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Supreme Court of California
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No. S271877

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, C1646865
The Honorable Cynthia C. Lie, Judge

REPLY BRIEF ON THE MERITS

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ARGUMENT

A CRIMINAL CASE CANNOT BE DISMISSED, EITHER DIRECTLY OR INDIRECTLY, WHEN A CONTINUANCE REQUEST IS MADE WITHOUT GOOD CAUSE

The issue in this case is whether, as was held in *People v. Ferrer* (2010) 184 Cal.App.4th 873, 886, a trial court lacks the legal authority to deny a continuance of a suppression hearing for the failure to establish good cause if such a denial will causally result in dismissal of the criminal charges. *Ferrer* was correct on this point because Penal Code section 1050 reflects the Legislature's prescription that, even absent good cause, continuances be granted and cases tried rather than continuances be denied and cases dismissed as a result of the denial.[1] As shown by the relevant text, legislative history, and decisional law addressing the issue, the no-dismissal rule reflects the Legislature's judgment in balancing the policy of prioritizing criminal hearings with society's interest in bringing criminal cases to trial. Under the statutory scheme, the generally appropriate point for dismissing a case due to delay is defined in bright-line terms by the speedy trial rules governing preliminary hearings and trials. (§§ 859b, 1382.) Within those limits, monetary and other sanctions, short of dismissal, are available if the court finds a continuance request to be lacking good cause. (See, e.g., Code Civ. Proc., § 128, subd. (a); § 1050.5.) And in exceptional cases, dismissal still remains an available sanction

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

for violations of other statutory or constitutional guarantees, like egregious prosecutorial misconduct. (See *Rochin v. California* (1952) 342 U.S. 165, 172; *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1261.) To the extent the no-dismissal rule may be subject to criticism, it is for the Legislature, not the courts, to consider changing it.

In the Answer Brief, appellant almost exclusively adopts the reasoning of the Court of Appeal's opinion in this case. For the reasons discussed in the Opening Brief, and as will be further discussed below, the Court of Appeal's analysis is unpersuasive.

A. The text of section 1050, properly construed, precludes causing a dismissal by denying a continuance

As appellant acknowledges (ABM 23), statutory construction "begin[s] with the text." (*People v. Mentch* (2008) 45 Cal.4th 274, 282.) Section 1050, subdivision (a), provides that 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*." (Italics added.) It further provides that a hearing must be held as scheduled unless there is good cause to continue it, but subdivision (*l*) of the statute clarifies that the continuance rules are directory only. (§§ 1050, subds. (e) ["Continuances shall be granted only upon a showing of good cause"], (*l*) ["This section is directory only and does not mandate dismissal of an action by its terms"].) As discussed in the opening brief (OBM 18-19), subdivision (*l*) was added by the Legislature to prohibit dismissals of criminal cases as a sanction for failing to establish good cause to continue a hearing beyond the "earliest

possible time." And courts have consistently interpreted the statute that way. (OBM 14-18.) Indeed, the Legislature's use of the term "directory" compels that interpretation.

A directory statute, by definition, does not permit dismissal as a consequence of a violation of its terms. Rather, a directory statute inherently bars dismissal for noncompliance with the procedural requirements of the statute. The terms "mandatory" and "directory" are flip sides of the same coin and are used to refer to the presence or absence of consequences of violating a procedural statute. "As a general rule . . . a 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates. If the action is invalidated, the requirement will be termed 'mandatory.' If not, it is 'directory' only." (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145, some internal quotation marks omitted.)

"Unless the Legislature clearly expresses a contrary intent, time limits are typically deemed directory." (*People v. Allen* (2007) 42 Cal.4th 91, 102.) "Courts have . . . adopted various tests to determine the Legislature's 'probable intent' regarding a statute's time requirements. For instance, a time requirement is considered directory 'unless a consequence or penalty is provided for failure to do the act within the time commanded.' Also, courts may look to see if the statutory requirement 'relates to matters

material or immaterial to matters of convenience or of substance." (*Id*. at p. 102, fn. 6, citations and some internal quotation marks omitted; see also *Briggs v. Brown* (2017) 3 Cal.5th 808, 859-860 ["No jurisdictional consequence is provided if [time limits] are not met. Nor can these limits be deemed mandatory in any other sense, despite the unconditional language in which they are stated. There is no provision for their enforcement"].)

But section 1050 does not suffer from an "absence of express language" (*Pulcifer v. Alameda County* (1946) 29 Cal.2d 258, 262) about the mandatory or directory classification of its policy prescription that criminal proceedings be held at the "earliest possible time" unless there is good cause to continue. "Here, the Legislature made its intent quite clear" (*People v. Lara* (2010) 48 Cal.4th 216, 225) by adding subdivision (*l*) to section 1050.

The first statement in subdivision (*l*) of section 1050 is that the section "is directory only." That means that a violation of any of its provisions—including the failure to establish good cause to continue a hearing—is not sanctionable by case termination. The Legislature's decision on that point is unsurprising given that a continuance relates "to matters of convenience," not "of substance." (*Allen*, 42 Cal.4th at p. 102, fn. 6.) Thus, the ordinary rule that a case *must* proceed notwithstanding the violation of a directory time limit applies—provided, of course, that proceeding does not violate a mandatory statute, i.e., one that does set a time limit enforced by dismissal, such as section 1382. (See OBM 13, 36-37.)

The second statement in section 1050, subdivision (*l*)—that section 1050 "does not mandate dismissal of an action by its terms" (§ 1050, subd. (*l*))—simply states a tautology that follows from the antecedent pronouncement that the section is "directory only" (§ 1050, subd. (*l*)). Because the Legislature classified section 1050 as "directory only," section 1050 does not contain "by its terms" an enforcement provision of dismissal. If it did, it would be mandatory, not "directory only." (*California Correctional Peace Officers Assn.*, *supra*, 10 Cal.4th at p. 1145; *Malengo*, *supra*, 56 Cal.2d at p. 816 ["section 1050 of the Penal Code . . . is directory only and *contains no provision for the dismissal of a case* when its terms are not complied with" (italics added)].)

Pointing to Court of Appeal's decision (ABM 25), appellant offers a different definition of "directory," 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 is authorized to do so. (Opn. 12, fn. omitted.) The court commented that the term "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." (Opn. 12-13, fns. omitted; see also ABM 31 [section 1050, subdivision (*l*), only "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"].)

The Court of Appeal misunderstood the text of section 1050, subdivision (*l*) and the thrust of the mandatory-directory dichotomy. Either a violation of a *particular* statutory procedural provision will always require termination of the case (the statute is mandatory) or the violation will never authorize termination of the case (the statute is directory). The Legislature's choice between the two options operates independent of and in lieu of any other *general* power to terminate a case. By making a procedural provision mandatory, the Legislature has determined that a violation of the procedure is of such significance to the scheme and to the competing interests at stake that the case cannot proceed. (See *Allen*, 42 Cal.4th at p. 102, fn. 6.) Conversely, by making a procedural provision directory, the Legislature has determined that even though there is an obligation to follow the procedure, failing to do so is of such limited significance to the statutory scheme and the competing interests that the case cannot be dismissed for a violation of the provision. (See *ibid*.)

Thus, contrary to the view of the Court of Appeal, it matters not whether the superior court had the "authority . . . to dismiss an action in the first place" under section 1385 or some other provision. (Opn. 13; ABM 25.) The Legislature's decision to make a time limit *mandatory* (e.g., § 1382) compels dismissal if the limit is violated. In those circumstances, the court has no

need, and no authority, to engage in a discretionary assessment under a general power to dismiss, nor could the court withhold dismissal based on such an assessment. The enacted legislative choice, in other words, forecloses resort to the general power to dismiss. (Cf. *People v. Ahmed* (2011) 53 Cal.4th 156, 163 ["because a specific statute prevails over a more general one relating to the same subject" "[t]he court should simply apply the answer found in the specific statutes and not consider the more general section 654"].) On the other hand, the Legislature's decision to make a time limit *directory* precludes remedying or sanctioning the failure to meet the time requirement by invoking a general power to dismiss because the Legislature has determined that the violation never warrants dismissal. Because the requirement of good cause in section 1050 is directory, adhering to it in a way that would ultimately authorize dismissal is contrary to the Legislature's choice in section 1050, subdivision (*l*).

Equally incorrect is the Court of Appeal's belief that absent some general authority to dismiss, "there would be no need for the statute to describe dismissal as a directory and not a mandatory consequence of its violation." (Opn. 13; ABM 25.) Section 1050, subdivision (*l*), does not describe *dismissal* as a directory consequence of a statutory violation. Subdivision (*l*) states, "*This section* is directory only and does not mandate dismissal of an action by its terms." (Italics added.) "This section" (meaning section 1050) provides in subdivision (a) that hearings in criminal cases must be set at the "earliest possible

time," and in subdivision (e) that in the absence of good cause, a continuance must be denied. In other words, those subdivisions identify the timing of hearings in criminal cases and the scope of the court's authority to enforce those time limits by denying a motion to continue. But the existence or absence of some general authority to dismiss is irrelevant. It is the Legislature's classification as one or the other that confers or withholds the power to dismiss for a violation of a time limit. Even without general authority to dismiss, a statute would still have to be mandatory to authorize dismissal for a violation of a time limit; if the statute were not mandatory but directory, dismissal would be unauthorized. The label would remain necessary so that the court would know the scope of its power and its duty.

B. Additional tools of statutory construction confirm that the Legislature intended to prohibit dismissal resulting from a continuance request that is unsupported by good cause

Even if the text of section 1050 did not by itself unambiguously forbid dismissal as a sanction for noncompliance, other tools of construction support that reading of the statute and weigh against appellant's understanding of section 1050.

"If [a] statute is ambiguous, we may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy" (*People v. Arias* (2008) 45 Cal.4th 169, 177) to resolve its meaning. As discussed in the opening brief (OBM 18-19), the Legislature's intent to bar dismissal as a sanction by enacting subdivision (*l*) of section 1050 was clearly stated in the legislative history: "[U]nder this bill a case *could not* be dismissed as a sanction for failing to comply with the rules

governing continuances if the statutory time for a speedy trial has not run." (Sen. Com. on Pub. Saf., Analysis of Assem. Bill No. 1273 (2003-2004 Reg. Sess.) as amended May 1, 2003, p. 6, italics added.) The Legislature also expressed its intent to codify the decades-long line of cases holding that the dismissal of criminal charges resulting from the denial of a continuance is an unauthorized sanction for a violation of the good cause requirements of section 1050. (*Id*. at p. 2; see OBM 14-18.) And by expressly citing to *People v. Ferguson* (1990) 218 Cal.App.3d 1173, the Legislature reflected its understanding that dismissal was prohibited even as an indirect result of denying a continuance request. (OBM 19; Sen. Com. on Pub. Saf., Analysis of Assembly Bill No. 1273 (2003-2004 Reg. Sess.) as amended May 1, 2003, pp. 5-6.)

Appellant, like the Court of Appeal below, rejects the importance of that legislative history. (See, e.g., ABM 27-30.) The court of appeal placed emphasis on the fact that the Legislature, in the same bill that added subdivision (*l*) to section 1050, also amended section 1050.5 to provide that the "court or magistrate shall not dismiss the case" if a party fails to comply with the notice provisions of section 1050, subdivision (b). (Opn. 13; see also ABM 25.) According to the Court of Appeal, the Legislature could have used the same language as in section 1050.5 if it intended to prohibit the trial court from dismissing a case if a continuance was requested without good cause. (Opn. 13.) But as discussed above, the legislative history demonstrates that the Legislature achieved the same result by enacting

subdivision (*l*) in section 1050, making the provisions of section 1050 directory, and explaining that dismissal is not "mandate[d]" (or authorized) as a sanction. That history reflects the Legislature's understanding that dismissal was prohibited not just for violating notice requirements but, more broadly, for failure to comply with "the rules governing continuances." (Sen. Com. on Pub. Saf., Analysis of Assem. Bill No. 1273 (2003-2004 Reg. Sess.) as amended May 1, 2003, p. 6.)

In any event, the text of section 1050.5 raises issues not raised by the language used in section 1050, and those concerns could be addressed only through direct language about dismissal authority. In section 1050.5, the Legislature conferred discretionary authority to impose a fine and to report the attorney (§ 1050.5, subd. (a)) and it made that authority cumulative "to any other authority or power available to the court, *except that the court or magistrate shall not dismiss the case*" (§ 1050.5, subd. (b), italics added). Having broadly referred "to any other authority or power"—something not done in section 1050—the Legislature chose a specific limitation on that power. Because section 1050 does not explicitly reference other authority or powers of the court, the Legislature could rely on longstanding practice of using the term "directory." Moreover, "directory" conveys more than just a limitation on the power to dismiss. It speaks to the validity of a proceeding held in violation of a directory statute. Following the Court of Appeal's drafting preference of simply articulating a bar on "dismissal" would have

obscured the Legislature's goal of codifying case law that section 1050 is "directory only."

Of course, subdivision (*l*) could have explicitly stated that dismissal is not an available remedy for a violation of section 1050's good cause provisions. But the text of subdivision (*l*) was taken verbatim from the opinion in *Ferguson*, *supra*, 218 Cal.App.3d at p. 1173.[2] And the source of the statutory language—a judicial opinion—is significant because opinions are not meant to be parsed as the Court of Appeal did. (Cf. *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 515 ["we think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code"]; *People v. Knoller* (2007) 41 Cal.4th 139, 154-155 ["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court"].) What was before the court in *Ferguson* was whether dismissal was proper where the prosecutor did not have good cause for a continuance and could not proceed. By borrowing the language from *Ferguson*, the Legislature codified its holding that dismissal is not proper in those circumstances. Thus, the fact that the Legislature did not embed in section 1050, subdivision (*l*) the exact language it used

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[2] Indeed, had the Legislature adopted this Court's explanation in *Malengo v. Superior Court* (1961) 56 Cal.2d 813, any ambiguity would have been eliminated. (*Id.* at p. 816 ["section 1050 of the Penal Code . . . is directory only and *contains no provision for the dismissal of a case* when its terms are not complied with" (italics added)].)

in section 1050.5 does not otherwise undermine the Legislature's intent to codify the holding of *Ferguson* and prohibit dismissals resulting from denials of continuances for lack of good cause.

Finally, the Court of Appeal's characterization of the relevant legislative history as "confusing" rests on a misapprehension. (Opn. 16.) In the Court of Appeal's view, the clear statements in that history that dismissal would not be available as a sanction under section 1050 were inconsistent with the fact that the bill at issue initially contemplated removing the good cause requirement altogether for trial continuances but did not ultimately do so. As explained in the opening brief, however, the question whether good cause should be required to support a continuance request is different from the question of what the appropriate sanction should be for failure to follow the rules regarding continuances. (OBM 32-36.) Any ambiguity in the plain language of subdivision (*l*) is resolved by reference to the Legislature's unambiguous intent to bar dismissals when a prosecutor fails to comply with the good cause requirement of section 1050, as long as the speedy trial time limit has not run.

C. Section 1385 does not provide an alternative basis for dismissal in these circumstances

As the Court of Appeal implicitly recognized, the text of section 1050 does not provide the court with any authority to dismiss a case; rather, the court suggested that such authority may derive from some other provision of law, such as section 1385. (See Opn. 12-13.) In addition to the textual analysis of section 1050 above, which forecloses that view, the requirements of section 1385, as longstanding decisional authority has

recognized, are also inconsistent with the Court of Appeal's understanding.

Typically, if the People are unable to proceed to trial because the court has granted a motion pursuant to section 1538.5 to suppress evidence, the court's authority to dismiss the case derives from section 1385, not section 1050. (*People v. Bonds* (1999) 70 Cal.App.4th 732, 738 [if the superior court "'grants a motion to suppress evidence, and the prosecution announces that it is unable to proceed without the suppressed evidence, the court on its own motion should dismiss the action under [section] 1385'"].) However, section 1385, subdivision (a) grants courts the power to dismiss an action when "in furtherance of justice," and courts have long and correctly recognized that it is not "in furtherance of justice" to dismiss a case when the denial of a continuance has left the prosecution with insufficient evidence to proceed. That jurisprudence provided background context in which the Legislature enacted subdivision (*l*) of section 1050. (See OBM 18-19.) And it is presumed that the Legislature was aware of that decisional law.

Appellant dismisses the significance of that case law, arguing that the limits established in those decisions on a court's authority to dismiss a criminal case pursuant to section 1385 "miss[es] the point." (ABM 34.) According to appellant, denying a continuance and granting a suppression motion simply results in a lack of sufficient evidence to proceed to trial and "it is well settled that a dismissal based on the lack of sufficient evidence is entirely proper under section 1385." (ABM 34.) Appellant is

correct in the abstract; a dismissal pursuant to section 1385 is proper for myriad reasons, including insufficient evidence. (See *People v. Orin* (1975) 13 Cal.3d 937, 946.) "[S]uch dismissals have been upheld where designed to enable the prosecution 'to obtain further witnesses, to add additional defendants, to plead new facts, or to plead new offenses'" (*Ibid*.) "Pretrial dismissals under section 1385 may also be used to effectuate plea bargains arranged between the People and the defense and approved by the court. . . . During trial, the court may properly upon the People's motion dismiss an action against one of several defendants where the prosecutor believes such defendant to be innocent." (*Ibid*.)

However, as explained in the opening brief, courts have distinguished those scenarios from the circumstance in which the prosecution's lack of evidence is due solely to the court's denial of a continuance for lack of good cause. (See OBM 14-20; *People v. Henderson* (2004) 115 Cal.App.4th 922, 936; *People v. Ferguson*, *supra*, 218 Cal.App.3d at p. 1181; *People v. Rubaum* (1980) 110 Cal.App.3d 930, 935; *People v. Arnold* (1980) 105 Cal.App.3d 456, 459; *People v. Hernandez* (1979) 97 Cal.App.3d 451, 455; *People v. Flores* (1978) 90 Cal.App.3d Supp. 1, 6.) As the *Henderson* court reasoned, there is a "distinction between evidence that does not exist and evidence that is simply unavailable at the moment. This is not like the situation where the People cannot proceed because they lack the evidence to establish sufficient cause of defendant's guilt." (115 Cal.App.4th at p. 942.)

Appellant contends that these "older cases stand only for the rule ultimately enacted as section 1050(*l*)," which in her view provides only "that the good cause provisions" do not require "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." (ABM 31.) Appellant does not separately identify "older cases" or point to language in any opinion that supports her interpretation. Nor does appellant explain why a dismissal for a violation of the good cause requirement would be in "furtherance of justice." (§ 1385.) And, as explained above, appellant's (and the Court of Appeal's) understanding of section 1050, subdivision (*l*) to authorize dismissal as a penalty for noncompliance is incorrect. In both sections 1050 and 1385, the Legislature has reflected that trials that can be conducted within mandatory time limits (e.g., § 1382) should proceed and that a defendant has no legitimate interest in exploiting a procedural misjudgment by the prosecutor about the existence of good cause for a continuance to secure a dismissal.

D. Section 1050's dismissal prohibition cannot be narrowed to causeless continuance of trials and preliminary hearings

Recognizing that the decisions in *Ferguson* and *Henderson* prohibit dismissal as a remedy for a continuance of a trial or preliminary hearing without good cause (see ABM 37-38 [citing *People v. Ferguson*, *supra*, 218 Cal.App.3d at p. 1181; *People v. Henderson*, *supra*, 115 Cal.App.4th at p. 936]), appellant argues that the reasoning of those decisions cannot be extended to

continuances of other pretrial hearings, like those pursuant to section 1538.5. Appellant's arguments are unfounded.

Appellant argues that extending the dismissal prohibition in section 1050, subdivision (*l*), to pretrial hearings largely makes the notice and good cause requirements in subdivisions (b) and (e) superfluous for any continuances of hearings that are not of trial or preliminary hearings. (ABM 36 ["Under *Ferrer*, section 1050's requirement that the prosecution show good cause for a continuance and provide notice to the defense appl[ies] 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"].) However, *Ferrer* did not eliminate the requirement that the prosecution provide notice and show good cause for a continuance request, nor does the People's proposed refinement of the *Ferrer* rule. The prosecution is still required to comply with section 1050, subdivisions (b) and (e). *Ferrer* simply recognized that the Legislature had limited the *remedies* available to the court for a violation of those provisions. (Cf. *In re Lance W.* (1985) 37 Cal.3d 873, 886-887 ["The substantive scope of both [state constitutional] provisions remains unaffected by Proposition 8. What would have been an unlawful search or seizure in this state before the passage of that initiative would be unlawful today, and this is so even if it would pass muster under the federal Constitution. What Proposition 8 does is to eliminate a judicially created *remedy* for violations of the search and seizure provisions . . . "].) The remedies still available to the court include monetary

sanctions, contempt orders, and, in certain circumstances where other guarantees are violated, such as the speedy trial time limitations of section 1382 or the protections of due process, dismissal may be available to the trial court. The application of the no-dismissal rule to suppression hearings, as in *Ferrer*, simply reflects the Legislature's determination that society's interest in holding criminal trials outweighs any failure to establish good cause for a continuance within speedy trial limits.

Appellant contends that the Legislature's enactment of section 1050, subdivision (*l*), only codified the specific principle in *Ferguson* that a court may not continue a *trial* if it will causally result in a dismissal. (ABM 37.) She further argues that *Henderson*'s extension of that principle to preliminary hearings is permitted by the statute 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 a trial in section 1382." (ABM 38.)

However, whether a prosecutor must litigate the "entire" criminal matter at the relevant hearing has no bearing on whether dismissal will result if the hearing is not continued. Moreover, appellant is fundamentally mistaken. It is axiomatic that a prosecutor does not have to litigate the "entire" criminal matter at a preliminary hearing. The prosecutor must only present sufficient evidence to establish probable cause that the defendant committed a felony and can present that evidence

through hearsay testimony that would be inadmissible at trial. (See §§ 866, 872.) The question is not the "type" of hearing that will be continued under the anti-dismissal rule the Legislature adopted in section 1050 and that courts have recognized is inherent in section 1385, but rather whether the denial of a continuance of a hearing will cause a prohibited dismissal.

Moreover, the existence of independent time limits for preliminary hearings and trials does not provide a relevant distinction between trials and preliminary hearings, on the one hand, and suppression hearings, on the other. As the *Ferrer* court explained:

> While the Legislature has provided statutory protection for the rights to a speedy preliminary hearing and trial, it has not provided any independent right to a speedy suppression hearing. And no such right exists in either the state or federal Constitutions. Instead, the statutory and constitutional rights to a speedy trial ensure that a criminal defendant is able to insist on a prompt resolution of any suppression motion. In interpreting section 1050, there is no reasonable basis to conclude the Legislature intended to provide greater protection to a defendant's interest in a prompt section 1538.5 hearing than it provided to a defendant's interest in a prompt preliminary hearing and trial. Instead, we conclude the Legislature did not intend for a dismissal to result unless the requested continuance results in violation of a statutory time limit (such as § 859b or § 1382) or defendant's constitutional right to a fair trial.

(184 Cal.App.4th at p. 884.)

Appellant also claims that *Ferrer*'s holding "undermines the purpose of section 1538.5" to require the defense to file a motion to suppress "at an early stage" of the proceedings. (ABM 38-39.)

However, according to the plain language of the section 1538.5, an "early stage" of the proceedings is any time *before trial*. (§ 1538.5, subds. (g), (i).) The only time limitation provided in section 1538.5 is that suppression motions cannot be brought *during trial* unless the opportunity for the motion did not exist or the defendant was unaware of the grounds for the motion. (§ 1538.5, subd. (h); see *People v. Burke* (1974) 38 Cal.App.3d 708, 713 ["[t]he procedural scheme established by Penal Code section 1538.5 displays a strong legislative preference for litigating *prior to trial* the legality of searches and seizures" (italics added)].) *Ferrer* does not permit courts to hold suppression hearings after the commencement of trial, in violation of section 1538.5, subdivision (h). *Ferrer* simply requires the court to continue a pretrial suppression motion to another pretrial date (as long as the trial date is still within the time limits of section 1382) if the denial of the continuance would otherwise result in the dismissal of the charges. Nothing about that holding is inconsistent with the purpose of section 1538.5. (See also OBM 36-37.)

Appellant further argues that *Ferrer*'s reasonable foreseeability standard as applied to pretrial hearings will result in confusion and difficulty for trial courts. (ABM 40.) As discussed in the opening brief, requiring a court to independently review the strength of the evidence could inject an unnecessary level of uncertainty into the proceeding, and the People propose a clarification of *Ferrer*'s reasonable foreseeability framework. (OBM 24.) The People agree with appellant that the proposed clarification "effectively eliminates the trial court's duty to make

a meaningful, independent determination whether dismissal is reasonably foreseeable" (ABM 42) and have explained the legal justification for the clarification (OBM 24-26). Appellant does not respond to the legal authorities or analysis presented in the opening brief; she simply makes a conclusory statement that the clarification would be "worse" than *Ferrer*'s standard. (ABM 42.)

Appellant poses the following hypothetical: "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?" (ABM 43.) As discussed in the opening brief, the decision as to whether a case can proceed with "weakened" evidence is a decision properly made by the prosecutor as an officer of the court. (OBM 24-26.) Even in the trial and preliminary hearing contexts addressed in *Ferguson* and *Henderson*, a court may have to rely on the prosecutor's representation that a missing witness is "critical" to the presentation of the case, such that the trial or preliminary hearing cannot proceed without a continuance.

The proposed requirement that the prosecutor expressly state on the record an inability to proceed to trial if the continuance is granted eliminates any confusion or ambiguity resulting from *Ferrer*'s reasonable foreseeability standard. And as explained in the Opening Brief, the court may engage in further inquiry if it has reason to doubt the prosecutor's assessment of the evidence. (OBM 26.) The precise details of

such an inquiry need not be defined for purposes of this case, but the inquiry could include an assessment of the district attorney's credibility as well as an in camera proffer of evidence. (Cf. Boren, *The Hillside Strangler Trial* (1999) 33 Loyola L.A. L.Rev. 707, 710-711 [district attorney's motion to dismiss on ground that "key witness . . . was devoid of credibility" denied by then-Judge George, and Attorney General's Office took over prosecution from district attorney's office]; *People v. Williams* (1998) 17 Cal.4th 148, 161 [matters to be considered when deciding to strike or vacate pursuant to § 1385, subd. (a) three strike's allegation or finding].)

Appellant contends that the *Ferrer* rule "only benefits prosecutors." (ABM 43.) Preliminarily, appellant's argument is contradictory because the prohibition on denial of continuances of trials and preliminary hearings where dismissal will causally result also "benefits prosecutors," as appellant conceives that phrase. If appellant's understanding of the "unfairness" of the dismissal prohibition is to be the basis for its elimination, then this Court must disapprove *Ferguson* and *Henderson* as well.

In any event, the *Ferrer* rule, whether as it currently exists or as modified according to the People's proposal, does not eliminate the good cause and notice requirements for either the prosecution or the defense. Both parties may face sanctions for a failure to comply with those provisions. And the limitation on dismissal as one of those sanctions does not benefit "the prosecutor" who committed the violation, or the prosecuting authority per se; it benefits society, by preventing the dismissal

of properly charged crimes based on the directory provisions of the continuance statute. (*Orin*, *supra*, 13 Cal.3d 937, 947 ["Courts have recognized that society, represented by the People, has a legitimate interest in 'the fair prosecution of crimes properly alleged'"].) The rule also evidences the Legislature's recognition that dismissal is an unduly harsh sanction for what may be nothing more than a mistake about the existence of good cause. The Legislature thus determined that the strict dismissal sanction is inappropriate in this context and should be reserved for violations of the comparatively clear speedy trial time limits or serious due process violations. To the extent appellant simply attacks the wisdom of the Legislature's judgment about the no-dismissal rule, her arguments do not provide a basis for second guessing or reforming the clear statutory scheme.

E. Concerns about the no-dismissal rule's effect on court operations are properly directed to the Legislature

Finally, extensively citing the concurring opinion below by Judge Saban of the superior court appellate division, appellant contends that the *Ferrer* rule unfairly disrupts the trial court's ability to manage its pretrial calendar. (ABM 44; ABM 47 ["'The inability to run an efficient and productive calendar is very frustrating for a judge presiding over a misdemeanor courtroom with a heavy caseload'"].) However, as discussed in the opening brief, a trial court's ability to manage its own calendar is often limited both by statute and the internal operations of the countywide superior court. (OBM 37; see also OBM 36-38.) The limitation at issue flows from the Legislature's reasonable

determination that, in light of society's interest in the prosecution of criminal cases, sanctions short of dismissal are the only available remedies for violations of rules governing continuances.

Judge Saban's concurring opinion relied on *People v. Engram* (2010) 50 Cal.4th 1131 to support the contention that section 1050 cannot be read to limit a trial court's ability to manage its own calendars. (ABM 45-46.) However, *Engram* involved a situation where the district attorney, due to the overwhelming number of no-time-waiver criminal cases in the county, argued that noncriminal departments were *required*, pursuant to section 1050, to handle criminal cases if necessary to avoid dismissal under section 1382. This Court held that section 1050 "does not preclude a trial court from creating separate criminal and civil departments, establishing a general policy under which cases or proceedings are assigned to an appropriate department for trial, and thereafter generally retaining cases for trial in the appropriate department." (50 Cal.4th at p. 1155.) The issue here does not involve moving criminal cases to civil departments. Nor would the People's interpretation require trial courts to grant continuances beyond the time limits set forth in section 1382. Any effect on a trial court's ability to manage its own pretrial calendar due to its inability to deny a continuance in some circumstances is not analogous to the issue in *Engram*.

Judge Saban's concurrence, relying on cases from other States, also concluded that a dismissal sanction is necessary as a deterrent "'for a prosecutor who wantonly violates the rules of court.'" (ABM 47; see also ABM 48 ["'Denial of the continuance

request sends the appropriate message to the prosecutor and the witness'"].) While such a sanction could advance deterrence goals, the judgment of California's Legislature is that the cost of such deterrence would be too high in light of society's interest in the prosecution of crimes when supported by evidence. It is for the Legislature to revisit that determination if it wishes.

Any practical difficulties in implementing the *Ferrer* rule are also considerations for the Legislature, not the courts. Notably, neither appellant nor Judge Saban's concurrence identifies particular difficulties given the sanctions that are still available to help the trial court control its calendar or adequately deal with a party acting in bad faith. And neither has identified any pervasive issue since the Legislature amended section 1050 in 2003 or since *Ferrer*'s application of the anti-dismissal rule to section 1538.5 proceedings was announced in 2010. Neither Judge Saban's concurrence nor appellant explains why such sanctions are inadequate to control a court's calendar. Nor does it appear that any legislation has been introduced to revise the applicable statutes because of difficulties that the trial courts have faced. (See Cal. Const., art VI, § 6, subd. (f) ["Judges shall report to the council as the Chief Justice directs concerning the condition of judicial business in their courts"], subd. (d) [Judicial Council is charged with "improv[ing] the administration of justice" by "survey[ing] judicial business" and "mak[ing] recommendations annually to the Governor and Legislature"].)

Finally, both Judge Saban's concurrence and appellant overlook that dismissal remains a possible sanction for egregious

prosecutorial misconduct, including possibly the type of "wanton violation" envisioned by Judge Saban. (See, e.g., *Rochin v. California*, *supra*, 342 U.S. at p. 172; *Morrow v. Superior Court*, *supra*, 30 Cal.App.4th at p. 1261.) To be clear, no such egregious misconduct occurred in this case. "'Dismissal of charges is an extraordinary remedy, which is reserved for the few cases where conduct by the prosecution has completely eliminated the possibility of a fair retrial.'" (*People v. Uribe* (2011) 199 Cal.App.4th 836, 885.) Here, the prosecutor's actions were not egregious and did not infringe on appellant's constitutional rights. Dismissal of the complaint would be "a punishment to society for [the prosecutor's] misdeeds, without consideration of whether those misdeeds prejudiced defendant's fair trial rights." (*Ibid*.)

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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August 15, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 6,384 words.

ROB BONTA
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August 15, 2022

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

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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 August 15, 2022, at San Francisco, California.

N. Kochiya	*/N. Kochiya/*
Declarant	Signature

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California Dept of Justice, Office of the Attorney General

Law Firm