MENTAL HEALTH DIVERSION UNDER PENAL CODE SECTIONS 1001.35 AND 1001.36

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Assembly Bill No. 1810 (AB 1810), an omnibus mental health bill, was signed by the governor on June 27, 2018, as a budget trailer bill; it became effective on signing. The legislation included the addition of Penal Code[1] sections 1001.35 and 1001.36[2] for the discretionary diversion of qualified persons who have committed a crime because of a mental disorder. Thereafter, the Legislature amended section 1001.36 with the passage of Senate Bill No. 215 (SB 215), which became effective January 1, 2019. The Legislature again amended the mental health diversion statutes with the passage of Senate Bill No. 1223 (SB 1223), effective January 1, 2023. This revised memorandum discusses the mental health diversion statutes effective January 1, 2023, including the amendments made by SB 1223 and other contemporaneous legislative enactments.

I. Crimes eligible for diversion

Until December 31, 2018, all crimes, felony and misdemeanor, were potentially eligible for diversion. (§ 1001.36, subd. (a) [effective until Dec. 31, 2018].) After SB 215 became effective on January 1, 2019, the following crimes are ineligible for diversion under section 1001.36:

(1) Murder or voluntary manslaughter.

(2) An offense for which a person, if convicted, would be required to register pursuant to section 290 as a sex offender, except for a violation of section 314 [indecent exposure].

(3) Rape.

(4) Lewd or lascivious acts on a child under 14 years of age.

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

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

(7) Continuous sexual abuse of a child, in violation of section 288.5.

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.
[2] The full text of sections 1001.35 and 1001.36 is set forth in Appendix A, *infra*.

(8) A violation of section 11418, subdivisions (b) or (c) [weapons of mass destruction].

(§ 1001.36, subd. (d).)

A. DUI offenses

Vehicle Code, section 23640 prohibits diversion under section 1001.36 for DUI offenses. (*Tellez v. Superior Court* (2020) 56 Cal.App.5th 439, 444; *Moore v. Superior Court* (2020) 58 Cal.App.5th 561, 573-579.)

B. Exclusion of sex offenders not ex post facto

In *People v. Cawkwell* (2019) 34 Cal.App.5th 1048 (granted review)(*Cawkwell*), the defendant committed a registerable sex offense approximately two years prior to the enactment of the mental health diversion law. The defendant contended the initial version of section 1001.36, which did not exclude sex offenders, should be applied retroactively. He also contended the amendments made by SB 215, which exclude sex offenders, should not be applied to him because they constitute an ex post facto law. *Cawkwell* rejected the latter contention and found the defendant ineligible for diversion. The court reasoned: "[T]he Legislature's amendment of section 1001.36 to eliminate eligibility for defendants charged with sex offenses did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for the offenses with which Cawkwell was charged. [Citation.] That is, Cawkwell was subject to the same punishment when he committed his offenses as he was after the Legislature narrowed the scope of defendants eligible for diversion. Thus, the amendment does not violate the ex post facto clauses of the state or federal Constitutions, and Cawkwell is ineligible for mental health diversion." (*Cawkwell*, *supra*, 34 Cal.App.5th at p. 1054.) The Supreme Court has been granted review of *Cawkwell*.

C. Crimes under the Three Strikes law

Whether a defendant charged under the Three Strikes law is eligible for diversion under section 1001.36 is not entirely clear. Both statutory versions of the Three Strikes Law expressly prohibit the diversion of a crime coming under its provisions. Sections 667, subdivision (c)(4), and 1170.12, subdivision (a)(4), provide, in relevant part: "*Diversion shall not be granted* nor shall the defendant be eligible for commitment to the California Rehabilitation Center. . . ." (Italics added.)

People v. Davis (2000) 79 Cal.App.4th 251 (*Davis*), a case involving eligibility for deferred entry of judgment under sections 1000, *et seq*., offers some support for the conclusion that the Three Strikes law precludes diversion under section 1001.36: "Moreover, even if the meaning were not clear, application of standard rules of construction reveal an intent to allow third strike defendants to participate in deferred entry of judgment. The Legislature is deemed to have

been aware of statutes already in existence and to have enacted or amended a statute in light thereof. [Citations.] *Thus, the Legislature must be deemed to have been aware, at the time it amended sections 1000-1000.4, that the Three Strikes law prohibited diversion, but did not prohibit deferred entry of judgment. Accordingly, it must be presumed that when the Legislature replaced diversion with deferred entry of judgment as to the drug violation in issue, it intended to permit otherwise qualifying strike defendants to participate in the deferred entry of judgment program, notwithstanding the prohibition of diversion found in the Three Strikes law.*" (*Davis*, supra, 79 Cal.App.4th at p. 258, italics original, underscore added.)

While it seems likely the intent of the enactors was to prohibit all forms of diversion for persons charged with crimes punishable under the Three Strikes law, it is not clear whether the statutes as drafted accomplish that result.

The provisions prohibiting diversion must be viewed in the context of the entire text of the Three Strikes law. Sections 667, subdivision (a), and 1170.12, subdivision (a), provide that "[n]otwithstanding any other law, if a defendant *has been convicted* of a felony and it has been pled and proved that the defendant has one or more prior serious or violent felony convictions, . . ., the court shall adhere to each of the following: . . . .(4) . . . *Diversion shall not be granted* . . . ." (Italics added.) The plain meaning of subdivision (a)(4) is that the prohibition only applies after the defendant has been *convicted* under circumstances triggering the application of the Three Strikes law. Indeed, that is the holding of *Davis* with respect to defendant's eligibility for deferred entry of judgment under section 1000 after being charged with a prior strike. *Davis* observed that although the defendant enters a guilty plea for the purposes of the program, the plea does not constitute a conviction unless judgment is entered upon the failure to perform satisfactorily in the program. (*Davis*, *supra*, 79 Cal.App.4th at p. 257.) "Turning to the Three Strikes law, we find the relevant provisions of both versions of its enactment require commitment to a state prison only whenever a defendant with prior serious or violent felony convictions has been *convicted* of a felony. [Citations.]" (*Id*., italics original.) In distinguishing deferred entry of judgment from diversion, however, *Davis* assumed without discussion that the Three Strikes law prohibited diversion. *Davis* did not view the prohibition of diversion through the same lens as it did for deferred entry of judgment – *i.e*., whether the granting of diversion occurs *prior to conviction*.

Because mental health diversion, by definition, is a pre-adjudication process under section 1001.36, subdivision (f)(1), granting of diversion will always occur prior to the defendant's conviction of a crime punishable under the Three Strikes Law. Such a statutory construction strongly suggests a defendant charged with a prior strike, but not yet convicted under the Three Strikes law, will be eligible for diversion under section 1001.36. To deny diversion under the current structure of sections 667, subdivision (a), and 1170.12, subdivision (a), the court must interpret the statutory language as requiring the exclusion if the defendant is "convicted *or charged*" with a prior strike – an interpretation likely beyond the authority of the court.

If the court believes the Three Stikes law precludes eligibility for diversion under section 1001.36, yet feels diversion otherwise is in the interests of justice, it can avoid the whole issue

of the application of sections 667, subdivision (a), and 1170.12, subdivision (a), if it appropriately dismisses the prior strikes under section 1385, subdivision (a). Once the strikes have been eliminated from the sentencing equation, the defendant is entitled to consideration of diversion the same as any non-strike defendant.

Similarly, if the court believes the defendant charged with a prior strike is statutorily eligible for diversion but feels diversion is inappropriate, the court may consider whether to exercise its overarching discretion to deny diversion, discussed *infra*.

II. When diversion may be granted

A. Timing of request for diversion

Diversion may be granted at any time after the filing of an accusatory pleading, up to the point of adjudication. "On an accusatory pleading alleging the commission of a misdemeanor or felony offense not set forth in subdivision (d), the court may, in its discretion, and after considering the positions of the defense and prosecution, grant pretrial diversion to a defendant pursuant to this section if the defendant satisfies the eligibility requirements for pretrial diversion set forth in subdivision (b) and the court determines that the defendant is suitable for that diversion under the factors set forth in subdivision (c)." (§ 1001.36, subd. (a).) Although the court must "consider" the position taken by the prosecution on defendant's application, the statute does not require the *consent* of the prosecution for the defendant to participate in diversion. (*People v. Watts* (2022) 79 Cal.App.5th 830, 835 (*Watts*). "Pretrial diversion" "means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment. . . ." (§ 1001.36, subd. (f)(1).) It seems clear the statute was drafted to permit pre-plea diversion of the defendant.

Courts disagree over the meaning of "until adjudication." *People v. Braden* (2021) 63 Cal.App.5th 330 (*Braden*), interprets the phrase as meaning "before trial." "The first reason why we [conclude defendant is ineligible for diversion under section 1001.36] is that the Legislature five times in the text of section 1001.36 referred to the mental health diversion program as 'pretrial' diversion. (§ 1001.36, subds. (a), (b)(1), (c), (d)(1), (d)(2).) Regardless of the precise moment that defines the beginning of trial, a case is no longer 'pretrial' once a trial has started. A case certainly is not pretrial where, as here, a jury has convicted the defendant." (*Braden*, *supra*, 63 Cal.App.5th at pp. 333-334.) *Braden* has been granted review.

People v. Graham (2021) 64 Cal.App.5th 827, interprets "until adjudication" as prior to the verdict of the jury. Although not addressed in the opinion, presumably *Graham* also would interpret the phrase as meaning prior to a guilty or no contest plea to the charges. *Graham* has been granted review. In accord with *Graham* on the interpretation of "adjudication" is *People v. Rodriguez* (2021) 68 Cal.App.5th 584; *Rodriguez* has been granted review.

People v. Curry (2021) 62 Cal.App.5th 314, defines "until adjudication" as the imposition of the judgment of conviction – *i.e*., the defendant is eligible for diversion up to the point of being sentenced. *Curry* has been granted review.

B. Request for diversion originates with the defendant

There is no *sua sponte* duty of the court to consider diversion. *People v. Banner* (2022) 77 Cal.App.5th 226 (*Banner*), observes: "In our view, the Legislature crafted a scheme wherein the diversionary interest originates in the defendant or someone other than the defendant, *e.g*., counsel, the prosecutor, or the judge. In those situations, a defendant justifiably professing his or her innocence might well decline diversion and choose instead to put the People to their burden of proof. Nowhere, however, does the scheme mandate a *sua sponte* duty for trial courts to consider mental health diversion. After all, a defendant (or his or her counsel) is often best positioned to know whether mental health diversion is an appropriate outcome. [Citation ['the onus is placed on the defendant to raise the issue of diversion'].]" (*Banner*, *supra*, 77 Cal.App.5th at p. 235; footnotes omitted.)

As is evident from *Banner*, the request for diversion most often will come from the defendant or defendant's counsel. Nothing in the statute prohibits the court on its own motion from initiating diversion proceedings. It appears the intent of the Legislature that diversion proceedings may be initiated informally with a simple request without the need for a formal evidentiary hearing. If counsel or the court have reason to challenge the defendant's request for diversion, counsel or the court may request the defendant make a prima facie showing of eligibility and suitability pursuant to section 1001.36, subd. (e), discussed, *infra*. Absent a request for the prima facie showing, the court can grant diversion on the request of the defendant supported by documentary evidence or declaration sufficient to show the defendant meets the requirements of eligibility and suitability.

C. Relationship between diversion and trial competence

The diversion program is not dependent on whether the defendant is competent to stand trial. Neither counsel nor the court are required to make a declaration or finding as to incompetence before the diversion process may be initiated. The purpose of the program is not to secure the defendant's trial competency, but to offer treatment for an underlying mental disorder. However, sections 1370, subdivision (a)(1)(B)(iv), and 1370.01, subdivision (b)(1), permit the court to place an incompetent defendant on diversion if deemed "eligible."[3]

[3] For a full discussion of the placement of incompetent persons on diversion, see Section XI, *infra*.

D. Retroactivity of the diversion statutes

Courts were divided on whether the new diversion statutes applied to cases not final as of the date the law became effective. The Supreme Court resolved the conflict in *People v. Frahs* (2020) 9 Cal.5th 618 (*Frahs*). The legislation applies to all cases not final as of its effective date on January 1, 2019. "In *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), we held that an amendatory statute lessening punishment for a crime was presumptively retroactive and applied to all persons whose judgments were not yet final at the time the statute took effect. In *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*), we applied the *Estrada* rule to legislation that mitigated the possible punishment for a class of persons. The statute here is similar to the scheme we considered in *Lara*, in that section 1001.36 by design and function provides a possible ameliorating benefit for a class of persons — namely, certain defendants with mental disorders — by offering an opportunity for diversion and ultimately the dismissal of charges. Moreover, neither the text nor the history of section 1001.36 clearly indicates that the Legislature intended that the *Estrada* rule would not apply to this diversion program. Therefore, consistent with our decision in *Lara*, we conclude that *Estrada's* inference of retroactivity applies. We also agree with the Court of Appeal's determination that defendant is entitled to a limited remand for the trial court to decide whether he should receive diversion under section 1001.36." (*Frahs*, *supra*, 9 Cal.5th at p. 624.)

In granting the defendant a limited remand to determine eligibility for mental health diversion, the court observed: "To summarize and apply the foregoing, we conclude that a conditional limited remand for the trial court to conduct a mental health diversion eligibility hearing is warranted when, as here, the record affirmatively discloses that the defendant appears to meet at least the first threshold eligibility requirement for mental health diversion — the defendant suffers from a qualifying mental disorder [citation]. Because this case does not present such an issue, we do not address the question of whether an appellate court may also decline a defendant's remand request when the record clearly indicates the trial court would have found the defendant 'pose[s] an unreasonable risk of danger to public safety' [citations] and is therefore ineligible for diversion. Nor are we here addressing the separate question of whether the 2019 amendments, which rendered defendants charged with certain crimes categorically ineligible for diversion, apply retroactively. [Citations.]" (*Frahs*, *supra*, 9 Cal.5th at p. 640.)

Finally, the Supreme Court disapproved *People v. Lipsett* (2020) 45 Cal.App.5th 569, *People v. Khan* (2019) 41 Cal.App.5th 460, and *People v. Craine* (2019) 35 Cal.App.5th 744, to the extent they were inconsistent with *Frahs*. (*Frahs*, supra, 9 Cal.5th at p. 641.)

Persons on probation

A person on probation with imposition of sentence suspended is entitled to the benefits of the legislative changes. "When new legislation reduces the punishment for an offense, we presume that the legislation applies to all cases not yet final as of the legislation's effective date. [Citation.] A case in which a defendant is placed on probation with imposition of sentence suspended is not yet final for this purpose if the defendant may still timely obtain

direct review of an order revoking probation and imposing sentence. [Citation.] We hold that a case in which a defendant is placed on probation with execution of an imposed state prison sentence suspended is not yet final for this purpose if the defendant may still timely obtain direct review of an order revoking probation and causing the state prison sentence to take effect." (*People v. Esquivel* (2021) 11 Cal.5th 671, 673.)

III. Determining eligibility and suitability for diversion

A. Discretion of the court

Diversion under section 1001.36 is a discretionary disposition available to the court and defendant if certain requirements are met. "On an accusatory pleading alleging the commission of a misdemeanor or felony offense, . . . the court *may, in its discretion,* and after considering the positions of the defense and prosecution, *grant pretrial diversion* to a defendant pursuant to this section if the defendant satisfies the eligibility requirements for pretrial diversion set forth in subdivision (b) and the court determines that the defendant is suitable for that diversion under the factors set for in subdivision (c)." (§ 1001.36, subd. (a), italics added.)

Existing law and canons of statutory construction strongly suggest that the legislature intended to broaden the discretion vested with courts with the most recent statutory change to Section 1001.36 made by SB 1223. As originally enacted, subdivision (a) simply provided that "the court may . . . grant pretrial diversion" under this section. The phrase "in its discretion" was added by the Legislature effective January 1, 2023, with the enactment of SB 1223. It is understood that the use of the word "may" in the original version of section 1001.36, already indicated the court's decision to grant diversion was discretionary. (See, e.g., *Nixon Peabody LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822 ["The inclusion of the word "may" [in Code of Civil Procedure 473] means that even if the trial court determines the order or judgment was void, it still retains discretion to set the order aside or allow it to stand."].) Further, statutes are not to be interpreted so that statutory terms become surplusage. (See *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1207(*Wells*) ["[I]nterpretations which render any part of a statute superfluous are to be avoided"].) Thus, if the word "may" already means the decision was discretionary, then further adding the words "in its discretion" – and placing no limits on that added "discretion" – must mean something more than creating a decision that is simply reviewed under a traditional "abuse of discretion" standard (which already existed by use of the word "may").

Although the Legislature did not further define the meaning of the phrase, presumably it at least means the court may consider factors not specifically identified by section 1001.36, subdivisions (b) and (c). If the Legislature had intended the analysis of eligibility and suitability to encompass only the statutory factors, there would have been no need to add the phrase "in its discretion" to the phrase "the court may . . . grant pretrial diversion." While a few cases have discussed what such discretion is *not* (see discussion of *Qualkinbush*, *Bunas* and *Whitmill*, *infra*) and a few cases have discussed what such discretion may *include* (see discussion of

Williams, *Bunas* and *Watts*, *infra*), none of these cases analyze the statute with the new "in its discretion" language. The parameters of the court's discretion remain murky. Appellate courts appear to agree that even though a defendant meets all the statutory requirements for eligibility and suitability, the court may nevertheless deny diversion. (See discussion of *Moine*, *Gerson* and *Qualkinbush*, *infra*.) Therefore, the phrase "may, in its discretion" must mean something more than the six factors delineated in subdivisions (b) and (c). As appellate courts continue to review the exercise of the court's discretion, the proper factors for consideration will come into greater focus.

Existing law suggests that the addition of "in its discretion" to section 1001.36, without specific direction or limitation, means the court may at least consider general interests of justice and equity in making the decision. As noted above, section 1001.36 was already discretionary because of the use of the word "may," meaning the "abuse of discretion" standard of review already applied before the words "in its discretion" were added. (See *People v. Lockwood* (1998) 66 Cal.App.4th 222, 227 [because "the word 'may' connotes a permissive standard," an appellate court reviews a claim of error under a statute using the term "may" for abuse of discretion].). Thus, because "in its discretion" cannot be superfluous to "may" (see *Wells, supra,* 39 Cal.4th at 1207), the addition of "in its discretion" must have a purpose and meaning independent of and beyond having an abuse of discretion standard of review. The meaning of "judicial discretion" where, as is the case here, no limits or direction are provided, is described *Harris v. Superior Court* (1977) 19 Cal.3d 786, 796:

> Judicial discretion is that power of decision exercised to the necessary end of awarding justice based upon reason and law but for which decision there is no special governing statute or rule. Discretion implies that *in the absence of positive law or fixed rule* the judge is to decide a question by his view of expediency or of the demand of equity and justice. [Citation.] The term implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy or warped by prejudice or moved by any kind of influence save alone the overwhelming passion to do that which is just.
>
> (Italics added; in accord is *People v. Crandell* (1988) 46 Cal.3d 833, 863 ["Discretion implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demand of equity and justice"]; overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346].)

This view is also consistent with the recent amendments made to section 1001.36. SB 1223 added powerful presumptions to multiple steps in the diversion assessment process. Yet SB 1223 did not remove preserving "local discretion" over diversion as a stated purpose under section 1001.35, subdivision (b). It stands to reason then that the simultaneous addition of "in its discretion" alongside the new presumptions was meant to balance out those presumptions

by giving the courts greater discretion (albeit a power rooted in notions of justice and equity as described in *Harris*) over the decision to grant or deny diversion.

The discretionary power of the court to grant or deny diversion is otherwise emphasized and referenced elsewhere in the statute. Section 1001.36, subdivision (k), expressly acknowledges the discretionary nature of the court's decision: "[W]hen determining whether to *exercise its discretion to grant diversion* under this section, a court may consider previous records of participation in diversion under this section." (Italics added.) The court having full discretion to grant diversion also appears consistent with a stated purpose of the act to give local discretion for the creation and implementation of a diversion program: "The purpose of this chapter is to promote all of the following: . . . Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings." (§ 1001.35, subd. (b).) This use of the words "local discretion" further implies an individualized discretion that considers the community interests of the jurisdiction in which the deciding judge sits.

The following cases, all of which predate the addition of "in its discretion," reference the discretionary nature of the court's decision to place the defendant on mental health diversion: "*People v. Frahs* (2020) 9 Cal.5th 618, 626, 264 Cal.Rptr.3d 292, 466 P.3d 844 [noting that § 1001.36 gives trial courts the discretion to grant pretrial diversion]; *People v. Moine* (2021) 62 Cal.App.5th 440, 447–449, 276 Cal.Rptr.3d 668 [§ 1001.36 affords the trial court discretion to grant or deny diversion if the defendant meets the statutory eligibility requirements]; *People v. ONeal* (2021) 64 Cal.App.5th 581, 588, 279 Cal.Rptr.3d 142.) A trial court 'has broad discretion to determine whether a given defendant is a good candidate for mental health diversion.' (*People v. Curry* (2021) 62 Cal.App.5th 314, 324, 276 Cal.Rptr.3d 406.)" (*Watts*, *supra*, 79 Cal.App.5th at pp. 834-835; *Curry* has been granted review.) In accord with *Watts* on the discretionary nature of the court's decision to grant diversion is *People v. Gerson* (2022) 80 Cal.App.5th 1067, 1080 (*Gerson*) ["Ultimately . . . diversion under section 1001.36 is discretionary, not mandatory, even if all the requirements are met."]. In accord with *Gerson* is *People v. Qualkinbush* (2022) 79 Cal.App.5th 879, 887 (*Qualkinbush*).

Accordingly, it seems clear the court can grant diversion if the minimum standards are met, and, correspondingly, can refuse to grant diversion even though the defendant meets the technical requirements of the program. There may be times because of the defendant's circumstances, where the interests of justice do not support diversion of the case. The defendant's criminal or mental health history may reflect an unsuitability of the crime or the defendant for diversion. It may be that because of the defendant's level of disability there is no reasonably available and suitable treatment program for the defendant. The defendant's treatment history may indicate the prospect of successfully completing a program is quite poor. Conduct in prior diversion programs may indicate the defendant is now unsuitable. (See § 1001.36, subd. (k) [the court may consider past performance on diversion in determining suitability].) The court may consider whether the defendant and the community will be better served by the regimen of mental health court. (See §1001.36, subd. (f)(1)(A)(ii)) [the court may consider interests of the community in selecting a program].) The court is not limited to

excluding persons only because of the risk of committing a "super strike." (*Qualkinbush*, supra, 79 Cal.App.5th at pp. 888-889.) In exercising its discretion to grant or deny mental health diversion under subdivision (a), the court may consider *any* factor relevant to whether the defendant is suitable for diversion.[4] (See *Qualkinbush*, *supra*, 79 Cal.App.5th at pp. 889-890 [commenting that an earlier version of the preceding paragraph was "the only [existing] interpretation of the [requirement that "the defendant and the offense" be suitable for diversion].)

It should be noted that, while the Legislature added the words "in its discretion" to subdivision (a), it removed the word "may" from subdivision (b). However, this does not affect the overall discretionary nature of diversion in the statute. As originally enacted, section 1001.36, subdivision (b)(1), stated: "Pretrial diversion may be granted pursuant to this section if all of the following criteria are met. . . ." SB 1223 amended the statute to simply provide that "[a] defendant is eligible for pretrial diversion pursuant to this section if both of the following criteria are met. . . ." Because the Legislature did not eliminate "may" from the introductory language of section 1001.36, subdivision (a), the change of the language in section 1001.36, subdivision (b), does not appear to alter the discretionary nature of diversion; the granting of mental health diversion remains discretionary with the court. As noted above, "[o]rdinarily, the word 'may' connotes a discretionary or permissive act; the word 'shall' connotes a mandatory or directory duty. This distinction is particularly acute when both words are used in the same statute." (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 432; footnotes omitted.) In enacting section 1001.36, the Legislature appears to have understood this distinction. When addressing the authority of the court to grant diversion, the statute uses the permissive "may." (See, *e.g.*, § 1001.36, subd. (a).) When addressing the court's duty upon the defendant's successful completion of diversion, the statute uses the directory "*shall* dismiss the defendant's criminal charges." (§ 1001.36, subd. (h), italics added.)

Consideration of dangerousness

Consideration of the defendant's dangerousness is a specific suitability factor identified in section 1001.36, subdivision (c)(4). For the defendant to be suitable for diversion, the court must find "[t]he defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community."[5] Because "dangerousness" is specifically defined in subdivision (c)(4), if the reason for the court's denial of diversion is based

[4] An earlier version of the foregoing paragraph was included in several legislative analyses of SB 1223. (See, *e.g.*, Senate Public Safety Committee, Senate Health Analysis, 3-25-22, p.7.) After observing that SB 1223 restructures and refines the standards for eligibility and suitability, an analysis stated: "In making a determination on the suitability factors, the bill retains the court's discretion to grant or deny mental health diversion to a person who is otherwise eligible." (*Ibid*.) The Assembly Public Safety Committee, Senate Bill Policy Committee Analysis, 6-27-22, p. 7, quotes the American Civil Liberties Union in support of the bill: "SB 1223 creates a rebuttable presumption that there is a nexus between a person's mental health condition and the charged offense. Importantly, SB 1223 preserves judicial discretion and does not require courts to grant diversion, even if such a finding is made."

[5] For a full discussion of dangerousness identified in section 1001.36, subdivision (c)(4), see Section V, subd. (A), *infra*.

on the specific element of dangerousness, the court must find the defendant is likely to commit one of the crimes listed in section 667, subdivision (e)(2)(C)(iv) – a "super strike" – if treated in the community. "[T]he risk of danger is narrowly confined to the likelihood the defendant will commit a limited subset of violent felonies. [Citation.]" (*Moine*, *supra*, 62 Cal.App.5th at pp. 449-450.) However, the court likely may consider the entire criminal history of the defendant, including crimes not specified as "super strikes," in deciding whether the crime and the defendant are suitable for diversion under section 1001.36, subdivision (a). It should also be noted that the case law in this area purporting to limit court discretion preexists the addition of the "in its discretion" language to the statute.

Ability of defendant to participate in the diversion process

People v. Watts (2022) 79 Cal.App.5th 830 (*Watts*), upheld the court's denial of diversion based on the defendant's inability to work collaboratively in the diversion process and because of repeated failures to attend therapy appointments. (*Watts*, *supra*, 79 Cal.App.5th at pp. 836-837.)

Circumstances of the underlying offense

People v. Bunas (2022) 79 Cal.App.5th 840 (*Bunas*), upheld the trial court's denial of diversion based on the circumstances of the underlying offenses: "[I]t was *the circumstances* of Bunas's commission of the charged offenses in this case that, in the court's view, rendered him unsuitable for diversion. The court noted that the circumstances of the charged offenses included, 'an unprovoked assault, on one victim, and a later attack on another victim with first a flashlight and then a machete where he splits open her head, again, unprovoked, threatening her all the while to kill her for ruining his life, and all in front of her children who are pleading for the man, the defendant, not to kill their mother. . . .' It is clear from the trial court's ruling that it was the *circumstances* of the charged offenses, rather than Bunas's commission of certain specified offenses, that led the trial court to deny his motion for diversion. [¶] Further, the fact that the Legislature enumerated a list of offenses that render a defendant ineligible *as a matter of law* for mental health diversion [citation] does not demonstrate that the Legislature intended to preclude a trial court from relying solely on the *circumstances* of an offense or offenses in determining either eligibility or suitability for diversion. Section 1001.36 specifies that the trial court may consider the 'the defendant's violence and criminal history, *the current charged offense*, and any other factors that the court deems appropriate,' in determining eligibility. [Citation.] While the statute does not specify the factors that a trial court may consider in determining *suitability* [citation], it permits the court to determine whether a defendant has made 'a prima facie showing ... that the defendant *and the offense* are suitable for diversion,' (italics added [by *Bunas*]) thereby evincing the Legislature's intent that a trial court be permitted to rely on a consideration of the circumstances of the charged offense in determining suitability. Finally, there is nothing in section 1001.36, with respect to either eligibility or suitability, that precludes a trial court from relying primarily, or even entirely, on the circumstances of the charged offense or offenses in denying a motion for diversion." (*Bunas*, *supra*, 79 Cal.App.5th at pp. 861-862, italics original.)

Improper to rely on objectives of the criminal justice system

It is improper for the court to determine a defendant unsuitable for mental health diversion based on the sentencing objectives of the criminal justice system. "Relying on the general sentencing objectives articulated in rule 4.410, the trial court found [the defendant] unsuitable for mental health diversion, and further found that punishment was appropriate, based on her lengthy history of mental health issues, her use of force in the commission of the charged crimes, and her history of violence. There is no indication in the trial court's comments that the court considered the primary purposes of the mental health diversion statute, as set forth in in section 1001.35, in imposing sentence. In particular, there is no indication that the court considered the goals of promoting increased diversion of individuals with mental disorders to mitigate their entry and reentry into the criminal justice system while protecting public safety, and providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders." (*Qualkinbush*, *supra*, 79 Cal.App.5th at pp. 891-892; in accord are *People v. Whitmill* (2022) 86 Cal.App.5th 1138, 1149 (*Whitmill*); *People v. Bunas* (2022) 79 Cal.App.5th 840, 865-867.) These cases must now be considered in the context of "in its discretion" being added to section 1001.36, subdivision (a).

Court should consider the purposes of the diversion statute

People v. Williams (2021) 63 Cal.App.5th 990 (*Williams*), in reversing the trial court's denial of diversion, commented: "Although the court's error regarding the danger element of the diversion statute compels reversal here, for the benefit of the trial courts we make the following observations. 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. As this court recently explained, the Legislature enacted this measure in response to the large and growing number of mentally ill persons who are incarcerated in California, including in our overcrowded prisons, and we have criticized its under-utilization. [Citation.] The Legislature's expressly stated purposes are to ' "promote ... [¶] [i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety," "[a]llowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings," and "[p]roviding diversion that meets the unique mental health treatment and support needs of individuals with mental disorders." [Citation])" [¶] In *People v. Frahs*, *supra*, 9 Cal.5th at 619, 264 Cal.Rptr.3d 292, 466 P.3d 844, which held the statute applies retroactively, our Supreme Court quoted and agreed with the Court of Appeal that 'the statute's express purpose of promoting " '[*i*]*ncreased diversion* of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety' " indicated "the Legislature intended the ... program to apply as broadly as possible." ' [Citation.] [The trial judge's] finding that Williams was not suitable for diversion because he posed an unreasonable risk to public safety cannot be reconciled with these legislative objectives. Once again, we emphasize that our trial courts must give serious consideration to this critical alternative, for the good not just of mentally ill offenders but,

ultimately, society at large. [Citation.]" (*Williams*, *supra*, 63 Cal.App.5th at pp. 1004-1005, footnotes omitted, italics original.) *Williams* must now be considered in the context of "in its discretion" being added to section 1001.36, subdivision (a).

Lack of incentive to conform

Diversion should not be denied because it lacks incentive to encourage the defendant to conform. *Whitmill* observed: "Here, the trial court stated: '[W]hat I have here is a defendant who had three years in the county jail suspended. And that's designed to create a strong disincentive to commit any new crime. That does not give me great confidence.' As already noted, the Legislature intended mental health diversion to be applied as broadly as possible. [Citation.] We find nothing in the diversion statute suggesting the Legislature intended to give courts discretion to deny diversion simply because diversion is or may be less motivating than probation or prison. The trial court appeared to be grafting on a seventh element that defendants show they do not need to be additionally motivated. The trial court's conclusion that diversion is insufficiently motivating is simply a challenge to the underlying premise of diversion itself. The Legislature has concluded that diversion has sufficient safeguards when the defendant does not pose an unreasonable risk of danger to public safety and is otherwise eligible and suitable for diversion; courts cannot override that determination just because a grant of probation in the past has not "motivated" defendants to overcome symptoms of mental illness which contribute to violations of the law." (*Whitmill*, *supra*, 86 Cal.App.5th at p. 1146.) *Whitmill* must now be considered in the context of "in its discretion" being added to section 1001.36, subdivision (a).

B. Prima facie showing of eligibility and suitability for diversion

The court has the explicit right to request the defendant to make a prima facie showing of eligibility and suitability for diversion. "At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." (§ 1001.36, subd. (e).)

While the prima facie showing includes consideration of both eligibility and suitability for diversion, there is no obligation on the court to decide these issues in any particular order. (*Bunas*, *supra*, 79 Cal.App.5th at pp. 859-860.) With the changes made by SB 1223, which divide consideration of factors between eligibility and suitability, it may be most efficient for the court to consider eligibility first.

It is suggested that when the defendant requests mental health diversion, the court conduct a hearing as authorized by section 1001.36, subdivision (e), to determine whether the defendant can offer a prima facie basis for the court to conclude the defendant is both eligible and

suitable for diversion.[6] At that time the court can receive information about the crime, the defendant's criminal and mental health history, and potential treatment options. If the defendant demonstrates the crime is generally eligible and suitable for diversion and the defendant has at least an arguable chance of meeting the other requirements for diversion, the court may proceed with appointment of any necessary experts and exploration of placement options. On the other hand, if the case is unsuitable for diversion, even assuming the defendant would otherwise qualify, the court could deny the request without further incurring unnecessary time and expense in obtaining forensic evaluations.

"The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel." (§ 1001.36, subd. (e).) The court likely can consider police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, and records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense. (See § 1001.36, subd. (b)(2).) "If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." (§ 1001.36, subd. (e).) The court could order resumption of the criminal proceedings or refer the defendant to other local mental health programs.

The defendant has no right to present live testimony at the prima facie hearing. "[T]he statute *explicitly* states that the hearing is informal and may be based on purely documentary evidence. Section 1001.36, subdivision [(e)] states in relevant part: 'At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. *The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel.* If a prima facie showing is not made, the court may summarily deny the request for diversion.' (Italics added [by *Watts*].)" (*Watts*, *supra*, 79 Cal.App.5th at p. 838, italics original.)

People v. Bunas (2022) 79 Cal.App.5th 840, 863 (*Bunas*), also holds the defendant is not entitled to an evidentiary hearing on diversion. "[W]hile Bunas contends that 'no published case has directly addressed whether a trial court is required to hold an evidentiary hearing in a mental health diversion proceeding *upon request*,' (italics [original]) it is clear that section 1001.36, subdivision [(e)] authorizes a trial court to deny a motion for diversion *without* holding an evidentiary hearing if the court determines that a defendant has failed to make a prima facie showing in support of diversion. The statute expressly authorizes a trial court to 'summarily deny the request for diversion,' if the defendant fails to carry his burden of making a prima facie showing in support of diversion at a hearing that '*shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel.'* (§ 1001.36, subd. (b)(3), italics [original].) Thus, the trial court was *not* required to hold an evidentiary hearing merely upon

[6] For a complete outline of the suggested procedure for considering diversion, see Appendix B, *infra*.

defense counsel's implied request for such a hearing." (*Bunas*, *supra*, 79 Cal.App.5th at p. 863, italics original.)

Although *Watts* and *Bunas* hold there is no *right* to hold an evidentiary hearing in determining whether the defendant can state a prima facie basis for relief, neither case suggests the court is not permitted to hold such a hearing. There may be circumstances, in the exercise of the court's discretion, where limited formal testimony may be helpful in bringing clarity to the defendant's eligibility and suitability for diversion.

Although the statute contemplates informal proceedings, should the victim choose to speak to the question of whether a defendant should get diversion, the California constitution appears to require the court to allow this. As stated in Article I, section 28(b)(8), a victim has the right "[t]o be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing … or any proceeding in which a right of the victim is at issue."

No need for full evidentiary hearing after prima facie showing

It appears the intent of the Legislature that if the defendant does establish a prima facie basis of eligibility and suitability for diversion, the court may rule on the request for diversion without the need for a full evidentiary hearing. If the Legislature had intended such a hearing, it knows how to require it. In motions to determine accomplice liability pursuant to section 1172.6, for example, the defendant has the burden of showing a prima facie basis for relief under section 1172.6, subdivision (c). If such a showing is made, section 1172.6, subdivision (d)(1), requires the court to conduct a full evidentiary hearing on the merits of the motion. No similar proceeding is required as a condition of granting mental health diversion. Eligibility and suitability for mental health diversion, if disputed, should be determined during the informal hearing in the context of the prima facie showing by the defendant.

C. Burden of establishing eligibility

Because the ability to participate in diversion is not a statutory right, but a matter of discretion with the court, the defendant will carry the burdens of proof and persuasion regarding eligibility and suitability for diversion. Diversion under section 1001.36 is quite different than the qualified "right" to resentencing and reclassification in Propositions 36 and 47, which, depending on the issue, have shifting burdens of proof. (See, generally, *People v. Romanowski* (2017) 2 Cal.5th 903, 916 [Proposition 47 – defendant has burden of proof of eligibility]; *People v. Frierson* (2017) 4 Cal.5th 225, 239 [Proposition 36 – People have burden of proof of dangerousness].)

The statute also specifies that "[e]vidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert." (§ 1001.36, subd. (b)(1).) This

provision explicitly places the burden of production on the defendant for the first eligibility criterion.

D. Juveniles are ineligible for diversion

Because of the differences in the law and procedure applicable to adults and juveniles, *In re J.M.* (2019) 35 Cal.App.5th 999, and *In re M.S.* (2019) 32 Cal.App.5th 1177, conclude the mental health diversion program is not applicable to juveniles not tried as adults.

IV. Statutory eligibility for diversion

As originally enacted, section 1001.36, subdivision (b)(1), specified a defendant may be granted mental health diversion if six conditions were satisfied: (1) the court is "satisfied" the defendant suffers from a qualified mental disorder; (2) the court is "satisfied" the mental disorder was a "significant factor" in the commission of the offense; (3) a mental health expert believes the disorder will respond to treatment; (4) the defendant consents to diversion and waives the right to a speedy trial; (5) the defendant agrees to comply with the conditions of diversion; and (6) the court is satisfied the defendant will not pose an unreasonable risk of danger to public safety.

SB 1223 redefines several of the factors and divides them between requirements for "eligibility" (factors (1) and (2)) and requirements for "suitability" (factors (3) through (6)).[7] As made clear in *People v. Bunas* (2022) 79 Cal.App.5th 840 (*Bunas*), and now by the restructured provisions of section 1001.36, subdivisions (b) and (c), whether a defendant is granted mental health diversion is a function of *both* eligibility and suitability. "[T]he defendant carries a prima facie burden with respect to *both* eligibility *and* suitability. . . . [¶] [T]here is nothing in the statute, or in any case law, that mandates that a trial court determine the defendant's *eligibility* if it determines that the defendant or offense is not *suitable* for diversion. Since, as [defendant] acknowledges, a trial court may deny a motion for diversion on the basis of *either* suitability or eligibility, if the court determines that the defendant or offense is not suitable, it makes no difference whether the defendant is *eligible*." (*Bunas*, *supra*, 79 Cal.App.5th at pp. 859-86, italics original.)

The requirements of eligibility and suitability make no distinction between felonies and misdemeanors.

[7] A Senate Bill Policy Committee Analysis observed: "[SB 1223] seeks to separate out the current eligibility factors based on the defendant's mental disorder from the factors the court shall consider when determining whether the defendant is suitable for diversion – i.e. the defendant's symptoms of the mental disorder would respond to mental health treatment and the defendant will not pose an unreasonable risk to public safety if treated in the community. In making a determination on the suitability factors, the bill retains the court's discretion to grant or deny mental health diversion to a person who is otherwise eligible." (Assembly Committee on Public Safety, Senate Bill Policy Committee Analysis, 6/27/22, p. 6.)

Section 1001.36, subdivision (b), specifies "a defendant is eligible for pretrial diversion pursuant to this section if both of the following criteria are met:"

1. **The defendant has been diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia.** Evidence of the defendant's mental disorder shall be provided by the defense and **shall include a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert**. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence." (§ 1001.36, subd. (b)(1), italics added.) Accordingly, while the statute permits diversion based on nearly every mental disorder, it expressly excludes persons who are diagnosed with antisocial personality disorder, borderline personality disorder, and pedophilia.

   The most significant change made by SB 1223 to the requirement of a mental disorder is that the disorder must be evidenced by a diagnosis or treatment within the last five years – presumably within the five years preceding the commission of the crime.

   Developmental disabilities

   The DSM-5 includes as a mental disorder certain developmental disabilities such as autism, neurocognitive disorder due to traumatic brain injury, and intellectual disability (intellectual developmental disorder). Persons suffering from a recognized disorder caused by the developmental disability also would be eligible for diversion.

   Substance abuse disorders

   The reference in section 1001.36, subdivision (b)(1), to "bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder" as being eligible for diversion may suggest the Legislature was primarily concerned about defendants who suffer from "traditional" mental illness. The plain meaning of the statutory language, however, opens eligibility to *any* DSM-5 disorder, except for antisocial personality disorder, borderline personality disorder, and pedophilia. Subdivision (b)(1) specifies the defendant must have been diagnosed with "*a mental disorder as identified* in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, *including, but not limited to*, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder. . . ." (Italics added.)

   The DSM-5 clearly identifies substance-related and addictive disorders, dividing them into two broad categories: substance use disorders and substance induced disorders. "The substance-related disorders encompass 10 separate classes of drugs: alcohol;

caffeine: cannabis; hallucinogens (with separate categories for phencyclidine [or similarly acting arylcyclohexylamines] and other hallucinogens); inhalants; opioids; sedatives, hypnotics, and anxiolytics; stimulants (amphetamine-type substances, cocaine, and other stimulants); tobacco; and other (or unknown) substances. These 10 classes are not fully distinct. All drugs that are taken in excess have in common direct activation of the brain reward system, which is involved in the reinforcement of behaviors and the production of memories." (Diagnostic and Statistical Manual of Mental Disorders: DSM-5. 5th ed., American Psychiatric Association, 2013, p. 481 (DSM-5).)

"The substance-related disorders are divided into two groups: substance use disorders and substance-induced disorders. The following conditions may be classified as substance-induced: intoxication, withdrawal, and other substance/ medication-induced mental disorders (psychotic disorders, bipolar and related disorders, depressive disorders, anxiety disorders, obsessive-compulsive and related disorders, sleep disorders, sexual dysfunctions, delirium, and neurocognitive disorders)." (*Ibid*.)

"The essential feature of a substance use disorder is a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems." (DSM-5, *supra*, at p. 483.) "An important characteristic of substance use disorders is an underlying change in brain circuits that may persist beyond detoxification, particularly in individuals with severe disorders. The behavioral effects of these brain changes may be exhibited in the repeated relapses and intense drug craving when the individuals are exposed to drug-related stimuli. These persistent drug effects may benefit from long-term approaches to treatment. [¶] Overall, the diagnosis of a substance use disorder is based on a pathological pattern of behaviors related to use of the substance." (DSM-5, *supra*, at p. 483.)

Diversion under section 1001.36 will be available to persons having a "dual diagnosis" or "co-occurring disorder." These phrases are frequently subject to misuse. As explained by the National Alliance on Menal Illness (NAMI): "As intuitive as the term 'dual diagnosis' may seem, it actually doesn't mean having two mental health conditions. *Dual diagnosis* (also referred to as a co-occurring disorder) is a term used when someone experiences a mental illness and a substance use disorder simultaneously. Therefore, 'dual diagnosis' *itself* is not a diagnosis, but rather a specific combination of diagnoses." (Greenstein, "Understanding Dual Diagnosis," NAMI, 2017, italics original.) For the purposes of setting the conditions of eligibility for mental health diversion, section 1001.36, subdivision (b)(1), makes no distinction between persons with one or multiple disorders – it is the existence of at least one qualified diagnosis that makes the person eligible. (See *Negron v. Superior Court* (2021) 70 Cal.App.5th 1007, 1017 [the defendant is eligible if there is at least one qualified mental disorder].)

Unspecified disorders

The DSM-5 divides and organizes all the mental disorders into specific categories with treatment codes for the purposes of medical documentation. The DSM-5 includes several "unspecified disorders" where a subject does not meet the criteria for a particular mental disorder, but the text provides a category and a code for the purposes of documentation. For example, the DSM-5 includes a listing for "Unspecified Schizophrenia Spectrum and Other Psychotic Disorder (298.9)," which states "[t]his category applies" to situations where the subject has symptoms, but those symptoms "do not meet the full criteria for any of the disorders in the schizophrenia spectrum and other psychotic disorders diagnostic class." The text then instructs that this category "is used in situations in which the clinician chooses not to specify the reason that criteria are not met for a specific schizophrenia spectrum and other psychotic disorder, and includes presentations in which there is insufficient information to make a more specific diagnosis." Because section 1001.36(b) requires a diagnosis of "a mental disorder *as identified* in the most recent edition of the [DSM]"(italics added), it would stand to reason that such a "placeholder" mental disorder, expressly used by the DSM-5 only to account for situations where one "do[es] not meet the full criteria" for a mental disorder, should not count as a "mental disorder . . . as identified" for the purposes of section 1001.36.

Mental health expert

The defense is directed to provide evidence of the disorder, which must include a diagnosis or treatment by a "qualified mental health expert." There are three points to observe about this requirement. First, "qualified mental health expert" "includes, but is not limited to, a psychiatrist, psychologist, a person described in Section 5751.2 of the Welfare and Institutions Code, or a person whose knowledge, skill, experience, training, or education qualifies them as an expert." (§ 1001.36, subd. (f)(2).) Likely the intent of the legislation is to allow the court to determine in any particular circumstance whether a person is qualified to express an opinion on the defendant's diagnosis.[8] The clear intent of the Legislature is to expand the pool of available persons who may have relevant information about the mental health status of the defendant, leaving it to the court's discretion to accord the appropriate *weight* to such information.

Diagnosis or treatment within five years

Second, the statue requires the diagnosis or treatment of the disorder must occur within five years. Depending on the defendant's circumstances, evidence of the diagnosis and treatment could come from a psychiatrist or psychologist in a full report ordered by the court, or it could come from recent medical records regarding the

[8] It seems unlikely the expert must meet the standards set forth in section 1369, subdivision (h), including having five years of experience; if it had wanted that level of expertise, the Legislature could have said so.

defendant's mental health treatment. Either way, the statute requires that the evidence "shall be provided by the defense." (§ 1001.36, subd. (b)(1).) If after the preliminary review of the prima facie basis for granting diversion, the court determines it is appropriate to proceed with diversion, the court should explore the availability of relevant information regarding the defendant's diagnosis and the other requirements of eligibility before ordering an expensive and time-consuming full psychological report. Particularly if the defendant is engaged in on-going treatment, any number of persons engaged in the defendant's treatment would likely be qualified to render an opinion as to the defendant's diagnosis and the other issues to be addressed by the court.

Third, it is unlikely section 1001.36, subdivision (b)(1), should be read as limiting the diagnosis to the one offered by the defense expert. The provision establishes a duty of disclosure by the defense, not a limitation on what the court may consider. The prosecution would not be precluded from having its own expert examine the defendant. (See § 1054.3, subd. (b)(1); see also *Sharp v. Superior Court* (2012) 54 Cal.4th 168, 173-174 [interpreting section 1054.3(b)(1)].) Furthermore, nothing precludes the court from appointing its own expert pursuant to Evidence Code, section 730.

In reaching an opinion as to whether the defendant has a qualifying disorder, the expert is expressly permitted to consider "the defendant's medical records, arrest reports, or any other relevant evidence." (§ 1001.36, subd. (b)(1).)

A defendant suffering from two or more disorders, at least one of which is a qualified disorder, remains eligible for diversion. In *Negron v. Superior Court* (2021) 70 Cal.App.5th 1007 (*Negron*), the defendant suffered from antisocial personality disorder [ASPD], an excluded disorder, and other, qualified, disorders. The appellate court held defendant was not per se disqualified by the ASPD so long as he had a qualified disorder. "Despite . . . differing interpretations of section 1001.36(b)(1)(A), the language strikes us as unambiguous. Section 1001.36(b)(1)(A) requires the defendant to establish he or she suffers from '*a* mental disorder' identified in the most recent edition of the DSM and then provides a nonexhaustive list of included disorders that suffice, followed by a list of excluded disorders that do not. (§ 1001.36(b)(1)(A), italics added.) Listing included and excluded disorders in this format simply articulates which disorders may and may not serve to prove the defendant has at least *one* qualifying mental disorder. [¶] It is entirely predictable, and thus certainly within the contemplation of the Legislature, that a person might suffer from included *and* excluded disorders. Because section 1001.36(b)(1)(A) requires suffering only *one* included disorder, the Legislature would have been aware a defendant could still meet that requirement notwithstanding suffering from a disorder section 1001.36(b)(1)(A) designates as excluded. Had the Legislature intended to wholly preclude from diversion any person diagnosed with an excluded disorder (regardless of concurrently suffering from included disorders), the sentence phrasing of section 1001.36(b)(1)(A) would have shifted from simply listing excluded *disorders* to disqualifying *persons* with any of the excluded disorders." (*Negron*, *supra*, 70 Cal.App.5th at p. 1017, italics original.)

People v. Gerson (2022) 80 Cal.App.5th 1067 (*Gerson*), affirmed the trial court's denial of diversion based on the failure of the defendant to establish the existence of a mental disorder. "The trial court's determination 'whether the defendant's disorder played a significant role in the commission of the charged offense' is 'a quintessential factfinding process' subject to review for substantial evidence. [Citation.] Similarly, the court's determination whether the defendant suffers from a mental disorder under subdivision (b)(1)(A) of section 1001.36 involves evaluating expert testimony and making conclusions based thereon and is also reviewed for substantial evidence." (*Gerson*, *supra*, 80 Cal.App.5th at p. 1079.) "It was Gerson's burden to present evidence that he suffered from a qualifying mental disorder. [Citations.] Accordingly, we believe the issue is more precisely framed as whether Gerson met his burden of presenting evidence that he suffered from endogenous bipolar disorder. The trial court's statements after a lengthy hearing show that, based on the totality of the evidence, it was not convinced that Gerson met his burden of showing he suffered from endogenous bipolar disorder, a qualifying mental disorder. As we shall explain, there is sufficient evidence in this record to support the trial court's conclusion that Gerson had not met his burden of proof." (*Gerson*, *supra*, 80 Cal.App.5th at p. 1082.)

2. **"The defendant's mental disorder was a significant factor in the commission of the charged offense.** If the defendant has been diagnosed with a mental disorder,[9] the court shall find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. A court may consider any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense." (§ 1001.36, subd. (b)(2), italics added.)

   Prior to January 1, 2023, section 1001.36, subd. (b)(1)(B) provided: "A court may conclude that a defendant's mental disorder was a significant factor in the commission of the charged offense if . . . the court concludes that the defendant's mental disorder substantially contributed to the defendant's involvement in the commission of the offense." The guidance was circular at best. As specified by section 1001.36, subdivision (b)(2), as amended by SB 1223, if a diagnosis of the qualified mental disorder is made and accepted by the court, the court must also find that the disorder was a significant factor in the commission of the crime. Accordingly, the diagnosis of a mental disorder serves two purposes: (1) it meets the requirements of subdivision (b)(1) that

[9] Section 1001.36, subd. (b)(1), allows proof of a qualified disorder by "diagnosis or treatment" of the disorder within the previous five years. Section 1001.36, subd. (b)(2), provides that "diagnosis" of the disorder satisfies the requirement that the disorder be a significant factor in the commission of the crime. It is likely the omission of "treatment" in subdivision (b)(2) is simply a drafting oversight.

the defendant have a qualified disorder, and (2) it meets the requirements of subdivision (b)(2) that the disorder was a significant factor in the commission of the crime.

While "SB 1223 creates a rebuttable presumption that there is a nexus between a person's mental health condition and the charged offense,"[10] the court is not required to find that the mental disorder was a significant factor in the commission of the crime if there is "clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense." (§ 1001.36, subd. (b)(2).) The bar is set very high. Not only is the scope of "motivating factor, causal factor, or contributing factor" extremely broad, but the finding of inapplicability must be by clear and convincing evidence.

In determining whether the defendant's mental disorder was a significant factor in the commission of the crime, the court may consider relevant reports addressing the defendant's mental condition, even though the reports were prepared in a context different than whether the defendant qualifies for mental health diversion. "[W]hen determining whether a defendant's mental disorder was a significant factor in the commission of the charged offense for purposes of mental health diversion, section 1001.36 broadly permits the trial court to consider '*any relevant and credible evidence,* including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, *records or reports by qualified medical experts,* or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense.' (§ 1001.36, subd. (b)(1)(B), italics added [by *Oneal*].) Thus, whether a court may consider a report prepared in relation to a defendant's insanity plea when evaluating a defendant's eligibility for mental health diversion ultimately turns on the relevance of that report in determining whether defendant's mental disorder was a significant factor in the commission of the charged offense." (*People v. Oneal* (2021) 64 Cal.App.5th 581, 591 (*Oneal*), italics original.)

The court's finding on whether the defendant's mental disorder is a significant factor in the commission of the crime is reviewable under the "substantial evidence" test. (*Oneal*, *supra*, 64 Cal.App.5th at p. 589.)

V. Statutory suitability for diversion

A. Elements of suitability

Section 1001.36, subdivision (c), as amended by SB 1223, specifies: "For any defendant who satisfies the eligibility requirements in subdivision (b), the court must consider whether the defendant is suitable for pretrial diversion. A defendant is suitable for pretrial diversion if all of the following criteria are met:"

[10] Senate Third Reading analysis of SB 1223, 8/26/22, p. 2.

1. **"In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment."** (§ 1001.36, subd. (c)(1), italics added.)

2. **The defendant consents to diversion and waives the right to a speedy trial.** (§ 1001.36, subd. (c)(2).) The only exception to this factor is when the "defendant has been found to be an appropriate candidate for diversion in lieu of commitment pursuant to [Section 1370, subdivision (a)(1)(B)(iv)] and, as a result of the defendant's mental incompetence, cannot consent to diversion or give a knowing and intelligent waiver of the defendant's right to a speedy trial." For a discussion of diversion of persons who are incompetent to stand trial, see Section XI, *infra*. See discussion, *infra*, if the defendant refuses to consent to diversion or waive the speedy trial right.

   The statute creates a potential conflict with the speedy trial rights of the prosecution and the victim. The statute recognizes both that the defendant has the right to a speedy trial and that it is necessary for the defendant to waive that right to participate in the diversion program. (§ 1001.36, subd. (c)(2).) However, the statute apparently overlooks that both the prosecution and any victim also have a constitutional right to speedy trial. Article I, section 28, subdivision (b)(9), protects a victim's right "[t]o a speedy trial and a prompt and final conclusion of the case. . . ." Similarly, Article I, section 29 of our Constitution declares that: "In a criminal case, the people of the State of California have the right to due process of law and to a speedy and public trial." In this context, the Supreme Court has found that allowing a *Pitchess* motion to take place prior to preliminary hearing, given the extensive process required by *Pitchess*, would violate this constitutional right: "By so amending our state Constitution, the voters expressly acknowledged that not just the criminal defendant but also the people … are constitutionally entitled to . . . speedy trial. The people's constitutional right to a speedy trial would be violated if, as petitioner urges us to do, we were to uphold the pre-Proposition 115 practice in question [granting postponements of a preliminary hearing to accommodate a defendant's efforts to obtain *Pitchess* discovery for use at the preliminary hearing]." (*Galindo v. Superior Court (City of Los Angeles Police Department)* (2010) 50 Cal.4th 1, 12.) Should prosecutors or victims choose to raise their speedy trial rights, it may be difficult for a defendant to argue that the right is not violated based on the reasoning of *Galindo*, particularly where the granting of diversion potentially involves years of delay.

3. **"The defendant agrees to comply with treatment as a condition of diversion,** unless the defendant has been found to be an appropriate candidate for diversion in lieu of commitment for restoration of competency treatment pursuant to [Section 1370, subdivision (a)(1)(B)(iv)] and, as a result of the defendant's mental incompetence, cannot agree to comply with treatment." (§ 1001.36, subd. (c)(3), italics added.) See discussion, *infra*, if the defendant does not agree to comply with treatment.

4. **"The defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community."** (§ 1001.36, subd. (c)(4), italics added.) In determining dangerousness, "[t]he court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's treatment plan, the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate." (*Ibid*.)

   The reference to section 1170.18 incorporates the definition of "unreasonable risk of danger to public safety" contained in Proposition 47: "'Unreasonable risk of danger to public safety' means an unreasonable risk that the [defendant] will commit a new violent felony within the meaning of section 667(e)(2)(C)(iv)." (§ 1170.18, subd. (c).) In considering this factor, the court must determine whether there is an unreasonable risk the defendant will commit one of the "super strikes," not whether there is an unreasonable risk that the defendant will commit other serious or violent felonies such as a robbery, kidnapping or residential burglary. (*People v. Moine* (2021) 62 Cal.App.5th 440, 449-450 (*Moine*); *People v. Williams* (2021) 63 Cal.App.5th 990, 1002-1003 (*Williams*).) (For a complete table of the listed violent felonies, see Appendix C, *infra*.) However, in determining whether to deny diversion to an otherwise eligible and suitable person as permitted by section 1001.36, subdivision (a), the court likely may consider the level of the defendant's criminality apart from the potential to commit super strikes. (See discussion of the court's discretion in Section III, subdivision (A), *supra*.)

   As observed in *Moine*: "Section 1001.36's definition of 'unreasonable risk of danger to public safety' is supplied by reference to section 1170.18. (§ 1001.36, subd. (b)(1)(F) [the trial court must be 'satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in [§] 1170.18'].) Section 1170.18, in turn, defines 'unreasonable risk of danger to public safety' as 'an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.' [Citation.] The violent felonies encompassed in this definition 'are known as "super strikes" and include murder, attempted murder, solicitation to commit murder, assault with a machine gun on a police officer, possession of a weapon of mass destruction, and any serious or violent felony punishable by death or life imprisonment.' [Citation.] They also include sexually violent offenses and sexual offenses committed against minors under the age of 14. [Citation.] [¶] Section 1001.36's reliance on the definition of dangerousness in section 1170.18, necessarily encompasses the list of super strike offenses found at section 667, subdivision (e)(2)(C)(iv). By requiring an assessment of whether the defendant 'will commit a new violent felony' within the meaning of section 667, subdivision (e)(2)(C)(iv), a trial court necessarily must find the defendant is 'likely to commit a super-strike offense.' [Citation.] Thus, the risk of danger is narrowly confined to the likelihood the defendant will commit a limited subset of violent felonies. [Citation.]" (*Moine*, *supra*, 62 Cal.App.5th at pp. 449-450.)

As explained by one court in the context of Proposition 47 (applying the same standard in the context of suitability for early release), this high threshold of dangerousness would not be met "except in very rare cases." (*People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1310-11 [citing Voter Information Guide, Gen. Elec. (Nov. 4, 2014), p. 39].) "For example, even if the judge finds that the [defendant] poses a risk of committing crimes like kidnapping, robbery, assault spousal abuse, torture of small animals, carjacking or felonies committed on behalf of a criminal street gang," this standard would not be met. (*Id.*) Even a likelihood of committing rape, by itself, does not meet this standard because the code requires a "sexually violent offense." Under the code the rape must be "committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another, or threatening to retaliate in the future against the victim or any other person." (§ 667(e)(2)(C)(iv)(a).)

Merely because a defendant meets the showing that they are not likely to commit a super strike does not mean the petition should be granted without consideration of the other factors for suitability. As observed by *Qualkinbush*: "Even after a defendant makes a prima facie showing that he or she meets the six threshold eligibility requirements, a trial court may still exercise its discretion to deny mental health diversion if it finds that the defendant or the offense are not suitable for diversion. [Citation.] The trial court expressly found that Qualkinbush's offenses were 'not suitable for diversion.' In her briefing on appeal, Qualkinbush appears to contend that a defendant may be deemed not suitable for diversion under section 1001.36 subdivision (b)(3) only if the court finds that the defendant poses an unreasonable risk of danger to public safety. [Citation.] We reject this contention." (*People v. Qualkinbush* (2023, 79 Cal.App.5th 879, 888 (*Qualkinbush*.) "The language and construction of section 1001.36 do not support Qualkinbush's argument that a defendant shall be deemed suitable for diversion under the statute if the court finds that the defendant does not pose an unreasonable risk of danger to public safety. The requirement that a defendant not pose an unreasonable risk of danger to public safety is one of the six eligibility requirements of section 1001.36, subdivision (b)(1). The Legislature added the requirement that 'the defendant and the offense' be suitable for diversion in 2019 in new subdivision (b)(3). [Citation.] Construing the new requirement that the defendant and offense be suitable for diversion as equivalent to a defendant not posing an unreasonable risk of danger to public safety would render the new statutory language superfluous. [Citation] ['An interpretation that renders statutory language a nullity is obviously to be avoided'].) (*Qualkinbush*, *supra*, 79 Cal.App.5th at p. 889.) In accord with *Qualkinbush* is *Moine*, *supra*, 62 Cal.App.5th at pp. 451-452 [must also consider whether the treatment program will meet the needs of the defendant].

"Super strike" offenses

Specifically, the court must determine whether there is an unreasonable risk that if treated in the community the defendant will commit any of the following offenses listed in section 667(e)(2)(C)(iv):

(a) A “sexually violent offense” as defined in Welfare and Institutions Code, section 6600, subdivision (b) [Sexually Violent Predator Law]: “ ‘Sexually violent offense’ means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code.”

(b) Oral copulation under section 288a, sodomy under section 286, or sexual penetration under section 289, if these offenses are committed with a person who is under 14 years of age, and who is more than 10 years younger than the defendant.

(c) A lewd or lascivious act involving a child under 14 years of age, in violation of section 288.
(d) Any homicide offense, including any attempted homicide offense, defined in sections 187 to 191.5, inclusive. Voluntary manslaughter under section 192, subdivision (a), involuntary manslaughter under section 192, subdivision (b), and vehicular manslaughter under section 192, subdivision (c), are not “super strikes.”

As noted, the determination of dangerousness includes the potential of committing gross vehicular manslaughter while intoxicated, in violation of section 191.5, subdivision (a). In that regard, likely the court will be able to consider the person’s history of substance abuse and driving as it relates to the person’s potential of killing someone while operating a vehicle while under the influence of alcohol or drugs.

(e) Solicitation to commit murder as defined in section 653f.

(f) Assault with a machine gun on a peace officer or firefighter, as defined in section 245, subdivision (d)(3).

(g) Possession of a weapon of mass destruction, as defined in section 11418, subdivision (a)(1).

(h) Any serious or violent offense punishable in California by life imprisonment or death.

Findings by the court

If the finding of unsuitability for diversion under section 1001.36 specifically relies on subdivision (c)(4), it should be accompanied by a finding that it is "likely" the defendant will commit one of the listed felonies if treated in the community. *People v. Whitmill* (2022) 86 Cal.App.5th 1138 (*Whitmill*), found the trial court's finding deficient in that regard. "Here, the trial court did not find that appellant is 'likely to commit a super-strike offense.' ([Citations] ['a trial court necessarily must find the defendant is "likely to commit a super-strike offense" ' to deny diversion on this ground; in other words, 'the risk of danger is narrowly confined to the likelihood the defendant will commit a limited subset of violent felonies'].) Nor is there any evidence in the record to support such a finding. It is undisputed appellant's prior record, consisting of possession and sales of drugs and theft, does not include violent or sexually violent convictions, let alone a super strike. ([Citation] [finding that the record did not support a finding of dangerousness under § 1170.18 where the defendant had no prior criminal history and her recent charges for 18 counts of felony forgery and one count of grand theft of property were not super-strike offenses].) Moreover, it is significant that the facts of this incident include appellant running away from further confrontation, throwing away his firearm, and peacefully complying with law enforcement's request that he come forward and (presumably) be arrested. This unusual scenario is a far cry from indicating that appellant is likely to commit a super strike offense in the future." (*Whitmill*, *supra*, 86 Cal.App.5th 1151.)

People v. Pacheco (2022) 75 Cal.App.5th 207 (Pacheco), upheld the finding of the trial court that placement of the defendant on diversion would create an unreasonable risk of danger to the public. The defendant's underlying crime was arson, committed as he set fire to brush in a populated rural area during fire season, to facilitate his use of methamphetamine; he had a significant history of drug abuse. "As to the sixth criterion, '[s]ection 1170.18 ... defines "unreasonable risk of danger to public safety" as "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." [Citation.] The violent felonies encompassed in this definition "are known as 'super strikes' and include murder ...." ' [Citation.] The list does not include arson of forest land. But this is not determinative. The list speaks to crimes that may be committed in the future. 'All murder ... that is committed in the perpetration of ... arson ... is murder of the first degree.' (§ 189, subd. (a).) Thus, a person would commit a super strike – first degree murder – if he intentionally set fire to forest land and an unintended death occurred as a result of the arson." (*Pacheco*, *supra*, 79 Cal.App.5th at p. 213.)

B. If the defendant does not participate as required by section 1001.36, subd. (c)2) and (3)

Whether the defendant waives the speedy trial right, consents to diversion, and agrees to comply with treatment are factors bearing on the suitability of the defendant for diversion. In most circumstances satisfaction of these factors is fundamental to the defendant's successful completion of diversion. It is understandable, then, that section 1001.36, subdivision (c), specifies "[a] defendant is suitable for pretrial diversion if all of the [designated] criteria are met. . . ," including making the appropriate waivers and consents. However, the court likely has some latitude in determining when certain of these factors make the defendant unsuitable for diversion. The refusal to agree to comply with treatment, for example, may not prove immediately fatal to the defendant's initial application for diversion if the court concludes participation will quickly come with treatment and trust.

The court must not hold the lack of consent or waiver in subdivisions (c)(2) and (c)(3) against the defendant in cases where the defendant has been found incompetent to stand trial, and the defendant cannot competently give the required consent or waiver. It is the intent of the Legislature that if the defendant is found incompetent to stand trial, that the waiver of the right to a speedy trial, consent to treatment, and agreement to comply with treatment will not be required for the defendant to be considered suitable for diversion. (§§ 1001.36, subd. (c)(2) and (3).)

Finally, in situations where the consent and waivers normally should be given but the defendant is resisting, the court may consider giving additional time to defense counsel and the defendant to discuss their concerns. The court should consider offering direct encouragement to the defendant to "give it a try." The court might even grant a short continuance before taking any necessary waivers or consents to give the defendant an opportunity to become acquainted with the people and program that will be assisting in treatment.

If ultimately the court concludes the defendant is not suitable for diversion because of the lack of consent and waiver, the court may enter an order under section 1001.36, subdivision (e), that the defendant has failed to make the prima facie showing necessary for granting diversion, summarily deny the request for diversion, and enter any other relief as deemed appropriate. Most likely the criminal proceedings will resume from the point where diversion was first considered. The court could also refer the defendant to other local mental health treatment services.

VI. Preserving judicial discretion

A. Abuse of discretion, standard of review

The denial of a defendant's motion for mental health diversion is appealable. (*People v. Qualkinbush* (2022) 79 Cal.App.5th 879, 887-888.) "The court's decision on a motion for diversion is reviewed for an abuse of discretion, and factual findings are reviewed for substantial evidence. [Citations.]" (*Watts*, *supra*, 79 Cal.App.5th at pp. 834-835.) In accord with *Watts* on the standard of review is *People v. Bunas* (2022) 79 Cal.App.5th 840, 848-849 (*Bunas*).

Moine holds the exercise of discretion is evaluated by an abuse of discretion standard. "[B]y requiring the trial court to evaluate the 'risk' posed to public safety, the statutory language directs the court to perform a quintessential discretionary function. ([Citation] [noting that 'the Legislature left it to trial courts to make fact-specific evaluations of risk under [§] 1001.36, [subd.] (b)(1)(F)'].) Analyzing similar language requiring consideration of 'dangerousness' in section 1170.18, subdivision (b), Courts of Appeal have applied the abuse of discretion standard. [Citations; footnote omitted.] Because section 1001.36's dangerousness prong references section 1170.18, and requires that the court be 'satisfied' the defendant will not pose an unreasonable risk of danger, we conclude that same standard applies to review of a dangerousness finding under section 1001.36." (*Moine*, *supra*, 62 Cal.App.5th at pp. 448-449.) In accord with *Moine* as to the standard of review is *People v. Williams* (2021) 63 Cal.App.5th 100-1001 (*Williams*).

Both *Moine* and *Williams* reversed the trial court's finding that the defendant presented an unreasonable risk to public safety. *Williams* observed: "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. As this court recently explained, the Legislature enacted this measure in response to the large and growing number of mentally ill persons who are incarcerated in California, including in our overcrowded prisons, and we have criticized its under-utilization. [Citation.] The Legislature's expressly stated purposes are to ' "promote . . . [¶] [i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety," "[a]llowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings," and "[p]roviding diversion that meets the unique mental health treatment and support needs of individuals with mental disorders." [Citations.] [¶] In *People v. Frahs*, *supra*, 9 Cal.5th 619, which held the statute applies retroactively, our Supreme Court quoted and agreed with the Court of Appeal that 'the statute's express purpose of promoting " *'[i]ncreased diversion* of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety' " indicated 'the Legislature intended the . . . program to apply as broadly as possible." ' (*Id*. at p. 630.) [The court's] finding that Williams was not suitable for diversion because he posed an unreasonable risk to public safety cannot be reconciled with

these legislative objectives. Once again, we emphasize that our trial courts must give serious consideration to this critical alternative, for the good not just of mentally ill offenders but, ultimately, society at large. [Citation.]" (*Williams*, *supra*, 63 Cal.App.5th at pp. 1004-1005, italics original; footnote omitted.)

B. Making a record to protect exercise of discretion

Statutory and case law make clear the defendant has the burden of establishing both eligibility and suitability for diversion. The cases further provide that even if the defendant satisfies the statutory elements of diversion, the court has discretion to deny diversion to a person who is otherwise facially eligible and suitable. But that discretion is not unfettered – it is subject to review for abuse.

It has long been understood that in reviewing a silent record, appellate courts generally presume the court followed applicable law in exercising its discretion. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The court is not statutorily required to state its reasons for granting or denying diversion.[11] Nevertheless, in denying diversion of a person who is *statutorily* eligible and suitable under section 1001.36, the prudent court may wish to detail its reasons based on the circumstances reflected in the record. While the court may use any rational and relevant reason in exercising its discretion, section 1001.36 suggests several factors which may be directly relevant to the court's decision.

Having determined the defendant is *eligible* for diversion, the court should consider the following factors and information listed throughout section 1001.36, if relevant, as a means for determining the defendant's *suitability* for diversion:

1. Whether in the opinion of a qualified mental health expert the symptoms of defendant's mental disorder affecting the criminal behavior would respond to treatment. (§ 1001.36, subd. (c)(1).)

2. Unless incompetent to stand trial, whether the defendant consents to diversion and waives the speedy trial right. (§ 1001.36, subd. (c)(2).)

3. Unless incompetent to stand trial, whether the defendant agrees to comply with treatment. (§ 1001.36, subd. (c)(3).)

[11] As stated by one court: "[A]buse of discretion [is not] demonstrated merely by characterizing the exercise of discretion as routine. For example, if 97 percent of all defendants convicted of driving while under the influence of alcohol or drugs are not (or are) sentenced to jail, that does not establish an abuse of discretion regarding a particular appellant, regardless of whether he is part of the 97 percent or the 3 percent. Abuse of discretion must be demonstrated based on the facts of the particular case being reviewed, and not on a statistical label." (*People v. Preyer* (1985) 164 Cal.App.3d 568, 574.)

4. Whether the defendant presents an unreasonable risk of danger to public safety as defined in section 1170.18 if treated in the community. (§ 1001.36, subd. (c)(4).) The fact that the defendant presents an unreasonable risk of danger to public safety as defined in section 1170.18 is not the sole basis for a finding of unsuitability. (*People v. Qualkinbush* (2022) 79 Cal.App.5th 879, 889-890.)

5. The opinions and positions of the district attorney, the defense, or a qualified mental health expert. (§ 1001.36, subd. (a).)

6. The defendant's treatment plan. (§ 1001.36, subd. (c)(4).) Whether the treatment plan meets the clinical needs of the defendant and the interests of the community. (§§ 1001.36, subd. (f)(1)(A)(i) and (f)(1)(A)(ii); see *People v. Watts* (2022) 79 Cal.App.5th 830, 837 [insufficiency of the case plan is grounds for denial of diversion].)

7. The defendant's record of prior grants of diversion. (§ 1001.36, subd. (k).)

8. Information from police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense. (§ 1001.36, subd. (b)(2).)

9. The defendant's violence and criminal history. (§ 1001.36, subd. (c)(4).)

10. The circumstances of the current charged offense(s). (*Ibid*.) *Bunas* upheld the denial of diversion based solely on the circumstances of the current offense. (*Bunas*, *supra*, 79 Cal.App.5th at pp. 861-862.) The statutory language evidences "the Legislature's intent that a trial court be permitted to rely on a consideration of the circumstances of the charged offense in determining suitability" for diversion. (*Ibid*.)

11. Whether there is a county mental health agency or private entity willing to accept the defendant for treatment. (§ 1001.36, subd. (f)(1)(A)(ii).)

12. Whether there is a county mental health program that will meet the treatment needs of the defendant. (§ 1001.36, subd. (f)(1)(A)(i).)

13. Any other factors deemed relevant by the court. (§ 1001.36, subd. (c)(4).)

Additional factors the court may consider include:

1. The defendant's record of success or failure during prior mental health treatment. *People v. Watts* (2022) 79 Cal.App.5th 830, 836-837 (*Watts*), upheld the court's denial of diversion in part based on the defendant's repeated failure to attend therapy.

2. The inability of the defendant to work collaboratively in diversion. (*Watts*, *supra*, 79 Cal.App.5th at p. 836.)

3. Whether the county is at risk of being penalized for exceeding the baseline commitment rate to the state hospital under Welfare and Institutions Code, section 4336.[12] In considering the risk of the penalty, the court should not jeopardize public safety or the welfare of the defendant by granting diversion to a person who is not suitable. However, if the court can reconcile the final decision on diversion with the penalty provision, it may be well to include the court's reasoning in the record.

4. The priority of placement specified in section 1370, subdivision (a)(2)(A)(ii): The "defendant shall first be considered for placement in an outpatient treatment program, a community treatment program, or a diversion program, if any such program is available," unless the needs of the defendant or community warrant placement in the state hospital."[13] The court should order the placement in the least restrictive program that will meet the needs of the defendant and the community.

VII. Need for a psychological report

The need of a psychological report generally arises, if at all, in the determination of eligibility for diversion under section 1001.36, subdivision (c), the determination of suitability for diversion under section 1001.36, subdivision (d), and when diversion is terminated for a person previously declared incompetent to stand trial under section 1370, subdivision (a)(1)(B)(v). Note that the statue dictates that the evidence of the mental disorder "shall be provided by the defense." (§ 1001.36, subd. (b)(1).) Depending on the defendant's circumstances, the diagnosis could come from a psychiatrist or psychologist in a full report ordered by the court, or it could come from recent medical records regarding the defendant's mental health treatment. If after the preliminary review of the prima facie basis for granting diversion, the court determines it is appropriate to proceed with diversion, the court should explore the availability of relevant information regarding the defendant's diagnosis and the other requirements of suitability before ordering an expensive and time-consuming full psychological report. Particularly if the defendant is engaged in on-going treatment, any number of persons engaged in the defendant's treatment would likely be qualified to render an opinion as to the defendant's diagnosis and the other issues to be addressed by the court.

While the defendant has an initial burden to supply evidence of a mental disorder, including a diagnosis from a mental health professional, it appears the substance of a report, if one is needed, can be of assistance to the court in determining each of the four conditions of suitability for diversion noted above.

[12] For a full discussion of Welf. & Inst., § 4336, see Section XII, *infra*.
[13] For a full discussion of section 1370, subdivision (a)(2)(A)(ii), see Section XII, *infra*.

A. Responsibility for the cost of psychological reports

The county generally is responsible for paying for experts in a criminal case, but the court is responsible for paying for any expert appointed for the "court's needs" or "court's use." Generally, experts for mental health diversion will be experts for the defense and, as such, will be a cost payable by the county.

The state, rather than the county, funds court operations. (See Gov. Code, § 77003.) Court operations include "Court-appointed expert witness fees (for the court's needs)" and "Court-ordered forensic evaluations and other professional services (for the court's own use)" but exclude indigent criminal defense and the district attorney services which are funded by the county. (See Gov. Code, §77003, subd. (a); see also Cal. Rules of Court, rule 10.810, subd. (d), Function 10; Evid. Code §§ 730, 731, subd. (a)(2).)

Of the six eligibility and suitability criteria for mental health diversion specified in section 1001.36, subdivisions (b) and (c), three either require or allow evidence from a "qualified mental health expert:" diagnosis of a mental disorder [§ 1001.36, subd. (b)(1)]; whether the defendant's mental disorder was a significant factor in the commission of the crime [§ 1001.36, subd. (b)(2)]; and whether the defendant's mental disorder would respond to treatment [§ 1001.36, subd. (c)(1)]. The statute puts the burden of producing evidence of a diagnosed mental disorder squarely on the defense. (§ 1001.36, subd. (b)(1) ["[e]vidence of the defendant's mental disorder shall be provided by the defense"].) The provisions of section 1001.36, subdivision (e), regarding the prima facie showing of eligibility and suitability for diversion, also place the burden of production of evidence on the defense. If the defense has the burden of production, the expert report is primarily for the defense's purpose rather than the court's and the cost would not be part of court operations or payable by the court.

The Attorney General has issued an opinion concerning the responsibility of the court to pay for seven types of forensic examinations (87 Ops.Cal.Atty.Gen. 62 (2004).) The opinion is relevant in determining the responsibility for paying the cost of reports prepared pursuant to section 1001.36. The opinion addresses the payment for reports for trial competency under section 1368 and sanity under section 1026. (*Id*., at pp. 5-6, 9-10.) The Attorney General's opinion concludes that expert reports evaluating competency are court expenses, largely because the court has an independent duty to suspend proceedings and assess competency when there is a doubt about the mental competency of the defendant. (*Id*., at pp. 5-6.)

In contrast, the opinion concludes that reports assessing a sanity defense under section 1026 are expenses to be borne by the county rather than the court. (*Id*., at pp. 9-10.) This makes sense because, unlike competency, the court has no independent constitutional duty to assess whether a defendant is not guilty by reason of insanity. The California Supreme Court has found that the insanity defense is not really a "defense" equated with innocence, but rather a finding that a defendant is not amenable to punishment. Mental health diversion seems more like the section 1026 context than the competency context (except in the case where a defendant is diverted after a finding of incompetency under sections 1370 or 1370.01) in that it is assessing

whether a defendant is amenable to punishment or suitable for a non-punitive program of mental health treatment. There is no independent duty of the court to determine suitability for diversion.

The court can order its own expert for its own needs under Evidence Code section 730 – ordered under that statute, such an expert would be at court expense. (See Evid. Code, §§ 730, 731.) Given the amount of information that will be produced by the defense and prosecution, it is likely that the need for such independent reports will be rare.

VIII. Program requirements

The statute gives the court broad discretion in the selection of the specific program of diversion for the defendant. Nothing in the legislation requires a court or county to create a mental health program for the purposes of diversion. Furthermore, even if a county has existing mental health programs suitable for diversion, the program selected by the court must give its consent to receive the defendant for treatment.

The mental health treatment program must meet the following requirements:

A. "**The court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant**." (§ 1001.36, subd. (f)(1)(A)(i), italics added.) Although this requirement is listed as part of the definition of "pretrial diversion" in subdivision (f), the identification of a suitable program clearly is a prerequisite to the court granting diversion. (See *People v. Gerson* (2022) 80 Cal.App.5th 1067, 1079.) Certainly one of the principal purposes of diversion is to treat the defendant sufficiently so that the person does not commit further crimes. Even though the court may be unable to find the defendant likely to commit a "super strike" if treated in the community as discussed above, the court must nevertheless be satisfied the program will address the needs of the defendant to prevent the commission of any serious crime because of the mental disorder. If the court cannot identify a program that will meet the "specialized mental health treatment needs of the defendant," diversion should not be granted. Finally, even if a suitable program is identified, the program must be willing to accept the defendant.

B. "**The defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources**. Before approving a proposed treatment program, the court shall consider the request of the defense, the request of the prosecution, the needs of the defendant, and the interests of the community. The treatment may be procured using private or public funds, and a referral may be made to a county mental health agency, existing collaborative courts, or assisted outpatient treatment only if that entity has agreed to accept responsibility for the treatment of the defendant, and mental health services are provided only to the extent that resources are available and the defendant is eligible for those services." (§ 1001.36, subd.

(f)(1)(A)(ii), italics added.) Subdivision (f)(1)(A)(ii) makes it clear that the court may refer to *existing* treatment resources; the court and county are not required to create new treatment resources to meet the defendant's needs. Furthermore, even as to existing resources, the program selected by the court must be willing to accept the defendant into treatment; placement may not be ordered over the program's objection.

C. "**If the court refers the defendant to a county mental health agency pursuant to this section and the agency determines that it is unable to provide services to the defendant, the court shall accept a written declaration to that effect from the agency in lieu of requiring live testimony**. That declaration shall serve only to establish that the program is unable to provide services to the defendant at that time and does not constitute evidence that the defendant is unqualified or unsuitable for diversion under this section." (§ 1001.36, subd. (f)(1)(A)(iii), italics added.)

D. **The program must submit regular reports to the court and counsel regarding the defendant's progress in treatment.** (§ 1001.36, subd. (f)(1)(B).) Nothing in the statute indicates the specific frequency of the reports. For persons committed to a residential program for restoration of competency, for example, there is an initial 90-day report, then a progress report every six months thereafter. (§ 1370, subd. (b)(1); see also § 1605, subd. (d) [requiring a progress report every 90 days for a person on outpatient treatment].) The court in its order referring the defendant for diversion should include the interval of reports from the program. There should be a final report calculated to correspond with the anticipated termination of the defendant's program in one year for a misdemeanor and two years for a felony. The final report should address the defendant's overall performance in the program and any long-term plans for mental health care. (See § 1001.36, subd. (h).)

E. **The diversion program is to last no longer than one year for a misdemeanor and two years for a felony.** (§ 1001.36, subd. (f)(1)(C).)

F. **The court must conduct a restitution hearing upon request.** "Upon request, the court shall conduct a hearing to determine whether restitution, as defined in subdivision (f) of Section 1202.4, is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of diversion. However, a defendant's inability to pay restitution due to indigence or mental disorder shall not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion." (§ 1001.36, subd. (f)(1)(D).)

Subdivision (f) of section 1202.4 dictates that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other

showing to the court." Restitution is usually ordered only after a conviction. (See § 1202.4, subd. (a)(1).) With diversion under section 1001.36, however, restitution is being ordered without a determination of responsibility for the underlying crime. It is a good practice to advise a defendant of the possibility of restitution before obtaining their consent to participate in diversion and waiver of speedy trial rights.

IX. Termination or modification of treatment

If any of the following circumstances occur, the court is directed to hold a hearing to determine whether criminal proceedings should be reinstated, treatment should be modified, or the defendant should be referred for conservatorship proceedings in accordance with Welfare and Institutions Code, sections 5350, *et seq*. (§ 1001.36, subd. (g).) The court is to give notice to the defendant and counsel. Nothing in the statute precludes either party from requesting the hearing.

A. The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence. (§ 1001.36, subd. (g)(1).)

B. The defendant is charged with an additional felony allegedly committed during the pretrial diversion. (§ 1001.36, subd. (g)(2).)

C. The defendant is engaged in criminal conduct rendering them unsuitable for diversion. (§ 1001.36, subd. (g)(3).)

D. Based on the opinion of a qualified mental health expert whom the court may deem appropriate, either of the following circumstances exist:

    1. The defendant is performing unsatisfactorily in the assigned program. (§ 1001.36, subd. (g)(4)(A).)

    2. The defendant is gravely disabled, as defined in Welfare and Institutions Code, section 5008, subdivision (h)(1)(B). A defendant may only be conserved and referred to the conservatorship investigator pursuant to this finding. (§ 1001.36, subd. (g)(4)(B).)

Nature of the termination or modification hearing

Section 1001.36, subdivision (g), provides that under the circumstances specified above, "the court shall, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine" whether action should be taken to change the defendant's diversion program or status. Other than the requirement of notice, there are no procedural rules in the statute

governing the nature of the hearing. To comport with fundamental notions of due process, likely the defendant will have the right to appear at the hearing with counsel and will have the opportunity to be heard on the nature of the allegations against them. However, it is unlikely the defendant has the right to a full evidentiary hearing with the ability to call and cross-examine witnesses. Because the Legislature allows the initial granting or denial of diversion at an "informal hearing," with "offers of proof, reliable hearsay, and argument of counsel," it is unlikely a more formal hearing is necessary for modification or termination of the diversion program. (§ 1001.36, subd. (e).)

At the very least, the scope of the hearing will be within the discretion of the court. Whether limited questioning of live witnesses may be appropriate can be determined by the court based on offers of proof by counsel. Absent a showing of need for live testimony, there is no reason why the court cannot modify or terminate the diversion program based on "offers of proof, reliable hearsay, and argument of counsel."

Access to records

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

Trial competency if criminal proceedings are reinstated

If criminal proceedings are reinstated, it still may be necessary for the court to address traditional competency issues. The defendant's treatment received during diversion is not primarily designed to restore trial competence. Depending on the procedural posture of the case when the defendant requested diversion, it may be necessary for the court or defense counsel to declare a doubt as to the defendant's competency to stand trial and pursue the traditional process for these individuals. (See § 1368, *et seq*.) It also seems clear that if the defendant does regain trial competence during diversion, that fact has no bearing on whether the defendant is entitled to continue on diversion and, if the program is successfully completed, obtain a dismissal of the criminal charges. (See next section.)

X. Successful completion of diversion

A. Dismissal of criminal charges

"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. (h).) Whether the defendant has performed "satisfactorily" on diversion is a matter left to the discretion of the court. However, the court *may* conclude the defendant has performed satisfactorily if the person has met all of the following performance standards:

- The defendant has "substantially complied" with the program requirements.

- The defendant has "avoided significant new violations of law *unrelated* to the defendant's mental health condition." (Italics added.) The statute gives the court authority to ignore new law violations that are *related* to the defendant's mental disorder. The court is not required to do so.

- The defendant has "a plan in place for long-term mental health care."

(§ 1001.36, subd. (h).)

B. Duties of the court

If the court dismisses the charges, the clerk must notify the Department of Justice of the dismissal pursuant to this section. (§ 1001.36, subd. (h).)

The court must order access to the record of the arrest restricted in accordance with section 1001.9, except as specified in section 1001.36, subdivisions (j) and (k). (§ 1001.36, subd. (h).)

Section 1001.36, subdivision (j), provides that "the defendant shall be advised that, regardless of his or her completion of diversion, both of the following apply:

(1) The arrest upon which the diversion was based may be disclosed by the Department of Justice to any peace officer application request and that, notwithstanding subdivision (i), this section does not relieve the defendant of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined in Section 830.

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

Section 1001.36, subdivision (k), provides that "[a] finding that the defendant suffers from a mental disorder, any progress reports concerning the defendant's treatment, or any other records related to a mental disorder that were created as a result of participation in, or completion of, diversion pursuant to this section or for use at a hearing on the defendant's eligibility for diversion under this section may not be used in any other proceeding without the defendant's consent, unless that information is relevant evidence that is admissible under the

standards described in paragraph (2) of subdivision (f) of Section 28 of Article I of the California Constitution." Article I, section 28, subdivision (f)(2), the "Right to Truth in Evidence," provides in part that "relevant evidence shall not be excluded in any criminal proceeding, including pretrial and postconviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court."

Section 1001.36, subdivision (k), further provides "when determining whether to exercise its discretion to grant diversion under this section, a court may consider previous records of participation in diversion under this section."

C. What the defendant must disclose

"Upon successful completion of diversion, if the court dismisses the charges, the arrest upon which the diversion was based shall be deemed never to have occurred. . . . The defendant who successfully completes diversion may indicate in response to any question concerning the defendant's prior criminal record that the defendant was not arrested or diverted for the offense, except as specified in subdivision (j)." (§ 1001.36, subd. (h).)

XI. Diversion of persons incompetent to stand trial

The provisions permitting diversion of persons found incompetent to stand trial are found in sections 1370, subdivision (a)(1)(B), and 1370.01, subdivision (a)(2).[14]

A. Eligibility for diversion - felony

Section 1370, subdivision (a)(1)(B)(iv), provides: "If, at any time after the court finds that the defendant is mentally incompetent and before the defendant is transported to a facility pursuant to this section, the court is provided with any information that the defendant may benefit from diversion pursuant to Chapter 2.8A (commencing with Section 1001.35) of Title 6, the court may make a finding that the defendant is an appropriate candidate for diversion." Accordingly, a defendant found incompetent to stand trial may be granted diversion pursuant to section 1001.36 if:

- If the defendant has not been "transported to a facility" pursuant to section 1370,
- The court has been provided with "any information that the defendant may benefit from diversion," and
- The court finds the defendant is "an appropriate candidate for diversion."

[14] The full relevant statutory provisions of sections 1370, subdivision (a)(1)(B) and 1370.01, subdivision (a)(2), are set forth in Appendix A, *infra*.

(§ 1370, subd. (a)(1)(B)(iv).)

Like section 1001.36, the transfer of a person not competent to stand trial to diversion is a matter of discretion with the court: "[T]he court *may* make a finding that the defendant is an appropriate candidate for diversion." (§ 1370, subd. (a)(1)(B)(iv), italics added.) Determining whether a person is eligible for diversion will be pursuant to the provisions of section 1001.36. (§ 1370, subd. (a)(1)(B)(v).)

"Transported to a facility" likely means a facility as described in section 1370, subdivision (a)(1)(B)(i): "The court shall order that the mentally incompetent defendant be delivered by the sheriff to a State Department of State Hospitals facility, as defined in Section 4100 of the Welfare and Institutions Code, as directed by the State Department of State Hospitals, or to any other available public or private treatment facility, including a community-based residential treatment system approved by the community program director, or their designee, that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status as specified in Section 1600." "Treatment facility" likely includes jail-based competency treatment programs. Such programs are identified in Welfare and Institutions Code, section 4100, subdivision (g): "The department [of State Hospitals] has jurisdiction over the following facilities: . . . A county jail treatment facility under contract with the State Department of State Hospitals to provide competency restoration services."

Accordingly, persons adjudicated as incompetent to stand trial for a felony and physically placed in a treatment facility generally are ineligible for mental health diversion. Section 1370, subdivision (a)(1)(B)(iv)(II), provides a limited exception to the rule: "Notwithstanding subclause (I), if a defendant is found mentally incompetent and is transferred to a facility described in Section 4361.6 of the Welfare and Institutions Code, the court may, at any time upon receiving any information that the defendant may benefit from diversion pursuant to Chapter 2.8A (commencing with Section 1001.35) of Title 6, make a finding that the defendant is an appropriate candidate for diversion." Welfare and Institutions Code, section 4361.6 authorizes the Department of State Hospitals to contract with private or public entities to house and treat persons committed to the department under sections 1026, 1370, and 2972, or Welfare and Institutions Code, section 5358.

Diversion program

A defendant granted diversion in a felony case may participate for the lesser of the period specified in section 1370, subdivision (c)(1), the normal period for restoration of competency, or the period specified in section 1001.36, subdivision (f)(1)(C). (§ 1370, subd. (a)(1)(B)(v).)

If, during the treatment period for a felony, the court determines that criminal proceedings should be reinstated pursuant to section 1001.36, subdivision (d), the court must, pursuant to section 1369, appoint a psychiatrist, licensed psychologist, or any other expert the court may deem appropriate, to determine the defendant's competence to stand trial. (§ 1370, subd. (a)(1)(B)(v).) Although not expressly provided by statute, if the defendant is terminated from

diversion and criminal proceedings are reinstituted, the defendant presumably would be returned to the point in the competency proceedings when diversion was first requested. If the defendant is determined to be competent to stand trial and is terminated from diversion pursuant to section 1001.36, subdivision (g), the defendant will be reinstated to the full criminal trial process.

If the defendant successfully completes diversion, the defendant will be entitled to a dismissal of the charges pursuant to section 1001.36, subdivision (e), and the "defendant shall no longer be deemed incompetent to stand trial pursuant to this section." (§ 1370, subd. (a)(1)(B)(vi).)

Nothing in section 1370 connects continuance on diversion with the defendant's lack of trial competence. Accordingly, even though the defendant regains trial competence during diversion, the defendant is entitled to remain in the program so long as criminal proceedings are not reinstituted pursuant to section 1001.36, subdivision (g).

The clerk of the court is required to notify the Department of Justice, "in writing, of a finding of mental incompetence with respect to a defendant who is subject to [section 1370, subdivision (a)(1)(B)] (ii) or (iii) for inclusion in the defendant's state summary criminal history information." (§ 1370, subd. (a)(1)(B)(vii).)

B. Eligibility for diversion - misdemeanor

Section 1370.01, subdivision (d), provides, in relevant part: "It is the intent of the Legislature that a defendant subject to the terms of this section receive mental health treatment in a treatment facility and not a jail." The court has two choices in adjudicating an incompetent defendant charged solely with a misdemeanor: The court may grant misdemeanor mental health diversion pursuant to section 1001.36 or dismiss the case in the interests of justice pursuant to section 1385. (§ 1370.01, subd. (b).) Section 1370.01, subdivision (e), provides that section 1370.01 applies only as specified in section 1367, subdivision (b): "Section 1370.01 applies to a person who is charged with a misdemeanor or misdemeanors only, or a violation of formal or informal probation for a misdemeanor, and the judge finds reason to believe that the defendant has a mental health disorder, and may, as a result of the mental health disorder, be incompetent to stand trial."

Granting misdemeanor mental health diversion is governed by the procedures outlined in section 1001.36, subdivision (b)(1). The court must conduct a hearing pursuant to sections 1001.35, *et seq*., and, if the defendant is eligible and suitable, grant diversion pursuant to section 1001.36 "for a period not to exceed one year from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the misdemeanor complaint, whichever is shorter." (§ 1370.01, subd. (b)(1)(A).) The hearing must be held within 30 days after the finding of incompetence. If the hearing is delayed beyond 30 days, the defendant must be released on their own recognizance pending the hearing. (§ 1370.01, subd. (b)(1)(B).)

If the defendant performs satisfactorily on diversion, the court must dismiss the criminal charges. (§ 1370.01, subd. (b)(1)(C).)

If the court finds the defendant ineligible or unsuitable for diversion based on the circumstances set forth in section 1001.36, subdivisions (b), (c), (d), or (g), after notice to the parties, the court must hold a hearing to determine whether to do any of the following:

- Modify the treatment plan as recommended by the treatment provider. (§ 1370.01, subd. (b)(1)(D)(i).)

- Refer the defendant to assisted outpatient treatment pursuant to Welfare and Institutions Code, section 5346. Such a referral may be made only in a county where the services are available, and where the agency agrees to accept responsibility for treatment. The hearing to determine eligibility for assisted outpatient treatment must be held within 45 days of the date of the referral. If it is delayed beyond 45 days, the court must order the defendant released on their own recognizance if the defendant is being held in the county jail. If the defendant is accepted into assisted outpatient treatment, the charges are to be dismissed under section 1385. (§ 1370.01, subd. (b)(1)(D)(ii).) Note that dismissal of the charges is not dependent on successful completion of assisted outpatient treatment – dismissal is required upon acceptance into the program. The defendant may not be returned to the criminal process if the treatment program is not completed.

- Refer the defendant to the county conservatorship investigator for possible conservatorship proceedings under Welfare and Institutions Code, sections 5350, *et seq*. The referral is permissible only if a qualified mental health expert has determined the defendant is gravely disabled as defined in Welfare and Institutions Code, section 5008, subdivision (h)(1)(A). If the petition is not filed within 60 days of the referral, the court must order the defendant released on their own recognizance pending the conservatorship proceedings. If the conservatorship proceedings are established, the court must dismiss the criminal charges under section 1385. (§ 1370.01, subd. (b)(1)(D)(iii).) Note that dismissal of the charges is not dependent on successful performance of the conservatorship – dismissal is required upon establishment of the conservatorship. The defendant may not be returned to the criminal process if the conservatorship program is not completed.

- Refer the defendant to the CARE program pursuant to Welfare and Institutions Code, section 5978.[15] "A hearing to determine eligibility for CARE shall be held within 14 days after the date of the referral. If the hearing is delayed beyond 14 days, the court shall order the defendant, if confined in county jail, to be released on their own recognizance

[15] For a full discussion of the CARE program, see Couzens, "Community Assistance, Recovery, and Empowerment (CARE) Act," October 2022.

pending that hearing. If the defendant is accepted into CARE, the charges shall be dismissed pursuant to Section 1385." (§ 1370.01, subd. (b)(1)(D)(iv).) Note that dismissal of the charges is not dependent on successful completion of the CARE program – dismissal is required upon the acceptance of the defendant into the CARE program. The defendant may not be returned to the criminal process if the CARE program is not completed.

If a mentally incompetent defendant is on misdemeanor probation, a petition alleging a violation must be dismissed. The court, however, may modify the terms and conditions of supervision to include mental health treatment. (§ 1370.01, subd. (c).)

Custody credit

Section 1370.01, subdivision (d), in relevant part, states: "A term of four days will be deemed to have been served for every two days spent in actual custody against the maximum term of diversion. A defendant not in actual custody shall otherwise receive day for day credit against the term of diversion from the date the defendant is accepted into diversion. 'Actual custody' has the same meaning as in Section 4019." Although the intent of the first sentence is not entirely clear, it seems to restate the entitlement to actual time and conduct credit required by section 4019. The effect of the statute is to give the defendant ordinary actual time and conduct credit earned under section 4019 while in actual custody pending the acceptance of the defendant into diversion – the credit applies to reduce the term of diversion. Once the defendant is accepted into the diversion program, however, they will be entitled only to actual time (day-for-day) credit against the period of diversion.

XII. Funding and placement issues

A. Funding of diversion by Department of State Hospitals

Senate Bill No. 840, the Budget Act of 2018, appropriated $100 million to the Department of State Hospitals (DSH) for support of county mental health diversion programs authorized by sections 1001.35 and 1001.36. The money will be provided for the diversion of felony defendants who have been found incompetent or are likely to be found incompetent to stand trial (Welf. & Inst. [WIC], § 4361, subd. (c).) The availability of funding through DSH is intended to reduce commitments to the state hospital system.

The purpose of the funding mechanism is described in WIC § 4361, subdivision (c)(1): "Subject to appropriation by the Legislature, [DSH] may solicit proposals from, and may contract with, a county to help fund the development or expansion of pretrial diversion described in Chapter 2.8A (commencing with Section 1001.35) of Title 6 of Part 2 of the Penal Code, for the population described in subdivision (b)[16] and that meets [specified] criteria. To qualify for DSH

[16] WIC section 4361, subdivision (b), provides: "The purpose of this chapter is to, subject to appropriation by the Legislature, promote the diversion of individuals with serious mental disorders as prescribed in Chapter 2.8A

funding, the defendant must meet the requirements of section 1001.36, and the following particular requirements:

> (A) Participants are individuals diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, and schizoaffective disorder, but excluding a primary diagnosis of antisocial personality disorder, borderline personality disorder, and pedophilia, and who are presenting non-substance-induced psychotic symptoms, who have been found incompetent to stand trial pursuant to . . . Penal Code [section 1370, subd. (a)(1)(b)(iv)].
>
> (B) There is a significant relationship between the individual's serious mental disorder and the charged offense, or between the individual's conditions of homelessness and the charged offense.
>
> (C) The individual does not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18 of the Penal Code, if treated in the community.
>
> (WIC, § 4361, subd. (c)(1).)

Although not expressly provided by the legislative scheme, it appears the intent of the Legislature that for a defendant to qualify for state funding of diversion, the court must make findings of eligibility and suitability under section 1001.36 and eligibility under WIC, section 4361.

Entitlement to funding will depend on the county's ability to provide:

(1) [C]linically appropriate or evidence-based mental health treatment and wraparound services across a continuum of care, as appropriate, to meet the individual needs of the diversion participant. For purposes of this section, 'wraparound services' means services provided in addition to the mental health treatment necessary to meet the individual's needs for successfully managing the individual's mental health symptoms and to successfully live in the community. Wraparound services provided by the diversion program shall include appropriate housing, intensive case management, and substance use disorder treatment, and may include, without limitation, forensic assertive community treatment teams, crisis residential services, criminal justice coordination, peer support, and vocational support.

(commencing with Section 1001.35) of Title 6 of Part 2 of the Penal Code, and to assist counties in providing diversion for individuals with serious mental illnesses who have been found incompetent to stand trial and committed to the department for restoration of competency. In implementing this chapter, the department shall consider local discretion and flexibility in diversion activities that meet the community's needs and provide for the safe and effective treatment of individuals with serious mental disorders across a continuum of care."

(2) Collaboration between community stakeholders and other partner government agencies in the diversion of individuals with serious mental disorders.

(3) Connection of individuals to services in the community after they have completed diversion as provided in this chapter.

(Welf. & Inst., § 4361, subd. (d).)

B. Growth cap program for felony commitments to the state hospital under section 1370

Senate Bill No. 184 (SB 184) established a growth cap program for all counties for persons charged with a felony and who are committed to the state hospital under section 1370. The goal of the program is to reduce commitments to the state hospital for persons found incompetent to stand trial by forcing the counties to prioritize these placements. The cap program, set forth in Welfare & Institutions Code, section 4336,[17] has the following key elements:

- "The department [of state hospitals] shall charge counties penalty payments as described in this subdivision to implement the growth cap program." (Welf. & Inst., § 4336, subd. (a)(1).)

- A baseline commitment rate will be based on the number of felony incompetency commitments[18] made in the 2021-2022 fiscal year. (Welf. & Inst., § 4336, subd. (b)(2).)

- Beginning in the fiscal year 2022-2023 and each year thereafter, the county will be required to pay a penalty for every incompetency commitment over the baseline. (Welf. & Inst., § 4336, subd. (b)(3)(A).)

- A sliding scale formula for calculating the penalty is specified in Welfare & Institutions Code, § 4336, subdivision (b)(3)(C). The penalty is based on a percentage of the rate charged by the state hospital for treating persons found incompetent to stand trial on a felony charge. (*Ibid*.)

[17] Welf. & Inst.,§ 4336 is set out in full in Appendix A, *infra*.

[18] Welf. & Inst., §§ 4336, subd. (b)(2) and (b)(3)(A), utilizes the phrase "incompetency determinations" as the triggering event for a penalty assessment. It appears from the legislative analysis of SB 184 that the Legislature had no intent to regulate the number of times a court could "determine" persons were incompetent to stand trial; rather, the Legislature was concerned about the number of "commitments" to the state hospital for incompetency. The Senate Floor Analysis – Third Reading, 6/28/22, at p.29, observed that SB 184 "[r]equires DSH to implement a cap on the number of mentally incompetent persons *committed* to State Hospitals in each county per year and assess a penalty rate for *commitments* exceeding that cap." (Italics added.) Accordingly, these materials will refer to IST "commitments" under the penalty provisions, not "determinations."

- The department is to "periodically notify the superior court and relevant county agencies" of the total number of felony commitments made in the current fiscal year compared to the county's baseline commitment rate. (Welf. & Inst., § 4336, subd. (b)(3)(D).)

- The penalty, assessed annually, may be paid by the county "from any local funding source available, including funds received by the county through contracts issued by the department to the county for purposes of serving the felony incompetent to stand trial population." (Welf. & Inst., § 4336, subd. (b)(3)(F).)

- A Mental Health Diversion Fund will receive the penalty assessments. "The funds collected in the fund shall be used for the purpose of supporting county activities that will divert individuals with serious mental illnesses away from the criminal justice system and lead to the reduction of felony incompetent to stand trial [commitments]." (Welf. & Inst., § 4336, subd. (c)(1).)

- The activities supported by the Mental Health Diversion Fund must include one or more of the following: (Welf. & Inst., § 4336, subd. (c)(2).)

  (A) Prebooking mental health diversion to serve those with serious mental illness and prevent their felony arrest. The target population that shall be served are individuals demonstrating psychosis manifesting as hallucinations, delusions, disorganized thoughts, or disorganized behavior at the time of the interaction.

  (B) Postbooking mental health diversion to serve those with serious mental illness and who are likely to be found incompetent to stand trial, to prevent the incompetent to stand trial commitment and divert the individual from incarceration. The target population that shall be served are individuals diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, and schizoaffective disorder, but excluding a primary diagnosis of antisocial personality disorder, borderline personality disorder, and pedophilia, and who are presenting non-substance-induced psychotic symptoms.

  (C) Reentry services and support to serve those who have been restored to competency following a felony incompetent to stand trial commitment and directly released to the community from jail.

The growth cap penalty under Welfare & Institutions Code, section 4336 clearly is designed to reduce commitments to the state hospital for persons found to be incompetent to stand trial (IST) for a felony crime by putting financial pressure on the court and counties when the baseline commitment rate is exceeded. The court should be aware of the current IST commitment rate and, to the extent possible, strive for a commitment or program alternative

that does not involve the state hospital. It is not suggested, however, that the court make its final commitment decision based solely on the growth cap and place an unsuitable person on mental health diversion – such a placement decision will serve neither the interests of the defendant nor the community.

C. Priority of placement decisions

In addition to the creation of the growth cap penalty program in Welfare & Institutions Code, section 4336 to regulate commitments to the state hospital, the Legislature also has dictated the priority of placement options available to the court to treat persons charged with a felony who are incompetent to stand trial (IST). If the defendant is found IST, before the defendant may be committed to the state hospital for treatment, section 1370, subdivision (a)(2)(A)(i) [19], requires the court to direct the community mental health director to prepare a "written recommendation as to whether the defendant should be required to undergo outpatient treatment, or be committed to the State Department of State Hospitals or to any other treatment facility." SB 184 added subdivision (a)(2)(A)(ii): "Commencing on July 1, 2023, a defendant shall first be considered for placement in an outpatient treatment program, a community treatment program, or a diversion program, if any such program is available, unless a court, based upon the recommendation of the community program director or their designee, finds that either the clinical needs of the defendant or the risk to community safety, warrant placement in a State Department of State Hospitals facility."

It appears the intent of SB 184 to restrict the discretion of the court to place a person in the state hospital when charged with a felony and who is IST. Unless the community program director finds the treatment needs of the defendant or the risk to community safety warrant a placement in the state hospital, the court must first "consider" community-based treatment. If the community program director does not find that the defendant's circumstances warrant a state hospital commitment, but the court disagrees with that recommendation, the court must first "consider" community-based treatment but is not required to order it. Other than to give good-faith consideration of community-based treatment, the court retains the discretion to order placement based on *the court's* final conclusions regarding the treatment needs of the defendant and the risk to community safety. It is particularly important for the court to articulate its reasoning on the record if it is overruling the position of the community program director.

D. Reassessment by the Department of State Hospitals

Welfare & Institutions Code, section 4335.2, permits the Department of State Hospitals (DSH) to reevaluate the placement of persons who are awaiting transfer to the state hospital because they have been found incompetent to stand trial (IST) in a felony matter.[20] Among other things,

[19] Section 1370, subd. (a)(2)(A), is set out in full in Appendix A, *infra*.
[20] Welf. & Inst., § 4335.2 is set out in full in Appendix A, *infra*.

the Legislature declared that the purpose of the program is to reduce the list of persons awaiting placement in the state hospital, to reduce the timeframe for competency evaluations, to reduce unnecessary costly hospitalizations, and to offer expert forensic mental health consultation to assist in the effective use of medication, and to identifying persons who may be appropriate for community placement. (Welf. & Inst., § 4335.2, subd. (b).)

DSH has "the authority and sole discretion to consider and conduct reevaluations for IST defendants committed to and awaiting admission to the department. A reevaluation shall involve a review by a department clinician or contracted clinician of an IST defendant's relevant medical and mental health records, including prior mental health evaluations and an evaluation of the IST defendant by that department clinician or contracted clinician." (Welf. & Inst., § 4335.2, subd. (c).)

The reevaluation must include, among other things, the following elements:

1. An evaluation, including an assessment for malingering, pursuant to section 1370, subdivision (b)(1) [report on the defendant's progress in treatment], section 1370.01, subdivision (b) [referral for mental health diversion], and section 1372, subdivision (a)(1) [defendant's restoration of competence]. (Welf. & Inst., § 4335.2, subd. (d)(1).)

2. "Assessments to determine whether the IST defendant should be referred to the county for further evaluation for potential participation in the county diversion program, if one exists, pursuant to [section 1370, subd. (a)(1)(B)(v)] or [section 1370.01, subd. (a)(2)], or other outpatient treatment program." (Welf. & Inst., § 4335.2, subd. (d)(2).)

3. Psychopharmacology evaluations in which a department clinician will identify IST defendants who may need psychotropic medications, a psychopharmacology consultation, or an involuntary medication order." (Welf. & Inst., § 4335.2, subd. (d)(4).)

4. "A written report from the department clinician or contracted clinician of their evaluations of the IST defendant, as well as any conclusions of mental health status and recommendations the clinician may have of placement of the IST defendant." (Welf. & Inst., § 4335.2, subd. (d)(5).)

5. "Written reports shall be filed with the court in the committing county. That report shall be accepted by courts, either pursuant to [section 1370, subd. (b)(1)] [report on the defendant's progress in treatment], [section 1370.01, subd. (b)] [referral for mental health diversion], or [section 1372, subd. (a)(1)] [defendant's restoration of competence]. (Welf. & Inst., § 4335.2, subd. (f).)

It is clear from the context of Welfare & Institutions Code, section 4335.2, that the Legislature intended DHS to have additional tools for facilitating placement evaluations for persons found IST on a felony offense, and for reducing the number of persons being placed in the state hospital if they were found otherwise suitable for some form of local placement, including

mental health diversion. Nothing in Welfare & Institutions Code, section 4335.2, makes recommendations prepared by DSH in the reevaluation process binding on the court. The report constitutes additional information to be considered by the court in making a diversion eligibility and suitability determination for an IST defendant. If the DSH recommendations differ from those received by the court in making its initial decision on diversion and placement, they should be considered in the context of all other information about the defendant. Rather than rejecting out of hand a report by DSH because of its different perspective, the relative weight of the recommendations should be resolved with the traditional analysis of conflicting expert opinions.

APPENDIX A: PENAL CODE §§ 1001.35, 1001.36, 1370, and 1370.01, and WEFARE & INSTITUTIONS CODE §§ 4335.2 and 4336

Penal Code Section 1001.35 [effective January 1, 2018]

The purpose of this chapter is to promote all of the following:

(a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while 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.

Penal Code Section 1001.36 [effective January 1, 2023]

(a) On an accusatory pleading alleging the commission of a misdemeanor or felony offense not set forth in subdivision (d), the court may, in its discretion, and after considering the positions of the defense and prosecution, grant pretrial diversion to a defendant pursuant to this section if the defendant satisfies the eligibility requirements for pretrial diversion set forth in subdivision (b) and the court determines that the defendant is suitable for that diversion under the factors set forth in subdivision (c).

(b) A defendant is eligible for pretrial diversion pursuant to this section if both of the following criteria are met:

(1) The defendant has been diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence.

(2) The defendant's mental disorder was a significant factor in the commission of the charged offense. If the defendant has been diagnosed with a mental disorder, the court shall find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. A court may consider any relevant and credible evidence, including, but not

limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense.

(c) For any defendant who satisfies the eligibility requirements in subdivision (b), the court must consider whether the defendant is suitable for pretrial diversion. A defendant is suitable for pretrial diversion if all of the following criteria are met:

(1) In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment.

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

(3) The defendant agrees to comply with treatment as a condition of diversion, unless the defendant has been found to be an appropriate candidate for diversion in lieu of commitment for restoration of competency treatment pursuant to clause (iv) of subparagraph (B) of paragraph (1) of subdivision (a) of Section 1370 and, as a result of the defendant's mental incompetence, cannot agree to comply with treatment.

(4) The defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community. The court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's treatment plan, the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate.

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

(1) Murder or voluntary manslaughter.

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

(3) Rape.

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

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

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

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

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

(e) At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate.

(f) As used in this chapter, the following terms have the following meanings:

(1) "Pretrial diversion" means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment, subject to all of the following:

(A) (i) The court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant.

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

(iii) If the court refers the defendant to a county mental health agency pursuant to this section and the agency determines that it is unable to provide services to the defendant, the court shall accept a written declaration to that effect from the agency in lieu of requiring live testimony. That declaration shall serve only to establish that the program is unable to provide services to the defendant at that time and does not

constitute evidence that the defendant is unqualified or unsuitable for diversion under this section.

(B) The provider of the mental health treatment program in which the defendant has been placed shall provide regular reports to the court, the defense, and the prosecutor on the defendant's progress in treatment.

(C) The period during which criminal proceedings against the defendant may be diverted is limited as follows:

(i) If the defendant is charged with a felony, the period shall be no longer than two years.

(ii) If the defendant is charged with a misdemeanor, the period shall be no longer than one year.

(D) Upon request, the court shall conduct a hearing to determine whether restitution, as defined in subdivision (f) of Section 1202.4, is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of diversion. However, a defendant's inability to pay restitution due to indigence or mental disorder shall not be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion.

(2) "Qualified mental health expert" includes, but is not limited to, a psychiatrist, psychologist, a person described in Section 5751.2 of the Welfare and Institutions Code, or a person whose knowledge, skill, experience, training, or education qualifies them as an expert.

(g) If any of the following circumstances exists, the court shall, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether the criminal proceedings should be reinstated, whether the treatment should be modified, or whether the defendant should be conserved and referred to the conservatorship investigator of the county of commitment to initiate conservatorship proceedings for the defendant pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code:

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

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

(3) The defendant is engaged in criminal conduct rendering the defendant unsuitable for diversion.

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

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

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

(h) If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. A court may conclude that the defendant has performed satisfactorily if the defendant has substantially complied with the requirements of diversion, has avoided significant new violations of law unrelated to the defendant's mental health condition, and has a plan in place for long-term mental health care. If the court dismisses the charges, the clerk of the court shall file a record with the Department of Justice indicating the disposition of the case diverted pursuant to this section. Upon successful completion of diversion, if the court dismisses the charges, the arrest upon which the diversion was based shall be deemed never to have occurred, and the court shall order access to the record of the arrest restricted in accordance with Section 1001.9, except as specified in subdivisions (j) and (k). The defendant who successfully completes diversion may indicate in response to any question concerning the defendant's prior criminal record that the defendant was not arrested or diverted for the offense, except as specified in subdivision (j).

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

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

(1) The arrest upon which the diversion was based may be disclosed by the Department of Justice to any peace officer application request and that, notwithstanding subdivision (i), this section does not relieve the defendant of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined in Section 830.

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

(k) A finding that the defendant suffers from a mental disorder, any progress reports concerning the defendant's treatment, or any other records related to a mental disorder that were created as a result of participation in, or completion of, diversion pursuant to this section or for use at a hearing on the defendant's eligibility for diversion under this section may not be used in any other proceeding without the defendant's consent, unless that information is relevant evidence that is admissible under the standards described in paragraph (2) of subdivision (f) of Section 28 of Article I of the California Constitution. However, when determining whether to exercise its discretion to grant diversion under this section, a court may consider previous records of participation in diversion under this section.

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

Penal Code Section 1370, subdivisions (a)(1)(B)(iv)-(vii) [effective January 1, 2023]

(iv) (I) If, at any time after the court finds that the defendant is mentally incompetent and before the defendant is transported to a facility pursuant to this section, the court is provided with any information that the defendant may benefit from diversion pursuant to Chapter 2.8A (commencing with Section 1001.35) of Title 6, the court may make a finding that the defendant is an appropriate candidate for diversion.

(II) Notwithstanding subclause (I), if a defendant is found mentally incompetent and is transferred to a facility described in Section 4361.6 of the Welfare and Institutions Code, the court may, at any time upon receiving any information that the defendant may benefit from diversion pursuant to Chapter 2.8A (commencing with Section 1001.35) of Title 6, make a finding that the defendant is an appropriate candidate for diversion.

(v) If a defendant is found by the court to be an appropriate candidate for diversion pursuant to clause (iv), the defendant's eligibility shall be determined pursuant to Section 1001.36. A defendant granted diversion may participate for the lesser of the period specified in paragraph (1) of subdivision (c) or the applicable period described in subparagraph (C) of paragraph (1) of subdivision (f) of Section 1001.36. If, during that period, the court determines that criminal proceedings should be reinstated pursuant to subdivision (g) of Section 1001.36, the court shall, pursuant to Section 1369, appoint a psychiatrist, licensed psychologist, or any other expert the court may deem appropriate, to determine the defendant's competence to stand trial.

(vi) Upon the dismissal of charges at the conclusion of the period of diversion, pursuant to subdivision (h) of Section 1001.36, a defendant shall no longer be deemed incompetent to stand trial pursuant to this section.

(vii) The clerk of the court shall notify the Department of Justice, in writing, of a finding of mental incompetence with respect to a defendant who is subject to clause (ii) or (iii) for inclusion in the defendant's state summary criminal history information.

Penal Code Section 1370, subd. (a)(2)(A) [effective January 1, 2023; paragraph (ii) operative July 1, 2023]

(i) The court shall order the community program director or a designee to evaluate the defendant and to submit to the court within 15 judicial days of the order a written recommendation as to whether the defendant should be required to undergo outpatient treatment, or be committed to the State Department of State Hospitals or to any other treatment facility. A person shall not be admitted to a State Department of State Hospitals facility or other treatment facility or placed on outpatient status under this section without having been evaluated by the community program director or a designee. The community program director or designee shall evaluate the appropriate placement for the defendant between a State Department of State Hospitals facility or the community-based residential treatment system based upon guidelines provided by the State Department of State Hospitals.

(ii) Commencing on July 1, 2023, a defendant shall first be considered for placement in an outpatient treatment program, a community treatment program, or a diversion program, if any such program is available, unless a court, based upon the recommendation of the community program director or their designee, finds that either the clinical needs of the defendant or the risk to community safety, warrant placement in a State Department of State Hospitals facility.

Penal Code Section 1370.01 [effective January 1, 2023]

(a) If the defendant is found mentally competent, the criminal process shall resume, and the trial on the offense charged or hearing on the alleged violation shall proceed.

(b) If the defendant is found mentally incompetent, the trial, judgment, or hearing on the alleged violation shall be suspended and the court may do either of the following:

(1) (A) Conduct a hearing, pursuant to Chapter 2.8A (commencing with Section 1001.35) of Title 6, and, if the court deems the defendant eligible, grant diversion pursuant to Section 1001.36 for a period not to exceed one year from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the misdemeanor complaint, whichever is shorter.

(B) If the court opts to conduct a hearing pursuant to this paragraph, the hearing shall be held no later than 30 days after the finding of incompetence. If the hearing is delayed beyond 30 days, the court shall order the defendant to be released on their own recognizance pending the hearing.

(C) If the defendant performs satisfactorily on diversion pursuant to this section, at the end of the period of diversion, the court shall dismiss the criminal charges that were the subject of the criminal proceedings at the time of the initial diversion.

(D) If the court finds the defendant ineligible for diversion based on the circumstances set forth in subdivision (b), (c), (d), or (g) of Section 1001.36, the court may, after notice to

the defendant, defense counsel, and the prosecution, hold a hearing to determine whether to do any of the following:

(i) Order modification of the treatment plan in accordance with a recommendation from the treatment provider.

(ii) Refer the defendant to assisted outpatient treatment pursuant to Section 5346 of the Welfare and Institutions Code. A referral to assisted outpatient treatment may only occur in a county where services are available pursuant to Section 5348 of the Welfare and Institutions Code, and the agency agrees to accept responsibility for treatment of the defendant. A hearing to determine eligibility for assisted outpatient treatment shall be held within 45 days after the date of the referral. If the hearing is delayed beyond 45 days, the court shall order the defendant, if confined in county jail, to be released on their own recognizance pending that hearing. If the defendant is accepted into assisted outpatient treatment, the charges shall be dismissed pursuant to Section 1385.

(iii) Refer the defendant to the county conservatorship investigator in the county of commitment for possible conservatorship proceedings for the defendant pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code. A defendant shall only be referred to the conservatorship investigator if, based on the opinion of a qualified mental health expert, the defendant appears to be gravely disabled, as defined in subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008 of the Welfare and Institution Code. Any hearings required in the conservatorship proceedings shall be held in the superior court in the county of commitment. The court shall transmit a copy of the order directing initiation of conservatorship proceedings to the county mental health director or the director's designee and shall notify the county mental health director or their designee of the outcome of the proceedings. Before establishing a conservatorship, the public guardian shall investigate all available alternatives to conservatorship pursuant to Section 5354 of the Welfare and Institutions Code. If a petition is not filed within 60 days of the referral, the court shall order the defendant, if confined in county jail, to be released on their own recognizance pending conservatorship proceedings. If the outcome of the conservatorship proceedings results in the establishment of conservatorship, the charges shall be dismissed pursuant to Section 1385.

(iv) Refer the defendant to the CARE program pursuant to Section 5978 of the Welfare and Institutions Code. A hearing to determine eligibility for CARE shall be held within 14 days after the date of the referral. If the hearing is delayed beyond 14 days, the court shall order the defendant, if confined in county jail, to be released on their own recognizance pending that hearing. If the defendant is accepted into CARE, the charges shall be dismissed pursuant to Section 1385.

(2) Dismiss the charges pursuant to Section 1385. If the criminal action is dismissed, the court shall transmit a copy of the order of dismissal to the county behavioral health director or the director's designee.

(c) If the defendant is found mentally incompetent and is on a grant of probation for a misdemeanor offense, the court shall dismiss the pending revocation matter and may return the defendant to supervision. If the revocation matter is dismissed pursuant to this subdivision, the court may modify the terms and conditions of supervision to include appropriate mental health treatment.

(d) It is the intent of the Legislature that a defendant subject to the terms of this section receive mental health treatment in a treatment facility and not a jail. A term of four days will be deemed to have been served for every two days spent in actual custody against the maximum term of diversion. A defendant not in actual custody shall otherwise receive day for day credit against the term of diversion from the date the defendant is accepted into diversion. "Actual custody" has the same meaning as in Section 4019.

(e) This section shall apply only as provided in subdivision (b) of Section 1367.

Welfare & Institutions Code Section 4335.2 [effective September 29, 2022]

(a) As used in this section, "department" means the State Department of State Hospitals.

(b) The Legislature finds and declares that the purpose of this section is to establish a program for the department to perform reevaluations primarily through telehealth evaluations for felony incompetent to stand trial (IST) individuals in jail who have been waiting for admission to the department. The goals of this program are:

(1) To permit the department to conduct reevaluations of IST defendants committed to the department and awaiting admission to department facilities.

(2) To reduce the growing list of IST defendants awaiting placement to a department facility for competency restoration treatment.

(3) To help address the significant impacts of the COVID-19 pandemic on the IST waitlist through identification of individuals on the waitlist who have restored to competency in jail, are nonrestorable, are malingering, may be divertible, or have stabilized and are appropriate for outpatient treatment.

(4) To reduce the timeframe for a competency evaluation for IST defendants in jail and reduce unnecessary costly hospitalizations.

(5) To offer expert forensic mental health consultation to assist in identifying ISTs who may be appropriate for community placement. This supports the principles of deinstitutionalization for individuals who can best be supported in the least restrictive setting in the community.

(6) To offer expert medication consultation and technical assistance to local sheriffs to support effective use of psychotropic medications and stabilization of IST defendants awaiting placement to a department facility.

(7) To require courts and local county jails to provide to the department all relevant medical, behavioral, and court records of IST defendants committed to the department for evaluation purposes.

(8) To require local county jails to provide the department access to IST defendants in county jails and for local county jails to ensure the department the ability to provide reevaluations for IST defendants remotely.

(9) To require local county jails to allow the department access to necessary IST defendants' information, including records and collateral information.

(c) The department, or its designee, have the authority and sole discretion to consider and conduct reevaluations for IST defendants committed to and awaiting admission to the department. A reevaluation shall involve a review by a department clinician or contracted clinician of an IST defendant's relevant medical and mental health records, including prior mental health evaluations and an evaluation of the IST defendant by that department clinician or contracted clinician. When conducting the reevaluation, the department or its designee may request defendant's counsel to provide any information bearing on the defendant's capacity to rationally cooperate in their defense that is absent from the records accessible to the court. Defense counsel may provide a written statement of their reasoning for questioning the defendant's mental competence and the time of their most recent contact with the defendant. Any communication between the defendant's counsel and the evaluator is confidential pursuant to Section 954 of the Evidence Code. If not already provided, the court shall provide the department with all IST defendant records pursuant to paragraph (3) of subdivision (a) of Section 1370 of the Penal Code, including any updated medical and behavioral health records requested by the department. At the sole discretion of the department, the department clinician or contracted clinician may conduct in person, or video telehealth, evaluations of IST defendants at the local jail for those IST patients awaiting admission to the department. The local jail shall provide the department confidential access to the IST defendant for reevaluation, including establishing and maintaining remote access capabilities at the jail for the department to remotely access the IST defendant.

(d) Reevaluations provided by the department clinician or contracted clinician shall include, but are not limited to, the following:

(1) Evaluations, including assessment of malingering, pursuant to paragraph (1) of subdivision (b) of Section 1370 of the Penal Code, subdivision (b) of Section 1370.01 of the Penal Code, or paragraph (1) of subdivision (a) of Section 1372 of the Penal Code.

(2) Assessments to determine whether the IST defendant should be referred to the county for further evaluation for potential participation in the county diversion program, if one exists, pursuant to clause (v) of subparagraph (B) of paragraph (1) of subdivision (a) of Section 1370 of the Penal Code or paragraph (2) of subdivision (a) of Section 1370.01 of the Penal Code, or other outpatient treatment program.

(3) Evaluations on whether the IST defendant is substantially unlikely to be restored to competence in the foreseeable future pursuant to paragraph (1) of subdivision (b) of Section 1370 of the Penal Code or subdivision (b) of Section 1370.01 of the Penal Code. Evaluations shall include, if applicable, facts supporting that a defendant appears gravely disabled as described in subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, which a court may utilize to order a conservatorship investigator to initiate conservatorship proceedings pursuant to paragraph (3) of subdivision (c) of Section 1370 of the Penal Code.

(4) Psychopharmacology evaluations in which a department clinician will identify IST defendants who may need psychotropic medications, a psychopharmacology consultation, or an involuntary medication order.

(5) A written report from the department clinician or contracted clinician of their evaluations of the IST defendant, as well as any conclusions of mental health status and recommendations the clinician may have of placement of the IST defendant.

(e) A court may issue an order authorizing involuntary administration of antipsychotic medication pursuant to paragraphs (2) and (3) of subdivision (b) of Section 1370 of the Penal Code. The court shall base its determination on the recommendation made by a department clinician pursuant to paragraph (4) of subdivision (d). If a hearing is ordered by the court pursuant to subparagraph (C) or (D) of paragraph (3) of subdivision (b) of Section 1370 of the Penal Code, the clinician shall be allowed to testify remotely. In-person witness testimony shall only be allowed upon a court's finding of good cause.

(f) Written reports shall be filed with the court in the committing county. That report shall be accepted by courts, either pursuant to paragraph (1) of subdivision (b) of Section 1370 of the Penal Code, subdivision (b) of Section 1370.01 of the Penal Code, or paragraph (1) of subdivision (a) of Section 1372 of the Penal Code.

(g) The department shall provide funding based on a flat rate set by the department to local county jails for reimbursement of information technology support and a portion of staff time utilized to facilitate telehealth interviews and evaluations of felony IST defendants in the jail. One-time funding based on a flat rate set by the department will be made available for reimbursement to the county sheriff upon agreement to facilitate telehealth evaluations in the jail. In addition, a flat rate, set by the department, for reimbursement of each telehealth evaluation conducted by the department for an IST defendant and facilitated by the jail will be paid on a quarterly basis in arrears following conclusion of the telehealth evaluation.

(h) Any contracts awarded to implement this chapter shall be exempt from the requirements contained in the Public Contract Code and the State Administrative Manual and shall not be subject to approval by the Department of General Services.

(i) Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the state hospitals and the department may implement, interpret, or make specific this section by means of a departmental letter or other similar instruction, as necessary.

(j) The department and any of the designated evaluators shall be provided access to the defendant's medical records, including mental health records for purposes of conducting a reevaluation of the competency status of the defendant.

(k) The department and any of the designated evaluators shall, upon request, be provided prompt and unimpeded collateral consult with local county jail staff, including contractors, for the purpose of determining an IST defendant's behavior, care, progress, and treatment.

Welfare & Institutions Code Section 4336 [effective January 1, 2023]

(a) As used in this section, "department" means the State Department of State Hospitals.

(b) (1) The department shall implement a growth cap program for all counties for individuals committed pursuant to Section 1370 of the Penal Code. The department shall charge counties penalty payments as described in this subdivision to implement the growth cap program.

(2) The baseline number of individuals determined to be incompetent to stand trial on felony charges for each county shall be the number of felony incompetency determinations made in the 2021–22 fiscal year for each county. For any county with zero felony incompetency to stand trial determinations in the 2021–22 fiscal year, the baseline shall be set at one individual.

(3) (A) Commencing with the 2022–23 fiscal year and each fiscal year thereafter, for each felony incompetent to stand trial determination that exceeds the baseline number identified in paragraph (2), a county shall pay the penalty amount described in subparagraph (C).

(B) The department shall reconcile the total county incompetent to stand trial determinations against the baseline by September 30 each year.

(C) Calculations shall be based on the published per individual rate set forth by the department for state hospital treatment for individuals found incompetent to stand trial on a felony charge, as follows:

(i) Each county shall make penalty payments equivalent to 50 percent of the rate for the 5th, 6th, and 7th individual felony incompetent to stand trial determinations over the baseline, 75 percent of the rate for the 8th and 9th individual felony

incompetent to stand trial determinations over the baseline, and 100 percent of the rate for the 10th and all subsequent felony incompetent to stand trial determinations over the baseline.

(ii) (I) Commencing with the 2026–27 fiscal year and each fiscal year thereafter, a county with a felony mental health diversion or community-based restoration contract with the department shall, for the third and any subsequent individual felony incompetent to stand trial determinations over the baseline, make penalty payments equivalent to 100 percent of the rate.

(II) Commencing with the 2026–27 fiscal year and each fiscal year thereafter, any county without a felony mental health diversion or community-based restoration contract with the department shall, for the third and any subsequent individual felony incompetent to stand trial determinations over the baseline, make penalty payments equivalent to 150 percent of the rate.

(D) Commencing with the 2022–23 fiscal year, the department shall periodically notify the superior court and relevant county agencies of each county, including, but not limited to, the county administrator, behavioral health department, sheriff, public defender, and district attorney of the total number of felony incompetent to stand trial determinations made in that county for the current fiscal year compared to the baseline determination for that county.

(E) Commencing with the 2023–24 fiscal year, each county shall remit payment to the department in an amount equal to the amount identified in the invoice issued to the county administrator or their designee by the department. The penalty payment shall be due no later than 90 days after the date that the invoice is received by the county. The penalty funds shall be collected as revenue by the department and deposited by the Controller into the Mental Health Diversion Fund, created pursuant to subdivision (c).

(F) A county may pay these penalty payments from any local funding source available, including funds received by the county through contracts issued by the department to the county for purposes of serving the felony incompetent to stand trial population.

(G) Commencing with the 2023–24 fiscal year, and each fiscal year thereafter, notwithstanding any other budgetary or accounting requirements, the department shall make the final determination of the proper budgeting and accounting of the penalties received, deposited, and disbursed from the Mental Health Diversion Fund to each county as appropriate.

(c) (1) The Mental Health Diversion Fund is hereby created in the State Treasury. The fund shall receive penalty payments from each county as collected by the department pursuant to this section. All moneys in the fund are reserved and continuously appropriated, without regard to fiscal years. The funds collected in the fund shall be used for the purpose of supporting county

activities that will divert individuals with serious mental illnesses away from the criminal justice system and lead to the reduction of felony incompetent to stand trial determinations.

(2) Activities supported by the funds collected in the Mental Health Diversion Fund shall include one or more of the following:

(A) Prebooking mental health diversion to serve those with serious mental illness and prevent their felony arrest. The target population that shall be served are individuals demonstrating psychosis manifesting as hallucinations, delusions, disorganized thoughts, or disorganized behavior at the time of the interaction.

(B) Postbooking mental health diversion to serve those with serious mental illness and who are likely to be found incompetent to stand trial, to prevent the incompetent to stand trial determination and divert the individual from incarceration. The target population that shall be served are individuals diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, and schizoaffective disorder but excluding a primary diagnosis of antisocial personality disorder, borderline personality disorder, and pedophilia, and who are presenting non-substance-induced psychotic symptoms.

(C) Reentry services and support to serve those who have been restored to competency following a felony incompetent to stand trial commitment and directly released to the community from jail.

(d) (1) Beginning in the 2024–25 fiscal year, each county that has received funds from the Mental Health Services Fund shall submit an annual report to the department, on or before October 1 of each fiscal year, identifying how funds were used in the prior fiscal year.

(2) The department shall, by no later than July 1, 2024, publish an administrative letter to counties outlining the required form and content of the report.

(3) Annual reports submitted by each county subject to this section shall include, without limitation, the number of individuals served, the services and support provided, and the projected impact to the number of felony incompetent to stand trial determinations by the county.

(e) Commencing with the 2023–24 fiscal year, and each fiscal year thereafter, the department shall submit a schedule to the Controller of disbursements of funds from the Mental Health Diversion Fund to each county. Disbursements for each county shall equal the amount of county payments made to the department in accordance with subdivision (b).

(f) Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the department may implement, interpret, or make specific this section by means of a departmental letter or other similar instruction, as necessary.

APPENDIX B: PROCEDURAL CHECKLIST FOR MENTAL HEALTH DIVERSION (§§ 1001.35 AND 1001.36)

I. DEFENDANT REQUESTS DIVERSION

A. Determine prima facie basis for diversion (§ 1001.36(e))

1. Informal hearing to review facts of crime, defendant's criminal and mental health history
    a. Is request timely – between filing of complaint and adjudication
    b. Does defendant have reasonable chance at meeting requirements in Section II, *infra*
    c. Is the defendant and/or crime reasonably suitable for diversion
2. Court to consider offers of proof and reliable hearsay
3. If prima facie basis not established, deny request and continue with criminal case or enter other appropriate orders
4. If prima facie basis is established, proceed to full determination of eligibility, suitability and program placement

II. REQUIREMENTS FOR DIVERSION (§ 1001.36)

The defendant is **eligible** for diversion if the following requirements are met:

A. **The defendant has been diagnosed or treated within 5 years for a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders**, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, **but excluding** antisocial personality disorder, borderline personality disorder, and pedophilia. (§ 1001.36(b)(1).)

1. Has defendant submitted evidence of a mental disorder
2. Court to order any additional reports as needed

B. **The defendant's mental disorder was a significant factor in the commission of the charged offense. The diagnosis will establish the disorder as a significant factor unless there is clear and convincing evidence that it was not a motivating, causal, or contributing factor in the commission of the crime.** (§ 1001.36(b)(2).)

The defendant is **suitable** for diversion if the following requirements are met:

A. In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder affecting the criminal behavior would respond to mental health treatment. (§ 1001.36(c)(1).)

B. The defendant consents to diversion and waives the right to a speedy trial. (§ 1001.36(c)(2).) Consent and waiver are not required if def incompetent to stand trial. It is good practice to advise of the possibility of restitution before obtaining this consent and waiver from the defendant.

C. The defendant agrees to comply with treatment as a condition of diversion. (§ 1001.36(c)(3).) Agreement not required if def incompetent to stand trial.

D. The defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community. (§ 1001.36(c)(4).) Whether def at risk of committing a "super strike."

E. Are there any other reasons, such as the circumstances of the crime, the defendant's criminal history, or the defendant's treatment history, that indicate the defendant is not suitable for diversion.

III. PROGRAM REQUIREMENTS

The program selected by the court must meet the following requirements:

A. **"The court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant."** (§ 1001.36(f)(1)(A).)

B. **The defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources.** (§ 1001.36(f)(1)(A)(ii).)

1. Has the program agreed to accept the defendant on diversion. (§ 1001.36(f)(1)(A)(ii).)
2. County program may indicate lack of acceptance by letter. (§ 1001.36(f)(1)(A)(ii).)

C. **The program must submit regular reports to the court and counsel regarding the defendant's progress in treatment.** (§ 1001.36(f)(1)(B).)

1. Set the frequency of the reports

2. Set final report near end of diversion period to determine:

   a. Whether defendant has substantially complied with treatment program

   b. Whether defendant has committed any new law violations, and whether the violations were related or unrelated to defendant's mental disorder

   c. Whether defendant has a long-term plan for mental health care

D. **The diversion program is to last no longer than one year for misdemeanors and two years for felonies.** (§ 1001.36(f)(1)(C).)

E. **Court to conduct a hearing on restitution, if requested.** (§ 1001.36(F)(1)(D).)

IV. TERMINATION OR MODIFICATION OF TREATMENT

Termination of diversion and reinstatement of criminal proceedings, modification of treatment, or referral for conservatorship may occur after noticed hearing if any of the following circumstances are established:

A. The defendant is charged with an additional misdemeanor allegedly committed during the pretrial diversion and that reflects the defendant's propensity for violence. (§ 1001.36(g)(1).)

B. The defendant is charged with an additional felony allegedly committed during the pretrial diversion. (§ 1001.36(g)(2).)

C. The defendant is engaged in criminal conduct rendering him or her unsuitable for diversion. (§ 1001.36(g)(3).)

D. Based on the opinion of a qualified mental health expert whom the court may deem appropriate, either of the following circumstances exists: (§ 1001.36(g)(4)):

   1. The defendant is performing unsatisfactorily in the assigned program. (§ 1001.36(g)(4)(A).)

   2. The defendant is gravely disabled, as defined in Welfare and Institutions Code, section 5008, subd. (h)(1)(B). A defendant shall only be conserved and referred to the conservatorship investigator pursuant to this finding. (§ 1001.36(g)(4)(B).)

E. If diversion terminated, consider status of defendant's competence to stand trial and whether to commence or continue proceedings under § 1368, *et seq.*

V. SUCCESSFUL COMPLETION OF DIVERSION

A. If the defendant has performed satisfactorily on diversion, the court must dismiss the criminal charges. (§ 1001.36(h).) The court *may* conclude the defendant performed satisfactorily if def meets all of the following:

1. The defendant has "substantially complied" with the program requirements

2. The defendant has "avoided significant new violations of law *unrelated* to the defendant's mental health condition." (Italics added.) The court can, in its discretion, ignore new violations of law *related* to the defendant's mental health condition.

3. The defendant has "a plan in place for long-term mental health care"

B. Duties of the court if case dismissed:

1. Clerk to notify Dept. of Justice of disposition

2. Court to order access to records of arrest restricted per § 1001.9

3. Court to advise defendant: (§ 1001.36(j).)

    a. "The arrest upon which the diversion was based may be disclosed by the Department of Justice to any peace officer application request and that, notwithstanding subdivision (f), this section does not relieve the defendant of the obligation to disclose the arrest in response to any direct question contained in any questionnaire or application for a position as a peace officer, as defined in Section 830."

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

VI. PERSONS INCOMPETENT TO STAND TRIAL

A. Persons charged with **felony** and found incompetent to stand trial are eligible for diversion if: (§ 1370(a)(1)(B)(iv).)

1. Person not transported to a mental health facility

2. Court receives information that defendant may benefit from diversion

3. Court determines defendant is appropriate for diversion

4. Diversion for two years or when competency restored, whichever is less

C. Persons charged with **misdemeanor** and found incompetent to stand trial are eligible for diversion if: (§ 1370.01(a)(1).)

1. Court determines appropriate for diversion

2. Diversion for one year or maximum term of custody, whichever is less

D. Consider whether defendant appropriate for diversion considering all relevant factors (Section II, *supra*)

1. If not appropriate, resume criminal proceedings

2. If appropriate, determine eligibility in accordance with § 1001.36

E. If diversion terminated under § 1001.36(g):

1. Appoint mental health expert to determine status of competency

2. If not competent, resume procedures under § 1368, *et seq*.

3. If competent, resume full criminal proceedings

F. If diversion successfully completed

1. Dismiss criminal charges

2. Court to follow duties in Section V (D), *supra*.

APPENDIX C: OFFENSES LISTED IN PENAL CODE § 667(e)(2)(C)(iv)

The following table was prepared by Hon. John "Jack" Ryan, Orange County Superior Court (Ret.)

TABLE OF CRIMES LISTED IN P.C. § 667(e)(2)(C)(iv) – "Super Strikes"

Prior Conviction	*Description*	*Pen C Sections*
Any Serious or Violent Felony	Punishable in California by life imprisonment or death.	667(e)(2)C)(iv)(VIII)
187	Murder or attempt. (Any homicide or attempt from 187 to 191.5	667(e)(2)C)(iv)(IV)
191.5	Vehicular manslaughter while intoxicated or attempt.	667(e)(2)C)(iv)(IV)
207	Kidnap to ... §261, 262, 264.1, 286, 288, 288a, or 289. (Kidnap, as defined in Pen C §207 does not include attempts to commit a defined sex offense.)	667(e)(2)C)(iv)(I)
209	Kidnap to violate §261, 262, 264.1, 286, 288, 288a, or 289.	667(e)(2)C)(iv)(I)
220	Assault to violate § 261, 262, 264.1, 286, 288, 288a, or 289. (Pen C § 220 specifies *rape* as a designated offense. It does not use a section number, 261 (rape) or 262 (spousal rape).	667(e)(2)C)(iv)(I)
245(d)(3)	Assault with a machine gun on a peace officer or firefighter	667(e)(2)C)(iv)(VI)
261(a)(2)	Rape by force.	667(e)(2)C)(iv)(I)
261(a)(6)	Rape by threat to retaliate.	667(e)(2)C)(iv)(I)
262(a)(2)	Spousal rape by force.	667(e)(2)C)(iv)(I)
262(a)(4)	Spousal rape by threat to retaliate.	667(e)(2)C)(iv)(I)
264.1	Rape in concert by force or violence	667(e)(2)C)(iv)(I)
269	Aggravated sexual assault of a child.	667(e)(2)C)(iv)(I)
286(c)(1)	Sodomy with child <14 + 10 years age differential.	667(e)(2)C)(iv)(II)
286(c)(2)(A)	Sodomy by force.	667(e)(2)C)(iv)(I)
286(c)(2)(B)	Sodomy by force upon child <14	667(e)(2)C)(iv)(I)
286(c)(2)(C)	Sodomy by force upon child >14	667(e)(2)C)(iv)(I)
286(c)(3)	Sodomy with threat to retaliate	667(e)(2)C)(iv)(I)
286(d)(1)	Sodomy in concert by force…., threat to retaliate.	667(e)(2)C)(iv)(I)

Prior Conviction	*Description*	*Pen C Sections*
286(d)(2)	Sodomy in concert by force upon child <14	667(e)(2)C)(iv)(I)
286(d)(3)	Sodomy in concert by force upon child >14	667(e)(2)C)(iv)(I)
288(a)	Lewd act upon a child under the age of 14	667(e)(2)C)(iv)(III)
288(b)(1)	Lewd act upon a child by force…	667(e)(2)C)(iv)(I)
288(b)(2)	Lewd act by caretaker by force…	667(e)(2)C)(iv)(I)
288a(c)(1)	Oral copulation upon a child <14 + 10 years…	667(e)(2)C)(iv)(III)
288a(c)(2)(A)	Oral copulation by force	667(e)(2)C)(iv)(I)
288a(c)(2)(B)	Oral copulation by force… force upon child <14.	667(e)(2)C)(iv)(I)
288a(c)(2)(C)	Oral copulation by force… force upon child >14.	667(e)(2)C)(iv)(I)
288a(d)	Oral copulation in concert by force.	667(e)(2)C)(iv)(I)
288.5(a)	Continuous sexual abuse of a child with force…	667(e)(2)C)(iv)(I)
289(a)(1)(A)	Sexual penetration by force, etc.	667(e)(2)C)(iv)(I)
289(a)(1)(B)	Sexual penetration upon a child <14 by force…	667(e)(2)C)(iv)(I)
289(a)(1)(C)	Sexual penetration upon a child >14 by force…	667(e)(2)C)(iv)(I)
289(a)(2)(C)	Sexual penetration by threat to retaliate.	667(e)(2)C)(iv)(I)
289(j)	Sexual penetration upon a child <14 + 10 years…	667(e)(2)C)(iv)(II)
653f	Solicitation to commit murder.	667(e)(2)C)(iv)(V)
664/191.5	Attempt vehicular manslaughter while intoxicated	667(e)(2)C)(iv)(IV)
664/187	Attempt murder	667(e)(2)C)(iv)(IV)
11418(a)(1)	Possession of a weapon of mass destruction	667(e)(2)C)(iv)(VII)