SUPREME COURT
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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ERIC J. FRAHS,

Defendant and Appellant.

Case No. S252220

Appellate District Division Three, Case No. G054674
Orange County Superior Court, Case No. 16CF0837
The Honorable Glenn R. Salter, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

"Pretrial diversion" means just that: diversion that is granted before trial. Contrary to appellant's arguments, "pretrial" does not mean "posttrial," "presentencing," or "at any stage of the proceedings." "Postponement of prosecution" does not mean nullifying the results of a trial once a conviction has been obtained. In limiting the availability of pretrial mental health diversion "until adjudication," the Legislature demonstrated its intent that mental health diversion should not apply retroactively to cases that had already been tried and prosecuted at the time of enactment. Ultimately, the availability of mental health diversion is the result of a balance struck between the treatment needs of the mentally ill and the rights of the People to prosecute crimes and conduct a trial by jury. Once there has been an adjudication, this balance shifts. The loss of cost savings, not to mention the risk of undermining jury verdicts and incentives for the mentally ill to seek early treatment, militate against allowing for diversion post-trial. For these reasons, diversion should not be applied retroactively to cases that had already been adjudicated at the time the diversion statute was passed.

But even if the statute is given retroactive effect, it cannot apply to appellant, who was both a strike offender and on probation at the time he committed his offenses. As to other defendants, they must establish eligibility in order to warrant a remand on direct appeal; if they cannot meet this standard due to limitations in the record, they must proceed by way of habeas corpus. Finally, they must also demonstrate good cause for proceeding after their claims have been adjudicated.

ARGUMENT

I. PENAL CODE SECTION 1001.36 IS NOT RETROACTIVE

Appellant is mistaken in his assertions that the Legislature must include an express saving clause in order to overcome the inference of retroactivity. Here, the Legislature made its intent abundantly clear. It demonstrated this intent not only in the language of Penal Code section 1001.36 (all further statutory references are to the Penal Code unless otherwise noted), but also in similar limitations section 1370 placed on diversion after a finding of mental incompetence. The Legislature's express purpose as stated in section 1001.35 and the legislative history demonstrate its intent to create a balance between the competing concerns of punishment for crimes, cost-efficient management of the judicial system, and the need for treatment of the mentally ill. That balance ceases to exist once a defendant has been tried and convicted. Finally, appellant has little or no response to respondent's arguments regarding the risk of overturning jury verdicts, the Legislature's subsequent expression of intent by closing a loophole for dangerous offenders, and the difficulty of applying the diversion statute after trial. Construed together as a whole, all of these reasons establish that the Legislature amply revealed its intent not to apply the statute retroactively.

A. This Court Does Not Require an Express Saving Clause in Order to Discern Legislative Intent Not to Apply a Statute Retroactively

Appellant attempts to recast this Court's jurisprudence as requiring an express saving clause that makes the statute explicitly prospective in order to demonstrate legislative intent not to apply a statute retroactively. (E.g., AABM 21 ["There is no 'saving clause' language making the statute explicitly prospective and no self-contained retroactivity provision"], 32.) He urges that respondent's reliance on the "present-tense language" of the

statute to create an inference of retroactivity is "in effect" a request to "overturn" the ameliorative retroactivity principles developed in this Court's decisions in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299. (AABM 22.) Appellant, however, both mischaracterizes the law and oversimplifies respondent's position.

This Court's decisions make clear that while an express saving clause is certainly one way for the Legislature to signal its intent to make a statute prospective, it is not the only means. (E.g., *People v. Nasalga* (1996) 12 Cal.4th 784, 794 ["Because the statute here at issue, section 12022.6, contains no express saving clause, consistent with the principles of *Estrada* and *Pedro T.*, we must look for any other indications of legislative intent"]; *Estrada*, *supra*, 63 Cal.2d at p. 747 [recognizing both express and implied saving clauses].) Ultimately, the question of retroactivity is simply a "quest for legislative intent." (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1045.) In conducting this quest, a reviewing court may rely on the full panoply of tools commonly available to discern legislative intent—such as the language, legislative history and practical effects of a given construction. (See, e.g., *In re Pedro T.*, *supra*, 8 Cal.4th at pp. 1046-48.)

Appellant misquotes this Court's decision in *Conley* to suggest that "when punishment ameliorating legislation lacks an alternative retroactivity process or some other '"saving clause" providing that the amendment should be applied only prospectively,' the inference of ameliorative retroactivity prevails." (AABM 19, quoting *People v. Conley* (2016) 63 Cal.4th 646, 656.) But what this Court really said was that the inference of retroactivity does not apply when there is an express saving clause; this Court did not say that an express saving clause is the only way to rebut the inference. In fact, *in the very next sentence* this Court "made clear" that "while such express statements unquestionably suffice to override the

Estrada presumption, the 'absence of an express saving clause...does not end "our quest for legislative intent."'" (*People v. Conley, supra,* 63 Cal.4th at p. 656.) Accordingly, this Court went on to consider a "set of interpretive considerations" to discern the electorate's intent. (*Id.* at p. 657.)

Appellant later expands upon this mischaracterization when he asserts that this Court's decision in *Lara* relied on *Conley* for the premise that "Unless a new law contains an alternative retroactivity process or some other '"saving clause" providing that the amendment should be applied only prospectively,' the *Estrada* inference of ameliorative retroactivity prevails." (AABM 32, quoting *Lara, supra,* at p. 312, which quotes *Conley, supra,* at p. 656.) Neither *Lara* nor *Conley* so held. *Lara*, like *Conley*, simply discussed the sufficiency of an express saving clause or alternative retroactive process without suggesting that these methods are the exclusive means for the Legislature to demonstrate its intent. This Court does not "'dictate to legislative drafters the forms in which laws must be written' to express an intent to modify or limit the retroactive effect of an ameliorative change" (*Conley, supra,* at p. 656, quoting *In re Pedro T., supra,* 8 Cal.4th at p. 1049).

Respondent abides by this Court's established principles, and has endeavored to show the Legislature's intent based on the language used throughout the diversion statute; the language used in other diversion statutes; the legislative history; and the consequences of permitting retroactive application. (ROBM 22-37.) Appellant reduces this argument to reliance on the "present-tense language" of the statute (AABM 22), *even though respondent never even mentions the tense of the statute anywhere in its opening brief.* Because this "present-tense language" does not constitute "an explicit saving clause," he argues that respondent has not refuted the inference of retroactivity. (AABM 23.) But appellant's requirement of an

"explicit saving clause" is nothing more than a strawman. And, as discussed below, his argument incorrectly minimizes respondent's interpretation.

B. The Language of Section 1001.36 Reveals It Was Not Intended to Apply Retroactively

As respondent has previously argued, the language of section 1001.36 reveals the Legislature intended "pretrial" mental health diversion to occur *pretrial*. The relevant language includes not only the specific limitation that defines pretrial diversion as the "postponement of prosecution" from the time of charging "until adjudication" (§ 1001.36, subd. (c)), but also language indicating that diversion may be granted at the charging stage (*id.*, subd. (a) & (e)), when the defendant would still have the right to a speedy trial (*id.*, subd. (b)(1)(D)). (See ROBM 25-27.)

1. The Phrase "Until Adjudication" Creates an Express Limitation on the Availability of Diversion

Appellant attempts to compare the diversion statute to the situations this Court faced in *People v. Francis* (1969) 71 Cal.2d 66, as well as the earlier decisions in *In re Corcoran* (1966) 64 Cal.2d 447 and *In re Ring* (1966) 64 Cal.2d 450. (AABM 24-25.) As appellant summarizes, despite the fact that the procedural postures of those cases were already past the time at which the legislative changes would otherwise have applied, this Court nevertheless relied on the inference of retroactive application and remanded the cases to allow the trial courts to employ their discretion at new sentencing hearings. (AABM 24-25.) But none of these cases involved a situation remotely resembling that presented by the diversion statute here. This is not a case in which the trial court simply lacked discretion at the time of an original sentencing hearing. Instead, the

language of section 1001.36, subdivision (c), provides an express procedural limitation on the availability of diversion "until adjudication."

Appellant's argument hinges on the notion that the language "until adjudication" is essentially meaningless. Like the Court of Appeal, appellant urges that the phrase does nothing more than set forth how the program is "'ordinarily designed to operate.'" (AABM, quoting *People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*).) Appellant does not address respondent's arguments that this construction fails to give meaning to subdivision (c), especially the preposition "until," and that it was entirely unnecessary for the Legislature to articulate what would typically or ordinarily occur, since this practice is already made more than clear in the concept of *pretrial* diversion. (ROBM 40.) Had the Legislature believed it necessary to spell out how diversion would typically operate in most but not all cases, it presumably would have signaled this intent by including modifiers denoting that diversion will commonly, but not always, be conducted prior to adjudication. But it did not. It chose instead the simple and unambiguous preposition "until." Neither appellant nor the Court of Appeal cites any other statute in which the Legislature has found it necessary to describe what is an ordinary but non-essential procedural practice—let alone such a statute that does so while bereft of language such as "typically," "commonly" or "ordinarily."

Appellant insists that the terms "adjudication" and "pretrial" no more reflect an "explicitly" prospective application than the use of the phrase "prior to the attachment of jeopardy" did in Welfare and Institutions Code section 707, subdivision (a)(1), which this Court construed in *Lara*. (AABM 28.) But appellant utterly ignores respondent's point that the limitation that a juvenile transfer hearing be held prior to the attachment of jeopardy provides a restriction *only on the prosecution*. (ROBM 40-41.) This limitation on the timing of a transfer hearing could not be used to

prevent a defendant from receiving such a hearing, even if it was past this procedural point; as amended by Proposition 57 the transfer hearing is a jurisdictional requirement before a case may be heard in adult court. The comparison to Proposition 57 and *Lara* is thus a false one. Here, the restriction on the availability of diversion is one that limits *the defendant*. Unlike in *Lara*, the limitation was designed to *restrict* the availability of the ameliorative amendments, and that restrictive intent also suggests that the Legislature did not mean the new law to apply retroactively after a case had been adjudicated.

2. "Until Adjudication" Means Prior to Trial, Not Prior to Sentencing

Appellant urges that the "adjudication" limitation in section 1001.36, subdivision (c), really means "sentencing." His interpretation, however, not only fails to construe the phrase "until adjudication" in context and with the remaining language of the statute, but it also simply makes no sense. It is telling that, like the Court of Appeal, appellant focuses solely on the term "adjudication," and disregards the preposition "until." (See ROBM 40.) If the Legislature really meant that diversion is available until sentencing, then presumably it would have used that term or at least would have said "at any stage of the criminal proceedings" as it had done in the context of diversion for defendants with cognitive disabilities (§ 1001.21, subd. (a)). Likewise, it would not have used the term "pretrial diversion," since sentencing occurs posttrial. (See *People v. Doolin* (2009) 45 Cal.4th 390, 455 fn. 39 [capital sentencing hearing is posttrial]; *Leversen v. Superior Court* (1983) 34 Cal.3d 530, 540 [noting posttrial proceedings include sentencing]; *People v. Miller* (2007) 153 Cal.App.4th 1015, 1023-1024 [motion for self-representation was not made during trial "for the simple reason that sentencing occurs posttrial"].) Appellant does not deny that elsewhere in the Penal Code the Legislature has demonstrated its intent that

"adjudication" involves a function of the "trier of fact" (e.g., § 299, subd. (b)(2)), and he provides no reason to believe the Legislature suddenly meant to change this construction in the context of mental health diversion to mean the legal rendering of sentence.

Because appellant had already been sentenced by the time the diversion statute was enacted, respondent noted that certainly by the time the trial court has pronounced sentence, his claim had been adjudicated. (ROBM 26.) Appellant now seizes on this remark and asserts that respondent's argument is "built on a dubious foundation"–namely, the "unproved assertion" that "adjudication" means determination of guilt rather than sentencing. (AABM 29.) Appellant is grasping at straws. "Pretrial" does not mean "posttrial." "Adjudication" does not mean "sentencing." Instead, sentence is imposed after guilt has been adjudicated. (See *People v. Clancey* (2013) 56 Cal.4th 562, 570 [court may indicate what sentence it will impose, "'irrespective of whether guilt is adjudicated at trial or admitted by plea'"].)

Appellant contends that the "best indication" that adjudication means sentencing is the Legislature's subsequent amendment of section 1001.36 under S.B. 215 to add subdivisions (b)(3) and (c)(4). (AABM 29-30.) Subdivision (b)(3) allows a trial court to require "at any stage of the proceedings" the defendant to make a prima facie showing that he or she will meet the minimum eligibility requirements for diversion. Since "any stage of the proceedings" includes sentencing, appellant reasons that "diversion must be available until sentencing and therefore 'adjudication' in section 1001.36, subdivision (c), must mean sentencing." (AABM 30.)

Appellant's argument relies on a non-sequitur. While it is true a trial court may require a prima facie showing "at any stage of the proceedings," nothing suggests this authority expands upon the limitations in subdivision (c) permitting diversion only "until adjudication." In fact, the contrary is

true. The Legislature's subsequent addition of subdivision (b)(3) demonstrated that it knew all too well how to authorize court action without temporal or procedural limitation by including the phrase "at any stage of the proceedings." It specifically chose not to use this language when describing the availability of relief under subdivision (c). To now read "until adjudication" as permitting diversion "at any stage" would violate accepted cannons of statutory construction. (E.g., *In re C.H.* (2011) 53 Cal.4th 94, 103 ["It is a settled principle of statutory construction, that courts should 'strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous'"; "We harmonize statutory provisions, if possible, giving each provision full effect"].) The language of subdivision (b)(3) means simply that a prima facie case may be ordered at any stage of the proceedings in which diversion is otherwise authorized.

It would not be reasonable to conclude that the amendment of subdivision (b)(3) somehow suggests that the Legislature believed that "adjudication" really means "sentencing." Appellant reasons that because sentencing is a stage of the proceedings (and therefore a trial court could presumably require a prima facie showing), it must be included within the proceedings at which diversion is available. (AABM 30.) However, post-sentencing matters (such as revocations of probation) are also stages of a proceeding, yet even appellant does not argue those stages can reasonably be included within the limitation of subdivision (c).

Next, appellant argues that the addition of subdivision (c)(4), which authorizes a trial court to conduct a restitution hearing as authorized under section 1202.4, subdivision (f), demonstrates that "adjudication" was intended to encompass "sentencing" because under the latter provision a restitution order is prepared by the sentencing court. (AABM 30, citing § 1202.4, subd. (f)(3).) Appellant's citation to the restitution statute,

however, is selective. Section 1202.4 does not require that restitution be ascertained "*at or after sentencing*" as appellant contends. (AABM 30.) In fact, the language appellant omits states, "*To the extent possible*, the restitution order shall be prepared by the sentencing court . . . ." (§ 1202.4, subd. (f)(3), italics added.)

Normally, of course, there can be no order of restitution without a conviction and determination of guilt. (See § 1202.4, subd. (a)(2) ["Upon a person being convicted of a crime..."].) Diversion, however, is different because it is intended to operate in lieu of a conviction. It is for this very reason that the Legislature found it necessary to amend section 1001.36 to permit restitution. Appellant fails to recognize that his argument proves too much and results in a *reductio ad absurdum* that only serves to disprove his thesis. Under appellant's reasoning, the addition of the restitution provision in section 1001.36 means that a defendant not only can be given diversion at sentencing, but also that he may not be given diversion *before* that time. There could be no pretrial, pre-conviction mental health diversion because "the statute must contemplate the granting of diversion *after* the determination of guilt *at sentencing*." (AABM 31, italics in original.) This conclusion ignores the express provision that diversion may be granted "On an accusatory pleading alleging the commission of a misdemeanor or felony offense." (§ 1001.36, subd. (a).)

Aside from disregarding the express statutory language, appellant's construction is contrary to public policy. Under appellant's reading of the statute, a mentally ill individual could wait to see whether he or she will be convicted before requesting mental health diversion at sentencing; indeed, according to appellant, diversion would not even be available before that time. Appellant insists this would be a good result because it would leave the option of diversion open so that someone who may be eligible is not "shipped off to prison without a hearing." (AABM 31.) But the very

purpose of the mental health diversion program is to meet the "unique mental health treatment and support needs" of the mentally ill. (§ 1001.35, subd. (c).) It would be directly contrary to this objective to force the mentally ill to endure a trial and sentencing before they could be eligible to receive treatment. And even if diversion were simply available at sentencing, this prospect would create an inverse incentive for mentally ill defendants not to seek early treatment, thereby avoiding trial as well as potential referrals to the Department of State Hospitals. The mentally ill could gamble on the outcome of a trial and perhaps avoid having to undergo any treatment at all. This inverse incentive is reason enough to reject appellant's interpretation. (See *People v. Superior Court* (*Sanchez-Flores*) (2015) 242 Cal.App.4th 692, 705 [rejecting interpretation of sentence deferral program that would reduce or eliminate a defendant's incentive to participate in the program and forego trial].)

C. The Legislature's Express Purpose as Well as the Legislative History Support Respondent's Interpretation

Both the Legislature's express purpose in section 1001.35 as well as the history surrounding enactment of the statute, and later its amendments, support an intent not to apply the statute retroactively to cases that have already been adjudicated.

1. The Legislative Purpose as Set Forth in Section 1001.35 Reflects an Intent to Balance the Needs of the Individual Against Protecting Public Safety and the Costs of Entry and Reentry Into the Criminal Justice System

Appellant interprets the Legislature's statement of purpose in section 1001.35 as calling "for broad application of the statute to as many qualified people as possible." (AABM 33.) He is mistaken. Rather than establishing an intent to apply the statute "as broadly as possible," the

Legislature revealed that the diversion statute reflects a delicate balance between the needs of the mentally ill and the overall protection of society, as well as the burdens on the entire judicial system. That balance supports respondent's position that the Legislature did not intend diversion to apply retroactively to those whose cases had already been adjudicated.

The Legislature demonstrated its purpose in enacting the diversion statute was in part to meet the "unique mental health treatment and support needs of individuals with mental disorders." (§ 1001.35, subd. (c).) But the Legislature did not stop there. It did not state that those needs were the sole consideration in determining the appropriateness of diversion. Instead, it expressed its intent that those needs were only one factor in the balance of competing objectives. As the Legislature stated, the increased use of diversion was intended to "mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).) This statement of purpose demonstrates concerns with the competing interests of not only protecting the public, but also reducing the effects that defendants have on the criminal justice system when they have repeated entries and reentries into that system.

Appellant overlooks this balance. First, he fails to consider the Legislature's concern with mitigating the entry and reentry into the criminal justice system. Once a defendant's case has been adjudicated, the defendant has unquestionably entered the criminal justice system and that system has incurred the time and expense of ensuring a fair trial. The original balance envisioned by the Legislature has thus changed. Further, the Legislature has specifically shown this change means everything. In the context of incompetency proceedings, for instance, diversion is available after a finding of incompetency, but only *before* the defendant is transported to a facility. (§ 1370, subd. (a)(1)(B)(iv); ROBM 31-32.) In

other words, once the defendant has entered the system, the policies supporting diversion cease to exist.

Second, the Legislature was also concerned with public safety. Once a defendant has been adjudicated to be a criminal, the need to protect the public has been conclusively established. Thus, the balance favoring diversion has once again been altered.

2. Legislative History Demonstrates an Intent to Save the Department of State Hospitals and Trial Courts Money

Respondent previously argued that the legislative history behind A.B. 1810 and its later amendments revealed an intent to save the state money, and a commensurate intent that the statute not be applied retroactively. (See ROBM 30-35.) Appellant rejoins that judicial notice of the underlying legislative materials is unnecessary because the Legislature made its intent clear when it codified its purpose in section 1001.35. (AABM 33.) But as noted above, the Legislature's statement of purpose in section 1001.35 does not expressly refer to retroactive application. If anything, the balancing of competing factors as revealed in the Legislature's statement of purpose militates against retroactive application.

According to appellant, even though A.B. 1810 was part of a budget bill, the fiscal effects of the diversion program were not mentioned in the codified statement of purpose in section 1001.35, and therefore those effects cannot be considered; at best, these fiscal ramifications were welcomed side effects, but not the goals of the legislation. (AABM 35.) Similarly, he argues that this Court may not consider concerns with undermining jury verdicts, because those concerns are also not listed in the statement of purpose. (AABM 38.) But where, as here, the purpose of a statute is subject to varying interpretations, evidence of that purpose may be drawn from many sources, and is not limited to express statements of

intent. (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1256 [stating court is aware of "no case" holding that it is limited to express statement of purpose in deciding purpose of initiative]; *Fay v. District Court of Appeal* (1927) 200 Cal. 522, 537 [court did not limit interpretation to express purpose of amendment, but instead examined amendment as a whole to discern its purpose]; *Sutter's Place, Inc. v. Kennedy* (1999) 71 Cal.App.4th 674, 686 [considering bill analyses along with codified statement of purpose].)

Appellant asserts respondent has shown only an "uncodified legislative concern" with the large number of persons being declared incompetent to stand trial, and has failed to show that this concern rebuts the inference of retroactivity. (AABM 35.) Appellant reasons that "incompetence to stand trial has nothing to do with the *charged offense* and therefore has nothing to do with diversion." (AABM 36.) But the Legislature sees it differently. First, contrary to appellant's suggestion, the Legislature did codify its concerns when it limited the application of mental health diversion for those who had been declared incompetent and sent to a facility. (§ 1370, subd. (a)(1)(B)(iv), as added by A.B. 1810 § 25.) More generally, while not all persons with a mental disorder as defined in section 1001.36, subdivision (b)(1)(A), will be incompetent to stand trial, the vast majority of (and perhaps all) persons who are incompetent will have such a disorder. Appellant does not dispute that the Legislature was motivated to reduce the number of incompetency referrals to state mental hospitals. That the Legislature saw fit to expand availability of mental health diversion to both competent as well as incompetent persons does not detract from the fact that the Legislature was prompted in part by concerns for the costs being incurred by the Department of State Hospitals. Contrary to appellant's intimation, respondent is neither attempting to "insert absent

words into the statute" nor somehow equating incompetency with the requirements for mental health diversion. (AABM 36.)

Respondent has pointed to two separate ways in which mental health diversion was intended to save the state money: (i) by reducing the number of referrals to the Department of State Hospitals; and (ii) by reducing the overall number of cases pending in the trial courts. (ROBM 30-32.) Without distinguishing between these two separate points, appellant challenges the notion that the desire to save the state money is consistent with a wider intent not to apply the statute retroactively where the state would not save money. He argues that respondent has "conceded" that pretrial diversion would be available up to the point a verdict is reached or even sentencing; consequently, he reasons that the cost of a trial would not be saved under the "normal operation" of the statute. (AABM 37.)

Appellant, however, conflates that which is not expressly forbidden by the statute with how the statute would normally operate. Once a jury has been empaneled and sworn, jeopardy has attached. (*Crist v. Bretz* (1977) 437 U.S. 28, 38; *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712.) If a trial court granted diversion to a defendant midtrial after jeopardy has attached but before a verdict has been reached, criminal charges could not be reinstated in the event the defendant did not successfully complete diversion. The defendant would therefore have no incentive to complete the program because there could be no criminal consequences if he or she did not. Such a scenario would not only deprive the People of their right to a jury trial (Cal. Const. art. I, § 16), not to mention due process of law and a speedy trial (Cal. Const. art. I, § 29), but it would also be contrary to "the interests of the community" (§ 1001.36, subd. (c)(1)(B)) and would be tantamount to an abuse of discretion. At a minimum, such a scenario would not be how the Legislature expected the diversion statute to normally operate.

As previously discussed, once there has been a verdict, the matter would have been adjudicated and diversion would no longer be available under the limitation of section 1001.36, subdivision (c). Hence, diversion must be granted prior to trial or any guilty plea.

Appellant next argues that respondent's economic argument is flawed because respondent has failed to produce any evidence that retroactive application would result in additional costs. (AABM 37.) He reasons that if even a few people succeed on diversion, the state would save the cost of prison housing. (AABM 37.) Pointing to a Senate Rules Committee report regarding the amendments of S.B. 215, appellant argues that the costs of diversion amount to only roughly $20,000, whereas the costs of jailing that same defendant would amount to more than $75,000 and entail a greater risk of recidivism. (AABM 37-38, citing Sen. Rules Com., Off. Of Sen. Floor Analyses, analysis of S.B. 215, as amended Aug. 23, 2018.) As an initial matter, appellant considers the costs of diversion too narrowly. Once again, appellant fails to recognize the delicate balance reached by the Legislature in enacting mental health diversion. The question is not whether diversion would necessarily cost more, but rather whether retroactive application would result in substantial enough savings so as to warrant foregoing criminal prosecution. The quick amendment of section 1001.36 in S.B. 215, which appellant refers to, makes this balance clear. Although the author of that bill trumpeted the potential cost savings of diversion, the primary purpose of the amendment was to *restrict* the availability of diversion to prevent murders and rapists from claiming its advantages.

Appellant's monetary argument is not only limited, but it assumes that the state could save incarceration costs if even a few defendants were able to avoid jail or prison. This is not necessarily true. The statute contemplates that some portion of the participants will fail to complete the

program and that criminal proceedings will have to be reinstated—for reasons including the defendant's commission of additional criminal conduct. (§ 1001.36, subd. (d).) Such additional criminal conduct could result in additional charges, additional harm to victims, additional police investigation, and additional court proceedings that may well not have occurred if the defendant had been incarcerated. And even if the original charges were simply reinstated, the People would then incur *both* the costs of the failed treatment program and incarceration.

By the time a defendant's claim has been adjudicated, the balance reached by the Legislature has been disrupted. The costs of trial would already have been incurred, including, in particular, any pretrial competency referrals to the Department of State Hospitals. As noted (ROBM 31), the costs of referrals to the Department of State Hospitals was a particular motivating factor behind A.B. 1810—a motivation that appellant does not deny. The Legislature expressly determined that once this balance has been disrupted and costs have been incurred by the defendant's mere transportation into a state mental facility, diversion would no longer be available. (§ 1370, subd. (a)(1)(B)(iv).) For similar reasons, diversion should not apply retroactively to cases that have already incurred the costs of adjudication, which may in some cases include the costs of restoring a defendant to competency prior to trial.

D. Appellant Fails to Respond to Concerns Regarding Overturning Jury Verdicts, the Significance of the Legislature's Desire to Close a Loophole for Certain Dangerous Offenders, and the Difficulty of Applying the Diversion Statute as Written After Trial

As respondent discussed in its Opening Brief, the Legislature's limitation of diversion "until adjudication" avoids the specter of potentially undermining jury verdicts. (ROBM 35-36.) Appellant labels this concern "inherently speculative" and maintains it is absent in the Legislature's

stated purpose in enacting the statute. (AABM 38-39.) The Legislature, however, was presumably well aware that under the California Constitution "Trial by jury is an inviolate right and shall be secured to all...." (Cal. Const., art. I, § 16.) Likewise, the Legislature surely knows that the rights of victims encompass the expectation that persons who commit felonious acts causing injury will be "tried by the courts in a timely manner, sentenced, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance." (Cal. Const., art. I, § 28(a)(4).) The Legislature did not need to cite these established rights in order to demonstrate its awareness of them.

Respondent also previously argued that the Legislature's decision to close the loophole for murderers and rapists demonstrates its belief that the law did not apply retroactively, because the Legislature otherwise would have required this change to take immediate effect. (ROBM 33-34.) Appellant does not dispute this point.

Finally, respondent pointed to the awkwardness of applying diversion posttrial as further evidence the Legislature did not intend this result. (ROBM 43.) Again, appellant does not dispute this point.

II. APPELLANT HAS NOT MADE AN ADEQUATE SHOWING OF ELIGIBILITY FOR DIVERSION AND HIS CASE SHOULD NOT BE REMANDED

Assuming the diversion statute was intended to be retroactive, before any remand should be ordered on appeal a defendant must nonetheless demonstrate that he or she satisfies the six eligibility requirements of section 1001.36, subdivision (b)(1), and also that he or she is not otherwise disqualified based on the nature of the offense under subdivision (b)(2). Abandoning the single factor showing required by the Court of Appeal, appellant urges that he need only make an "arguable" prima facie showing of three conditions. Respondent disagrees. There is no basis for a remand

without an affirmative showing of error—not a mere prima facie showing of potential eligibility and certainly not one based on merely arguable claims involving certain eligibility factors to the exclusion of others.

Regardless of what rule is applied for determining when a remand is appropriate, appellant cannot take advantage of it because he is statutorily ineligible to receive either a suspended sentence or diversion, and the trial court has already determined that his mental illness did not substantially contribute to the criminal behavior.

Finally, because appellant's case was already post-adjudication when the diversion law was passed, he is procedurally barred from receiving diversion and he has made no attempt to show good cause to excuse the default.

A. Appellant Bears the Burden of Demonstrating a Prima Facie Case Before Remand Should Be Required

The Court of Appeal determined a remand to the trial court was appropriate because appellant "appears to meet a least one of the threshold requirements" for mental health diversion. (*Frahs, supra,* 27 Cal.App.5th at p. 791.) As respondent pointed out, this rule requiring satisfaction of one eligibility factor, let alone the mere appearance of satisfaction, is entirely arbitrary where the statute expressly requires a showing of six separate factors. (ROBM 45-51.) Remanding every case in which there is an appearance of mental illness would soon overwhelm the trial courts and devour any cost savings the mental health diversion program might otherwise have achieved. (See generally *People v. Furhman* (1997) 16 Cal.4th 930, 945-946 ["taking into consideration the interests of the administration of justice throughout the state" this Court declined to order a remand for new sentencing hearings for all Three Strikes cases that arose before Court determined that trial courts have discretion to dismiss strikes; Court noted that such a process would be unduly cumbersome and rejected

the notion that a "remand *en masse* would represent a wise use of scare judicial resources"].)

Appellant apparently agrees. He makes no attempt to defend the Court of Appeal's "apparent single factor" rule, and instead now suggests a new rule: remand is appropriate where the record on appeal establishes a prima facie case that the defendant (i) has a qualifying mental disorder; (ii) the disorder was "arguably" a significant factor in the charged offense; and (iii) the defendant would not pose an unreasonable risk of danger to public safety as defined by section 1170.18. (AABM 9.) Perhaps recognizing the limitations of this rule, appellant later alters the third requirement to mandate that habeas corpus petitioners need only raise an "arguable" claim of suitability for diversion under section 1001.36, subdivision (b)(1)(F), and he also adds an additional caveat that the charged offense must also be eligible for diversion under section 1001.36, subdivision (b)(2). (AABM 10.) Later still, he changes his proposed rule once again by requiring that instead of a showing that the defendant arguably would not pose a risk of danger to public safety, the defendant must simply not have been convicted of a "super strike" within the meaning of sections 667, subdivision (e)(2)(C)(iv) and 1170.18. (AABM 43.) While appellant's proposed rule (or perhaps better said, "rules") is more limited than the Court of Appeal's, it is no less arbitrary. The diversion statute establishes six eligibility factors, not three. And there is no basis in the law for creating a standard that can be satisfied based on merely "arguable" claims, whatever those may be.

Appellant insists that he should not be required to make a showing of eligibility on appeal because such a requirement would conflict with the broad purposes of the diversion statute to facilitate treatment and because some of the eligibility factors require certain factual questions to be decided by the trial court (e.g., § 1001.36, subd. (b)(1)(B) & (F) [court must be

"satisfied" both that mental disorder was a significant factor and defendant will not pose an unreasonable risk of danger]). (AABM 42.)

But appellant starts from the false assumption that the showing of eligibility is one that he should be able to make on direct appeal. As respondent has previously pointed out, appellant must show error in order to be entitled to relief on direct appeal, and he cannot do that without first demonstrating the trial court had the discretion to grant diversion and it unknowingly abused that discretion. (ROBM 48; see also *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 321 ["a trial court's order may be set aside only if it constitutes an abuse of discretion"; "error must be affirmatively shown"].) Even if he cannot make the showing on direct appeal, appellant has the remedy of raising his claim on habeas corpus. (See ROBM 50.) Appellant has no response to these arguments. He does not contend that he need not show error in order to be entitled to a remand on direct appeal, or explain why habeas corpus, in which his petition need only set forth a prima facie case (*Maas v. Superior Court* (2016) 1 Cal.5th 962, 974), would be an inadequate remedy, especially where it may be combined with a direct appeal.

Appellant relies on this Court's decision in *People v. Braxton* (2004) 34 Cal.4th 798, 818 (*Braxton*), for the principle that under section 1260, a limited remand is appropriate to allow the trial court to resolve factual issues affecting the validity of the judgment but distinct from the issues submitted to the jury. (AABM 44.) Far from supporting appellant's argument, *Braxton* only underscores the flaw in appellant's reasoning. In *Braxton*, unlike the present case, there was proven trial court error: the trial court had improperly refused to consider a motion for new trial. (*Braxton*, *supra*, 34 Cal.4th at p. 807.) In addressing whether this error required reversal, this Court turned to the well-accepted principle in article VI, section 13 of the California Constitution that "'*No judgment shall be set*

aside. . . , unless. . . the error complained of has resulted in a miscarriage of justice.'" (*Id.* at p. 815, italics in original.) Commensurate with this principle, this Court held that a trial court's failure to hear a motion for new trial does not require reversal absent a showing of prejudice. (*Id.* at pp. 817-18.) In some cases, remand may be appropriate under section 1260 to allow a trial court to determine whether a motion for new trial would be meritorious. (*Id.* at p. 819.)

As *Braxton* reveals, there can be no reversal under the California Constitution without error resulting in a miscarriage of justice. Section 1260 permits a remand of the cause to the trial court for such further proceedings as may be "just under the circumstances." But without a proven error, justice does not require a remand. A defendant has an adequate remedy on habeas corpus to go outside the record in order to demonstrate error. (See *People v. Furhman*, *supra*, 16 Cal.4th at p. 946 ["Denial of remand on appeal in such cases does not leave a defendant who possesses a meritorious claim, supporting the exercise of discretion in his or her favor, without an effective remedy. A defendant in such a case is free to file a petition for writ of habeas corpus in the sentencing court..."].) Appellant does not contend otherwise.

In any event, even if appellant need only show a prima facie case to be entitled to a remand on direct appeal, there is no basis for weakening this standard to permit reliance on merely "arguable claims" as appellant urges. (AABM 9, 10, 43.) Certainly nothing in subdivision (b)(3), which appellant invokes and which allows a trial court to require a defendant to make a "prima facie" showing, washes this standard away based on merely "arguable" facts. A "prima facie" case is a well-known legal standard and need not be diluted as appellant urges. (See *In re Raymond G.* (1991) 230 Cal.App.3d 964, 972 ["'The words "prima facie" mean literally, "at first view," and a prima facie case is one which is received or continues until the

contrary is shown and can be overthrown only by rebutting evidence adduced on the other side'"]; see also Evid. Code, § 602.)

Second, appellant advances no principled reason for discarding the three remaining eligibility requirements, or substituting the lack of a super strike for a showing the defendant will not pose an unreasonable risk of danger. Appellant simply asserts that his various formulations "provide a workable framework that would not open the gate to remand for a diversion hearing for everyone who claims to have had a mental disorder at the time of the charged offense." (AABM 43.) But whether a rule is "workable" is not the metric of whether it is arbitrary. In particular, appellant simply ignores the requirement that a mental health professional must opine that the defendant's symptoms of the mental disorder that motivated the criminal behavior would respond to mental health treatment. (§ 1001.36, subd. (b)(1)(C).) The Legislature established six eligibility factors, not three. A rule requiring a defendant to show all six best comports with the legislative intent.

B. The Trial Court Already Rejected Appellant's Mental Health Defense

Regardless of the standard employed, appellant is not entitled to a remand both because the trial court already rejected his underlying claim that mental illness was a substantial factor, and because he is ineligible as a strike offender and probationer.

1. The Trial Court Already Found That Mental Illness Was Not a Factor in Mitigation

Appellant maintains that he has satisfied his proposed remand standard because he has made an "arguable" prima facie case that his mental illness was a significant factor in the commission of the crimes, insofar as the Red Bull and beer were part of his self-medication regimen and he testified that voices were talking to him before he entered the store.

(AABM 53.) However, it is not necessary to consider how a hypothetical judge might rule because the actual trial court rejected the factual underpinnings for appellant's assertions at sentencing.

Appellant stole the beverages because he wanted them, not because of any mental illness. He simply did not believe that anyone would make a big deal out of two low value items. He had stolen alcohol and other items from convenience stores on several prior occasions. (2RT 322, 384-385.) He knew this was wrong, and so he told himself on this occasion that he would go into the market and pay for those items. (2RT 348, 398-399.) But appellant also knew he did not have any money, which is why he had attempted to "borrow" money from someone to pay for them only moments earlier. (2RT 406.) Notwithstanding his lack of money, appellant went into the market, grabbed what he wanted, and attempted to leave. He knew this was wrong, but according to appellant a voice told him, "Go ahead and bust a jack move, and the police will let you get away with anything, as long as you submit to their power when they show up." (2RT 348.)

Based on these facts, the trial court declined to show appellant leniency. While agreeing that appellant suffers from mental health issues, the court nonetheless found that there were not "any significant mitigating factors" that would warrant dismissing the prior strike. (3RT 629.) As the court reasoned, appellant knew his actions were illegal, but he simply did not believe there would be any consequences. (3RT 629.)

In arguing that he established an arguable prima facie case notwithstanding the trial court's findings, appellant accuses respondent of "misunderstanding" the nature of mental health diversion. He insists that the court's findings have "nothing to do [with] the issues in a diversion hearing" and that diversion is not based on the same criteria that would make a defendant not guilty by reason of insanity. (AABM 55.) But appellant seems to miss the point. A mental disorder is a significant factor

in the commission of an offense if it "substantially contributed to the defendant's involvement in the commission of the offense." (§ 1001.36, subd. (b)(1)(B).) In concluding that there were no significant mitigating factors, the trial court necessarily determined that mental illness did not substantially contribute to the commission of the offense. Even before the mental health diversion law, a trial court was authorized to consider whether a "defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime." (Cal. Rules of Court, rule 4.423(b)(2).) Neither respondent nor the trial court confused the standard for determining whether a defendant is not guilty by reason of insanity. Instead, the trial court reasonably found that appellant's knowingly illegal behavior was a result of a base desire for beer and Red Bull rather than mental illness. That finding is also dispositive of appellant's claim of eligibility for the diversion program.

2. Appellant Is Statutorily Ineligible for Diversion Based on His Strike and Probation Violation

Appellant is statutorily ineligible for diversion or any type of suspended sentence as a result of his prior strike and the fact that he was on probation at the time of the present offenses. (See §§ 667, subd. (c) & 1203, subd. (k).) Accusing respondent of "arguing based on phantoms," appellant retorts that "[i]f prior-based limitations applied to mental health diversion, the statute would say so." (AABM 56, 57.) However, he advances no reason why such a limitation cannot be found in another statute. In fact, section 667, subdivision (c)(4), specifically provides that "[d]iversion shall not be granted" for a strike offender. It defies reason to suggest that this provision does not include mental health diversion (or by extension, any other type of diversion) because it is not included in the relevant diversion statute. (See *People v. Superior Court (Roam)* (1998) 69 Cal.App.4th 1220, 1228.) Contrary to appellant's argument, the mere fact

that section 1001.36 does not prohibit diversion based on the commission of serious offenses has no bearing on whether diversion is prohibited based on prior convictions. (AABM 57.)

Appellant next insists that there would not be a prohibited suspension of his sentence, but instead only a conditional reversal. He notes that the Court of Appeal provisionally reversed his convictions pending a mental health diversion eligibility hearing; the conviction would only be reinstated if the trial court declined to grant diversion or appellant did not successfully complete the program. (AABM 57, citing *Frahs*, *supra*, 27 Cal.App.5th at p. 792.) But appellant fails to recognize that if he were granted diversion, the execution of his sentence would necessarily be held in suspension while he attempts to satisfy the program. The mere fact that this suspension is the result of a conditional reversal does not make it any less a suspension of sentence. (See *People v. Carrillo* (2001) 87 Cal.App.4th 1416, 1421-1423 [no authority to conditionally dismiss strike allegation]; cf. *People v. Davis* (2000) 79 Cal.App.4th 251, 257-258 [distinguishing deferred entry of judgment].) That suspension of the execution of his sentence is expressly prohibited by sections 667, subdivision (c)(2) and 1203, subdivision (k).

C. Appellant Is Procedurally Barred Because His Case Was Post-Adjudication When the Diversion Law Went Into Effect

Contrary to the Court of Appeal's conclusion, the limitation in section 1001.36, subdivision (c), that "pretrial diversion" means postponement of judicial proceedings at any point "until adjudication," provides a meaningful temporal restriction on when diversion may be granted; that language does not simply suggest an aspirational view of what will typically or commonly occur. (See *Frahs*, *supra*, 27 Cal.5th at p. 791.) At a minimum, this language creates a procedural bar, regardless of whether it also demonstrates legislative intent to preclude retroactive application.

Consequently, even if the diversion statute is deemed to apply retroactively, it cannot now apply to appellant, who is past the point of adjudication, unless he can show good cause to excuse the procedural bar.

Appellant makes no attempt to show good cause. Instead, he argues that if the diversion statute is retroactive as to all non-final cases, then he would be "provisionally returned to a pre-adjudication posture." (AABM 58.) This statement is both perplexing and legally unsupported. Assuming the Legislature intended the diversion statute to apply retroactively to all non-final cases, it does not follow that the limitations found within the statute would not apply. It certainly does not follow that the Legislature intended to undo the effect of a jury trial by returning certain defendants to a pre-adjudication stage of "pretrial" litigation. This would make no sense. Retroactive application would mean that a defendant would be allowed to show that he or she falls within the purview of the statute, but it does not mean that such defendants are deserving of special treatment or that their convictions should be nullified.

In this regard, the language of the mental health diversion statute must again be contrasted with the situation presented under Proposition 57. In *Lara*, this Court concluded that because Proposition 57 was retroactive, juveniles with non-final cases who had not received a transfer hearing were entitled to one, regardless of whether they had already had pending cases in adult court. (*Lara*, *supra*, 4 Cal.5th at p. 313.) The difference between these two situations, however, is that after Proposition 57 a transfer hearing became a prerequisite to initiating adult proceedings. Thus, a juvenile with a non-final judgment became entitled to such a hearing, irrespective of the stage of the proceedings. The same is not true with mental health diversion, which elides any such jurisdictional requirement and which instead expressly limits when diversion may be granted.

CONCLUSION

Accordingly, for the reasons stated above, respondent respectfully requests this Court hold that the mental health diversion statute does not apply retroactively to all non-final cases, and, alternatively, that appellant is not entitled to a remand because he has not, and cannot, meet his burden of demonstrating eligibility.

Dated: May 16, 2019

Respectfully submitted,

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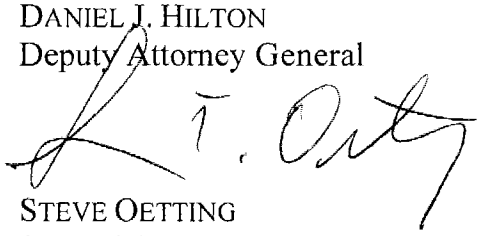

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,400 words.

Dated: May 16, 2019

XAVIER BECERRA
Attorney General of California

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

Case Name: **People v. Frahs**
No.: **S252220**

I declare:

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

On May 17, 2019, I electronically served the attached **REPLY BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on May 17, 2019, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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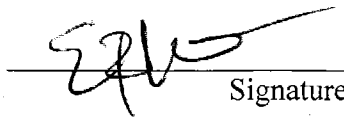
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 17, 2019, at San Diego, California.

E. Blanco-Wilkins
Declarant


Signature

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