Supreme Court No. S271877

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **DAJAH BROWN**, Defendant and Appellant.

(Sixth Dist. No. H048462; Santa Clara County Nos. AP002184, C1646865)

APPELLANT'S BRIEF ON THE MERITS

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ISSUE ON REVIEW

Did the trial court err in granting the People's motion under Penal Code section 1050 to continue the hearing on a motion to suppress evidence, when it was reasonably foreseeable that denying the continuance would result in a dismissal of the case but the People otherwise failed to show good cause for a continuance?[1]

SUMMARY OF ARGUMENT

In the present case, this Court will resolve a split within the lower courts on an issue which has troubled the trial courts for some time. In *People v. Ferrer* (2010) 184 Cal.App.4th 873 ("*Ferrer*") Division 5 of the First District concluded that Penal

1. From "Issues Pending Before the California Supreme Court in Criminal Cases," found at https://www.courts.ca.gov/documents/JUL0122crimpend.pdf .

Code section 1050[2], as interpreted by prior cases and as amended by Assembly Bill No. 1273 (2003–2004 Reg. Sess., Stats. 2003, ch. 133, § 1, hereafter "AB 1273"), compelled a conclusion that a trial court was precluded from denying a prosecutor's request – made without good cause – for a continuance of a motion to suppress pursuant to section 1538.5 if it is "reasonably foreseeable that [such denial] would result in dismissal of the case."

The Court of Appeal in the present case, following the lead of a concurring judge in the Appellate Division decision in the same case, disagreed with *Ferrer*, concluding, after review of the same case law and legislative history, that a trial court had discretion to deny a "no good cause" continuance request even if, based on a granting of the motion to suppress, dismissal was a likely consequence. The court ordered reversal of the judgment below in which the trial court had reversed its own prior order denying a last-minute, no-good-cause continuance request by the prosecutor and granting a motion to suppress, and granted the continuance request under compulsion of *Ferrer*. (*People v. Brown* (2021) 69 Cal.App.5th 15, *passim* (*"Brown*").)

Appellant submits that a careful review of the decision in the present case and *Ferrer*, as well as the briefing by the parties in this case, should persuade this Court that *Ferrer* got it wrong and the unanimous opinion in the present case got it right. First, as explained in Part B-1 below, and as the opinion in the present case makes clear, neither section 1050, the 2003 amendments,

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2. Statutory references are to the Penal Code if not otherwise specified.

nor a careful review of pertinent case law suggests that the Legislature intended to preclude a trial court, in the sound exercise of its discretion, from denying a no-good-cause continuance request by the prosecutor with respect to a section 1538.5 hearing because of the prosecutor's representation that such a denial would result in dismissal of the case.

As the Court of Appeal opinion carefully explains, *Ferrer* and *People v. Henderson* (2004) 115 Cal.App.4th 922 ("*Henderson*"), which it purported to follow, misinterpreted the 2003 amendment to section 1050 as compelling such a result based in significant part on these courts' reliance on language in the legislative history of this amendment referencing a provision of the proposed amendment which was deleted from the bill in the version enacted by the Legislature.

The pertinent actual language added to section 1050 – "This section is directory only and does not mandate dismissal of an action by its terms . . ." (§ 1050, subd. (l) – did nothing more than confirm prior case law holding that a court facing a no-good-cause continuance request was not *required* to dismiss a case in this situation, but cannot be fairly read to restrict a court, in the sound exercise of discretion, from denying a no-good-cause continuance in these circumstances simply because dismissal of the case is a possible consequence of such a denial.

Second, as developed in Judge Saban's excellent concurrence in the Appellate Division opinion, and expanded upon in both the Court of Appeal opinion and the discussion in Part B-2 below, even if section 1050 and controlling case law require, as

pre-*Ferrer* cases like *People v. Ferguson* (1990) 218 Cal.App.3d 1173 and *Henderson*, *supra*, 115 Cal.App.4th 922 hold, precluding a trial court from denying a no-good-cause continuance of trial or preliminary hearing which will result in dismissal of a case, *Ferrer* erred by improperly expanding this rule to the context of a pretrial motion to suppress under section 1538.5. *Ferrer* unwisely expands the scope of the rule by unjustifiably limiting a trial court's ability to control its own calendar and requiring a trial court to accept the prosecutor's representation as to whether dismissal is likely, leading to the potential for the kind of gamesmanship which the prosecutor in the present case appears to have engaged in with respect to its assessment of the likelihood of dismissal. Moreover, the *Ferrer* rule unfairly restricts a trial court's authority to control its own calendar, and unfairly disadvantages defendants, as compared to the prosecution, who are seeking timely settlement of their pending charges.

The Government's opening brief in this Court contends that it was the Court of Appeal in the present case, and not prior opinions which it criticizes, which got it wrong in terms of the proper interpretation of section 1050 and its legislative history. According to respondent, both case law and the 2003 amendments to section 1050 establish the principle that a no-good-cause continuance request for a prosecutor cannot be the basis for dismissal of a case, and *Ferrer* correctly applied this principle to motions to suppress.

Respondent's interpretation of this point is untenable. As the opinion below carefully explains, nothing in the legislative

history of the amendments meaningfully alters a plain language interpretation of subdivision (l) of section 1050, which simply holds that dismissal is not *mandated* by a no-good-cause continuance request, but in no conceivable sense *precludes* this as a possibility *except* in the single situation specified by the Legislature in which dismissal is precluded, namely, a no-good-cause request for continuance of a preliminary hearing within the statutory 10-day period. (Opin. at 11-18; *Brown*, *supra*, 69 Cal.App.5th at pp. 25-32.)

Finally, respondent's proposed alteration of the *Ferrer* court's unworkable standard, which directs a trial court to determine whether it is reasonably foreseeable that the prosecution will be unable to proceed if a continuance is denied, with a new rule, requiring granting of a no-good-cause prosecutorial request for continuance of a section 1538.5 hearing where "the prosecutor expresses an inability to proceed to trial . . .", is a solution that is worse than the problem. The *Ferrer* standard, despite its flaws, discussed in the Court of Appeal opinion. and herein, at least gives a trial court authority to independently assess, based on the facts before it, whether a dismissal is really likely or whether, as in the present case, it is simply a matter of the prosecution not choosing to go forward with a weaker case without the evidence sought to be suppressed.

As summarized above and developed below, *Ferrer* was wrongly decided and should be disapproved by this Court. In the context of a pretrial section 1538.5 motion, nothing in the language or spirit of section 1050 or any other statutory

provisions precludes a trial court from denying the kind of last-minute, no-good-cause continuance request by the prosecution simply because the upshot of such a denial – an order directing suppression of evidence as sought by the defense – could likely lead to the prosecution deciding not to proceed further with the case.

Statement of the Case

On July 13, 2016, a Notice to Appear was issued to appellant Dajah Brown for a misdemeanor violation of section 653.22, loitering for the purposes of prostitution. (CT 1) Arraignment was waived on December 22, 2016. (CT 15)

On January 19, 2017, appellant, through appointed counsel, filed a motion to suppress evidence pursuant to section 1538.5, alleging that the detention and arrest of Ms. Brown violated the Fourth Amendment, and seeking suppression of the fruits of this unlawful seizure. (CT 16-20) The Government filed an opposition on February 9, 2018, contending that the encounter between appellant and arresting Officer Yasin was consensual, that, alternatively, there was a reasonable suspicion of criminality sufficient to justify a detention, and that there was probable cause for an arrest. (CT 21-29)

At an initial hearing of February 17, 2017, the arresting officer failed to appear. The prosecution's oral motion to continue the motion was denied, and the court granted the motion to suppress. (CT 31) Thereafter, on March 2, 2017, the prosecution filed a motion to reconsider the ruling granting the suppression motion, citing, *inter alia*, *People v. Ferrer*, *supra*, 184 Cal.App.4th

873, for the proposition that a trial court cannot refuse to grant a continuance of a section 1538.5 motion to the prosecution where the result of such refusal is tantamount to a dismissal of charges, even when there is no showing of good cause for the continuance. (CT 32-44)

On March 17, 2017, the trial court, by the Honorable Jesus Valencia, Jr., granted the motion for reconsideration. The court then heard evidence from Officer Yasin and from appellant Dajah Brown, after which it issued an order denying the motion to suppress. (CT 57)

On March 20, 2017 appellant entered a "slow plea" or "*Bunnell* submission" to the charged offense.[3] Prior to the submission, the court provided an indicated disposition of the case: three years of probation, with no custody time, and a stay away order from the location where the incident took place. Following the submission, the court found the defendant guilty of the charge of loitering with intent to engage in an act of prostitution. (CT 58; 2RT 302-306) The court then imposed judgment as it had indicated. (CT 58; 2RT 306-308)

Following a timely notice of appeal, the appellate division, applying *Ferrer*, affirmed the judgment. (App. Div. Opn. 5) However, a concurring opinion authored by Judge Saban

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3. "A *Bunnell* submission, or 'slow plea,' is a bargained-for submission to the court on the preliminary hearing transcript [or, here, on police reports], unaccompanied by defendant's testimony or argument of counsel." (*People v. McCoy* (1992) 9 Cal.App.4th 1578, 1581, fn. 2, citing, e.g., *Bunnell v. Superior Court* (1975) 13 Cal.3d 592 and *People v. Wright* (1987) 43 Cal.3d 487, 495.)

explained her reasons for disagreeing with the holding in *Ferrer*, urging the Court of Appeal to reconsider and disagree with the holding in that case. (See App. Div. Opn., sep. conc. opn of Saban, J., *passim*.)

The Court of Appeal granted appellant's petition to transfer the case. (Cal. Rules of Court, rule 8.1006.) In a unanimous published opinion, the Court of Appeal reversed, expressly rejecting the holding in *Ferrer*. The opinion below specifically disagreed with that court's "construction of sections 1050 and 1050.5," holding to the contrary 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. at 20; *Brown*, *supra*, at p. 32.)

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. (Oct. 12, 2021, order modifying opn.)

Statement of .the Facts[4]

Prosecution Evidence.

At about 11 p.m. on the night of July 13, 2016, San Jose Police Officer Nader Yasin was patrolling in a marked police vehicle in the area of First and Humboldt Street in San Jose, looking for prostitution activity, which is common in that area. (1RT 15-16, 18, 21) Yasin, who was qualified as an expert on prostitution (1RT 17-18), noticed, from about fifty feet away, that two females were standing around, about five feet apart, not interacting with each other; each woman appeared to be looking up and down the street as if they were monitoring vehicular traffic, which led Yasin to conclude they were potentially prostitutes soliciting customers, and not in a social encounter with each other. (1RT 22-24, 26) Yasin did not see either woman hailing cars or persons who were passing by. (1RT 37-38)

Yasin observed that when the two women noticed his patrol car, they looked at each other, then walked away in opposite directions, one to the west, the other to the east. (1RT 25) Yasin decided to follow after one of the two women, whom he identified in court as appellant Dajah Brown. (1RT 27-28) Appellant

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4. Except where otherwise noted, the facts are those adduced at the hearing of the renewed section 1538.5 hearing of March 17, 2017. (1RT *passim*) Although respondent's brief omits a summary of the facts, they are included here as they are pertinent to an important side-issue in the case, whether the prosecutor was really unable to proceed in the case without the suppressed evidence, or simply opted to take advantage of the *Ferrer* rule, a factor which highlights the unworkability of the *Ferrer* standard.

walked west, then north, then west again, ending up near the corner of Goodyear and Almaden. (1RT 28-29) Yasin parked his patrol car on the northeast corner, got out, and walked slowly toward appellant, asking her something like, "How's it going?" or "Can I talk to you?" (1RT 29-31) Appellant was friendly and responsive to Yasin. (1RT 32)

Appellant's clothing that night, depicted in People's 1, a photograph of her taken by Yasin, consisted of a one-piece black and white outfit, with her upper chest and thighs exposed; she was wearing high heels and no socks. Yasin characterized this outfit as the kind of typical provocative clothing worn by prostitutes. (1RT 33-34)

According to the prosecutor's summary of the facts, Yasin and appellant "conversed about prostitution." Defendant acknowledged being in the area for prostitution purposes, but indicated she had not had any dates. Based on his training and experience, Officer Yasin recognized the term 'dates' as meaning a prostitution engagement. Officer Yasin then asked Defendant how many condoms she had in her possession. Defendant indicated she had four and produced them to the officer. (CT 22)

In Officer Yasin's police report, which is included in the record, he states that he "asked [Suspect Brown] how many 'dates' she has had, she replied she had not had any dates." (CT 6) It also describes him asking "Suspect Brown how many condoms she had on her . . ." and Brown replying "that she had four condoms . . ."; Yasin asked her "to produce them, which she did . . ", placing them "on my patrol car's hood" at Yasin's "request." He

then read her the *Miranda* rights, and she admitted loitering for prostitution, after which he issued appellant a citation and released her. (CT 7)

"Based on his training, experience, and observations, Office Yasin believed Defendant was loitering in the area for prostitution and issued her a citation." (CT 22)[5]

ARGUMENT

A Trial Court Has Discretion Under Section 1050 to Deny a Prosecutor's No-Good-Cause Request to Continue the Hearing of a Section 1538.5 Motion Even When Such Denial Could Result in the Prosecutor Deciding to Dismiss the Underlying Criminal Charge. *Ferrer*, Which Precluded Such a Denial, Should be Disapproved.

A. Procedural Background.

1. The Scheduled Hearing, Denial of the Oral Continuance Motion, and Initial Order Granting the Motion to Suppress.

On January 19, 2017, counsel for appellant noticed a motion to suppress evidence under section 1538.5, which was calendared for February 17, 2017 at 1:30 p.m. (CT 16) The prosecution filed an opposition on February 9, 2017, which indicated the same date and time for the suppression motion. (CT 21) No written request for continuance of said hearing was ever filed by the Government.

At the time and date scheduled for the hearing, the prosecutor advised the court that it "unfortunately" had to ask for a

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5. Defendant Brown also testified at the hearing. (See RT 42-53.) Her testimony is not summarized here as it is not pertinent to any issues before this Court.

continuance because "Officer [Yasin[6]], who happens to now be in the . . . gang task force . . . informed me he was the only one who could interview a percipient witness in a shooting . . . at 1:00." The prosecutor added that he told the officer "it would be okay for him to do that . . .", and requested a continuance of the suppression hearing on behalf of the prosecution. (1Aug RT 4) Defense counsel objected that there was no showing of good cause under section 1050. (1Aug RT 5)

The court took exception to the prosecutor's action of taking it upon himself to tell a subpoenaed witness that he did not need to attend the hearing, found a lack of good cause, and denied the request for a continuance. (1Aug RT 5-6) The court suggested that the prosecutor attempt to reach the witness and secure his appearance. (1Aug RT 6)

Following a recess, the prosecutor, without stating whether he had been able to contact the officer, stated, "I don't think this is a day where the officer will be returning to court . . .", and again sought to have the court make a finding of good cause, which was opposed by defense counsel. (1Aug RT 6-8) The court then reiterated its ruling that there was no good cause. "If we allow any party to excuse witnesses or other necessary parties to the proceeding, . . . it is not a workable alternative. I don't see good cause." The court opined that the police could have found other ways to interview the witness, concluding, "I am not satisfied, or I don't believe whatever it is that the officer is doing

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6. The name is misspelled in the record as "Uscene" (1Aug RT 4).

is so indispensable that it requires his absence from these proceedings." (1Aug RT 8-9)

The prosecutor then advised the court that "the People are unable to proceed at this time." (1Aug RT 9) Initially, the court responded by indicating that "the matter is dismissed." (1Aug RT 9-10) After further discussion between the court and counsel, it was agreed that the order granting the motion to suppress meant that all statements made by appellant Brown, both before and after the *Miranda* advisements, were to be suppressed. (1Aug RT 10-12) The prosecutor then suggested there was a possibility the Government could proceed with its case without the suppressed evidence, advising the court that "a lot of the evidence from this case was obtained by . . . observation from the police officer before any contact with the defendant . . .", and asked the court to set a trial date so that the prosecution could consider whether it was able to proceed. (1Aug RT 12) The court then set the matter for a readiness hearing on March 2, 2017, and for a trial on March 6, 2019. (1Aug RT 12-13)

2. The Prosecution's Reconsideration Motion and the Court's Ruling.

On March 2, 2017, the prosecution filed a motion to reconsider the rulings on the continuance request and the suppression motion, stating, for the first time, that the Government is "unable to proceed with this case." (CT 34) The prosecution based its motion on the authority of *People v. Ferrer*, *supra*, 184 Cal.App.4th 873, contending that under that case, the court was prohibited from denying a continuance, even with no showing of

good cause, where the likely result of such a denial was the dismissal of a criminal charge. (CT 34-43)

At the readiness hearing of the same date, the court advised counsel that it believed it was bound by *Ferrer*, issued a tentative ruling granting reconsideration of its order suppressing evidence, and set the case for a motion to suppress hearing on March 17, 2017, while allowing defense counsel to file opposition papers with respect to the reconsideration motion. (2Aug RT 303-305, 308)

Thereafter, defense counsel filed an opposition to the reconsideration motion, arguing that the court lacked jurisdiction to reconsider an order granting suppression of evidence under section 1538.5 except in narrow circumstances which were not present in this case. (CT 46-49) At the hearing of the motion on March 17, 2017, following argument of counsel, the court held it was bound by *Ferrer* and, notwithstanding the lack of good cause for a continuance, concluded that the prosecution should have been granted a continuance. The court then vacated its previous order denying the continuance and granting the section 1538.5 motion. (1RT 12-13) Thereafter, following a full hearing, the court denied the motion to suppress. (CT 57)

B. *Ferrer* Was Wrongly Decided and Should Be Disapproved. A Trial Court Retains Discretion to Deny a Last-Minute Motion to Continue a Section 1538.5 Hearing, Made Without Good Cause, Even if the Potential Consequence of Such Denial Could Be Dismissal.

1. The Court of Appeal Correctly Concluded that Section 1050 Does Not Preclude a Trial Court, in the Exercise of Its Discretion, From Denying a Prosecutor's No-Good-Cause Continuance Request Except in the Statutorily Limited Situation of a Preliminary Hearing.

The unanimous Court of Appeal opinion provides this Court with a template for rejecting the holding in *Ferrer* and resolving the issue before the Court.

The opinion's discussion begins with a detailed summary of the holding in *Ferrer*, which, purporting to follow the holdings in *Ferguson*, *supra*, 218 Cal.App.3d 1173, and *Henderson*, *supra*, 115 Cal.App.4th 922, reasoned that a trial court lacked authority to deny a prosecutor's motion to continue a section 1538.5 hearing made without good cause where the denial was likely to lead to dismissal of the case. (Opin. at 7-9; *Brown*, *supra*, 69 Cal.App.5th at pp. 21-23.) The opinion then turns to the language of sections 1050 and 1050.5, noting the Legislature's mandating of a "good cause" requirement for continuances, and strict procedures for enforcing this requirement, were part of an effort to "decrease the granting of continuances in criminal cases." (Opin. at 9-10; *Brown* at 23-24.) Looking more specifically to the language of subdivision (b) of section 1050 ("section 1050(b)"), the opinion notes the express requirement for written notice at least two days before a hearing, and a requirement of good cause for a failure to give

such notice, without which there is a mandatory rule that "'the motion for continuance shall not be granted . . .'", with a further provision permissively allowing the court to impose sanctions under section 1050.5 for a failure to show good cause for the failure to comply with the notice requirements. (Opin. at 10, *Brown* at p. 24, quoting § 1050(b).)

The opinion then references two further provisions of section 1050, subdivision (k), which creates an evenhanded *express* exception to the good cause requirement of section 1050, stating that it "'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." (*Ibid*., quoting § 1050, subd. (k).)

Finally, the opinion references subdivision (l), added by AB 1273, which "provides that section 1050 'is directory only and does not mandate dismissal of an action by its terms.' (§ 1050, subd. (l) (hereafter § 1050(l).)" (*Ibid*.)

The opinion then summarizes the "sanctions" provisions of section 1050.5 – which it later concludes, as discussed below, has no applicability to the present case because no sanction was imposed – including a provision, in subdivision (b) of section 1050.5, that "[t]he authority to impose sanctions provided for in 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." (Opin. at 10-11, *Brown*, *supra*, at p. 24.)

The opinion then ably summarizes the controlling principles of statutory interpretation applicable herein, quoting this Court's opinion in *Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190.

> 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.

(Opin. at 11, *Brown*, *supra*, at p. 25, internal citations and quotations omitted.)

The opinion begins its analysis by noting an obvious point, undisputed by Respondent in its brief: that "section 1050.5 by its terms was not applied in this case . . ." because there was never any announced intention to impose sanctions against the prosecution for its failure to comply with the notice and good cause requirements of section 1050.5. (Opin. at 11-12, *Brown*, *supra*, at

p. 25.) As the opinion makes clear, the denial of a continuance in the present case was based solely on the lack of good cause as manifested by "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." (*Ibid.*; see 1Aug RT 5-6, 8-9, summarized above.)[7]

The opinion then turns to a careful review of the applicable provisions of section 1050, with careful analysis explaining how the *Ferrer* court's flat prohibition of denial of a continuance of a section 1538.5 motion if there is a likelihood that the prosecution will not go forward is unsupportable.

> 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

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7. That sanctions under section 1050.5 had no bearing in the present case is further demonstrated by the trial court's express determination, following its order granting reconsideration of the denial of the continuance, that it would not impose monetary sanctions against the prosecutor under section 1050.5, based on the court's conclusion that the prosecutor had not acted in bad faith. (2Aug. RT 304-305.)

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, but it can hardly stand for the proposition that the trial court 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) – 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.

(Opin. at 12-13, *Brown*, *supra*, 69 Cal.App.5th at p. 25-26.)

The opinion then carefully analyzes the opinions in *Ferguson*, *supra*, 218 Cal.App.3d 1173, and *Henderson*, *supra*, 115 Cal.App.4th 922, which both the *Ferrer* opinion and respondent herein rely on, as well as the legislative history of AB 1273 to show how the *Ferrer* rule is unsupportable, and to explain why, under a proper interpretation of section 1050, a trial court has authority to deny a no-good-cause continuance even if dismissal of the case my result. Based on its thorough and careful analysis, it is quoted at length below.

> [I]n *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. (See *Ferguson*, *supra*, 218 Cal.App.3d at 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. 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.[ ]" (*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 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.

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), 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.

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*.

(Opin. at pp. 13-19, footnotes omitted; *Brown*, *supra*, 69 Cal.App.5th at pp. 26-30.)

Respondent in its brief in this Court contends that the foregoing detailed analysis by the Court of Appeal misreads the legislative history to reach this conclusion. According to respondent, even with the deletion of the portion of the proposed amendment to which the legislative analysis relied upon by the courts in

Henderson and *Ferrer*, prior case law still controlled and had the effect of "barring dismissal as a remedy for a good cause violation." (See Respondents Opening Brief on the Merits ("ROBM") at 32-36.) It is respondent who misreads these earlier cases. As explained in the Court of Appeal opinion quoted above, these older cases stand only for the rule ultimately enacted as section 1050(l), which provides that the good cause provisions do not *mandate* dismissal when violated, but in no way limits a court from dismissing a case in the exercise of its discretion for a violation of the good cause requirements.

Put into the context of the present case, and assuming that the trial court was not bound by *Ferrer*, as it ultimately determined it was when it granted the prosecutor's reconsideration request, the trial court was not obligated to either deny the no-good-cause continuance or to dismiss the case. Under a proper interpretation of section 1050, the court retained discretion to either grant a continuance, despite the absence of good cause – and perhaps sanction the prosecutor under section 1050.5 – but also had discretion to deny the continuance based on the prosecutor's action of telling the police witness not to show up despite his subpoena.

Ignored by respondent in all its discussion of the present case is that the trial judge in this case did not promptly impose a draconian solution – here, granting the suppression motion – until it gave the prosecutor a chance to undo its breach of protocol and procure the appearance of the witness following a recess. It was only after the prosecutor was unable to comply with this

fairly simple request – telling the court "I don't think this is a day where the officer will be returning to court" (1Aug. RT 6) – which would have resolved the matter, that the court reiterated its prior finding of no good cause. (1Aug. RT 8-9)

Also ignored by respondent is the fact that the record strongly suggests that the Government could have gone forward with the prosecution of appellant for solicitation of prostitution, albeit with a weakened case, without the suppressed statements and evidence. While granting of the motion precluded introduction of Ms. Brown's admissions to the officer that she was soliciting prosecution, and the physical evidence of condoms in her pocket, the record demonstrates there was arguably enough evidence to go forward with a weaker case. As noted above, the prosecutor told the court even *after* the continuance was denied, that he believed he could possibly proceed with the case despite the fact that the motion to suppress had been granted because "a lot of the evidence in this case was . . . obtained by . . . observation from the police officer before any contact with the defendant." (1Aug.RT 12:11-14) Indeed, prior to Ms. Brown's admissions about seeking "dates" and possessing condoms, Officer Yasin saw her loitering in a flimsy outfit with another apparent prostitute, looking at cars and not interacting with the other woman, and observed her quickly walking away when she noticed him in his police vehicle. (See CT 6 [police report]; see also 1RT 22-26, 37-38) Put together, this evidence went a long way toward proving her guilt for the charged crime of soliciting prostitution. But for *Ferrer*, it is fair to conclude that the prosecutor's change-of-tune

avowal that he would not be able to proceed might not have been made.

In this manner, the present case illustrates how the *Ferrer* rule, which strictly prohibits denial of a prosecutor's no-good-cause continuance request with respect to a motion to suppress hearing based on a prosecutor's representation that they cannot go forward with a case – has the potential to give rise to games-manship by the prosecution. In the present case, involving a truly victimless crime of soliciting prostitution, the prosecution initially advised the court of its option to go forward with the case without the suppressed evidence. (See 1Aug. RT 12.) It is fair to infer that at this point in time, the prosecutor was unaware of *Ferrer*; and that only later, when the prosecutor discovered the *Ferrer* rule and prepared the motion for reconsideration, that the prosecutor changed his tune and told the court he could not go forward with the weaker case, and that dismissal would be the result of the court's denial of a continuance and consequent granting of the suppression motion. (See CT 34: "the People are unable to proceed with this case".) It is not unreasonable to infer from this procedural history that if the *Ferrer* rule did not exist, the present case would have gone forward as a weaker case, or been resolved without trial, even with the denial of the contin-uance, and it was only the existence of the draconian *Ferrer* rule, and its binding effect on the trial court, that led the prosecutor to state that he could not go forward with a weaker case.

In an earlier part of its brief, respondent contends that the Court below erred by failing to recognize that any dismissal

following denial of a no-good-cause continuance would be based on section 1385, and not on the language of section 1050. In a detailed discussion, respondent seeks to persuade this Court that the limits on the exercise of section 1385 discretion, including the requirement that such a dismissal be "in furtherance of justice," restricts a trial court from dismissing a case based on a prosecutor's failure to show good cause for a continuance. (See ROBM at 27-32.)

Respondent appears to miss the point of both appellant's argument and the Court of Appeal's analysis in the context of the present case. Here, a dismissal of the prosecution for solicitation would not be based on the trial court's determination that such a dismissal was, or was not, in the interest of justice. Assuming it was not bound by *Ferrer*, the trial court here would have denied the continuance request and then granted the motion to suppress; if the prosecutor ultimately decided it couldn't go forward with its prosecution of appellant without the suppressed evidence, there then would have been a motion by one of the parties, if not both, to dismiss; and it is well settled that a dismissal based on the lack of sufficient evidence is entirely proper under section 1385. See, e.g., *Casey v. Superior Court* (1989) 207 Cal.App.3d 837, 848, citing *People v. Orin* (1975) 13 Cal.3d 937, 946 ["dismissal for insufficiency of the evidence would clearly be in furtherance of justice and a proper ground for dismissal under section 1385"].) Thus, the limitations of section 1385 are irrelevant to the issue before this Court.

In sum, based on the arguments put forward above and in the Court of Appeal's opinion, quoted at length above, appellant submits that section 1050 contains no preclusion against a trial court, in the exercise of its discretion, denying a no-good-cause continuance request by the prosecution – other than one related to a preliminary hearing, and controlled by section 1050(k) – based on the court's discretionary determination that the absence of good cause requires denial of the continuance request, even if the ultimate consequence of such a request could be the dismissal of the underlying case.

2. Assuming *Arguendo* that Section 1050 Precludes Denial of a Prosecution Continuance Request as to a Trials or Preliminary Hearings Where the Consequences of Such Denial Would Be Dismissal, the *Ferrer* Court's Application of this Rule to a Section 1538.5 Hearings Is Contrary to the Legislative Intent and Fails to Harmonize the Relevant Statutory Provisions.

Ferrer found section 1050, subdivision (*l*), and section 1050.5, subdivision (b), ambiguous. (*Ferrer*, *supra*, 184 Cal.App. 4th at pp. 880-881.) Specifically, *Ferrer* found that it was not clear whether the Legislature meant to prohibit courts from denying prosecution requests for continuances only where dismissal was a *certain* outcome or also where a dismissal was "*probable*." (*Ibid*.) Ultimately, the *Ferrer* Court concluded that the Legislature meant to prohibit denials of prosecutors' requests for continuances, regardless of failure to comply with the good cause and notice provisions of section 1050, whenever it is "reasonably foreseeable" to the trial court that the prosecution

will be unable to proceed if a continuance is denied. (*Id*., at p. 883.)

Assuming for the sake of argument that this Court disagrees with the above analysis and concludes that subdivision (*l*) of section 1050 and subdivision (b) of section 1050.5 are ambiguous, the *Ferrer* court's analysis and conclusions are contrary to a number of settled rules of statutory construction. First, *Ferrer*'s conclusion fails to effectuate the intent of the Legislature in enacting both *section 1050 as a whole* and the amendments of subdivision (*l*) of section 1050 and subdivision (b) of section 1050.5. In other words, the opinion fails to harmonize the enactments so that section 1050's good cause and notice provisions would continue to have effect with respect to the prosecution while also providing that the court may not sanction the prosecution with dismissal of the case, as prohibited in *Ferguson*, *supra*. Under *Ferrer*, section 1050's requirement that the prosecution show good cause for a continuance and provide notice to the defense apply to the prosecution pre-trial only in narrow circumstances, i.e., only where the court cannot "reasonably foresee" that denial of continuance might prevent the prosecution from proceeding. The holding requires the court to undertake reasonable foreseeability analysis, which involves potential prosecution evidence, a process which was neither contemplated by any previous decisional law, nor specifically required by any statute. Under the questionable reasoning of *Ferrer*, this "reasonable foreseeability" analysis and section 1382 functionally *replace* section 1050 in governing the timeliness of

the prosecution's litigation of many pre-trial hearings.

Basic statutory interpretation principles militate against this aspect of the holding in *Ferrer*. The "fundamental task [of statutory interpretation] is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and common-sense meaning. [Citation.]" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) When a statute is ambiguous, a reviewing court "must harmonize the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole. [Citations.]" (*Ibid.*; internal quotation marks omitted.)

Here, while the *Ferrer* court noted a committee analysis which referenced the Legislature's intent to codify *Ferguson* (*Ferrer*, *supra*, at p. 882; but see discussion above), *Ferrer* goes far beyond the holding of *Ferguson* by effectively prohibiting trial courts from denying prosecutors' motions to continue pre-trial suppression hearings whenever it is "reasonably foreseeable" that dismissal of the case will result from the denial.

Put plainly, the *Ferrer* court's reasonable foreseeability standard fails to harmonize the different parts of the statutory framework, which can be done by holding that section 1050.5, subdivision (b), and section 1050, subdivision (*l*), only prohibit trial courts, consistent with *Ferguson*, from denying prosecutors' motions to continue *a trial* when such a motion is made within the statutory time limit provided in section 1382. *Henderson*, *supra*, 115 Cal.App.4th 922, on which *Ferrer* relied, appears to

have logically applied *Ferguson* to the context in which a prosecutor was not prepared to litigate a preliminary hearing, because a preliminary hearing involves a situation much like a trial, in which the prosecutor must litigate the entire criminal matter, and because the statutory time limit for holding a preliminary hearing contained in section 859b is directly analogous to the statutory time limit provisions for beginning trial in section 1382. (*Ferrer, supra*, 184 Cal. App.4th at pp. 881-882.) The "reasonable foreseeability" standard of *Ferrer*, however, expands the scope of AB 1273 beyond the holding of *Ferguson* to strip trial courts of much of their authority to control their *pre-trial* calendars and effectively eliminates most of the impact of the key provisions of section 1050 on the prosecution with respect to pre-trial hearings such as suppression motions.

Because this standard is not required by prior cases, and fails to harmonize the applicable statutory provisions, it is inconsistent with the Legislature's intent in enacting and amending sections 1050 and 1050.5, such that this Court should conclude that *Ferrer* was wrongly decided and should be disapproved.

3. The *Ferrer* Court's Statutory Interpretation Undermines the Purpose of Section 1538.5.

As this Court has observed, the purpose of the enactment of section 1538.5 was to replace numerous procedural mechanisms by which a defendant could move to suppress evidence with a single procedure that would provide for litigation of suppression motions at an "'early stage'" in the prosecution and "'require the

defendant to raise it at that stage.'" (*People v. Johnson* (2006) 38 Cal.4th 717, 727, quoting 4 Witkin & Epstein, *Cal. Criminal Law* (3d ed. 2000) Illegally Obtained Evidence, § 355, pp. 1040- 1041.) The requirement that the defense bring a motion to suppress evidence at an early stage was intended "'to allow the prosecution greater latitude in initiating appellate review of adverse decisions on a search and seizure issue.'" (*Kirby v. Superior Court* (1970) 8 Cal.App.3d 591, 596, quoting Search and Seizure – Procedure for Challenging Evidence Obtained by Search and Seizure, Committee Report, Vol. 22, No. 12, p. 18 (1967).)

The holding in *Ferrer* allows the prosecution to delay a section 1538.5 hearing right up to the last date of the statutory time limit for starting trial and possibly beyond. *Ferrer* thus runs contrary to the legislative intent behind the enactment of section 1538.5, which was to make certain that search and seizure issues were litigated at an early stage of the proceedings.

The Court of Appeal's discussion of this point is also informative.

> [U]nlike 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.

(Opin. at 19; *Brown*, *supra*, 69 Cal.App.5th at p. 31.)

4. ***Ferrer* Should Be Disapproved Because Its "Reasonable Foreseeability" Standard Requires the Trial Court to Speculate as to the Matters Peculiarly Within the Knowledge of the Prosecution and is Likely to Sow Confusion; Respondent's Proposed Replacement of this Standard is Worse than the Original Problem.**

The *Ferrer* Court's "reasonable foreseeability" standard presents a number of problems likely to sow confusion and cause difficulty for trial courts – as evident from the procedural history of the present case. In addition to the other considerations discussed above, these problems call for a repudiation of the holding in *Ferrer* as unsound.

The "reasonable foreseeability" standard requires a court to speculate as to matters peculiarly within the prosecution's knowledge, i.e., whether the prosecution has, or is able to obtain, sufficient evidence to proceed against the defendant if a motion to suppress evidence is granted. As noted above, in this case the prosecutor initially suggested to the court that the case could go forward without the suppressed evidence because "a lot of the evidence in this case was . . . obtained by . . . observation from the police officer before any contact with the defendant . . ." (1Aug.RT 12:11-14), including Officer Yasin's observation of appellant loitering in a flimsy outfit with another apparent prostitute, interacting with cars and not with looking at cars and not with

the other apparent prostitute, then saw appellant quickly walk away after seeing Yasin in his police vehicle. (See CT 6 [police report]; see also 1RT 22-26, 37-38) Given this background, it is difficult to see how the trial court could have concluded it was reasonably foreseeable that the case would be dismissed as a result of the denial of the continuance.

However, as soon as the prosecutor, with no meaningful discussion of this body of evidence, changed his tune and advised the court in a written motion that he was unable to proceed against Ms. Brown without the evidence which had been ordered suppressed, the trial court, with no independent analysis, concluded it was bound by *Ferrer* to revoke its order denying the continuance for lack of good cause and granting the suppression motion. (1RT 6-7, 11-12)

Plainly, *Ferrer* leaves completely unclear the key question as to what facts and circumstances courts are allowed to consider in determining whether it is reasonably foreseeable that the prosecution would be unable to proceed in a case by virtue of an order granting suppression of evidence. *Ferrer* necessarily sows confusion because it leaves a number of questions unanswered. First and foremost, *Ferrer* provides no indication whether the trial court has an obligation to mine the factual record regarding the potential prosecution evidence in order to rule on a prosecutor's motion to continue a suppression hearing. Plainly, there was no such "mining" in the present case, where the trial court simply took the prosecution's vague statement that it could not proceed at face value without inquiry.

This begs the question as to what the trial court is supposed to do when, as may commonly occur, there is no independent basis for the court to make a determination as to whether dismissal is reasonably foreseeable. This is a realistic possibility, in light of the fact that the scope and nature of prosecution evidence is something particularly within the knowledge of the prosecutor.

Respondent's answer to this problem, presented for the first time in its brief in this Court, creates more problems than it solves. Rather than have a trial court determine the foreseeability of the case going to trial – which respondent tacitly concedes, as argued above, provides no specific guidance to the trial court as to how to make such a decision (ROBM at 24), respondent suggests that the matter be committed solely to the prosecutor, such that if a no-good-cause continuance request is made, it cannot be denied if, upon suppression of the evidence, "the prosecutor expresses an inability to go to trial." (ROBM at 25.) Under respondent's test, the trial court would still perform a "gatekeeping" function, making "whatever inquiry is needed" to assure the court of the bona fides of the prosecutor's assertion. (ROBM at 24-25) Candidly, it is difficult to see how respondent's "new" standard is any better than *Ferrer*'s; it appears to be worse, as it effectively eliminates the trial court's duty to make a meaningful, independent determination whether dismissal is reasonably foreseeable.

The present case also suggests that there are other questions left unanswered by both the *Ferrer* standard and

respondent's suggested replacement. What if the result of the order denying a continuance and granting a suppression motion is not the *elimination* of the prosecution's case, but simply a *weakening* of it, reducing the odds of obtaining a conviction after trial, rather than making such a conviction impossible? As this appears to be the situation in the present case, this question is hardly hypothetical to the present controversy. Shouldn't a court's exercise of discretion in deciding whether to grant a no-good-cause continuance request in circumstances like the present case, where a weaker case could go forward, be affected by this factor, as contrasted to a more typical section 1538.5 situation, where the fruit of the Fourth Amendment violation, such as seized drugs or weapons, is the entirety of the prosecution's case?

Furthermore, there is a fairness problem with the *Ferrer* rule. Unlike section 1050(k), which apply evenhandedly to the prosecution and defense with respect to continuances of preliminary hearings, the *Ferrer* rule only benefits prosecutors. Under the spirit of section 1050(k), why shouldn't the *Ferrer* rule apply to the defense? Imagine, for example, that in the present case, the defense had subpoenaed Ms. X, the second woman who Officer Yasin saw standing with Ms. Brown, as a witness at the suppression hearing, based on an offer of proof that she saw and heard Yasin command Ms. Brown to come and speak with him. At the date set for the hearing, defense counsel advises the court that Ms. X had telephoned to advise him that she had child care problems that morning; and that counsel excused her from coming to court so she could take care of her kids. Why shouldn't

the same rule, absolving the prosecutor of the need to show good cause for a last-minute continuance, apply to the defense?

While there may be sound answers to the above hypothetical, it begs the question about the fundamental fairness of the *Ferrer* rule.

5. The *Ferrer* Rule Unfairly Disrupts The Trial Court's Ability To Manage Its Own Calendars And Unfairly Disadvantages Defendants Seeking Timely Settlement of their Pending Litigation.

Judge Saban's thorough and well-considered concurrence in the Appellate Division Opinion in the present case provides a further sound basis for this Court to disapprove the holding in *Ferrer* based on the effect that case has on a trial court's ability to manage its own calendar. It is quoted here at length, as it should inform this Court's determination whether *Ferrer* is unsound and should be disapproved.

> As noted by the trial court in this case, the *Ferrer* decision greatly diminishes a trial court's ability to manage its calendar in an efficient and productive manner. Our Supreme Court has commented on the inherent responsibility of the trial court to administer judicial proceedings in relationship to other directive language within section 1050 and has noted that:
>
> > [O]ne important element of a court's inherent judicial authority [to fairly and efficiently administer all pending judicial proceedings] is "the power . . . to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. *How this can best be done calls for the exercise of judgment, which must weigh competing*

interests and maintain an even balance.
(*People v. Engram* (2010) 50 Cal. 4th 1131, 1146 (*Engram*), emphasis added, quoting *Landis v. North American Co.* (1936) 299 U.S. 248, 254-255.)

In *Engram*, the defendant's case was called for trial on the last day of the statutory speedy trial period (Pen. Code § 1382), but there were no available courtrooms. However, family, juvenile and probate matters were all scheduled to be heard in other courtrooms. The prosecutor suggested using one of the non-criminal courtrooms, but the court declined to do so.

The case did not go to trial before the last day and the court granted the defendant's resulting request for dismissal. (*Engram, supra*, 50 Cal.4th at pp. 1139-1144.) On appeal, the People argued that the trial court should have transferred the case to one of the courtrooms reserved for non-criminal matters, as required by section 1050, subsection (a), and that the court erred by failing to do so. (*Id*. at p. 11 37.) The California Supreme Court did not agree. They concluded that section 1050's "directive that criminal cases be given precedence over civil cases ' is not of such absolute and overriding character that the system of having separate departments for civil and criminal matters must be abandoned.'" (*Id*. at p. 1157, quoting *People v. Osslo* (1958) 50 26 Cal.2d 75, 106.)

Engram sheds insight into our high court's reading and interpretation of section 1050. Many courts prior to *Engram* had read section 1050's directive as requiring courts to give precedence to criminal matters over all civil matters in every instance. (See *Tudman v. Superior Court* (1972) 29 Cal.App.3d 129; *Perez v. Superior Court* (1980) 111 Cal.App.3d 994.) And it is easy to see why – the actual statutory language reads: "It shall be the duty of all courts and judicial officers and of all counsel, both for the pros-

ecution and the defense, to expedite these proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings." (Pen. Code § 1050, subd. (a), emphasis added.) Despite this clear and direct statutory language, the California Supreme Court did not interpret this statute to override a court's judicial discretion in the management of its own calendars. Instead the high court decided that an interpretation of PC § 1050 that removed all trial court discretion to manage its own docket so as to best promote the fair administration of justice for all court users would materially impair the court's inherent authority to control its own proceedings and safeguard the rights and interests of all litigants – and such an interpretation would be unconstitutional. (*Engram, supra*, 50 Cal.4th at pp. 1148-1149, 1161-1162.)

This issue and analysis recited in *Engram* is analogous to the critical issue in *Ferrer*, where *Ferrer* read amendments to section 1050 to strip the trial court of its ability to dismiss a case as a sanction against the People for failure to show good cause. As in *Engram*, the issue here involves directive language in the statue that can be read to limit a trial court's authority to manage the disposition of cases within its own calendar. The high court's analysis of section 1050 in *Engram*, appears to indicate that the California Supreme Court might not support such an interpretation.

A reading of the statute that interrupts a court's constitutional duty to administer their calendars so as to best promote the ends of justice for all users as required by *Engram*, precludes removal of judicial discretion as it relates to the court's own calendar. "All court users" as

described in *Engram* includes the defendant, and "all court users" includes other defendants whose cases have become delayed due to the rescheduling caused by an unprepared party. The trial judge is tasked with considering all of these competing interests every time it makes a calendaring decision. An isolated grant or denial of a motion to continue is not contained in a vacuum– its effects are felt by other victims, defendants, and lawyers whose cases are pushed out to accommodate the scheduling restraints proffered by the prosecutor and their unavailable witnesses.

Of course, dismissal may not be appropriate in every instance the prosecutor lacks good cause to continue. It is appropriate that the trial court properly function and manage its docket in a way that is fair to all defendants that come before it. It is for the trial court to exercise its judgment, "weigh competing interests and maintain an even balance." (*Engram, supra*, 50 Cal.4th at p. 1146.) This discretion is critical to the effective administration of justice. The inability to run an efficient and productive calendar is very frustrating for a judge presiding over a misdemeanor courtroom with a heavy caseload. The ends of justice are best served when the court has the option to deny a prosecutor's continuance request when it is unsupported by good cause, especially in cases where there have been multiple requests to continue and the case has been pending for an unreasonable amount of time. Yet, *Ferrer* effectively precludes a trial court from enforcing the good cause requirement in section 1050, usurping the court's inherent discretion to manage its own calendars.

Moreover, this rule does little to encourage prosecutors to be prepared because it provides a safety net that eliminates any meaningful punitive consequences for a prosecutor who wantonly violates the rules of court. In the instant case, the prosecutor unilaterally released a sub-

poenaed witness before ever even speaking to the trial court judge. *Ferrer* contends that the available remedies proscribed by section 1050.5(a) and (b), sanctions and reporting to the appropriate disciplinary agency, are available to the judges who find themselves in this difficult situation. However, neither option provides the deterrent effect of a trial court's ability to deny the continuance request. Denial of the continuance request sends the appropriate message both to the prosecutor and to the witness, who is most often the investigating officer, that failure to come to court prepared to proceed, without a reason that constitutes good cause, may result in dismissal of the case. This is the most effective tool the trial court has to properly manage its calendar and *Ferrer*'s holding eliminates it.

This Court is not alone in the determination that a trial court judge's use of dismissal as a sanction is a necessary aid in the competent and fair administration of court calendars. Other jurisdictions have upheld trial court judges who have denied a prosecutor's request to continue, resulting in dismissal of the case.

In the *People v. Crow*, a Colorado appellate court held that the district court did not abuse its discretion when it denied the prosecution's motion to continue a suppression hearing so that the arresting officer, who was attending a training session, could testify. (*People v. Crow* (Colo. 1990) 789 P.2d 1104, 1107.) The appellate court there also found that the court did not err when, after denying the request for continuance, it granted defendant's motion to suppress because the prosecution was unable to offer any evidence to support the warrantless arrest and search. (*Id.* at p. 1108.) Notably, in that case the court did not find the officer's attendance at a training session sufficient good cause to warrant a grant of the prosecutor's motion for continuance. Similarly, here the trial court did not find the officer's

planned interview with a witness in another case sufficient good cause for a continuance.

Additionally, in the *Commonwealth v. Burston*, the appellate court found that the trial court acted within its discretion in granting defendants' motion to suppress evidence without a hearing, upon determination that the prosecutor had failed to exercise due diligence to produce his witnesses for the scheduled suppression hearing, even though the grant of the motion was tantamount to a dismissal of the Commonwealth's cocaine distribution case. (*Com. v. Burston* (Mass. 2010) 77 Mass. App. Ct. 411, 931.) In upholding the trial court, the Massachusetts appellate panel noted that the trial court was authorized to manage the schedule of its criminal sessions, and that the trial court was uniquely positioned to assess the credibility and motives of counsel. (*Ibid*.) I find the reasoning in both of these cases sound and the outcomes demonstrative of the spirit that was articulated by our high court in *Engram*.

(App Div. Opin, conc. opin. of Saban, J, at pp. 14-17.)

Appellant submits that this Court's holding in *Engram*, the reasoning of the two other-state cases cited above, and the careful discussion by Judge Saban of this point provide further strong grounds for this Court to disapprove of *Ferrer*.

6. This Court Should Disapprove the Ferrer Rule and Affirm the Decision of the Court of Appeal.

The opinion of the Court of Appeal in this case effectively summarized its sound reasons for disagreeing with *Ferrer*, which, read together with Judge Saban's concurrence should, appellant urges, be persuasive to this Court.

[E]ven 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. We leave the decision whether to grant 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.

(Opin. at 20-21; *Brown*, *supra*, 69 Cal.App. 5th at p. 31-32.)

C. **Remedy.**

If appellant's position is adopted by this Court, there is no dispute between the parties that the remedy granted by the Court of Appeal in its modification to the opinion below is correct. (See Oct. 5, 2021 modif.)

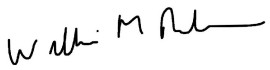
> Since Ferrer provided the sole basis for the trial court's reversal of its decision to deny the continuance request, and

> 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.

(*Ibid*.)

Accordingly, appellant respectfully asks this Court to affirm the decision of the Court of Appeal reversing the judgment, while expressing its disapproval of the holding in *Ferrer*.

Dated: July 8, 2022 Respectfully submitted,



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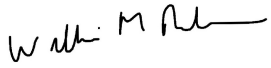
CERTIFICATE OF WORD COUNT

Appellant, by and through his appointed counsel on appeal, hereby certifies that the software used in preparing this brief is Corel Word Perfect X-7 and that according to the software report for this document the brief contains 11,956 words.

I declare under penalty of perjury under the laws of the state of California that this declaration is true and correct. Executed at San Jose, California, on July 8, 2022.



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Case Name: ***People v. Brown***
Case No.: **S271877**

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_X_ **BY MAIL** - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California, addressed as follows:

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Culver City, CA 90230

I declare under penalty of perjury the foregoing is true and correct. Executed this 8th day of July, 2022, at San Jose, California.

/s/ *Priscilla A. O'Harra*
Priscilla A. O'Harra

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Robinson, William (95951)
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