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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ALEXANDER CERVANTES,

Defendant and Appellant.

On review from the decision of the Court of Appeal,
First Appellate District, Division Four, Case No. A140464,
reversing the judgment of the Solano County Superior Court,
The Honorable Harry S. Kinnicutt, Judge

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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APPLICATION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

To the Honorable Chief Justice of the Supreme Court of the State of California:

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of Respondent, the People of the State of California, pursuant to rule 8.520(f) of the California Rules of Court.[1]

Applicant's Interest

CJLF is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public

1. No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae CJLF made a monetary contribution to its preparation or submission.

interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the Court of Appeal held that a "fitness hearing" is required for an adult previously convicted of brutal sex crimes and attempted murder of children. These crimes were committed while he was a juvenile and subject to the mandatory direct filing provision of the former law. To send the case back for such a hearing many years later is contrary to the interests of victims of crime that CJLF was formed to protect.

Need for Further Argument

Amicus is familiar with the arguments presented on both sides of this issue and believe that further argument is necessary.

The brief is submitted with this application and ready for immediate filing. The attached brief brings to the attention of the court additional authorities and argument relevant to the question presented.

December 6, 2017

Respectfully Submitted,

KENT S. SCHEIDEGGER

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

In December 2010, 14-year old Alexander Cervantes entered a home in the very early hours of the morning carrying a steak knife and a condom. (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 581.) The only occupants inside of the home at that time were 13-year-old A.P. and her 1-year-old brother I.A. (*Ibid.*) A.P. was babysitting her little brother while their mother was out. (*Ibid.*) Defendant attacked A.P., raped and sodomized her, and forced her to orally copulate him. (*Id.* at pp. 581-582).

When defendant later fell asleep, A.P. grabbed her cellphone and her little brother, and ran outside. She then called 911. The SWAT team arrived and entered A.P.'s home. Defendant was found naked in the master bedroom smeared with blood and was arrested. (*Id*. at p. 582.)

A.P. had been stabbed 42 times, had a collapsed lung, and a lacerated liver and spleen. She was hospitalized for three days. Her 1-year-old brother had been stabbed 13 times, suffered four fractured ribs and had internal injuries. (*Ibid.*)

Defendant was subsequently charged as an adult pursuant to former Welfare and Institutions Code sections 602, subdivision (b)(2), and 707, subdivision (d)(2)(A). (*Cervantes*, 9 Cal.App.5th at pp. 582-583.) A jury trial was held in September 2012 and defendant was found guilty of all of the charged substantive offenses. (*Id*. at p. 584, and fn. 4.) Defendant was later sentenced to 50 years to life for the sex crimes under the "one-strike" law, plus a consecutive 11 years for the attempted murder of I.A., plus an additional consecutive life term for the attempted murder of A.P. (*Id.* at pp. 588-589.)

Defendant promptly appealed, arguing, among other things, that his trial counsel was ineffective for failing to completely investigate his mental state. (*Id.* at p. 591.) The Court of Appeal agreed and reversed eight of the specific intent counts, but affirmed the remaining seven counts, which included burglary and all of the general intent crimes. (*Id.* at p. 579.) The Court of Appeal remanded the case for retrial and resentencing on the reversed counts. (*Id.* at pp. 579-580.)

Because during the pendency of the appeal California voters passed Proposition 57 and eliminated the statutes that either required or permitted prosecutors to directly file charges against a minor in adult court, the Court of Appeal found that defendant had the right to request a "fitness hearing" in the juvenile court on remand. (*Id*. at p. 580.) If so requested, defendant's case must be transferred to the juvenile court.

This Court granted review on May 17, 2017.

SUMMARY OF ARGUMENT

The defendant's case was lawfully initiated in adult criminal court and must remain in that court on remand for retrial and resentencing. Pre-Proposition 57 law provided three methods by which a minor could be prosecuted in adult criminal court, and one of those methods was invoked in this case.

Statutes are presumed to apply prospectively only unless they provide otherwise. Proposition 57 does not make the provision in question retroactive though it does apply another part of the act retroactively. The analysis and argument given to the voters is also consistent with prospective-only application.

To determine what applications are retroactive for a particular statute, one must identify the "retroactivity event" or the "conduct to be regulated." It is not sufficient to simply lump the statute into a broad category such as "procedural" or "substantive." For this statute, the retroactivity event is the decision to proceed in adult court under regular criminal law or in juvenile court under juvenile law. Proposition 57 changes the criteria and in some cases the decision-maker for this decision, making that decision the conduct regulated. Application of the Proposition to undo a decision properly made under then-existing law would be retroactive application.

Retrial of a criminal case after trial in adult court must be in adult court. California law requires that a motion to transfer a case from juvenile to adult court be made before the attachment of jeopardy. This requirement implements a constitutional mandate. The procedure specified by the Court of Appeal in this case contradicts that requirement and is not authorized by California statutes.

ARGUMENT

I. Defendant's case was lawfully initiated in adult criminal court and must remain in that court on remand for retrial and resentencing.

A. Minors Prosecuted as Adults.

The process by which a delinquent minor can be prosecuted as an adult in adult court has changed over the years. Thirty years ago, "judicial waiver" was the sole method of transferring a minor from the jurisdiction of the juvenile court to the adult court. (Seiser & Kumli, Seiser & Kumli on California Juvenile Courts Practice and Procedure § 3.60, p. 3-110 (Matthew Bender 2017).) A judge was required to evaluate whether a minor was a "fit and proper" subject to be dealt with under juvenile court law. (*People v. Arroyo* (2016) 62 Cal.4th 589, 593; *Juan G. v. Superior Court* (2012) 209 Cal.App.4th 1480, 1488.) If not "fit and proper," the minor could be transferred to adult court and prosecuted under general criminal law.

Proposition 21, the "Gang Violence & Juvenile Crime Prevention Act of 1998," was passed by the California voters on March 7, 2000, and "broadened the categories of minors subject to prosecution" in adult court. (*Arroyo*, 62 Cal. 4th at p. 596; *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 549.) The initiative significantly reformed the juvenile and criminal justice system in direct response to the growing problem of youth gang violence. (Voter Information Guide, Primary Elec. (Mar. 7, 2000) § 2, p. 119.)

> "Under Proposition 21 there were three procedures by which a minor could be transferred to adult court — statutory waiver, prosecutorial waiver, and judicial waiver. Statutory waiver required minors, age 14 and over, be charged in adult court when they were alleged to have committed certain offenses. [Welf. & Inst. Code, § 602, subd. (b).] The second mechanism (prosecutorial waiver) authorized the prosecutor to file directly in adult court when certain offenses and

> circumstances were alleged. [Welf. & Inst. Code, § 707, subd. (d).] Finally, the traditional 'judicial waiver' process was expanded but remained a viable certification option. [Welf. & Inst. Code, § 707, subds. (a)-(c).]" (Seiser & Kumli, *supra*, § 3.60, p. 3-111; see also Voter Information Guide, Gen. Elec. (Nov. 8, 2016) analysis of Prop. 57 by the Legislative Analyst, p. 55 ("2016 Voter Guide").)

In California, each county contains only one superior court that has subject matter jurisdiction over both criminal and civil matters. (*In re Harris* (1993) 5 Cal.4th 813, 837; Cal. Const., Art. VI, § 10.) The juvenile court and the criminal court are both divisions of the superior court. (*Manduley*, 27 Cal.4th at p. 548, fn. 3.) The juvenile court is a creature of statute that exercises statutory authority over people under 18 years old. (*Ibid.*; *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1099-1100; Welf. & Inst. Code, § 245.) When a minor commits a crime, the juvenile court exercises delinquency jurisdiction and the minor is subject to juvenile court law, unless an exception applies. (*Manduley, supra*, at p. 548; *Juan G.*, 209 Cal.App.4th at p. 1487; Welf. & Inst. Code, §§ 602,[1] 603.)

Before Proposition 57, one of the exceptions was that the minor was charged with a crime that fell within former section 602, subdivision (b).[2] (See *Guillory v. Superior Court* (2003) 31 Cal.4th 168, 172-173.) The former section 602, subdivision (b) crimes automatically granted the adult court exclusive jurisdiction over these enumerated crimes and excluded these cases from the juvenile court's jurisdiction (*Manduley*, 27 Cal.4th at p. 550; 10 Witkin, Summary of Cal. Law (10th ed.) Parent & Child, § 736, p. 919) effectively creating a conclusive presumption that the minor was

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1. The present section 602 is former subdivision (a) of the section. The section no longer has subdivisions.

2. Section 602 former subdivision (b) provided: "Any person who is alleged, when he or she was 14 years of age or older, to have committed one of the following offenses *shall* be prosecuted under the general law in a court of criminal jurisdiction." (Italics added.)

"unfit" to be tried as a juvenile. (Cf. *Manduley*, *supra*, at pp. 548-549 (former rebuttable presumption for section 707, subdivision (b) offenses).) "Commencing with the filing of charges, all proceedings under such systems occur as if the defendant were an adult." (J. Sorrentino & G. Olsen, *Certification of Juveniles to Adult Court* (1977) 4 Pepperdine L.Rev. 497, 503.)

Thus, under Proposition 21, minors age 14 years and older who personally committed murder with special circumstances or personally committed an enumerated "one strike" aggravated sex offense were statutorily waived to adult court and were *required* to be tried as adults. (*Juan G.*, 209 Cal.App.4th at p. 1489; Seiser & Kumli, *supra*, § 3.60, p. 3-111.) Under this statutory scheme, defendant was "statutorily waived" to adult court pursuant to former section 602, subdivision (b) because of the violent nature of his crimes, and he had a full adjudicatory hearing in adult court. (See *Cervantes*, 9 Cal.App.5th at pp. 582-583 (direct file under section 602, subdivision (b).)

B. Proposition 57 Applies Only Prospectively.

On November 8, 2016, California voters passed Proposition 57, "The Public Safety and Rehabilitation Act of 2016." Proposition 57 eliminated statutory waiver and prosecutorial waiver, and "substantially alter[ed] the process of judicial waiver." (Seiser & Kumli, *supra*, § 3.60, p. 3-111.) Under current law, all allegations of criminal conduct against a minor *must* be initiated in juvenile court "regardless of the age of the juvenile or the severity of the offense." (*People v. Mendoza* (2017) 10 Cal.App.5th 327, 343.) The only method by which a minor age 14 or older can be transferred to and prosecuted in an adult court is via a "motion to transfer" filed by a prosecutor. (*Ibid.*; Welf. & Inst. Code, § 707, subd. (a)(1).)[3]

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3. Welf. & Inst. Code, section 707, subdivision (a)(1) provides in part: "In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years

Defendant's trial was held and a guilty verdict was returned on all counts in September 2012. In April 2013, defendant moved for a new trial contending that his trial counsel had rendered ineffective assistance. (*Cervantes*, 9 Cal.App.5th at p. 588.) The motion was denied on October 18, 2013. (*Ibid.*) The trial court found that defendant's attorney was not ineffective and that had she further investigated evidence of defendant's mental state on the night of the crimes, it would not have resulted in a more favorable verdict for defendant. (*Ibid*.) The court sentenced defendant on October 28, 2013. (*Id.* at pp. 588-589.)

On appeal, defendant's counsel further pursued the ineffective assistance argument that was presented and rejected at the new trial motion. (*Id.* at p. 589.) The Court of Appeal examined the issue because the claim had been "fully developed" in the trial court. The Court of Appeal agreed with defendant that his trial counsel should have more fully pursued evidence of defendant's mental state because it may have negated the specific intent required for some of the charged crimes. (*Id.* at pp. 593-594.) As a result, the Court of Appeal reversed the jury's verdict with respect to the specific intent crimes only. (*Ibid.*) Because Proposition 57 became law during defendant's appeal, he argued that it applied retroactively to his case and required the appellate court to vacate his entire conviction and sentence. (*Id*., at p. 594.) The Court of Appeal rejected the defendant's retroactivity argument, but nevertheless held that because a prospective application of Proposition 57 intends "to give every juvenile

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> of age or older, of any felony criminal statute or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction. The motion must be made prior to the attachment of jeopardy."

felon a right to a fitness hearing before being 'tried in adult court' " it also applies to defendant's case on remand.[4] (*Id.* at p. 595.)

The Court of Appeal's holding ignores the fact that defendant's case was lawfully initiated and fully adjudicated under the exclusive jurisdiction of the adult court. Furthermore, the holding overlooks the past and places defendant, who is now an adult, in the position of a juvenile who is currently awaiting trial for the first time *after* the enactment of Proposition 57.

The Legislative Analyst's analysis of Proposition 57 in the 2016 voter information materials contains no indication that a defendant, who had been directly prosecuted in adult court under the statutory scheme then in place, would be allowed to return as an adult to have a hearing in juvenile court before he or she could be retried in adult court on the previously litigated charges. In the Voter Information Guide,

> "the Legislative Analyst must provide an analysis that is 'easily understood by the average voter' and it 'may contain background information, *including the effect of the measure on existing law* and the effect of enacted legislation which will become effective if the measure is adopted, and shall generally set forth in an impartial manner the information the average voter needs to adequately understand the measure.' " (*People v. Valencia* (2017) 3 Cal.5th 347, 365-366, quoting Elec. Code, § 9087, subd. (b), italics added.)

The Legislative Analyst stated, "[t]he measure changes state law to require that, before *youths* can be transferred to adult court, they must have a hearing in juvenile court to determine whether they *should be* trans-

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4. "That hearing will, in effect, determine which department of the superior court, the juvenile court or the adult criminal court, will try any remaining counts on remand (should the People elect retrial) and will decide the *consequences* [defendant] faces for the offenses of which he stands convicted or that are found to be true following remand." (*Ibid*., italics in original.)

ferred." (2016 Voter Guide, *supra*, p. 56, italics added.) The average voter would understand the law to apply prospectively to minors who have not yet had their "day in court" for a crime that could potentially be transferred to adult court, not to a now adult whose case was partially reversed and remanded for retrial after it was fully and lawfully litigated in adult criminal court over five years ago.

> "[L]ogic dictates that had voters intended the juvenile offender provisions of Proposition 57 to apply to such offenders who were already tried, convicted, and sentenced, the enactment would have included an express provision to that effect, as did the parole eligibility portions of the Act." (*People v. Navarra* (2017) 16 Cal.App.5th 173, 183; see *Lindh v. Murphy* (1997) 521 U.S. 320, 329 (express retroactivity provision for one part of act and silent on another: latter not retroactive).)

This Court had the opportunity to address the prospective application of a new law to a case remanded for retrial in *People v. Hayes* (1989) 49 Cal.3d 1260. In that case, the crime victim was hypnotized within a few hours of a crime (committed in 1979) in an effort to assist the law enforcement investigation. Because the post-hypnotic testimony was erroneously admitted at trial, the defendant's conviction was reversed on appeal. (*Id*. at pp. 1262-1263.) However, during the pendency of the appeal, the California Legislature enacted a statute that excluded the admission of pre-hypnotic testimony at trial unless certain statutory conditions were met at the time of hypnosis. (*Id.* at p. 1273.) This Court addressed whether the newly enacted statute applied to exclude evidence of the victim's pre-hypnotic testimony at the retrial. (*Ibid*.)

This Court reaffirmed the well-established canon of statutory construction that new statutes are presumed to operate prospectively. (*Id*. at p. 1274; see also *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 291.) Because the new statute contained no express retroactivity clause nor did a review of the "history, context, wording, or purpose" of the law suggest

the Legislature intended it to apply retroactively, this Court held that it did not apply to retrial of the defendant's case on remand.

> "The prehypnotic evidence in question here predates the statute by several years: the prehypnotic interviews with [the victim] occurred on February 27, 1979, while [the statute] took effect on January 1, 1985. It would be manifestly unfair to apply the regulatory provisions of [the statute] to retrial of this case, the investigation of which took place some *six years* before those provisions were enacted. To invoke [the statute] to exclude such evidence on retrial would be tantamount to giving the statute retroactive effect." (*Hayes*, Cal.3d at p. 1274, italics in original.)

C. Identifying the "Retroactivity Event."

In accord with the weight of authority, the Court of Appeal held that Proposition 57 does not apply retroactively, but only prospectively. (See *Cervantes*, 9 Cal.App.5th at p. 597; People's Opening Brief 18-19 (listing decisions).) However, the meaning of "prospective" application has not always been clear. The crux of the present case is whether application of the statute to the reconsideration of this case at this point in the process constitutes a prospective or retroactive application of the statute.

Justice Scalia set forth a useful way of looking at retroactivity in his opinion concurring in the judgment in *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 291, italics added in part):

> "The critical issue, I think, is not whether the rule affects 'vested rights,' or governs substance or procedure, but rather what is *the relevant activity that the rule regulates*. Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relevant *retroactivity event*."

Under Justice Scalia's approach, retroactivity analysis should begin with identifying the "retroactivity event." This approach is stated in a concurring opinion, but a "parallel" approach was followed in the opinion of the court in *Republic of Austria v. Altmann* (2004) 541 U.S. 677, 697, footnote 17 (quoting the passage above). This court has followed a similar method in cases where it focused on "the date of the conduct regulated by the statute." (See *Tapia*, 53 Cal.3d at p. 291.)

The "retroactivity event" or "conduct regulated" must be identified with some care with respect to the particular statute and not simply lumped into broad categories. Justice Scalia gives an example of a statute governing expert testimony. In that case, the retroactivity event is the admission of the evidence. Application of the new statute to a trial conducted after enactment but concerning events occurring before the enactment is prospective. Application of the statute on appeal to reverse the judgment in a trial conducted before enactment would be retroactive. (See *Landgraf*, 511 U.S. at pp. 291-292 (conc. opn.).) However, a different result was reached by this court in *Hayes* regarding admissibility of witnesses who had been hypnotized. (49 Cal.3d at p. 1274.) The Legislature had established a detailed procedure for documenting the pre-hypnotic memory and conducting the hypnotic session. (See *id.* at pp. 1273-1274, fn. 4.) *Hayes* held that applying the statute to exclude pre-hypnotic evidence predating enactment would be retroactive (see *id.* at p. 1274), implicitly holding that the conduct regulated is the gathering of the pre-hypnotic evidence and conduct of the hypnotic session and not the admission of the evidence at trial.

Justice Scalia's hypothetical and the statute in *Hayes* fall into the same category of regulation of evidence, yet they come to different conclusions because of the different focus of the conduct to be regulated. In the expert testimony situation, the focus is on the admission at trial, and the expert can adjust his testimony if needed to meet the new requirements. In *Hayes*, it would have been unrealistic and unfair to expect anyone to follow the

new procedure before it was enacted (see *Hayes*, 49 Cal.3d at p. 1274), so a different standard addressed to the fairness of admitting the evidence applied to pre-enactment cases. (See *id.* at pp. 1272-1273.)

In Proposition 57, the "conduct regulated" or the "retroactivity event" is the decision to send the case to adult court rather than juvenile court. The Legislative Analyst's summary of the then-existing law said cases of certain crimes committed by 14- to 17-year-olds "can be *sent* to adult court in one of the three following ways . . . ." (2016 Voter Guide, *supra*, at p. 55, italics added.) The summary of the proposal states that "[t]he measure changes state law to require that, before youths can be *transferred* to adult court, they must have a hearing in juvenile court to determine whether they should be *transferred*." (*Id.* at p. 56, italics added.) "Sent" and "transferred" are the operative words here. Similarly, the proponents' argument says that the proposition "requires judges instead of prosecutors to *decide* whether minors should be prosecuted as adults . . . ." (*Id*., Arguments and Rebuttals, p. 58, italics added.) The decision of whether to prosecute as an adult, not the subsequent trial, is what is being changed.

The "retroactivity event" is therefore the decision to prosecute as an adult and the sending of the case to adult court. If the case had already been sent there before the enactment of Proposition 57, then applying the initiative to undo that action and require a new decision would be retroactive application. Because defendant's case was initially filed when sections 602, subdivision (b) and 707, subdivision (d) permitted direct filing in adult court, all proceedings from that point occurred as if he were an adult and that continued treatment applies on remand as well.

II. Retrial of a criminal case after reversal must be heard in the same court.

By appealing, defendant sought and successfully obtained a partial reversal of his initial conviction. Penal Code section 1260 authorizes an

appellate court to reverse "a judgment or order appealed from . . . 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." Penal Code section 1262 provides that "[i]f a judgment against a defendant is reversed, such reversal shall be deemed an order for a new trial, unless the appellate court shall otherwise direct." Penal Code section 1179 defines "new trial" as "a reexamination of the issue in the *same Court*, before another jury, after a verdict has been given." (Italics added.) Retrial is a new trial that is constitutionally permitted because reprosecution of a conviction overturned at the hands of a defendant does not violate the Double Jeopardy Clause. (*Justices of Boston Municipal Court v. Lydon* (1984) 466 U.S. 294, 308; *People v. Hernandez* (2003) 30 Cal.4th 1, 6-7.) "[R]etrial simply 'affords the defendant a second opportunity to seek a favorable judgment . . . .' " (*People v. Hatch* (2000) 22 Cal.4th 260, 274, quoting *Tibbs v. Florida* (1982) 457 U.S. 31, 43.)

The Court of Appeal appears to have remanded the case to the "same Court" in an effort to comply with Penal Code section 1179. It then inexplicably gave defendant the option to request a "fitness hearing" in juvenile court before any retrial could take place. (*Cervantes*, 9 Cal.App.5th at pp. 608-609, 613.)

Proposition 57 "eliminated the words 'fitness' and 'unfitness' " from section 707. (Seiser & Kumli, *supra*, § 3.61[1], p. 3-111.) Under the new law, the transfer hearing process is initiated upon motion of the prosecution prior to the attachment of jeopardy. (Welf. & Inst. Code, § 707, subd. (a)(1); Seiser & Kumli, *supra*, § 3.61[4][a], p. 3-112.) "[T]he juvenile court shall decide whether the minor should be transferred to a court of criminal jurisdiction." (Welf. & Inst. Code, § 707, subd. (a)(2).) The Court of Appeal acknowledged that it was using "fitness hearing" and "transfer hearing" interchangeably because of the similar criteria used to determine the minor's amenability to treatment as a juvenile under both the old and new statutory schemes. (*Cervantes*, 9 Cal.App.5th at p. 594, fn.

29.) However, the Court of Appeal's analysis appears not to treat the two interchangeably, but rather as separate hearings — one initiated by the defendant ("fitness hearing") and one initiated by the prosecution ("transfer hearing").

There is no authority, pre- or post-Proposition 57, and the Court of Appeal cited to none that gives the accused the ability to request his own "fitness hearing" in juvenile court when the case is directly filed in adult court. The only method in which a case initiated in adult court can be transferred to the juvenile court is through Welfare & Institutions Code section 604.

Under section 604, if during a criminal prosecution it appears or it is suggested that the accused committed the crime as a minor, the judge must immediately suspended the case, and inquire into the accused's age. If the judge is satisfied that the accused was a minor when the crime occurred, the case shall be certified to the juvenile court for further proceedings. (See *People v. Nguyen* (1990) 222 Cal.App.3d 1612, 1619.) Here, defendant's age was known when his case was lawfully filed directly in adult court and fully litigated.

The Court of Appeal cited to section 604 as "procedural framework . . . from which the trial court may take direction on remand." (*Cervantes*, 9 Cal.App.5th at pp. 613-614.) Proposition 57 contains no language like that found in section 604, and there is no other statutory authority that permits the Court of Appeal's disposition. (See *People v. Superior Court* (*Walker*) (2017) 12 Cal.App.5th 687, 717-718.) On the contrary, when a case is *initiated in the juvenile court*, under past and current law, only the district attorney or other prosecuting officer has the authority to file a motion to have a juvenile transferred to adult court. (Welf. & Inst. Code, § 707, subd. (a)(1).) There is no statutory authority for the converse.

In addition to the statutory authority governing retrial after successful appeal by a defendant, principles of double jeopardy law also guide why

defendant's case must return to the adult court for retrial. "Jeopardy denotes risk." (*Breed v. Jones* (1975) 421 U.S. 519, 528.) "[J]eopardy [in the constitutional sense] refers [to risk] that [is] traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.' " (*Id*., at p. 529, quoting *United States ex rel. Marcus v. Hess* (1943) 317 U.S. 537, 548-549.)

Generally, a second trial for a same offense is prohibited after acquittal or conviction. (*United States v. Ball* (1896) 163 U.S. 662, 669; *People v. Eroshevich* (2014) 60 Cal.4th 583, 590; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 71-72.) Policy dictates that " 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual.' " (*Eroshevich*, 60 Cal.4th at p. 588, quoting *Green v. United States* (1957) 355 U.S. 184, 187.) If, however, a defendant challenges his conviction "[b]y seeking reversal of a judgment of conviction on appeal, in effect [a defendant] assents to all the consequences legitimately following such reversal, and consents to be tried anew . . . ." (*Eroshevich*, 60 Cal.4th at p. 591, internal quotation marks omitted.) Policy reasons also support permitting a retrial.

> "First, 'society would pay too high a price "were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." [Citations.] Second, the Court has concluded that retrial after reversal of a conviction is not the type of governmental oppression targeted by the Double Jeopardy Clause.' " (*Id*. at 591, quoting *Tibbs v. Florida* (1982) 457 U.S. 31, 40.)

Two theories support why retrial is constitutionally permitted — the "waiver" theory and the "continuing jeopardy" theory. California Courts subscribe to both theories. (See 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Defenses, § 198, pp. 671-672.) Under a "waiver" theory, a defendant "waives" state and federal Double Jeopardy protections if the conviction is reversed as a result of the defendant's appeal. (See

Eroshevich, 60 Cal.4th at pp. 590-591.) Under a "continuing jeopardy" theory, "[i]t is settled that jeopardy as to an offense of which a defendant has been convicted continues during appellate proceedings and retrial following reversal of the judgment, but ends as to offenses of which he has been expressly or impliedly acquitted." (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 606, citing *Price v. Georgia* (1970) 398 U.S. 323, 326-327.)

In this case, the Court of Appeal viewed the two theories as contradictory and followed the "waiver theory" to hold that defendant waived his state and federal double jeopardy protections and "consents to be tried anew." (*Cervantes*, 9 Cal.App.5th at p. 608, and fn. 42.) Because he is being tried "anew," the Court of Appeal held that the prospective application of Proposition 57 provides defendant with the procedural protections a juvenile now receives under the current law. *(Id*. at pp. 608-609.)

In so holding, the Court of Appeal concluded that jeopardy terminated after defendant's conviction and sentence, but will potentially "reattach" when a jury is sworn in at his retrial. (*Cervantes*, 9 Cal.App.5th at p. 608.) Under the Court of Appeal's analysis, because Proposition 57 requires a district attorney to bring a transfer motion "prior to the attachment of jeopardy," if the district attorney wishes to file a motion to transfer defendant's case back to adult court, it will not be precluded from doing so because jeopardy will not "reattach" until retrial commences. (*Id.,* at p. 609.)[5] This analysis again appears to provide defendant with the individual right to request his own fitness hearing and treat it as something different from a prosecutor's ability to file a motion to transfer.

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5. "By our understanding of jeopardy principles, if we instruct the trial court to transfer the case to the juvenile court for a fitness hearing before commencing any retrial, the district attorney will have an opportunity to request a transfer to adult court 'prior to the attachment of jeopardy' within the meaning of section 707, subdivision (a)(1)[.]" (*Ibid*.)

Furthermore, Welfare and Institutions Code section 707's use of the phrase "prior to the attachment of jeopardy" must be examined in the context of why it was added to the statute in the first place. Proposition 57 did not add the requirement that the transfer motion be made "prior to the attachment of jeopardy." Rather, it was added to section 707 by the Legislature in 1975 and has remained a constant despite all of the changes over the years to the methods by which a minor can be transferred to and prosecuted in adult court.

Prior to 1975, a minor could be deemed unfit and transferred to adult court *at any time* during a juvenile adjudicatory hearing. (*Barker v. Estelle* (9th Cir. 1990) 913 F.2d 1433, 1437.) In *Breed v. Jones* (1975) 421 U.S. 519, 521, a minor committed a criminal act that would have constituted robbery had he been an adult. The juvenile court conducted a full adjudicatory hearing in which witnesses were sworn in and testified. (*Id.* at pp. 521-522.) After the hearing, the minor was found to have committed the offense. The juvenile court then held a fitness hearing and found that pursuant to former section 707, the minor was unfit for treatment as a juvenile and ordered him to be prosecuted as an adult. (*Id.* at pp. 523-524.) The minor was then tried again in the Superior Court and was found guilty of robbery in the first degree. (*Id.* at p. 525.)

On appeal, the U.S. Supreme Court held that subjecting the minor to an adjudicatory hearing in juvenile court and then to a subsequent prosecution in an adult court for the same offense violated the Double Jeopardy Clause of the Fifth Amendment. (*Id.* at p. 541.) In so holding, the Court acknowledged the significant need for states to have "the flexibility needed to deal with youthful offenders who cannot benefit from the specialized guidance and treatment contemplated by the [juvenile court] system." (*Id.* at p. 535.) Such flexibility can be attained, however, by holding a transfer hearing prior to a juvenile court adjudicatory proceeding. (See *id.* at pp. 537-539.)

In direct response to the *Breed* decision, the California Legislature repealed and reenacted section 707. (*Barker*, 913 F.2d at p. 1439.) Under the rewritten statute, any decision to transfer must be made *prior* to the attachment of jeopardy. (*Id.* at pp. 1439-1440; *People v. Trujeque* (2015) 61 Cal.4th 227, 248.)

Thus, if the district attorney would like to prosecute a minor as an adult, the motion must be made before jeopardy attaches in the juvenile court. In this case, because the Court of Appeal essentially returned defendant's case to juvenile court, it was concerned that the district attorney would be handcuffed by the "prior to the attachment of jeopardy" mandate due to the fact that the district attorney was never required to file a transfer motion under the old law. However, this is not the type of situation where defendant is truly being tried for the first time. Rather, his case was fully litigated. Defendant's appeal was successful and because it is on remand for retrial, it must return to the "same Court, before another jury." (Pen. Code, § 1179.)

Had defendant's case been initially filed in juvenile court, and the district attorney successfully moved to have defendant judicially declared unfit to be tried as a juvenile, there is no question that defendant's case would return to adult court for retrial and resentencing. At defendant's first trial, he was legislatively deemed unfit to be tried as a juvenile. "[T]he legislative branch possesses the power to require that particular charges against certain minors always be initiated in criminal court (§ 602, subd. (b)), and to preclude juvenile dispositions for certain minors convicted of specified offenses (§ 1732.6)." (*Manduley*, 27 Cal.4th at p. 554.) Under Proposition 21, which was in effect when defendant's case was assigned to the adult court, both statutory waiver and judicial waiver were lawful methods of transferring a juvenile to adult court. Defendant was deemed legislatively unfit to be charged as a juvenile and he was charged as an adult. Any retrial or resentencing on the reversed charges must return to the criminal division of the court.

CONCLUSION

The judgment of the Court of Appeal for the First District should be reversed.

December 6, 2017

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kent S. Scheidegger, hereby certify that the attached brief amicus curiae contains 5,720 words, as indicated by the computer program used to prepare the brief, WordPerfect.

Date: December 6, 2017

Respectfully Submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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