not mentally competent to stand trial. Existing law provides that if a person has been charged with a crime and is not able to understand the nature of the criminal proceedings and/or is not able to assist counsel in his or her defense, the court may determine that the offender is IST. (Pen. Code § 1367.) When the court issues an order for a hearing into the present mental competence of the defendant, all proceedings in the criminal prosecution are suspended until the question of present mental competence has been determined. (Pen. Code, §1368, subd. (c).)

In order to determine mental competence, the court must appoint a psychiatrist or licensed psychologist to examine the defendant. If defense counsel opposes a finding on incompetence, the court must appoint two experts: one chosen by the defense, one by the prosecution. (Pen. Code, § 11369, subd. (a).) The examining expert(s) must evaluate the defendant's alleged mental disorder and the defendant's ability to understand the proceedings and assist counsel, as well as address whether antipsychotic medication is medically appropriate. (Pen. Code, § 1369, subd. (a).)

Both parties have a right to a jury trial to decide competency. (Pen. Code, § 1369.) A formal trial is not required when jury trial has been waived. (*People v. Harris* (1993) 14 Cal.App.4th 984.) The burden of proof is on the party seeking a finding of incompetence. (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459-460.) In order to be competent to stand trial, "a defendant must have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him or her." (*People v. Oglesby* (2008) 158 Cal.App.4th 818, 827 citing *People v. Ramos* (2004) 34 Cal.4th 494, 507.) Because a defendant is initially considered competent to stand trial (*Medina v. California* (1992) 505 U.S. 437), usually this means that the defense bears the burden of proof to establish incompetence. Therefore, defense counsel must first present evidence to support mental incompetence. However, if defense counsel does not want to offer evidence to have the defendant declared incompetent, the prosecution may. Each party may offer rebuttal evidence. Final arguments are presented to the court or jury, with the prosecution going first, followed by defense counsel. (Pen. Code, § 1369, subds. (b)-(e).)

If after an examination and hearing the defendant is found IST, the criminal proceedings are suspended and the court shall order the defendant to be referred to DSH, or to any other available public or private treatment facility, including a community-based residential treatment system if the facility has a secured perimeter or a locked and controlled treatment facility, approved by the community program director that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status, except as specified. (Pen. Code § 1368, subd. (c) and 1370, subd. (a)(1)(B).) The court may also make a determination as to whether the defendant is an appropriate candidate for mental health diversion pursuant to Penal Code section 1001.36.

California, similar to the rest of the nation, has seen a significant increase over the last decade in the number of individuals with serious mental illness who become justice-involved and deemed IST on felony charges. A 2017 study conducted by the National Association of State Mental Health Program Directors Research Institute found that from 1999 to 2014, the overall number of forensic patients in state hospitals increased by 74% while the number of IST patients increased by 72% during that same period.[11] Due to increasingly long waiting period to be admitted to the Department of State Hospitals (DSH) for treatment, in 2015, the American Civil Liberties Union sued DSH. (See *Stiavetti v. Clendenin* (2021) 65 Cal.App.5th 691.) In *Stiavetti*, the appellate court held that the long waitlist for competency restoration treatment violates the due process rights of people found to be IST. (Id. at p. 737.) The Court ordered that DSH must begin substantive restoration services within 28 days of being placed on the list. (*Id*. at p. 730.) The court's order is being implemented in phases, with the original target date being set on February 27, 2024 to meet the 28 day standard.

However, on October 6, 2023, the court modified the interim benchmarks and final target date for compliance with the 28 day standard as follows: March 1, 2024 – provide substantive treatment services within 60 days; July 1, 2024 – within 45 days; November 1, 2024 – within 33 days; and March 1, 2025 – within 28 days.[12]

In 2021, the Legislature charged the California Health & Human Services Agency and the DSH to convene an IST Solutions Workgroup to identify actionable solutions that address this increasing population.[13] The IST Workgroup released a report in November 2021 that outlined system improvements and one of the changes discussed was mental health diversion[14]:

> By FY 2017-18, DSH recognized that the demand for IST treatment services was not going to be met by capacity created within the State Hospital system. At this time the department began working to establish treatment pathways in the community with the long-term goal of decreasing demand for State Hospital services by connecting more people with Serious Mental Illness into ongoing community care. The Budget Act of 2018 included funding for two major new programs to help DSH realize this vision.
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> The Budget Act of 2018 allocated $13.1million for DSH to contract with the Los Angeles County Office of Diversion and Reentry (ODR) for the first community-based restoration (CBR) program in the state. In this program, ODR subcontracts for housing and treatment services for IST patients in the community. Most IST patients in this program live in unlocked residential settings with wraparound treatment services provided on site. The original CBR program provided funding for 150 beds; investments in the LA program since 2018 has increased the program size to 515 beds. In addition, DSH has received funding to implement additional CBR programs across the state. The Budget Act of 2021 included ongoing funding to add an additional 252 CBR beds in counties outside of Los Angeles, bringing the total number of funded CBR beds to 767.

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[11] Wik, A., Hollen, V., Fisher, W.H. (2017) Forensic Patients in State Psychiatric Hospitals: 1999-2016.
[12] See 24-25 Governor's Budget Estimate: Department of State Hospitals (Jan. 10, 2025), p. 2.
[13] AB 133 (Committee on Budget), Chapter 143, Statutes of 2021.
[14] *IST Solutions Workgroup Report of Recommended Solutions*, A report of recommended solutions presented to the California Health and Human Services Agency and the California Department of Finance in Accordance with Section 4147 of the Welfare and Institutions Code (Nov. 2021) pp. 17-18.

> The Budget Act of 2018 also allocated DSH $100 million (one-time) to establish the DSH Felony Mental Health Diversion (Diversion) pilot program. Of this funding, $99.5 million was earmarked to send directly to counties that chose to contract with DSH to establish a pilot Diversion program (the remaining $500,000 was for program administration and data collection support at DSH). Assembly Bill 1810 (2018) established the legal (Penal Code (PC) 1001.35-1001.36) and programmatic (Welfare & Institutions Code (WIC) 4361) infrastructure to authorize general mental health diversion and the DSH-funded Diversion program. The original Diversion pilot program includes 24 counties who have committed to serving up to 820 individuals over the course of their three-year pilot programs.

The report noted that IST restoration of competency is not an adequate long-term treatment plan. The Workgroup looked at the 3-year post discharge recidivism rates using the Department of Justice's criminal offender record information data and found that recidivism rates are still high – about 70% rearrest post discharge – which shows that whatever circumstances led to an individual's prior arrest have likely not hcanged and most IST patients are stuck looping through the criminal justice system and DSH.[15] The solutions identified by the report included expanding community-based treatment and diversion options for felony ISTs that will help end the cycle of criminalization by connecting patients to comprehensive behavioral health treatment.[16]

This bill would give courts broader authority to deny diversion by loosening the public safety standard in existing law. As discussed above, mental health diversion is an alternative to an IST finding. Removing diversion as an option will likely result in more people proceeding with the IST process with the goal of restoration of competency. This will place more burdens on an already overburdened system that are currently under a court order to provide services within a shortened time frame in order to meet constitutional standards that has already been shown to not be a long-term solution for the individual or the community in addressing public safety.

6) **Argument in Support**: According to the *Sacramento County District Attorney*, the sponsor of this bill, "Changes to Mental Health Diversion under Penal Code section 1001.36 are needed as recent amendments have led to disastrous results that have undermined public safety.

"Courts have repeatedly expressed frustration at their lack of ability to exercise their judicial discretion when determining a defendant's amenability for the diversion program. Furthermore, upon acceptance into the program, defendants are released back into the community with minimal supervision and high likelihood of recidivism. Despite these flaws with the Mental Health Diversion program, the result can still lead to the expungement of their criminal records. The victims receive no protection or assurance they will ever be free from further victimization.

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[15] *Id*. at p. 11.
[16] *Id*. at p. 28.

"AB 46 is a commonsense solution to the negative consequences the Mental Health Diversion statute has created. It gives discretion back to the court to determine an individual defendant's amenability to treatment. It allows prosecutors the ability to object to applicants that pose a risk to public safety and changes the unfair presumption of amenability for every applicant with a mental health diagnosis."

7) **Argument in Opposition**: According to *Ella Baker Center for Human Rights*, "We oppose AB 46 because it will limit access to California's existing mental health diversion program, regardless of the circumstances of the case or of the person.

"California should continue to provide judges and prosecutors discretion to offer diversion in as wide a variety of cases as possible so that they can ensure safety, justice, and accountability. Diversion may not be suitable in many cases charged as an attempted murder, but removing the option is a step backward for California, eliminating much-needed flexibility and discretion. California already has rigorous screening factors in Penal Code 1000.36(c), including that the person does not present an unreasonable risk to public safety. This allows judges and prosecutors to make safer, more informed decisions than if their options were to be more broadly determined by charge type.

"Research shows diversion programs serve to reduce recidivism overall, which keeps us all safer. Diversion focuses on the drivers behind people's conduct, and it provides resources to address their unmet needs. Services such as treatment for substance use and mental health, job training, housing support, or education provide people with the means to thrive so that they are less likely to come into contact with the criminal legal system in the future. Diversion programs are particularly effective in cases of people suffering from mental illness. If someone with mental illness is a good candidate for diversion, judges and prosecutors should be allowed to pursue that option for the sake of public safety.

. . . .

"Finally, diversion programs reduce racial disparities in convictions and incarceration. Black and brown Californians remain more likely to be arrested because of over-policing, but if judges choose to extend the option to qualified candidates, diversion programs allow successful participants to avoid conviction histories. This means avoiding the long-term collateral consequences of incarceration includes difficulties accessing housing, employment, and education—consequences that are shown to increase recidivism in the United States."

8) **Related Legislation**:

   a) AB 433 (Krell), would exclude additional crimes from eligibility for mental health diversion. AB 433 is pending hearing by this committee.

   b) SB 483 (Stern), would add another suitability factor for granting mental health diversion, requiring the court be satisfied that the recommended mental health treatment program is consistent with the purpose of diversion and will meet the defendant's specialized treatment need. SB 483 is pending hearing by the Senate Appropriations Committee.

9) **Prior Legislation**:

a) AB 1412 (Hart), Chapter 687, Statutes of 2023, removed borderline personality disorder as an exclusion for mental health diversion.

b) AB 1323 (Menjivar), Chapter 646, Statutes of 2024, required a court to determine whether the restoration of the defendant's mental competence is in the interests of justice, and if it finds that it is not in the interests of justice, to hold a hearing to consider granting mental health diversion or other programs to the defendant.

c) AB 455 (Quirk-Silva), Chapter 236, Statutes of 2023, authorized the prosecution to request an order from the court to prohibit a defendant subject to pretrial diversion from owning or possessing a firearm because they are a danger to themselves or others until they successfully complete diversion or their firearm rights are restored.

d) SB 1223 (Becker), Chapter 735, Statutes of 2022, added a presumption for purposes of mental health diversion eligibility that the defendant's mental disorder was a significant factor in the commission of the offense which could be overcome by 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.

e) SB 666 (Stone), of the 2019-2020 Legislative Session, would have added offenses which would preclude an individual from being eligible for mental health diversion. SB 666 was held in the Senate Public Safety Committee.

f) SB 215 (Beall), Chapter 1005, Statutes of 2018, specified ineligible offenses for mental health diversion and required the court to determine whether restitution is owed to any victim of the diverted offense.

g) AB 1810 (Committee on Budget), Chapter 34, Statutes of 2018, created mental health diversion in statute and specified that when a defendant is determined to be IST, the court can find that they are an appropriate candidate for mental health diversion.

REGISTERED SUPPORT / OPPOSITION:

Support

Sacramento County District Attorney's Office (Sponsor)
California Police Chiefs Association
California State Sheriffs' Association
Crime Victims United of California
San Diego County District Attorney's Office

Opposition

ACLU California Action
California Attorneys for Criminal Justice
California Public Defenders Association (CPDA)
Californians United for a Responsible Budget
Ella Baker Center for Human Rights

Fair Chance Project
Friends Committee on Legislation of California
Initiate Justice
Initiate Justice Action
Justice2jobs Coalition
LA Defensa
Local 148 LA County Public Defenders Union
National Alliance on Mental Illness (NAMI-CA)
San Francisco Public Defender
Silicon Valley De-bug
Smart Justice California, a Project of Tides Advocacy
Universidad Popular
Vera Institute of Justice
1 Private Individual

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