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

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

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ISSUES PRESENTED

In granting review, this Court limited the issues to the following:

1. **Does Penal Code section 1001.36 apply retroactively to all cases in which the judgment is not yet final?**

2. **Did the Court of Appeal err by remanding for a determination under Penal Code section 1001.36?**

INTRODUCTION

As he had often done in the past, appellant Eric Frahs attempted to steal beer and an energy drink from a small market. But this time when the owner and his son tried to stop appellant, he ran into the owner and punched him in the head. At trial, appellant presented evidence that he suffers from schizoaffective disorder and he maintained that he heard voices telling him that the police would allow him to steal the drinks as long as he submitted to their authority. The jury rejected appellant's defense that he did not have the intent to commit theft and convicted him of two counts of robbery, among other crimes. Later, the trial court likewise rejected appellant's mental defense, declined to dismiss his prior strike, determined he was ineligible for probation, and sentenced him to prison for nine years.

While his appeal was pending on an unrelated challenge to the prior strike, the Legislature enacted Penal Code section 1001.36 (all further statutory references are to the Penal Code unless otherwise noted), which provides for pretrial mental health diversion. Because the Court of Appeal had already issued a decision rejecting appellant's claim, appellant filed a petition for rehearing urging the appellate court to remand his case to allow the trial court to consider granting him diversion. Although respondent argued the new law was not retroactive, the Court of Appeal disagreed. It issued a new decision holding not only that the new law applied to

appellant because his claim was not final on appeal, but also that because appellant satisfied one of the six prerequisites to be eligible for the program (namely, he had a qualifying mental disorder), he was entitled to have his case remanded for a determination of eligibility.

The Court of Appeal erred in both regards. The new diversion statute is not retroactive. The statute is intended to provide *pretrial* diversion to certain individuals suffering from identifiable mental disorders in order to reduce the number of cases where legal proceedings are suspended and criminal defendants are referred for competency evaluations to the Department of State Hospitals. Commensurate with this intent, the language of the statute expressly demonstrates the Legislature's intent to limit the application of "pretrial diversion" to criminal defendants whose cases have yet to reach the point of adjudication and therefore whose competency to stand trial would be at issue. Defendants who were tried and convicted have already had their cases adjudicated, and thus are precluded from seeking relief under section 1001.36. This statutory language, as well as similar language in other diversion statutes, the legislative history, subsequent amendments to the statute, and the potential for undermining jury verdicts, reveals the Legislature did not intend the statute apply retroactively to all cases not final on appeal, and certainly not to those cases that had reached the stage of conviction.

But even if the statute were retroactive, the record in this case demonstrates that appellant does not satisfy the conditions for eligibility. The trial court agreed with the jury that mental illness was not a substantial factor in appellant's (oft-repeated) decision to steal alcohol. Moreover, once the court found the strike true and declined to dismiss it, appellant was statutorily prohibited from receiving any type of suspended sentence, which would include diversion. Finally, on a broader level, any motion for

diversion would be procedurally barred as untimely because appellant's case has already been adjudicated.

STATEMENT OF THE CASE

On January 25, 2017, an Orange County jury convicted appellant of two counts of robbery (§ 211; counts 1 & 2), as well as one count of throwing a substance at a vehicle without intent to cause injury (Veh. Code, § 23110, subd. (a)), as a lesser included offense of throwing a substance at a vehicle with intent to cause injury (Veh. Code, § 23110, subd. (b)). (CT 154–157.)

In a bifurcated proceeding, the trial court found that appellant had previously suffered a prior serious felony (§ 667, subd. (a)), which was also a prior strike (§§ 667, subd. (b)–(i); 1170.12). (3RT 622.) That conviction was based on appellant's 2015 assault upon a person with a broken beer bottle. (CT 223.)

Prior to sentencing, appellant was evaluated to participate in Orange County's WIT (Whatever It Takes) program, which is designed to treat persons with serious mental illness. Although he had previously participated in the program, appellant was deemed unacceptable to enter the program. (2RT 325; 3RT 624.)

At sentencing, appellant asked the trial court to employ its discretion to dismiss his prior strike under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. As a basis for this request, he urged that his mental illness was a "huge contributor" to his crimes, and that because of his mental illness, it would not be appropriate to sentence him under the Three Strikes law. (CT 196.) The trial court denied appellant's *Romero* motion. The trial court found that appellant knew his conduct was illegal; he simply did not believe there would be any consequences from it because this is what voices in his head told him. (3RT 629.) Accordingly, the court determined it would be inappropriate to strike the prior strike. (3RT 629.)

The court sentenced appellant to a total term of nine years in prison, consisting of a low term of two years for count 1, which was doubled to four as a result of the strike, and an additional five years for the prior serious felony enhancement. Count 2 was ordered to run concurrently, and the final charge of throwing a substance at a vehicle was suspended because it was a misdemeanor. (3RT 631–633.)

Appellant timely appealed the judgment to Division Three of the Fourth Appellate District. He initially challenged the evidence that his prior offense constituted a strike. However, after the Court of Appeal rejected this claim, he petitioned for rehearing, claiming that pretrial mental health diversion under section 1001.36, which the Legislature enacted while his appeal was pending, should apply retroactively to him. On September 28, 2018, the Court of Appeal granted rehearing and issued a new published decision holding that section 1001.36 applies retroactively to all cases not yet final on appeal. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 786.) Because the Court of Appeal concluded the record "affirmatively discloses" that appellant "appears to meet at least one of the threshold requirements" for eligibility (namely, a diagnosed mental disorder), the appellate court ordered the trial court to conduct an eligibility hearing and, to the extent possible, treat the matter as though appellant had moved for pretrial diversion after the charges had been filed, but prior to their adjudication. (*Id.* at p. 791.) Accordingly, the Court of Appeal conditionally reversed the judgment: The court held that if appellant qualifies for and is given diversion, then the charges are to be dismissed; on the other hand, if the trial court finds that appellant does not meet the criteria under section 1001.36, or appellant does not complete diversion, then the conviction and sentence are to be reinstated. (*Id.* at p. 792.)

This Court granted review on its own motion and limited the issues to be briefed to those listed at the outset of this brief.

STATEMENT OF FACTS

A. Appellant Throws Rocks at Cars, Steals a Can of Beer and an Energy Drink, and Then Punches a Store Owner in the Head

On the morning of March 31, 2016, appellant walked into a market in Santa Ana to purchase beer. (1RT 190, 191, 193.) The owner of the market, however, refused to sell him the beer because about a week earlier appellant had tried to take some cigarettes from the store without paying. (1RT 193–196; 2RT 209.)

Appellant left the market and began throwing pieces of brick at passing cars. (2RT 210, 215, 262–264, 265.) He struck the windshield of one car, cracking or shattering the glass. (2RT 239, 265.) The car, however, did not stop. (2RT 254, 266.) Next, appellant went to a nearby parking lot and began stacking bricks on the roof of a parked car. (2RT 218–220, 240–241.)

Appellant returned to the store. Although the owner stood outside and told him that he would not sell him any beer, appellant nonetheless entered the market. (2RT 220.) Appellant walked directly to a refrigerated section and selected a can of beer and a Red Bull energy drink. (2RT 221.) As appellant walked towards the exit, the owner said that he would not sell him the beverages. (2RT 221–222.) The owner and his adult son used their bodies to block the exit. (2RT 222–223.)

Appellant lowered his shoulder and rushed or lunged toward the owner. (2RT 224, 290.) As the owner and his son struggled to restrain appellant, he threw the Red Bull out the door, dropped the beer, and used his fist to punch the owner in the back of his head. (2RT 225, 244, 248, 270.) After he was punched in the head, the owner lost his grip on appellant and fell down. (2RT 225.) Appellant left the store, but the owner managed to tackle him outside. (2RT 226.) Appellant tried to strike the

owner, but the owner's son held appellant's hands, pinning him down until officers arrived. (2RT 228, 281.)

B. Appellant Presents Evidence of His Mental Illness at Trial

Appellant, who was 30 years old at trial, testified in his own defense. (2RT 308.) He described his history of mental illness, including auditory hallucinations that began when he was 22. (2RT 320.) He was hospitalized on at least eight occasions, and in 2015 a conservator was appointed for roughly a year. (2RT 324–325.) He had been prescribed a variety of medications, including antidepressants, mood stabilizers, antipsychotics, and anti-anxiety pills. (3RT 328.) An admitted alcoholic, appellant had been in and out of various sober living facilities. (2RT 322, 377.)

Although at times he maintained a variety of different jobs (2RT 378), by age 29 appellant was homeless and living on the streets (2RT 372). Over the years, he had been convicted of an assault with a beer bottle, as well as eight theft offenses, including an attempted theft of alcohol at age 19, and several cases involving 7-Eleven stores in 2010, some of which also involved theft of beer. (2RT 322, 326–330, 384–385, 389.)

Four days before the present offense, appellant stopped taking his prescribed medications. (2RT 336.) On the day of the offense, appellant was suffering from delusions and hallucinations. (2RT 337.) He heard the owner of the market talking on his cell phone outside the store, and appellant believed the owner was calling the police. (2RT 345.)

An angel on a horse, or perhaps the voice of a friend from high school, told appellant to call his father to get help. (2RT 346.) Appellant placed a traffic cone in the street and directed cars into the market parking lot. (2RT 347.) Later, an angel told appellant to throw rocks at a car, so that it would pull over and he could "bum" money to pay for the items he wanted, or alternatively so that he could use a phone or get a ride. (2RT 348, 401–402.)

Appellant wanted to "borrow" money from someone to pay for the items, rather than commit the crime of stealing. (2RT 406.)

When his efforts failed, appellant heard a voice telling him to "bust a jack move," meaning to commit a petty theft. (2RT 398.) The voice told him that the police would let him get away with anything, so long as he ultimately submitted to their authority. (2RT 348, 398.) Appellant told himself that he would go to the store to get what he needed, which included his morning supply of beer, Red Bull and cigarettes, but that he would pay for these items. (2RT 348, 398–399.)

Although his plan to bum or borrow money was unsuccessful, appellant nonetheless went into the store even without money to make the purchase. (2RT 407.) Appellant maintained he believed he had money on a debit card, even though he had given away his debit card earlier that morning and notwithstanding his attempt to "bum" the money. (2RT 341, 407.)

Appellant claimed he did not know the owner did not want him in the store. (2RT 399.) Appellant went straight to the rear of the market and grabbed a beer and a Red Bull, but the owner's son told appellant to put the beer back. (2RT 349–350.) Appellant believed he was not allowed to purchase beer because the owner did not want him drinking alcohol in public. (2RT 350.) After putting the beer back, appellant was confused and believed he would be allowed to keep the Red Bull without paying. (2RT 350, 404.)

Appellant said, "Thank you," and began walking toward the two men. (2RT 351.) The owner grabbed appellant from behind, and, after a struggle, tackled appellant inside the store. (2RT 352.) The blow caused appellant to lose his grip on the can of Red Bull, which flew outside. (2RT 353.) The owner then took appellant outside and pinned him down until the police arrived. (2RT 354.)

A forensic and clinical psychologist also testified on appellant's behalf. Based on his review of a report from one of appellant's prior hospitalizations, records of appellant's criminal history, and an interview with appellant, as well as historical information provided by appellant's parents, the psychologist opined that appellant suffers from schizoaffective disorder, which is a combination of schizophrenia and bipolar disorder. (2RT 414, 416, 419, 421, 425, 428.) The psychologist concluded that in the days preceding the arrest appellant was suffering from a psychotic episode such that he was not in touch with reality. (3RT 458.) Likewise, appellant was experiencing symptoms on the day of the offense, as evidenced by his decision to throw rocks at cars in order to bum money. (3RT 464–465.)

Although the psychologist was aware appellant reported suffering from delirium tremens on the day of the theft, the psychologist was unaware that appellant was treated for alcohol withdrawal while in jail or that appellant had denied having any delusions or hallucinations when evaluated by a jail doctor—facts that could have influenced the psychologist's opinion. (3RT 488, 491–492.)

The psychologist acknowledged that appellant does not suffer from command hallucinations and that the voice he heard did not tell him what to do; instead, the voice only told him that it was permissible to steal as long as he later cooperated with police. (3RT 494–495.) In addition, the psychologist concluded that appellant knew he did not have any money after he gave away his debit card, and that this was the reason he attempted to bum money by throwing rocks. (3RT 497–498.)

C. Defense Counsel Argues Appellant Lacked Intent to Steal

In argument to the jury, defense counsel urged that the prosecution had not shown beyond a reasonable doubt that appellant intended to permanently or temporarily deprive the owner of the two drinks. Counsel

submitted that there was no intent to steal, because appellant was listening to voices that told him it was permissible to take the drinks because law enforcement officers would not do anything. (3RT 534–535, 546.) Defense counsel further maintained that there was no intent to inflict great bodily injury as to count 3; instead, appellant was trying to get the drivers to pull over so that he could bum money off them. (3RT 536–537.)

ARGUMENT

I. SECTION 1001.36 IS NOT RETROACTIVE

The Legislature demonstrated its intent that section 1001.36 not be given retroactive effect to all cases not final on direct appeal. This legislative intent is seen not only in the language of the statute, especially in consideration of language in other similar diversion statutes, but also the legislative history of the statute and its subsequent amendments, as well as public policies that caution against undermining jury verdicts. These indicia of legislative intent demonstrate at a minimum that the Legislature intended to limit retroactive application to exclude adjudicated cases. The Court of Appeal's contrary conclusion, which failed to consider the statute's history and which was premised on an inapposite analogy to juvenile transfer proceedings under Proposition 57, is not persuasive.

A. The Statutory Framework

Newly enacted section 1001.36 generally allows for pretrial diversion for persons suffering from certain mental illnesses. Although it was signed into law on June 27, 2018 as part of Assembly Bill (A.B.) 1810 (Stats. 2018, ch. 34, § 24), within three months the Legislature found it necessary to amend the law to restrict the eligibility requirements for persons charged with certain crimes as well as make a variety of other changes to the language of specific provisions. (Senate Bill (S.B.) No. 215, Stats. 2018, ch. 1005, § 1, as filed on September 30, 2018.)

"Pretrial diversion" is defined as the "postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment...." (§ 1001.36, subd. (c).) The stated purposes of the diversion program include promotion of the following:

> (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety.
>
> (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings.
>
> (c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders.

(§ 1001.35.)

As originally enacted, section 1001.36, subdivision (b), provided that pretrial diversion may be granted if the following six eligibility criteria are met:

> (1) The court is satisfied that the defendant suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a recent diagnosis by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence.
>
> (2) The court is satisfied that the defendant's mental disorder played a significant role in the commission of the charged offense. A court may conclude that a defendant's mental disorder played a significant role in the commission of the

charged offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense, the court concludes that the defendant's mental disorder substantially contributed to the defendant's involvement in the commission of the offense.

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

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

(5) The defendant agrees to comply with treatment as a condition of diversion.

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

(A.B. 1810, Sec. 24.)

As amended three months later, a new version of section 1001.36 made certain changes to the language of these six criteria and reordered those criteria as subparagraphs of a new subdivision (b)(1). A new subparagraph (b)(2) now proscribes a defendant from receiving pretrial diversion if charged with the following offenses:

(A) Murder or voluntary manslaughter.

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

(C) Rape.

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

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

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

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

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

(§ 1001.36 as amended by S.B. 215.)

Even if the defendant otherwise satisfies the six eligibility requirements, the court must nonetheless be satisfied that the recommended mental health treatment program "will meet the specialized mental health treatment needs of the defendant." (§ 1001.36, subd. (c)(1)(A).) In exercising its discretion to approve diversion, the court must "consider the request of the defense, the request of the prosecution, the needs of the defendant, and the interests of the community." (*Id.*, subd. (c)(1)(B).)

As part of a bill providing for appropriations related to the budget bill, A.B. 1810 was declared to take immediate effect. (A.B. 1810, sec. 37; Cal. Const. art. IV, § 12, subd. (e).) The September amendments in S.B. 215, on the other hand, became effective on January 1, 2019. (See *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 615; Cal. Const., art. IV, § 8, subd. (c)(1).)

Appellant was sentenced on February 24, 2017 (3RT 617), well before A.B. 1810 was signed into law on June 27, 2018.

B. Principles of Retroactivity Analysis

Section 3 provides that no statutory enactment is "retroactive, unless expressly so declared." "It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287.) An exception to this presumption is the *Estrada* rule. (*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) "The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*People v. Conley* (2016) 63 Cal.4th 646, 657.) "When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, *absent evidence to the contrary*, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted and emphasis added.)

When ascertaining whether a statute should be applied retroactively, the Legislature's intent is the paramount consideration. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) When the Legislature's intent is not clear, a law lessening the punishment for a given crime generally is applied to cases that are not yet final. (*Estrada*, *supra*, 63 Cal.2d at p. 748.) "The rule of lenity applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule." (*People v. Avery* (2002) 27 Cal.4th 49, 58, internal quotation and brackets omitted.)

It is not necessary for the Legislature to include an express saving clause in order to demonstrate its intent not to apply a statute retroactively. (*People v. Conley, supra*, 63 Cal.4th at p. 656 ["the 'absence of an express

saving clause ... does not end "our quest for legislative intent""].) This Court's cases "do 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; rather, they require 'that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.'" (*Id.* at pp. 656–657, quoting *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049.)

In discerning legislative intent, a reviewing court "'must first look at the plain and commonsense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose.'" (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185, quoting *People v. Cochran* (2002) 28 Cal.4th 396, 400.)

Accordingly, respondent will first turn to the language of the statute.

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

The language of section 1001.36 provides the primary evidence of the Legislature's intent. (See, e.g., *People v. Dehoyos* (2018) 4 Cal.5th 594, 601–602 [although Proposition 47 contained no express saving clause, its provisions nonetheless addressed the questions of retrospective application to completed sentences]; *People v. Conley, supra*, 63 Cal.4th at p. 657 [language of Proposition 36 was not silent on the question of retroactivity].) The statute expressly limits itself. Subdivision (c) of the statute defines "pretrial diversion" as the "postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged *until* adjudication." (Italics added.) This language indicates the Legislature did not intend to extend the potential benefits of section 1001.36 beyond resolution in the trial court. The Legislature made it clear that pretrial mental health diversion is only available from the time a

defendant is charged with a crime to the time the defendant's case is resolved by a trier of fact.

An "adjudication" has been broadly defined as "[t]he determination of the issues in an action according to which judgment is rendered; a solemn, final, and deliberate determination of an issue by the judicial power, after a hearing in respect to the matters determined." (Ballentine's Law Dictionary (3d ed. 1969) p. 31; see also Black's Law Online Dict. (2d ed.) <https://thelawdictionary.org/adjudication> [as of January 24, 2019] ["Adjudication" is "[t]he giving or pronouncing a judgment or decree in a cause; also the judgment given"].) In California, courts have given the term a somewhat more limited construction, at least in the criminal context. "'[G]uilt is adjudicated at trial or admitted by plea.'" (*People v. Clancey* (2013) 56 Cal.4th 562, 570, quoting *People v. Superior Court (Smith)* (1978) 82 Cal.App.3d 909, 916.) Courts in this state have sometimes distinguished between adjudications of guilt and the rendering of final judgment. (*In re DeLong* (2001) 93 Cal.App.4th 562, 568–570 [interpreting Proposition 36, court concluded that "conviction" included both concepts]; cf. *People v. Mendoza* (2003) 106 Cal.App.4th 1030, 1035 [conviction means adjudication of guilt, but does not include sentencing].) This limited definition of resolution by a trier of fact comports with the manner in which the Legislature has used the term "adjudication" elsewhere in the Penal Code. (E.g., § 299, subd. (b)(2) [regarding effect of dismissals "prior to adjudication by a trier of fact"].)

Regardless of whether a narrow or a broad view of "adjudication" is used, the result in this case is the same: Once the jury has returned its verdict, and certainly by the time the trial court has pronounced sentence, the defendant's case has been adjudicated. Notably, in using the word "adjudication," the Legislature did not state, as it easily could have done,

that pretrial diversion is available beyond resolution in the trial court until the judgment is final on appeal.

There is additional language in newly minted section 1001.36 that reflects its prospective application. Subdivision (a) provides: "*On an accusatory pleading* alleging the commission of a misdemeanor or felony offense, the court may, after considering the positions of the defense and prosecution, grant *pretrial* diversion to a defendant pursuant to this section if the defendant meets all of the requirements specified in paragraph (1) of subdivision (b)." (Emphasis added.) The statute thus anticipates that diversion will be granted at the pretrial charging phase. At no point is there any mention of "posttrial diversion." Further, one of the eligibility factors, subdivision (b)(1)(D), provides in part: "The defendant consents to diversion and waives his or her right to a speedy trial, ..." As discussed more thoroughly below, there is no speedy trial right once a conviction has been had. Finally, subdivision (e) once again reiterates that diversion occurs at the charging phase, providing in pertinent part: "If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's *criminal charges* that were the subject of the criminal proceedings at the time of the initial diversion." (Emphasis added.) By its language, the Legislature repeatedly made it clear that it intended pretrial local mental health diversion to be available to defendants with pending criminal charges, not convictions.

D. The Limiting Language in Section 1001.36 Comports with Limitations Found in Other Similar Diversion Statutes

In interpreting the language of section 1001.36, it is appropriate to consider other statutes of which it is a part. As this Court has often observed, "we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that

the whole may be harmonized and retain effectiveness.' [Citation.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 898–899; see also *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 ["The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible"].)

Beginning in the early 1970's, the Legislature enacted a variety of different diversion programs, such as diversion of certain narcotics offenders (§§ 1000–1000.10), misdemeanor diversion (§§ 1001.1–1001.9; see also §§ 1001.50–1001.55), diversion of defendants with cognitive development disabilities (§§ 1001.20–1001.34), pretrial diversion of traffic offenders (§ 1001.40), diversion of individuals suspected of writing bad checks (§§ 1001.60–1001.67), diversion of parents suspected of contributing to the delinquency of a minor (§§ 1001.70–1001.75), and diversion of military members suffering from mental health issues (§ 1001.80).

What is noteworthy about these provisions is that they demonstrate the Legislature's sharp awareness regarding the distinction between pretrial and posttrial stages of trial. For instance, like mental health diversion, several diversion programs, such as misdemeanor diversion, parental diversion, and military diversion, are expressly designated as "pretrial diversion" that apply from the time the accused is charged "until adjudication." (§§ 1001.1, 1001.70, subd. (b), 1001.80, subd. (k)(1)); see also § 1001.50, subd. (c).) This language was no accident. The Legislature has specifically recognized the existence of other non-applicable pretrial diversion and "postrial programs" to which diversion programs do not apply. (See, e.g., § 1001.2; see also § 1001.51, subd. (b).)

The "until adjudication" language in these diversion programs stands in stark contrast to the language chosen by the Legislature for diversion of

defendants with cognitive developmental disabilities. For these persons, diversion is available "at any stage of the criminal proceedings"—that is, without any limitation as to whether the case has been adjudicated. (§ 1001.21, subd. (a).) It is a venerable canon of statutory interpretation that "[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 26, internal quotations deleted; see also *In re Jennings* (2004) 34 Cal.4th 254, 273.) The Legislature demonstrated that in crafting diversion statutes it was well-equipped to allow diversion without limitation "at any stage of the proceedings," or alternatively allow diversion also at post-trial phases. In drafting section 1001.36, however, the Legislature rejected the broad, limitless language applicable for diversion of persons with cognitive disabilities and instead chose to limit the application "until adjudication," as it had previously done with other diversion statutes.

As these related diversion provisions demonstrate, the Legislature's use of the phrase "until adjudication" was meant to provide a meaningful limitation on the stage at which diversion would be available. The reason for this limitation is evident. Diversion statutes in general are frequently concerned with saving the state money. (See, e.g., *People v. Superior Court* (*Sanchez-Flores*) (2015) 242 Cal.App.4th 692, 705 ["avoiding the time and expense of certain misdemeanor trials is certainly one of the goals that animated supporters" of pilot program of deferred sentencing in Los Angles]; *People v. Cisneros* (2000) 84 Cal.App.4th 352, 357 [deferred entry of judgment program for first time drug offenders must be liberally construed to promote objectives of "rehabilitating novice drug users and reducing congestion in the criminal justice system"].) In order to save the

state money and prevent the unnecessary use of trial court resources, diversion must occur before trial, not after.

E. The Legislative History Reveals the Legislature Did Not Intend the Act to Apply Retroactively to All Adjudicated Cases

The legislative history behind the original enactment, as well as the subsequent amendment of section 1001.36, support this interpretation of the express language and the Legislature's desire to limit its application. In interpreting a statute, it is necessary to "consider 'the object to be achieved and the evil to be prevented by the legislation. [Citations.]'" (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276, quoting *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159.) As with other diversion statutes discussed above, the legislative history behind A.B. 1810 likewise reveals that the Legislature was eager to avoid expending state resources in trying mentally ill individuals, and that it also sought to shift many of the pretrial associated costs back to the counties. Those goals would not be accomplished by making the law retroactive. The quick amendment of the statute in S.B. 215 underscores this intent.

1. The legislative history behind A.B. 1810 demonstrates an intent to save the state money

The addition of section 1001.36 was part of the Omnibus Health Trailer Bill for 2018-2019, and made a variety of changes to the Budget Act of 2018. (See Ass. Floor Analysis of A.B. 1810, as amended June 12, 2018.)[1] As a budget bill, which took effect immediately upon being signed by the Governor, the Act was primarily concerned with the costs of various health care measures in the state. The diversion program stood to save the state money in at least two respects. One of the Legislature's concerns was

[1] Respondent will file a separate request for judicial notice of the assembly analysis.

with the high cost on the Department of State Hospitals due to the large number of persons who were being declared incompetent to stand trial. (See *id.* at p. 8.) To reduce this cost, the Act sought to divert such persons away from state hospitals and direct them instead to county facilities by giving local areas discretion in how they handle such cases through pretrial diversion. While the Act mandates the state provide counties with certain funds for these programs, counties would still have to furnish "a specified match of county funds." (Legis. Counsel's Dig. Ass. Bill No. 1810, Stats. 2018 Summary Dig., p. 5; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1129, fn. 4 [summary digests of Legislative Counsel are properly considered by an appellate court without the need for judicial notice because the digests are published].) The Act also requires that the distribution of state funds prioritize proposals to "reduce incompetent to stand trial referrals to the Department" of State Hospitals. (Ass. Floor Analysis of A.B. 1810, as amended June 12, 2018 at p. 8; see also section 29 of the Act, adding Welf. & Inst. Code, § 4361, subd. (b) [providing that the purpose of the chapter is "to assist counties in providing diversion for individuals with serious mental illnesses who may otherwise be found incompetent to stand trial and committed to the State Department of State Hospitals for restoration of competency"].)

Consistent with this intent to save the state money by reducing the number of persons who would potentially be referred to the Department of State Hospitals for treatment based on their inability to stand trial, A.B. 1810 also made changes to section 1370 regarding the interplay of diversion and competency determinations. (See A.B. 1810, sec. 25.) As amended, section 1370, subdivision (a)(1)(b)(iv), provides that after a defendant has been found to be incompetent, the trial court may make a finding that he or she is an appropriate candidate for diversion. However, this provision provides an important limitation on the timing of such a

referral: it must be "*before* the defendant is transported to a facility pursuant to this section." (*Ibid.*, italics added.) Once the defendant has already been transported to a state facility for treatment, the cost savings to the Department of State Hospitals would have waned. The temporal limitation for referrals under section 1370 is, therefore, consistent with the similar limitation "until adjudication" found in section 1001.36.

By utilizing diversion to reduce the number of cases pending trial, the Act also stood to save the state money in a second respect by alleviating the burden on state-funded courts and instead placing that burden, at least partially, on county-run diversion programs. As the Legislative Digest summarized: "By increasing the duties of local officials relating to diversion and the sealing of arrest records, this bill would impose a state-mandated local program." (Legis. Counsel's Dig., Ass. Bill No. 1810, Stats. 2018, Summary Dig., p. 5.) But once a defendant has stood trial, this benefit to the state once again fades away. It is for this reason that the Legislature limited application of the diversion program "until adjudication," both because after that time the defendant would necessarily have been shown to be competent and would not pose a fiscal burden to the Department of State Hospitals, and because the cost of a trial would already have been incurred.

This intent to encourage local mental health treatment, and thereby decrease the number of cases where legal proceedings are suspended and defendants are referred to the Department of State Hospitals for competency evaluations, as well as reduce the number of cases generally awaiting judicial determination, bears directly on the Legislature's intent regarding retroactive application. The Legislature's desire to save the state money is consistent with a wider intent not to apply the statute retroactively to cases that would not save the state money. Once a case has proceeded to trial, there would be no or reduced cost savings to the state.

2. The September 2018 amendments demonstrated an intent to close a loophole and further disclosed the Legislature's earlier intent that the statute would not apply retroactively

In amending section 1001.36 a mere three months after it enacted that provision, the Legislature demonstrated its intent and belief that pretrial diversion would not be retroactive. The September 2018 amendments were necessary to prevent certain serious offenders, such as rapists and murderers, from avoiding the consequences of their actions and escaping punishment without ever suffering a criminal conviction. Yet, despite the flaw in the original enactment that would have enabled these serious offenders to escape punishment, the Legislature did not enact the September 2018 amendments as urgency legislation that would be effective immediately. Instead, the amendments were ratified in the normal course and became effective in January 2019.

Had the Legislature believed that the original enactment was retroactive for all cases not yet final on appeal, presumably it would have taken urgent action in order to avoid allowing convicted murderers and rapists with non-final judgments to avoid conviction in the interim. (See *Russ Bldg. Partnership v. City and County of San Francisco* (1988) 44 Cal.3d 839, 852 ["While '"subsequent legislation interpreting [a] statute ... [cannot] change the meaning [of the earlier enactment,] it [does] suppl[y] an indication of the legislative intent which may be considered together with other factors in arriving at the true intent existing at the time the legislation was enacted"'"]; *People v. Cole* (2006) 38 Cal.4th 964, 981, fn. 12.) To the extent there is any reason for sometimes questioning whether a later-sitting Legislature may speak on the intent of an earlier legislative enactment, this is not a situation in which the later enactment occurred many years or even a decade after the original (cf. *De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 985, fn. 6); it must be remembered that the

amendment here occurred a mere *three months* after the original enactment. It would have been absurd for the Legislature to amend the statute so shortly after enacting the provision, yet allow a loophole for all those who, by happenstance, were awaiting appeal in the final months of 2018.

That the Legislature failed to ensure the amendments took immediate effect, even after recognizing the serious risk to public safety posed by allowing murderers and rapists to escape conviction and go free after only two years of diversion, demonstrates the Legislature did not believe there was a need for immediate action. The Legislature's intent that the original enactment would not apply retroactively explains why the Legislature believed the changes to the law could wait until the new year to become effective.

Admittedly, by delaying the effective date of the amendments, the Legislature opened the door for persons charged with murder or rape in the final quarter of 2018 to continue to be able to seek mental health diversion without being categorically excluded based on their crimes. This seeming incongruity does not detract, however, from the evidence that the Legislature did not intend mental health diversion to apply retroactively. Once a defendant has been convicted of rape or murder, all doubt has been removed as to whether he or she poses a threat to society. While it is one thing for the Legislature to allow trial courts to continue to consider diversion for persons *charged* with murder or rape during this short period, it is another thing entirely for the Legislature to intend to allow *convicted* murderers and rapists to have their sentences overturned and their cases remanded *after* their cases were already adjudicated and they were found guilty. Having recognized the categorical danger posed by potentially allowing such dangerous offenders to be released into the community, the Legislature's failure to immediately limit the release of convicted rapists

and murderers suggests the Legislature did not believe the law applied retroactively to them.

F. Application of *Estrada* to Cases After Adjudication Would Risk Potentially Undermining the Legitimacy of the Jury's Verdict

By defining "pretrial diversion" as extending only until adjudication, the Legislature was able to avoid potentially undermining factual findings made by the jury. Namely, as previously noted, a defendant is eligible for diversion only if the mental disorder was a "significant factor" in the commission of the charged offense—that is, one that "substantially contributed to the defendant's involvement in the commission of the offense." (§ 1001.36, subd. (b)(1)(B).) In cases that proceed to trial, defendants suffering from mental illness will frequently pursue a mental health defense. When a case proceeds through adjudication and results in conviction, the jury must necessarily reject any such defense. Permitting a trial court thereafter to reach a different conclusion and find the defendant eligible for mental health diversion would risk potentially undermining the integrity of the jury's findings.

As discussed further below, the present case is an apt illustration of this tension. Here, appellant defended against the robbery charges based on the notion that he did not intend to permanently deprive the owners of the beer and energy drink. The trial court instructed the jury with CALCRIM No. 3428, regarding mental impairment as a defense to specific intent or mental state. (CT 144.) The jury rejected appellant's defense and found him guilty of both counts of robbery. As the trial court later pointed out in declining to dismiss the prior strike, appellant did not believe that his actions were legal; he simply did not believe that he would suffer any consequences. (3RT 629.) If a court were now to conclude that appellant's mental illness was a significant factor in the commission of the offense,

such a conclusion would either conflict, or at least be in tension, with the jury's determination beyond a reasonable doubt on this factual issue.

Even if it could be argued that the trial court's determination of eligibility will not always be based on the same precise considerations of guilt that were determined by the jury (cf. *People v. Towne* (2008) 44 Cal.4th 63, 87 [permitting a judge to consider conduct underlying acquitted counts does not undermine role of jury in establishing maximum authorized sentence]), the Legislature could well have sought to avoid even the appearance of undercutting the role of the jury as the ultimate finder of fact.

And even if the role of the jury were not directly undermined, the Legislature could well have been concerned that giving a defendant mental health diversion after the jury had already rejected the mental health defense could imperil the public's perception of the entire diversion program. This is especially true considering the Legislature anticipated that some number of defendants placed on diversion would fail out of the program, and some would even go on to commit new felonies. (See § 1001.36, subd. (d) [regarding reinstatement of criminal proceedings].) It would be bad enough if a defendant placed on diversion committed a serious offense while released to the community; it would be all the worse if a defendant did so after a jury of the defendant's peers had already rejected a mental health defense and found the defendant guilty as charged. Because the law as originally enacted applied to all crimes without limitation, it is particularly difficult to imagine that the Legislature would have intended that rapists and murderers whose mental health defenses were already rejected by their juries would be released to potentially commit more crimes.

Based on the Legislature's decision to limit pretrial diversion "until adjudication," there is every reason to believe it wished to avoid these potential consequences. Retroactive application of section 1001.36 would

target in large part those persons whose crimes had already been adjudicated. It is therefore reasonable to surmise that the Legislature did not intend the law's retroactive effect.

G. Even If the Legislature Did Not Intend to Foreclose Retroactive Application as to All Cases, It Did Intend to Limit Retroactive Application to Adjudicated Cases

Admittedly, the language of section 1001.36 does not necessarily demonstrate an intent to foreclose diversion to all those who *committed* a crime prior to the effective date of the Act, but whose claims were not *adjudicated* by that time. Nevertheless, at least as to those persons such as appellant whose cases were adjudicated on the effective date, the Legislature demonstrated it did not intend the law to apply retroactively to them. That the Legislature may not have intended to foreclose retroactivity across the board does not prevent this Court from concluding the Legislature intended to limit retroactivity as to some defendants.

Because the *Estrada* rule reflects an inference about legislative intent, rather than a constitutional command, "the Legislature . . . may choose to *modify, limit, or entirely forbid* the retroactive application of ameliorative criminal-law amendments if it so chooses." (*People v. Conley, supra*, 63 Cal.4th at p. 656, italics added.)

Here, the Legislature demonstrated its intent to limit retroactive application through the "until adjudication" limitation of the statute, among other provisions. The history and policies behind the statute richly support this conclusion. That the Legislature did not intend the statute to apply posttrial to a certain class of individuals calls "'into question the central premise underlying the *Estrada* presumption,' namely, that the lawmaking body had 'categorically determined that "imposition of a lesser punishment" will in all cases "sufficiently serve the public interest."'" (*People v. Dehoyos, supra*, 4 Cal.5th at p. 602, quoting *People v. Conley,*

supra, 63 Cal.4th at p. 657 and *In re Pedro T., supra,* 8 Cal.4th at p. 1049.) Even if the Legislature contemplated that pending pretrial cases would be able to take advantage of the new diversion statute (a question not presented by the facts of the instant case), it manifestly did not intend the statute to apply to all posttrial cases as well. Thus, the central premise of *Estrada* does not apply at least as to these posttrial cases.

H. The Court of Appeal's Reasons for Applying Section 1001.36 Retroactively Are Not Compelling

In the present case, the Court of Appeal agreed that appellant's case had "technically" been "adjudicated" at the time section 1001.36 was enacted, but nonetheless concluded that the law applied retroactively to all cases not final on appeal. As the court reasoned, however, the "adjudication" language found in subdivision (c) addresses "simply how this particular diversion program is ordinarily designed to operate." (*People v. Frahs, supra,* 27 Cal.App.5th at p. 789.) Implicitly, the Court of Appeal concluded that the language did not act as a limit to retroactivity for cases already adjudicated. Pointing to this Court's decision in *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, the court reasoned that "the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy," did not prevent this Court from concluding in that case that such a hearing must be made available to all defendants whose convictions are not yet final on appeal. (*Ibid.*) Further, while determining it was "not necessary" to consider the legislative history (*id.* at p. 789, fn. 2) behind A.B. 1810 in reaching this conclusion, the court relied on section 1035, subdivision (a), as expressing a legislative intent to apply the diversion program "as broadly as possible" (*id.* at p. 791). The Court of Appeal therefore ordered the trial court on remand to apply the mental health diversion "as nearly as possible" as though the statute existed at the time appellant was first charged. (*Ibid.*)

The Court of Appeal was mistaken in each regard.

1. Pretrial diversion is unlike direct filing of juvenile cases under Proposition 57

The Court of Appeal's reliance upon this Court's holding in *Lara* to support its retroactivity analysis was misplaced. In *Lara*, this Court considered whether the principles of *Estrada* applied in the context of retroactive application of Proposition 57, which eliminated prosecutorial discretion to directly file certain cases against juveniles in adult court. The Court concluded that the rationale of *Estrada* applied where Proposition 57 had the potential to result in a dramatically more lenient sentence for persons who were treated as juveniles. However, this did not end the inquiry. Instead, this possibility for more lenient treatment served only to create an inference of retroactivity; the Court further examined whether anything rebutted this inference:

> Proposition 57 does not reduce the punishment for a crime. But [*Estrada's*] rationale does apply. The possibility of being treated as a juvenile in juvenile court—where rehabilitation is the goal—rather than being tried and sentenced as an adult can result in dramatically different and more lenient treatment. Therefore, Proposition 57 reduces the possible punishment for a class of persons, namely juveniles. For this reason, *Estrada's* inference of retroactivity applies. *As nothing in Proposition 57's text or ballot materials rebuts this inference*, we conclude this part of Proposition 57 applies to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted.

(*Lara*, *supra*, 4 Cal.5th at pp. 303–304, emphasis added.)

Respondent does not dispute that like Proposition 57, mental health diversion has a potentially ameliorative effect: defendants who successfully complete the program would be able to have criminal charges wiped clean. Under the reasoning of the *Lara* decision, the *Estrada* principle would generally apply even though the diversion program does

not reduce the punishment for a particular crime. (See *Lara, supra,* 4 Cal.5th at p. 308.)

But unlike Proposition 57, section 1001.36 does have direct language indicating pretrial mental health diversion is not to be available retroactively. It specifically provides for the "postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).) This language rebuts "*Estrada's* inference of retroactivity." Simply put, the Legislature did not intend a post-trial, post-sentencing appeal to preserve a claim for *pre*-trial diversion.

In concluding that the Legislature's use of the term "adjudicated" simply expressed an aspirational view of how the procedure should normally take place, the Court of Appeal failed to reckon with the limiting preposition "until" that immediately precedes that noun. The Legislature did not need to include the limiting language "at any point in the judicial process until adjudication" if what it really wanted to express was that the relevant period extended until finality. Likewise, if the Legislature intended to express only what would typically occur, it did not need to provide any limitation at all; the notion that *pretrial* diversion would typically occur *pretrial* was already inherent in the language of the statute. Correctly construed, the phrase "until adjudication" means exactly what it says. The Legislature demonstrated its intent with more than ample clarity.

This language makes section 1001.36 entirely different from the situation before this Court in *Lara*. In *Lara*, this Court observed that "'Historically, a child could be tried in criminal court only after a judicial determination, before jeopardy attached, that he or she was unfit to be dealt with under juvenile court law.'" (*Lara, supra,* 4 Cal.5th at p. 305.) As amended by Proposition 57, Welfare and Institutions Code section 707, subdivision (a), requires a motion to transfer a juvenile case to criminal

court to be made "prior to the attachment of jeopardy." This language did not serve as a limitation to preclude transfer hearings back to the juvenile court where a fitness hearing had never been held, which was the issue presented in *Lara*. Nor could it. The language was designed only to limit transfers *to adult court* after jeopardy had attached; it did not apply to transfers in the other direction. Thus, the *Lara* court was not faced with a statute that contained limiting language and it certainly did not decide the effect of language similar to that found in section 1001.36.

2. Section 1035 does not demonstrate an intent to apply mental health diversion as broadly as possible

Contrary to the Court of Appeal's view, the prefatory language in section 1035 does not express a legislative intent to apply mental health diversion as broadly as possible; in fact, it does the exact opposite. As noted above, subdivision (a) of that provision demonstrates an intent to promote mental health diversion "to mitigate the individuals' *entry and reentry into the criminal justice system while protecting public safety.*" (Italics added.) Far from demonstrating an intent to apply mental health diversion as broadly as possible, the Legislature instead revealed that it hoped to balance the competing interests of protecting the public, facilitating the treatment of the mentally ill, and preventing cases involving the mentally ill from consuming unnecessary judicial resources. But once a defendant has been convicted, this carefully-balanced equilibrium no longer applies. Once the judicial resources have been spent by proceeding with a trial, the concern with the defendants' *entry* into the criminal justice system effectively vanishes, judicial resources would already have been spent, and the need for protecting the public safety established by the jury's verdict.

3. The Court of Appeal improperly ignored legislative history, and did not have an opportunity to consider subsequent developments

As previously discussed, to the extent there was any ambiguity in the statutory language, the legislative history of the budget bill amply supports respondent's position. However, the Court of Appeal declined to consider respondent's request for judicial notice of the legislative history as "not necessary to resolve the legal issues on appeal." (*People v. Frahs*, *supra*, 27 Cal.App.5th at p. 789, fn. 2.) Yet, the Court of Appeal did not explain why it was unnecessary to examine the legislative history behind section 1001.36. The court did not conclude that the Legislature's plain language was so clear in its intent to apply the law retroactively that there is no need to apply rules of statutory construction. (See *In re W.B.* (2012) 55 Cal.4th 30, 52 [extrinsic aids, such as legislative history may be considered only if the statutory language is reasonably subject to multiple interpretations].) Nor could the court make such a claim given the definition of pretrial diversion as extending until adjudication. The Legislature certainly did not expressly declare that section 1001.36 was to operate retroactively. Accordingly, it is appropriate to consider extrinsic sources to determine this intent. (See *People v. Brown, supra,* 54 Cal.4th at p. 320; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209.)

Nor did the appellate court consider the effect of the Legislature's amendments to section 1001.36 in S.B. 215. Although the bill was enrolled and presented to the Governor on September 6, 2018, he did not sign it until September 30th—two days after the court filed its decision.

Thus, the court never considered either the Legislature's original concerns with saving the state money and judicial resources, or its subsequent decision to close a loophole as to dangerous murderers and rapists yet make this change effective only prospectively.

4. The awkwardness in applying the diversion statute after trial serves to further demonstrate the Legislature did not intend such a result

The Legislature's intent not to give section 1001.36 retroactive effect is further revealed by the awkwardness in applying the statute after there has already been an adjudication.

Implicitly, the Court of Appeal recognized the difficulty of applying the mental health diversion statute after adjudication, which is why the court ordered the lower court to apply the statute "as nearly as possible" as if appellant had not already been adjudicated and found guilty. (*People v. Frahs, supra,* 27 Cal.App.5th at p. 791.) This is because once there has been an adjudication, some of the eligibility requirements no longer apply, and other limiting language would have to be entirely ignored. For instance, one of the eligibility requirements is that the defendant must "waive[] his or her right to speedy trial." (§ 1001.36, subd. (b)(1)(D).) But after there has already been a speedy trial, there is no longer any right to be waived. (*Betterman v. Montana* (2016) __ U.S. __ [136 S.Ct. 1609, 1618] [Sixth Amendment speedy trial right "detaches upon conviction" and does not extend to sentencing].) Yet, the Legislature did not require that a defendant waive "any" right he or she may have. Instead, it anticipated that the defendant would have a right to speedy trial precisely because it intended that the statute would apply only until adjudication—that is, while the right still exists.

More generally, the trial court would be required to utterly ignore the limitations in section 1001.36, subdivision (c), that diversion be made pretrial (so that the state could avoid the expense of a trial). And, of course, nothing in the appellate court's "nearly as possible" rule explained how the trial court should reconcile contrary factual findings that were already made by a jury in rejecting a proffered mental defense.

In *Lara*, this Court rejected a similar, yet distinguishable argument that the complexity of holding a juvenile transfer hearing for a person who had already been convicted of a criminal offense provided a reason for denying such a hearing. This Court agreed that the remedy was complex, but pointed out that "complexity is inherent when juveniles are to be treated as adults." (*Lara, supra,* 4 Cal.5th at p. 313.) The Court further determined that lower courts would be able to implement the remand orders without undue difficulty. (*Ibid.*)

Respondent's argument here is different. It is not a question whether the trial court could figure out how to hold a posttrial diversion hearing; all the court would have to do is ignore certain provisions and language that would not apply in the posttrial context. Instead, the fact that certain provisions would have to be overlooked provides further evidence that the Legislature did not *intend* such a result, not that such a result should be denied because it is difficult to implement. Unlike juvenile transfer hearings, diversion hearings in general are not inherently complex. The complexity arises only when a statute is applied retroactively where that was not what the Legislature contemplated.

Accordingly, this Court should decline to follow the *Frahs* decision, and should instead conclude the law was not intended to apply retroactively.

II. APPELLANT DID NOT MAKE AN ADEQUATE SHOWING OF ELIGIBILITY AND HIS CASE SHOULD NOT BE REMANDED

Even if section 1001.36 was intended to be retroactive, appellant has failed to sustain his burden of showing he would be eligible under the statute's six eligibility provisions. Contrary to the Court of Appeal's decision, a remand for an eligibility determination is not appropriate where the record establishes the defendant satisfies only one of the six preconditions. In any event, the record affirmatively demonstrates the trial court would not have granted appellant mental health diversion, and any

remand would be futile. In fact, as a strike offender, appellant is statutorily prohibited from receiving any type of suspended sentence, which necessarily includes diversion. More broadly, relief is not available in cases such as the present that have already been adjudicated. Notwithstanding the Court of Appeal's conclusion, the phrase "until adjudication" provides a meaningful temporal limitation on requests for diversion—a procedural bar that can only be excused based on good cause.

A. Appellant Bears the Burden of Demonstrating Eligibility

Appellant has not satisfied his burden of showing that he is eligible under the six preconditions that must be shown prior to a grant of mental health diversion. Without this showing, there is no basis for a remand to the trial court. To the extent the appellate record is insufficient to allow appellant to make that showing, the burden rests on him to supplement that record with a petition for writ of habeas corpus. Contrary to the Court of Appeal's view, it is not appropriate to require remand whenever there is proof of simply one of the six preconditions.

Section 1001.36 establishes six *prerequisites* to eligibility. (See § 1001.36, subd. (b)(1) ["Pretrial diversion may be granted pursuant to this section if all of the following criteria are met..."].) Moreover, that provision places upon the defendant the burden of establishing this eligibility. (§ 1001.36, subd. (a) [pretrial diversion may be granted "if the defendant meets all of the requirements specified in paragraph (1) of subdivision (b); see also *id.*, subd. (b)(1)(A) ["Evidence of the defendant's mental disorder shall be provided by the defense..."].) If all of these requirements are not shown, then the trial court has no discretion to impose pretrial mental health diversion. And if the trial court has no discretion, then there can be no error in failing to order or even consider diversion.

Only after the defendant satisfies the six eligibility requirements does the trial court move to the next stage of exercising its discretion in deciding

whether to grant admission to the program. Under section 1001.36, subdivision (c), the trial court must weigh, among other conditions, the following factors in making this determination:

> (1) (A) The court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant.
>
> (B) The defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources. *Before approving a proposed treatment program, the court shall consider the request of the defense, the request of the prosecution, the needs of the defendant, and the interests of the community.*

(Italics added.)

In this regard, section 1001.36 is decidedly different from other situations in which appellate courts have remanded matters in light of subsequent legislative changes, such as recent amendments to section 12022.5, subdivision (c), and 12022.53, subdivision (h), which gave trial courts discretion to strike firearm enhancements where there was previously no discretion to do so (see Sen. Bill No. 620 (2017-2018 Reg. Sess.), Stats. 2017, ch. 682, § 1 (S.B. 620)), or juvenile transfer hearings after Proposition 57. For instance, in the firearm enhancement context, there are no requirements for eligibility; all that is necessary is that a firearm enhancement was found to be true. If a trial court did not know it had the discretion to strike one of these enhancements (e.g., because the amendments had not passed at the time of sentencing), then it would be appropriate to remand the matter for a new sentencing hearing to allow the trial court to exercise informed discretion. (*People v. Billingsly* (2018) 22 Cal.App.5th 1076, 1081; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

Unlike the firearm enhancement statutes, section 1001.36 distinguishes the prerequisites necessary for consideration of a motion for

diversion from the factors that are used to evaluate the merits of that motion. Unlike firearm enhancements, the trial court does not reach the second step under subdivision (c) unless it first finds the six factors in subdivision (b). There is therefore no discretion to be exercised, and no basis for a remand for a failure to exercise discretion, until a defendant has affirmatively shown eligibility for diversion.

As with the firearm enhancements, Proposition 57 transfer hearings likewise underscore the differences with the eligibility requirements of section 1001.36. After Proposition 57, the onus rests on *the prosecution* to move to transfer a minor from juvenile court to a court of criminal jurisdiction. (Welf. & Inst. Code, § 707, subd. (a) [the prosecution "may make a motion to transfer the minor"].) Unlike section 1001.36 motions, there are no prerequisites to consideration of such a transfer motion (other than that the defendant must be a minor). In ruling on the transfer motion, the court must consider five statutorily-enumerated factors. (Welf. & Inst. Code, § 707, subd. (b) ["the court shall consider the criteria specified in subparagraphs (A) to (E)"]; see generally *J.N. v. Superior Court* (2018) 23 Cal.App.5th 706, 711 [noting that unlike former law, the revised text contains no presumption minor is unsuitable for treatment under juvenile court system].) Those factors, however, are not prerequisites to consideration of the motion; rather, they provide the guidelines that inform the court's discretion to grant or deny the motion. Thus, in *Lara* it was necessary to hold transfer hearings that had never been held in order to fulfill the statutory mandate. (*Lara, supra*, 4 Cal.5th at p. 304.)

Unlike juvenile transfer hearings, a trial court is not required to initiate weighing the factors relevant to a mental health diversion determination simply based on a motion by one of the parties. As noted above, section 1001.36 entails a two-step process, in which the trial court does not reach the second step of exercising its discretion under subdivision

(c) unless *the defendant* first demonstrates eligibility under the six factors in subdivision (b). Once again, unlike juvenile transfer hearings, there is therefore no discretion to be exercised until a defendant has affirmatively shown eligibility for diversion.

Before there has been a showing of error, there is no basis for a remand. Appellant cannot show an abuse of discretion unless he shows the trial court had the discretion in the first place. It is well accepted that "'[a] judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see also *People v. Booth* (2018) 25 Cal.App.5th 450, 452.) It follows that before appellant's case should be remanded to the trial court, he must first show that there was error, which in turn requires he show the trial court had discretion to exercise. (See § 1260 [reviewing court may "remand the cause to the trial court for such further proceedings as may be just under the circumstances"]; *People v. Rodriguez* (1998) 17 Cal.4th 253, 258 [reviewing court has the power to remand with directions "when a trial court has made a mistake in sentencing"]; *People v. Southack* (1952) 39 Cal.2d 578, 591 [remanding for a determination as to eligibility for probation where court had erroneously assumed the defendant was not eligible].)

In the present case, the Court of Appeal briefly addressed the showing that must be made to require a remand as follows:

> Further, Frahs' case is not yet final on appeal and the record affirmatively discloses *that he appears to meet at least one of the threshold requirements* (a diagnosed mental disorder). Therefore, we will direct the trial court on remand to make an eligibility determination regarding diversion under section 1001.36.

(*People v. Frahs, supra,* 27 Cal.App.5th at p. 791, italics added.)

The Court of Appeal's rule thus requires a remand where there is just an apparent showing of only one eligibility factor. But this rule is arbitrary. Why should satisfaction (let alone an appearance of satisfaction) of one factor be sufficient when the section 1001.36, subdivision (a), expressly requires that a defendant must "meet[] *all of the requirements* specified in paragraph (1) of subdivision (b)?" (Italics added.) Clearly, the Legislature did not contemplate remanding all cases across the state that were pending when section 1001.36 was enacted. Such a waste of resources would be particularly contrary to the Legislature's concerns with saving the state money. A showing of one factor, while perhaps better than no showing whatsoever, still does not satisfy the antecedent conditions necessary to establish eligibility.

The Court of Appeal did not maintain that this situation is similar to the circumstance that was presented after the enactment of Proposition 47, which reclassified as misdemeanors certain non-serious, nonviolent crimes that were previously felonies. And correctly so. In the immediate aftermath of this initiative, certain defendants with pending appeals stood to suffer potential prejudice if the appeals went through the normal process because the superior courts lacked jurisdiction to consider their Proposition 47 petitions while the appeals were pending. To avoid this "jurisdictional conundrum," the very same appellate court invoked section 1260 to remand the matter to the trial court during the pendency of the appeal for the limited purpose of considering the Proposition 47 resentencing. (*People v. Awad* (2015) 238 Cal.App.4th 215, 218 (*Awad*).)

In *Awad*, the defendant had committed a forgery of less than $200 and he filed a Proposition 47 petition in the trial court seeking to have that count reduced to a misdemeanor under section 473, subdivision (b). (*Id.* at p. 219.) The trial court, however, refused to do so, because it had no jurisdiction while the case was pending on appeal. (*Ibid.*) The *Awad* court

reasoned a limited remand was appropriate to "'allow the trial court to resolve one or more factual issues affecting the validity of the judgment but distinct from the issues submitted to the jury, *or for the exercise of any discretion that is vested by law in the trial court.*'" (*Id.* at p. 222, quoting *People v. Braxton* (2004) 34 Cal.4th 798, 818–819, italics added in original.) The court was willing to take this unusual step, while at the same time maintaining its own jurisdiction and not triggering the remittitur process, because both the time and scope of the remand were limited. Specifically, the court relied upon representations by the defense that the case could be handled within 10 to 15 minutes on remand. (*Id.* at p. 225.)

Here, unlike in *Awad,* there has been no preliminary showing of vested trial court discretion based on eligibility under the new statute, nor does appellant suggest that remand would be a simple 10-to-15-minute process.

It is perhaps true that a reviewing court will be unable to determine whether the six eligibility factors exist in many cases. But this is not a reason to remand all non-final cases, or even all cases involving the apparent satisfaction of a single eligibility factor, without a showing of error. Defendants, such as appellant who were sentenced before June 2018, but whose convictions were not final, have an adequate remedy at law—namely, a petition for writ of habeas corpus. These circumstances are similar to those that exist when a defendant claims his attorney provided ineffective assistance, but the record is silent as to the reasons why the attorney acted in a given matter. In such cases, unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation, the claim must be rejected on appeal. (See, e.g., *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267; *People v. Wilson* (1992) 3 Cal.4th 926, 936.) Instead, such claims can best be decided on habeas corpus, where the defendant may go outside the record. (*People v.*

Mendoza Tello, supra, 15 Cal.4th at p. 267.) In order to preserve judicial economy, the defendant is free to join an appeal with a verified petition for writ of habeas corpus. (*Ibid.*)

Accordingly, before there should be any remand, appellant must demonstrate that he satisfies the preliminary eligibility requirements of section 1001.36. He has not satisfied that burden, and, as discussed further below, the trial court has already determined he cannot meet these requirements.

B. The Trial Court Already Rejected Appellant's Mental Health Defense and Appellant was Statutorily Ineligible in Any Event

Here, not only has appellant failed to demonstrate he satisfies the eligibility requirements, but the record affirmatively demonstrates that any remand would be futile both because the trial court would not grant the motion, and because appellant was statutorily ineligible to receive a suspended sentence based on his prior performance on probation and his strike prior.

First, in declining to dismiss appellant's prior strike, the trial court specifically rejected the mental health defense appellant proffered at trial. The trial court had discretion to consider evidence of a mental disorder in sentencing appellant and fashioning an appropriate disposition. (§ 25, subd. (c).) As previously discussed, the trial court did not question whether appellant suffers from mental illness, but instead found that appellant nonetheless knew his actions were illegal, and that he simply did not believe there would be any significant consequences. (3RT 629.) In reaching this conclusion the trial court necessarily determined that appellant was not eligible for mental health diversion.

To be eligible for diversion, the trial court must be "satisfied that the defendant's mental disorder was a significant factor in the commission of

the charged offense." (§ 1001.36, subd. (b)(1)(B).) A court may make this finding if "the court concludes that the defendant's mental disorder substantially contributed to the defendant's involvement in the commission of the offense." (*Ibid.*) Here, in finding that there were no "significant mitigating factors" that militated in favor of striking the prior strike, the court necessarily reached the conclusion that appellant's mental disorder was not a significant factor in the commission of the offense. (3RT 629.) In denying appellant's motion, the trial court rejected the defense argument that mental illness was a "huge contributor" to his crimes. (CT 196.)

This conclusion was well supported by the record. Appellant's psychologist acknowledged that appellant does not suffer from command hallucinations that ordered him to get beer; instead the voices he heard only told him that he would not get in trouble with police if he cooperated with them afterwards. (3RT 494–495.) Appellant knew he did not have any money, as the psychologist again recognized. (3RT 497–498.) It was because he lacked money that appellant devised his plan to stop passing motorists so as to bum or borrow the money he needed. (2RT 348, 401–402.) According to appellant, he did not follow the voice telling him to steal the items, because he knew it was wrong to steal. (2RT 348, 398–399, 406.) At trial, appellant tried to convince the jury that he never took the beer; instead he set it down, but the store owner nevertheless grabbed him. (2RT 350–352.) The jury, however, rejected this claim, as evidenced by the verdicts.

In sum, appellant knew he was stealing; he simply did not believe that anyone would make a big deal out of such a small theft and that the authorities would let him get away with it (2RT 348, 398). In fact, appellant's probation report reveals he had made a habit out of stealing beer and other alcohol from markets, documenting a minimum of ten times in which he had previously done so. (CT 174–180.) As appellant candidly

summarized, he "steals alcohol often" and he "needs to stop." (CT 171.) These facts demonstrate it was appellant's desire for alcohol, and not his mental illness, that substantially contributed to his involvement in the theft. The trial court's conclusion was not only reasonable, but it presaged the question of eligibility under section 1001.36 and definitively answered that question in the negative.

Second, as the trial court noted, appellant was statutorily ineligible for probation, both because of the prior strike and because he was on probation at the time of the offense. (See §§ 667, subd. (c)(2), 1203, subd. (k); 3RT 628.) While there are certainly differences between the two, diversion is similar in many respects to probation. (See *People v. Mazurett* (2001) 24 Cal.4th 789, 796; *People v. Superior Court (On Tai Ho)* (1974) 11 Cal.3d 59, 66 ["diversion may also be viewed as a specialized form of probation..."].) Accordingly, by being ineligible for probation, appellant would also be ineligible for diversion because he would pose an unreasonable risk of danger to public safety if treated in the community. (§ 1001.36, subd. (b)(6).) Moreover, the Penal Code specifically prohibits a defendant, such as appellant, who is ineligible for probation or who has a prior strike from receiving a suspended sentence. (§§ 667, subd. (c)(2), 1203, subd. (k).) In order to allow diversion in circumstances such as the present where appellant's case had already been adjudicated, the trial court would necessarily be required to suspend imposition of sentence while appellant pursued diversion; if appellant failed diversion, then his suspended sentence would be reinstated. (*People v. Frahs, supra,* 27 Cal.App.5th at p. 796.) But such a suspension would violate the express prohibition in sections 667 and 1203.

For any and all of these reasons, remanding the case to the trial court would be a futile act. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 419 [no possibility court would use discretion to strike firearm

enhancement where, inter alia, it deliberately chose the highest possible term for the enhancement]; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [court declined to remand so that the superior court could exercise newfound discretion to strike a recidivist allegation, noting the sentence imposed by the superior court and the court's comments at sentencing demonstrated that "no purpose would be served" by a remand].)

C. Relief Is Not Available Because Appellant's Case Is Post Adjudication and Therefore He Is Procedurally Barred

Even if the Legislature generally intended to make the new mental health diversion statute retroactive, appellant would still be procedurally barred from taking advantage of those provisions because his case was already adjudicated. That is, even if this Court were to conclude that the "until adjudication" language or the other indicia of legislative intent previously discussed by respondent did not satisfy the requirements of *Estrada* for one reason or another, that language nonetheless establishes a procedural limitation (and one that would continue to apply even as to cases that are prospectively filed after enactment of the Act).

Under the Court of Appeal's reading of the statute, the words "until adjudication" express nothing more than common or ordinary practice. (*People v. Frahs, supra,* 27 Cal.App.5th at p. 791.) But this interpretation effectively writes that limiting language out of the statute and will implicitly affect the timing of future cases as well as retroactive ones. Allowing a hypothetical prospective defendant to roll the dice and proceed to trial, but then nonetheless claim the benefits of pretrial diversion, would undermine not only the Legislature's intent of saving judicial resources, but would also discourage defendants from seeking help as early as possible. (See *People v. Superior Court* (*Sanchez-Flores*), *supra,* 242 Cal.App.4th at p. 705 [rejecting interpretation of sentence deferral program that would reduce or even eliminate a defendant's incentive to participate in the

program and forgo going to trial].) Unlike diversion of persons with cognitive developmental disabilities, which can occur "at any stage of the proceedings" (§ 1001.21, subd. (a)), the Legislature sought to place temporal limits on the availability of mental health diversion so as to prevent squandering judicial resources where treatment is available.

While it is true that in this case appellant was not discouraged from taking advantage of diversion prior to trial (because the program, of course, did not exist at the time), the Court of Appeal did not determine that this circumstance provided good cause to excuse the untimely application; instead, the court concluded that the bar created no limitation at all, and provided at best a goal or expression of what would "ordinarily" occur. (*People v. Frahs, supra,* 27 Cal.App.5th at p. 791.) As previously discussed, the language "until adjudication" imposes a manifest procedural limitation. Contrary to the Court of Appeal's view, that language provides more than simply an aspirational expression of what will typically occur.

Because appellant's claim has been adjudicated, and that conviction has not been overturned, he is now procedurally barred from obtaining diversion absent a showing of good cause. (See generally *In re Reno* (2012) 55 Cal.4th 428, 460-476 [discussing required showing of good cause to excuse an untimely petition for writ of habeas corpus as well as exceptions to the rule].)

CONCLUSION

Accordingly, for the reasons stated above, respondent respectfully requests this Court hold that the provisions for mental health diversion under section 1001.36 are not retroactive. In the alternative, this Court should hold that a remand is not required as to those cases that were not final at the time of the statutory enactment unless the defendant can show eligibility under the six factors listed in section 1001.36, subdivision (b). At a minimum, remand is not required where, as here, the record

affirmatively shows the defendant does not satisfy one or more eligibility requirements.

Dated: February 20, 2019

Respectfully submitted,

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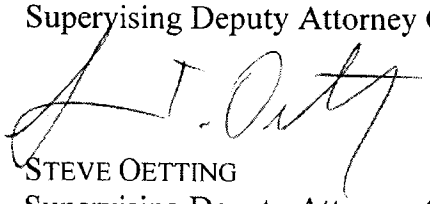

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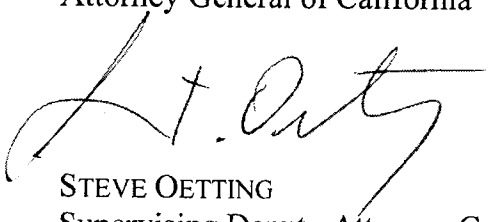
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 13,804 words.

Dated: February 20, 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 February 21, 2019, I electronically served the attached ***RESPONDENT'S OPENING 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 February 22, 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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(Continued on page 2)

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 February 21, 2019, at San Diego, California.

L. Blume	L. Blume
Declarant	Signature

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