IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People of the State of California, Plaintiff and Respondent, v. Eric Jason Frahs, Defendant and Appellant.	**No. S252220** Court of Appeal No. G054674 Superior Court No. 16CF0837

On review from the
California Court of Appeal,
Fourth Appellate District, Division Three
and the
Superior Court of California for the County of Orange
Honorable Glenn R. Salter, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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Table of Contents

Issues Presented 7
Introduction 7
Statement of the Case 11
Statement of Facts 13
Argument 14

I. Penal Code section 1001.36 applies retroactively to cases not yet final on appeal because (a) the statute ameliorates potential punishment for a class of defendants; (b) the statute does not rebut the inference of ameliorative retroactivity; and (c) a broad application of the statute's mental health diversion process fulfills its stated policy purposes. 14

A. Introduction 14

B. Absent a contrary indication, statutes ameliorating criminal punishment apply retroactively to all cases in which the judgment is not final. 16

C. Section 1001.36 is retroactive because it ameliorates potential punishment, it is not explicitly limited to prospective application, and retroactivity fulfills the stated policy purposes of mitigating the entry of individuals with mental disorders into the criminal justice system in favor of individually focused mental health treatment. 20

1. Standard of review: *de novo* 20

2. Section 1001.36 ameliorates the possible punishment for a class of persons charged with criminal offenses 20

3. Section 1001.36 contains nothing rebutting the inference of ameliorative retroactivity. 21

a. The present-tense language making "pretrial" mental health diversion under section 1001.36 possible "at any point in the judicial process . . . until adjudication" (subd. (c)) does not reflect a legislative intent to prospectively limit the ameliorative effect of the statutes. 22

b. The language and policy purposes of section 1001.36 demonstrate that "adjudication" means sentencing. 28

c. The Legislature enacted section 1001.36 without a "saving clause" knowing this Court found Proposition 57 applied retroactively to not-final cases.. 32

4. The policy underlying mental health diversion for qualified individuals, as expressed in section 1001.35, calls for broad application to cases not final on appeal. 33

D. Conclusion. 39

II. Based on the facts of this case, conditional reversal and remand for an eligibility hearing under section 1001.36 is the proper disposition.....40

A. Introduction.....40

B. Upon a prima facie showing within the meaning of section 1001.36, subdivision (b)(3), conditional reversal and remand for a diversion hearing is the appropriate disposition. 41

C. The trial record: facts of the offense and appellant's mental condition 45

1. Prosecution case. 45

2. Defense case. 47

D. The record in this case makes a prima facie showing appellant is eligible for a diversion hearing in the superior court.. 53

1. As required by section 1001.36, subdivision (b)(3), appellant meets the minimum requirements for eligibility, and he and the offenses are suitable for diversion 53

2. The Attorney General's arguments against remand are based on a series of misunderstandings. 55

E. Conditional remand for a diversion hearing under section 1001.36 is the appropriate disposition of this case. 58

Conclusion 59

Certification of Word Count.....60

Table of Authorities

Cases

Adoption of Kelsey S. (1992) 1 Cal.4th 816 ..... 35, 36-37

Bullard v. California State Automobile Assn. (2005) 129 Cal.App.4th 211 20

In re Corcoran (1966) 64 Cal.2d 447 ..... 25, 26

In re Estrada (1965) 63 Cal.2d 740 ..... *passim*

In re Ring (1966) 64 Cal.2d 450 ..... 25, 26

Kane v. Hurley (1994) 30 Cal.App.4th 859 34

Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861 20

People v. Braxton (2004) 34 Cal.4th 798 43-44

People v. Buycks (2018) 5 Cal.5th 857 ..... 9-10, 26

California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627 34

People v. Carron (1995) 37 Cal.App.4th 1230 34

People v. Conley (2016) 63 Cal.4th 646 ..... 19, 21, 32

People v. DeHoyos (2018) 4 Cal.5th 594 ..... 18, 21

People v. Frahs (2018) 27 Cal.App.5th 784, review granted Dec. 27, 2018 ..... 12, 15, 23, 40, 57

People v. Francis (1969) 71 Cal.2d 66 ..... 17, 24, 25, 26

People v. Harrison (1989) 48 Cal.3d 321 32

People v. Jefferson (2016) 1 Cal.App.5th 235 54

People v. Ramirez (1995) 33 Cal.App.4th 559 34-35

People v. Salcido (2008) 166 Cal.App.4th 1303 ..... 35, 39

People v. Superior Court (Lara) (2018) 4 Cal.5th 299 .....*passim*

People v. Vela (2017) 11 Cal.App.5th 68,
review granted July 12, 2017, and vacated on other
grounds Feb. 28, 2018, S242298 .....18, 27, 28, 57, 58

People v. Weidert (1985) 39 Cal.3d 836 32

Statutes

Penal Code
Section 3 16
Section 211 11
Section 245, subd. (a)(1) 11, 54
Section 667 .....11, 54
Section 667.5 54
Section 1001.35 .....*passim*
Section 1001.36 .....*passim*
Section 1001.36, subd. (b)(1) 41, 44
Section 1001.36, subd. (b)(1)(A) 36, 58
Section 1001.36, subd. (b)(1)(B) 36, 44
Section 1001.36, subd. (b)(1)(F) 10, 42, 44, 53-54
Section 1001.36, subd. (b)(2) 10
Section 1001.36, subd. (b)(3) .....*passim*
Section 1001.36, subd. (c) 30, 44
Section 1001.36, subd. (c)(4) 30
Section 1001.36, subd. (e) 21
Section 1170.12 11
Section 1170.18 .....42, 53, 54
Section 1192.7 .....11, 54
Section 1202.4, subd. (a)(2) 30
Section 1202.4, subd. (f) 30
Section 1203, subd. (k) 11
Section 1260 .....40, 41, 43
Section 1367, subd. (a) 36

Vehicle Code
Section 23110, subd. (a) 11
Section 23110, subd. (b) 11

Welfare & Institutions Code
Section 707 27
Section 5150 52

Rules

California Rules of Court
Rule 8.520(c)(1) 60

Other

Assembly Bill No. 1810 (Stats. 2018, ch. 34, § 24) 14

Proposition 47 ..... 9-10, 18, 26

Proposition 57 ..... *passim*

Senate Bill No. 215 (Stats. 2018, ch. 1005, § 1) 37

Sen. Rules Com., Off. of Sen. Floor Analyses,
analysis of S.B. 215, as amended Aug. 23, 2018 38

Issues Presented

On its own motion, the Court ordered review of the following issues:

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

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

Introduction

A panel of the Fourth District Court of Appeal, Division Three, ruled that the newly created mental health diversion procedure codified in Penal Code section 1001.36[1] is retroactive to cases not final on appeal and conditionally reversed and remanded appellant's[2] case for a hearing at which the trial court could determine whether appellant qualified for diversion. This Court ordered review of the Court of Appeal's holding of retroactivity and consequent remand to the trial court.

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[1] Unspecified statutory references will be to the Penal Code.
[2] The Court's order for review deemed the People petitioner. The Attorney General's Opening Brief on the Merits refers to himself as respondent.

The Court of Appeal correctly resolved these questions. Section 1001.36 applies retroactively to cases not yet final on appeal under this Court's *Estrada-Lara* line of cases because the statute ameliorates potential punishment for a class of defendants, it is not explicitly prospective, and a broad application of mental health diversion fulfills the stated policy purposes of the statute.

The Attorney General's arguments to the contrary, based on the procedural structure through which mental health diversion is available, is unpersuasive. Those arguments fail to identify anything in section 1001.36 rebutting the principle of ameliorative retroactivity. The government's reliance on the present-tense language of the statute describing the process of diversion as available "until adjudication" is based on a misunderstanding of the *Estrada* inference. This Court's *Estrada-Lara* line of cases demonstrates that being past the procedural point where a new law would typically apply does not rebut the inference of retroactivity. This Court should find that the ameliorative effect of section 1001.36 applies retroactively to all otherwise-qualifying defendants whose cases were not final when the law went into effect.

As to the second issue presented for review, the Court of Appeal did not err in its disposition of Eric Frahs's case. Conditional reversal and remand for a hearing under section 1001.36 is the appropriate remedy in cases, like this one, where the record on appeal establishes a

prima facie case that the defendant has a qualifying mental disorder, that disorder was arguably a significant factor in the offenses charged, and the defendant would not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community. Under section 1001.36, subdivision (b)(3), as amended, the triggering event for a diversion hearing is a "prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion." When the record on appeal establishes such a prime facie case, remand for a diversion hearing fulfills the purposes of the statute. And the subsequent hearing, where the facts will be developed for a judicial determination, will be no more complicated than "pretrial" hearings in cases that have not reached adjudication.

Appellant notes the issues presented by this case apply to a limited universe of criminal cases – those that were adjudicated before June 27, 2018, but in which an appeal initiated after adjudication was not yet final on that date. In the small universe of qualifying defendants, most will have had their appeals become final by the time this issue is decided. Like the petitioner in *In re Estrada* (1965) 63 Cal.2d 740, this Court's case establishing the principle of ameliorative retroactivity, those few defendants would be able to seek amelioration through habeas corpus. (See also *People v. Buycks* (2018) 5 Cal.5th 857, 895 [collateral consequences of Proposition 47 "can properly be

enforced by means of petition for writ of habeas corpus for those judgments that were not final when Proposition 47 took effect"].) To get a diversion hearing, a petitioner would make a prima facie showing that (1) establishes he suffered a qualifying mental disorder at the time of the charged offense, and (2) asserts arguable claims that (a) the disorder played a significant role in the commission of the charged offense and (b) the defendant and offense are suitable for diversion under section 1001.36, subdivisions (b)(1)(F) and (b)(2).

The codified purpose of section 1001.36 is to identify qualified defendants who are committing offenses based on mental disorders and, while protecting public safety, "to mitigate [those] individuals' entry and reentry into the criminal justice system" by "[p]roviding diversion that meets the unique mental health treatment and support needs of individuals with mental disorders." (§ 1001.35, subds. (a) & (c).) Every single individual defendant who successfully completes diversion is also a success for the state and society. Diversion will change some individuals' lives for the better of all. Section 1001.36's benevolent purpose calls for extending its ameliorative effect to every case to which it constitutionally could apply, including all cases not yet final on appeal on the effective date of July 27, 2018.

Statement of the Case

On June 6, 2016, the Orange County District Attorney filed an information charging appellant Eric Frahs with two counts of second degree robbery in violation of section 211 (counts 1 and 2), and one count of throwing a substance at a vehicle with intent to cause injury in violation of Vehicle Code section 23110, subdivision (b) (count 3). (CT [Clerk's Transcript] 72-73.) The information alleged appellant was on felony probation at the time of the charged offenses and therefore ineligible for probation under section 1203, subdivision (k). (CT 73.) The information also alleged appellant had a prior conviction under section 245, subdivision (a)(1), qualifying as a strike (§§ 667, subds. (d) & (e)(1), and 1170.12, subds. (b) & (c)(1)) and a serious felony prior (§§ 667 subd. (a)(1) & 1192.7). (CT 73.)

A jury found appellant guilty of counts 1 and 2. (CT 154-155) On count 3, the jury convicted appellant of the lesser included offense of throwing a substance at a vehicle without intent to cause injury (Veh. Code, § 23110, subd. (a)). (CT156-157.) Appellant waived a jury trial on the prior allegations and the court found them true. (CT 32, 35.)

On February 24, 2017, the court sentenced appellant to nine years in prison – the low term of two years on count 1, doubled to four by the strike prior, plus five years for the serious felony prior. (CT 35 [minutes]; CT 200 [abstract of judgment].) A two-year sentence on

count 2 was imposed concurrently with the sentence in count 1. (CT 35, 200.) The sentence for the misdemeanor conviction under count 3 was suspended. (CT 35.)

Appellant appealed. In a published opinion the Court of Appeal ruled that under the principles of *In re Estrada* and *People Superior Court (Lara)*, the recently enacted section 1001.36 retroactively applied to cases not yet final on appeal; the court conditionally reversed the judgment and remanded the case to the trial court "to conduct a mental health diversion eligibility hearing under the applicable provisions of section 1001.36." (*People v. Frahs* (2018) 27 Cal.App.5th 784, 792, review granted Dec. 27, 2018, S252220 (*Frahs*).) If the trial court finds Frahs does not meet the criteria for diversion, or fails to successfully complete diversion if granted, "the convictions and sentence will be reinstated." (*Ibid.*, rev.gr.)

On its own motion, this Court ordered review of two issues: whether section 1001.36 applies retroactively to all cases in which the judgment is not yet final; and whether the Court of Appeal erred by remanding the case for a determination under section 1001.36.

Statement of Facts[3]

In March 2016, appellant Eric Frahs was a homeless, mentally ill 28 year-old with a string of misdemeanor convictions, mostly petty thefts, and one for assault with a deadly weapon. (3RT 308, 321-324, 326-331.) On the morning of March 31, appellant went to the Acapulco Market where the owner told him he was not welcome based on a previous incident. (1RT 190, 193-194.) Eventually, appellant entered the store anyway, selected a can of beer and a Red Bull energy drink, and tried to barge his way past the owner and out the door. (2RT 220-222.) There was a tussle and the owner was knocked down and possibly hit in the head. (2RT 224-225.) Appellant either dropped or set down the beer; the Red Bull flew into the parking lot. (2RT 225.) Appellant then walked out to the parking lot, but was tackled and detained by the owner and his son until police arrived a few minutes later. (2RT 225-227.)

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[3] The detailed facts as presented at trial are only relevant to the second issue presented on review – whether conditional reversal and remand for a mental health diversion hearing is the appropriate disposition in this case. Those details are included within Argument II.

Argument

I.

Penal Code section 1001.36 applies retroactively to cases not yet final on appeal because:
(a) the statute ameliorates potential punishment for a class of defendants;
(b) the statute does not rebut the inference of ameliorative retroactivity;
and
(c) a broad application of the statute's mental health diversion process fulfills its stated policy purposes.

A. Introduction

On February 24, 2017, appellant Eric Frahs was sentenced to nine years in prison. (CT 35.) On June 27, 2018, while appellant's case was on appeal, the Governor signed Assembly Bill No. 1810 (2017-2018 Reg. Sess.) that, among other things, added sections 1001.35 and 1001.36 to the Penal Code. (Stats. 2018, ch. 34, § 24.) These sections comprise a chapter of the Penal Code called "Diversion of individuals with mental disorders." Section 1001.35 defines the three-part purpose of the chapter; section 1001.36 lays out the criteria for and processes of diversion.

On appeal, a panel of the Fourth District Court of Appeal, Division Three, analyzed section 1001.36 under *In re Estrada, supra,* 63 Cal.2d 740 (*Estrada*) and *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*) and ruled the new diversion statute applies

retroactively to cases, like appellant's, that are not yet final on appeal. (*Frahs, supra*, 27 Cal.App.5th 784, 791, rev. gr.) In accord with that ruling, the court conditionally reversed the judgment and remanded the case to superior court to determine whether appellant qualifies for diversion under the statute. (*Id.* at pp. 791-792, rev. gr.)

This Court then ordered review of two issues in *Frahs*, including whether section 1001.36 is, as the Court of Appeal found, retroactive to all cases in which the judgment is not final. The answer, as explained in this argument, is yes. Section 1001.36 is retroactive in light of the principles this Court developed in a line of cases from *Estrada* to *Lara*, because it ameliorates potential punishment for a class of defendants, it is not expressly prospective, and a broad, retroactive application fulfills the stated policy purposes of the diversion process.

To the extent a determination whether section 1001.36 applies retroactively requires interpretation of the Legislature's intended policy purposes, section 1001.35 explicitly provides those purposes:

> The purpose of this chapter [comprising §§ 1001.35 & 1001.36] is to promote all of the following:
>
> (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while promoting 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.)

The policy purposes codified in section 1001.35 call for applying the diversion process in section 1001.36 as broadly as possible, including, through ameliorative retroactivity, cases not yet final on appeal on the statute's effective date.

B. Absent a contrary indication, statutes ameliorating criminal punishment apply retroactively to all cases in which the judgment is not final.

Criminal statutes are generally presumed to apply prospectively if they do not indicate otherwise. (§ 3; *Estrada, supra*, 63 Cal.2d 740 at p. 745.) In *Estrada, supra*, this Court ruled that one 'indication otherwise' is the enactment or amendment of a law that lessens punishment. (*Id.* at p. 745.) The *Estrada* court held that "[i]t was an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be

applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Id.* at p. 745.)

In *People v. Francis* (1969) 71 Cal.2d 66, 76, this Court extended the principle of ameliorative retroactivity to a statute amended to include the *possibility* of a lesser penalty. Specifically, the Legislature changed marijuana possession from a felony to a "wobbler" that could be treated as either a felony or a misdemeanor. (*Id.* at p. 75.) The *Francis* court inferred an ameliorative intent in the amendment "because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*Id.* at p. 76) The ameliorative effect of the new law meant a defendant whose case was not yet final when the new law became operative was entitled to a new sentencing hearing where the judge could decide whether to treat the conviction as a felony or a misdemeanor. (*Id.* at pp. 75-76.) In other words, even the *potential* for a lesser punishment under a new law created an inference of retroactivity, regardless of whether all defendants would ultimately get the lesser punishment.

This principle was further developed in a line of cases, including, recently, *Lara, supra,* 4 Cal.5th 299. In *Lara,* this Court ruled the principle of ameliorative retroactivity applied to a new law, Proposition

57, that *potentially* lessened punishment not for a particular crime, but for a *class of persons*, specifically minors. (*Id.* at pp. 303-304.) Proposition 57 changed the procedure for prosecuting minors as adults. Rather than let the prosecutor decide where a minor's case would proceed, the new law placed that decision in the juvenile court, to be made after receipt of a probation report and a full "transfer hearing" focused on facts concerning the minor and the alleged offense. (*Id.* at pp. 308-309.) The *Lara* Court ruled that the ameliorative effect of the statutory scheme created an inference of retroactivity under the *Estrada* line of cases, and that inference was not rebutted by a "saving clause" or any other indication of authorial intent. (*Id.* at pp. 303-304, 309.) Therefore, juveniles prosecuted in adult court whose cases were not final on appeal had a right to a conditional remand for a "transfer hearing" in the juvenile court. (*Id.* at pp. 309-310 [describing with approval the remedy (conditional remand for a hearing) ordered in *People v. Vela* (2017) 11 Cal.App.5th 68, 82, review granted July 12, 2017, and vacated on other grounds Feb. 28, 2018, S242298].)

Some punishment-ameliorating laws contain contrary indications obviating the inference of ameliorative retroactivity. Proposition 47 was dramatically ameliorative, turning felonies into misdemeanors among other effects. (*People v. DeHoyos* (2018) 4 Cal.5th 594, 597-598.) But this Court found the new law did not apply retroactively to people already sentenced under the old law because the

new law provided a petition-and-hearing procedure through which those people could apply for resentencing under the new law. (*Id.* at p. 603.) The availability of the petition procedure for people already sentenced meant the law applied prospectively to people already sentenced, whether or not their cases were final after appeal. (*Ibid.*) This Court had reached the same conclusion in analyzing Proposition 36. (*People v. Conley* (2016) 63 Cal.4th 646, 651-652 (*Conley*).) That legislation also rebutted the inference of ameliorative retroactivity because it contained its own retroactivity provision. (*Id.* at p. 651-652.) The ameliorative effect of the new law was made available without the need for retroactive application.

But 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. (*Conley*, *supra*, 63 Cal.4th at p. 656.) As this Court has explained in *Conley*, "Because the *Estrada* rule reflects a presumption 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." (*Ibid.*) When the Legislature chooses *not* to modify, limit, or forbid the ameliorative retroactivity of a new criminal law, the *Estrada* presumption applies, as it should here to section 1001.36.

C. Section 1001.36 is retroactive because it ameliorates potential punishment, it is not explicitly limited to prospective application, and retroactivity fulfills the stated policy purposes of mitigating the entry of individuals with mental disorders into the criminal justice system in favor of individually focused mental health treatment.

1. Standard of review: *de novo*

A judicial determination whether a new statute is retroactive is a question of law and therefore reviewed *de novo*. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 861-865; *Bullard v. California State Automobile Assn.* (2005) 129 Cal.App.4th 211, 217.)

2. Section 1001.36 ameliorates the possible punishment for a class of persons charged with criminal offenses.

Absent contrary indications, a law that potentially ameliorates punishment for a class of people will apply retroactively to all cases not final on appeal at the time the law went into effect. (*Lara, supra,* 4 Cal.5th 299, 303-304.) As the Attorney General concedes, section 1001.36 is indisputably ameliorative. (Respondent's Opening Brief on the Merits [OBM], p. 39)

The new mental health diversion system creates potential lesser punishment for a class of people, specifically people suffering from mental disorders that were a significant factor in the commission of the offenses with which they are charged. (§ 1001.36, subds. (a) & (b).) People who successfully complete diversion have the charges dismissed

and "the arrest upon which the diversion was based shall be deemed never to have occurred." (§ 1001.36, subd. (e).)

In *Lara*, this Court noted there is a significant, life-altering difference between facing felony charges in adult court and a felony petition in juvenile court. (*Lara, supra*, 4 Cal.5th at p. 303.) The *possibility* of a juvenile court disposition is the potential ameliorative effect that made Proposition 57 retroactive. (*Ibid.*)

Like Proposition 57, section 1001.36 creates a whole new procedure with potentially huge punishment-lessening effect. Under Proposition 57, a qualified minor can avoid prosecution as an adult and possible prison time. Under section 1001.36, a qualified person can avoid prosecution altogether by accepting and successfully completing mental health treatment. Accordingly, section 1001.36 is ameliorative and therefore, under the *Estrada-Lara* line of cases, carries an inference of retroactivity absent indication of a contrary legislative intent.

3. Section 1001.36 contains nothing rebutting the inference of ameliorative retroactivity.

Nothing in the statutory language of sections 1001.35 and 1001.36 undermines the inference of ameliorative retroactivity to cases not final on appeal. There is no "saving clause" language making the statute explicitly prospective and no self-contained retroactivity provision. Based on this Court's recent decisions in *Conley*, *DeHoyos*,

and *Lara*, the Legislature knows new laws potentially lessening punishment apply retroactively to not-final cases if they do not explicitly rebut the inference of retroactivity. Nothing in sections 1001.35 and 1001.36 rebuts the inference of ameliorative retroactivity. The Attorney General's argument that the present-tense language of the statute describing the process of diversion rebuts the inference of retroactivity is in effect a request to overturn the principle of ameliorative retroactivity as developed in this Court's *Estrada-Lara* line of cases.

a. The present-tense language making "pretrial" mental health diversion under section 1001.36 possible "at any point in the judicial process . . . until adjudication" (subd. (c)) does not reflect a legislative intent to prospectively limit the ameliorative effect of the statute.

The Attorney General's argument against ameliorative retroactivity is based on the manner in which the statute is normally intended to operate. The "pretrial" diversion out of prosecution created by section 1001.36 is possible "at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).) The Attorney General misconstrues this present-tense language describing how the system of diversion operates into a "saving clause" purportedly rebutting the *Estrada* inference of ameliorative retroactivity. (OBM, pp. 25-30.) In doing so, the Attorney General is reading a phantom intent into the statute. In fact, the

words "adjudication" and "pretrial" have nothing to do with the analysis of ameliorative retroactivity. As the *Frahs* court responded to the same point, "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate." (*Frahs, supra,* 27 Cal.App.5th at p. 791, rev. gr.) The present-tense statutory language describing the normal operation of the diversion process is not reasonably interpreted as an explicit saving clause refuting the inference of ameliorative retroactivity.

The government's position is that if a defendant's "adjudication" occurred prior to the effective date of section 1001.36, it is too late for him to receive the benefit of the statute, even if the case was not yet final on appeal. This position confuses the normal operation of the diversion system with an intent to remove the inference of ameliorative retroactivity under *Estrada*. The Attorney General's confusion is manifest in his assertion that "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." (OBM, pp. 26-27.) Such a construction would *not* have made the diversion process in section 1001.36 *retroactive* to cases with an active appeal on its effective date; it would have been an alteration of the normal operation of the statute going forward. So the government's argument seems to be that since section 1001.36 does not apply

prospectively to all cases through appellate review, it does not apply retroactively under *Estrada*. In the context of this Court's *Estrada-Lara* line of cases establishing the principle of ameliorative retroactivity, this position does not make sense.[4]

This Court's prior cases establish that present-tense statutory language alone does not rebut the inference of the ameliorative retroactivity of new or amended laws. For example, the statutory change at issue in *People v. Francis*, *supra*, 71 Cal.2d 66, changed the possible punishment for marijuana possession. Before the change, a prison sentence of one to ten years was required; after the amendment, the crime became a felony-misdemeanor "wobbler" that was potentially punishable by not more than one year in jail. (*Id.* at p. 75.)

Similar to the argument in the instant case, in *Francis*, "[t]he Attorney General [] argue[d] that, since [Health and Safety Code] section 11530 as amended vests discretionary sentencing power in the trial court, 'the very nature' of the amendment leads to the conclusion that it was only intended to apply to cases where sentencing occurred

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[4] The confusion with prospective application of the law versus retroactive application through the *Estrada* inference appears again in section I.G of the Attorney General's opening brief on the merits. There he suggests the statute's normal prospective application "until adjudication" could apply "retroactively" to cases that had already been charged but not yet adjudicated at the time the statute went into effect. (OBM, pp. 37-38.) But in that situation, the statute applies prospectively starting on its operative date to every case that is not yet adjudicated.

after the effective date of the amendment – that to hold that the amendment applied to cases on appeal would be to hold that the trial court erred in not exercising discretion when it in fact had no discretion at the time it acted." (*Francis, supra,* at pp. 77-78.) Citing *In re Ring* (1966) 64 Cal.2d 450 and *In re Corcoran* (1966) 64 Cal.2d 447, the *Francis* Court rejected the argument that the normal operation of the statute – granting "wobbler" discretion at sentencing – was an indication that the ameliorative effect of the amended statute was not retroactive to non-final cases in which sentencing had already occurred. (*Francis, supra,* at p. 77-78.)

Estrada, In re Ring, supra, and *In re Corcoran, supra,* involved a statutory amendment lessening the potential punishment for escape, giving courts new discretion to impose sentences for escape concurrently, rather than consecutively, to the sentence being served at the time of the escape. (*Estrada, supra,* 63 Cal.2d 740, *In re Ring, supra,* 64 Cal.2d 450, *In re Corcoran, supra,* 64 Cal.2d 447.) In those cases, this Court ruled the change in the law applied retroactively to cases not yet final on appeal at the time the amendment became effective; the cases were remanded for new sentencing hearings for "the trial judge to determine in his discretion whether the sentences shall be consecutive or concurrent." (*Corcoran, supra,* at p. 450.)

Thus, despite the fact that the defendant and petitioners in *Francis, Ring,* and *Corcoran,* were past the procedural points where

the legislative changes would have applied to their cases, this Court found the principle of ameliorative retroactivity applied and the cases were remanded for the trial courts to consider using newly available sentencing discretion. (*Francis*, *supra*, at p. 75; *Ring*, *supra*, at pp. 451-452; *Corcoran*, *supra*, at pp. 459-450.) In other words, the present-tense language of a new statute granting discretion at sentencing did not rebut the presumption of ameliorative retroactivity for cases in which sentencing had already occurred. (See also *People v. Buycks*, *supra*, 5 Cal.5th 857, 883 ["the reduction of a felony conviction to a misdemeanor conviction under Proposition 47 exists as 'a misdemeanor for all purposes' prospectively, but, under the *Estrada* rule, it can have retroactive collateral effect on judgments that were not final when the initiative took effect"].)

As explained in section I.C.3.c below, the Legislature knows how to rebut the inference of retroactivity, and under this Court's *Estrada-Lara* line of cases, present-tense language describing the normal application of the statute does not do so. If writing a law in the present tense was proof the Legislature did not intend a new law potentially lessening punishment to be retroactive, and was in effect a contra-indicating 'saving clause' rebutting the inference of ameliorative retroactivity, this Court would have found Proposition 57 non-retroactive in *Lara*.

After Proposition 57, a prosecutor can transfer a juvenile case to adult court only if authorized by a juvenile court after a fitness hearing conducted "*prior to the attachment of jeopardy* . . . ." (Welf. & Inst. Code, § 707, subd. (a), italics added.) As related in *Lara, supra,* 4 Cal.5th 299, the defendant in *People v. Vela, supra,* 11 Cal.App.5th 68 was a juvenile tried and convicted of murder and other crimes whose case was on appeal when Proposition 57 passed. (*Lara, supra,* at p. 308.)

The question before the *Lara* court was whether someone to whom jeopardy had already attached and who had already been tried and convicted as an adult got to go back to square one and make the prosecutor win a transfer hearing. The benefit of the new ameliorative law had to be cut off somewhere. The benefit could be limited to juveniles who had not yet had jeopardy attach when the law went into effect, which would be a literal reading of the present tense language of the statute. Or, applying the *Estrada* inference, the benefit could be extended to juveniles already tried as adults whose cases were not yet final on appeal on the effective date. Despite the fact that jeopardy had long since attached by the time the case was on appeal, the *Vela* court found the inference of ameliorative retroactivity was not rebutted and the new law applied to all applicable cases not yet final on appeal. (*Lara, supra,* at pp. 308-309.) The *Lara* court "agree[d] with *Vela* that *Estrada*'s inference of retroactivity applies here," and approved, at

least by implication, the *Vela* court's conditional reversal and remand for a transfer hearing that could result in the adult court criminal conviction being wholly wiped away. (*Id.* at pp. 309-310).

This is the crucial point: the fact that the procedures are written in the present tense does not rebut the *Estrada* inference of ameliorative retroactivity. The procedural terms "adjudication" and "pretrial" no more reflect an explicitly prospective application than the use of the term "prior to the attachment of jeopardy" did in the case of Proposition 57.

b. The language and policy purposes of section 1001.36 demonstrate that "adjudication" means sentencing.

The weight the Attorney General's argument places on the words "pretrial" and "adjudication" creates a foundational problem. Within the meaning of section 1001.36, "pretrial" has a specific meaning assigned by the Legislature. It does not mean "before the jury is selected" or "before the first witness is sworn"; for purposes of mental health diversion, "pretrial" means "at any point in the judicial process from the point at which the accused is charged until adjudication. . . ." (§ 1001.36, subd. (c).) Although the Attorney General proceeds as if adjudication means 'adjudication of guilt by a jury verdict or plea,' and asserts this definition rebuts the inference of ameliorative retroactivity, he is expressly unable to eliminate the possibility that adjudication means *sentencing*. All he can say is that

"Once the jury has returned its verdict, *and certainly by the time the trial court has pronounced sentence,* the case has been adjudicated." (OBM, p. 26, italics added.) Thus, much of the Attorney General's argument is built on a dubious foundation – an admittedly unproved assertion that "adjudication" means determination of guilt rather than sentencing.

In appellant's view, the meaning of adjudication is not relevant for an *Estrada* analysis, in which the present tense language of the operation of the statute does not rebut the inference of ameliorative retroactivity. But also, the language of the statute and the policy underlying it demonstrate that "adjudication" means sentencing, and this definition is important in two respects.

First, when "adjudication" occurs will determine whether ameliorative retroactivity applies to the small number of cases in which the defendant was found guilty before June 27, 2018, but not sentenced until after. If adjudication means sentencing, people who received a verdict or pled guilty before June 27, 2018, but were sentenced after that date, were eligible for diversion at their sentencing, and the issue of retroactivity does not arise. Second, the meaning of adjudication determines when the trial court has the ability to grant diversion.

The best indication that adjudication means sentencing is the language of the statute, specifically the amendments of section 1001.36

adding subdivisions (b)(3) and (c)(4), neither of which is addressed in the opening brief on the merits.

Section 1001.36, subdivision (b)(3), added as part of the September 2018 amendment of the statute, expressly allows for a prima facie showing of eligibility for diversion, presumably preliminary to a more formal hearing, "*[a]t any stage of the proceedings . . . .*" (Italics added.) While this part of the statute does not appear in the government's opening brief, the very same language in other diversion statutes is cited as if to contrast the lack of that language here, where it in fact exists. (OBM, pp. 29, 55.) Since "any stage of the proceedings" in a criminal prosecution would include sentencing, diversion must be available until sentencing and therefore "adjudication" in section 1001.36, subdivision (c), must mean sentencing.

The amendment of section 1001.36 also added subdivision (c)(4). That part of the law authorizes the court granting diversion to "conduct a hearing to determine whether restitution, as defined in subdivision (f) of Section 1202.4, is owed to any victim as a result of the diverted offense . . . ." (§ 1001.36, subd. (c)(4).) Under section 1202.4, subdivision (f), restitution is ascertained *at or after sentencing*: "the restitution order shall be prepared by the sentencing court . . . ." (§ 1202.4, subd. (f)(3).) Further, the requirement of victim restitution under section 1202.4 is triggered "[u]pon a person being convicted of a crime" (§ 1202.4, subd. (a)(2)), which necessarily means after a

determination of guilt by verdict or plea. Since a person who is granted mental health diversion under section 1001.36 can be ordered to pay restitution, the statute must contemplate the granting of diversion *after* the determination of guilt *at sentencing*.

The statutory language largely undermines the government's speculation-based definition of "adjudication" as verdict. The statute's policy purposes, as codified in section 1001.35, also indicate "adjudication" means sentencing. Those policies call for diversion to be available as an option until sentencing. The stated purpose of section 1001.36 is to divert people with mental disorders that play significant roles in criminal conduct *away from the criminal justice system* and *into local, individualized treatment.* (§ 1001.35.) Given this purpose, it makes sense to leave the option of diversion open until sentencing so that someone who may be eligible for diversion is not instead shipped off to prison without a hearing. Every individual who successfully completes diversion and avoids entry or reentry into prison is a success for California as a whole. Although it should be the rare case when a prima facie case for diversion is not manifest until after a verdict, leaving open the possibility until sentencing accords perfectly with the purpose of diversion as explicitly stated in section 1001.35 – to get qualified individuals out of the criminal justice system and into local, individually focused mental health treatment.

c. The Legislature enacted section 1001.36 without a "saving clause" knowing this Court found Proposition 57 applied retroactively to not-final cases.

The Legislature "is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted" (*People v. Weidert* (1985) 39 Cal.3d 836, 844), "and to have enacted or amended a statute in light thereof" (*People v. Harrison* (1989) 48 Cal.3d 321, 329). At the time the Legislature enacted section 1001.36, this Court's decision in *Lara, supra,* 4 Cal.5th 299, had been decided and was part of the existing laws and judicial constructions operative in California. In other words, upon enacting section 1001.36, the Legislature knew the Court was interpreting new procedural systems ameliorating potential punishment as applying retroactively to all non-final cases. 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. (*Lara, supra,* at p. 312, quoting *Conley, supra,* at p. 656.)

As this Court explained in *Conley*, "Because the *Estrada* rule reflects a presumption 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." (*Conley, supra,* at p. 656.)

Thus, when the Legislature chooses *not* to modify, limit, or forbid the retroactivity of a new, punishment-ameliorating criminal law, the *Estrada* presumption of ameliorative retroactivity applies.

If the Legislature had intended the diversion system created by section 1001.36 to only apply prospectively, it would have made that clear. Since it chose not to, the presumption of ameliorative retroactivity prevails.

4. The policy underlying mental health diversion for qualified individuals, as expressed in section 1001.35, calls for broad application to cases not final on appeal.

The purpose of section 1001.36 is explicitly stated in section 1001.35. That purpose is to move qualified people who commit crimes based on a mental illness out of the criminal justice system and into local, individually appropriate mental health treatment. (§ 1001.35.) Fulfilling this purpose calls for broad application of the statute to as many qualified people as possible. If the law *could* apply to a person, the underlying policy calls for applying it.

The materials for which the Attorney General has requested judicial notice are unnecessary for determining the legislative intent behind section 1001.36 because that intent is unambiguously codified in section 1001.35.[5] Analysis of legislative intent starts with the

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[5] Again, section 1001.35 states:

language of the statute. (*People v. Carron* (1995) 37 Cal.App.4th 1230, 1236.) "We begin with the touchstone of statutory interpretation, namely, the probable intent of the Legislature. To interpret statutory language, we must 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.'" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632.) "'Our first step [in determining the Legislature's intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. [Citations.]'" (*Id.* at p. 633.) "'In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose . . . .'" (*Id.* at p. 634.) "'The words of the statute must be construed in context, keeping in mind the statutory purpose....'" (*Kane v. Hurley* (1994) 30 Cal.App.4th 859, 862.) "If the language [of a statute] is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the [Legislature]

The purpose of this chapter [comprising §§ 1001.35 & 1001.36] is to promote all of the following:

(a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while promoting 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.

. . . ." (*People v. Ramirez* (1995) 33 Cal.App.4th 559, 563, internal quotation marks omitted.) In other words, "If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute governs." (*People v. Salcido* (2008) 166 Cal.App.4th 1303, 1311, internal quotation marks omitted; see also *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826-827 [courts do not insert words into a statute because "[d]oing so would violate the cardinal rule that courts may not add provisions to a statute"].)

Section 1001.35 provides the purposes of section 1001.36 and, contrary to the Attorney General's assertion (OBM, pp. 30-32), saving money is not among them. Thus, while saving money may be a positive side effect of keeping qualified people out of prison, the Attorney General's trek through the legislative history of a budget bill of many parts to find some intent other than that codified in section 1001.35, specific to mental health diversion, does not advance his argument. (See OBM, pp. 30-35.)

The Attorney General also fails to demonstrate that an uncodified legislative concern with the purportedly "large number of persons who were being declared incompetent to stand trial" (OBM, p. 31) in some way rebuts the inference that section 1001.36 applies retroactively under *Estrada*. Eligibility for diversion under the statute is a distinctly different and wholly separate determination from whether a person is competent to stand trial. Diversion is available for

people diagnosed with qualifying mental disorders charged with offenses in which the mental disorder was a "significant factor." (§ 1001.36, subd. (b)(1)(A) & (B).) The key is that the diagnosed mental disorder "substantially contributed to the defendant's involvement in the commission of the offense." (§ 1001.36, subd. (b)(1)(B).)

By contrast, a defendant is "mentally incompetent" and "cannot be tried . . . if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (§ 1367, subd. (a).) Incompetence to stand trial has nothing to do with the *charged offense* and therefore has nothing to do with diversion. A person could be perfectly sane when they committed a crime, and therefore ineligible for diversion, and yet be incompetent to stand trial. Or a person could commit an offense in which his diagnosed mental disorder played a significant role and still be able to understand the nature of the criminal proceedings and participate in his defense. If the Legislature had wanted to limit diversion under section 1001.36 to defendants who were also incompetent to stand trial, they could have done so. They did not; section 1001.36 has nothing to do with competence to stand trial and this Court should deny the Attorney General's attempt to insert absent words into the statute because "[d]oing so would violate the cardinal rule that courts

may not add provisions to a statute." (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th 816, 826-827.)

To the extent a concern with saving money is implicitly relevant, the Attorney General's position has two fundamental flaws. First, the whole argument comes down to the assertion that "[t]he 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 money." (OBM, p. 32.) This makes no sense because the government has already conceded, based on the statutory definition (§ 1001.36, subd. (c)), that "pretrial diversion" would be available up to the point a verdict is rendered or even sentencing. (OBM, p. 26.) In other words, the cost of a trial is not foreclosed under the normal operation of the statute even accepting the government's speculative interpretation that "until adjudication" means until a verdict or plea.

The second fatal flaw in the Attorney General's money-saving argument is the failure to produce any evidence that applying section 1001.36 retroactively under *Estrada* would cost more than otherwise. There is now some finite number of individuals sentenced to prison who would qualify for a diversion hearing under *Estrada*. If a few of those are granted diversion and some succeed, the state will save the cost of prison housing. As noted by the author of Senate Bill No. 215 (Stats. 2018, ch. 1005, § 1), which amended section 1001.36, "while community based treatment for a mentally ill defendant costs roughly

$20,000 per year (and greatly reduces recidivism), jailing that same defendant (with a greater risk of recidivism) costs the community more than $75,000 a year." (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of S.B. 215, as amended Aug. 23, 2018.[6]) If those individuals whose cases were past adjudication but not final on appeal do not even get a chance for a hearing, they all stay in prison and no money is saved. And, again, those who complete diversion will achieve success for themselves and society as a whole.

Also, applying the individual-focused policy codified in section 1001.35, the inevitably small number of hearing-eligible defendants calls for addressing the issue of retroactivity from the individual human person perspective, rather than based on a phantom concern for accounting. The individual human perspective calls for extending the ameliorative effect of the law "to every case to which it constitutionally could apply." (*Estrada, supra*, 63 Cal.2d at p. 745.)

The Attorney General's stated concern with undermining the legitimacy of a jury's verdict, which in some cases may have rejected a mental-health-based defense prior to diversion (OBM, p. 35), is also absent from the Legislature's stated intents in making diversion available, and therefore cannot rebut the *Estrada* inference of

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[6] Appellant is filing a separate request for judicial notice of the Senate floor analysis contemporaneously with this brief.

ameliorative retroactivity. Again, the Attorney General's position depends on a meaning of "until adjudication" that he manifestly cannot establish as the Legislature's intended meaning. (See OBM, p. 26.) Since, as explained in I.C.3.b above, the statutory language itself indicates diversion is available at sentencing, any possible concern with the validity of verdicts is inherently speculative.

Notably, this section of the government's brief twice turns on assertions that "the Legislature could well have . . . " had some intent making sense of the government's argument. (OBM, p. 36.) But the government's hopeful speculation cannot change the fact that the Legislature did not in fact express the desired intents and courts do not read phantom intents into statutes that explicitly state their purposes. (See *People v. Salcido, supra,* 166 Cal.App.4th 1303, 1311.)

Since retroactive application fulfills the codified policy objectives of mental health diversion, the *Estrada* presumption calls for section 1001.36 to be applied "to every case to which it constitutionally could apply," including cases not yet final on appeal. (*Estrada, supra,* 63 Cal.2d at p. 745.)

D. Conclusion

Both the *Estrada* principle of ameliorative retroactivity and the policy purposes of section 1001.36 call for broad application of the diversion process "to every case to which it constitutionally could apply," including specifically cases like Eric Frahs's that were post-

adjudication but not yet final on appeal when the law went into effect. (*Estrada, supra,* 63 Cal.2d at p. 745.) Accordingly, this Court should find that Penal Code section 1001.36 applies retroactively to cases not yet final on appeal on its effective date, June 27, 2018.

II.

Based on the facts of this case, conditional reversal and remand for an eligibility hearing under section 1001.36 is the proper disposition.

A. Introduction

After finding section 1001.36 was retroactive under *Estrada* the appellate court conditionally reversed Eric Frahs's convictions and remanded the case to the trial court to hold a hearing to determine his eligibility for mental health diversion. (*Frahs, supra,* at p. 489, rev. gr.) The second issue on review in this case is whether the Court of Appeal erred by remanding the case for a determination under section 1001.36. The answer is no, the appellate court did not err because remand is an appropriate remedy under section 1260 and in this case the record on appeal establishes the prima facie showing triggering a determination under section 1001.36, subdivision (b)(3). Although section (b)(3) did not become operative until January 1, 2019, it

provides a framework with which to analyze cases to which section 1001.36 applies retroactively.

In cases in which a prima facie showing of eligibility can be made, conditional reversal and remand for a determination is consistent with the disposition approved by this Court in *Lara*, *supra*, 4 Cal.5th 299, and with section 1260, which authorizes an appellate court to "remand the cause to the trial court for such further proceedings as may be just under the circumstances."

B. Upon a prima facie showing within the meaning of section 1001.36, subdivision (b)(3), conditional reversal and remand for a diversion hearing is the appropriate disposition.

Section 1001.36, subdivision (b)(3), states that: "at any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate."

This part of the statute provides a framework to determine which cases among those to which ameliorative retroactivity applies should be remanded for a diversion hearing in the superior court. The

Attorney General proposes that a defendant has to prove he is eligible for diversion under the six criteria listed in subdivision (b)(1) *before* the hearing where eligibility is ultimately determined. (OBM, pp. 45-51.) This construction would only make sense if the statute's purpose was to *limit* the availability of diversion. But the purpose of diversion, as expressly stated in section 1001.35, is to make local, individually-focused treatment available for qualifying people whose mental disorders played a significant role in the offenses charged. Given this broad purpose, which benefits the state as well as the individual defendant, creating an impossible standard as the Attorney General urges should be rejected as a matter of policy.

Further, we know the Attorney General's position that a defendant must demonstrate eligibility under all six criteria before remand cannot be correct because one of those criteria is a public safety assessment by the trial court: "[t]he court [must be] 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." (§ 1001.36, sub. (b)(1)(F).) Since a defendant cannot establish the court's satisfaction prior to a hearing, either on appeal or in a habeas petition, meeting the six criteria of eligibility for *diversion* cannot be the way to establish eligibility for a *diversion hearing*.

Instead, a defendant seeking a diversion hearing through retroactive amelioration should be required to make a prima facie

showing based on the record on appeal (or evidence attached to a habeas petition) that (1) s/he had been diagnosed with a qualifying mental disorder at the time of the charged offense, (2) the diagnosed mental disorder was arguably a significant factor in the charged offense, and (3) s/he has never been convicted of a "super strike" within the meaning sections 667, subdivision (e)(2)(C)(iv), and 1170.18, a conviction that would indicate the posing of a disqualifying risk of danger to public safety. These criteria would 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.

When a defendant can make the prima facie showing, conditional reversal and remand for an eligibility hearing is appropriate. Section 1260 provides that, on an appeal from a judgment of conviction, a reviewing court "may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." This Court held in *People v. Braxton* (2004) 34 Cal.4th 798, that "limited remand is appropriate under section 1260 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. . . ." (*Id.* at p. 818.) Although eligibility for mental health diversion does not affect the validity of the judgment, it does involve issues distinct from those submitted to the jury, issues that if resolved in favor of diversion could lead to vacation of the judgment and dismissal of the underlying charges.

Section 1001.36 creates a two-step process. Under subsection (b)(3), "at any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion." If a prima facie showing is made, the court would then go on to make a diversion determination under subdivisions (b)(1) and (c), including expert testimony and a judicial determination whether the defendant would pose an unreasonable risk to public safety if treated in the community.

A mental health diversion hearing will typically focus on whether the defendant's "mental disorder was a significant factor in the commission of the charged offense" and whether "[t]he court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety . . . if treated in the community." (§ 1001.36, subds. (b)(1)(B) & (F).) These fact-intensive proceedings will occur in every case where diversion is considered beyond the informal prima

facie hearing. For cases like appellant's, in which the record on appeal makes the prima facie case, conditional remand for the more detailed proceedings makes perfect sense and will not be more complicated than any other "pretrial" diversion proceeding under section 1001.36.

C. The trial record: facts of the offense and appellant's mental condition.

A prima facie showing can be made in appellant's case based on the facts disclosed in the record of the trial, which are detailed here.

1. Prosecution case

James Kim owned the Acapulco Market in Santa Ana. (1RT 188.) Around 8 a.m. on March 31, 2016, ten months before the trial, James and his son Edward Kim were working at the store when Eric Frahs came in. (1RT 190, 193; 2RT 259.) James refused to serve Frahs because about a week earlier Frahs had left the store without paying for a pack of cigarettes. (1RT 194; 2RT 235.)[7]

When James said he would not serve Frahs, Frahs went outside. (2RT 209.) James observed Frahs in the shopping center parking lot and at some point saw him pick up rocks from a flower bed and throw them at passing cars. (2RT 210, 214-215, 219.) James heard what

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[7] On cross examination, James acknowledged that Edward told him Frahs had attempted to pay for the cigarettes with a card. (2RT 231-232.) Frahs subsequently testified that he had swiped a card to pay and stepped outside to smoke before he realized the payment had not processed properly. (2RT 342-344.)

sounded like a car windshield getting hit by a rock. (2RT 218-219.) James then observed Frahs stacking two or three stones on top of a car in the parking lot. (2RT 219-220.) James testified that in his opinion Frahs's behavior indicated "he was not normal." (2RT 241-242.)

At some point, Frahs headed back toward the Acapulco Market and James, who was still standing at the entrance, again told Frahs he was not going to serve him. (2RT 220, 242-243.) Frahs walked past James to a cooler, picked up a can of beer and a can of Red Bull, and then walked toward the exit where James was blocking the way, telling Frahs he was not going to sell him the drinks. (2RT 220-222.) Frahs lowered his head and shoulders and tried to push past James, who tried to hold on to him. (2RT 224-225.) James thought Frahs dropped the beer at that point and then threw the Red Bull out the door toward the parking lot. (2RT 225.) James "felt something was hitting the back of [his] head . . . kind of a fist . . . it was painful," and kept trying to hold on. (2RT 225.) James fell down and lost his grip and Frahs moved out of the store. (2RT 225-226.) James ran after Frahs, knocked him down in the parking lot, and with Edward's help held him two or three minutes until the police arrived. (2RT 226-227.) A bystander had called 911. (2RT 228.)

Edward Kim testified that he was standing at the cash register when Frahs re-entered the store, picked up a can of beer and a can of Red Bull, and tried to rush out the door. (2RT 266-267, 269.) Edward

joined James and they struggled with Frahs to keep him from leaving with the merchandise; "for a split second" Edward saw Frahs hit James on the side of the head. (2RT 269, 270-271.) Frahs ran outside, but James was able to knock him down, and Edward held him there. (2RT 271- 272.) By that point, James had already removed the beer from Frahs's hand and the Red Bull was on the ground outside. (2RT 271-272.)

Officer Gibbons responded to the 911 call and watched the store's security video. (2RT 285-288.) According to Gibbons, James and Edward were standing side by side blocking the door when Frahs rushed towards them and a struggle ensued. (2RT 290.) Gibbons did not see any punching in the video. (2RT 293.) James removed the beer can from Frahs's hands and the Red Bull flew outside the store. (2RT 292, 296.) Frahs ran outside and was stopped by James who held Frahs until police arrived. (2RT 294-296.)

2. Defense case

Eric Frahs testified in his defense. (2RT 307.) At the time of trial, he was 30 years old. (2RT 308.) Frahs testified he began having mental health issues while at Santa Ana Mater Dei High School and was sent to a psychiatrist and put on antidepressant medication at 17. (2RT 308-310.) He also self-medicated with marijuana, which he thought helped. (2RT 310-311.)

Frahs experienced his first manic episode when he was 18 and attending Irvine Valley College. (2RT 311-313.) Around that time, Frahs's father became concerned with his behavior and took him to St. Joseph's Hospital. (2RT 314.) Frahs fled almost immediately and was then detained by police and held at UCI Medical Center for two weeks. (2RT 315.) Around the age of 22, Frahs started hallucinating and having delusions. (2RT 319-320.) He thought his computer hard drive and birds chirping were talking to him. (2RT 320.) His father thought Frahs's issues were alcohol and drugs and put Frahs in rehab. (3RT 322.) Frahs acknowledged being an alcoholic. (2RT 322.)

At the time of trial, Frahs had been hospitalized for mental health issues by police or his parents "like eight times." (2RT 321.) Around 2015, he was "on a conservatorship" for about seven months. (2RT 324-325.) Frahs's medications include "antidepressants, mood stabilizers, antipsychotics, [and] anti-anxiety pills." (2RT 329.)

Frahs acknowledged he had been in trouble numerous times for drinking in public, vandalism, and theft. (2RT 323.) He also admitted that he was arrested for assault in 2015. (2RT 326-327.) Frahs said a man accused him of stealing a beer and punched him twice in the face, so Frahs picked up a broken bottle to defend himself. (2RT 327-330.) Frahs testified he pled guilty so he could get out of jail. (2RT 330.) He was arrested and released many times after that. (2RT 331.) Whenever

he has been in trouble with the law, Frahs was having mental health issues. (2RT 323.)

Frahs had been homeless for two years when the Acapulco Market incident occurred. (2RT 321, 324.) In March 2016, he was sleeping at the armory and had stopped his anti-psychotic medication because it was giving him a really bad headache. (2RT 332, 335-336.) Instead, he was self-medicating with beer and cigarettes. (2RT 336.) He had not slept for four days leading up to the Acapulco Market incident. (2RT 337-337.)

According to Frahs, he had a friendly relationship with James Kim and frequented the Acapulco Market because it was on the way to the armory. (2RT 342.) He explained there was an earlier incident when he swiped his card to pay for cigarettes and went outside to smoke, but his card did not work so he went back inside. (2RT 342-344.)

When Frahs first arrived at the store on March 31, 2016, he had lost his cell phone and debit card. (2RT 340-342.) James was on the phone. (2RT 344.) Frahs thought he was calling the police and confusing him with someone else. (2RT 346.) Frahs testified that at that point an angel flew by on a horse and told him he needed help and to call his father; a friend's voice told him the same thing. (2RT 346.) Frahs then put a traffic cone in the street and tried to direct traffic into the shopping center parking lot. (2RT 347.) When that didn't produce

help, Frahs threw a rock at a gardener's truck so he could use the driver's cell phone or get a ride out of the area. (2RT 347-348, 402.) Frahs told a psychologist he was trying to "bum money." (2RT 401.) No one pulled over. (2RT 348.) Frahs did not remember stacking rocks on a car in the parking lot. (2RT 349.)

Frahs then decided "to get what I needed for the morning . . . cigarettes, beer, and a Red Bull, and I would take my medication." (2RT 348.) At that point, Frahs testified, "one of my friends said . . . just get your head straight. And he said, go ahead and bust a jack move [commit a theft], and the police will let you get away with anything, as long as you submit to their power when they show up. I said, okay, well, I'm going to buy it, but I'm going to get my stuff so I can get my head straight. So I went in the store." (2RT 348, 398.)

Frahs "just went straight to the back and grabbed a beer, a Bud Light, and a Red Bull." (2RT 349.) At that point Frahs heard Edward say, "No, no beer. Put the beer back." (2RT 350-351.) Frahs said he put the beer back but thought the Red Bull was okay. (2RT 350.) The Kims were both standing by the door, not the register, so Frahs thought, "well, either they want to ring it up or they're maybe going to let me have it for free, and I thought that was cool." (2RT 351.) Frahs said he said "thank you" and kept walking. (2RT 351.) When one of the Kims said to put the beer back, Frahs was confused. (2RT 351.) At some point, James grabbed Frahs's arms from behind and they stumbled,

and then James tackled him. (2RT 352-353.) Frahs thought he Red Bull flew out of his hand when he tried to brace his fall. (2RT 353. Frahs denied hitting James at any point. (2RT 353.) Frahs said James walked him out of the store and sat him down. (2RT 354.) Frahs said, "I was already so tired. I was just like, whatever, okay. I guess I'll get in trouble for throwing a rock at a car or something." (2RT 354.)

The prosecutor's cross-examination of Frahs focused on the fact that Frahs made choices and decisions throughout his adult life, including on March 31 at the Acapulco Market, and had pled guilty to petty theft eight times. (2RT 368-386, 403-407.)

The defense called forensic psychologist Dr. Richard Lettieri as a witness. (2RT 409.) Lettieri reviewed medical records and spoke with Frahs's parents and Frahs. (2RT 414, 416, 425.)

Lettieri reviewed a medical history report on Eric Frahs from Royale Therapeutic Residential Center where police take very mentally ill people and where Frahs was housed for four and a half months. (2RT 414.) Patients typically stay at the residential center for three to fourteen days to stabilize. (2RT 415.) Frahs's four-month stay, with a temporary conservatorship given to the county, indicated a severe mental illness. (2RT 415-416.) A conservatorship occurs when a person "can't take care of himself . . . so that the county then takes responsibility for his personhood and his decision-making." (2RT 416.)

Frahs was diagnosed as suffering schizoaffective disorder; "he has a mood disorder and a thinking disorder. He has a combination of schizophrenia and bipolar disorder." (2RT 419-420.) Before he was 20, Frahs "started showing severe [symptoms] of schizophrenia, hallucinations, and delusions." (2RT 420.)

Frahs had had multiple "5150 holds,"[8] had been hospitalized over ten times, and has been on dozens of different medications including antidepressants and antipsychotics. (2RT 422-423.) Lettieri testified that Frahs "clearly is not faking his symptoms" and "formed the opinion he suffered from schizoaffective disorder." (2RT 426, 428.)

Lettieri believed that Frahs had experienced psychotic episodes for years, including in the four days leading up to March 31, 2016, as well as on that day. (3RT 459, 462, 464.) Lettieri testified that that one symptom of psychosis is an inability to form appropriate judgments. (3RT 461.) For instance, throwing rocks at cars to flag them down is "extremely crazy, inappropriate judgment as a way to get somebody to stop to give you money." (2RT 461.) A person experiencing a psychotic

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[8] Under Welfare and Institutions Code section 5150, "a person [who] as a result of a mental disorder [] is a danger to others, or to himself or herself, or [is] gravely disabled" may be taken "into custody for a period of up to 72 hours for assessment, evaluation, or crisis intervention, or placement for evaluation and treatment in a facility designated by the county . . . ."

episode does not necessarily have to experience hallucinations or delusions. (3RT 508.)

D. The record in this case makes a prima facie showing appellant is eligible for a diversion hearing in the superior court.

1. As required by section 1001.36, subdivision (b)(3), appellant meets the minimum requirements for eligibility, and he and the offenses are suitable for diversion.

The record in this case makes a prima facie showing that appellant's diagnosed mental disorder was a significant factor in the offenses he committed on March 31, 2016. There can be no dispute appellant Eric Frahs suffers from a diagnosed mental disorder that derailed his life. There is evidence in the record his mental disorder was a significant factor in the offenses with which he was charged and the offenses for which the jury found him guilty. He testified that Red Bull and beer were part of his self-medication technique and that voices were talking to him before he entered the store, including one that said he could steal what he needed and it would be okay with the police. (2RT 348, 398-399.) Maybe a judge will disagree Frahs is suitable for diversion after a hearing with prosecutor participation, but it is prima facie arguable based on the record on appeal.

In addition, there is no indication in the record Frahs would "pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community." (§ 1001.36, subd.

(b)(1)(F).) Under section 1170.18, subdivision (c), an "'unreasonable risk of danger of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent offense within the meaning of [section 667, subdivision (e)(2)(C)(iv)]." That clause of section 667 lists "violent felonies ... known as 'super strikes' and include murder, attempted murder, solicitation to commit murder, assault with a machine gun on a police officer, possession of a weapon of mass destruction, and any serious or violent felony punishable by death or life imprisonment." (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 242.)

Eric Frahs is not someone whose criminal history demonstrates he is an unreasonable risk of danger to public safety under section 1170.18 if treated in the community. He has committed two "violent felony" within the meaning of section 667.5, subdivision (c) – the *Estes* robberies of James and Edward Kim in this case. He also previously pled guilty to a "serious felony," assault with a deadly weapon (§§ 245, subd. (a)(1), 1192.7, subd. (c)(31)), after he picked up a broken bottle in a fight. (CT 266, 269 [change of plea form]). Frahs's many misdemeanor convictions, accrued since the onset of mental illness and homelessness, do not demonstrate that he poses a risk of committing a "super strike" offense that would make him a danger to public safety within the meaning of section 1170.18. Frahs's string of convictions demonstrates a need for the stability of individually focused support

and treatment of his mental disorders, as envisioned by section 1001.35.

2. The Attorney General's arguments against remand are based on a series of misunderstandings.

In arguing against a remand in appellant's case, the Attorney General demonstrates a misunderstanding of the nature of mental health diversion. The opening brief states that, "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." (OBM, p. 51.) Contrary to the Attorney General's implication, this finding by the trial court has nothing to do the issues in a diversion hearing, which focus on whether a defendant's diagnosed mental disorder played a significant role in the charged offense.

Contrary to the Attorney General's implication, eligibility for diversion is not based on the same criteria that would make a defendant not guilty by reason of insanity. Diversion under section 1001.36 is intended for people who would in fact be culpable for the charged offense, i.e., the elements could be proven. Also, the record in this case shows that appellant's belief he would not face consequences for stealing was in fact rooted in his mental disorders – the voice of a

friend told him he could steal and the police would not arrest him if he submitted to their authority. (2RT 348, 398.) Notably, this explanation proffered by appellant would *not* make him not guilty by reason of insanity – it is essentially a confession of guilt – but it does make a prima facie case that his schizoaffective disorder was a significant factor in the *Estes* robbery offenses he committed at the Acapulco Market.

The Attorney General also erroneously twists statutory ineligibility for probation into disqualification for mental health diversion under section 1001.36. (OBM, p. 53.) Again, the government is reading requirements into the statute that are not there. First, appellant's ineligibility for probation is based on his prior felony offense and being on probation for that offense at the time of the offense in this case.[9] (CT 189-190.) If prior-based limitations applied to mental health diversion, the statute would say so. Instead, it focuses on the current charged offense. Also, by its own terms, section 1001.36 makes diversion available to defendants charged with many serious and violent felonies, including robbery, arson, and first degree burglary. If the Legislature intended that defendants charged with a

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[9] Notably, the probation officer wrote that "While a custody commitment does not appear to be the best option to address his significant mental health issues, his criminal conduct and poor prior progress on probation eliminates this option." (CT 190.)

serious or violent felony would not be eligible for diversion, they would have made that limitation a part of the statute. They did not, meaning the Attorney General is again arguing based on phantoms.

The Attorney General next argues that diversion at this point, on remand after appeal, would require "suspending" appellant's sentence, and sections 667, subdivision (c)(2), and 1203, subdivision (k), prohibit the suspending of a sentence for a defendant who is ineligible for probation or has a prior strike. (OBM, p. 53.) The Attorney General's mix-and-match of statutes is not persuasive and depends on ignoring what the *Frahs* court actually did. The court did not *suspend* Frahs's sentence within the meaning of sections 667, subdivision (c)(2), or 1203, subdivision (k). The court provisionally *reversed* the sentence. Specifically, as the *Frahs* court wrote, "similar to our disposition in *Vela*, we conditionally reverse Frahs' convictions and sentence. On remand, the trial court is to conduct a mental health diversion eligibility hearing under the applicable provisions of section 1001.36. . . . [If] the court determines that Frahs does not meet the criteria under section 1001.36, or if Frahs does not successfully complete diversion, then his convictions shall be reinstated." (*Frahs*, *supra*, 27 Cal.App.5th 784, 792, rev. gr.) Thus, contrary to the Attorney General's assertion, the Court of Appeal's remedy did not involve the suspension of Frahs's sentence, but a conditional reversal. And notably, the *Lara* Court wrote that "we believe remedies like those

provided in *Vela* [which the *Frahs* court replicated] . . . are readily understandable, and the courts can implement them without undue difficulty." (*Lara, supra,* 4 Cal.5th at p. 313.)

Finally, appellant admittedly does not follow the logic of the Attorney General's "procedural bar" assertion in Argument II.C. (OBM, pp. 54-55.) Ameliorative retroactivity only applies to a particular case if the defendant is already past the procedural point where the new law ordinarily applies. Otherwise the application is prospective. So if *Estrada* retroactivity applies to section 1001.36, as the second issue presented here presumes, Frahs's case would be provisionally returned to a pre-adjudication posture. That is how *Estrada* works, which ultimately seems to be the Attorney General's real issue.

E. Conditional remand for a diversion hearing under section 1001.36 is the appropriate disposition of this case.

The record in this case establishes that Eric Frahs has a qualifying mental disorder under section 1001.36, subdivision (b)(1)(A). The record strongly suggests that mental disorder was a significant factor in the commission of the offenses in this case. And the record does not indicate that Frahs would pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if treated in the community. These points make a prima facie case of eligibility for diversion under section 1001.36. This case should therefore be remanded to the trial court to hold a hearing on whether to grant

Frahs diversion and thereby, in accord with the purposes of the statute codified by the Legislature, mitigate his re-entry into the criminal justice system and provide him with individually focused mental health treatment and support. (See § 1001.35.)

Conclusion

Based on the foregoing arguments, appellant respectfully requests the Court affirm the Court of Appeal's disposition of the case (1) holding that, under *In re Estrada*, section 1001.36 applies retroactively to cases not final on appeal at the time of its enactment, and (2) ordering conditional reversal and remand for a section 1001.36 diversion hearing.

Dated: April 18, 2019

Respectfully submitted,

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Certification of Word Count

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify this brief contains 12,186 words, excluding the cover, tables, this certification, and the proof of service, according to the word count of the program used to prepare this brief.

Date: April 18, 2019

/s/ Arthur Martin
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PROOF OF SERVICE BY MAIL
(Cal. Rules of Court, rules 1.21, 8.50.)
(Court of Appeal No. G054674; Supreme Court No. S252220 ; People *v.* Eric Jason Frahs)

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