IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People of the State of California,	)	**No. S268925**
Plaintiff and Respondent,	)	
v.	)	Ct. App. 4/2
	)	No. E073204
Cory Juan Braden, Jr.,	)	
Defendant and Appellant.	)	Sup. Ct. No.
_____	)	FVI18001116

On review from the
California Court of Appeal,
Fourth Appellate District, Division Two
and the
Superior Court of California for the
County of San Bernardino
Honorable John M. Tomberlin, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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Issue Presented

This Court has limited review in this case to the following issue:

What is the latest point at which a defendant's request for mental health diversion is timely under Penal Code[1] section 1001.36?[2] (Order of July 14, 2021.)

Introduction

The mental health diversion statute, section 1001.36, is the leading edge of a fundamental change in how our criminal justice system treats persons with serious mental disorders. It shifts proper discretion as to mentally ill offenders toward treatment and away from incarceration.

Appellant Cory Juan Braden, Jr., is the kind of person section 1001.36 was written for. Appellant was involved in a family argument. His sister called the police about the incident and informed them that appellant was schizophrenic and was off his medication. An altercation occurred between appellant and the responding officer when the officer attempted to take appellant into custody. Appellant was charged with resisting arrest with force and after the preliminary hearing requested to represent himself. Prior to the commencement of trial, section 1001.36 became effective. During trial, appellant testified on his own behalf. Appellant explained that he did not trust the responding officer because he had previously been beaten by the police and sent to prison for a crime he did not commit. Appellant could not understand how that prior incident happened to him

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[1] All further statutory references are to the Penal Code, unless otherwise specified.

[2] The complete text of section 1001.36 is included as Attachment A and bookmarked for the Court's convenience.

because at the time he had been military police on a counter-terrorist team with Homeland Security. He felt the military left him behind. Appellant also explained he believed the responding officer for the current incident was racist and appellant feared for his life. After appellant was convicted he withdrew his pro per status and the trial court appointed a public defender to represent him. Prior to sentencing, defense counsel requested that appellant be considered for mental health diversion under the new law. The trial court denied the request holding that it was untimely and sentenced appellant to four years in prison instead of considering the possibility of diversion and getting him the help he needed. This is certainly not what the Legislature had in mind when it created a mental health diversion program.

Prior to the enactment of section 1001.36, a trial court could not order mental health treatment, relevant counseling, or adherence to a medication regime unless the person suffering from mental illness was first convicted, and then placed on probation or sent to prison. However, the mentally ill were not receiving the types of treatment they needed while incarcerated because California's prisons are ill-equipped to deal with such defendants. The statute was created to solve this problem by giving courts the ability to grant mental health diversion "at any point in the judicial process from the point at which the accused is charged until adjudication" to meet the specialized mental health treatment needs of a defendant.

The issue presented in this case involves the statutory construction of section 1001.36 to determine at what point in the judicial process a defendant must request mental health diversion. The plain text of section 1001.36, the absence of limiting language in section 1001.36 found in other statutes, the codified purposes, and the history of the statute, demonstrate that the Legislature intended for a trial court to have the ability

to grant mental health diversion at any point until sentence is imposed. The trial court and the Court of Appeal here erred in concluding to the contrary and holding that diversion is only available prior to the commencement of trial.

The express purpose of section 1001.36, stated in section 1001.35, is to increase mental health diversion to defendants suffering from identifiable mental disorders in order to mitigate the defendants' entry and reentry into the criminal justice system. Commensurate with this purpose, the plain language of the statute demonstrates the Legislature's intent to give trial courts the discretion to grant mental health diversion at any point until imposition of sentence. The Legislature specifically included the definition of "pretrial diversion" meaning "at any point in the judicial process from the point at which the accused is charged until adjudication. . . ." In other words, the Legislature did not intend pretrial diversion to be limited to before the trial begins, as the ordinary meaning suggests. Additionally, in analyzing the potential meanings of "adjudication" as used in the definition of section 1001.36, the reasonable interpretation is until entry of judgment. Granting diversion until the entry of judgment is consistent with the purposes of the new law – to increase diversion to defendants suffering from mental illness. Construing section 1001.36 to limit diversion to before trial begins would be contrary to the Legislature's intent in enacting section 1001.36.

The legislative history further supports the idea of keeping the possibility of mental health diversion open until sentence is imposed. The legislative materials focus on the problems associated with incarcerating the mentally ill and providing them the specialized treatment they so badly need before being incarcerated.

Mental illness impacts roughly one-third of inmates in

California's prisons. Every single individual defendant who successfully completes diversion is a success for the state and society. Extending the benefits of mental health diversion to every qualifying mentally ill defendant to which it could apply, including all defendants up until sentence is imposed, would fulfill the purposes for which the statute was enacted.

Statement of the Case

On May 2, 2018, the court granted appellant's request to represent himself. (CT 15; Supp. CT 4.) In an amended information filed August 6, 2018, appellant Cory Juan Braden, Jr., was charged with one count of resisting an executive officer with force in violation of section 69. (CT 116-117.) The information further alleged that appellant suffered two strike priors pursuant to sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i).[3] (CT 117.)

Appellant pled not guilty and denied the special allegations. (1RT 80.)

A jury found appellant guilty of resisting an executive officer with force in violation of section 69. (CT 136, 161.) The matter proceeded to a jury trial on the prior allegations. (CT 136.) The jury found true appellant's priors. (CT 138, 162, 163.)

Prior to sentencing the court granted appellant's request to withdraw his pro per status and appointed counsel. (CT 138.)

On September 11, 2018, the day for pronouncement of judgment and sentencing, trial counsel requested more time to evaluate appellant for Mental Health Diversion. (2RT 368-370, 372-373.) The court denied the request finding that appellant was ineligible because his request was untimely. (CT 189.)

The court sentenced appellant to the midterm of two years on the section 69 count, doubled pursuant to the Three Strikes law, for a total sentence of four years. (CT 203, 205.)

Appellant timely appealed the judgment to Division Two of the Fourth Appellate District. Appellant raised four issues in his appeal. First, appellant argued that his conviction for resisting an executive officer with force and violence should be reversed

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[3] The amended information indicates that the two prior strike allegations occurred on June 21, 2007. (CT 117.) The prosecution treated both allegations as one prior strike. (CT 199.)

because the trial court erred in failing to instruct the jury on the lesser included offenses of simple assault, simple battery, and resisting a peace officer. Secondly, appellant argued that if the court did not reverse appellant's conviction for failing to instruct on the lesser included offenses as argued in Argument I, it should find the trial court abused its discretion in not treating resisting an executive officer under section 69, a "wobbler" offense, as a misdemeanor under section 17, subdivision (b). Thirdly, appellant argued if the court determined appellant's conviction remained a felony, it should find the trial court abused its discretion in not granting appellant's *Romero*[4] motion. Lastly, appellant addressed the issue of whether he should have been given an opportunity to be evaluated as a candidate for mental health diversion under section 1001.36. The Court of Appeal rejected appellant's claims and affirmed the judgment in full.

This Court granted review and limited the issue to be briefed to the one listed at the outset of this brief.

[4] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

Statement of Facts

Prosecution Case

On April 25, 2018, Deputy Harvey was dispatched to a domestic disturbance between a mother and son. (1RT 97, 98.) Dispatch advised Harvey that the subject was schizophrenic, not on his medications and had a history of violence. (1RT 101, 141.)

Prior to arriving on scene, Harvey was flagged down by appellant's sister, the reporting party, who told him that appellant was inside the residence and she pointed to where he was. (1RT 105, 106, 130.) Harvey exited his car, walked up the driveway and contacted appellant at the threshold of the apartment doorway. (1RT 106.) Appellant was holding a backpack in front of himself with both hands. (1RT 106.) Harvey asked appellant to drop the backpack and come talk with him in the driveway. (1RT 106.)

When appellant walked toward the driveway Harvey told him that he was a San Bernardino Sherrif's Deputy. (1RT 107.) Appellant said he wanted to call 911 and requested to contact a supervisor. (1RT 107.) Harvey told appellant he was willing to call a supervisor, but that he first needed to secure the scene and conduct a pat down search. (1RT 107.) Appellant was holding a cell phone in his right hand which he placed on the hood of a car parked in the driveway. (1RT 108) Harvey testified that appellant then put his hands on his head. (1R 108.) Harvey stated that he considered appellant to be passively resistant so he took hold of appellant's left wrist, told appellant to place his other hand behind his back so he could conduct a pat-down search. (1RT 107, 108.) Appellant complied. (1RT 109, 164.) While Harvey was holding appellant's hands appellant tensed up, turned, and punched Harvey on the left side of his face with his right fist. (1RT 109.) Harvey backed up to assess the situation. (1RT 110, 113.) Harvey saw appellant take a fighting stance, grip

his hands in a fist motion and move toward him. (1RT 114.) Harvey delivered two ineffective punches to the right side of appellant's face. (1RT 114.) Harvey did not pull out a weapon because it all happened too fast. (1RT 114.)

Appellant threw approximately three more punches at Harvey's face. (1RT 115.) Harvey tackled appellant to the ground and put his body on appellant's back to hold him down. (1RT 116.) Harvey delivered two more punches to appellant's left side because appellant's hands were free and he was concerned appellant had a weapon. (1RT 116, 117.) Harvey yelled for appellant to put his hands behind his back and held appellant's head down on the ground, but appellant continued to resist. (1RT 116, 117, 165.)

Deputies Sara Tamayo and Travis Gonya responded to assist Harvey. (1RT 118, 141.) Tamayo had information that the suspect was schizophrenic and off his medications. (1RT 141.) When they arrived they saw Harvey and appellant on the ground. (1RT 143.) Tamayo got on top of appellant and eventually Harvey, Gonya and her were able to get appellant's hands behind his back and handcuff him. (1RT 117, 118, 144, 145.) Tamayo noticed Harvey's baton was on the ground, but she did not see him use it. (1RT 150, 161.) Harvey explained that he did not use his baton, but while he was wrestling appellant to the ground the baton popped off. (1RT 162, 163.)

Appellant's mother, sister, and stepfather were present for the incident and stood approximately five feet away from the altercation. (1RT 111, 112, 116.) Appellant's sister was recording the incident with a cell phone. (1RT 116, 146.) Harvey told her to stop recording when Harvey got appellant on the ground. (1RT 230.) The video recording from her cell phone was played for the jury. (1RT 125; Exhibit 3 - CD, Exhibit 3A - transcript.)

Harvey was trained on use of force and in responding to

domestic violence calls. (1RT 101, 110.) Once a suspect stops resisting he must cease and desist force. (1RT 137.) At the time of this incident Harvey had been a police officer for approximately two years and Tamayo was in training and Gonya was her training officer. (1RT 97, 147.)

Harvey suffered stiffness to the left side of his face, and a bruised knee and right elbow. (1RT 120, 121.) Harvey's knee injury was a result of hitting it on the ground. (1RT 163.) Appellant suffered a bruised left eye. (1RT 121.) Tamayo and Gonya transported appellant to the hospital. (1RT 151.)

The video recording from appellant's sister's phone was played for the jury. The video began with the initial contact between appellant and Harvey on the driveway until they fell on the ground. (1RT 125, 138.) Harvey did not recall if everything was captured on the video. (1RT 139.)

Defense Case

Appellant testified on his own behalf. (1RT 166-193.) He testified that his sister called 911, which she had also done two weeks prior to this incident, and he did not know why she had called so he called 911 as well. (1RT 188.) 911 dispatch told appellant to stay on the scene so he did. (1RT 191.)

Appellant explained that he was distrustful of law enforcement because he had previously been beaten by the police and sent to prison for a crime he did not commit. (1RT 167, 168, 169, 178, 192.) Appellant could not understand how that could have happened to him because at that time of that prior incident he had been military police on a counter-terrorist team with Homeland Security yet no one from his unit came to rescue him. (1RT 168, 169, 176, 177.)

When Harvey arrived appellant told him that he feared for his life and wanted to call 911. (1RT 170, 191.) Appellant also asked Harvey to contact his supervisor. (1RT 192.) Appellant

believed Harvey could be a racist and he did not trust him. (1RT 180, 187.)

Appellant testified that he agreed to a pat down and complied with Harvey's orders to put his hands behind his back. (1RT 171, 174, 192.) Harvey then grabbed appellant's wrist, jumped on him and punched appellant eight times. (1RT 171, 174, 192, 194.) Appellant explained that he never hit Harvey, he was only trying to block his punches. (1RT 174.) Appellant explained that when Tamayo came over to where appellant and Harvey were appellant did not have his hands under him because he was protecting his face. (1RT 175, 196.)

Appellant heard his sister say, "Cory, you have to stop," on the video that was played for the jury. (1RT 189.) Appellant stated that the video stopped just before Harvey raised his hand to punch appellant. (1RT 191, 192, 193.) The video also did not show other things that happened after it stopped like his mother telling Harvey to "stop hitting my son." (1RT 193.)

Prosecution Rebuttal

Appellant's mother testified that appellant and his sister were fighting so she got in between them. Appellant's mother stated that appellant was upset with his sister and kicked his mother in the groin and grabbed her by the throat. Appellant's sister called the police. (1RT 199, 200, 202, 203, 204, 205, 215, 216, 217.)

Appellant went outside to wait for the deputies to arrive. (1RT 200, 206.) Harvey told appellant he wanted to know what was going on and needed to check him. Appellant had his hands up, turned around, put his phone on the car and went at Harvey. Appellant and Harvey tussled and appellant ended up on the ground. Harvey got appellant's hands behind his back and handcuffed him. Harvey then punched appellant in the head seven or eight times. (1RT 200, 208, 209, 225, 227.) Tamayo

came to get appellant and put him in the police car. (1RT 200.)

Appellant's mother talked to Tamayo at the scene. (1RT 202.) At trial, appellant's mother did not remember telling Tamayo that appellant charged Harvey, but after refreshing her recollection with the police report she admitted she said that appellant charged Harvey. (1RT 212, 214.)

Argument

I.

The language, legislative intent and stated policy purposes of section 1001.36 indicate a court can grant mental health diversion at any point until sentence is imposed.

A. Background

On August 14, 2018, prior to sentencing, a public defender was appointed to represent appellant after the trial court granted appellant's request to withdraw his pro per status. (CT 138.) On September 11, 2018, trial counsel requested more time to evaluate appellant for Mental Health Diversion pursuant to section 1001.36, which became effective June 27, 2018 (Stats. 2018, ch. 34, § 24). (2RT 368-370, 373-373.) Trial counsel argued that Mental Health Diversion was an available option up until sentence was imposed. (2RT 368, 369, 372.) The prosecution disagreed arguing that Mental Health Diversion can only be considered pre-trial. (2RT 370.)

After hearing arguments regarding the possibility of Mental Health Diversion pursuant to section 1001.36, the court ruled that appellant was ineligible because his request was untimely and sentenced him to four years in state prison. (2RT 373-374, 405.)

On appeal, a panel of the Fourth District Court of Appeal, Division Two, affirmed the judgment in an opinion certified for partial publication concluding that a defendant is ineligible for a pretrial mental health diversion program after his trial begins. (*People v. Braden* (2021) 63 Cal.App.5th 330, 333, 342.) In direct contrast, the Third District Court of Appeal in *People v. Curry* (2021) 62 Cal.App.5th 314, review granted July 14, 2021 (S267394), issued a published opinion and held that section 1001.36 allows a defendant to request mental health diversion up

until imposition of sentence and entry of judgment.[5]

This Court ordered review of the issue, "[w]hat is the latest point at which a defendant's request for mental health diversion is timely under [] section 1001.36?" The answer, as explained in this argument, is at any point up until sentence is imposed. The language of the statute, its codified policy purposes and the legislative history of the statute and its subsequent amendments support this interpretation. The Court of Appeal's contrary conclusion is not persuasive.

B. Standard of Review

Questions involving an issue of statutory construction are reviewed de novo. (*Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190 (*Smith*).)

When interpreting a statute, a reviewing court's fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose. (*Smith, supra,* 11 Cal.5th at p. 190.) As the *Smith* court explained,

> " ' " ' "[w]e first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." [Citation.] "Furthermore, we consider portions of a statute in the context of the

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[5] Two other published cases have held that a request for mental health diversion under section 1001.36 is timely when made prior to the jury's guilty verdict/ or a plea of guilty. (*People v. Graham* (2021) 64 Cal.App.5th 827, 833, review granted Sept. 1, 2021 (S269509) [jury's guilty verdict]; *People v. Rodriguez* (2021) 68 Cal.App.5th 584 [plea of guilty].)

> entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." ' " ' [Citation.]"

(*Smith, supra,* 11 Cal.5th at p. 190.)

C. Sections 1001.35 and 1001.36

Effective June 27, 2018, the California Legislature enacted sections 1001.35 and 1001.36. (Stats. 2018, ch. 34, § 24.) The Legislature amended section 1001.36 effective January 1, 2019. (Stats. 2018, ch. 1005, § 1.) These sections comprise a chapter of the Penal Code called "Diversion of individuals with mental disorders." Section 1001.35 defines the three-part purpose of the chapter; section 1001.36 lays out the criteria for and processes of diversion.

Section 1001.35 explicitly provides:

> The purpose of this chapter [comprising §§ 1001.35 & 1001.36] is to promote all of the following:
>
> (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while promoting public safety.
>
> (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings.
>
> (c) Providing diversion that meets the unique mental health treatment and supports needs of individuals with mental disorders.

(§ 1001.35.)

"Section 1001.36 authorizes a pretrial diversion program for defendants with qualifying mental disorders." (*People v. Frahs* (2020) 9 Cal.5th 618, 626 (*Frahs*).) "As used in this chapter, 'pretrial 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 . . . ." (§ 1001.36, subd. (c), emphasis added.)

"On an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court may, after considering the positions of the defense and prosecution, grant pretrial diversion . . . if the defendant meets all of the requirements . . . ." (§ 1001.36, subd. (a).) There are six requirements. First, the court must be "satisfied that the defendant suffers from a mental disorder" outlined in the statute. (§ 1001.36, subd. (b)(1)(A).) Second, the court must also be "satisfied that the defendant's mental disorder played a significant role in the commission of the charged offense." (§ 1001.36, subd. (b)(1)(B).) Third, "qualified mental health expert" must opine that "the defendant's symptoms motivating the criminal behavior would respond to mental health treatment." (§ 1001.36, subd. (b)(1)(C).) Fourth, subject to certain exceptions, the defendant must consent to diversion and waive his or her right to a speedy trial. (§ 1001.36, subd. (b)(1)(D).) Fifth, the defendant must agree "to comply with the treatment as a condition of diversion." (§ 1001.36, subd. (b)(1)(E).) And finally, the court must be "satisfied that the defendant will not pose an unreasonable risk of danger to public safety . . . if treated in the community." (§ 1001.36, subd. (b)(1)(F).)

If a trial court determines that a defendant meets the six requirements, then the court also must determine whether "the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant." (§ 1001.36, subd. (c)(1)(A).) The court may then grant diversion and refer the defendant to an approved treatment program. (§ 1001.36, subd. (c)(1)(B).) Thereafter, the provider "shall provide regular reports to the court, the defense, and the prosecutor on the defendant's progress in treatment." (§

1001.36, subd. (c)(2).) The maximum diversion period "shall be no longer than two years." (§ 1001.36, subd. (c)(3).)

The outcome of diversion is determined by the defendant's performance. If the defendant has performed unsatisfactorily while in diversion, the trial court must hold a hearing to determine whether to reinstate criminal proceedings. (§ 1001.36, subd. (d).) On the other hand, if the defendant has performed satisfactorily while in diversion, then at the end of the period of diversion, the trial court must dismiss the criminal charges that were the basis of the defendant's criminal proceedings. (§ 1001.36, subd. (e).)

As demonstrated below, properly construed, section 1001.36 contemplated that "***until adjudication***" means "until the judgment of conviction" – which does not occur until imposition of sentence. (See *People v. McKenzie* (2020) 9 Cal.5th 40, 46 ["In criminal actions, the terms 'judgment' and '"sentence"' are generally considered 'synonymous' [citation], and there is no 'judgment of conviction' without a sentence"].)

D. The language and policy purposes of section 1001.36 demonstrate that the Legislature intended for trial courts to have the ability to grant diversion at any point until the imposition of sentence.

By enacting sections 1001.35 and 1001.36, the Legislature recognized the need for trial courts to have the ability to grant mental health diversion prior to the imposition of sentence. The language of the statute and the policy purposes underlying it make clear that mental health diversion under section 1001.36 was intended to be an available option at any time prior to sentence is imposed. In construing section 1001.36, it is instructive to first look at the language keeping in mind the purpose for which this new statute was enacted.

1. The plain text of section 1001.36 supports that

a request for mental health diversion can be considered by the trial court up until imposition of sentence.

The plain language of section 1001.36 supports that the Legislature intended trial courts to have the ability to grant mental health diversion at any point until the imposition of sentence. Nothing in the plain language of section 1001.36 precludes the trial court from granting mental health diversion at any time prior to imposition of sentence – including post-verdict. Although section 1001.36 uses the term "pretrial diversion" on several occasions (§ 1001.36, subds. (a), (b)(1), (c), (d)(1) & (d)(2)), the Legislature specifically defined the term "pretrial diversion" within the statute. (See § 1001.36, subd. (c).) It does not mean "before the jury is selected" or "before the first witness is sworn"; for purposes of mental health diversion, "pretrial diversion" means "at any point in the judicial process from the point at which the accused is charged ***until adjudication***. . . ." (§ 1001.36, subd. (c), emphasis added..) While it is true that generally a case is no longer considered pretrial once a trial has begun, the Legislature chose to give a specific meaning to the word pretrial and forego the ordinary meaning. Furthermore, in analyzing the explicit definition of "pretrial diversion," it would make no sense to restrict diversion to before trial begins because a case cannot be prosecuted to "adjudication" before a trial has even begun. Even if the use of the words "pretrial" and "adjudication" are in conflict, "[w]hen 'a statute includes an explicit definition' of a term, 'we must follow that definition, even if it varies from a term's ordinary meaning.' [Citation.]" (*Van Buren v. United States* (2021) __ U.S. __ [141 S.Ct. 1648, 1657, 210 L.Ed.2d 26, 37-39].)

Including the language that diversion may be granted if a defendant waives his or her right to a "speedy trial" (§ 1001.36,

subd. (b)(1)(D), which occurs before a defendant has proceeded to trial, does not undermine the legislative intent to keep mental health diversion as an option until imposition of sentence. Given that the statute was written in the context of increasing diversion for individuals with mental disorders, the commonsense meaning would be that the waiver of the right to a speedy trial was included for those situations when mental health diversion is considered as an option prior to the start of trial where a defendant would be required to waive that right in order to proceed, not as a limiting requirement. Leaving open the possibility of a trial court being able to consider granting diversion until imposition of sentence accords perfectly with the purposes of diversion as explicitly stated in section 1001.35 – "increased diversion" and "to get qualified individuals out of the criminal justice system and into local, individually focused mental health treatment.

Of key significance to the analysis of when is the latest point a request for mental health diversion must be made is the meaning of the phrase "until adjudication." Courts typically look to dictionaries to ascertain the common meaning of a word. (*Consumer Advocacy Group Inc. v. Exxon Mobil Corp*. (2002) 104 Cal.Ap.4th 438, 444.) The term "adjudication" has several potential meanings. According to Black's Law Dictionary, it has two meanings: (1) "[t]he legal process of resolving a dispute," and (2) "judgment," which is itself defined to mean "[a] court's final determination of the rights and obligations of the parties in a case." (Black's Law Dict. (11th ed. 2019).) Other dictionaries define "adjudication" broader. The Random House Dictionary of the English Language defines the term to mean, with respect to the law, either "the act of a court in making an order, judgment, or decree," "a judicial decision or sentence," or "a court decree in bankruptcy." (Random House Dictionary of the English

Language (2d ed. 1987) p. 25, col. 2; see also Webster's New Collegiate Dict. (9th ed. 1988) p. 56, col. 1 [adjudication means, among other things, "a judicial decision or sentence"].)

In the context of section 1001.36, of all the possible definitions, "judgment" is the most reasonable definition for the term "adjudication." Consider Black's Law Dictionary, where the first definition of adjudication is "the legal process of resolving a dispute." (Black's Law Dict. (11th ed. 2019).) Since the term "adjudication" in section 1001.36, refers to a "point in the judicial process," and the "legal process of resolving a dispute" is plainly not a "point in the judicial process," applying that definition must be rejected.

Another potential definition of adjudication is a judicial decision other than a judgment. (See Random House Dictionary of the English Language (2nd ed. 1987) p. 25, sol.2; Webster's New Collegiate Dict. (9th ed. 1988) p. 56, col. 1.) Generally, courts understand this to refer to the "adjudication of guilt." (*In re Harris* (1989) 49 Cal.3d 131, 136.) The Legislature has occasionally used similar language, at times referring to the "adjudication of guilt" and "adjudication by a trier of fact." (Veh. Code, § 15210, subd. (d) ["adjudication of guilt"]; § 299, subd. (c)(2)(B) ["adjudication by a trier of fact"].) However, the Legislature did not include the phrase "until adjudication of guilt" here, or any other indication of this intent. Because the Legislature is deemed to be aware of existing laws when it enacts a statute (*People v. Overstreet* (1986) 42 Cal.3d 891, 897), it can be assumed that the Legislature was aware the phrase "until adjudication of guilt" when it enacted section 1001.36 and chose not to limit mental health diversion to the point where guilt is established. It referred simply to the point of "adjudication" in lieu of the restrictive phrase "until adjudication of guilt."

Accordingly, the better reasoned definition for adjudication

is judgment. There is no indication that the Legislature intended any meaning of "adjudication" in section 1001.36 other than judgment, which is when the trial court orally pronounces sentence. (See *People v. Karaman* (1992) 4 Cal.4th 335, 344 ["In a criminal case, judgment is rendered when the trial court orally pronounces sentence."].) It would disserve the stated purpose of section 1001.36 to construe the phrase "until adjudication" as anything other than judgment. The plain language of the statute clearly suggests that until adjudication means until sentence is imposed. Such an interpretation is also consistent with the intent of the Legislature to increase diversion for mentally ill defendants.

Additional support that adjudication means the imposition of sentence is the language of the amendments of section 1001.36 adding subdivisions (b)(3) and (c)(4).

Section 1001.36, subdivision (b)(3), added as part of the September 2018 amendment of the statute, expressly allows for a prima facie showing of eligibility for diversion, presumably preliminary to a more formal hearing, "*[a]t any stage of the proceedings* . . . ." (Italics added.) Since "any stage of the proceedings" in a criminal prosecution would include sentencing, diversion must be available until sentence is imposed and therefore "until adjudication" in section 1001.36, subdivision (c), must mean until the time for imposition of sentence.

The amendment of section 1001.36 also added subdivision (c)(4). That part of the law authorizes the court granting diversion to "conduct a hearing to determine whether restitution, as defined in subdivision (f) of Section 1202.4, is owed to any victim as a result of the diverted offense . . . ." (§ 1001.36, subd. (c)(4).) Under section 1202.4, subdivision (f), restitution is ascertained *at or after sentencing*, "the restitution order shall be prepared by the sentencing court . . . ." (§ 1202.4, subd. (f)(3).)

Further, the requirement of victim restitution under section 1202.4 is triggered "[u]pon a person being convicted of a crime" (§ 1202.4, subd. (a)(2)), which necessarily means after a determination of guilt by verdict or plea. Since a person who is granted mental health diversion under section 1001.36 can be ordered to pay restitution, the statute must contemplate the granting of diversion should be treated as a "diversion sentence" and include *after* the determination of guilt at *sentencing*. Senate Bill No. 215's (SB 215) author even referred to a court's discretion to grant diversion as the "diversionary ***sentence***" in noting that a court will not be authorized to grant diversion where no treatment program for the defendant exists. (Assem. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) as amended January 25, 2018, *Comments* ¶ 1, *Author's Statement*, p. 5.[6])[7]

2. The codified purposes of section 1001.36 call for the trial court to have discretion to grant diversion until sentence is imposed.

The purpose of section 1001.36 is explicitly stated in section 1001.35. The first stated purpose is to ***increase diversion*** of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety. (§ 1001.35, subd. (a), emphasis added.) Section 1001.35, subdivision (b), states that another purpose of

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[6] (Sen. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) Jan. 3. 2018, *Comments*, ¶ 1, *Need for the Bill*, p. 5; Sen. Third Reading, analysis of SB 215 (2017-2018 Reg. Sess.) as amended August 6, 2018, *Comments*, p. 3; Sen. Third Reading, analysis of SB 215 (2017-2018 Reg. Sess.) as amended August 23, 2018, *Comments*, p. 3.)

[7] Contemporaneously with this brief, appellant is filing a separate request for judicial notice of the legislative history materials for SB 215 cited herein.

this chapter is to allow local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. The third stated purpose is to promote providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (§ 1001.35, subd. (c).) The express language of section 1001.35 indicates that the Legislature was clearly focused on increasing diversion to get defendants with mental disorders the specific treatment they need and to prevent their entry and reentry into the criminal justice system, which includes punishment and sentencing. (See Definition of *criminal justice system* [online]. Oxford University Press. Available at: https://www.lexico.com/en/definition/criminal_justice_system, accessed September 13, 2021, ["Criminal justice system" is "[t]he system of law enforcement that is directly involved in apprehending, prosecuting, defending, sentencing, and punishing those who are suspected or convicted of criminal offenses"] .)

The statutes's policy purposes clearly support the interpretation that "adjudication" means imposition of sentence. Fulfilling these purposes calls for broad application of the statute to as many qualified people as possible, which would require diversion to be available until sentence is imposed. If the law *could* apply to a person, the underlying policy calls for applying it. Given that the stated purpose of section 1001.36 is to promote increased diversion for people with mental disorders that play significant roles in criminal conduct *away from the criminal justice system* and *into local, individualized treatment* (§ 1001.35), it makes sense to leave the option of diversion open until imposition of sentence so that someone who may be eligible for diversion is not instead shipped off to prison without an opportunity to be considered for diversion. This construction is

consistent with the Legislature's broad statement of purpose. As this Court noted in *Frahs,* the statement of legislative purpose found in section 1001.35, subdivision (a) supported the conclusion that "the Legislature intended the mental health diversion program to apply as broadly as possible. [Citation.]" (*Frahs, supra,* 9 Cal.5th at p. 632.) Although the purpose of increased diversion would be accomplished in part by allowing mental health diversion before the beginning of trial, it is better served by keeping the possibility of diversion open until imposition of sentence.

Furthermore, since the granting of diversion is always within the court's discretion, there is no downside to leaving the possibility of diversion open until imposition of sentence that would warrant limiting its application to only pretrial. Restricting a court's discretion to fulfill the goals of the law to divert people from the criminal justice system into mental health treatment would serve no reasonable purpose. For example, it would not be in line with the purposes of mental health diversion if evidence came out during trial that revealed a defendant's mental illness was a significant factor in the commission of the charged offense and the court could not consider the option of mental health diversion because the evidence came out after the trial started. Or as here, where appellant represented himself, mental health diversion had just become effective, the court had evidence that appellant was schizophrenic and off his medication at the time of the incident, and as soon as counsel was appointed to represent appellant he recognized the possible need for mental health diversion, yet because the request was not made pretrial, diversion was not an option. This interpretation directly conflicts with the Legislature's intent in enacting a mental health diversion statute. This Court even acknowledged in *Frahs* that the "Legislature could well have intended to allow judges to

decide under the statute whether a defendant's mental disorder was a 'significant factor in the commission of the charged offense' (*ibid*.) even after a verdict in which a mental health defense had been presented but rejected by the trier of fact." (*Frahs, supra,* 9 Cal.5th at p. 636.)

It is also important to keep in mind the individuals who are impacted by mental health diversion and how difficult it may be for them to fully understand the complexities of trial and the ramifications of diversion. For example, people who are schizophrenic interpret reality abnormally. (See Schizophrenia, available at https://www.mayoclinic.org/diseases-conditions/schizophrenia/symptoms-causes, accessed October 13, 2021.) To achieve the goal of increased diversion, it makes better sense to give individuals with mental disorders more time to process the situation and request diversion than it would be to limit the decision to before trial begins. Keeping the possibility of mental health diversion open until the imposition of sentence best fulfills the purposes of section 1001.36.

3. The limiting language requiring a waiver of the right to a jury trial to be considered for drug diversion included in the current version of section 1000.1 was omitted in section 1001.36, indicating the intent for a broader application.

Since 1972, the Legislature has developed an array of diversion programs, found in sections 1000 through 1001.97. In interpreting the language of section 1001.36, it is appropriate to consider other statutes of which it is part. As this Court has often observed, "we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 898-899; see also *Lungren v. Deukmejian* (1988) 45

Cal.3d 727, 735 ["The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provision relating to the same subject matter must be harmonized to the extent possible"].)

At the time section 1000.1 [pretrial diversion in drug cases] was first enacted in 1972, the Legislature included a speedy trial waiver requirement to be considered for pretrial diversion. In 2018, section 1000.1 was amended and now requires a defendant to plead not guilty to the charge or charges, consent and waive his or her right to a speedy trial, a speedy preliminary hearing, and to a trial by jury, if applicable, to be considered for pretrial diversion. (§ 1000.1, subd. (a)(3); Stats. 2017, c. 778 (A.B.208), § 2, eff. Jan. 2018.) The Legislature's choice of the language in section 1001.36 stands in stark contrast to the current language in section 1000.1. It is a venerable canon of statutory interpretation that "[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 26, internal quotations deleted; see also *In re Jennings* ((2004) 34 Cal.4th 254, 273.) Because the Legislature is deemed to be aware of existing laws when it enacts a statute (*Overstreet, supra,* 42 Cal.3d. at p. 897), it can be assumed that the Legislature was aware of section 1000.1 when it enacted section 1001.36 and chose not to include waiver of a jury trial or preliminary hearing as a condition of mental health diversion.

The express omission that a defendant must waive his or her right to a jury trial to be considered for mental health diversion supports the construction that diversion is an option after a trial has begun. This lack of a command indicates that the Legislature intended for a broad application of mental health

diversion and for diversion to be an available option at any point in the judicial process until sentence is pronounced.

E. The legislative history indicates the Legislature intended for trial courts to be able to consider mental health diversion as an available option up until imposition of sentence.

Appellant believes section 1001.36 is unambiguous, as explained, *ante*. The plain language and policy purposes clearly indicate the Legislature's intent to give courts the ability to grant mental health diversion up until imposition of sentence. Thus, this Court need look no further. (See, e.g., *Kaufman & Broad Comm., Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29 ["a resort to legislative history is appropriate only where statutory language is ambiguous"].) But the legislative history also indicates that the Legislature intended to give a court the ability to grant mental health diversion at any point until sentence is imposed.

In interpreting a statute, it is necessary to "consider 'the object to be achieved and the evil to be prevented by the legislation. [Citations.]'" (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276, quoting *Harris v. Capital Growth Investors XIV* (1991) 53 Cal.3d 1142, 1159.)

Significantly, section 1001.36 came about because prior to the new law trial courts only had the ability to order treatment for mentally ill defendants after sentencing them and there was an urgent need for targeted efforts to reduce the rates of incarceration of people with mental illness and increase diversion to mitigate the individuals' entry and reentry into the criminal justice system. (Assem. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) as amended January 25, 2018, *Comments* ¶ 1, *Author's Statement*, p. 5, *Comments* ¶ 6, *Argument in*

Support, p. 8.[8]) With these goals in mind, the Legislature enacted section 1001.36 to solve this problem by giving courts the ability to grant diversion and provide the appropriate treatment for mentally ill defendants prior to imposition of sentence.

Much of the legislative history behind SB 215 focused on the prevalence of defendants with mental disorders in California's prisons and how our prisons are not designed to provide effective mental health treatment for inmates thereby resulting in adverse consequences to the mentally ill. (Assem. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) as amended January 25, 2018, *Comments* ¶ 6, *Argument in Support,* p. 8.[9]) Roughly a third of inmates in California's prisons suffer from serious mental illness. "At least one study concluded that California's prison system has become de facto the largest mental health service provider in the United States, despite being ill-equipped to do so." (Assem. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) as amended January 25, 2018, *Comments* ¶ 1, *Author's Statement,* p. 5.[10]) It has been estimated that 20% of

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[8] (Sen. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) Jan. 3, 2018, *Comments*, ¶ 1, *Need for the Bill*, p. 5 and *Comments*, ¶ 5, *Arguments in Support*, p. 8; Sen. Rules Com., Off. of Sen. Floor Analyses, Third Reading, analysis of SB 215 (2017-2018 Reg. Sess.) as amended Jan. 25, 2018, *Support, Arguments in Support*, p. 7; Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business, analysis of SB 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, p. 2; Sen. Third Reading, analysis of SB 215 (2017-2018 Reg. Sess.) as amended August 6, 2018, *Comments*, p. 3; Sen. Third Reading, analysis of SB 215 (2017-2018 Reg. Sess.) as amended August 23, 2018, *Comments*, p. 3 .)

[9] (Sen. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) Jan. 3, 2018, *Comments*, ¶ 5, *Arguments in Support*, p. 8.)

[10] (Sen. Com. on Public Safety, analysis of SB 215 (2017-2018 (continued...)

inmates have a serious mental illness. According to the Los Angeles Sheriff's Department (LASD), the overall inmate population decreased in 2015, while the mentally ill population was on the rise. Between 2009-2016, LASD reported seeing a 60% increase in its mentally ill population. (Assem. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) as amended January 25, 2018, *Comments,* ¶ 2, *Prevalence of Mentally Ill Offenders in Jail*, p. 6.)

The legislative materials note that the over-incarcerations of people with mental illness is directly at odds with California's stated commitment to providing treatment in the least restrictive manner appropriate, with respect for the right to "dignity, privacy, and humane care." (Assem. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) as amended January 25, 2018, *Comments,* ¶ 6, *Argument in Support*, p. 8.)

The reports and analyses reveal that the Legislature was particularly concerned with the adverse consequences mentally ill defendants experience by being sent off to prison. "The goal of the diversion program created by this bill is to address the population of jail inmates who suffer from a mental disorder whose incarceration often leads to worsening their condition and in some cases suicide." (Sen. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) Jan. 3, 2018, *Comments*, ¶ 2, *Diversion of Defendants with Mental Disorders*, p. 7.) Other consequences were pointed out as well, such as incarceration only serves to aggravate preexisting conditions and does little to deter future lawlessness. (Sen. Comm. on Public Safety, analysis of SB

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[10](...continued)
Reg. Sess.) Jan 3, 2018, *Comments*, ¶ 1, *Need for the Bill*, p. 5; Sen. Third Reading, analysis of SB 215 (2017-2018 Reg. Sess.) as amended August 6, 2018, *Comments*, p. 3; Sen. Third Reading, analysis of SB 215 (2017-2018 Reg. Sess.) as amended August 23, 2018, *Comments*, p. 3.)

215 (2017-2018 Reg. Sess.) Jan. 3, 2018, *Purpose*, p. 4.[11]) Once incarcerated, people with mental illness tend to stay in detention longer. (Assem. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) as amended January 25, 2018, *Comments* ¶ 6, *Argument in Support*, p. 8 ["In Los Angeles County, for example, prisoners with mental illness were found to spend 2-3 times longer in prison than similarly situated prisoners without mental illness. Discrimination against people with mental illness is 'baked in' to state and local policies and practices, resulting in disproportionately high incarceration rates."].)

Another significant consequence pointed out was without appropriate treatment and other supports, many inmates find it difficult to understand and follow rules resulting in loss of good time credits, additional criminal charges, and extension of their term. Thus, their placement in prison sets them up to fail. (Assem. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) as amended January 25, 2018, *Comments* ¶ 6, *Argument in Support*, p. 8.)

By focusing on getting mentally ill defendants the treatment they need prior to being incarcerated, the Legislature made clear their intention to give courts the ability to grant mental health diversion at any time before a defendant is incarcerated, which strongly supports the interpretation that diversion was meant to be an available option until sentence is imposed. According to the non-profit organization *Disability Rights California*, "SB 215 is an important step toward recognizing that the population of inmates suffering from a mental disorder is growing and provides opportunities for the courts and communities to begin providing effective alternatives

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[11] Sen. Rules Com., Off. of Sen. Floor Analyses, Third Reading, analysis of SB 215 (2017-2018 Reg. Sess.) as amended Jan. 25, 2018, *Analysis,* p. 5.)

for treatment other than the woefully non-therapeutic environment in jails." (Assem, Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) amended January 25, 2018, *Comments* ¶ 6, *Argument in Support*, p. 8.) "SB 215 provides a tool for trial courts to use in appropriate cases when diversion is the best option and treatment resources are available. It is crafted in a manner to ensure that treatment resources will be available and the best interests of the community are considered. Further, the bill recognizes that a crucial part of a successful treatment system is one that diverts individuals who can safely and effectively be treated and supervised outside of jail and prison settings. The diversion of criminal defendants with mental illness can improve both mental health and criminal justice outcomes." (Assem. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) as amended January 25, 2018, *Comments* ¶ 6, *Argument in Support*, p. 9.[12])

Considering that the Legislature's intent in enacting section 1001.36 was to prevent sending mentally ill defendants to ill-equipped prisons, it would be counterproductive to limit eligibility for diversion to only those individuals that make the request pretrial. For example, the goals of the bill would not be achieved where a court discovers during trial that a defendant's mental illness played a significant factor in the crime, yet the court must sentence him or her to prison instead of considering mental health diversion. Allowing a defendant to seek mental health diversion until imposition of sentence and entry of judgment harmonizes with the overall statutory scheme. (*People*

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[12] (Sen. Rules Com., Off. of Sen. Floor Analyses, Third Reading, analysis of SB 215 (2017-2018 Reg. Sess.) as amended Jan. 25, 2018, *Support,* p. 7; Sen. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) Jan 3, 2018, *Comments* ¶ 5, *Arguments in Support*, p. 8.)

v. Valladoli (1996) 13 Cal.4th 590, 599.)

In light of the Legislature's intents, the overwhelming inference is that section 1001.36 was intended to be an available option until imposition of sentence. Therefore, it should be interpreted accordingly.

Even if this Court finds the language and context of section 1001.36 ambiguous, the legislative history is not. The Legislature intended to avoid the incarceration of mentally ill individuals by giving courts the ability to grant mental health diversion at any point until sentence is imposed.

F. The court of appeal's reasons for concluding a trial court's ability to grant mental health diversion is only available pretrial are not compelling.

To begin with, the Court of Appeal concluded that diversion was only available before trial begins because "the Legislature five times in the text of section 1001.36 referred to the mental health diversion program as 'pretrial' diversion. [Citation.]." (*Braden, supra,* 63 Cal.App.5th at p. 333.) The court reasoned that "[r]egardless of the precise moment that defines the beginning of trial, a case is no longer 'pretrial' once a trial has started." (*Ibid*.) However, by relying on the common meaning of the word "pretrial," the court ignored that the Legislature defined "pretrial diversion" in section 1001.36 and gave it a specific meaning. The court's reliance on the ordinary meaning of "pretrial" cannot be reconciled with the explicit definition of "pretrial diversion," as explained above in section D(1).

The Court of Appeal also relied on the inclusion of a speedy trial waiver requirement in the statute to conclude diversion must be requested prior to trial. The Court of Appeal relied on this Court's decision *Morse v. Municipal Court* (1974) 13 Cal.3d 149 (*Morse*) to reach its conclusion. (*Braden, supra,* 63 Cal.App.5th at p. 335.) In *Morse*, this Court considered the latest

point in time that a defendant could seek pretrial diversion under section 1000 et seq., a statutory scheme allowing for pretrial diversion for certain drug crimes. In addressing this question, this Court reasoned that since a defendant's participation in the diversion program was contingent on the defendant waiving his or her right to a speedy trial and that right may only be asserted before the commencement of trial, diversion must be requested before trial. (*Morse, supra,* 13 Cal.3d at p. 156.) Here, the Court of Appeal applied that reasoning and held that since section 1001.36 included a speedy trial waiver requirement, *Morse* required the court to construe section 1001.36 as precluding requests for mental health diversion after trial begins. (*Braden, supra,* 63 Cal.App.5th at p. 335.) The Court of Appeal's reliance on *Morse* was misplaced.

The statutory scheme covered in *Morse* is distinguishable to section 1001.36. Most importantly here, even though both statutes require defendants to waive their speedy trial rights and although both refer to pretrial diversion, only section 1001.36 specifically defines the phrase "pretrial diversion" to allow diversion "at ***any point in the judicial process*** from the point at which the accused is charged ***until adjudication***. . . ." (§ 1001.36, subd. (c), emphasis added.)

Another key difference is that section 1001.36 is concerned with increasing diversion for individuals with mental disorders to avoid incarceration while the statutory scheme analyzed in *Morse* was concerned with promoting diversion to reduce clogged courts and prevent trials. Taken in context of the purpose of section 1001.36, the commonsense meaning of including the speedy trial waiver requirement would be quite different than that of section 1000.1. Here, the focus was on increasing diversion and reducing incarceration, not reducing trials, so it would make more sense to find that the waiver of the right to a speedy trial was not meant

as a limiting requirement, and included for those situations where needed.

The Court of Appeal acknowledged that "adjudication" can mean "until sentencing," however the court chose to interpret "adjudication" as referring to the process of adjudicating a dispute and failed to consider the express policy purposes, as stated in section 1001.35. The court stated that it is not unusual to consider the ordinary meaning of a defined term, especially when there is dissonance between that ordinary meaning and the reach of the definition. (*Braden, supra,* 63 Cal.App.5th at pp. 336-337.) As discussed above in section D(1), while adjudication could be interpreted as referring to the process, this interpretation would not be reasonable because "adjudication" in section 1001.36 refers to "a point in the judicial process," and the "process of adjudicating an issue" is clearly not a "point in the judicial process."

Furthermore, the Court of Appeal stated that nothing in the language of section 1001.36, or its legislative history showed that the Legislature sought to apply the phrase "until adjudication" in a manner different than before trial. (*Braden, supra,* 63 Cal.App.5th at p. 338.) However, it appears that the court failed to review the legislative history thoroughly and accord the proper weight to the purpose of increasing diversion to ensure treatment rather than incarceration for mentally ill defendants.

The Court of Appeal also found that requiring a defendant to seek mental health diversion before trial is consistent with the nature of California diversion programs, which long have had a purpose of reducing the systemic burdens on criminal trials. (*Braden, supra,* 63 Cal.App.5th at p. 335.) This argument is also misplaced.

It is true diversion statutes in general are frequently

concerned with reducing court congestion and saving the state money. (See, e.g., *People v. Superior Court* (*Sanchez-Flores*) (2015) 242 Cal.App.4th 692, 705 ["avoiding the time and expense of certain misdemeanor trials is certainly one of the goals that animated supporter" of pilot program of deferred sentencing in Los Angeles]; *People v. Cisneros* (2000) 84 Cal.App.4th 352, 357 [deferred entry of judgment program for first time drug offenders must be liberally construed to promote objectives of "rehabilitating novice drug users and reducing congestion in the criminal justice system"].) This Court described California's first diversion program as having two purposes, one of which to rehabilitate a defendant without the stigma of a conviction, and the other of which was to create a "quick and inexpensive method of disposition" that enabled courts "to devote their limited time and resources to case requiring full criminal proceedings." (*People v. Superior Court* (*On Tai Ho*) (1974) 11 Cal.3d 59, 61-62.)

However, not all diversion programs are established to reduce the burden of a criminal trial and the associated costs. While reducing the burden of a trial and saving money by avoiding a trial would be positive side effects of section 1001.36, it is clear from the express purpose of mental health diversion (to increase diversion) and the legislative history that the above stated results were not among the goals of the mental health diversion program. In enacting section 1001.36 the Legislature was focused on increasing diversion to reduce recidivism and to avoid the incarceration of the mentally ill, not on reducing the burdens of criminal trials. (See Assem. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) as amended January 25, 2018, *Comments* ¶ 1, *Author's Statement*, p. 5, *Comments* ¶ 6, *Argument in Support*, p. 8 [section 1001.36 came about because there was an urgent need for targeted efforts to reduce the rates of incarceration of people with mental illness and increase

diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system].) Even when the Legislature considered the cost, the focus was on the cost of incarceration, not the cost of a trial. (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business, analysis of SB 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, p. 2 ["while community based treatment for a mentally ill defendant costs roughly $20,000 per year (and greatly reduces recidivism), jailing that same defendant (with a greater risk of recidivism) costs the community more than $75,000 a year"]; Sen. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) Jan. 3, 2018, *Comments*, ¶ 1, *Need for this Bill*, p. 5 ["lawsuits resulting from jail overcrowding and inmate deaths or injuries relating to inadequate mental health care or mistreatment of the mentally ill have cost California hundreds if millions of dollars"].) As shown above in section E, the legislative history regarding mental health diversion focused on creating a diversion process to increase treatment for mentally ill individuals prior to incarcerating them. A liberal construction of section 1001.36 to allow mental health diversion up until imposition of sentence would promote the objectives of keeping mentally ill defendants from incarceration, providing them the treatment they need and reducing recidivism.

The Court of Appeal also expressed concern that if a defendant was not required to request diversion before trial, many defendants would lack the incentive to "agree[] to comply with treatment as a condition of diversion" (§ 1001.36, subd. (b)(1)(E)) until after conviction. (*Braden, supra,* 63 Cal.App.5th at p. 341.) Assuming this is true, this factor alone does not require a narrow interpretation of section 1001.36. The Legislature may have thought it better to maximize the number of individuals who participate in mental health diversion programs than to minimize the number of individuals who pursue

trial.

Additionally, a safety valve was written into section 1001.36 to prevent situations such as the one presented by the Court of Appeal above or the possibility of encouraging "gamesmanship." The statute contemplates the court obtaining a broad range of inputs into a decision regarding mental health diversion both in determining whether to grant the program and in determining what the defendant's treatment program will be if the program is granted. The court was given many opportunities to exercise its discretion to weed out any self-serving requests.

The Court of Appeal also pointed out that section 1001.36 does not contain a provision for setting aside a conviction, which would be expected if the Legislature contemplated postconviction motions. (*Braden, supra,* 63 Cal.App.5th at p. 335, fn. 2.) This reasoning is flawed.

It would have been unnecessary for the Legislature to include postconviction wording because the wording in section 1001.36, subdivision (e) is broad enough to encompass dismissing a case after conviction, as long as sentence has not been imposed. Section 1001.36, subdivision (e) states in relevant part, "If a 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*." (§ 1001.36, subd. (e), emphasis added.) This language is not inconsistent with the idea that the Legislature intended diversion to be an available option postconviction.

Indeed, keeping the option of diversion open after a conviction would actually give the court leverage to encourage a defendant to succeed with treatment because he or she would already have a conviction hanging over his or her head.

Furthermore, the Court of Appeal unreasonably discounted

the purposes of the statute in construing the ordinary meaning of the language used in section 1001.36. In responding to appellant's argument that since the purpose of enacting section 1001.36 was to divert individuals with mental disorders away from the criminal justice system and into treatment it "makes sense to leave the option of diversion open until sentencing," the Court of Appeal referred to the purpose as a "general purpose." (*Braden, supra,* 63 Cal.App.5th at p. 340.) To the contrary, the purposes codified in section 1001.35 are specific and provide key guidance when interpreting the Legislature's intent. The Court of Appeal failed to recognize this.

G. The rule of lenity compels resolution of any remaining ambiguity in appellant's favor.

Appellant believes that a fair reading of the language, purpose, and history make clear that diversion can be requested at any point until sentence is imposed. But any remaining ambiguity perceived by this Court should be resolved in appellant's favor.

The rule of lenity generally requires courts to "resolve doubts as to the meaning of a statute in a criminal defendant's favor." (*People v. Avery* (2002) 27 Cal.4th 49, 57.) This rule applies when two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable. (*People v. Jones* (1988) 46 Cal.3d 585, 599.)

Appellant maintains that the language of the statute is unambiguous and that section 1001.36 compels that diversion is available until sentence is imposed. This approach to section 1001.36 is the most logical way to interpret the application of the statute and to respect the express purposes of the Legislature. Keeping the possibility of diversion open until the imposition of sentence would not produce an absurd result, or a result

inconsistent with the legislative intent. (*People v. Cruz* (1996) 13 Cal.4th 764, 783.) In contrast, the interpretation expressed by the Court of Appeal undermines the intents and goals of the Legislature.

To the extent this Court finds that an ambiguity exists, section 1001.36's scope must be construed in favor of those seeking relief under it, like appellant.

H. Conclusion

The plain text of section 1001.36, the absence of limiting language in section 1001.36 found in other statutes, and the codified purposes, demonstrate that the Legislature intended for trial courts to have the ability to grant mental health diversion at any point until sentence is imposed. Furthermore, the legislative history clearly indicates that the main goal of enacting section 1001.36 was to increase diversion for individuals with mental disorders to provide the treatment they need prior to incarceration. This goal would be best achieved by keeping the possibility of diversion open until sentence is imposed for individuals just like appellant.

Conclusion

Accordingly, for the reasons stated above, appellant respectfully requests this Court hold that a request for mental health diversion under section 1001.36 is timely up until the time of imposition of sentence.

DATED: October 26, 2021 Respectfully submitted,

/s/ Cindy Brines
CINDY BRINES
Attorney for Appellant
Cory Juan Braden, Jr.

Certificate of Compliance

I certify pursuant to CA Rules of Court, Rule 8.520, subdivision (c)(1) that **APPELLANT'S OPENING BRIEF ON THE MERITS** contains 10,627 words, excluding the cover, tables, this certification, the attachment, and the proof of service, according to the word count of the program used to prepare this brief.

DATED: October 26, 2021 Respectfully submitted,

/s/ Cindy Brines
CINDY BRINES
Attorney for Appellant
Cory Juan Braden, Jr.

Attachment A

(Section 1001.36)

Penal Code Section 1001.36.
Granting of pretrial diversion; defendants suffering from mental disorders; reinstatement of criminal proceedings; dismissal of charges

(a) On an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court may, after considering the positions of the defense and prosecution, grant pretrial diversion to a defendant pursuant to this section if the defendant meets all of the requirements specified in paragraph (1) of subdivision (b).

(b)(1) Pretrial diversion may be granted pursuant to this section if all of the following criteria are met:

(A) The court is satisfied that 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. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a recent diagnosis 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.

(B) The court is satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense. A court may conclude that a defendant's mental disorder was a

significant factor in the commission of the charged offense if, after reviewing 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, the court concludes that the defendant's mental disorder substantially contributed to the defendant's involvement in the commission of the offense.

(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 the defendant's right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment pursuant to clause (iv) of subparagraph (B) of paragraph (1) of subdivision (a) of Section 1370 and, as a result of the defendant's mental incompetence, cannot consent to diversion or give a knowing and intelligent waiver of the defendant's right to a speedy trial.

(E) The defendant agrees to comply with treatment as a condition of diversion.

(F) The court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community. The court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's violence

and criminal history, the current charged offense, and any other factors that the court deems appropriate.

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

(A) Murder or voluntary manslaughter.

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

(C) Rape.

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

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

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

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

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

(3) 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. 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.

(c) As used in this chapter, "pretrial 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:

(1)(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.

(2) 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.

(3) The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years.

(4) Upon request, the court shall conduct a hearing to determine whether restitution, as defined in subdivision (f) of Section 1202.4, 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.

(d) 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 pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code:

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

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

(3) The defendant is engaged in criminal conduct rendering the

defendant unsuitable for diversion.

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

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

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

(e) 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. If the court dismisses the charges, the clerk of the court shall file a record with the Department of Justice indicating the disposition of the case diverted pursuant to this section. 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, and the court shall order access to the record of the arrest restricted in accordance with Section 1001.9, except as specified in subdivisions (g) and (h). The defendant who

successfully completes diversion may indicate in response to any question concerning the defendant's prior criminal record that the defendant was not arrested or diverted for the offense, except as specified in subdivision (g).

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

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

(1) The arrest upon which the diversion was based may be disclosed by the Department of Justice to any peace officer application request and that, notwithstanding subdivision (f), this section does not relieve the defendant 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, as defined in Section 830.

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

(h) 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 pursuant to this section or for use at a hearing on the defendant's eligibility for diversion under this section may not be used in any other proceeding without the defendant's consent, unless that information is relevant evidence that is admissible under the standards described in paragraph (2) of subdivision (f) of Section 28 of Article I of the California Constitution. However, when determining whether to exercise its discretion to grant diversion under this section, a court may consider previous records of participation in diversion under this section.

(i) The county agency administering the diversion, the defendant's mental health treatment providers, the public guardian or conservator, and the court shall, to the extent not prohibited by federal law, have access to the defendant's medical and psychological records, including progress reports, during the defendant's time in diversion, as needed, for the purpose of providing care and treatment and monitoring treatment for diversion or conservatorship.
(§ 1001.36.)

Proof of Service

I, Cindy Brines, declare that: I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is P.O. Box 2712, San Pedro, CA 90731.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United State Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

On October 26, 2021, I caused to be served the following document: **APPELLANT'S OPENING BRIEF ON THE MERITS**, by placing a true copy in a separate envelope addressed to each addressee, respectively, as follows:

Cory Braden, Jr.
16429 Lariat Rd. #5
Victorville, CA 92395

County of San Bernardino
Appeals and Appellate Div.
The Honorable John M. Tomberlin
8303 Haven Avenue, 1st Floor
Rancho Cucamonga, CA 91730

I then sealed the envelope and, with the postage fully prepaid, I placed the envelop in the United States mail, this same day, at San Pedro, California.

On October 26, 2021, I electronically served the attached **APPELLANT'S OPENING BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system.

I electronically served from my electronic service address of cindybrines@sbcglobal.net, **APPELLANT'S OPENING BRIEF ON THE MERITS** on October 26, 2021 to the following entities: Appellate Defenders Inc., eservice-court@adi-sandiego.com

Attorney General's Office, sdag.docketing@doj.ca.gov
District Attorney, appellateservices@sbcda.org
Court of Appeal Fourth Appellate District, Division Two, via Truefiling
Daniel Messner, daniel.messner@pd.sbcounty.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 26, 2021 *<u>/s/ Cindy Brines</u>*
CINDY BRINES