

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, )  
)  
Plaintiff and Respondent, )  
)  
DANIEL WILLIAMS MARSH, )  
)  
Defendant and Appellant. )

RECEIVED

AUG 01 2019

YOLO COUNTY DISTRICT ATTORNEY

) C088553

) Yolo No.

) CRF132418

)  Assigned DDA ASZ

)  DDA Review NDA

)  Send To: \_\_\_\_\_

)  File Not in Main - Document to DDA

Appeal from the Judgment of the Superior Court

State of California, County of Yolo

The Hon. Samuel T. McAdam, Judge

APPELLANT'S OPENING BRIEF

Mark David Greenberg  
Attorney at Law  
SBN: 99726  
484 Lake Park Ave., No. 429  
Oakland, CA 94610  
510 452 3126

Attorney for Appellant  
Daniel Marsh  
Under ADI's Independent Case System

## TABLE OF CONTENTS

<b>APPELLANT’S OPENING BRIEF</b>	5
<b>STATEMENT OF APPELLATE JURISDICTION</b>	5
<b>STATEMENT OF THE CASE</b>	5
<b>ARGUMENT ON APPEAL</b>	10
<b>BECAUSE JUDGMENT IN THIS CASE WAS STILL PENDING WHEN SB-1391 BECAME EFFECTIVE LAW ON JANUARY 1, 2019, ITS PROVISIONS APPLY TO THE INSTANT CASE AND REQUIRE A FULL REVERSAL OF THE CRIMINAL JUDGMENT AND REMAND TO THE JUVENILE COURT FOR DISPOSITION</b>	10
<b>A. Introduction</b>	10
<b>B. Retroactivity</b>	11
<b>C. Finality of Judgment in the Instant Case</b>	13
<b>1. The Pendency of Direct Appeal</b>	13
<b>2. The finality of Judgment as Determined by the Finality of the Transfer Order</b>	17
<b>CONCLUSION</b>	19
<b>CERTIFICATION OF WORD-COUNT</b>	20
<b>PROOF OF SERVICE</b>	21

## TABLE OF AUTHIORITIES

### Cases

<i>In re Estrada</i> (1965) 63 Cal.2 <sup>nd</sup> 740	11
<i>In re Rose</i> (2000) 22 Cal.4 <sup>th</sup> 430	18
<i>Lascher v. State</i> (1966) 64 Cal.2 <sup>nd</sup> 687	14
<i>C.S. v. Superior Court</i> (2018) 29 Cal.App.5 <sup>th</sup> 1009	7
<i>People v. Chi Ko Wong</i> (1976) 18 Cal.3 <sup>rd</sup> 698	15
<i>People v. Evans</i> (2016) 6 Cal.App.5 <sup>th</sup> 894	13
<i>People v. Franklin</i> (2016) 63 Cal.4 <sup>th</sup> 261	15
<i>People v. Hargis</i> (2019) 33 Cal.App.5 <sup>th</sup> 199	15-17,18
<i>People v. Vieira</i> (2005) 35 Cal.4 <sup>th</sup> 264	13
<i>People v. Superior Court (Alexander)</i> (2019) 34 Cal.App.5 <sup>th</sup> 994	10,11-13, 17
<i>People v. Superior Court (Lara)</i> (2018) 4 Cal.5 <sup>th</sup> 299	6,11
<i>Powers v. City of Richmond</i> (1995) 10 Cal.4 <sup>th</sup> 85	18

### Statutes

Pen. Code, § 1237	13
Welf. & Inst. Code, § 707	6 <i>et passim</i> .

### Rules

Cal. Rules of Court, Rule 5.770(g)	8,15
Cal. Rules of Court, Rule 8.500(a)(1)	18

**Constitutional Provisions**

Cal. Const., art. II, § 10, subd. (d)

12

**Other Authorities**

Proposition 57

6 *et passim*.

SB 1391

7 *et passim*.

Mark D. Greenberg, 99726  
 Attorney at Law  
 484 Lake Park Avenue, No. 429  
 Oakland, CA 94610  
 510-452-3126  
 Markdgreen2@comcast.net

Attorney for Appellant

By Appointment of the Court of Appeal  
 Under ADI's Independent Case System

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
 THIRD APPELLATE DISTRICT**

<b>PEOPLE OF THE STATE OF CALIFORNIA,</b>	)	
	)	
<b>Plaintiff and Respondent,</b>	)	<b>C088553</b>
	)	
<b>DANIEL WILLIAMS MARSH,</b>	)	<b>Yolo No.</b>
	)	<b>CRF132418</b>
<b>Defendant and Appellant.</b>	)	
	)	
	)	

**APPELLANT'S OPENING BRIEF**

**STATEMENT OF APPELLATE JURISDICTION**

This case is properly before this Court pursuant to Section 1237 of the Penal Code as an appeal from a final judgment.

**STATEMENT OF THE CASE**

This is a second appeal after a conditional reversal – or stated from a different perspective, a conditional affirmance – of convictions for two counts of first-degree, special circumstance murder, for which appellant was sentenced to an aggregate term of fifty-two years to life. The judgment was appealed to this Court

as case number C078999. At the time appellant committed his crimes in 2013, he was fifteen years of age, and the law extant at the time allowed the prosecution to file charges in adult criminal court without first obtaining from the juvenile court a transfer order based on the minor's unfitness for juvenile court treatment. In November 2016, while appeal of the criminal judgment was pending in this Court, the electorate enacted Proposition 57, which amended Welfare and Institutions Code section 707 to abolish direct filing and require a transfer hearing for any minor before allowing prosecution to proceed in adult, criminal court. (1 CT 5-6, 14-15; 3 CT 797-798.)

This Court, in its decision filed on February 22, 2018 (1 CT 5), relied on *People v. Superior Court (Lara)* (2018) 4 Cal.5<sup>th</sup> 299 to find that Proposition 57 was an ameliorative statute intended to apply retroactively, at least to those cases in which judgment was not yet final. (1 CT 15.) This Court then entered a conditional reversal of the judgment with the following instructions:

“The judgment of the criminal court is conditionally reversed and the matter remanded to the juvenile court with direction to hold a juvenile transfer hearing to determine defendant’s suitability for treatment in juvenile or criminal court within 90 days of the issuance of our remittitur. If the juvenile court determines that defendant is the proper subject of criminal proceedings, it shall reinstate the criminal judgment. If the juvenile court finds that it would *not* have transferred defendant to a court of criminal jurisdiction, then it shall deem defendant’s convictions to be juvenile adjudications and conduct a dispositional hearing with its usual time frame. [Citation.]” (1 CT 15-16, emphasis in the original.)

Appellant’s petition for review was denied on May 23, 2018<sup>1</sup>, and remittitur was issued by this Court on June 6, 2018. (1 CT 1.)

---

<sup>1</sup> Along with the filing of this opening brief, appellant will be seeking, *inter alia*, judicial notice by this Court of its own records in case no. C078999 and in Supreme Court case no. S247864.

On June 21, the prosecution, in the remanded case, filed a juvenile petition alleging the same offenses and special allegations originally alleged in the criminal information in 2013. (1 CT 22-24.) At the same time, the prosecution filed a motion to transfer the case to an adult criminal court. The prosecution argued that, although Mr. Marsh was between 14 and 16 years old at the time of the commission of the crime, he was eligible for transfer based on the crimes committed, and urged that under the discretionary criteria governing the juvenile court, Mr. Marsh was unfit for treatment as juvenile. (1 CT 26 *et seq.*) The case was set for July 18 to hear a motion to continue, which the defense advised the court it intended to file. (1 CT 32.) The motion was filed on July 16, seeking a continuance to allow for preparation for the transfer hearing. (1 CT 38, 43-45.) The Court granted the continuance and set October 1 as the date of the transfer hearing. (1 CT 51-52.)

On September 30, 2018, the Governor signed SB 1391, which further amended Welfare and Institutions Code section 707, by setting an absolute boundary for adult criminal prosecution of a minor at 16 years of age, and repealing any exceptions allowed adult prosecution of offenders who committed their crimes at the age of 14 or 15. (*C.S. v. Superior Court* (2018) 29 Cal.App.5<sup>th</sup> 1009, 1037.) Although the new law was not effective until January 1, 2019 (*ibid.*), the defense in the instant case, on October 1, made an oral motion for continuance until after January, when the new law would become effective and bar a transfer of this case to a court of criminal jurisdiction. The defense argued that to go forward with the hearing would be a waste of judicial resources. (1 RT 61-62.) The prosecution argued that the case was governed by the current law in effect: Mr. Marsh, according to the prosecution, would in fact have no appellate rights since the reinstatement of judgment would be self-executing and final upon the granting of the transfer order. (1 RT 63.) But the Court denied the motion to continue simply on the ground that there was no good cause to continue the hearing, which

could easily be completed long before January 1. The Court, however, invited the parties to file written motions by October 4 to protect the record on the motion to continue. (1 RT 63-64; 2 CT 447.) With this, the Court began hearing evidence on the issue of transfer. (2 CT 447-448.) On October 4, while the hearing was still in progress, the prosecution and defense filed written motions staking out their respective positions on SB 1391. (2 CT 462 *et seq.*; 2 CT 468 *et seq.*)

On October 24, 2018, the juvenile court granted the prosecution's motion to transfer the case to adult court. (3 CT 796.) In its order, the court adverted to SB 1391, noting that if it applied, then Marsh would not be subject to transfer. (3 CT 799.) But "[w]hether this case is final for purposes of appeal is not," the court noted, "an issue before this Court. There was ample time in juvenile court to hear the transfer motion before January 1, 2019, which we have done." (*Ibid.*) Pursuant to the terms of the conditional reversal (or affirmance) by this Court, the lower court further ordered: "The criminal judgment in case CRF-13-2418 is reinstated. The defendant is remanded to State Prison (CDCR) to serve the balance of an indeterminate sentence with a minimum of 52 years." (3 CT 813.) A notice of appeal from imposition of judgment was timely filed on December 21, 2018. (4 CT 939.)

However, before that, on November 13, 2018, an extraordinary writ was timely filed in this Court seeking review of the order of transfer itself. (See Cal. Rules of Court, Rule 5.770(g).) (4 CT 875 *et seq.*) The writ, presented as case no. C088306 in this Court, raised the issue of whether it was an abuse of discretion not to grant a continuance of until after the effective date of SB 1391. (4 CT 894.) In addition, the claim was raised that the juvenile court improperly shifted the burden of proof to the minor to show that he was fit for juvenile court treatment; and that the court, in its transfer decision misapplied the applicable time period for the minor to rehabilitate, which was a factor of consideration in the decision to transfer. (4 CT 876 *et seq.*) This Court summarily denied the writ on December 6, 2018. (4 CT 909.)



On December 14, a petition for review from the order denying the writ was timely filed in the California Supreme Court on December 14, 2018. (4 CT 910.)<sup>2</sup> The petition raised the same issues presented in the writ. (4 CT 910 *et seq.*) On December 17, the Supreme Court requested answers to the petition for review from the Attorney General and from the District Attorney. The District Attorney filed an answer on January 3, to which petitioner responded on January 14. The Attorney General filed an answer on January 22, to which petitioner responded on February 1. (See fn. 2.) The Supreme Court issued an order on February 13, 2019: “The petition for review is denied without prejudice to any relief under Senate Bill No. 1391 (Stats. 2018, ch. 1012) to which defendant might be entitled on direct appeal.” (See fn. 2.) At the time the California Supreme Court issued this order, the direct appeal in the instant case was pending, awaiting the filing of the record on appeal. (See fn. 2.)

---

<sup>2</sup> The petition contained in the clerk’s transcript in the instant case shows only that it was received by the Yolo County Superior Court on December 14, 2018. However, it was in fact also filed in the Supreme Court on that date, and the request for judicial notice by this Court will include judicial notice of the Supreme Court record in case no. S253054, as well as notice of this Court’s own records in case no. C088306 and its records in the instant appeal, case no. C088553.

## ARGUMENT ON APPEAL

**BECAUSE JUDGMENT IN THIS CASE WAS STILL PENDING WHEN SB-1391 BECAME EFFECTIVE LAW ON JANUARY 1, 2019, ITS PROVISIONS APPLY TO THE INSTANT CASE AND REQUIRE A FULL REVERSAL OF THE CRIMINAL JUDGMENT AND REMAND TO THE JUVENILE COURT FOR DISPOSITION**

### A. Introduction

The sole question presented on this appeal is the one left open in the California Supreme Court's order denying the petition for review on February 13, 2019: do the provisions of SB 1391 apply retroactively to the instant case so as to require a full reversal of the criminal judgment and require a remand of this case for juvenile court disposition? Appellant's answer, to be elaborated in the following argument, is yes. SB 1391 is an ameliorative provision consistent with, and in furtherance of, the ameliorative intent of Proposition 57. (*People v. Superior Court (Alexander)* (2019) 34 Cal.App.5th 994, 1000-1002.) Further, insofar as the electorate intended Proposition 57 to be applied as broadly as possible to any case for which judgment was not final at the time the proposition took effect as law (*People v. Superior Court (Lara)*, *supra*, 4 Cal.5th 299, 303-304), it follows, logically, that the Legislature intended SB 1391 -- the amendment to Proposition 57 -- to apply in the same way. (See *People v. Superior Court (Alexander)*, *supra*, 34 Cal.App.5th 994.) Here, judgment is not final, either because this case is pending direct appeal currently while the new law is in effect; or because, at the very least, judgment was not final until February 13, 2019 when the Supreme Court denied review in regard to the transfer order, at which time the new law was in effect. In either case, SB 1391 applies and requires reversal of the criminal judgment.

## **B. Retroactivity**

The general rule in regard to enactments that reduce punishment for a criminal offense is that, absent an express indication from the legislative body responsible for the enactment, such ameliorative measures are intended to apply retroactively in as broad a scope as is constitutionally possible. This means that they apply at least retroactively to all cases in which final judgment is still pending. (*In re Estrada* (1965) 63 Cal.2<sup>nd</sup> 740, 745.) In *People v. Superior Court (Lara)*, *supra*, 4 Cal.5<sup>th</sup> 299, the Supreme Court held that this principle applied also to Proposition 57's abolition of direct filing in criminal court for juveniles who committed certain specified felonies. Although the enactment did not affect a specific sentence, it did have a comprehensive penological affect on the treatment of the offender. Consequently, in accord with the *Estrada* rule, the measure did apply retroactively to cases in which judgment was not yet final. (*Id.*, at pp. 304-305.) This indeed was the basis for this Court's conditional reversal of the criminal judgment in this case. (1 CT 14-16.)

In *People v. Superior Court (Alexander)*, *supra*, 34 Cal.App.4<sup>th</sup> 994, Mr. Alexander, like Mr. Marsh, committed major felonies when he was 15 years old, and was prosecuted directly in criminal court as an adult under the direct-filing regimen extant at the time. Alexander's appeal was pending in November 2016 and, like Mr. Marsh, his case was conditionally reversed and remanded for a fitness and transfer determination, the result of which would determine whether or not the criminal judgment would be reinstated. (*Id.*, at p. 998.) The People filed a petition for review, which was initially granted, but then dismissed with a remand for reconsideration in light of *Lara*, pursuant to which the Court of Appeal remanded the case to the Superior Court to conduct a juvenile transfer hearing. (*Id.*, at pp. 998-999.) Like Mr. Marsh's, Mr. Alexander's transfer hearing was pending when the Governor signed SB 1391, but Mr. Alexander, instead of asking for a continuance until the law took effect, simply moved to dismiss the transfer motion on the ground that SB 1391 would preclude criminal jurisdiction in any

event. The juvenile court agreed and terminated the transfer hearing (*id.*, at p. 999), whereupon the People sought a writ of mandate in the Court of Appeal, which was denied by the Court (*id.*, at pp. 999, 1005.)

It seems, in *Alexander*, the People did not contest the retroactivity of SB 1391. The only issue they raised in the trial court and on writ review was the constitutionality of a legislative amendment to an initiative enacted by the electorate, and this was the only issue addressed in the trial court and on writ review in the Court of Appeal. (*Id.* at pp. 999 *et seq.*) Nonetheless, both the trial court and the Court of Appeal clearly took it for granted that the reasoning of *Lara* also applied to SB 1391 and that the latter measure, like the former, was retroactive to non-final cases. The Court's analysis of the constitutional issue nonetheless provides the logical substance connecting Proposition 57 with SB 1391 and establishes the argument for retroactivity as well.

Under the California Constitution (art. II, § 10, subd. (d)), the Legislature, without a vote of the people, may not amend an initiative statute "unless the initiative statute permits amendment or repeal with the electors' approval." Proposition 57 in fact allowed such amendment by a majority vote of the Legislature, but only "so long as such amendments are consistent with and further the intent of the proposition. [Citation.]" (*People v. Superior Court (Alexander)*, *supra*, 34 Cal.App.5<sup>th</sup> at p. 999.) As the Court in *Alexander* noted, the expressed intent of Proposition 57 was "to promote juvenile rehabilitation by channeling more minors into the juvenile system" to be treated with a more intense focus on rehabilitation over punishment. The abolition of direct filing for 14 and 15 year old offenders furthered that goal by increasing the number of minors directed to the juvenile system. SB 1391 took this goal "one step further by ensuring that almost all who commit crimes at the age of 14 or 15 will be processed through the juvenile system." (*Id.* at p. 1000.)

Further, insofar as Proposition 57 was promoted by its proponents as enhancing public safety on the ground that minors who remain under juvenile

court supervision were less like to commit new crimes, the Legislature, according to the *Alexander* Court, could reasonably conclude that the blanket treatment of 14 or 15 year old offenders as juveniles enhanced this purpose as well. (*Id.* at p. 1001.)

Finally, according to the Court in *Alexander*, SB 1391 was aligned with Proposition 57's other two express purposes. The first was reducing wasteful spending on prisons. The second was to avoid indiscriminate federal release of California prisoners, since the State was under federal order to reduce the prisoner population to 137.5% of the adult institutions design capacity. Keeping more minors in the juvenile system would serve both purposes. (*Id.* at p. 1002.)

In establishing the close consistency of SB 1391 with the intent informing Proposition 57, the Court in *Alexander* gives a cogent exposition of the identical ameliorative intents informing each enactment. If Proposition 57 is retroactive for cases that are not final, then clearly SB 1391 has was intended by the Legislature to have same scope of retroactivity. Thus, if judgment in the instant case is not final, then the provisions of SB 1391 must be applied. Appellant has foreshadowed his argument regarding the finality of judgment in this case in the introduction to this brief, and now it is time to set forth that argument in detail.

### **C. Finality of Judgment in the Instant Case**

#### **1. The Pendency of Direct Appeal**

The order reinstating judgment (3 CT 896) has rendered the criminal judgment final as to the Superior Court and, accordingly, that judgment is subject to direct appeal. (Pen. Code, § 1237.) But finality for purposes of appeal, is not the ultimate or conclusive finality of the judgment. This type of finality occurs “when the availability of an appeal and the time for filing a petition for certiorari in the United States Supreme Court have expired.” (*People v. Evans* (2016) 6 Cal.App.5<sup>th</sup> 894, 903, internal quotes and editorial markings omitted; *People v. Vieira* (2005) 35 Cal.4<sup>th</sup> 264, 306.) Thus, in a simple and straightforward way, there is no final judgment in this case since direct appeal is still pending. In an

equally simple and straightforward way, under the rule of *Estrada* and *Lara*, SB 1391 applies to this case, and thus requires a reversal of the criminal judgment in its entirety.<sup>3</sup>

One may anticipate an objection to this argument based on the prosecution's position in the trial court, which may be paraphrased to emphasize the procedural situation after the first appeal in this case: The scope of remand was exceedingly narrow, allowing only for the reinstatement of the criminal judgment as an administrative act once the transfer order was granted. If there was a formal right to appeal, there was no appealable substance left to appeal, and the matter was, in effect, conclusively final on October 24, 2018, when the lower court reinstated the criminal judgment at a time when SB 1391 was not yet the law in this state.

The answer to such an objection is twofold. The first is relatively simple. The California Supreme Court order of February 13, 2019 expressly keeps the criminal judgment in suspension pending direct appeal specifically for purposes of considering the retroactivity of SB 1391. Whatever technical procedural rules may otherwise govern, the order is decisive as legal *force majeure* in as much as the higher court's order binds this Court (*Lascher v. State* (1966) 64 Cal.2<sup>nd</sup> 687, 690.) The second answer is complex, but not substantially different insofar as it provides the explanation and rationale for the California Supreme Court's order. Indeed, it provides an independent basis if in fact appellant has over-interpreted the Supreme Court order.

The complexity of the second answer begins with the initial complexity of the procedural situation created by the use of a conditional reversal as a remedial method to accommodate *Lara*-type retroactivity. The condition on which reinstatement of judgment depends is the grant of a transfer order, which itself, in

---

<sup>3</sup> One need not worry in this case whether or not the time for certiorari extends the non-finality of judgment in a case in which no federal issue has been raised. The pendency of the state appeal is a sufficient basis for a finding of non-finality.

the normal situation, is *not* within the scope of the criminal judgment, is independent of it and collateral to it, and is reviewable only by extraordinary writ. (*People v. Chi Ko Wong* (1976) 18 Cal.3<sup>rd</sup> 698, 710-714; see Cal. Rules of Court, Rule 5.770(g).) The remedy of conditional reversal thus forces two otherwise incompatible procedural constituents into a single procedure. This situation thereby renders the transfer order itself subject to the direct appeal triggered by the reinstatement of judgment. Under this regimen, the transfer order is no longer independent, collateral, or subject exclusively to writ review. Thus, cognizable on an appeal from the reinstatement of judgment would be any legal impropriety in the transfer order including, a claim that the jurisdictional basis for the transfer order no longer exists because of an ameliorative change in the law. *People v. Hargis* (2019) 33 Cal.App.5<sup>th</sup> 199 illustrates the meaning of this abstract convolution by providing a “concrete” example of how it works in this context of changing law and incompatible procedures.

In *Hargis*, defendant, a juvenile offender prosecuted as an adult, was convicted of serious felonies and sentenced to an indeterminate life term of 57 years to life in state prison. On appeal, judgment was affirmed in its entirety. The California Supreme Court granted review and remanded back to the Court of Appeal to consider the cause in light of *People v. Franklin* (2016) 63 Cal.4<sup>th</sup> 261, 283-284, which, to effect the purpose of statutes now allowing for an earlier parole of youthful offenders, afforded such an offender the right to make a current record at the time of judgment of any mitigating factors related to his youth. The Court of Appeal again affirmed the judgment and sentence, but remanded the case solely for the purpose of conducting a *Franklin* hearing. The opinion directing this disposition of the case was filed on October 31, 2016. (*Hargis, supra*, 33 Cal.App.5<sup>th</sup> at p. 202.)

On November 8, 2016, Proposition 57 was enacted, going into effect the next day. Remittitur on the Court of Appeal’s decision of October 31 issued on January 3, 2017. On March 31, 2017, defendant, *in propria persona*, filed a

motion in Superior Court to have the case transferred to juvenile court for a fitness hearing pursuant to Proposition 57. The People, apart from claiming that Proposition 57 had no retroactive effect, also argued that the motion for such a hearing fell outside the scope of the Court of Appeal's remand. On May 22, 2017, the trial court ruled that it in fact had no jurisdiction to entertain the Proposition 57 motion presented by defendant and denied the motion on that basis. The *Franklin* hearing went forward, in the course of which the defense re-raised the Proposition 57 issue, which again was rejected for lack of jurisdiction. A timely notice of appeal was filed. (*Id.*, at pp. 202-203.)

The Court of Appeal in *Hargis* issued a holding and an alternative holding regarding retroactivity both pertinent to the instant case. In the first, the Court noted that under the rules regarding remittitur from a Court of Appeal to a Superior Court, the People's position was technically correct, and that the scope of remand did not include an order for a fitness or transfer hearing. Nonetheless, it was indisputable that defendant was 16 at the time he committed the crimes of conviction and that he was entitled to a juvenile fitness hearing under Proposition 57. Since the rules governing the retroactive application of ameliorative statutes demanded as broad an application as possible, any cause still open as a non-final judgment was subject to the ameliorative effect of the new enactment. Thus, regardless of the technical rules of remand and remittitur, the trial court in *Hargis* did have jurisdiction. (*Id.*, at pp. 203-205, 208.)

Although in *Hargis*, Proposition 57 took effect while the case was in Superior Court, while SB 1391 in this case had not taken effect until after the case was out of Superior Court, in *Hargis* the limitations imposed on the Superior Court by the rules of remand and remittitur conduced to the same (arguable) effect of precluding the issue of retroactive application. The Court in *Hargis* eschewed jurisdiction because of the scope of remand; the Court in the instant case eschewed jurisdiction over a future enactment even though the Court could certainly have exercised discretion to continue the case to allow the waste of judicial resources



that *would* occur as writ or appellate review extended into 2019. This is what the lower court *Alexander* did. (*People v. Superior Court (Alexander)*, *supra*, 34 Cal.App.4<sup>th</sup> 994, 999.) Thus, the situation here and in *Hargis* are in fact parallel. Just as technical rules of remand and remittitur did not prevent the trial court from effecting the equitable purpose of applying an ameliorative law to a non-final case, the narrow scope of remand here did not prevent the trial court from granting a continuance to accommodate the ameliorative effect of a law that would eventually be applied to this case, or prevent this Court from in fact applying the ameliorative law itself when the case eventually came before it on a second appeal.

But *Hargis*'s alternative holding is equally pertinent here:

“Finally, even if the trial court properly concluded it lacked jurisdiction to entertain the motion, the Proposition 57 issue has now been brought before us. The scope of our prior remand is no longer relevant to our analysis, as the law entitles defendant to a juvenile fitness/transfer hearing. [Citation.] We are bound by the law to afford him that hearing, and so will conditionally reverse his convictions and sentence, as more fully set out in our disposition, *post*.” (*People v. Hargis*, *supra*, at p. 208.)

In other words, says the *Hargis* Court, regardless of the scope of remand from which this second appeal comes before us, the cause is nonetheless legally before us as a direct appeal, and judgment is for that reason alone non-final and open to the retroactive application of an ameliorative enactment.

## **2. The finality of Judgment as Determined by the Finality of the Transfer Order**

There is perhaps a somewhat simpler route to the same result by a shift of to the transfer order as the penultimate step toward the finality of judgment. Again, the reinstatement of the criminal judgment in this case was dependent on

the grant of a transfer order by the Superior Court sitting as a juvenile court. But the transfer order itself, subject not merely to Court of Appeal review by means of extraordinary writ, but to a *substantive* Court of Appeal review even through summary writ procedures (*Powers v. City of Richmond* (1995) 10 Cal.4<sup>th</sup> 85, 113-114; see also *In re Rose* (2000) 22 Cal.4<sup>th</sup> 430, 446), is not conclusively final as an order until that order has been reviewed by writ in the Court of Appeal and then by the California Supreme Court through a petition for review. (See Cal. Rules of Court, Rule 8.500(a)(1) ["A party may file a petition in the Supreme Court for review of any decision of the Court of Appeal, including any interlocutory order . . . ."].) Thus, the criminal judgment in the instant case could not have been final any earlier than February 13, 2019 when the Supreme Court denied review of this Court's order denying the writ of prohibition. On February 19, 2019, defendant in the instant had a vested right to a juvenile court disposition in this case, and this vested right is enforceable in the instant appeal. (See *People v. Hargis, supra*, 35 Cal.App.4<sup>th</sup> 199, 208.)

## CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This document has been produced by computer, and in reliance on the word-count function of the computer program used to produce this document. I hereby certify that, exclusive of the table of contents, the proof of service, and this certificate, this document contains 4665 words.

Dated: July 29, 2019

s/ Mark D. Greenberg  
Attorney for Appellant

## CONCLUSION

SB 1391, effective January 1, 2019, bars adult prosecution against any juvenile offender who committed his crime when he was under the age of 16. Because SB 1391 is an ameliorative amendment to Proposition 57, which itself was an ameliorative amendment to broaden the class and number of juvenile offenders to be kept within the juvenile system, it is applicable to any case in which judgment was not final at the time the law took effect. Here, from whatever procedural perspective one views the cause in this case, the criminal judgment was not final before January 1, 2019, and is still pending. This Court is obligated to apply SB 1391, which entails the reversal of the judgment in its entirety, and a remand to the Superior Court for a juvenile disposition of the case.

Dated: July 29, 2019

Respectfully submitted,

s/ Mark D. Greenberg  
Attorney for Daniel Marsh

## **PROOF OF SERVICE**

The undersigned certifies that he is an active member of the State Bar of California, not a party to the within action, and his business address is 484 Lake Park Avenue, No. 429, Oakland, California; that he served a copy of the following documents:

### **APPELLANT'S OPENING BRIEF**

by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said envelope in the United States mail at Oakland, California on July 29, 2019 addressed as follows:

District Attorney, Yolo County  
301 Second Street  
Woodland, CA 95695

Clerk of the Superior Court  
Yolo County  
1000 Main Street  
Woodland, CA 95695  
FOR: THE HON. SAMUEL MACADAM

Daniel William Marsh, AW0819  
R.J. Donovan Correctional Facility  
480 Alta Road  
San Diego, CA 92179

The following parties have been served electronically through this Court's TRUEFILING system.

Attorney General

Appellate Defender's, Inc.

I, declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 29, 2019, at Oakland, California.

s. Mark D. Greenberg  
Attorney at Law