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 REPLY BRIEF ON THE MERITS

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APPELLANT'S REPLY BRIEF ON THE MERITS

Appellant files the following Reply Brief on the Merits to respondent's Answer Brief on the Merits ("RB"). The failure to respond to any particular argument should not be construed as a concession that respondent's position is accurate. It merely reflects appellant's view that the issue was adequately addressed in Appellant's Opening Brief on the Merits ("AOB").

Issue Presented for Review

The issue presented for review in this case is: what is the latest point at which a defendant's request for mental health diversion is timely under Penal Code[1] section 1001.36?

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.

Respondent contends that 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. (RB at pp. 18, 21-58.)

Respondent is mistaken. As appellant explained in detail in his AOB, 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. (AOB at pp. 24-39.)

A. 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 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

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

diversion. Respondent asserts that the plain language of section 1001.36 requires a defendant to seek mental health diversion before trial starts. (RB at pp. 21-28.) Not so.

Respondent relies on the statute's repetitive use of the word "pretrial" and its ordinary meaning to support the interpretation that diversion is to be sought before a trial starts. (RB at p. 23, 32.) Respondent, however, not only assigns too much significance to the repetitive use of the word "pretrial," but fails to take into consideration the Legislature chose to give a specific meaning to the word pretrial and forego the ordinary meaning. (RB at pp. 23, 32.) The statute is clear in this respect: "pretrial diversion" is defined not as diversion that occurs exclusively before a trial, but as diversion that may be pursued "at any point in the judicial process from the point at which the accused is charged until adjudication." (1001.36, subd. (c).) If the definition given for the phrase "pretrial diversion" in section 1001.36, subdivision (c), means the same thing as "pretrial," adding the definition of pretrial diversion would be practically superfluous.

Respondent agrees with appellant that "until adjudication" has been interpreted by appellate courts in three ways: 1) before imposition of sentence; 2) before a trial starts; and 3) before a jury verdict or guilty plea. (RB at pp. 21-22; AOB at pp. 20, 21.) The parties disagree, however, on which is the most reasonable definition for the term "adjudication."

Respondent contends that requiring mental health diversion to be sought before trial starts is the most reasonable interpretation proposed. (RB at p. 23.) Respondent further contends that by using "adjudication" as a term defining "pretrial diversion," the Legislature signaled that diversion should be sought before the process of adjudication begins, which is consistent with the common definition as the process of deciding

an issue. (RB at pp. 24, 25.) While adjudication has several possible definitions, respondent's choice makes no sense. 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," respondent's argument must be rejected. (§ 1001.36, subd. (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 . . . ."] emphasis added.) As appellant explained in his AOB, in the context of section 1001.36, of all the possible definitions, "judgment" (when the trial court orally pronounces sentence) is the most reasonable definition for the term "adjudication." (AOB at pp. 27-28.) As this Court has recently held, a case is not adjudicated, and a judgment not issued, unless and until a sentence is rendered. (*People v. McKenzie* (2020) 9 Cal.5th 40, 46.) Any other reading would be contrary to the stated purpose of increasing mental health diversion. (§ 1001.35.)

Respondent acknowledges that adjudication could in some contexts mean "judgment" or "sentencing," however argues that definition does not work in the context of section 1001.36 because of the Legislature's consistent use of the word "pretrial." (RB at p. 32.) As explained above, respondent's interpretation is not persuasive. 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].)

Respondent also relies on the statute's initial reference to

"[o]n an accusatory pleading" as textual evidence that the Legislature intended mental health diversion to be available only before trial begins. Respondent reasoning is that once there has been a trial, the accusatory pleading no longer controls, but instead the jury's or court's verdicts. (RB at pp. 23, 35.)

Respondent's analysis is flawed. Section 1001.36 provides that "[o]n 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)." (§ 1001.36, subd. (a).) The use of the phrase "on an accusatory pleading" does not require a narrow interpretation of section 1001.36. At most, the use of that phrase indicates that charges have to be filed in order to trigger the availability of diversion under this statute. In other words, a defendant cannot request diversion after just an arrest, but rather the filing of charges is the earliest point at which diversion becomes an available option. The definition of pretrial diversion supports this interpretation: "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." (§ 1001.36, subd. (c), emphasis added.)

Respondent contends that the language in section 1001.36, subdivision (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," shows that the Legislature clearly intended mental health diversion to be available to defendants with pending criminal charges–not adjudicated convictions. (RB at p. 36.) To the contrary, 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.

Respondent focuses on the many diversion statutes that the Legislature has enacted over the years to support its position that the language of section 1001.36 suggests that mental health diversion should be sought before trial starts. Respondent asserts that the Legislature specifically rejected the broad, limitless language used for diversion of defendants with cognitive developmental disabilities (§ 1001.21, subd. (a)), and chose to limit the application by using the phrase "until adjudication" for section 1001.36 (RB at pp. 27.) The key language respondent relies on is that for those persons with cognitive developmental disabilities, diversion is available "at any stage of the criminal proceedings" –that is, without any limitation as to whether the case has been adjudicated. (RB at p. 27.)

Respondent's assertion is unpersuasive for two reasons. First, while 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," the Legislature chose to include references to *criminal proceedings*: 1) the period during which *criminal proceedings* against the defendant may be diverted shall be no longer than two years[2] (§ 1001.36, subd. (c)(3)); and 2) the court shall hold a hearing to determine whether the *criminal proceedings* should be reinstated if certain circumstances exist (§ 1001.36, subd. (d)). Even the title of section 1001.36 includes the phrase "reinstatement of criminal proceedings." (§ 1001.36.) Furthermore, section 1001.36,

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[2] The same wording is also used in section 1001.28 for cognitive developmental disabilities diversion. (§ 1001.28.)

subdivision (b)(3) includes the phrase "at any stage of the proceedings." Including references to *criminal proceedings* and *at any stage of the proceedings* within the language of section 1001.36 is a strong indication that the Legislature intended for mental health diversion to be an option without limitation.

Second, the Legislature not only considered other diversion statutes in creating section 1001.36, but also considered the statutory scheme regarding incompetent to stand trial defendants. The legislative history of Assembly Bill No. 1810 (AB 1810) reveals that mental health diversion was implemented with a focus on reducing the number of incompetent to stand trial referrals to the Department of State Hospitals. (RB at pp. 46, 47.) Indeed, the section discussing mental health diversion in AB 1810 was titled: "Incompetent to Stand Trial Mental Health Diversion Program." (See Assem. Com. on Budget, Floor Analysis of AB 1810 (2017-2018 Reg. Sess.) as amended June 12, 2018, p. 7.)

AB 1810, in addition to adding section 1001.36, amended section 1370, by adding subdivision (a)(1)(B)(iv) and (v) to provide that if a court finds that a defendant is mentally incompetent to stand trial, a defendant may be eligible for mental health diversion pursuant to section 1001.36. The only limitation on when an incompetent to stand trial defendant can be considered for diversion is that it must be before the defendant is transported to a facility. It is established law that questions of competency can be addressed until sentence is imposed. (*People v. Rogers* (2006) 39 Cal.4th 826, 847 [the court's duty to conduct a competency hearing may arise at any time prior to judgment]; *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1510 [sentencing is a proceeding in the criminal prosecution that must be suspended until the question of competency has been determined]; see also § 1368.)

Considering that the incompetent to stand trial statutory scheme was a major influence in enacting section 1001.36 strongly suggests that the Legislature intended for trial courts to have the ability to grant mental health diversion prior to the imposition of sentence. The Legislature is deemed to be aware of existing laws when it enacts a statute. (*People v. Overstreet* (1986) 42 Cal.3d 891, 897.) Furthermore, 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"].)

Respondent also asserts that the speedy trial waiver requirement supports an interpretation that diversion must be sought before trial starts. (RB at pp. 25-26, 33-34.) Respondent relies on this Court's previous holding in *Morse v. Municipal Court for San Jose-Milpitas Judicial Dist.* (1974) 13 Cal.3d 149, that when a statute makes diversion contingent upon a speedy trial waiver, diversion must be requested before trial starts. (RB at pp. 25-26.) This interpretation is not reasonable in light of the purposes of mental health diversion, the inclusion of incompetent to stand trial defendants, and the current version of section 1000.1.

As appellant argued in his AOB, including a speedy trial waiver requirement does not undermine the legislative intent to keep mental health diversion as an option until imposition of sentence. (AOB at pp. 25-26, 39-41.) 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. This makes sense as a policy matter as a way of increasing diversion.

In support of a broad application of mental health diversion, appellant previously argued that the Legislature was aware of the inclusion of a jury trial waiver, as well as a speedy trial waiver, to be considered for diversion in section 1000.1 and chose not to include it as a condition of mental health diversion. (AOB at p. 32-34.) Section 1000.1 was amended in 2018 to add this requirement. (§ 1000.1, subd. (a)(3); Stats. 2017, c. 778 (A.B.208), § 2, eff. Jan. 2018.) However, respondent misconstrues appellant's argument and contends that because *Morse* held that a speedy trial waiver requires a defendant to seek diversion before trial starts that 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. (RB at p. 34.) Respondent fails to recognize that the jury trial waiver for drug diversion was added in 2018 and currently remains a condition of diversion, as well as the speedy trial waiver. 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.)

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.

Respondent asserts alternatively, another possible reading of the statute is that mental health diversion may be sought before a verdict is reached, but that this interpretation raises double jeopardy issues that are not addressed in the statute. (RB at p. 28, 29.) Respondent does recognize though that any constitutional concerns not addressed in the statute are not insurmountable. (RB at p. 31.) For this reading, "adjudication" becomes the determination of guilt as opposed to the process of deciding guilt. (RB at pp. 28-29.)

Respondent is mistaken. If the Legislature intended to limit section 1001.36 to refer to the time guilt is established it would have provided some indication of this intent, yet it did not do so. Significantly, in section 1001.36 the Legislature did not refer to the "adjudication of guilt." Nor did it refer to the adjudication of a particular issue.

Appellant acknowledges that by keeping diversion as an option until sentencing there may be times when diversion is sought before a verdict is reached. However, respondent's double jeopardy concerns if this occurred are misplaced because retrial is not barred if the defendant consents to a mistrial. (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 712.) Counsel may also consent to a mistrial on behalf of the defendant. (*People v. Brandon* (1995) 40 Cal.App.4th 1172, 1175 ["Although the right to request a mistrial or proceed to a conclusion with the same jury is a fundamental right, the law does not require that it be

personally waived by an accused, nor does the law require that an accused by admonished concerning the nature of the right," holding that counsel's consent to a mistrial is deemed the defendant's consent]; *People v. Moore* (1983) 140 Cal.App.3d 508, 513-514 ["We hold the right of the defendant to request a mistrial or proceed to a conclusion with the same jury, though a fundamental one, is one that should and can properly be exercised by experienced legal minds and is not beyond the control of counsel"].) Additionally, California law is clear that a defendant can impliedly consent to the declaration of a mistrial. (*People v. Boyd* (1972) 22 Cal.App. 714, 717.)

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

In enacting a mental health diversion program, the Legislature sought to expand the use of community-based mental health treatment in order to prevent defendants with treatable mental illness from cycling in and out of our criminal justice system. These goals are codified in section 1001.35. The first stated purpose of section 1001.36 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.) The second stated purpose 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. (§ 1001.35, subd. (b).) 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).)

Respondent contends that the public policy reasons behind mental health diversion support that diversion should be sought

before trial starts. (RB at pp. 38-41.) Respondent first contends that allowing diversion to be sought posttrial would waste scarce judicial resources–both time and money–and section 1001.36 should be construed to avoid such an absurd result. (RB at p. 38-39.) Although true that pretrial diversion programs can serve to avoid the necessity of trial, and although true that this result may be beneficial, this is not among the stated purposes of the diversion program at issue here. By allowing diversion to be sought until imposition of sentence may demand more judicial resources, but it could very well result in more efficient use of resources overall. In addition, appellant does not understand how the possibility of getting a truly mentally ill person the treatment they need could ever be considered an absurd waste of judicial resources just because the request for diversion came after the start of trial, as respondent suggests.

Respondent next contends that 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. (RB at p. 39-40.) 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 respondent 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.

Respondent lastly contends that granting diversion midtrial or posttrial 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. (RB at p. 40.) Respondent's contention assumes gamesmanship, which as stated above, can be avoided by the court's broad discretion in granting diversion. Also, allowing diversion midtrial or posttrial would not erode public confidence in the judicial system. While the matter to be determined in *People v. Ochoa* (2011) 191 Cal.App.4th 664 (*Ochoa*), involved a different issue, the Court dealt with the policy consideration regarding the integrity of the judicial system. (*Ochoa, supra,* 191 Cal.App.4th at p. 672.) The Court found since revocation hearings and trials served different purposes and interests, a ruling at a revocation hearing, though inconsistent with the verdict at trial, did not erode public confidence in the judicial system. (*Ochoa, supra,* 191 Cal.App.4th at p. 673.) The same reasoning can be applied here. Since a trial and a mental health diversion eligibility hearing serve different purposes and interests, a ruling at a diversion hearing, though inconsistent with a verdict at trial, would not erode public confidence in the judicial system.

As appellant argued in his AOB, the statutes's express 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. (AOB at pp. 29-32.) 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.

Respondent, however, argues that 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" while protecting public safety. (RB at p. 41, 43.) Respondent points out that diversion was increased by creating a program that could be applied to an expansive set of crimes, defendants and mental health illnesses and the statute endeavored to support individuals with mental health disorders by encouraging intervention as early as possible in the process. (RB at p. 41.)

While it is true that mental health diversion could be increased by the factors respondent points out, restricting a request for diversion to before trial starts would serve no reasonable purpose. The purpose of increased diversion is better served by keeping the possibility of diversion open until imposition of sentence.

Keeping diversion as an option until imposition of sentence also furthers the goal of mitigating the individuals' entry and reentry into the criminal justice system while protecting public safety. Interestingly, respondent argues that once a defendant has undergone trial, that defendant has certainly entered the criminal justice system and the concern with the defendant's entry into the system vanishes. (RB at p. 43.) Contrary to respondent's argument, the goal of mitigating a defendant's entry and reentry into the criminal justice system does not vanish just because he has undergone trial. The goal of mitigating a defendant's entry and reentry into the criminal justice system involves a much broader concept than just preventing a trial. The criminal justice system in California is comprised of a four stage processing structure. Those four stages are the commission of the crime, arrest by law enforcement, prosecution of a case in court, and detention and supervision by corrections agencies.

(https://california.staterecords.org/understandingthegoldenstatescriminaljusticesystem.php, accessed Feb. 9, 2022.) The goal of diversion is to mitigate the cycling in and out of these four stages. For example, if a mentally ill defendant is not permitted to get the mental health treatment they need because of the timing of the diversion request and is shipped off to prison, that defendant will one day be released, still suffer from mental illness and has a high chance of reentering the criminal justice system when he commits another crime. This could not be what the Legislature had in mind in enacting section 1001.36. Getting a mentally ill defendant the help they need at any point prior to incarceration would further the express goals of mitigating entry and reentry into the criminal justice system and promoting public safety much more than limiting a request for diversion to before trial starts.

C. 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.

Respondent contends that the legislative history of AB 1810 and SB 215 focuses on saving the state money by reducing the

number of incompetent to stand trial defendants sent to the Department of State Hospitals. (RB at pp. 47, 48, 49, 50.)

Appellant agrees that the legislative history of AB 1810 focuses on saving money by diverting incompetent to stand trial defendants away from the Department of State Hospitals. However, by limiting diversion to before trial begins limits the amount of savings, especially considering that a defendant can be found incompetent to stand trial up until sentencing.

Respondent argues that the legislative history confirms that diversion should be requested before trial starts because the goal of the mental health diversion program was to avoid the cost of trials. (RB at pp. 50-52.) Although respondent cites to the Legislature's statements that diversion will avoid unnecessary and unproductive costs of trial and incarceration, respondent only focuses on the cost saving aspect of trials.

Appellant acknowledges that reducing the burden of a criminal trial and saving money by avoiding a trial could be a positive side effect of section 1001.36. But, it is clear from the legislative history that the Legislature was focused on increasing diversion to avoid the problems associated with incarceration of the mentally ill and the costs incurred from it. The attention to these issues was not cursory; it formed the bulk of the argument for the statute. (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]; 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 ["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."]; 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 ["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."]; Sen. Comm. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) Jan. 3, 2018, *Purpose*, p. 4 [incarceration only serves to aggravate preexisting conditions and does little to deter future lawlessness]; 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."].) 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, as respondent suggests.

When the Legislature considered the cost, the focus was on the specific costs of incarceration, compared to the generalized cost savings of avoiding 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 of millions of dollars"]; 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 Jails,* p. 6 [mentally ill inmates are expensive to house, for example, in Broward County, Florida in 2007, it cost $80 a day to house a regular inmate, but $130 a day for an inmate with mental illness]; compare Sen. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) Jan. 3, 2018, *Fiscal Effect*, p. 6, italics addred [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"] .)

Respondent also contends that the Legislature intended to provide early intervention and treatment to further support its position the diversion must be sought before trial starts. (RB at pp. 52-53.) Respondent notes that the bill authorizes a court "to order treatment early in the process rather than waiting for the disposition of the case." (RB at p. 53.) However, respondent left out the remainder of the sentence which states: "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. (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.) When taken in the proper context that

prior to implementing section 1001.36 mental health diversion treatment could only be sought after sentencing, this statement indicates that *early in the process* refers to anytime prior to sentencing. While it is true that a mentally ill defendant would benefit from treatment if granted before trial starts, there is nothing in the legislative history to indicate that the Legislature intended to exclude those defendants who requested diversion prior to sentencing.

Respondent further contends that 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. (RB at pp. 56-58.) To support this contention respondent focuses on the author of SB 215's explanation 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 additional burden of a criminal record. This approach was unfair, impractical and costly." (RB at pp. 56-57.)

While respondent correctly cites the author's explanations for mental health diversion, it is interesting to note that respondent leaves out the examples used by the author immediately proceeding and subsequent to the quote which state:

> For example, even where an offense is clearly a product of mental illness, a court could not, prior to AB 1810, order mental health treatment, relevant counseling, or adherence to a medication regime unless the person was first convicted, *and then placed on probation or sent to jail* at county expense;
> For example, 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. Rules Com., Off. of Sen. Floor Analysis, Unfinished Business, SB 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, *Comments*, p. 2, italics added.) Respondent's argument misconstrues the author's statements. The author's focus was on preventing a mentally ill defendant from having to be *placed on probation or sent to jail* before receiving treatment (as prior law required), not on being convicted. Furthermore, the legislative history focuses on the costs of incarceration, not the cost of trials, demonstrating the Legislature was more concerned with keeping the mentally ill from being incarcerated and less concerned with the trial.

As appellant pointed out in his AOB, 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.[3])

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[3] (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,

(continued...)

Respondent also incorrectly notes that the language appellant cited: "[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" involves "'jail inmates'–this is, persons who are most commonly awaiting trial–rather than prison inmates who have already been convicted." (RB at p. 57.) The legislative history is clear that the original concern of SB 215 was to create a diversion program for defendants who commit a misdemeanor or jail-eligible felony who suffer from a mental disorder if the mental disorder played a significant role in the commission of the charged offense. (Sen. Com. on Public Safety, analysis of SB 215 (2017-2018 Reg. Sess.) Jan. 3, 2018, *Purpose*, p. 1.)[4]

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.

D. Conclusion

The plain text of section 1001.36, the absence of limiting

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[3](...continued)
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 .)

[4] Section 1001.36 specifies that diversion was available for allegations of misdemeanor or felony offenses (§ 1001.36, subd. (a)), with the exceptions stated in subdivision (b)(2).

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: February 17, 2022 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 REPLY BRIEF ON THE MERITS** contains 6,232 words, excluding the cover, tables, this certification, and the proof of service, according to the word count of the program used to prepare this brief.

DATED: February 17, 2022 Respectfully submitted,

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

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 February 17, 2022, I caused to be served the following document: **APPELLANT'S REPLY BRIEF ON THE MERITS**, by placing a true copy in a separate envelope addressed to each addressee, respectively, as follows:

Cory Braden, Jr.
2807 Elyvra Way #229
Sacramento, CA 95821

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 February 17, 2022, I electronically served the attached **APPELLANT'S REPLY 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 REPLY BRIEF ON THE MERITS** on February 17, 2022 to the following entities:
Appellate Defenders Inc., eservice-court@adi-sandiego.com
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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 February 17, 2011 */s/ Cindy Brines*
CINDY BRINES