No. S268925

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

CORY JUAN BRADEN, JR.,
Defendant and Appellant.

Fourth Appellate District, Division Two, Case No. E073204
San Bernardino County Superior Court, Case No. FVI18001116
The Honorable John M. Tomberlin, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

What is the latest point at which a defendant's request for mental health diversion is timely under Penal Code section 1001.36? [1]

INTRODUCTION

Appellant Cory Braden assaulted a sheriff's deputy who responded to a domestic disturbance call at his home. He invoked his right to a speedy trial and a jury convicted him of resisting an executive officer with force or violence. Before sentencing, defense counsel requested a continuance so that, among other things, appellant could be evaluated for mental health diversion—a program of pretrial diversion that became available six weeks before Braden's trial started. The prosecution opposed the request, arguing it was untimely because it was made after Braden was tried and convicted. The trial court agreed and denied appellant's request for mental health diversion.

On appeal, appellant claimed that his request for mental health diversion was timely made before sentencing. The Court of Appeal rejected this contention and concluded that the text of section 1001.36, this Court's precedent, and the nature of California's diversion programs all required pretrial diversion, including mental health diversion, to be requested before trial starts.

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

The mental health diversion statute provides that "pretrial diversion" is available "at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).) There are three possible interpretations of when mental health diversion may be sought based on the definition's use of the term "until adjudication": (1) before jeopardy attaches; (2) before a determination of guilt; or (3) before imposition of sentence.

On balance, the better interpretation is the one adopted by the Court of Appeal below—that pretrial diversion is available only until a jury is empaneled and jeopardy attaches. This interpretation eliminates double jeopardy issues that could arise if the jury is dismissed in order to grant diversion midtrial. It is also consistent with this Court's prior ruling that when a statute makes diversion contingent upon a speedy trial waiver, diversion must be requested before trial starts. Finally, this interpretation promotes several public policies, such as incentivizing early treatment and reducing costs associated with trials and incompetency proceedings.

While another plausible reading of the statutory language would give the trial court discretion to grant or deny diversion until a determination of guilt is made, this would raise double jeopardy concerns in cases where the defendant fails out of the diversion program and the prosecution seeks to reinstate trial proceedings. And, aside from the double jeopardy concerns, the same policy reasons mentioned above counsel against allowing diversion to be sought midtrial. At a minimum, those public

policies provide good discretionary reasons for a trial court to deny diversion midtrial in appropriate cases.

Diversion posttrial, however, is not contemplated by the statutory text or legislative history and raises even greater public policy concerns. By arguing that diversion may be requested after a defendant has already been tried and convicted, appellant is effectively trying to alter the statute from one that permits "pretrial" diversion to be granted prior to "adjudication" to one that permits "posttrial" diversion to be granted prior to "sentencing or judgment." This approach would incentivize defendants to go to trial rather than to seek treatment at the earliest opportunity. It would also conflict with several compulsory provisions of section 1001.36, such as the requirement that a defendant waive his or her right to a speedy trial. Therefore, diversion should never be permitted posttrial.

STATEMENT OF THE CASE

A. Appellant assaulted Deputy Harvey

On April 25, 2018, appellant's sister called 911 after appellant tried to attack her, and then kicked his mother in her stomach and grabbed her by her throat. (1RT 199-200, 203-209, 216, 222-223.) San Bernardino County Sheriff's Deputy Alexander Harvey responded to the domestic disturbance call. (1RT 97-98, 141.) Deputy Harvey was in uniform and driving a marked patrol vehicle. (1RT 103-104.)

When Deputy Harvey arrived on scene, he walked to the front door of the apartment, where appellant was waiting. (1RT 106.) Appellant was holding a backpack in front of his person, hiding his waistband area. (1RT 106.) Believing that he might

be concealing a weapon, Deputy Harvey told appellant to drop the backpack and come speak with him in the driveway. (1RT 106.)

Appellant walked over to the hood of a vehicle that was parked in the driveway and told the deputy that he wanted to call 911. (1RT 107.) Deputy Harvey explained that he was a sheriff's deputy so there was no reason to call 911. (1RT 107.) Appellant then demanded that a supervisor be contacted. (1RT 107.) Deputy Harvey advised that he would call his supervisor, but that he first wanted to secure the scene and conduct a pat-down search of appellant. (1RT 107.)

Appellant's sister started recording the encounter on her cell phone. (1RT 116, 120, 146; Exh. No. 3.) Deputy Harvey asked appellant to put his hands behind his back so that he could conduct a quick pat-down search of appellant's person. (1RT 108.) Appellant started to put his hands behind his back, but he then tensed up, turned and punched Deputy Harvey in the face. (1RT 108-109, 113.) Deputy Harvey responded by backing up and throwing two punches to appellant's face that did nothing to subdue him. (1RT 110-114.) Appellant backed up, took a fighting stance, and balled up his fists. (1RT 114.) Appellant threw about three more punches at Deputy Harvey. (1RT 114-115.)

Deputy Harvey was able to tackle appellant onto the ground, and get on top of appellant's back to hold him down. (1RT 116, 143, 200.) Appellant was holding one of his hands at his waist and the other near his face. (1RT 116-117.) Deputy Harvey, who was still concerned that appellant might have a weapon on him,

punched appellant twice on his left side, but appellant kept his hands hidden underneath his body. (1RT 116-117.) Deputy Harvey ordered appellant to put his hands behind his back, but appellant did not follow his commands. (1RT 117.)

Two other sheriff's deputies arrived to assist. (1RT 118, 141, 146.) Appellant continued to resist all three officers until they finally were able to gain control and put appellant's hands behind his back and handcuff him. (1RT 119, 144-145.)

Deputy Harvey suffered stiffness to the left side of his face, a bruised right knee, and bruised elbow. (1RT 120-121, 126-128.)

B. The jury convicted appellant of resisting an executive officer with force

On April 27, 2018, the San Bernardino County District Attorney charged appellant with resisting an executive officer with force or violence (§ 69) and alleged two prior strike convictions (§§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)). (CT 10-12.) The public defender's office was appointed to represent appellant at his arraignment. (CT 13-14.) At a hearing five days later, the trial court granted appellant's request to represent himself and the public defender's office was relieved as counsel. (CT 15.) Appellant subsequently invoked his right to a speedy trial. (1RT 8.)

Section 1001.36 took effect when Assembly Bill (A.B.) No. 1810 (2017-2018 Reg. Sess.) was signed into law on June 27, 2018. (Stats. 2018, ch. 34, § 37; Cal. Const., art. IV, § 12, subd. (e).) Appellant's jury was selected and sworn to try the cause on August 7, 2018. (CT 131-132.) Appellant thus had 42 days to request mental health diversion from the time it became

available until the time jeopardy attached. On August 9, 2018, the jury found appellant guilty and found both prior strike conviction allegations to be true. (CT 136, 138, 161-163.)

C. After he was convicted, appellant requested mental health diversion and the trial court denied his request

After the jury was excused on August 9, 2018, appellant asked the court to appoint counsel to represent him. (2RT 362-363.) On August 14, 2018, the court officially reappointed the public defender's office to represent appellant from that point forward. (2RT 364-367.)

Before sentencing, on September 11, 2018, defense counsel requested a continuance so that, among other things, appellant could be evaluated for mental health diversion. (2RT 368-370.)

The prosecution responded that the time for the court to consider mental health diversion had passed because appellant had already been tried and convicted. (2RT 370.) The prosecutor further noted that in the five days that defense counsel had represented appellant before trial, counsel did not raise any mental health concerns. (2RT 370.) Thus, the prosecutor asked the trial court to deny the request for mental health diversion. (2RT 370-371.)

Defense counsel replied that the case had not yet been adjudicated within the meaning of section 1001.36, subdivision (c), because appellant had not been sentenced. (2RT 372.) Counsel reasoned that, in a situation where a defendant is placed on probation, the proceedings are suspended and adjudication does not occur until the individual is sentenced. (2RT 372.)

Here, because counsel intended to file motions to reduce appellant's crime to a misdemeanor and strike the prior strike convictions, probation was a possible scenario; thus, appellant had not been adjudicated for purposes of the mental health diversion statute. (2RT 372.)

The trial court ruled that appellant was ineligible for relief under section 1001.36. (2RT 373.) The court explained that appellant's request that mental health diversion be considered after trial concluded was untimely and moot, but even if not, the court was exercising its discretion to deny diversion. (2RT 373-374.) The court, however, granted appellant's request for a continuance to file necessary sentencing motions. (2RT 373-374.)

On November 16, 2018, the court sentenced appellant to four years in state prison. (CT 202-203, 205-206; 2RT 406.)

D. The Court of Appeal affirmed the trial court's ruling that appellant's request to be considered for mental health diversion was untimely

Appellant timely appealed the judgment to Division Two of the Fourth Appellate District. (CT 207, 211.) He challenged, among other things, the trial court's determination that his request to be considered for mental health diversion was untimely. The Court of Appeal agreed with the trial court and held that because appellant did not request mental health diversion before his trial started, he was ineligible for the program. (Slip opn., p. 18.) This Court granted appellant's petition for review.

ARGUMENT

THE LANGUAGE, LEGISLATIVE INTENT, AND PUBLIC POLICY REASONS BEHIND SECTION 1001.36 ALL REQUIRE THAT MENTAL HEALTH DIVERSION BE SOUGHT BEFORE TRIAL STARTS, BUT AT THE LATEST, BEFORE A DETERMINATION OF GUILT

The Legislature demonstrated its intent that pretrial mental health diversion be sought before trial starts. This legislative intent is seen primarily in the language of section 1001.36, especially in consideration of language in other similar diversion statutes. And this intent is confirmed by the legislative history of the statute and its subsequent amendments, as well as public policies that promote early intervention for mental health treatment and saving costs associated with trials and incompetency proceedings. While another plausible interpretation of the statutory language would allow defendants to request diversion up until a determination of guilt, this approach raises double jeopardy concerns and goes against the public policies just mentioned. And for these reasons, even if midtrial diversion is permissible, courts should exercise their discretion to grant it only in exceptional circumstances. Appellant's argument that pretrial mental health diversion may be sought up until the point of sentencing is not persuasive because his interpretation would effectively change pretrial diversion into a posttrial proceeding.

A. The statutory framework of section 1001.36

Mental health diversion under section 1001.36 applies only "[o]n an accusatory pleading." (§ 1001.36, subd. (a).) The statute defines "pretrial diversion" as the "postponement of prosecution, either temporarily or permanently, at any point in the judicial

process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment[.]" (§ 1001.36, subd. (c).) The stated purposes of the diversion program include promotion of the following:

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

(§ 1001.35.)

As originally enacted, section 1001.36, subdivision (b), provided that pretrial diversion may be granted if six eligibility criteria are met. The defendant must suffer from a recognized mental disorder, the disorder must have played a significant role in the commission of the charged offense, and the disorder must be treatable. (Stats. 2018, ch. 34, § 24.) The defendant must also consent to diversion and, importantly, waive his or her right to a speedy trial. (*Ibid.*) Finally, the defendant must agree to comply with treatment and the court must be satisfied that the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (*Ibid.*)

Section 1001.36 was later amended to prohibit a defendant from receiving pretrial diversion if charged with certain specified offenses. (Senate Bill (S.B.) No. 215, Stats. 2018, ch. 1005, § 1.)

The amendments also made certain changes to the language of the six eligibility criteria and reordered the criteria as subparagraphs of a new subdivision (b)(1). (*Ibid.*)

Even if a defendant otherwise satisfies the six eligibility requirements, the trial court must nonetheless be satisfied that the recommended mental health treatment program "will meet the specialized mental health treatment needs of the defendant." (§ 1001.36, subd. (c)(1)(A).) In exercising its discretion to approve diversion, the court must "consider the request of the defense, the request of the prosecution, the needs of the defendant, and the interests of the community." (*Id.* at subd. (c)(1)(B).)

Appellant was tried and convicted almost two months after section 1001.36 became operative on June 27, 2018. (CT 136, 161, 202-203, 205-206.)

B. The principles of statutory construction

"The principles of statutory construction are well established." (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.) "'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (*Ibid.*, quoting *People v. Pieters* (1991) 52 Cal.3d 894, 898.) In effectuating this purpose, a reviewing court "must first look at the plain and commonsense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose." (*People v. Cochran* (2002) 28 Cal.4th 396, 400.) "If there is no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it

said," and courts "need not resort to legislative history to determine the statute's true meaning." (*Id.* at pp. 400-401.)

However, a court "may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results." (*Baker v. Worker's Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 442.) And to the extent the statutory text is ambiguous, courts may look to extrinsic interpretive aids, including the ostensible objectives to be achieved and the legislative history. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1369.) Ultimately, a court should adopt "the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." (*Ibid.*, internal quotations and citations omitted.)

C. The plain language of section 1001.36 requires a defendant to seek mental health diversion before trial starts, but at the latest, before a verdict is reached

Section 1001.36 defines "pretrial diversion" as "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged *until adjudication* . . . ." (§ 1001.36, subd. (c), italics added.) The statute itself does not further define the phrase "until adjudication." And while this Court has held that section 1001.36 applies retroactively, this Court specifically declined to interpret this language. (*People v. Frahs* (2020) 9 Cal.5th 618, 633, fn. 3.)

Since *Frahs*, appellate courts have presented three potential interpretations of "until adjudication": (1) before imposition of

sentence (*People v. Curry* (2021) 62 Cal.App.5th 314, 321-326, review granted July 14, 2021, S267394); (2) before a trial starts (*People v. Braden* (2021) 63 Cal.App.5th 330, 334 [the Court of Appeal decision below]); and (3) before a jury verdict or guilty plea (*People v. Graham* (2021) 64 Cal.App.5th 827, 832-836 [before jury verdict], review granted Sept. 1, 2021, S269509); *People v. Rodriguez* (2021) 68 Cal.App.5th 584, 589-593 [before guilty plea], review granted Nov. 10, 2021, S270895). Importantly, *Rodriguez* and *Graham* acknowledged that they could reject the appellants' claims without defining the point when diversion becomes unavailable quite so finely as the Court of Appeal below. Therefore, they did not disagree with the holding below, but instead left open the question of whether a diversion request is untimely after trial begins. (*Rodriguez*, at p. 591; *Graham*, at p. 835.)

As discussed below, on balance, the statutory language favors an interpretation that pretrial mental health diversion must be sought before trial starts and jeopardy attaches. While another possible interpretation of the statute would allow diversion until the time of conviction, this should not be the normal course and should be permitted only where the defendant properly requests and consents to a mistrial in order to avoid a double jeopardy bar to retrial should the defendant fail at diversion. But no reading of the statutory language permits diversion to take place posttrial, after the point of adjudication.

1. Mental health diversion should be sought before trial starts

Of the three proposed interpretations, requiring mental health diversion to be sought before trial starts is the most reasonable. As discussed below, such an interpretation comports with the ordinary meaning of "pretrial," is consistent with this Court's precedent and other similar diversion statutes, and prevents double jeopardy problems.

Requiring diversion to be sought before a trial starts comports with the statute's repetitive use of the word "pretrial" and initial reference to an "accusatory pleading." (See § 1001.36, subds. (a) ["On an accusatory pleading" the court may "grant pretrial diversion"], (b)(1) ["Pretrial diversion may be granted" if all criteria are met], (c) [containing definition of "pretrial diversion"], (d)(1) and (2) [court to consider reinstating criminal proceedings if defendant is charged with an additional misdemeanor or felony "committed during the pretrial diversion"].) There can be no dispute that "pretrial" means "occurring or existing before a trial." (See Merriam-Webster Dict. Online, <https://www.merriam-webster.com/dictionary/pretrial> [as of Nov. 19, 2021]; see also Dictionary.com, <https://www.dictionary.com/browse/pretrial> [defining pretrial as "before a trial" and "prior to a trial"] [as of Nov. 19, 2021].) Moreover, once there has been a trial, the accusatory pleading no longer controls, but instead the jury's or court's verdicts. The defendant is no longer accused of committing a crime; he or she has been found guilty.

The Legislature's use of the terms "pretrial" and "accusatory pleading" are thus clear textual evidence of the intended timing of eligibility for relief under the statute, for "a case is no longer 'pretrial' once a trial has started." (*Braden*, *supra*, 63 Cal.App.5th at p. 334); see also *Rodriguez*, *supra*, 68 Cal.App.5th at p. 590 ["the legislatively-chosen words "'pretrial diversion'" were not inconsequential" and "strongly suggests a timing requirement"]; *Graham*, *supra*, 64 Cal.App.5th at p. 833 [same].) "After all, 'pretrial' exists in contradistinction to posttrial, and 'pretrial *diversion*' connotes a diversion away from trial. One cannot divert a river *after* the point at which it has reached the sea." (*Graham*, at p. 833.)

This reading of the statute is also consistent with the common definition of "adjudication" as the *process* of deciding an issue, such as the court's adjudication of a defendant's guilt or innocence through trial. (See Merriam-Webster Dict. Online, <https://www.merriam-webster.com/dictionary/adjudication> [first definition of "adjudication" is "the act or process of adjudicating a dispute"] [as of Nov. 11, 2021]; see also Dictionary.com, <https://www.dictionary.com/browse/adjudication> [first definition of adjudication as "an act of adjudicating] [as of Nov. 10, 2021].; Lexico.com, <https://www.lexico.com/en/definition/adjudication> [definition of adjudication as "the action or process of adjudicating] [as of Nov. 10, 2021].) In fact, this Court referred to "adjudication" as a "process" when discussing a 1972 drug diversion statute. (*People v. Superior Court (On Tai Ho*) (1974) 11 Cal.3d 59, 62 ["If it

appears the defendant may be eligible [for first-time drug offender diversion], the process of adjudication begins"].)

By using "adjudication" as a term defining "pretrial diversion," the Legislature signaled that diversion should be sought before the process of adjudication begins, such as during the discovery, preliminary hearing, and pretrial motion stages of the proceedings; if not, the case would no longer be pretrial. "In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition." (*Bond v. United States* (2014) 572 U.S. 844, 861.)

The statute's speedy trial waiver requirement also supports an interpretation that diversion must be sought before trial starts. This Court previously held that when a statute makes diversion contingent upon a speedy trial waiver, diversion must be requested before trial starts. (*Morse v. Municipal Court for San Jose-Milpitas Judicial Dist.* (1974) 13 Cal.3d 149.) *Morse* addressed California's first statutorily-mandated diversion program—a 1972 statute (§ 1000.1) intended to divert first time drug offenders away from criminal prosecution. (*Id.* at p. 153.) This Court held that "the plain meaning of the waiver of speedy trial language of section 1000.1 is that the defendant's consent to referral of his case to the probation department should be tendered to the district attorney *prior to the commencement of trial*." (*Id.* at p. 156, italics added.)

Three years after this Court's decision in *Morse*, the Legislature enacted section 1001.1, a misdemeanor diversion

program. (Stats. 1977, ch. 574, § 2 [enacting former § 1001.1].) Section 1001.1 was the first statute to define "pretrial diversion" as "the procedure of postponing prosecution of an offense . . . either temporarily or permanently at any point in the judicial process from the point at which the accused is charged *until adjudication*." (§ 1001.1, italics added.) Nothing in former section 1001.1's statutory scheme or legislative history suggests that the Legislature intended to deviate from this Court's holding in *Morse*. (Stats. 1977, ch. 574, § 2, p. 1819.) As the Court of Appeal below posited, it is likely that the Legislature intended former section 1001.1's reference to "at any point in the judicial process until adjudication" to codify *Morse's* holding that pretrial diversion requests can be made at any time before trial starts. (*Braden*, *supra*, 63 Cal.App.5th at p. 338.)

The Legislature has enacted three additional pretrial diversion statutes since section 1001.1 that use the same "until adjudication" language and require waiver of the defendant's speedy trial rights. (§§ 1001.50, subd. (c), 1001.52, subd. (a) [model misdemeanor diversion statute enacted in 1982]; §§ 1001.70, subd. (b), 1001.72, subd. (a) [parental diversion statute enacted in 1988]; § 1001.80, subds. (b), (k)(1) [military diversion statute enacted in 2014].) In interpreting the language of section 1001.36, it is appropriate to consider other statutes of which it is a 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*, *supra*, 52 Cal.3d at p. 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 provisions relating to the same subject matter must be harmonized to the extent possible"].) Thus, section 1001.36 should be interpreted as one of several pretrial diversion programs that use the same language this Court is now interpreting.

In contrast, other diversion programs do not apply "pretrial" or use the same "until adjudication" limiting language. For instance, the Legislature has specifically recognized the existence of "posttrial programs." (See §§ 1001.2, 1001.51, subd. (b).) The Legislature also chose to use different limiting language for diversion of defendants with cognitive developmental disabilities. For these persons, diversion is available "at any stage of the criminal proceedings"—that is, without any limitation as to whether the case has been adjudicated. (§ 1001.21, subd. (a).) 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 quotation marks omitted; see also *In re Jennings* (2004) 34 Cal.4th 254, 273.)

These differences in diversion statutes demonstrate that the Legislature was well-equipped to allow diversion without limitation "at any stage of the proceedings," or alternatively allow

diversion at posttrial phases when crafting the statutory language for its diversion programs. In drafting section 1001.36, however, the Legislature rejected the broad, limitless language applicable for diversion of persons with cognitive disabilities and instead chose to limit the application "until adjudication," as it had previously done with other pretrial diversion statutes. Accordingly, the language of section 1001.36 strongly suggests that mental health diversion should be sought before trial starts.

2. Alternatively, mental health diversion may be sought before a verdict is reached, but only if certain conditions are met

Setting aside the holding in *Morse* that the speedy trial language used in section 1001.36 requires diversion to be sought before trial starts, another possible reading of the statute is that mental health diversion can be granted up until a determination of guilt. But as discussed below, this interpretation raises double jeopardy issues that are not addressed in the statute and would require that additional precautions be taken to ensure criminal proceedings could proceed when a defendant fail out of diversion.

California courts have explained, in the criminal context, that "'guilt is adjudicated at trial or admitted by plea.'" (*People v. Clancey* (2013) 56 Cal.4th 562, 570, quoting *People v. Superior Court (Smith)* (1978) 82 Cal.App.3d 909, 916.) That is the definition that was adopted by *Graham* when it reviewed the timing of section 1001.36: "'adjudication' typically refers to an adjudication of guilt—whether by plea . . . or by jury verdict." (*Graham*, *supra*, 64 Cal.App.5th at p. 833.) Interpreted this way,

"adjudication" becomes the determination of guilt as opposed to the process of deciding guilt.

Courts have sometimes distinguished between adjudications of guilt and the rendering of final judgment. (*In re DeLong* (2001) 93 Cal.App.4th 562, 568-570 [interpreting Proposition 36, court concluded that "conviction" included both concepts]; cf. *People v. Mendoza* (2003) 106 Cal.App.4th 1030, 1035 [conviction means adjudication of guilt, but does not include sentencing].) This limited definition of resolution by a trier of fact comports with the manner in which the Legislature has used the term "adjudication" elsewhere in the Penal Code. (E.g., § 299, subd. (b)(2) [regarding effect of dismissals "prior to adjudication by a trier of fact"].) It is also in line with this Court's comparison of a bench trial in a criminal case with the adjudication of a jurisdictional petition in a juvenile delinquency case. (See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 306.)

But even though this interpretation is plausible under the statutory language, allowing diversion to be granted after a trial starts raises double jeopardy issues not contemplated by the statute. Once a jury has been empaneled and sworn, jeopardy has attached. (*Crist v. Bretz* (1977) 437 U.S. 28, 38; *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712.) The Legislature anticipated, however, that some defendants placed on diversion would fail out of the program. (See § 1001.36, subd. (d) [regarding reinstatement of criminal proceedings].) If diversion were granted midtrial, the trial court would have to declare a mistrial and release the jurors with no ability to resume the trial

if the defendant fails out of the diversion program. Therefore, situations may arise in which criminal charges cannot be reinstated if the defendant does not successfully complete diversion because the trial court granted diversion midtrial after jeopardy attached but before a verdict was reached.

To avoid this constitutional uncertainty, the statute should not be interpreted as permitting a trial court to grant diversion midtrial. For if a trial court sua sponte grants diversion midtrial, or fails to obtain the defendant's consent to discharge the jury, retrial would be barred and the defendant would have no incentive to complete the diversion program because there could be no criminal consequences if he or she did not. Moreover, if a mistrial is improperly granted, the People would be deprived of their right to a jury trial (Cal. Const. art. I, § 16), not to mention due process of law and a speedy trial (Cal. Const. art. I, § 29), and the result would clearly be contrary to "the interests of the community" (§ 1001.36, subd. (c)(1)(B)). And while double jeopardy does not preclude retrial where a defendant requests and consents to a mistrial (*Curry v. Superior Court*, *supra*, 2 Cal.3d at p. 712), obtaining the defendant's consent creates another set of problems, such as ensuring that a person who suffers from mental illness gives knowing and intelligent consent to mistry the case.

The difficulties involved in ensuring that double jeopardy does not serve as a bar to further criminal proceedings when defendants fail out of diversion suggests that the Legislature did not intend to permit midtrial diversion. Indeed, nothing in the

statutory language anticipates the double jeopardy problem midtrial diversion would create, nor does it suggest how to overcome such issues. The absence of any elaboration of the careful rules that would be required to implement such a construction suggests that this interpretation, while plausible, is not the intended interpretation.

Respondent recognizes that these constitutional concerns are not insurmountable. For example, if this Court interprets the statute as allowing diversion after trial starts, this Court could—and should—exercise its supervisorial power to ensure that retrial is possible if and when a defendant fails diversion. At a minimum, trial courts should require the defendant to request and consent to a mistrial, and courts should ensure that the consent is knowing and intelligent. But, the fact that this Court would have to resort to its supervisorial powers to avoid these constitutional concerns corroborates the inference that the Legislature did not intend to create those concerns by authorizing diversion after a trial has started.

Finally, as will be discussed in part D below, several public policies militate against allowing diversion after a trial starts. For instance, the court would have squandered valuable resources by empaneling and dismissing a jury, only to repeat the process in the future if the defendant fails out of diversion. While these policies may provide reasons for a trial court to exercise its discretion to deny diversion midtrial, they also strongly support adherence to the statutory language, which only contemplates pretrial diversion. Thus, requiring mental health diversion to be

sought before trial starts remains the most reasonable interpretation of the statute even if proper precautions are taken to prevent a future double jeopardy issue.

3. A request for mental health diversion is untimely when made after a verdict has been reached

Regardless of whether this Court concludes that the statute's use of the phrase "until adjudication" allows diversion only before a trial starts or any time before guilt is determined, that limiting language cannot reasonably be interpreted to permit diversion posttrial. Appellant's suggested interpretation of "until adjudication" as "until imposition of a sentence" is inconsistent with the plain text of the statute, which contemplates *pretrial* diversion. Appellant is effectively trying to change pretrial adjudication into posttrial sentencing.

While "adjudication" could in some contexts mean "judgment" or "sentencing," that definition does not work in this context because of the Legislature's consistent use of the word "pretrial." (See *People v. Torres* (2019) 39 Cal.App.5th 849, 855 [construing "until adjudication" to mean "before the jury is empaneled and sworn"].) If "until adjudication" referred to sentencing posttrial, "the definition of 'pretrial diversion' would be at odds with the ordinary meaning of the word pretrial." (*Braden*, *supra*, 63 Cal.App.5th at p. 337.) This interpretation is untenable, as "the very term being defined would be read out of the statute." (*Ibid.*)

Several of section 1001.36's statutory provisions are also inconsistent with appellant's position that mental health diversion is available after conviction but before sentencing.

First and foremost is the statute's requirement that a defendant waive his or her right to a speedy trial, as discussed above. (§ 1001.36, subd. (b)(1)(D).) Because there is no speedy trial right to be waived after a conviction has occurred, this provision can only logically apply to a case that is in the pretrial stage. (*Betterman v. Montana* (2016) 578 U.S. 437, 441, 448 [Sixth Amendment speedy trial right "detaches upon conviction" and does not extend to sentencing].) The Legislature did not require that a defendant waive "any" right he or she may have. Instead, it anticipated that the defendant would have a right to a speedy trial precisely because it intended that the statute would apply only before a trial starts—that is, while the right still exists—as this Court held in *Morse*. (*Morse*, *supra*, 13 Cal.3d at p. 156.)

Appellant contends the reasoning in *Morse* should not apply in this case because the statute interpreted in *Morse* did not include the same "until adjudication" language as section 1001.36 and the goals of the statutory scheme analyzed in *Morse* were to reduce clogged courts and prevent trials, which are not present here. (OBM 40.) Neither of these points requires departure from *Morse*. The speedy trial waiver is one of six eligibility requirements, whereas the "until adjudication" language is part of the statute's timing requirement. The provisions do not conflict; they complement each other. Moreover, three other

pretrial diversion statutes include both the speedy trial waiver requirement and the "until adjudication" timing requirement, which suggests that the Legislature determined the requirements together showed an intent that diversion be sought before trial. (See §§ 1001.50, subd. (c), 1001.52, subd. (a) [misdemeanor diversion]; 1001.70, subd. (b), 1001.72, subd. (a) [parental diversion]; 1001.80, subds. (b), (k)(1) [military diversion].) Finally, as discussed below, the goals of section 1001.36—to prevent trials, reduce recidivism, relieve the backlog of defendants declared incompetent to stand trial, and prevent the stigma of convictions for mentally ill defendants—are consistent with those present in *Morse*.

Appellant also urges this Court to conclude that because section 1001.36 does not require a defendant to waive his right to a jury trial, as does the drug diversion statute considered in *Morse*, that omission "supports the construction that diversion is an option after a trial has begun." (OBM 32-34.) But the additional waiver of a right to a jury trial does not change this Court's holding that that the speedy trial waiver requires a defendant to seek diversion before trial starts. In fact, precisely because of this Court's holding in *Morse*, the additional waiver of a jury trial is no longer necessary in subsequent diversion statutes, as the speedy trial waiver alone will ensure diversion is sought before trial. Hence, respondent's construction of the statute is consistent with the omission of this language, not contradictory. Moreover, even if "until adjudication" could be

construed to apply after a trial has begun, this would not support appellant's position that diversion remains available posttrial.

Appellant further contends that the speedy trial language is optional and can apply sometimes and not others. (OBM 26, 41.) But the statutory language does not support this theory. Section 1001.36 provides in pertinent part: "Pretrial diversion may be granted pursuant to this section *if all of the following criteria are met*." (§ 1001.36, subd. (b)(1), italics added.) One of the six enumerated eligibility factors is that the defendant waives his or her right to a speedy trial. (*Id.* at subd. (b)(1)(D).) Thus, waiver of the speedy trial right is required in *all* mental health diversion cases; it is not optional. Appellant's contention that it applies only when a defendant seeks diversion before the start of trial, and not when diversion is sought after trial but before sentencing, would write this requirement out of the statute.

Second, permitting diversion to be sought posttrial would conflict with the statute's reference to "an accusatory pleading." (§ 1001.36, subd. (a) ["On an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court may . . . grant pretrial diversion to a defendant" who meets all of the necessary requirements"].) Once a defendant is convicted, the accusatory pleading is no longer operative, having been superseded by the verdict. Thus, prefacing the trial court's authority to grant relief on the allegations of an *accusatory pleading*—but not on a conviction after trial—is indicative of the Legislature's intent to limit eligibility to applications before a defendant is convicted. So is the Legislature's choice of the

phrase "until *adjudication*," instead of "until *sentencing*," which would have clearly signaled that pretrial mental health diversion was available posttrial.

Third, and similar to the "accusatory pleading" limitation, subdivision (e) reiterates that diversion should be granted at the charging phase, providing, in pertinent part: "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." (§ 1001.36, subd. (e), italics added.) By its language, the Legislature clearly intended pretrial mental health diversion to be available to defendants with pending criminal charges—not adjudicated convictions. As the Court of Appeal below acknowledged, "[t]he statute contains no 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.) Of note, several similar pretrial diversion statutes, three of which use the same "until adjudication" language as section 1001.36, also contemplate dismissal of a defendant's criminal charges. (See § 1001.54 [misdemeanor diversion]; § 1001.74 [parental diversion]; § 1001.80, subd. (c) [military diversion]; § 1001.83, subd. (g) [primary caregivers diversion].)

Appellant's suggestion that other statutory language supports his argument that adjudication means imposition of sentence is unpersuasive. (OBM 28.) That section 1001.36, subdivision (b)(3) contemplates a prima facie showing of

eligibility be made "[a]t any stage of the proceedings" does not expand the pretrial diversion program to operate posttrial. This phrase cannot be interpreted in a vacuum and must be read in conjunction with the entire statute, which, as discussed above, consistently and repeatedly refers to *pretrial* diversion, not *posttrial* diversion. (*Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 735 [words of a statute must be construed in context as a whole].) Thus, the prima facie showing is required at any stage of the proceedings at which diversion is available—that is, the pretrial proceedings.

Additionally, section 1001.36, subdivision (c)(4)'s authorization to conduct a hearing to determine if restitution is owed as a result of the diverted offense is not evidence that adjudication means the imposition of sentence as appellant suggests (OBM 28-29), but further proof that diversion is available only before a trial starts. If diversion were permitted at sentencing, this provision would be practically superfluous because restitution is already considered at the time of sentencing. (§ 1202.4, subd. (f).) Indeed, the purpose of this provision is to allow the trial court to award restitution to victims even without a trial or conviction, separate and apart from the requirements of section 1202.4.

The fact that certain provisions of section 1001.36 would have to be rendered inoperative for mental health diversion to apply posttrial provides further evidence that the Legislature intended mental health diversion to be granted pretrial, as repeatedly stated throughout the statute.

D. The public policy reasons behind mental health diversion reinforce the statutory language that diversion should be sought before trial starts

Several public policies support that diversion should be sought before trial starts. Permitting a defendant to seek diversion after a conviction or guilty plea, or even midtrial, would discourage early treatment of mentally ill defendants and potentially waste judicial resources.

One major policy behind section 1001.36 is to save the state money, both in avoiding trials and mental incompetency proceedings. Allowing defendants to seek diversion *after* they have already been convicted would undermine these goals and waste scarce judicial resources—both time and money—which could be used on other trials where defendants are not eligible for pretrial diversion. Specifically, delaying diversion until after trial would continue to increase the costs associated with incompetency proceedings and rehabilitation, as those steps would still have to be taken before the trial starts. Diverting a defendant into mental health treatment in the community is a better option than delaying trial while he or she spends time in custody waiting to be rehabilitated for trial.

As one court has explained, allowing diversion to be sought posttrial "would invite 'the inefficient use of finite judicial resources' and would potentially turn trial into a '"read through"' that could be rendered 'retroactively moot should pretrial diversion be requested following a guilty verdict.'" (*Rodriguez*, *supra*, 68 Cal.App.5th at p. 50, quoting *Graham*, *supra*, 64 Cal.App.5th at p. 834.) A statute should be construed to avoid such an "absurd waste of judicial resources." (See *People v. Hazle*

(2007) 157 Cal.App.4th 567, 573; *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 9.) Moreover, reviewing courts "must give the statute a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (*People v. Budwiser* (2006) 140 Cal.App.4th 105, 109, citing *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744.)

Another important policy behind section 1001.36 is to get defendants with mental health issues into treatment as early as possible. Allowing defendants to seek diversion posttrial would do the opposite and incentivize trial over treatment. Simply put, there would be little incentive for a defendant to seek diversion before trial if the "defendant knows that pretrial diversion is available even after going to trial." (*Rodriguez*, *supra*, 68 Cal.App.5th at p. 50, quoting *Graham*, *supra*, 64 Cal.App.5th at p. 834.) Instead, such an interpretation would encourage defendants to gamble that they would not be found guilty at all and thereby avoid early treatment. If a defendant was then acquitted, his or her mental health issues would go entirely untreated.

In some cases, as highlighted in *Rodriguez*, allowing a defendant to delay seeking mental health diversion until sentencing and entry of judgment could lead to unintended results. (*Rodriguez*, *supra*, 68 Cal.App.5th at p. 506.) Rodriguez was granted probation with imposition of sentence suspended. (*Ibid.*) At the end of her probation term, Rodriguez asked to be

placed on diversion only to have her case immediately dismissed. (*Ibid.*) Such a result, which could occur any time a sentence is suspended, would completely thwart the purpose of mental health diversion, which is to divert defendants into approved mental health programs for up to two years, with regular reports to the court, defense, and prosecution on the defendant's progress. (§ 1001.36, subds. (c)(1), (c)(2), (c)(3).)

Another public policy consideration reinforcing that diversion should be sought pretrial is the effect granting diversion midtrial or posttrial would have on jurors. It would waste jurors' time and further erode public confidence in the judicial system if potential jurors know their verdict can be thrown out when a defendant requests diversion after first trying and failing to get an acquittal. (*People v. Ochoa* (2011) 191 Cal.App.4th 664, 669 [erosion of public confidence in the judicial system is public policy concern].)

All of the above public policy considerations support what the text of section 1001.36 compels—that mental health diversion should be sought before trial starts. While respondent acknowledges that the statutory language could plausibly be interpreted to allow diversion after a trial starts but before a conviction, many of these same public policy concerns—waste of time and money on trials and incompetency proceedings, delaying mental health treatment, and eroding public confidence—counsel against such an interpretation. Indeed, allowing diversion midtrial could result in an *increase* in costs where the defendant fails out of diversion, because the state will have to go through

the trial process twice and empanel two juries to bring the case to a conclusion. Thus, even if this Court finds no double jeopardy problem with permitting a defendant to request a mistrial and seek diversion midtrial, public policy suggests it should not be done in the normal course, and a trial court may have good discretionary reasons not to grant diversion midtrial even if it is technically permissible. (§ 1001.36, subd. (c)(1)(B) [trial court's decision to grant or deny diversion is discretionary].)

Despite these public policy concerns, appellant contends that the codified purposes of the diversion program give the trial court discretion to grant diversion until a sentence is imposed. (OBM 29-32.) The stated purposes include increasing diversion, giving local discretion and flexibility to counties to create and implement programming, and supporting individuals with mental health disorders. (§ 1001.35.) Contrary to appellant's assertion, these purposes are consistent with an interpretation that requires mental health diversion to be sought pretrial, but at the latest, before conviction. As discussed below, the statute's goal to increase diversion was not unqualified and expressly sought to "mitigate the individuals' entry and reentry into the criminal justice system." (*Id.* at subd. (a).) The statute sought to increase diversion in this way by creating a program that could be applied to an expansive set of crimes, defendants, and mental illnesses if requested before trial started. The statute also endeavored to support individuals with mental health disorders by encouraging intervention as early as possible in the process.

Still, appellant cites to language in *Frahs*, which states that "the Legislature intended the mental health diversion program to apply as broadly as possible," as supporting his interpretation that fulfilling the purposes of the statute requires defendants to be able to request pretrial diversion even after being tried and convicted. (OBM 30-31, quoting *Frahs*, *supra*, 9 Cal.5th at p. 632.) Appellant also quotes language from *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." (OBM 31-32, quoting *Frahs*, at p. 636, italics added.)

But this language must be read in context, as the only issue addressed in that case was the retroactivity of section 1001.36. (*Frahs*, *supra*, 9 Cal.5th at p. 624.) In that context, this Court held that the stated purpose of increasing diversion "is consistent with the retroactive application of the diversion scheme" and "further 'supports the conclusion that the *Estrada* inference of retroactivity is not rebutted.'" (*Id.* at p. 632.) This Court cautioned "that expectation regarding how the statute normally will apply going forward is quite different from the specific retroactivity question presented here, to which the *Estrada* inference applies." (*Id.* at p. 633.) Moreover, this Court's statement that the Legislature *could have intended* for judges to make a mental health diversion decision *after* a jury verdict further supports that only retroactivity, and not the normal way

the statute would function, was previously considered in *Frahs*. Indeed, at one point this Court also stated, "In the normal course of operations, a trial court would determine *before trial* whether a defendant is eligible for pretrial diversion," which appears to agree that diversion should be sought before trial. (*Ibid.*) Nevertheless, this Court specifically declined to define "until adjudication" in *Frahs*. (*Id.* at p. 633, fn. 3.)

Additionally, the prefatory language in section 1001.35 does not express a legislative intent to apply mental health diversion as broadly as possible; in fact, it does the opposite. As noted above, subdivision (a) of that provision demonstrates an intent to promote mental health diversion "to mitigate the individuals' *entry and reentry into the criminal justice system while protecting public safety*." (Italics added.) Far from demonstrating an intent to apply mental health diversion as broadly as possible, the Legislature instead revealed that it hoped to balance the competing interests of protecting the public, facilitating the treatment of the mentally ill, and preventing cases involving the mentally ill from consuming unnecessary judicial resources. But once a defendant has been convicted, this carefully-balanced equilibrium no longer applies. By the time a defendant has undergone trial, that defendant has certainly entered the criminal justice system. Once the judicial resources have been spent by proceeding with a trial, the concern with the defendant's *entry* into the criminal justice system effectively vanishes, judicial resources would already have been spent, and the need for protecting the public safety established by the guilty verdict.

But even if the Legislature did intend the statute to be read broadly, that can be done while still honoring the timing requirement of section 1001.36. For instance, the diversion program applies broadly to anyone who "suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders," including several specifically enumerated disorders. (§ 1001.36, subd. (b)(1)(A).) Additionally, the qualifying disorder can be determined through "an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence." (*Ibid.*) Thus, there are few limits on what disorders qualify and how they can be proved.

The determination of whether the defendant's mental disorder "was a significant factor in the commission of the charged offense" may also be broadly interpreted. (§ 1001.36, subd. (b)(1)(B).) To do so, the court may review "any relevant and credible evidence," including a long and diverse list of examples. (*Ibid.*)

Finally, the type of treatment the defendant may seek is also broad, ranging from inpatient to outpatient treatment. (§ 1001.36, subd. (c)(1).) And while some offenses are now expressly excluded from the diversion program, all non-excluded offenses remain eligible. (§ 1001.36, subd. (b)(2).)

Thus, section 1001.36 may be broadly applied while still honoring its stated purpose of increasing diversion of mentally ill offenders away from the criminal justice system without sacrificing its timing requirement. That pretrial mental health

diversion is required to be sought before trial starts does not conflict with its purpose, as any qualifying defendant can request diversion before trial starts, thereby increasing diversion.

Further, appellant's contention that "there is no downside to leaving the possibility of diversion open until imposition of sentence that would warrant limiting its application to only pretrial" (OBM 31) fails to acknowledge several important concepts. First and foremost is that the plain language of the statute, discussed above, includes a timing requirement, and thus allowing trial courts to grant pretrial diversion *after* trial and conviction goes against the statutory language. Additionally, as also discussed above, allowing pretrial diversion to be requested posttrial would thwart public policy interests by wasting scarce judicial resources, incentivizing trial over treatment, increasing the costs associated with incompetency proceedings, and even decreasing treatment in cases where inmates take a gamble and win an acquittal.

Appellant's speculation that a mental health issue unknown pretrial could mysteriously be revealed during trial and found to be a significant factor in the commission of the charged offense (OBM 31, 38) should not control the way the pretrial mental health diversion statute is interpreted and applied. As a general matter, any significant factors in the crime should come out during the pretrial investigation and discovery phases. It is hard to imagine when a "significant factor" of the offense would be unknown before trial, let alone that this would occur with great frequency.

Nor should the fact that a defendant may request to defend himself suggest a different outcome. (OBM 31.) A criminal defendant may represent himself only if he is (1) mentally competent, (2) makes his request knowingly and intelligently after being apprised of the dangers of self-representation, and (3) when made within a reasonable time *before trial*. (*People v. Stanley* (2006) 39 Cal.4th 913, 931-932.) "Self-represented defendants are 'held to the same standard of knowledge of law and procedure as is an attorney.'" (*People v. Frederickson* (2020) 8 Cal.5th 963, 1000.) Therefore, a defendant assumes the risk of missing the deadline for diversion should he choose to represent himself and not be aware of the law.

The language the Legislature chose to use in section 1001.36 should control its application, and requiring pretrial mental health diversion to be sought before trial starts honors the statute's timing requirement, stated purposes, and the important public policy interests described above.

E. The legislative history of section 1001.36 supports the interpretation that pretrial mental health diversion should be sought before trial starts

Section 1001.36 was added as part of the Omnibus Health Trailer Bill for 2018-2019, which made a variety of changes to the Budget Act of 2018. (See Assem. Com. on Budget, Floor Analysis of Assembly Bill (A.B.) No. 1810 (2017-2018 Reg. Sess.) as amended June 12, 2018.) As a budget bill, which took effect immediately upon being signed by the Governor, the Act was primarily concerned with the fiscal impacts of various programs, including the costs of healthcare measures in the state. The

amendments to section 1001.36 became effective a few months later, on January 1, 2019. (Stats. 2018, ch. 1005, § 1, as filed on September 30, 2018; See Cal. Const., art. IV, § 8, subd. (c)(1); *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 615.)

The legislative history behind the original enactment, as well as the subsequent amendment of section 1001.36 by S.B. 215, support the above interpretation of the statute's plain language and demonstrate the Legislature's desire to limit the section's application to requests for diversion made before trial. 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) 52 Cal.3d 1142, 1159.)

Consistent with most diversion statutes, the legislative history behind A.B. 1810 reveals that the Legislature was eager to avoid expending state resources in trials of mentally ill individuals, and that it also sought to shift many of the associated pretrial costs back to the counties, as well as reduce the costs associated with incompetency proceedings. The amendment of the statute in S.B. 215 just three months later reinforced these intents, as well as ensuring early intervention, avoiding convictions, and reducing recidivism rates. Not only do these purposes confirm the statute's text, that diversion should be sought before trial starts, but the legislative history itself indicates that the Legislature was aware of similar existing

pretrial diversion statutes and how they operated before it enacted section 1001.36.

1. The Legislature intended to save the state money by reducing the number of defendants pending restoration of competency at the Department of State Hospitals

The legislative history of A.B. 1810 indicates the Legislature was concerned with the high cost on the Department of State Hospitals (Department) due to the large number of persons who were being declared incompetent to stand trial. (Assem. Com. on Budget, Floor Analysis of A.B. 1810 (2017-2018 Reg. Sess.) as amended June 12, 2018, p. 7.) The legislative history of S.B. 215 confirms this. (Cal. Health & Human Services Agency, Enrolled Bill Rep. on S.B. 215 (2017-2018 Reg. Sess.) prepared for Governor Brown (Sept. 14, 2018) p. 2 ["diversion allows individuals who have been found incompetent to stand trial on felony or misdemeanor charges to be diverted to community-based mental health treatment thus potentially reducing the number of individuals referred to DSH for treatment"].)

The Department reported it had experienced a 33 percent increase in the number of defendants who were found incompetent to stand trial and referred to the Department for restoration of competency services since fiscal year 2013-2014. (Cal. Health & Human Services Agency, Enrolled Bill Rep. on S.B. 215 (2017-2018 Reg. Sess.) prepared for Governor Brown (Sept. 14, 2018) p. 2.) Despite adding 411 state hospital beds and over 300 jail-based beds, by the end of August 2018, 666 defendants found incompetent to stand trial were still awaiting admission to the Department. (*Ibid.*)

To reduce the cost on the Department, the Act sought to divert such persons away from state hospitals and direct them instead to county facilities by giving local jurisdictions discretion in how they handle such cases through pretrial diversion. (Sen. Com. on Budget and Fiscal Review, Rep. on A.B. 1810 (2017-2018 Reg. Sess.) as amended June 12, 2018, pp. 2-3.) While the Act mandated the state provide counties with certain funds for these programs, counties would still have to furnish "a specified match of county funds." (Legis. Counsel's Dig., A.B. 1810 (2017-2018 Reg. Sess.) Stats. 2018, Summary Dig., p. 5; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1129, fn. 4 [summary digests of Legislative Counsel are properly considered by an appellate court without the need for judicial notice because the digests are published].)

The Act also required that the distribution of state funds prioritize proposals to "reduce incompetent to stand trial referrals to the Department." (Assem. Com. on Budget, Floor Analysis of A.B. 1810 (2017-2018 Reg. Sess.) as amended June 12, 2018, p. 7; see also section 29 of A.B. 1810, adding Welf. & Inst. Code, § 4361, subd. (b) [providing that the purpose of the chapter is "to assist counties in providing diversion for individuals with serious mental illnesses who may otherwise be found incompetent to stand trial and committed to the State Department of State Hospitals for restoration of competency"].)

Consistent with this intent to save the state money by reducing the number of persons who would potentially be referred to the Department for treatment based on their inability

to stand trial, A.B. 1810 also made changes to section 1370 regarding the interplay of diversion and competency determinations. (See A.B. 1810, § 25.) As amended, section 1370, subdivision (a)(1)(B)(iv), provides that after a defendant has been found to be incompetent, the trial court may make a finding that he or she is an appropriate candidate for diversion. However, this provision provides an important limitation on the timing of such a referral: it must be "*before* the defendant is transported to a facility pursuant to this section." (*Ibid.*, italics added.) Once the defendant has already been transported to a state facility for treatment, there would be no cost savings to the Department. The temporal limitation for referrals under section 1370 is, therefore, consistent with the similar timing limitation found in section 1001.36.

2. The Legislature intended to save the state money by avoiding the costs associated with trials of mentally ill defendants

By utilizing diversion to reduce the number of cases pending trial, A.B. 1810 also stood to save the state money in a second respect by alleviating the burden on state-funded courts and instead placing that burden, at least partially, on county-run diversion programs. As the Legislative Digest summarized: "By increasing the duties of local officials relating to diversion and the sealing of arrest records, this bill would impose a state-mandated local program." (Legis. Counsel's Dig., A.B. 1810 (2017-2018 Reg. Sess.) Stats. 2018, Summary Dig., p. 5.)

The legislative history of S.B. 215 further confirms that the goal of the mental health diversion program was to avoid the cost

of trials, and therefore, that diversion should be requested before trial starts. The author of S.B. 215 explained that by diverting those defendants "suffering from mental illness into treatment *at an early stage in the proceedings*, AB 1810 seeks to . . . *avoid unnecessary and unproductive costs of trial* and incarceration." (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business, S.B. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, Comments, p. 3, italics added.) A Judicial Council task force concurred that "interventions and diversion possibilities must be developed and utilized *at the earliest possible opportunity*." (Assem. Com. on Public Safety, analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended Jan. 25, 2018, Comments, p. 6, italics added.)

Moreover, because diversionary sentences "take advantage of existing community resources for the mentally ill, research suggests that such sentences will save counties money *in the short-term on reduced trial and incarceration costs*, and in the long-term on reduced recidivism rates." (Assem. Com. on Public Safety, analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended Jan. 25, 2018, Comments, p. 5, italics added.) Thus, the initial diversion away from trial and the secondary effects of reducing recidivism both result in saving costs associated with trials.

Indeed, when considering the fiscal effect of implementing section 1001.36, the Legislature noted the savings that would result from avoiding trials. The Senate Rules Committee acknowledged the "ongoing potentially-reimbursable" local costs, but noted "[t]hese costs could be offset by savings achieved

through reduced workload in *not preparing for and litigating cases to trial*." (Sen. Rules Com., Off of Sen. Floor Analyses, 3d reading analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended Jan. 25, 2018, Fiscal Effect, p. 6, italics added.) The Committee separately considered there could be "[p]otentially-significant future cost savings to the criminal justice system, to state and local agencies, *in averted court proceedings* and reduced local incarceration, supervision, *and prosecution costs* to the extent participation in diversion programs is successful." (*Ibid.*, italics added.)

Once a defendant has stood trial, the cost-saving benefits to the state fade away. It is for this reason that the Legislature limited application of the diversion program "until adjudication," i.e., before trial, both because after that time the defendant would necessarily have been shown to be competent and would not pose a fiscal burden to the Department of State Hospitals, and because the cost of a trial would have already been incurred. This is not to say that the Legislature was not also concerned with reducing the mentally ill in prison. The question, however, is whether allowing defendants to request diversion posttrial would lead to this result. To the contrary, as the policy discussion above suggests, it would incentivize trial over treatment, which benefits no one.

3. The Legislature intended to provide early intervention and treatment

The intention of S.B. 215 was to remedy the current problem that a trial court could not order mental health treatment for a defendant "without first convicting them." (Sen. Rules Com., Off.

of Sen. Floor Analyses, Unfinished Business, S.B. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, Comments, p. 2.) The bill authorized a court "to order treatment *early in the process* rather than waiting for the disposition of the case." (Sen. Com. on Public Safety, analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended Jan. 3, 2018, p. 7, italics added.)

The author of the bill explained that "*early, court-assisted interventions* are far more likely to lead to longer, cheaper, more stable solutions for the community, and for the person suffering from mental illness." (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business, S.B. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, Comments, pp. 2-3, italics added.) "By granting courts the ability to divert those suffering from mental illness into treatment *at an early stage in the proceedings*, AB 1810 seeks to reduce recidivism rates for mentally ill defendants." (*Id.* at p. 3, italics added.)

4. The Legislature acknowledged and considered existing pretrial diversion laws when it enacted section 1001.36

California's diversion programs "long have had a purpose of reducing the systemic burdens of criminal trials." (*Braden*, *supra*, 63 Cal.App.5th at p. 335.) Indeed, the Legislature placed section 1001.36, among all other pretrial diversion programs in Title 6 of the Penal Code. And the legislative history confirms that existing diversion laws were considered in conjunction with A.B. 1810, and section 1001.36's placement was purposeful. (Legis. Counsel's Dig., A.B. 1810 (2017-2018 Reg. Sess.) Stats. 2018, Summary Dig., p. 5.)

Further, in S.B. 215, the Legislature specifically considered that section 1001.1 used the same definition of "pretrial diversion" that was to be used in section 1001.36 when it noted that existing law "[s]tates that pretrial diversion refers to the procedure of postponing prosecution of an offense filed as a misdemeanor either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication." (Sen. Rules Com., Off of Sen. Floor Analyses, 3d reading analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended Jan. 25, 2018, Analysis, p. 1; Sen. Com. on Public Safety, analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended January 3, 2018, p. 1.)

The Legislature also showed it was aware of existing sections 1001.50 and 1001.80, which, as discussed above, both used the same "until adjudication" language as sections 1001.1 and 1001.36, as well as several other pretrial diversion statutes. (Sen. Rules Com., Off of Sen. Floor Analyses, 3d reading analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended Jan. 25, 2018, Analysis, pp. 1-2; Assem. Com. on Public Safety, analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended Jan. 25, 2018, pp. 3-5; Sen. Com. on Appropriations, analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended Jan. 9, 2018, pp. 1-2; Sen. Com. on Public Safety, analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended Jan. 3, 2018, pp. 1-2.) By acknowledging the existence of other pretrial diversion statutes that used the same language contemplated in section 1001.36, the Legislature signaled it was

aware of how those programs worked and intended section 1001.36 to work in the same way—pretrial.

Additionally, the Legislature went further than just noting the existence of other pretrial diversion programs and discussed the procedures for both diversion and deferred entry of judgment programs used within the statutory framework. (Assem. Com. on Public Safety, analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended Jan. 25, 2018, pp. 6-7.) The Legislature stated that "[t]his bill would give the courts the authority to grant *pretrial diversion* to [*sic*] defendant charged with misdemeanors or felonies that are punishable in county jail under Realignment" if certain conditions are met. (*Id.* at p. 7.) Of note, the Legislature contemplated that if a judge denied a defendant admission to the program, "*the prosecution would continue in the normal fashion*." (*Ibid.*, italics added.) Thus, the Legislature's discussion of the trial court's discretion to grant "pretrial diversion" and the prosecution continuing "in the normal fashion" when a defendant is denied diversion, indicates that the Legislature intended diversion under section 1001.36 to work the same way as in other diversion statutes.

5. While the rise in incarcerated individuals suffering from mental illness was of concern to the Legislature, this concern is met by diverting mentally ill defendants into treatment *before trial starts*

Appellant's analysis of the legislative history of S.B. 215[2] focuses only on comments regarding the jail and prison systems' inability to treat mentally ill inmates. (OBM 34-39.) But those comments do not require pretrial mental health diversion to remain available to a defendant up until the time of sentencing, as appellant suggests. Encouraging diversion to occur before trial begins honors the full legislative history, which was concerned not only with the treatment of mentally ill inmates, but also with avoiding the costs of trial, relieving the overburdened Department of State Hospitals, early intervention, avoiding convictions, and reducing recidivism. Moreover, inmates who cannot satisfy bail requirements are held in jail pretrial, and thus, requiring mental health diversion to occur before trial begins would help many defendants find their way out of incarceration and into programming early in the process.

Additionally, the legislative history emphasized that mental health diversion should not be available postconviction. For instance, the author of S.B. 215 explained that "[b]y reserving court-ordered services for the mentally ill until *after a conviction*, the prior system led to higher recidivism rates for mentally ill Californians, who were not only left untreated, but with the

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[2] Appellant requested that this Court take judicial notice of six legislative history documents, all from S.B. 215 and none from A.B. 1810.

additional burden of a criminal record. This approach was unfair, impractical and costly." (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business, S.B. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, Comments, p. 2, italics added.)

While appellant correctly cites the legislative history as stating "[t]he 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 of their condition and in some cases suicide" (OBM 36), appellant left out the remainder of this paragraph, which states:

> This bill authorizes the court to order treatment *early in the process rather than waiting for the disposition of the case* where the defendant may be facing the possibility of prolonged incarceration or re-arrest upon release. Because diversion *does not result in a conviction*, once a defendant completes diversion he or she would not be foreclosed from housing and employment opportunities.

(Sen. Com. on Public Safety, analysis of S.B. 215 (2017-2018 Reg. Sess.) as amended Jan. 3, 2018, p. 7, italics added.) Requiring diversion "early in the process" and before conviction does not comport with appellant's interpretation that the legislative history contemplated that diversion could be sought after conviction but before sentencing. Notably, the language appellant underscores involves "jail inmates"—that is, persons who are most commonly awaiting trial—rather than prison inmates who have already been convicted.

Nor does appellant's interpretation "harmonize[] with the overall statutory scheme" (OBM 38), as three other diversion

statutes that use the same "until adjudication" language as section 1001.36 all operate pretrial.

Contrary to appellant's position, the Legislature's focus on early intervention and cost savings is consistent with the conclusion—supported by the statute's text—that a defendant must apply for diversion before trial starts. The benefits of early intervention through more effective offender treatment and the avoidance of litigation costs can no longer be captured after trial has occurred.

F. The rule of lenity does not assist appellant

Appellant also argues that any ambiguity regarding the interpretation of section 1001.36 should be resolved in his favor, according to the rule of lenity. (OBM 45-46.) The rule does not apply where appellant's construction does not stand in relative equipoise with construing the statute as requiring diversion be granted prior to determination of guilt or attachment of jeopardy.

"The rule of lenity does not apply every time there are two or more reasonable interpretations of a penal statute." (*People v. Manzo* (2012) 53 Cal.4th 880, 889.) "Rather, the rule applies '"only if the court can do no more than guess what the legislative body intended; there must be an *egregious* ambiguity and uncertainty to justify invoking the rule."' [Citation.] In other words, 'the rule of lenity is a tie-breaking principle, of relevance when "'two reasonable interpretations of the same provision stand in relative equipoise. . . .'"'" (*Ibid.*)

This case does not present the degree of uncertainty needed to invoke the rule of lenity. Even if the "until adjudication"

language injects some ambiguity into the statute, the overall text, as well as the legislative purpose and history, the statute's placement in the Penal Code along with the other *pretrial* diversion statutes, general public policy concerns, and logic all favor an interpretation that pretrial mental health diversion must be sought before a trial starts, but at the latest, before a conviction. Thus, the rule of lenity does not apply.

CONCLUSION

Accordingly, for the reasons stated above, respondent respectfully requests that this Court affirm the judgment below and hold that pretrial mental health diversion under section 1001.36 should be sought before trial starts, but at the latest, before a conviction or guilty plea.

Respectfully submitted,

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January 28, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13-point Century Schoolbook font and contains 11,928 words.

ROB BONTA
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/AMANDA LLOYD/
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Deputy Attorney General
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January 28, 2022

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DECLARATION OF SERVICE

Case Name: ***People v. Braden*** No.:**S268925**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266. On January 28, 2022, I served the following document(s):

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☐ on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

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Kimberly Wickenhagen	/Kimberly Wickenhagen/
Declarant	Signature

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Supreme Court of California

PROOF OF SERVICE

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Last Name, First Name (PNum)

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