S271877

No. S_____

In the Supreme Court of the State of California

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

v.

DAJAH BROWN,
Defendant and Appellant.

Sixth Appellate District, Case No. H048462
Santa Clara County Superior Court, Case Nos. AP002184, C164865
The Honorable Cynthia C. Lie, Judge

PETITION FOR REVIEW

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November 19, 2021

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Respondent respectfully petitions for review of the published decision of the Court of Appeal for the Sixth Appellate District. The opinion as originally filed on September 21, 2021, is attached as Exhibit 1 (Opn.). The order of October 5, 2021 modifying the opinion with no change in the judgment on denial of the People's petition for rehearing is attached as Exhibit 2 (1Mod.). The order of October 12, 2021 modifying the opinion and judgment on denial of the parties' joint petition for rehearing is attached as Exhibit 3 (2Mod.). The opinion is available at 69 Cal.App.5th 15. This petition is timely. (Cal. Rules of Court, rules 8.366(b)(1) & (4), 8.500(e)(1).)

ISSUE PRESENTED

Whether the superior court can deny a continuance for the failure to establish good cause pursuant to Penal Code section 1050 if such a denial will causally result in dismissal of a criminal charge.

STATEMENT OF THE CASE

In 2016, the Santa Clara County District Attorney charged appellant with misdemeanor loitering with intent to commit prostitution (Pen. Code, § 653.22, subd. (a)).[1] (CT 21.) The charges were based on observations made by San Jose Police Officer Yasin as well as incriminating statements made by appellant to Officer Yasin. (CT 22.) On January 19, 2017,

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

appellant filed a motion to suppress evidence pursuant to section 1538.5. (CT 16.)

On February 17, 2017, the date set for hearing the motion, the People orally moved for a continuance. (2/17/17 RT 4.) The prosecutor stated that he had received a telephone call from Officer Yasin that afternoon. Officer Yasin informed the prosecutor that he was the only gang unit officer available to interview a percipient witness to a shooting and the interview was scheduled at the same time as the hearing. The prosecutor had told Officer Yasin to go to the interview. (2/17/17 RT 4.) Appellant objected to the continuance. (2/17/17 RT 5.)

The court concluded that there was no good cause to continue the hearing on the motion to suppress, and denied the motion to continue the hearing. (2/17/17 RT 6, 8.)[2] Because the prosecution was unable to proceed with the hearing without Officer Yasin's testimony, the court granted appellant's motion to suppress all statements made after Officer Yasin contacted appellant. (2/17/17 RT 11-12.)

The prosecutor stated that the People needed additional time to determine whether they would be able to proceed without the suppressed evidence. (2/17/17 RT 12.) Appellant withdrew her previously entered time waiver, thereby requiring the trial to

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[2] Section 1050 provides that continuances in a criminal case must be requested in writing with two days' notice, and may be granted only upon a showing of good cause. (§ 1050, subds. (b) & (e).) The court did not deny the motion to continue based on the lack of notice, but on the failure of the prosecutor to establish good cause.

begin by March 20, 2017. (2/17/17 RT 12-13.) The court set jury trial for March 6, 2017. (2/17/17 RT 13.)

On March 2, 2017, relying on *People v. Ferrer* (2010) 184 Cal.App.4th 873, the People moved to reconsider the rulings on the motions to continue and to suppress. (CT 32.) As discussed *post*, *Ferrer* held that a trial court has no authority to deny a continuance for a violation of the notice and good cause requirements for a motion to continue under section 1050 if the denial of the continuance would foreseeably result in dismissal of the criminal charges. (184 Cal.App.4th at p. 886.) In reliance on *Ferrer*, the trial court vacated its previous rulings and set the suppression hearing for March 17 and trial for March 20. (CT 45.)

On March 17, after hearing the testimony of Officer Yasin and appellant, the court denied appellant's motion to suppress. (CT 57; 3/17/17 RT 59.) On March 20, 2017, appellant entered a "slow plea" pursuant to *Bunnell v. Superior Court* (1975) 13 Cal.3d 592. (CT 58.) The court found appellant guilty, suspended imposition of sentence, and placed appellant on probation for three years. (CT 58.)

Applying *Ferrer*, the appellate division affirmed the judgment. (Opn. 5) In a concurring opinion, Judge Saban urged the Court of Appeal to reconsider and disagree with *Ferrer*. (Opn. 6.) The Sixth District granted appellant's petition to transfer pursuant to California Rules of Court, rule 8.1006.

The court announced that it would "decline to follow *Ferrer*." (Opn. 2.) The court disagreed with *Ferrer*'s "construction of

sections 1050 and 1050.5," and held that "if the trial court finds that the request for a continuance of a motion to suppress lacks good cause, the court has the authority to deny the requested continuance for lack of good cause under section 1050, subdivision (e), even if this decision may foreseeably result in a dismissal of the matter for lack of evidence." (Opn. 9, 20.) Based on the parties' agreement that the admission of the challenged evidence at the *Bunnell* trial was not harmless beyond a reasonable doubt, the court reversed the judgment, ordered the trial court to reinstate its orders denying the prosecution's request for a continuance and granting the motion to suppress, and remanded for further proceedings, including possible retrial. (2Mod. 1-2.)

REASONS FOR GRANTING REVIEW

Review is necessary to settle an important question of law and to secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).) The Court of Appeal's holding conflicts with *Ferrer*'s limitation on a trial court's authority to deny a continuance of a motion to suppress evidence for failure to comply with the good cause and notice requirements under section 1050. (See Opn. 2 ["we decline to follow *Ferrer* and consequently reverse the judgment"].) In addition, the opinion not only creates a direct conflict with *Ferrer*, but its reasoning could be extended to situations involving preliminary hearings and trials, in conflict with the prior cases of *People v. Ferguson* (1990) 218 Cal.App.3d 1173 and *People v. Henderson* (2004) 115 Cal.App.4th 922. These conflicts of authority, if unresolved, will inevitably lead to

inconsistent results in the trial courts. This court should grant review to resolve the issue.

I. CASE LAW LIMITS THE TRIAL COURT'S AUTHORITY TO DENY CONTINUANCES FOR LACK OF GOOD CAUSE WHERE THE CONTINUANCE WILL RESULT IN A DISMISSAL

One of the leading cases involving a dismissal after a denial of a continuance is *People v. Ferguson*, *supra*, 218 Cal.App.3d 1173. In *Ferguson*, the trial court denied the People's same-day request to continue a jury trial to the afternoon to accommodate the prosecutor's morning appearance in another courtroom. (*Id.* at p. 1177.) The trial court dismissed the case pursuant to section 1385 because the prosecution was unable to proceed in the absence of the assigned prosecutor. (*Id.* at p. 1178.)[3] The appellate court held that the trial court abused its discretion in dismissing the case, even though the People had not complied with the notice and good cause requirements of section 1050 when requesting the continuance. "Section 1050 governs continuances and is based on the premise that criminal proceedings shall be set for trial and heard and determined at the earliest possible time." (*Id.* at p. 1181.) Section 1050 "'is directory only and does not mandate any dismissal of an action by its terms.'" (*Ibid.*) The *Ferguson* court held that a dismissal pursuant to section 1385, where dismissal was not otherwise

[3] Section 1385, subdivision (a) provides that the "judge or magistrate may, either on his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

required by the speedy trial provisions of section 1382, was an abuse of discretion. (*Ibid*.)

In 2003, Assembly Bill No. 1273 (2002-2003 Reg. Sess.) amended section 1050 to add subdivision (*l*), which tracks *Ferguson* by providing: "This section is directory only and does not mandate dismissal of an action by its terms." The bill also amended section 1050.5—which authorizes particular sanctions against counsel for not complying with the notice requirements for a motion to continue—by adding to subdivision (b) of section 1050.5 the italicized limitation: "The authority to impose sanctions provided for by this section shall be in addition to any other authority or power available to the court, *except that the court or magistrate shall not dismiss the case*." (Italics added.) "Assembly Bill No. 1273 'codifie[d] existing case law which provides that the courts may not dismiss a case due to failure to meet the good cause requirements for a continuance, before the expiration of the 60-day statutory limit.' (Sen. Rules Com., Off. Of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1273 (2003-2004 Reg. Sess.) as amended May 1, 2003, p. 1.)" (*People v. Ferrer*, *supra*, 184 Cal.App.4th at p. 881.)

Applying the new statutory amendments, *People v. Henderson*, *supra*, 115 Cal.App.4th at page 927 held that a trial court lacks authority to dismiss an action based on the prosecutor's failure to show good cause under section 1050 for a continuance of the preliminary hearing, so long as the hearing can be conducted within the timelines set forth in section 859b. The court observed that sections 1050 and 1050.5 were "directory

only" and that they had been specifically amended to provide that the trial court may not dismiss a case for a failure to meet the good cause requirement for a continuance if the statutory time for a speedy trial had not run. (*Id.* at pp. 934-935.) The court rejected the argument that dismissal after a denial of a continuance was authorized by section 1385, noting that courts have "rejected the application of [that section] to dismiss cases before trial after a failed request for a continuance made within the statutory period." (*Id.* at p. 936, fn. omitted.) "Unless the prosecutor's conduct rises to the level of depriving defendant of his constitutional right to a fair trial, the trial court may not dismiss an action under section 1385 after finding no good cause for a continuance under section 1050, when the requested date falls within the statutory time limits established by the Legislature in section 859b." (*Id.* at p. 940.)

People v. Ferrer, *supra*, extended *Henderson*'s reasoning to hearings on motions to suppress evidence pursuant to section 1538.5. In *Ferrer*, the prosecution moved for a continuance of the suppression hearing due to a "'mix up'" which resulted in the failure to subpoena the witnesses. (184 Cal.App.4th at p. 878.) The trial court found no good cause, denied the motion to continue, and granted the defendant's motion to suppress. (*Ibid.*) The People announced that they were unable to proceed against the defendant without the suppressed evidence and the court dismissed the information. (*Ibid.*)

The *Ferrer* court reversed. The court concluded that the amendments to sections 1050 and 1050.5 prohibit dismissal of a

criminal case as a sanction for the failure to comply with section 1050's good cause requirements, and thus, "effectively limit a trial court's authority to deny a request for a continuance." (184 Cal.App.4th at p. 879.) The court further noted that the "Legislature intended that a dismissal that *causally follows* from a denial of a motion for a continuance be treated as a sanction of dismissal." (*Id*. at p. 882, italics added.) The court observed that in *Henderson*, "the direct consequence of the failure to show good cause was denial of the motion for a continuance; it was the prosecution's inability to proceed with the preliminary hearing that resulted in dismissal of the case." (*Id*. at p. 882.) Likewise, in *Ferguson*, "it was the prosecution's inability to proceed with trial that resulted in dismissal of the case." (*Ibid*.) The court reasoned that denying the continuance of the suppression hearing was "analogous" because "it was clear at the time that denial of the request to continue the hearing was likely to lead to dismissal of the case." (*Ibid*.) The court noted that in construing section 1050, subdivision (*l*), and 1050.5, subdivision (b), to "prohibit denials of continuances in circumstances such as those in this case, we avoid confronting trial courts with the dilemma of whether dismissal due to a prosecutor's inability to proceed following a grant of a motion to suppress is 'in furtherance of justice' under section 1385, where the prosecutor might have been able to prove the legality of the search and/or seizure and brought defendant to trial." (*Id*. at p. 885.)

The *Ferrer* court recognized that "our decision restricts the options available to the trial court in responding to a motion for

continuance that is not properly noticed and is unsupported by good cause. However, other sanctions, including fines and the filing of reports with appropriate disciplinary committees, are available under section 1050.5, subdivision (a), when a prosecutor fails to comply with the notice requirements of section 1050, subdivision (b)." (184 Cal.App.4th at p. 885.) "And, of course, the trial court may exercise its discretion in selecting the length of a continuance; it need not necessarily accede to the prosecutor's preferred date." (*Id*. at p. 886.)

II. THE COURT OF APPEAL'S OPINION CONFLICTS WITH PRIOR CASE LAW BY CONCLUDING THAT A TRIAL COURT HAS THE AUTHORITY TO DENY A MOTION TO CONTINUE FOR LACK OF GOOD CAUSE EVEN IF THE DENIAL WILL CASUALLY RESULT IN DISMISSAL OF THE CHARGES

Here, the Court of Appeal explicitly disagreed with *Ferrer*, concluding there is "no statutory support in either section 1050 or section 1050.5 for the rule announced in *Ferrer*." (Opn. 18.) The court held that the trial court, pursuant to section 1050, subdivision (e), has "the authority to deny a requested continuance for lack of good cause . . . even if this decision may foreseeably result in a dismissal of the matter for lack of evidence." (Opn. 20.) The court left the "decision whether to grant or deny a continuance request to the sound discretion of the trial court." (Opn. 20-21.)

In so holding, the Court of Appeal also distinguished *Ferguson* and *Henderson* because "those cases analyzed a different question. Neither *Ferguson* nor *Henderson* considered the propriety of the denial of a continuance. Instead, both examined whether the trial court had erred in dismissing the

case after the denial of a continuance and found error based in part on section 1385." (Opn. 18-19.)

However, that distinction is dubious because the suppression of evidence may likewise result in dismissal pursuant to section 1385, particularly where the district attorney is unable to try the case without the suppressed evidence. (See *People v. Bonds* (1999) 70 Cal.App.4th 732, 738-740 [dismissal after the granting of a motion to suppress is pursuant to section 1385].) Section 1050, in and of itself, does not provide the court with any authority to dismiss a case. Section 1050 only permits the court to deny a continuance if the moving party fails to establish good cause. (§ 1050, subd. (d) ["If the moving party is unable to show good cause for the failure to give notice, the motion for continuance shall not be granted"]; see also § 1050, subd. (e) ["Continuances shall be granted only upon a showing of good cause"].) The superior court's authority to dismiss a case in a situation where the People cannot proceed, but the case is still within the time limits of section 859b or section 1382, arises from section 1385. Thus, any dismissal that results from the denial of a continuance—whether of a trial, a preliminary hearing, or a motion to suppress—must necessarily be a dismissal pursuant to section 1385, not section 1050.

As discussed, *Henderson* and *Ferguson* held that a dismissal because the People are unable to proceed solely as a result of a denial of a motion to continue is not a dismissal "in the interests of justice." (§ 1385, subd. (a); see also *People v. Allan* (1996) 49 Cal.App.4th 1507, 1519-1520; cf. *People v. Superior Court*

(*Romero*) (1996) 13 Cal.4th 497, 530 [standard "requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*"].) In permitting a dismissal pursuant to section 1385 as a causal result of the prosecutor's failure to comply with section 1050, the Court of Appeal's holding and disposition necessarily rest on the contrary assumption that such a dismissal *would* be in the interests of justice.

Review is necessary to resolve the conflict of authority and provide guidance to superior courts faced with motions to continue without good cause, the denial of which will causally result in dismissal of the charges pursuant to section 1385.

CONCLUSION

The petition for review should be granted.

Respectfully submitted,

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November 19, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Century Schoolbook font and contains 2,642 words.

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November 19, 2021

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EXHIBIT 1
Opinion
(Filed September 21, 2021)

Filed 9/21/21

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAJAH BROWN, Defendant and Appellant.	H048462 (Santa Clara County Super. Ct. Nos. C1646856, 17AP002184)

Appellant Dajah Brown was charged with misdemeanor loitering with the intent to commit prostitution in violation of Penal Code section 653.22, subdivision (a)[1] and later filed a motion to suppress evidence under section 1538.5. On the date scheduled for the hearing on Brown's motion, the prosecutor informed the trial court that his sole witness would not appear because, on his own initiative, he had released the officer from the subpoena to interview a witness in an unrelated investigation. The prosecutor requested a continuance of the hearing.

The trial court denied the prosecution's motion to continue the suppression hearing as lacking in good cause under section 1050 and, in the absence of any evidence offered by the prosecution to justify the warrantless search, granted Brown's motion to suppress. The prosecution later filed a motion for reconsideration of the trial court's orders on the motions for continuance and for suppression of evidence, stating the People

[1] Unspecified statutory references are to the Penal Code.

were unable to proceed with the case and, therefore, the trial court lacked authority to deny their motion for a continuance of the suppression motion under *People v. Ferrer* (2010) 184 Cal.App.4th 873, 877 (*Ferrer*). In *Ferrer*, the First District Court of Appeal decided that when it is reasonably foreseeable that denial of the prosecutor's request for a continuance under section 1050 will result in dismissal of the case, the trial court may not deny the requested continuance of a defendant's section 1538.5 motion. (*Ferrer*, at p. 886.)

Based on *Ferrer*, the trial court granted the People's motion for reconsideration, vacated its prior ruling on the motion to suppress, and granted a continuance of Brown's motion to suppress, which it ultimately denied. Brown was subsequently convicted and appealed to the appellate division of the Santa Clara County Superior Court, arguing *Ferrer* was wrongly decided. The appellate division, concluding it was bound by *Ferrer*, affirmed the judgment, but one of its members in a concurring opinion urged this court to reconsider the rule announced in *Ferrer*.

Brown filed a petition in this court to transfer the matter, which this court granted. For the reasons set out below, we decline to follow *Ferrer* and consequently reverse the judgment. We decide that if a trial court finds that the request for a continuance of a motion to suppress lacks good cause under section 1050, subdivision (e), the trial court has the authority to deny the requested continuance on that basis even if this decision may foreseeably result in a dismissal of the prosecution.

I. FACTS AND PROCEDURAL BACKGROUND

A. *Facts of the Offense*[2]

On July 13, 2016, around 11:30 p.m., San Jose Police Department Officer Nader Yasin, working in uniform, observed Brown loitering in an area known for prostitution. Brown walked away from the officer and began talking on her cell phone. The officer

[2] These facts are taken from the police report, which was the basis of Brown's guilty plea.

followed Brown and eventually spoke with her. Brown acknowledged to the officer that she was working as a prostitute but hadn't had any "dates" yet. When the officer asked Brown if she had any condoms, she showed him four. The officer gave Brown *Miranda* warnings (see *Miranda v. Arizona* (1966) 384 U.S. 436); she waived those rights and gave a statement to the officer acknowledging loitering for purposes of prostitution. Officer Yasin did not secure a search warrant at any point in his investigation of Brown.

B. *Proceedings in the Trial Court*

On July 13, 2016, Brown was charged by citation with one violation of section 653.22, subdivision (a), misdemeanor loitering with the intent to commit prostitution. She was arraigned on December 22, 2016. On January 19, 2017,[3] Brown filed a motion to suppress evidence under section 1538.5. Brown sought to suppress any statements she had made to Officer Yasin and any evidence obtained from her interaction with him. The trial court scheduled a hearing on the motion for February 17 and ordered Brown present.

On February 17, the parties appeared for the hearing on the motion to suppress. The prosecutor had not filed a written motion to continue but at the hearing orally requested a continuance. He stated that shortly before the hearing was scheduled to begin, he received a phone call from Officer Yasin in which the officer told the prosecutor that he needed to interview a witness in an ongoing investigation. Although the officer had been subpoenaed for the hearing, the prosecutor told the officer "it would be okay for him to do that." The prosecutor noted that the defendant had waived time for trial. The trial court opined that the People had not shown good cause for a continuance but agreed to "pass" the matter until later in the afternoon so the prosecutor could request that the officer come to court for the hearing.

When the hearing resumed, the prosecutor stated that the officer would not be appearing that day but contended that the unforeseen circumstances of the other

[3] Unless otherwise noted, all dates occurred in 2017.

investigation constituted good cause. He asserted he would need only a short continuance for the hearing on the motion to suppress. Brown objected to the continuance and maintained that the prosecutor had not shown good cause under section 1050. She observed that the witness was available and was properly subpoenaed but was "willfully choosing not to be here and given permission by the People."

The trial court agreed that the People had not shown good cause for the continuance and, exercising its discretion, declined to grant one. The court noted it was not "workable" for parties on their own to excuse necessary witnesses. The court observed that other investigators could interview witnesses and stated it was "not satisfied or I don't believe whatever it is that the officer is doing is so indispensable that it requires his absence from these proceedings."

Following the trial court's denial of the continuance request, the prosecutor stated he was unable to proceed with the hearing on the motion. Based on this representation, the trial court granted the motion and ordered suppressed any statements made by Brown to the officer. The prosecutor observed that "a lot of the evidence in this case was evidence obtained by . . . observation from the police officer before any contact with the defendant" and requested another court date to consider whether he could proceed with the prosecution. He did not mention *Ferrer*. Brown withdrew her time waiver and requested the trial be set on a time-not-waived basis. The court set a trial date of March 6 and a trial readiness date of March 2.

On March 2, the prosecutor filed a motion for reconsideration. In the motion, the People asserted, based on the trial court's denial of the continuance and its granting of the motion to suppress, that the prosecution was unable to proceed with the case. Citing *Ferrer*, *supra*, 184 Cal.App.4th 873, the People contended that the trial court had no authority under sections 1050 and 1050.5 to refuse to grant a continuance—even in the absence of good cause—where the foreseeable result of that refusal would be dismissal of

the case. Brown opposed the trial court's vacatur of its order granting her section 1538.5 motion.

In light of the district attorney's motion for reconsideration, the trial court vacated its previous rulings granting the section 1538.5 motion and denying the request for a continuance. The trial court maintained that it still found no good cause for the continuance but believed it did not have authority to deny a continuance under *Ferrer*, *supra*, 184 Cal.App.4th 873. The court set the matter for a new section 1538.5 hearing on March 17 and for trial on March 20.

On March 17, the trial court formally granted the People's motion for reconsideration and held an evidentiary hearing on Brown's section 1538.5 motion at which Officer Yasin and Brown testified. The trial court denied Brown's section 1538.5 motion.

On March 20, Brown pleaded guilty. The trial court suspended imposition of sentence, placed Brown on three years of court probation, did not order any jail time, and ordered her to stay away from the corner of Almaden Avenue and Goodyear Street in San Jose. The court ordered that Brown pay $235 in fines and fees. The trial court stayed Brown's sentence pending appeal.

C. *Proceedings in the Appellate Division*

Brown appealed to the appellate division of the Santa Clara County Superior Court. She argued, first, *Ferrer* was wrongly decided and, second, inapplicable on its facts because it was not reasonably foreseeable that granting the motion to suppress would inevitably result in dismissal of the prosecution.

On August 20, 2020, over three years after Brown filed her notice of appeal, the appellate division affirmed the judgment. The appellate division stated it was bound by *Ferrer*, *supra*, 184 Cal.App.4th 873, and it agreed with the trial court that it was " 'reasonably foreseeable' " that suppression of the evidence would result in a dismissal. (*People v. Brown* (Super. Ct. Santa Clara County, 2020, No. 17AP002184) at p. 2

(*Brown*).) Therefore, it affirmed the trial court's decision that, under *Ferrer*, it had no authority to deny the district attorney's request for a continuance. (*Ibid*.) Judge Saban, who authored the majority opinion, also authored an individual concurring opinion. She wrote separately to "urge the Court of Appeal to reconsider the rule announced in *Ferrer*," which in her view was unsupported by the text of the relevant statutes or precedent. (*Brown*, conc. opn. of Saban, J. at p. 1.)

Brown filed an application to transfer in the appellate division, which was denied by a vote of 2-1. Brown petitioned this court to transfer the matter (Cal. Rules of Court, rule 8.1006(a)), and this court on November 6, 2020, ordered by a vote of 2-1 that the case be transferred to us for hearing and decision. (Cal. Rules of Court, rules 8.1002, 8.1008.)

II. DISCUSSION

Brown contends that *Ferrer* was wrongly decided and argues that the rule announced in the case conflicts with the texts of sections 1050 and 1050.5 and undermines the intent of section 1538.5. Brown urges this court to reverse the judgment, order the trial court to reinstate its original orders denying the prosecution's request for a continuance and granting Brown's motion to suppress, and order the trial court to dismiss the case based on the prosecution's statement that it could not proceed with the prosecution absent the statements taken by the officer. The Attorney General maintains that *Ferrer* was correctly decided and this court should affirm the judgment. The Attorney General does not address the appropriate remedy in the event this court declines to follow *Ferrer*.

The sole issue before us is one of statutory construction, which we review de novo. (*People v. Tran* (2015) 61 Cal.4th 1160, 1166.) As the above discussion makes clear, the opinion in *Ferrer* is central to this appeal.

A. *The* Ferrer *Decision*

The key facts here largely mirror those in *Ferrer*, and we agree with much of the statutory background the opinion sets out. It notes that section 1050 applies to the People's request for a continuance on a motion to suppress and "[n]ormally, the prosecutor's failure to show good cause would require the trial court to deny the motion for a continuance under section 1050, subdivisions (d) and (e). (§ 1050, subd. (d) ['If the moving party is unable to show good cause for the failure to give notice, the motion for continuance shall not be granted.']; § 1050, subd. (e) ['Continuances shall be granted only upon a showing of good cause.']." (*Ferrer*, *supra*, 184 Cal.App.4th at p. 879.)

Nevertheless, *Ferrer* reasoned that "other statutory provisions effectively limit the trial court's authority to deny a request for a continuance. In particular, in 2003 the Legislature passed Assembly Bill No. 1273 (2003–2004 Reg. Sess.), which added subdivision (*l*) to section 1050. (Stats. 2003, ch. 133, § 1.) The provision states: 'This section is directory only and does not mandate dismissal of an action by its terms.' (§ 1050, subd. (*l*).) Moreover, while a court may impose sanctions under section 1050.5 if a party fails to show good cause for failure to provide notice (§ 1050, subd. (c)), including the imposition of fines or the filing of a report with a disciplinary committee (§ 1050.5, subd. (a)), Assembly Bill No. 1273 also amended section 1050.5, subdivision (b), to read: 'The authority to impose sanctions provided for by this section shall be in addition to any other authority or power available to the court, *except that the court or magistrate shall not dismiss the case*.' (Italics added.) (Stats. 2003, ch. 133, § 2; see also [*People v. Henderson* (2004) 115 Cal.App.4th 922,] 935 [(*Henderson*)].)" (*Ferrer*, *supra*, 184 Cal.App.4th at pp. 879–880.)

In deciding that the trial court did not have the authority to deny a request for a continuance, *Ferrer* relied on two prior decisions of the Courts of Appeal, one of which predated Assembly Bill No. 1273, and one of which postdated it. *Ferrer* said of the former, "In *People v. Ferguson* (1990) 218 Cal.App.3d 1173, 1175–1178, 1183

(*Ferguson*), the case cited in the Assembly Bill No. 1273 legislative history, the trial court refused to continue a trial and dismissed a case due to the prosecution's inability to proceed; the Court of Appeal ruled that the trial court abused its discretion in rejecting the prosecution's request to delay the trial. In codifying the result in *Ferguson*, the Legislature must have understood that it was obligating trial courts to grant continuances where necessary to avoid a dismissal, even in the absence of a showing of good cause." (*Ferrer, supra,* 184 Cal.App.4th at p. 881.)

With respect to the latter case, *Ferrer* observed, "The court in *Henderson* expanded upon the reasoning in *Ferguson* and applied it to the preliminary hearing context. (*Henderson*, *supra*, 115 Cal.App.4th at p. 939.) In *Henderson*, a magistrate dismissed a case after denying the prosecutor's request for continuance of the preliminary hearing. (*Id*. at pp. 928–929.) The court applied sections 1050 and 1050.5 as they read before Assembly Bill No. 1273, but the court discussed the Assembly Bill No. 1273 amendments, which were in place at the time of the decision. *Henderson* concluded that Assembly Bill No. 1273 merely codified existing law and that nothing in section 1050 or section 1050.5 authorized dismissal of the action as a sanction for the prosecutor's failure to show good cause for a continuance. (*Henderson*, at pp. 934–935.)" (*Ferrer, supra,* 184 Cal.App.4th at p. 881.)

Addressing dismissal, the court in *Ferrer* observed, "In *Henderson*, *supra*, 115 Cal.App.4th at p. 929, the direct consequence of the failure to show good cause was denial of the motion for a continuance; it was the prosecution's inability to proceed with the preliminary hearing that resulted in dismissal of the case. Similarly, in *Ferguson*, *supra*, 218 Cal.App.3d at p. 1179, it was the prosecution's inability to proceed with trial that resulted in dismissal of the case. This case is analogous. Although the trial court did not literally dismiss the action as a sanction for the prosecutor's failure to show good cause, it was clear at the time that denial of the request to continue the hearing was likely to lead to dismissal of the case." (*Ferrer, supra,* 184 Cal.App.4th at p. 882.)

Relying on the opinions in *Ferguson* and *Henderson*, and extending the reasoning of those decisions to hearings on motions to suppress, the *Ferrer* court decided, because "it was reasonably foreseeable that denial of the prosecutor's request for a continuance would result in dismissal of the case, we conclude the trial court erred in denying the requested continuance of defendant's section 1538.5 motion." (*Ferrer, supra*, 184 Cal.App.4th at p. 886.)

While we agree with the statutory background set out in *Ferrer*, we do not concur in the opinion's construction of sections 1050 and 1050.5. We explain the basis for our conclusion below.

B. *Authority to Deny a Motion for a Continuance of the Hearing on the Motion to Suppress*

1. Sections 1050 and 1050.5

The language of section 1050 makes clear that the Legislature sought to decrease the granting of continuances in criminal cases. It states, "The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end, the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. Excessive continuances contribute substantially to this congestion and cause substantial hardship to victims and other witnesses. Continuances also lead to longer periods of presentence confinement for those defendants in custody and the concomitant overcrowding and increased expenses of local jails. It is therefore recognized that the people, the defendant, and the victims and other witnesses have the right to an expeditious disposition, and to that end it shall be the duty of all courts and judicial officers and of all counsel, both for the prosecution and the defense, to expedite these proceedings to the greatest degree that is consistent with the ends of justice." (§ 1050, subd. (a).) To that end, section 1050 mandates that

"[c]ontinuances shall be granted only upon a showing of good cause." (§ 1050, subd. (e).)

Section 1050, subdivision (b) (hereafter section 1050(b)) requires a party that seeks to continue a hearing in a criminal proceeding to provide written notice at least two court days before the hearing. If a party fails to comply with section 1050(b), two consequences follow. First, "the court shall hold a hearing on whether there is good cause for the failure to comply with those requirements. . . . If the moving party is unable to show good cause for the failure to give notice, the motion for continuance shall not be granted." (§ 1050, subd. (d) (hereafter § 1050(d).) Second, "a party may make a motion for a continuance without complying with [section 1050(b)]. However, unless the moving party shows good cause for the failure to comply with those requirements, the court may impose sanctions as provided in Section 1050.5." (§ 1050, subd. (c).)

Section 1050 also carves out an exception in subdivision (k), which states that the section "shall not apply when the preliminary examination is set on a date less than 10 court days from the date of the defendant's arraignment on the complaint, and the prosecution or the defendant moves to continue the preliminary examination to a date not more than 10 court days from the date of the defendant's arraignment on the complaint." (§ 1050, subd. (k).)

Finally, subdivision (*l*), added by Assembly Bill No. 1273, provides that section 1050 "is directory only and does not mandate dismissal of an action by its terms." (§ 1050, subd. (*l*) (hereafter § 1050(*l*).)

Section 1050.5, the provision cross-referenced in section 1050, subdivision (c), states in full:

"(a) When, pursuant to subdivision (c) of Section 1050, the court imposes sanctions for failure to comply with the provisions of subdivision (b) of Section 1050, the court may impose one or both of the following sanctions when the moving party is the prosecuting or defense attorney: [¶] (1) A fine not exceeding one thousand dollars

($1,000) upon counsel for the moving party. [¶] (2) The filing of a report with an appropriate disciplinary committee. [¶] (b) The authority to impose sanctions provided for by this section shall be in addition to any other authority or power available to the court, except that the court or magistrate shall not dismiss the case." (§ 1050.5.)

2. Analysis

We now turn to the application of these provisions to the facts here. In so doing, we employ familiar principles of statutory interpretation. " ' " 'When we interpret a statute, "[o]ur fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." [Citation.] "Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." ' " ' " (*Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190.)

At the outset, we observe that section 1050.5 by its terms was not applied in this case. Section 1050.5 sets out sanctions for failure to comply with section 1050(b). Section 1050(b), in turn, codifies the requirement that a motion to continue be made in writing two court days before the hearing. (§ 1050(b).) Here, the trial court did not impose sanctions for the prosecution's failure to make a written motion to continue—instead, the trial court found that the prosecution's request for a continuance was not supported by good cause. At the February 17 hearing, the trial court did not reference

any failure to make a written request but focused instead on the reason for which the officer was not present—namely, the prosecutor's unilateral decision to tell the officer he need not comply with the subpoena so he could interview a witness in an unrelated investigation. The requirement for good cause appears in section 1050, subdivision (e), which is not referenced in section 1050.5.

Therefore, the only basis for the rule announced in *Ferrer* and urged by the Attorney General here—that a trial court may not deny a request to continue a motion to suppress where it is reasonably foreseeable that denial of the continuance would result in dismissal of the case—must be section 1050 itself.

We see no basis in the statutory text for such a rule. Section 1050 states that the section "is directory only and does not mandate dismissal of an action by its terms." (§ 1050(*l*).) The California Supreme Court has described the difference between a directory and mandatory statute: "Traditionally, the question of whether a public official's failure to comply with a statutory procedure should have the effect of invalidating a subsequent governmental action has been characterized as a question of whether the statute should be accorded 'mandatory' or 'directory' effect.
If the failure is determined to have an invalidating effect, the statute is said to be mandatory; if the failure is determined not to invalidate subsequent action, the statute is said to be directory." (*People v. McGee* (1977) 19 Cal.3d 948, 958.)

We understand the use of the characterization "directory" in section 1050(*l*) to mean that the trial court is not *required* to dismiss an action because of a party's failure to comply with section 1050,[4] but it can hardly stand for the proposition that the trial court

[4] Indeed, as early as 1961, the California Supreme Court held that the provisions of section 1050 are not mandatory. "Defendant argues that [section 1050] is mandatory and therefore that since there was an absence of proof in open court that the ends of justice required a continuance, respondent court lost jurisdiction to proceed with the trial of the case. [¶] This contention is devoid of merit, for the reason that section 1050 of the Penal Code, providing for the time for trial of criminal cases, is directory only and

has no authority— for example, under section 1385 (authorizing dismissal of an action on application of the prosecuting attorney, or on the trial court's own motion[5])—to dismiss an action in the first place. If the trial court had no such authority, then there would be no need for the statute to describe dismissal as a directory and not a mandatory consequence of its violation. Similarly, if the Legislature had intended to articulate a rule that a trial court shall not dismiss a matter following a failure to comply with section 1050 as a whole (rather than simply 1050(b), as it did in section 1050.5), it could have done so. It chose not to do so in either section 1050 or 1050.5.

Our interpretation of the relatively straightforward language of section 1050 is also informed by *Ferguson*, *supra*, 218 Cal.App.3d 1173 and *Henderson, supra*,115 Cal.App.4th 922—the two opinions referenced in *Ferrer*—and by the legislative history of Assembly Bill No. 1273, which added subdivision (*l*) to section 1050.

As described above, in *Ferguson* the Court of Appeal considered whether the trial court in that case had the authority to dismiss a felony prosecution when the assigned prosecutor was unavailable for trial and there remained several days under section 1382 for the defendant to be brought to trial.[6] (See *Ferguson*, *supra*, 218 Cal.App.3d at

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contains no provision for the dismissal of a case when its terms are not complied with." (*Malengo v. Municipal* (1961) 56 Cal.2d 813, 816.)

[5] This provision states in relevant part: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading." (§ 1385, subd. (a).)

[6] Section 1382 provides in relevant part, "The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases: [¶]… [¶] (2) In a felony case, when a defendant is not brought to trial within 60 days of the defendant's arraignment on an indictment or information. . . . However, an action shall not be dismissed under this paragraph if . . . [¶] . . . [¶] (B) The defendant requests or consents to the setting of a trial date beyond the 60-day period. In the absence of an

pp. 1176–1177.) The Court of Appeal concluded that the trial court did not have the authority to dismiss the case under section 1382, because there remained time for trial under that provision. (*Ferguson*, at p. 1178.) Turning to other potential sources of authority for the trial court's order dismissing the case, the Court of Appeal concluded that the trial court had abused its discretion under section 1385 because there was probable cause to believe the defendant was guilty and the dismissal served no policy objective because the defendant was out of custody. (*Id*. at pp. 1182–1183.)

In reaching its holding, the Court of Appeal in *Ferguson* rejected the possibility that the trial court had the authority to dismiss the matter under section 1050. The court in *Ferguson* relied upon an earlier decision, *People v. Rubaum* (1980) 110 Cal.App.3d 930 (*Rubaum*). The appellate court in *Rubaum* reasoned that section 1050 should not "control the dismissal" (*Ferguson, supra,* 218 Cal.App.3d at p. 1181) because section 1050 "governs continuances and is based on the premise that criminal proceedings shall be set for trial and heard and determined at the earliest possible time." (*Ibid.*) *Ferguson* adopted *Rubaum*'s conclusion that " '[*s*]*ection 1050 is directory only and does not mandate any dismissal of an action by its terms*.' " (*Rubaum*, *supra*, at p. 935 [italics added].) Because section 1050 is directory and section 1382 is mandatory, section 1382 controls. (*Rubaum*, *supra*, at pp. 934–935.)" (*Ferguson*, *supra*, at p. 1181.)

This italicized language from *Rubaum*, also quoted in *Ferguson*, was added in 2003 by Assembly Bill No. 1273 to section 1050, where it now appears as section 1050(*l*). (Assem. Bill No. 1273 (2003-2004 Reg. Sess.) as amended by the Assembly on May 1, 2003; § 1050(*l*).) Construing the effect of this relatively modest change to section 1050, however, is complicated by language that was originally part of Assembly Bill No.

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express general time waiver from the defendant, or upon the withdrawal of a general time waiver, the court shall set a trial date. Whenever a case is set for trial beyond the 60-day period by request or consent, expressed or implied, of the defendant without a general waiver, the defendant shall be brought to trial on the date set for trial or within 10 days thereafter." (§ 1382, subd. (a)(2).)

1273 and deleted before the legislation's final enactment but which continued to be included in materials describing the effect of the bill. Later courts, including *Henderson*, relied on the description of the omitted language—instead of the actual text of the final bill—in describing the import of Assembly Bill No. 1273.

Henderson, supra, 115 Cal.App.4th 922, the principal case cited by *Ferrer*, rested in part on the legislative history of Assembly Bill No. 1273 in reaching its conclusion that "the trial court has no authority to dismiss an action, even when the People have failed to show good cause for a continuance under section 1050, so long as the requested date for the preliminary hearing is within the statutory time limit established in section 859b.[7]" (*Henderson, supra*, 115 Cal.App.4th at p. 939.) In particular, the court in *Henderson* cited legislative materials that assert that Assembly Bill No. 1273 " 'codifies existing case law which provides that the courts may not dismiss a case due to a failure to meet the good cause requirements for a continuance, before the expiration of the 60–day statutory limit.' " (*Id.* at p. 935.) The court in *Henderson* relied on this language to

[7] Section 859b states in relevant part: "Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in Section 1050, the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later, or within 10 court days of the date criminal proceedings are reinstated pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2. [¶] Whenever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment, plea, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2, and the defendant has remained in custody for 10 or more court days solely on that complaint, unless either of the following occur: [¶] (a) The defendant personally waives his or her right to preliminary examination within the 10 court days. [¶] (b) The prosecution establishes good cause for a continuance beyond the 10-court-day period. [¶] . . . [¶] The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment, plea, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2, unless the defendant personally waives his or her right to a preliminary examination within the 60 days." (§ 859b.)

conclude that "a dismissal is a disfavored and possibly unauthorized remedy" (*id*. at p. 936) "so long as the requested date for the preliminary hearing is within the statutory time limit established in section 859b." (*Id*. at p. 939.)

It is true that this language quoted in *Henderson* appears in the legislative history for Assembly Bill No. 1273. (See Rep. Nakanishi, sponsor of Assem. Bill No. 1273 (2003-2004 Reg. Sess.), Enrolled Bill Mem. to Governor, Oct. 6, 2003.) It is also true that the bill at one point included language in the proposed legislation stating that "The good cause requirement shall not apply to a prosecution or defense motion to continue a felony trial to a date not more than 60 days from the date of the defendant's arraignment on the information, or to a date not more than 10 days from a trial date set following the defendant's waiver pursuant to subparagraph (B) of paragraph (2) of subdivision (a) of section 1382. This exception to the requirement of a finding of good cause is intended to codify existing case law." (Assem. Bill No. 1273 (2003-2004 Reg. Sess.) as introduced on Feb. 21, 2003.)

However, this language was *deleted* from the bill before it was enacted. (Assem. Bill No. 1273 (2003-2004 Reg. Sess.) as amended by the Assem. on May 1, 2003.) The legislative history does not appear to explain why the language was intentionally omitted, but it is clear that it was. The intentional deletion of this language undercuts any conclusion that, in enacting Assembly Bill No. 1273, the Legislature adopted the rule that "courts may not dismiss a case due to a failure to meet the good cause requirements for a continuance, before the expiration of the 60–day statutory limit," as asserted in the materials accompanying the bill. (Rep. Nakanishi, sponsor of Assem. Bill No. 1273 (2003-2004 Reg. Sess.), Enrolled Bill Mem. to Governor, Oct. 6, 2003.) In fact, the Legislative elected *not* to include the language that would have specified this rule.

Confusingly, the description of the bill after its amendment continued to include references to the deleted language. (See Rep. Nakanishi, sponsor of Assem. Bill No. 1273 (2003-2004 Reg. Sess.), Enrolled Bill Mem. to Governor, Oct. 6, 2003.) However,

these summaries of legislative intent, which do not correspond to the bill's final text, do not permit us to ignore the text of the enacted statute.

"A court 'may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed' " in the statutory language. (*Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 171; see also *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 624 [" ' "[t]he rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision" ' "].) *Henderson* and *Ferrer*, which incorporated *Henderson*'s reasoning, appear to have ignored the critical point that the language was deleted from the bill, even though materials accompanying it (erroneously) continued to include it in their bill summaries.[8]

The only language added by Assembly Bill No. 1273 to section 1050 was subdivision (*l*), which we have already concluded does not support the rule that a trial court has no authority to dismiss an action as a consequence of a party's failure to comply with section 1050. Further, the only proceeding expressly excluded from the good cause requirement appears at subdivision (k),[9] which applies to preliminary hearings set fewer than 10 court days from the date of arraignment (§ 1050, subd. (k)) and does not reference motions to suppress.

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[8] The Court of Appeal in *Henderson* acknowledged that "defendant may argue that [Assembly Bill No. 1273] effectively changed existing law" (*Henderson*, *supra*, 115 Cal.App.4th at p. 936) but then asserted "the amendments are entirely consistent with the cases below that show that a dismissal is a disfavored and possibly unauthorized remedy in circumstances such as the one presented here." (*Ibid.*) However, *Henderson* did not acknowledge that the bill in fact deleted both the proposed language most closely tracking the prior cases and the statement that the bill codified existing case law.

[9] This subdivision predated Assembly Bill No. 1273. (See former § 1050 (Stats. 2002, ch. 788, § 1).)

In short, section 1050 does not contain any exceptions referencing either the 60-day trial rule or, critically for this appeal, section 1538.5. " 'Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary.' " (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 635–636.) The legislative history makes clear that the Legislature explicitly declined to expand the list of hearings falling outside the section 1050 good cause requirement beyond the 10-day preliminary hearing. Under these circumstances, we decline to add an exception for hearings on motions to suppress under section 1538.5.

Further, as noted above, section 1050.5, as enacted by the Legislature in Assembly Bill No. 1273, does *not* state that a court may not dismiss a case following a party's failure to comply with section 1050 generally. It precludes dismissal for failure to comply with section 1050(b)—the requirement that the motion to continue be timely filed in writing. (§ 1050.5, subd. (a) ["When, pursuant to subdivision (c) of Section 1050, the court imposes sanctions *for failure to comply with the provisions of subdivision (b)* of Section 1050 . . . ."], italics added.) The limited scope of section 1050.5's restriction on a trial court's authority to dismiss an action for failure to comply with section 1050(b) further supports a conclusion that a trial court must otherwise possess that authority. In its analysis, *Ferrer* overlooked this limitation. As the trial court here did not rely on the lack of a written motion to continue to deny the requested continuance, section 1050.5's restriction on dismissal was not triggered.

For the reasons stated above, we find no statutory support in either section 1050 or section 1050.5 for the rule announced in *Ferrer.* We are not called on here to determine whether *Henderson* (which applied the earlier rule announced in *Ferguson* to the context of preliminary hearings) was correctly decided. Indeed, it bears noting that while *Ferrer* relied on *Ferguson* and *Henderson,* those cases analyzed a different question. Neither *Ferguson* nor *Henderson* considered the propriety of the denial of a continuance.

Instead, both examined whether the trial court had erred in dismissing the case after the denial of a continuance and found error based in part on section 1385. (*Ferguson*, *supra*, 218 Cal.App.3d at pp. 1179–1180; *Henderson*, *supra*, 115 Cal.App.4th at p. 929.) By contrast, *Ferrer* concluded that the trial court lacked the authority to deny a continuance based on the strained statutory construction of sections 1050 and 1050.5 we now reject. Because neither case directly addressed the trial court's authority to grant a continuance, we conclude that *Ferguson* and *Henderson* do not support the rule announced in *Ferrer*.

Furthermore, unlike the rules announced in *Henderson* and *Ferguson*, which in practice preclude the trial court from denying a motion for continuance of a trial or preliminary hearing if there remains time left under the statutes dictating the timing of those proceedings, the *Ferrer* rule poses distinctive difficulties in application. Under *Ferguson* and *Henderson*, the trial court need only consult the last day for trial or preliminary hearing when deciding whether it must continue the case to avoid ordering an unauthorized dismissal. (See §§ 1382, 859b.)

By contrast, section 1538.5 does not set out a single timeline by which the defendant must bring a motion to suppress. (See § 1538.5, subds. (h) & (i).) Therefore, the trial court cannot determine the consequence of denying a continuance request by consulting a calendar. Instead, under the *Ferrer* rule, the trial court must assess whether "it [is] reasonably foreseeable that denial of the prosecutor's request for a continuance [will] result in dismissal of the case." (*Ferrer*, *supra*, 184 Cal.App.4th at p. 886.)

The case at hand illustrates the difficulties with this standard. When the trial court first denied the continuance, the prosecutor indicated he believed he could still go forward with the case. The People would likely have relied upon evidence other than Brown's statements, such as the officer's observations, and his training and experience with the crime and the location. Moreover, there is a suggestion in the record that Brown had a prior conviction for the same offense, which might have been admissible. Nevertheless, at the following hearing (and presumably after having read *Ferrer*), the

prosecutor reversed course and asserted that the denial of the continuance would result in dismissal. The trial court credited the latter representation, and it is hard to see how it could have made any independent assessment of the strength of the People's evidence.

Consequently, even though the language of section 1050 states it "shall be the duty of all courts and judicial officers . . . to expedite [criminal] proceedings to the greatest degree that is consistent with the ends of justice" (§ 1050, subd. (a)), the *Ferrer* rule delegates the trial court's management of its own criminal calendar to a party seeking a delay and who by definition has failed to meet the good cause standard required by the statute. In this case, for example, the prosecutor elected to release the officer from a subpoena to conduct an interview without first consulting the court and opposing counsel and without asking the officer to remain on standby in the event the court or opposing counsel objected. It is hard to imagine how any court could find good cause under those circumstances.

For these reasons, we decline to follow the rule announced in *Ferrer*. We hold that if the trial court finds that the request for a continuance of a motion to suppress lacks good cause, the court has the authority to deny the requested continuance for lack of good cause under section 1050, subdivision (e), even if this decision may foreseeably result in a dismissal of the matter for lack of evidence.[10] We leave the decision whether to grant

[10] We reject the Attorney General's contention that this holding contravenes the California Constitution's bar on the exclusion of evidence in criminal cases except where that evidence was obtained in violation of a defendant's Fourth Amendment rights. (See Cal. Const., art. I, § 28, subd. (f)(2); *In re Lance W.* (1985) 37 Cal.3d 873, 890.) A warrantless search is presumptively a violation of the Fourth Amendment, and the government bears the burden of establishing an exception to the warrant requirement. (*People v. Williams* (1999) 20 Cal.4th 119, 130, 136–137.) If the government concedes (as it did here) that it acted without a warrant and is unable or unwilling to elicit any evidence supporting a legal justification for that action at the hearing on a motion to suppress, then the trial court may properly decide that the government has not carried its burden, conclude the defendant's Fourth Amendment rights were violated, and grant the motion.

or deny a continuance request to the sound discretion of the trial court, using the standards set out in sections 1050 and 1050.5, and exercising its judgment and experience in light of the particular circumstances before it.

The Attorney General does not contend that the trial court erred here in its finding that the prosecutor's continuance request lacked good cause or that it abused its discretion in denying the continuance. Since *Ferrer* provided the sole basis for the trial court's reversal of its decision to deny the continuance request, we reverse the judgment. We order the trial court to reinstate its original orders denying the prosecution's request for a continuance and granting Brown's motion to suppress. We decline Brown's further suggestion that we order the trial court to dismiss the case. We leave it to the trial court—with the consultation of the parties—to determine the appropriate course of action following reinstatement of the trial court's original orders.

III. DISPOSITION

The judgment is reversed and remanded for further proceedings. The trial court is ordered to reinstate its orders denying the prosecution's request for a continuance and granting Brown's motion to suppress.

_____
Danner, J.

WE CONCUR:

_____
Elia, Acting P.J.

_____
Grover, J.

H048462
People v. Brown

Trial Court: County of Santa Clara

Trial Judge: Hon. Jesus Valencia, Jr.

Counsel: William Robinson, by appointment of the Court of Appeal under the Sixth District Appellate Program, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, Seth K. Schalit, Supervising Deputy Attorney General, Bridget Billeter, Deputy Attorney General for Plaintiff and Respondent.

EXHIBIT 2
Modified Opinion
(filed October 5, 2021)

Filed 10/5/21

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAJAH BROWN, Defendant and Appellant.	H048462 (Santa Clara County Super. Ct. Nos. C1646856, 17AP002184) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on September 21, 2021, be modified as follows:

1. On page 2, footnote 2, delete "which was the basis of Brown's guilty plea." Footnote 2 should read:

   These facts are taken from the police report.

2. On page 5, replace "On March 20, Brown pleaded guilty" with:

   On March 20, Brown waived her right to a jury trial and agreed the case could be tried by the court based upon the submission of the police report (See *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 602–604.) The trial court convicted Brown of loitering with the intent to commit prostitution (§ 653.22, subd. (a)).

There is no change in the judgment.

Dated: _____

_____
Elia, Acting P.J.

_____
Grover, J.

_____
Danner, J.

H048462
People v. Brown

EXHIBIT 3
Modified Opinion
(filed October 12. 2021)

FILED 10/12/21

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAJAH BROWN, Defendant and Appellant.	H048462 (Santa Clara County Super. Ct. Nos. C1646856, 17AP002184) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on September 21, 2021, and modified by order on October 5, 2021, be further modified as follows:

1. On page 21, replace the first full paragraph, beginning "The Attorney General does not contend," with the following:

   The Attorney General does not contend that the trial court erred here in its finding that the prosecutor's continuance request lacked good cause or that it abused its discretion in denying the continuance. Additionally, as raised for the first time in a joint petition for rehearing, Brown and the Attorney General agree that the admission of Brown's statements and other evidence for decision pursuant to *Bunnell v. Superior Court* (1975) 13 Cal.3d 592 was not harmless beyond a reasonable doubt. We accept the parties' assessment of prejudice resulting from the admission of evidence that should have been suppressed.

Since *Ferrer* provided the sole basis for the trial court's reversal of its decision to deny the continuance request, and the subsequent admission of evidence prejudiced Brown, we reverse the judgment. We order the trial court to reinstate its original orders denying the prosecution's request for a continuance and granting Brown's motion to suppress. We decline Brown's further suggestion that we order the trial court to dismiss the case. We leave it to the trial court—with the consultation of the parties—to determine the appropriate course of action following reinstatement of the trial court's original orders, including possible retrial within the time limits set by section 1382.

2. On page 21, delete the Disposition paragraph and replace it with the following:

The judgment is reversed and remanded for further proceedings consistent with this opinion, including for possible retrial. The trial court is ordered to reinstate its orders denying the prosecution's request for a continuance and granting Brown's motion to suppress.

This modification changes the judgment. Brown's and the Attorney General's joint petition for rehearing is denied.

Dated: _____

_____
Elia, Acting P.J.

_____
Grover, J.

_____
Danner, J.

H048462
People v. Brown

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Brown** No.: **H048462**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On November 19, 2021, I electronically served the attached **PETITION FOR REVIEW** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on November 19, 2021, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Sixth District Appellate Program
servesdap@sdap.org

William M. Robinson
Senior Staff Attorney
Sixth District Appellate Program
bill@sdap.org

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
DCA@dao.sccgov.org

County of Santa Clara
Criminal Division - Hall of Justice
Superior Court of California
Attention: Criminal Clerk's Office
191 North First Street
San Jose, CA 95113-1090 (via U.S. mail)

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 19, 2021, at San Francisco, California.

B. Wong
Declarant

/s/ B. Wong
Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **People v. Dajah Brown**
Case Number: **TEMP-QSH6PDW4**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **bridget.billeter@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR REVIEW	Brown, H048462

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

11/19/2021
Date

/s/Beverly Wong
Signature

Billeter, Bridget (183758)
Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General
Law Firm