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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

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**Bill No:** AB 455                      **Hearing Date:** June 27, 2023  
**Author:** Quirk-Silva  
**Version:** March 29, 2023  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Firearms: prohibited persons*

## HISTORY

**Source:** California District Attorneys Association

**Prior Legislation:** AB 1121 (Bauer-Kahan), held on suspense Assem. Approps., 2020  
AB 1810 (Committee on Budget), Ch. 34, Stats. 2018

**Support:** California Faculty Association; California State Sheriffs' Association; Los Angeles County District Attorney's Office; Peace Officers Research Association of California; San Mateo County District Attorney's Office

**Opposition:** California Attorneys for Criminal Justice (oppose unless amended); California Public Defenders Association (oppose unless amended); Depression and Bipolar Support Alliance

**Assembly Floor Vote:** 79 - 0

## PURPOSE

*The purpose of this bill is to authorize the prosecution to request an order from the court to prohibit a defendant participating in mental health diversion from owning or possessing a firearm because they are a danger to themselves or others until they successfully complete diversion.*

*Existing law* states that the right of the people to keep and bear arms shall not be infringed. (U.S. Const., 2nd Amend.)

*Existing law* provides that no state shall deprive any person of life, liberty, or property, without due process of law. (U.S. Const., 14th Amend.)

*Existing law* authorizes diversion programs for specified crimes (Pen. Code, §§ 1000 et seq. for drug abuse; Pen. Code, § 1001.12 et seq. for child abuse; Pen. Code, §§ 1001.70 et seq. for contributing to the delinquency of another, Pen. Code, §§ 1001.60 et seq. for writing bad checks) and for specific types of offenders (Pen. Code, §§ 1001.80 et seq. for veterans; Pen. Code, §§ 1001.83 for caregivers; Pen. Code, §§ 1001.35 et seq. for persons with mental disorders).

*Existing law* states that the purpose of mental health diversion is to promote the following:

- Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety;
- 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,
- Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (Pen. Code, § 1001.35.)

*Existing law* authorizes a court to, after considering the positions of the defense and prosecution, grant pretrial diversion to defendant charged with a misdemeanor or felony if the defendant satisfies the eligibility requirements and the court determines that the defendant is suitable for diversion. (Pen. Code, § 1001.36, subd. (a).)

*Existing law* provides that a defendant is eligible for pretrial diversion if both of the following criteria are met:

- 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, borderline personality disorder, and pedophilia. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence; and,
- The defendant's mental disorder was a significant factor in the commission of the charged offense. If the defendant has been diagnosed with a mental disorder, the court shall find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. A court may consider any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense. (Pen. Code, § 1001.36, subd. (b).)

*Existing law* states that for any defendant who satisfies the eligibility requirements, the court must consider whether the defendant is suitable for pretrial diversion. The defendant is suitable for pretrial diversion if all of the following criteria are met:

- 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;

- 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;
- The defendant agrees to comply with treatment as a condition of diversion, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment for restoration of mental incompetence and cannot agree to comply with treatment; and,
- 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, the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subds. (c).)

*Existing law* excludes defendants charged with the following offenses from mental health diversion eligibility:

- Murder or voluntary manslaughter;
- An offense for which a person, if convicted, would be required to register as a sex offender, except for an indecent exposure violation;
- Rape;
- Lewd or lascivious act on a child under 14 years of age;
- Assault with intent to commit rape, sodomy, or oral copulation;
- Commission of rape or sexual penetration in concert with another person;
- Continuous sexual abuse of a child; and,
- Violations involving weapons of mass destruction. (Pen. Code, § 1001.36, subds. (d).)

*Existing law* provides that “pretrial diversion” for purposes of mental health diversion means 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 all of the following:

- 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 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;

- 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;
- The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years for a felony and no longer than one year for a misdemeanor;
- Upon request, 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 diversion. However, a defendant's inability to pay restitution due to indigence or mental disorder shall not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion. (Pen. Code, § 1001.36, subd. (f).)

*Existing law* states that if any of the following circumstances exists, the court shall, after notice to the defendant, defense counsel, and the prosecution, 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:

- The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence;
- The defendant is charged with an additional felony allegedly committed during the pretrial diversion;
- The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion;
- Based on the opinion of a qualified mental health expert whom the court may deem appropriate, either of the following circumstances exists:
  - The defendant is performing unsatisfactorily in the assigned program.
  - The defendant is gravely disabled, as defined. (Pen. Code, § 1001.36, subd. (g).)

*Existing law* provides that if the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial 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).)

*Existing law* requires that the defendant shall be advised that, regardless of the defendant's completion of diversion, both of the following apply:

- The arrest upon which the diversion was based may be disclosed by the DOJ to any peace officer application request and the defendant is not relieved of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer; and
- An order to seal records pertaining to an arrest has no effect on a criminal justice agency's ability to access and use those sealed records and information regarding sealed arrests. (Pen. Code, § 1001.36, subd. (j).)

*Existing law* provides that a finding that the defendant suffers from a mental disorder, any progress reports concerning the defendant's treatment, or any other records related to a mental disorder that were created as a result of participation in, or completion of, diversion may not be used in any other proceeding without the defendant's consent, except as specified. (Pen. Code, § 1001.36, subd. (k).)

*Existing law* permits specified individuals to request that a court, after notice and a hearing, issue a gun violence restraining order (GVRO) enjoining a person from having a firearm, for a period of time between one to five years, upon a finding that the person poses a significant danger of causing personal injury to themselves or another by having a firearm. (Pen. Code, §§ 18170 et seq.)

*Existing law* provides that any person subject to a domestic violence restraining order (DVRO) shall not own, possess, purchase, or receive a firearm or ammunition while that order is in effect. (Fam. Code, § 6389, subd. (a).)

*Existing law* provides that the following individuals shall not purchase or receive, or attempt to purchase or receive, or have in his or her possession, custody, or control a firearm or any other deadly weapon:

- Any person who has been adjudicated by a court of any state to be a danger to others as a result of a mental disorder or mental illness, or who has been adjudicated to be a mentally disordered sex offender;
- Any person who has been found not guilty by reason of insanity;
- Any person found by a court to be mentally incompetent to stand trial;
- Any person who has been placed under conservatorship by a court because they are gravely disabled as a result of a mental disorder or impairment by chronic alcoholism;
- Any person who has been taken into custody, assessed and admitted into a facility, as provided in Section 5150 of the Welfare and Institutions Code because that person is a danger to themselves or to others; and,

- Any person who has been certified for intensive treatment as a result of mental disorder or impairment by chronic alcoholism because that person is a danger to themselves or to others. (Welf. & Inst. Code, § 8103, subds. (a)-(g).)

Existing law states that a person who is subject to firearm prohibitions based on having been certified for intensive treatment for a mental disorder or impairment by chronic alcoholism because that person is a danger to themselves or to others may petition the court to authorize them to possess or purchase firearms. (Welf. & Inst. Code, § 8103, subds. (g)(4).)

Existing law states that if the court finds by a preponderance of the evidence that the person would be likely to use firearms in a safe and lawful manner, the court may order that the person may own, control, receive, possess, or purchase firearms, and that person may request the return of any firearms. A copy of the order shall be submitted to DOJ, and upon receipt of the order, the DOJ shall delete any reference to the prohibition against firearms from the person's state mental health firearms prohibition system information. (Welf. & Inst. Code, § 8103, subds. (g)(4).)

*Existing law* provides that any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony. (Pen. Code, § 29800, subd. (a)(1).)

*This bill* authorizes the prosecution to request an order from the court that the defendant be prohibited from owning or possessing a firearm until they complete diversion because they are a danger to themselves or others.

*This bill* provides that the prosecution shall bear the burden of proving, by clear and convincing evidence, that both of the following are true:

- The defendant poses a significant danger of causing personal injury to themselves or another by having in their custody or control, owning, purchasing, possessing, or receiving a firearm;
- The prohibition is necessary to prevent personal injury to the defendant or any other person because less restrictive alternatives either have been tried and found to be ineffective or are inadequate or inappropriate for the circumstances of the defendant.

*This bill* states that if the court finds that the prosecution has met the burden, the court shall order that the person is prohibited, and shall inform the person that they are prohibited, from owning or controlling a firearm until they successfully complete diversion because they are a danger to themselves or others.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

The vast number of people who suffer from mental illness do not act out violently or commit crimes. However, an individual who is charged with a felony or specified misdemeanor offense who is eligible for and chooses to participate in a mental health diversion program, should also be required to adhere to post-conviction gun

restrictions until they have successfully completed their mental health treatment program.

## 2. Mental Health Diversion Law

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, subs. (b)-(c).) The defendant is not eligible if they are charged with specified crimes. (Pen. Code, § 1001.36, subd. (d).)

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 gives discretion to courts to grant diversion if the minimum standards are met, and, correspondingly, refuse to grant diversion even though the defendant meets all of the requirements

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 a substantial risk the defendant will commit dangerous crimes beyond the "super strikes" identified in section 1001.36, subdivision (b)(6). 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 defendant is now unsuitable. . . . The court may consider the defendant and the community will be better served by the regimen of mental health court. . . . Clearly the court is not limited to excluding persons only because of the risk of committing a "super strike" – the right to exclude because of dangerousness goes well beyond that limited list. In short, the court may consider any factor relevant to whether the defendant is suitable for diversion.

(J. Couzens, *Memorandum RE: Mental Health Diversion* (Penal Code §§ 1001.35-1001.36) (AB 1810 & SB 215) [revised] (Nov. 14, 2018), p. 4, fn. omitted.)

This bill would authorize a court to order that a defendant participating in mental health diversion be prohibited from owning or possessing a firearm until they successfully complete diversion if the prosecution is able to show, by clear and convincing evidence, that the defendant is a danger to themselves or others.

### **3. Existing Firearm Prohibitions**

Existing law prohibits certain persons from owning or possessing a firearm. Those prohibitions apply to persons subject to a domestic violence restraining order (Fam. Code, § 6389); persons convicted of a felony (Pen. Code, § 29800); persons convicted of specified misdemeanors (Pen. Code, § 29805); and other categories of persons found to be a danger to themselves or to others (Welf. & Inst. Code, § 8103).

Existing law also authorizes the court to issue a GVRO. (Pen. Code, §§ 18100 et seq.). The process to obtain an emergency GVRO is designed to address situations where a person presents a current danger to themselves or others by virtue of owning or possessing a firearm. An application for an emergency GVRO can be made orally and processed immediately. (Pen. Code, § 18170.) Current law allows a law enforcement officer, immediate family members, and additional categories of individuals to request a court, either ex parte or after notice and a hearing, to issue a GVRO enjoining the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition. If issued after notice and a hearing, the duration of the order may last up to 5 years. (Pen. Code, § 18170.)

The criteria for obtaining a GVRO requires the petitioner to establish by clear and convincing evidence that 1) the person poses a significant danger of causing personal injury to themselves or another by having in the subject's custody or control, owning, purchasing, possessing, or receiving a firearm; and 2) a GVRO is necessary to prevent personal injury to the subject of the petition or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of the petition. (Pen. Code, § 18175, subd. (b).) This standard of proof and requisite findings for obtaining a GVRO is similar to the one proposed in this bill to issue a firearm prohibition order during the period of mental health diversion.



However, unlike the GVRO law that authorizes the subject of the order to petition the court to terminate the order early based on evidence that the circumstances that existed for the issuance of a GVRO are no longer true (see Pen. Code, § 18185), this bill does not specifically authorize a person to petition the court to have their right to own or possess a firearm before the period of mental diversion is completed.

#### **4. Argument in Support**

According to the Los Angeles County District Attorney:

It is an all-too-common occurrence that an individual suffering from mental health issues uses a firearm to injure or kill themselves or others. The recent mass murders in Monterey Park and Half Moon Bay this year are examples of the danger firearms pose in the hands of individuals with mental illnesses. Individuals charged with a crime who are eligible for mental health diversion should be prohibited from owning or possessing a firearm until they complete their mental health diversion program.

The vast majority of people who suffer from mental illness do not act out violently or commit criminal acts, however an individual who is charged with a felony or specified misdemeanor offense who is eligible for and chooses to participate in a mental health diversion program should also be required to adhere to post-conviction gun restrictions until they have successfully completed their mental health treatment program.

Because a finding that a defendant is not a risk to public safety if treated in the community is a requirement to be eligible for mental health diversion, a court may be more inclined to grant diversion if it could restrict a person's ability to own or possess firearms.

#### **5. Argument in Opposition**

According to California Public Defenders Association (CPDA), who is opposed unless amended:

CPDA is appreciative of all the amendments the authors have taken. Our remaining issue is that unlike other provisions of Welfare and Institutions Code (WIC) section 8103 relating to firearms, there is provision for individuals who have failed to complete mental health diversion to petition to have their gun rights restored.

This is an Equal Protection Clause issue under the United States Constitution because individuals who are similarly situated are not being treated similarly by the state.

- An individual who has been taken into custody as a danger to self or others and hospitalized (WIC section 5150-5152) and lost their rights to possess a firearm for 5 years or life, has the right to bring a petition for the restoration of their gun rights (WIC section 8103(f)(11)).

- An individual who has been certified for intensive treatment (WIC section 5250, 5260 or 5270.15) and lost their gun rights, may petition the superior court for the restoration of their gun rights (WIC 8103(g)(4)).

As amended AB 455, appropriately lets a judge decide after hearing evidence whether it necessary to deny individuals on mental health diversion their rights to gun ownership. Our requested amendment would also let judges decide whether to restore that right similarly to the procedure for individuals who have been taken into custody as a danger to self or others or certified for intensive treatment and lost their gun rights.

(i) (1) A person, who has been found by a court to be prohibited from owning or controlling a firearm because they are a danger to themselves or others and has been granted pretrial mental health diversion pursuant to subdivision (m) of Section 1001.36 of the Penal Code, shall not own, possess, control, receive, or purchase, or attempt to own, possess, control, receive, or purchase, any firearm until the person successfully completes diversion *or their firearm rights are restored pursuant to section (g)(4).*

-- END --