IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

PATRICK LEE CONLEY,

Defendant and Appellant.

Case No. S211275

Third Appellate District, No. C070272
Yolo County Superior, No. CRF113234
Honorable Stephen L. Mock, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PATRICK LEE CONLEY, Defendant and Appellant.	Case No. S211275

QUESTION PRESENTED

Does the Three Strikes Reform Act of 2012 ("Reform Act") (Pen. Code, secs. 667, subd. (e)(2)(C) and 1170.12, subd. (c)(2)(C))[1], which reduces punishment for certain non-violent/non-serious third-strike offenders, apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date?

STATEMENT OF FACTS AND CASE

On October 16, 2010, in Yolo County, a California Highway Patrol

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[1] All statutory references are to the Penal Code unless otherwise noted. This brief will dispense with the use of "subdivision" in referring to statutes, unless necessary to convey a point. It will from hereon refer solely to section 667, in discussing the Reform Act, omitting further reference to the substantially identical section 1170.12. However, the analysis applies to both.

Officer made contact with Mr. Conley and determined that he had been driving under the influence of alcohol. Subsequent chemical analysis of his blood revealed a blood-alcohol content over .08% . (RT 48-100.)

Mr. Conley had suffered two prior "strike" convictions (sec. 667(b)-(i); secs. 245(a)/12022.7(a) and 459) and three prior prison terms. (Sec. 667.5(b)). (CT 205, 213-221; RT 618-622.)

Mr. Conley appealed his conviction for driving under the influence of alcohol (Veh. Code, sec. 23152/22350) for which he received a third-strike sentence of 25 years to life under the Three Strikes Law, plus three years for three prior prison terms. (CT 275, 279; RT 649-650.)

Mr. Conley's appointed appellate counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, asking the Court of Appeal to independently review the record and determine whether there were any arguable issues on appeal. (Slip opn., at p. 4.)

On November 6, 2012, California voters approved the Three Strikes Reform Act of 2012 (Proposition 36), which amended section 667 to reduce punishment from an indeterminate life term to a doubled determinate term for certain qualified third-strikers. The Reform Act became effective the next day. (Slip opn., at p 2.)

On November 8, 2012, the Court of Appeal issued its opinion in Mr.

Conley's case affirming the judgment. (Slip opn., at p. 2.) On November 21, 2012, Mr. Conley filed a petition for rehearing asking the Court of Appeal to vacate his sentence and remand his case for sentencing in conformity with the ameliorative amendments to sections 667, citing the retroactivity rule in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) (Slip opn., at p. 2.)

The Court of Appeal initially denied Mr. Conley's petition then granted rehearing on its own motion to further explain its reasoning. (Slip Opn., at p. 2.) It concluded that because Mr. Conley had been sentenced prior to the Reform Act's effective date, he was not entitled to have amended section 667 applied retroactively under the *Estrada* rule; his only recourse was to petition for a recall of sentence under section 1170.126. (Slip opn., at p. 13.)

Mr. Conley petitioned this Court for review of the Court of Appeal's decision that he was not entitled, under the *Estrada* rule, to retroactive application of amended section 667.

SUMMARY OF ARGUMENT

The Reform Act, also known as Proposition 36, applies retroactively to those defendants whose judgments were not final on the Reform Act's effective date under the *Estrada* rule.

In *Estrada, supra,* 63 Cal.2d 740, this Court recognized a specific contextual qualification to section 3's presumption that a penal statute operates prospectively. Under the *Estrada* rule, it is presumed that the legislative body intended a mitigating penal amendment to be applied retroactively to all defendants with non-final judgments on the amendment's effective date in the absence of a clear indication of a legislative intent to the contrary.

In enacting new laws, the voters are presumed to be aware of existing law and judicial construction thereof. (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.) Accordingly, in enacting the Reform Act, the voters were deemed to be aware of the *Estrada* rule. In the absence of a clear indication of contrary legislative intent, the Reform Act is presumed to apply retroactively to all nonfinal judgments. There is nothing in the Reform Act that clearly signals a legislative intent that the 48-year-old *Estrada* rule does not apply to the Reform Act's reduction in punishment. As such, section 667(e)(2)(C) retroactively applies under the *Estrada* rule.

The Court of Appeal erred by construing section 1170.126 as limiting retroactive application of amended section 667(e)(2)(C) under *Estrada* to those defendants not yet sentenced. There is nothing in the Reform Act that establishes the voters' intent for this limitation. In fact,

subdivision (k) of section 1170.126 plainly establishes the intent that the Reform Act's ameliorative provisions apply retroactively to defendants whose judgments were not yet final on the Reform Act's effective date.

Despite subdivision (k) of section 1170.126 ("Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant."), which demonstrates the voters' intent that the Reform Act be applied retroactively under the *Estrada* rule, the Court of Appeal misconstrues section 1170.126 to preclude a defendant's exercise of his rights under *Estrada.*

The resentencing provisions of section 1170.126 express the voters' intent that the Reform Act was not intended to be applied prospectively only. In addition to confirming retroactive relief under *Estrada* for those defendants with nonfinal judgments, section 1170.126 creates a right to petition for recall of sentence for those whose judgments were *final* by the time the Reform Act took effect, thus expanding its retroactive effect beyond what even *Estrada* would have allowed.

Construing the Reform Act to apply retroactively under both *Estrada* and the newly created recall petition process more readily achieves the Reform Act's objectives. These objectives include limiting life sentences to defendants whose current conviction is for a serious or violent crime;

imposing twice the normal sentence instead of a life sentence for repeat offenders convicted of non-violent, non-serious crimes; avoiding housing or long-term health care payments for elderly low-risk, non-violent inmates serving life sentences for minor crimes; and, reducing jail and prison overcrowding created by life sentences for petty crimes. (Voter Information Guide, Gen. Elec. (Nov. 6, 2012), at p. 105, Text of Proposition 36, Sec. 1.)).

Thus, defendants serving indeterminate terms based on the former version of the Three Strikes Law, whose convictions were not final on the Reform Act's effective date, are entitled to remand for automatic resentencing if their current crimes would not have drawn an indeterminate third-strike sentence had they been committed after the Reform Act's effective date. Mr. Conley's judgment was not final on the date the Reform Act took effect and his current crimes would not have qualified for an indeterminate Three Strikes sentence had they been committed after the Reform Act's effective date. He is entitled under *Estrada* to be automatically resentenced under 667(e)(2)(C) to a doubled second-strike term.

ARGUMENT

I. Because the Reform Act Reduces Punishment, In The Absence of Contrary Legislative Intent, The Reduction is to be Applied Retroactively to Defendants Whose Judgments Are Not Yet Final under the *Estrada* Rule.

A. Former Three Strikes Law Was Amended to Reduce Punishment.

The Reform Act (Proposition 36) amended section 667 of the former Three Strikes Law by reducing what were previously indeterminate life sentences to doubled determinate term sentences in cases in which a defendant's current and prior convictions satisfy the Reform Act's qualifying requirements. (Sec. 667(e)(2)(C)(i)-(iv).) The amended provisions apply to a defendant who has a current nonserious, nonviolent felony conviction which is not otherwise disqualified under section 667(e)(2)(C)(i)-(iii); and whose two or more prior "strike" convictions are not otherwise disqualified under section 667(e)(2)(C)(iv).

B. Standard of Review.

Whether a statute was intended to operate retroactively is a question of law that this Court decides independently. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901.)

C. The *Estrada* Rule Governs Retroactive Operation of Amended Section 667(e)(2)(c).

As consistently stated by this Court, in the absence of a savings clause or a clear indication that an ameliorative statute is to be applied prospectively only, a defendant whose judgment is not yet final when the law reducing punishment is enacted is entitled to its benefit.

Although we often remember only *Estrada, supra,* 63 Cal.2d 740, this Court issued four opinions that same day. Each of these opinions considered a small variation in the nature of a change in the statutes at issue, which demonstrates that the rule announced in *Estrada* was not limited to a single scenario. In *Estrada,* there was a statutory amelioration by the elimination of a minimum period in custody before parole. (*Id.* at p. 743.) In *In re Griffin,* (1965) 63 Cal.2d 757, this Court found that, as to that defendant, the amendment actually increased his overall punishment and therefore was not ameliorative. Thus, this Court declined to apply retroactively the beneficial portion to that defendant. (*Id.* at 762.) In *In re Daup* (1965) 63 Cal.2d 754, this Court held "that the Adult Authority shall re-fix [Daup's] sentence by imposing" the new reduced penalty to his crime, again affirming the *Estrada* rule. (*Id.* at p. 756.) In *In re Kirk* (1965) 63 Cal.2d 761, it held that the defendant was entitled to the benefit of the law that increased the threshold for felony treatment of the theft crime Mr. Kirk

was convicted of, thus resulting in a misdemeanor disposition rather than the felony. (*Id.* at p. 763.)

Time and again, this Court has reiterated the rule and logic of *Estrada*. It did so in *People v. Rossi* (1976) 18 Cal.3d 295 and *People v. Collins* (1978) 21 Cal.3d 208, where the defendant in each case was convicted of an act that was later decriminalized by the Legislature. This Court reversed those convictions.

In *People v. Tapia* (1991) 53 Cal.3d 282, a statutory amendment benefitted defendants by adding additional elements for certain conduct to qualify as a special circumstance. This Court held the *Estrada* rule applied, stating that, in past cases where statutes reduce the penalties of crimes, it has not applied the Penal Code section 3 presumption that new statutes are intended to operate prospectively. (*Id.* at p. 301.)

As recently as *People v. Nasalga* (1996) 12 Cal.4th 784 (*Nasalga*), this Court adhered to the well-established *Estrada* rule and held that a mitigating amendment to an enhancement statute operates retroactively so that the lighter punishment is imposed. (*Id.* at pp. 797-798.)

Even in cases in which this Court found that the statute was not intended to be applied retroactively, the conclusion was reached in keeping with the *Estrada* rule by considering the intent of the Legislature. In *In re*

Pedro T. (1994) 8 Cal.4th 1041 (*Pedro T.*), this Court examined legislative intent to determine whether a statute that reverted to a lesser punishment under a sunset clause should be applied under *Estrada.* It concluded that the Legislature's intended experiment – whether an increase in the penalty range for vehicle theft would have a desirable impact on the number of vehicles thefts – would have been undermined if all defendants whose judgments were not final when the law reverted would have their sentences reduced to the lower range pursuant to the statute's sunset clause. Thus, it determined that it was not likely that the Legislature intended a retroactive application when the law reverted.

This Court most recently considered the *Estrada* rule in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*). In *Brown,* this Court determined that the January 2010 changes to the law regarding conduct credits were to be applied prospectively only. This Court nonetheless affirmed what it stated in *Estrada.* "This court's decision in *Estrada, supra,* 63 Cal.2d 740, supports an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively: When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, [footnote omitted] that the Legislature intended the amended statute to apply to all defendants

whose judgments are not yet final on the statute's operative date." (*Id.* at p. 323.) "Accordingly, *Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments. (*Cf. People v. Nasalga* (1996) 12 Cal.4th 784, 792, fn. 7, [declining request to reconsider *Estrada*].)" (*Id.* at p. 324.) "The rule and logic of *Estrada* is specifically directed to a statute that represents a '" legislative mitigation of the *penalty for a particular crime*"' [citation] because such a law supports the inference that the Legislature would prefer to impose the new, shorter penalty rather than to '"satisfy a desire for vengeance."' [Citation.]" (*Id.* at p. 325.)

The *Estrada* rule applies to voter initiative legislation as much as it applies to amendatory legislation enacted by the Legislature. (*E.g., People v. Wright* (2006) 40 Cal.4th 81, 94-95 [acknowledged that the Compassionate Use Act, Proposition 215, was subject to *Estrada* analysis for retroactive application].)

D. The *Estrada* Rule Benefits Defendants Whose Judgments Are Not Yet Final When The Mitigating Change In Punishment Takes Effect.

Defendants whose judgments are not final – those who have not yet been convicted or sentenced and those whose convictions are on appeal – are entitled to the benefit provided by the *Estrada* rule. (*People v. Viera* (2005) 35 Cal.4th 264, 305-306 [quoting *Estrada,* at p. 744 [ameliorative changes in the law pertaining to restitution fines]]; *In re Corcoran* (1966) 64 Cal.2d 447, 449 [appeal was pending when statutory change eliminating the requirement that the sentence for nonviolent escape be served consecutively became effective, so that he is entitled to their mitigating benefits]; *In re Kirk* (1965) 63 Cal.2d 761, 763 [held, defendant was entitled to have his felony reduced to misdemeanor as a result of a change in law raising the minimum amount necessary for felony treatment of writing checks knowing there were insufficient funds].) "A judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*Pedro T., supra,* 8 Cal.4th 1041, citing *In re Pine* (1977) 66 Cal.App.3d 593, 594.)

E. The Legislature Has Acquiesced to The *Estrada* Rule's Presumption That A Legislative Mitigation of Punishment is Intended to be Applied Retroactively Unless Otherwise Clearly Indicated.

The holding in *Estrada* was founded on the premise that "'[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law'" (*Brown, supra,* 54 Cal.4th at p. 325, citing *Estrada, supra,* 63 Cal.2d at p. 745.) This Court issued its opinion in *Estrada* 48 years ago. (*Estrada, supra,* 65 Cal.2d 740.) The Legislature has never abrogated the *Estrada* rule. (See *Nasalga, supra,* 12 Cal.4th 784, 792, fn. 7.)

In the process of establishing its rule of retroactivity, *Estrada* interpreted the significance of Penal Code section 3 ("No part of it [the Penal Code] is retroactive unless expressly so declared.") and Government Code section 9608. ("The termination of suspension [by whatsoever means effected] of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law.")

Estrada concluded that "Neither a savings clause such as section 9608 of the Government Code nor a construction statute such as section 3 of the Penal Code changes that [presumption of retroactivity] rule. This is the rule followed by a majority of the states [footnote omitted], and the United States Supreme Court. (*Calder v. Bull,* 3 U.S. [3 Dall.] 386, 390 [1 L.Ed. 648].)" (*Ibid.*)

This court reasoned as follows: "First, as to section 3 of the Penal Code. That section simply embodies the general rule of construction, coming to us from common law, that when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively. That rule of construction, however, is not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." (*Estrada, supra,* 63 Cal.2d at p. 746.) It determined that Government Code section 9608 arose from a common law rule whose primary purpose was to prevent the barring of prosecutions when a statute is amended. (*Id.* at p. 746-747.)

This Court's reasoning in *Estrada* is consistent with the rule of construction found in section 4 which states "The rule of common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." (Sec. 4.)

Since this Court's decision in *Estrada,* neither Government Code section 9608 nor Penal Code section 3 has been changed. If the Legislature were opposed to the logic and rule in *Estrada*, it could have amended either or both of these provisions to expressly abrogate the role the *Estrada* rule properly plays in our jurisprudence of prospective versus retrospective operation.

The Legislature certainly recognizes its authority to reject judicial construction of statutes. For example, the Legislature amended section 1385 to disallow a court from dismissing a prior serious felony conviction alleged under section 667(a) in response to this Court's decision in *People v. Fritz* (1985) 40 Cal.3d 227, which was decided only six months earlier. In another example, the Legislature expressly overruled *People ex rel. Deukemajian v. County of Mendocino* (1984) 36 Cal.3d 476, by amending Food and Agricultural Code section 11501.1 shortly after the Court's decision. "It is the intent of the Legislature by this Act to overturn the

holding of People ex rel. Deukemajian v. County of Mendocino et al., and to reassert the Legislature's intention . . . ." (Food & Agr. Code, sec. 11501.1, see Amendments, Note – Stats. 1984, ch. 1386, sec. 3.)

ARGUMENT

II. The Reform Act Contains Neither an Express Saving Clause Nor Any Other Signal The Voter Intended Its Provisions to be Applied Prospectively only.

In cases in which the legislative act mitigates punishment for a particular offense, application of the *Estrada* rule is overcome only where "the Legislature clearly signals its intent to make the amendment prospective only, by inclusion of either an express saving clause or its equivalent." (*Nasalga, supra,* 12 Cal.4th at p. 793, fn. omitted.)

When enacting new laws, the voters are deemed to have in mind existing laws and judicial construction in effect at the time legislation is enacted. (*In re Lance W., supra,* 37 Cal.3d 873, 890, fn. 11.) Accordingly, in enacting the Reform Act, the voters were presumed to be aware of the *Estrada* rule and existing case law interpreting the application of this rule. Retroactive application of amended section 667(e)(2)(C) under the *Estrada* rule is supported by the text of the Reform Act as it contains no express saving clause or other signal of voter intent that its provisions were to be applied prospectively only.

In *Nasalga*, this Court held the *Estrada* retroactivity rule applied to an ameliorative amendment because there was no clear indication of an

intent to have the amendment apply prospectively only. (*Nasalga, supra*, 12 Cal.4th 784, 793.) There the defendant was convicted of grand theft. The prosecution proved the loss amounted to $124,000. In addition to a 16-month state prison sentence for the theft, the court imposed a two-year enhancement based on the amount of the loss. At the time of her offense, section 12022.6 provided a two-year enhancement where the loss exceeds $100,000. Prior to her sentencing, however, the Legislature amended section 12022.6, increasing from $100,000 to $150,000 the amount of loss necessary to trigger the two-year enhancement. The defendant claimed the trial court should not have imposed a two-year enhancement because she was entitled to the ameliorative effect of the amendment under *Estrada*. (*Id.* at pp. 789-790.)

This Court held "[i]n light, therefore of *Kirk* and *Estrada*, the Legislature's acquiescence in these opinions and, most especially, its failure in amending section 12022.6 to express its intent that the amendments apply prospectively only, we adhere to the well-established principle that 'where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.' [Citations.]" (*Nasalga, supra,* 12 Cal.4th at pp. 797-798.)

Nasalga supports the conclusion that the *Estrada* presumption applies in this case. Section 667(e)(2)(C) was amended to reduce punishment and the voters were mindful of *Estrada* and its effect when they enacted the Reform Act.

If the voters wanted to apply section 667(e)(2)(C) prospectively only, the language of the proposition would have clearly expressed that intent. Just 12 years prior to the adoption of the Reform Act, California voters adopted another proposition, The Substance Abuse and Crime Prevention Act, also coincidentally designated Proposition 36. That act prohibits commitments to jail or prison for certain offenders convicted of qualifying drug offenses. The drafters of that proposition included specific language that it would be applied prospectively only and that language was challenged in *People v. Floyd* (2003) 31 Cal.4th 191 (*Floyd*). The defendant in *Floyd* sought application of the ameliorative law to his case on the basis of *Estrada* but this court rejected that challenge because the proposition contained the following express saving clause: "'Except as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively.'" (*Floyd*, at p. 182.) This Court concluded that the plain language of this saving clause "reveals an intent to avoid the *Estrada* rule." (*Id.* at p. 185.) The fact that the

Reform Act contains no similar language indicates the voters intended that section 667(e)(2)(C) be applied retroactively in keeping with the presumption described in *Estrada* and its progeny.

Not only is there no saving clause or other clear signal of intent that the Reform Act is to be applied prospectively only, it expressly extends its provisions retroactively to all persons meeting the criteria, no matter when convicted, including giving those an opportunity for resentencing who would not otherwise be included because their judgments were final when the law took effect.

ARGUMENT

III. Section 1170.126 Establishes That The Mitigating Provisions of The Reform Act Were Intended to be Applied Retroactively And Expands Retroactive Relief Beyond What The *Estrada* Rule Provides.

As discussed earlier, the *Estrada* rule operates to retroactively apply a legislative mitigation of penalty only to those defendants whose judgments are not yet final on the statute's effective date. In the case of the Reform Act, it operates to apply retroactively the provisions of section 667(e)(2)(C) to those qualifying defendants whose judgments were not yet final on the effective date of the Reform Act, entitling these defendants to automatic resentencing to a doubled-term.

Under its rule, *Estrada* does not provide retroactive relief to those defendants with final judgments. However, the Reform Act does. Its drafters crafted a new statute, section 1170.126, which establishes resentencing provisions applicable to the Reform Act. (Sec. 1170.126(a)-(m).) Subdivision (b) of section 1170.126 creates a new retroactive relief procedure in the form of a statutory right to petition for recall of sentence. Subdivisions (c) through (j) provide for the implementation of this relief procedure.

But section 1170.126 itself declares that it is not the exclusive means

for obtaining resentencing. Subdivision (k) expresses the intent of the voters that section 1170.126 was only one possible avenue of relief. Subdivision (k) states: "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant."]

Retroactive application under *Estrada* is a right or remedy in cases in which the Legislature or voters have proclaimed by statutory amendment that a previous punishment was too severe. It entitles a defendant to the reduction in punishment if the amendment takes place before his judgment becomes final. (E.g. *Estrada, supra,* 63 Cal.2d at p. 748; *In re Fink* (1967) Cal.2d 692, 693; *In re Pine, supra,* 66 Cal.2d 692, 693.) A defendant's right to a sentence reduction under *Estrada,* because amended section 667(e)(2)(C) took effect before his judgment became final, is plainly a "right or remedy otherwise available to the defendant."

While 1170.126(k) is not necessary for implementation of *Estrada* under the Reform Act, it leaves no doubt that the *Estrada* rule was intended to apply to defendants whose judgments are not yet final on its effective date.

A. Subdivisions (b) and (k) Are Readily Harmonized to Support Retroactive Application of Section 667(e)(2)(C) Under the *Estrada* Rule and Beyond.

Legislation is construed in light of relevant judicial decisions that

existed at the time of its enactment. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 606.) This Court's decision in *Estrada* establishes a bright-line division between those cases in which the judgment is not yet final where retroactive application under the *Estrada* rule does apply and those cases with a final judgment where retroactive application under *Estrada* does not apply.

As with any other statute, provisions of the same initiative are read together and construed harmoniously, and each is considered in the context of the whole. (*Robert L. v. Superior Court, supra,* 30 Cal.4th 894, 903 [construing Proposition 21, "The Gang Violence and Juvenile Crime Prevention Act of 2000".)

With these principles of statutory construction in mind, subdivisions (b) and (k) are readily harmonized in the context of the Reform Act by the following construction: For those defendants whose current and prior convictions fall under the mitigating provisions of section 667(e)(2)(C) and whose judgments were not final on November 7, 2012, the Reform Act's effective date, the *Estrada* rule of retroactivity applies under subdivision (k); for those defendants whose current and prior convictions fall under the amended section 667(e)(2)(C) but whose judgments were *final* before November 7, 2012, *Estrada* doesn't apply – but the recall petition provision

in subdivision (b) does.

Construing section 1170.126 as expanding retroactive relief to those qualifying defendants whose judgments are final is in harmony with subdivision (l) which states "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." (Sec. 1170.126, subd. (l). This language fits neatly into the interpretation that the recall petition process set forth in section 1170.126 was intended as a retroactive remedy designed to reach those defendants serving life terms under the former Three Strikes Law who would otherwise qualify for a doubled determinate term under the Reform Act were their judgments not already final when the Reform Act became effective.

Subdivision (l) limits the court's jurisdiction under the petition for recall provisions to providing a retroactive remedy to those with final judgments whose indeterminate sentences were imposed under the provisions of the former Three Strikes Law. The recall petition provisions of section 1170.126 provide the trial courts with limited jurisdiction over those qualifying defendants with final judgments who would have received a doubled term if sentenced under 667(e)(2)(C). Thus, section 1170.126 operates to extend the ameliorative benefit of the Reform Act to those

otherwise precluded from retroactive relief because their judgments were final on November 7, 2012. The statutory right to petition for recall of sentence is an added remedy that affords the right to request retroactive application of amended section 667(e)(2)(C) to those defendants whose "strikes" judgments became final within the 18 years between the adoption of the Three Strikes law in 1994 and the enactment of the Reform Act.

B. The Court of Appeal's Opinions in This Case and *People v. Yearwood* (2013) 213 Cal.App.4th 161 Are Wrong Because They Interpret Section 1170.126 in a Manner That is Irreconcilable With Subdivision (k).

Despite the plain language of subdivision (k)["Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant."] , the Court of Appeal in this case and in *People v. Yearwood* (2013) 213 Cal.App. 4th 161 (*Yearwood*), erroneously held that section 1170.126 precludes application of the *Estrada* presumption to a defendant who has already been sentenced but whose judgment was not yet final on the Reform Act's effective date and limits such defendant to the petition for recall procedure set forth in subdivision (b). (Slip Opn, at pp. 10, 13; *Yearwood, supra,* at pp. 167, 169, 175 [also held that section 1170.126 is the functional equivalent of a savings clause].) The holdings in this case and *Yearwood* are irreconcilable with the express language in subdivision (k). (*People v. Contreras* (November 18, 2013, G047603) __ Cal.App.4th __), filed opn. at p. 8], LEXIS 926 (*Contreras*).) Not only does the plain language of subdivision (k) preclude this limiting interpretation of section 1170.126, it also undermines *Yearwood's* holding that section 1170.126 is the functional equivalent of a savings clause because it underscores that section 1170.126 is far from what this Court has

required for *Estrada* to be overcome – the lawmaking body must "*clearly signal[] its intent to make the amendment prospective, by inclusion of either an express savings clause or its equivalent.*" (*Nasalga, supra,* 12 Cal.4th at p. 793, italics added.)

The Court of Appeal in this case applied unsound reasoning in its attempt to reconcile subdivision (k) with its holding that 1170.126 limits those defendants sentenced before the Reform Act's effective date to the recall petition remedy in set forth in 1170.126. In an attempt to explain away subdivision (k), it claims "[s]ubdivision (k) simply confirms that the resentencing provision is not intended to prevent defendants from pursuing other substantive or procedural challenges to their three strike conviction, whether by direct appeal or petition for writ of habeas corpus." (Slip opn. at p. 11; see also *Yearwood, supra,* 213 Cal.App.4th 161, 172 ["[s]ection 1170.126(k) protects prisoners from being forced to choose between filing a petition for a recall of sentence and pursuing other legal remedies to which they might be entitled (e.g. petition for habeas corpus)."].) Neither this case nor *Yearwood* provide any authority in support of this interpretation of subdivision (k). In fact, there is authority that contradicts such an interpretation. "When a statute states its remedies are in addition to any other that may be available, its remedies are non-exclusive." (*Home Depot*

U.S.A. Inc. v. Superior Court (2010) 191 Cal.App. 4th 210, 233 [section 20(A) of Wage Order 7-2001, Cal. Code Regs., tit. 8, § 11070, states that it is in addition to any other civil penalties provided by law].) A new statutory remedy is deemed exclusive only if it exhibits "a legislative intent to displace all preexisting or alternative remedies..." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 80 [The Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) (FEHA), providing an administrative remedy for vindication of the constitutional right to be free from employment discrimination, does not supplant any causes of action and remedies that are otherwise available; the remedy is cumulative rather than preemptive].)

It is a cardinal rule of statutory construction that courts may not add provisions to a statute. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827; Code Civ. Pro., sec. 1858.) There is no language in subdivision (k) which specifically identifies or limits which "rights and remedies [are] otherwise available to the defendant." The statute refers to "*any* rights or remedies." (Sec. 1170(k), italics added.) "If the statutory language is clear and unambiguous, the Court's inquiry ends." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) The right to be resentenced under *Estrada* is a "right[] or remed[y] otherwise available to the defendant" where the judgment is not final. (Sec. 1170.126(k);

Contreras, ___ Cal.App.4th ___, [*supra,* (G047603) filed opn. at p. 8], LEXIS 926.)

ARGUMENT

IV. The Voters Intended a Reduction in Punishment They Determined Was Too Severe; Operation of the *Estrada* Rule Is a Means to That End.

"Because the most reasonable interpretation of a provision may be reflected, in part, by evidence of the enacting body's intent beyond the statutory language itself, in its history and background [citation], we also consider the measure as presented to the voters with any uncodified findings and statements of intent. In considering the purpose of legislation, statements of the intent of the enacting body contained in a preamble, while not conclusive, are entitled to consideration. [Citations.] Although such statements in an uncodified section do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute. [Citations.]" (*People v. Canty* (2004) 32 Cal.4th 1266, 1280 [construing the earlier Proposition 36, "The Substance Abuse and Crime Prevention Act of 2000"].)

"[T]he purposes of the Reform Act are served by applying *Estrada.*" (*Contreras,* ___Cal.App.4th___, [*supra*, (G047603) filed opn. at p. 8], LEXIS 926.)

The uncodified preamble to the Reform Act expressly states its purpose: "The People enact the Three Strikes Reform Act of 2012 to restore

the original intent of California's Three Strikes law – imposing life sentences for dangerous criminals like rapist, murderers, and child molesters." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) at p. 105, Text of Proposition 36, Sec. 1.)

The voters enacted the Reform Act with the understanding it will require life sentences only when a defendant's current conviction is for a violent or serious crime, maintain that repeat offenders convicted of non-violent, non-serious crimes will receive twice the normal sentence instead of a life sentence, save hundreds of millions of taxpayer dollars by no longer paying for housing or long-term health care for elderly, low-risk, nonviolent inmates serving life sentences for minor crimes, prevent the early release of dangerous criminals who are currently being released early because jails and prisons are overcrowded with low-risk, non-violent inmates serving life sentences for petty crimes. (*Ibid.*)

Retroactive operation of amended section 667(e)(2)(C) under the *Estrada* rule, for those defendants serving a life term for a non-serious, non-violent crime with judgments that were not final on the Reform Act's effective date, comports with the express purpose and objectives of this voter initiative. The voters intended that the Act "*[r]estore* the Three Strikes law to *the public's original understanding* by requiring *life*

sentences only when a defendant's current conviction is *for a violent or serious crime*." (*Ibid,* italics added.) They understood that the Act would "[m]aintain that *repeat offenders convicted of non-violent, non-serious crimes* . . .will receive *twice the normal sentence* instead of a life sentence. (*Ibid.*, italics added.)

Application of the *Estrada* rule to the mitigating provisions in section 667 is wholly consistent with the spirit of the Reform Act and its purpose. It effectuates the voters' undisputed intent that a life sentence is too severe for non-violent, non-serious crimes committed by repeat offenders and that such offenders are properly punished by twice the normal sentence.

It also promotes the voters' intent to save taxpayer dollars by automatically extending the ameliorative reach of the Act to those defendants with non-final judgments, regardless of sentencing dates.

Given this statement of purpose, retroactive application of the amendment to section 667(e)(2)(C) to all defendants whose judgments were not yet final upon the Reform Act's effective date is wholly consistent with fulfilling this purpose.

CONCLUSION

The Court of Appeal erred in concluding that section 1170.126 precludes application of the *Estrada* rule where a defendant has been sentenced but his/her judgment was not yet final on the effective date of the Reform Act. The Reform Act's amendment to section 667 falls under the *Estrada* rule because it changes the law by mitigating the penalty for a particular crime. The Reform Act does not contain a savings clause or any clear signal that it is to be applied prospectively only, thus it applies retroactively. By the language of its own provisions, the Reform Act indicates an intent that its ameliorative changes apply retroactively not only to defendants whose judgments were not yet final (as in Mr. Conley's case), but also to those defendants who would otherwise not be entitled to any remedy because their judgments were final.

Under the rule established by *Estrada*, *supra,* 63 Cal.2d 740, which this Court has upheld and followed time and time again, the reduced punishment in section 667(e)(2)(C) must be applied retroactively to all defendants serving life terms under the old Three Strikes law whose judgments were not final on its effective date of November 7, 2012.

For these reasons, Mr. Conley's case must be reversed and remanded to the trial court for resentencing in compliance with section 667(e)(2)(C).

DATED: December 10, 2013

Respectfully submitted,

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Certificate of Appellate Counsel
Pursuant to Rules 8.412(a), 8.204(c)(1), and 8.360(b)
of the California Rules of Court

I, Carol Foster, appointed counsel for appellant, certify pursuant to rule 8.204(c)(1) of the California Rules of Court, that I prepared this opening brief on behalf of my client, and that the word count for this opening brief is 6257.

This brief complies with the rule that limits a brief to 25,500 words, including footnotes. I certify that I prepared this document in WordPerfect 15 and that this is the word count WordPerfect generated for this document.

DATED: December 10, 2013

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DECLARATION OF SERVICE

People v. Patrick Lee Conley - Case No. S211275

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 2407 J Street, Suite 301, Sacramento, CA 95816.

On December 13, 2013, I served the attached

APPELLANT'S OPENING BRIEF ON THE MERITS

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 13, 2013 at Sacramento, California.

Sheila Brown