In the Supreme Court of the State of California

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

Third District Court of Appeal, Case No. C070272
Yolo County Superior Court, Case No. CRF113234
The Honorable Stephen L. Mock, Judge

ANSWER BRIEF ON THE MERITS

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Which section of the Three Strikes Reform Act of 2012[1] applies to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date?

INTRODUCTION

In January 2012, appellant Patrick Conley was sentenced to an indeterminate term of 25 years-to-life under the Three Strikes law for driving under the influence of alcohol, a non-serious and non-violent felony. In November 2012, the electorate enacted the Three Strikes Reform Act (the Act) in Proposition 36. The Act significantly reduces the circumstances in which an indeterminate life sentence may be imposed on a non-serious and non-violent felony conviction under the Three Strikes law. The Act also created a new procedure allowing prisoners currently serving an indeterminate term under the Three Strikes law on a non-serious and non-violent felony conviction to seek retroactive sentencing relief.

Before his judgment became final, appellant requested the Third District Court of Appeal to automatically resentence him to a two-strike term under the amended law. In support, appellant cited this Court's decision in *In re Estrada* (1965) 63 Cal.2d 740 for the general principle that a statute reducing punishment for a particular criminal offense is assumed, absent evidence to the contrary, to apply to all defendants whose judgments are not yet final at the operative date. But the Court of Appeal found *Estrada* inapplicable to the Act and declined to automatically resentence appellant. Instead, it determined that the Act intended all prisoners currently serving a three-strike sentence to seek retroactive sentencing relief

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[1] Penal Code sections 667, subdivisions (e)(2)(C), and 1170.12, subdivisions (c)(2)(C), or § 1170.126

through a petition for recall of sentence under section 1170.126, regardless of the finality of their judgment. As detailed below, the Court of Appeal's decision was sound. The electorate demonstrated a clear intent that amended sections 1170.12 and 667 apply prospectively only while establishing section 1170.126 as the sole remedy for retrospective sentencing relief under the Act.

STATEMENT OF THE CASE

On October 16, 2010, California Highway Patrol Officer Keerat Lal found appellant picking up tools in the middle of a rural Yolo County road. Appellant's truck idled on the shoulder, partially blocking the lane of traffic. (1 RT 46, 48-50, 64.) Officer Lal contacted appellant and noticed a glazed look, red and watery eyes, a smell of alcohol, and a staggered gait. (1 RT 52-53.) Appellant also told Lal that he had a suspended license and had drunk three to four eight-ounce cans of malt liquor. (1 RT 60-61, 72.) Officer Lal then performed a series of field sobriety tests and administered two breath tests with a preliminary alcohol screening device, which showed appellant's blood alcohol content at .167 and .171, respectively (1 RT 76-87.) Officer Lal arrested appellant on suspicion of driving under the influence of alcohol. (*Ibid.*)

At trial, appellant pled no contest to driving with a suspended license with prior violations within the last five years (Veh. Code, § 14601.2, subd. (a)), failure to provide proof of insurance (Veh. Code, § 16028), and driving an unregistered vehicle (Veh. Code § 4000, subd. (a)(1)). (CT 135-138; slip opn., at p. 1.) A jury then found appellant guilty of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)) and driving with a blood alcohol content above .08 (Veh. Code, § 23152, subd. (b)) with enhancements for refusing a chemical test (Veh. Code, § 23578). (CT 203, 208; slip opn., at p. 2.)

In a bifurcated proceeding, the jury determined that appellant had been previously convicted of four separate counts of driving with a blood alcohol content above .08 (Veh. Code, § 23152, subd. (b)), burglary (Pen. Code, § 459)[2] and assault with a deadly weapon (§ 245, subd. (a)(1)), and had served three prior prison terms (§ 667.5). (CT 213-221; Slip opin., at pp. 1-2.)

Because two of appellant's prior convictions were "strikes," the trial court sentenced appellant to 25 years-to-life under the Three Strikes law and imposed three consecutive one-year terms on the prior prison enhancements. (CT 275-276.) Appellant filed a *Wende*[3] brief asking the Court of Appeal to review the record for any arguable issues. (slip opn., at p. 2.) On November 6, 2012, the electorate passed Proposition 36, enacting the Three Strikes Reform Act. After the Court of Appeal filed its first opinion affirming the judgment, appellant filed a petition for rehearing seeking resentencing under the amended law. (*Ibid.*) The Court of Appeal denied the petition but later granted rehearing on its own motion to fully explain its holding that a defendant sentenced prior to the effective date of the Act whose judgment was not yet final must seek sentencing relief under section 1170.126 and is not entitled to automatic resentencing under amended sections 1170.12 or 667. (*Ibid.*) This Court granted appellant's petition for review on August 14, 2013.

SUMMARY OF ARGUMENT

The electorate demonstrated an unequivocal intent that amended sections 1170.12 and 667 apply prospectively, and that the recall procedure created in section 1170.126

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[2] Further statutory references are to the Penal Code unless specified.

[3] *People v. Wende* (1979) 25 Cal.3d 436

be the sole remedy for current prisoners serving three-strike terms, regardless of the finality their judgment. This intent is first demonstrated by the language of section 1170.126, which explicitly states that it applies exclusively to all prisoners currently serving a three-strike sentence. This unambiguous language includes every qualifying prisoner and makes no distinction between those whose judgments were final at the effective date of the Act and those whose were not. Because appellant is a prisoner currently serving a three-strike term on a non-serious and non-violent felony conviction, the plain language of the Act states that his remedy lies within the recall procedure under section 1170.126. And adherence to the plain meaning and common understanding of the language of a statute is the first rule of construction. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.)

Additionally, a practical application of the new sentencing scheme as a whole also demonstrates the prospective intent of sections 1170.12 and 667. Specifically, the Act still allows an indeterminate life term to be imposed on a non-serious and non-violent felony conviction if: (1) the current offense is a controlled substance charge in which an allegation under Health and Safety Code sections 11370.4 or 11379.8 was found true; (2) the current offense is a specified felony sex offense; (3) the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury during the commission of the current offense; or (4) the defendant suffered a specified prior conviction. (§ 1170.12, subds. (c)(2)(C)(i)-(iv).) But these additional factors must be plead and proved under amended sections 1170.12 and 667. The trial court simply determines if these factors are present under section 1170.126. Under a retrospective application of sections 1170.12 and 667, a person sentenced prior to the Act may appear eligible for sentencing relief despite the existence of one of these factors if it was not plead and proved at trial. And

the trial court could not review the record of conviction to determine whether any of the factors existed as it would do today under section 1170.126.

Similarly, section 1170.126 created a procedure for review of a prisoner's disciplinary record and record of rehabilitation while incarcerated as part of the determination of whether resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (g).) Because amended sections 1170.12 and 667 have no similar procedure, a retroactive application to a prisoner whose judgment is not yet final would eliminate such a review. As a result, a retroactive application of sections 1170.12 and 667 would create a loophole in which appellant and those similarly situated would be entitled to automatic resentencing without a full review of the Act's safeguards intended to prevent the release of dangerous criminals while limiting application of the Three Strikes law. As shown below, this loophole could result in the resentencing of ineligible prisoners and would undermine the electorate's intent.

Accordingly, the Act's intent that all potentially eligible prisoners seek sentencing relief through retroactive application of section 1170.126 leaves appellant's reliance on *Estrada* misplaced. Unlike *Estrada*, this Court is not deciding between a harsher punishment under an obsolete sentencing scheme and the more lenient punishment under the newly amended scheme. Instead, this Court must decide which section of a comprehensive new sentencing scheme applies to a prisoner whose judgment was not yet final at the scheme's effective date. The plain language and practical application of the Act demonstrate the electorate's intent for all prisoners, regardless of the finality of their judgment, to seek sentencing relief under section 1170.126, and for amended sections 1170.12 and 667 to apply prospectively.

ARGUMENT

I. IN ENACTING THE THREE STRIKES REFORM ACT, THE ELECTORATE INTENDED FOR AMENDED SECTIONS 1170.12 AND 667 TO APPLY PROSPECTIVELY AND NEWLY CREATED SECTION 1170.126 TO APPLY TO ALL PRISONERS CURRENTLY SERVING AN INDETERMINATE TERM UNDER THE THREE STRIKES LAW

Appellant contends that because the electorate amended the Three Strikes law before his judgment was final, this Court's decision in *In re Estrada* entitles him to automatic resentencing under a retroactive application of sections 1170.12 and 667. (AOB 19-34.) Respondent disagrees. *Estrada* does not apply to the Act because the electorate demonstrated an unequivocal intent for amended sections 1170.12 and 667 to apply prospectively only, and for any prisoner currently serving a three-strike term imposed under the old law to seek sentencing relief through a section 1170.126 recall petition, regardless of the finality of the judgment.

A. The Three Strikes Reform Act

On November 6, 2012, California voters passed Proposition 36, which enacted the Three Strikes Reform Act of 2012, effective November 7, 2012. The Act did two things pertinent here. First, it amended sections 1170.12 and 667 to lessen the sentence that may be imposed on many non-violent and non-serious felonies committed after two prior "strikes." (Act, §§ 2 & 4.) Before the Act, the Three Strikes law subjected a recidivist with two or more prior "strikes" to an indeterminate life sentence upon conviction of any new felony. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167; *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1292.) After the Act, sections 1170.12 and 667 reserve "the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor." (*Yearwood*, at p. 167; *Kaulick*, at p. 1292.) The four disqualifying factors are: (1) the current

offense is a controlled substance charge in which an allegation under Health and Safety Code section 11370.4 or 11379.8 was admitted or found true; (2) the current offense is a felony sex offense under sections 261.5, subdivision (d), or 262 or is a felony resulting in mandatory registration as a sex offender, with specified exceptions; (3) the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury during commission of the current offense; and (4) the defendant suffered a prior conviction for specified serious and/or violent felonies. (§§ 1170.12, subds. (c)(2)(C)(i)-(iv), 667, subds. (e)(2)(C)(i)-(iv).) In all other cases, the law now mandates that the recidivist be sentenced as a second-strike offender. (*Yearwood*, at pp. 167-168; *Kaulick*, at p. 1292; see also § 667, subd. (e)(2)(C) [a defendant with two prior strikes whose current conviction is not for a serious or violent felony shall be sentenced as a second striker], § 1170.12, subd. (c)(2)(C) [same].)

Second, the Act created section 1170.126, which sets forth a recall procedure to provide retroactive relief for prisoners currently serving an indeterminate life sentence on a non-serious and non-violent felony conviction. (Act, § 6; § 1170.126, subd. (a).) Under this new statute, the prisoner may file a "petition for a recall of sentence" within two years of the date of the Act or at a later date on a showing of good cause. (§ 1170.126, subd. (b).) A petitioner is eligible for resentencing if: (1) he or she is currently serving an indeterminate term of life imprisonment for a non-serious and non violent felony conviction (§§ 667.5, subd. (c), 1192.7, subd. (c)); (2) his or her current sentence was not imposed for any of the disqualifying offenses specified above; and (3) he or she has no prior convictions for offenses listed in sections 667, subdivision (e)(2)(C)(iv) and 1170.12, subdivision (c)(2)(C)(iv). (§ 1170.126, subd. (e).) If a trial court determines that the petitioner satisfies this criteria, the prisoner shall be resentenced as a second striker, "unless the court, in its discretion,

determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) In exercising its discretion, the trial court may consider the petitioner's criminal history, the circumstances of the current offense, his or her disciplinary record and record of rehabilitation while incarcerated, and any other evidence the court, in its discretion, determines to be relevant. (§ 1170.126, subd. (g).)

The Voter Information Guide explained these changes to the Three Strikes law in the following bullet points:

> • Revises three strikes law to impose life sentence only when new felony conviction is serious or violent.
>
> • Authorizes re-sentencing for offenders currently serving life sentences if third strike conviction was not serious or violent and judge determines sentence does not pose unreasonable risk to public safety.
>
> • Continues to impose life sentence penalty if third strike conviction was for certain nonserious, nonviolent sex or drug offenses or involved firearm possession.
>
> • Maintains life sentence penalty for felons with nonserious, non-violent third strike if prior convictions were for rape, murder, or child molestation.

(Voter Information Guide, Gen. Elec. (Nov. 6, 2012), at p. 48.) The ballot pamphlet analysis by the Legislative Analyst also informed voters that "the measure requires that if the offender has committed certain new or prior offenses, including some drug-, sex-, and gun-related felonies, he or she would still be subject to a life sentence under the three strikes law." (Voter Information Guide, at p. 49.) The proponents of the measure argued: "Prosecutors, judges and police officers support Prop. 36 because Prop. 36 helps ensure that prisons can keep dangerous criminals behind bars for life. Prop. 36 will keep dangerous criminals off the streets . . . . Criminal justice experts and law enforcement leaders carefully crafted Prop. 36 so that truly dangerous criminals will receive no benefits whatsoever from the reform."

(Voter Information Guide, at p. 52.) They further argued that "dangerous criminals are being released early from prison because jails are overcrowded with nonviolent offenders who pose no risk to the public. Prop. 36 prevents dangerous criminals from being released early. People convicted of shoplifting a pair of socks, stealing bread or baby formula don't deserve life sentences." (Voter Information Guide, at p. 53.)

B. The General Principles of Statutory Construction

In interpreting this Act, the same principles governing statutory construction apply. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.) First, the language of the statute is given its ordinary and plain meaning. (*Id.* at p. 901.) Second, the statutory language is construed in the context of the statute as a whole and within the overall statutory scheme to effectuate the voters' intent. (*Ibid.*) And statutes addressing the same subject matter and enacted at the same time should be construed together. (*People v. Honig* (1996) 48 Cal.App.4th 289, 327; *Stickel v. Harris* (1987) 196 Cal.App.3d 575, 590.) Third, where the language is ambiguous, the court will look to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L.*, at p. 900; *People v. Floyd* (2003) 31 Cal.4th 179, 187-188 [The ballot pamphlet information is a valuable aid in construing the intent of voters].) Any ambiguities in an initiative statute are "not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent legislative intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782, internal citation and quotation omitted.) Ultimately, the court's duty is to interpret and apply the language of the initiative "so as to effectuate the electorate's intent." (*Robert L.*, at p. 900.)

C. The *Estrada* Principles

Additionally, specific principles of statutory construction address the issue of whether an amended statute reducing criminal punishment operates prospectively or retroactively. In *In re Estrada* (1965) 63 Cal.2d 740, this Court considered an amended statute lessening the punishment for escape. But the new statute did not explicitly state whether it applied prospectively or retroactively. (*Id.* at pp. 743–744.) In deciding whether to impose the old law's harsher punishment or the new law's more lenient punishment to a defendant who had been sentenced prior to the change but whose judgment was not yet final, this Court reasoned "that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail. When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Id.* at pp. 744–745.) Accordingly, this Court established what is known as the *Estrada* rule: a statute reducing punishment for a particular criminal offense is assumed, absent evidence to the contrary, to apply to all defendants whose judgments are not yet final at the operative date.[4] (*Id.* at pp. 744, 748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) This rule applies equally to amendments enacted through the initiative process. (*Floyd, supra,* 31 Cal.4th at p. 182.)

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[4] A judgment becomes final once there are no available remedies on direct review. (*In re Pine* (1977) 66 Cal.App.3d 593, 594.)

But *Estrada* did not overrule the codified common-law presumption that law makers intend new statutes to operate prospectively. (§ 3; *Estrada, supra*, 63 Cal.2d at p. 746; *Brown*, *supra*, 54 Cal.4th at p. 319.) Instead, *Estrada* harmonizes section 3 so as not to ignore factors demonstrating a clear retroactive intent. (*Estrada*, at p. 746.) Whether a statute operates prospectively or retroactively is simply "a matter of legislative intent." (*Brown*, at p. 319.) And "[t]he rule in *Estrada*, of course, is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent." (*People v. Nasalga* (1996) 12 Cal.4th 784, 793.) "Rather, what is required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it." (*Nasalga*, at p. 793, quoting *In re Pedro T.* (1994) 8 Cal.4th 1041, 1046.) And legislative intent is determined through a review of the statutory scheme as a whole with any ambiguities presumed to be prospective. (*Brown*, at pp. 319-320 ["[A] statue that is ambiguous with respect to retroactivity application is construed ... to be unambiguously prospective"]; *Nasalga*, at p. 793.)

Because the *Estrada* rule is always subject to legislative intent, this Court has often found it inapplicable to statutes reducing punishment. In *Pedro T.*, this Court affirmed a minor's sentence under a statute temporarily enhancing punishment for vehicle theft that was effective at the time of the offense but expired at the time of appeal. Although the Legislature reduced the punishment prior to the minor's judgment becoming final, the Court found *Estrada* inapplicable because the Legislature demonstrated an intent to punish offenders more severely during the three-year period in which the minor committed his offense in order to combat a rise in vehicle thefts. (*Pedro T., supra*, 8 Cal.4th at p. 1048; see also *Nasalga, supra*, 12 Cal.4th at pp. 790-791.) Despite the absence of an express saving clause, the

Legislature's demonstration of a prospective intent rendered *Estrada* inapplicable. (*Pedro T.* at p. 1052.)

This Court also found *Estrada* inapplicable to the Substance Abuse and Crime Prevention Act. (*People v. Floyd, supra,* 31 Cal.4th at p. 184.) The new voter-enacted law specifically stated, "Except as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provision shall be applied prospectively." (*Ibid.*) The defendant argued that the language "except as otherwise provided" included the *Estrada* rule and should be interpreted to read, "to the extent that *Estrada* provides for retroactive application." (*Id.* at 185.) The Court rejected this argument and found the plain language clearly indicative of a prospective intent. Because *Estrada* does not create an inherent right independent of legislative intent, the defendant's reliance on *Estrada* could not trump the prospective intent. (*Id.* at pp. 186-187.)

Finally, this Court declined to apply *Estrada* to former section 4019, which increased the rate prisoners in local custody could earn conduct credits for good behavior. (*Brown, supra*, 54 Cal.4th at pp. 323-325.) In doing so, the Court rejected the defendant's attempt to expand the *Estrada* principle to any statute reducing punishment in any manner. (*Id.* at p. 325.) Instead, the Court found *Estrada* only applicable to "legislative mitigation of the penalty for a particular crime...." (*Brown* at p. 325.) The Court also reiterated the rule that ambiguities in a statute's retroactive or prospective application are "construed to be unambiguously prospective." (*Id.* at p. 324.) Starting with this presumption, the Court found no "clear and unavoidable implication" that the Legislature intended retroactive application. (*Id.* at p. 320.)

D. The *Estrada* Principles Do Not Apply to the Three Strikes Reform Act

Like this Court's decisions cited above, *Estrada* does not apply to the Three Strikes Reform Act. Unlike *Estrada*, in which the Court decided between an obsolete punishment scheme and the amended law, the Act creates two new sections within a comprehensive scheme that addresses both prospective and retroactive application. And the plain language and practical application of the Act demonstrates an unequivocal intent that section 1170.126, not amended sections 1170.12 and 667, apply to all prisoners currently serving a three-strike sentence, regardless of the finality of judgment.

1. Section 1170.126 plainly states that it applies to all persons presently serving an indeterminate three-strike sentence

The first indication of the prospective intent of amended sections 1170.12 and 667 is the plain language of section 1170.126 outlining the procedure for seeking retroactive sentencing relief under the Act. Subdivision (a) states that "[t]he resentencing provisions under this section and related statues are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment" under the Three Strikes law. (§ 1170.126, subd. (a).) Similarly, subdivision (b), states "[a]ny person serving an indeterminate term of life imprisonment imposed" under the Three Strikes law may seek sentencing relief through a petition of recall of sentence." (§ 1170.126, subd. (b).) This unambiguous language makes no distinction between prisoners whose judgments are final and those whose are not.

For this reason, the Fifth District Court of Appeal properly determined that section 1170.126 provided the only remedy available for those sentenced before the Act, even if their judgments were not final: "The post

conviction release proceeding created in section 1170.126 operates as the functional equivalent of a saving clause. In part, section 1170.126(b) provides that '[a]ny person serving an indeterminate term of life imprisonment' imposed for a third strike conviction 'may file a petition for a recall of sentence.' The quoted phrase is not ambiguous. Section 1170.126(b) could have been, but was not drafted so that it applied only to prisoners whose judgments were final before the Act's effective date. We believe that section 1170.126(b) is correctly interpreted to apply to all prisoners serving an indeterminate life sentence imposed under the former three strikes law. The finality of the judgment is not determinative for purposes of section 1170.126(b)." (*Yearwood, supra,* 213 Cal.App.4th at p. 175.)

As *Yearwood* reasons, section 1170.126 explicitly addresses *all* prisoners currently serving an indeterminate three-strike sentence, including appellant. Because appellant is currently serving an indeterminate three-strike sentence, the plain language of the Act requires him to seek sentencing relief through a section 1170.126 recall petition. And adhering to the plain meaning and common understanding of the language of a new statute is the first rule of statutory construction. (*Robert L., supra,* 30 Cal.4th at p. 900.) Appellant's distinction between prisoners whose judgments are final and those are whose are not simply attempts to create ambiguities where none exist.[5]

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[5] Appellant's claim fails even if the language could be construed as unclear because ambiguities are construed as favoring the prospective application of amended statutes. (*Brown, supra,* 54 Cal.4th at p. 320, quoting *Myers v. Phillip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 ["Consequently, 'a statue that is ambiguous with respect to retroactivity application is construed ... to be unambiguously prospective.'"].)

In light of section 1170.126, *Estrada* is inapplicable because the Act lays out a comprehensive statutory scheme to ameliorate the punishments of all qualifying persons. The Court is not deciding between an old punishment scheme and a new and more lenient scheme. The question instead is which section of the new sentencing scheme applies to appellant. Because appellant is "presently serving an indeterminate term of imprisonment pursuant to" the Three Strikes law, the answer is that section 1170.126 governs.

2. The practical application or the Act viewed as a whole further demonstrates the prospective intent of sections 1170.12 and 667

In addition to the plain language, a practical application of the Act also demonstrates the intent that sections 1170.12 and 667 apply prospectively. As stated, the Act still allows for an indeterminate life term to be imposed on a non-violent and non-serious felony conviction if: (1) the current offense is a controlled substance charge with a specified weight enhancement; (2) the current offense is a specified felony sex offense; (3) the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury during the commission of the current offense; or (4) the defendant suffered a specified prior conviction. (§ 1170.12, subds. (c)(2)(C)(i)-(iv).) These factors further the Act's goals of ensuring that "truly dangerous criminals will receive no benefits whatsoever from the reform" while noting that "[p]eople convicted of shoplifting a pair of socks, stealing bread or baby formula don't deserve life sentences." (Voter Information Guide, at pp. 52-53.)

Under amended sections 1170.12 and 667, the People must "plead and prove" these additional factors. (§§ 667, subd. (e)(2)(C) and 1170.12, subd. (c)(2)(C).) This language suggests the Act was meant to be prospective by describing the requirements of the People in anticipation of trial ("plead")

and during trial ("prove"). In contrast, section 1170.126 allows the trial court to review a prisoner's current offense to determine if any additional factors are present without the pleading or proof requirement. (§ 1170.126, subd. (e)(3); see also *Kaulick, supra*, 215 Cal.App.4th at p. 1298, fn. 21 ["By its terms, the Act doe not require a jury finding establishing this exception when a prisoner is seeking resentencing pursuant to the retrospective part of the Act; the court must simply 'determine' whether the exception applies"].)

Here, appellant and similarly situated prisoners were charged, tried, and convicted prior to the effective date of the Act. Because the People never had an opportunity to fulfill the technical requirements of pleading and proving potential disqualifying factors, a prisoner may appear eligible for sentencing relief under a retrospective application of sections 1170.12 and 667 despite the existence of an ineligibility factor. Further, the trial court could not review the record of conviction to determine whether a factor exists like it could under section 1170.126. In effect, appellant's proposed construction potentially eliminates consideration of circumstances allowing for a three-strike sentence on a non-serious and non-violent felony conviction. (§§ 1170.12, subd. (c)(2)(C)(i)-(iv), 1170.12, subd. (e).) In other words, appellant seeks to find a "loophole" allowing automatic resentencing without full application of the Act's safeguards.

The Fourth District Court of Appeal's recent decision in *People v. White* (January 28, 2014) _Cal.App.4th_, 167 Cal.Rptr.3d 328, is illustrative. In *White*, a prisoner serving a three-strike sentence for possession of a firearm by a felon was ineligible for resentencing because the record of conviction showed that he was armed while illegally possessing the firearm. (*White,* slip opn., at p. 3; see §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii) [The Act precludes resentencing for any prisoner armed with a firearm during commission of the current

offense.].) Because the defendant was convicted prior to the Act, the People did not plead and prove that he was "armed" while illegally possessing the weapon. In fact, they may have been precluded from doing so. (*In re Pritchett* (1994) 26 Cal.App.4th 1754, 1756-1757 [use-of-a-firearm enhancement cannot be imposed on conviction for felony possession of a firearm].) Nonetheless, section 1170.126 allowed the trial court to review the entire record of conviction and find the defendant "armed" under the plain meaning of the term. (*White*, slip Opn., at pp. 5-6, 18.) But had the defendant's judgment been final, a retrospective application of amended sections 1170.12 and 667 would have revealed no "pled and proved" ineligibility factors. And because the defendant would not have filed a recall petition under 1170.126, there would have been no judicial review of those factors. Thus, appellant's proposed construction would have resulted in the resentencing of an ineligible prisoner and circumvented the electorate's intent to preclude sentencing relief for any person armed with a firearm during commission of the current offense.[6]

And the loophole which would be created under appellant's argument is not limited to the "arming" factor. The Act also precludes resentencing for any person who intended to cause great bodily injury during commission of the current offense. But respondent is unaware of any offense or enhancement prior to the Act in which the intent to cause great bodily injury is an element. The Penal Code provides additional punishment for the personal infliction of great bodily injury.[7] (§ 12022.7.)

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[6] The defendant in *People v. Lewis*, S211494, in which this Court granted review and deferred further action pending disposition of this case, is serving a three-strike term on a conviction for possession of a firearm by a felon.

(continued...)

And force likely to cause great bodily injury has been similarly codified. (§ 245, subd. (a)(1).) But no statute prior to the Act explicitly prohibits the intent to cause great bodily injury. Because the intent to cause great bodily injury appears to be novel, there are no circumstances in which the People would have specifically plead and proved that a defendant intended to cause great bodily injury during commission of a third-strike offense. As in the example above, a defendant who intended to cause great bodily injury during commission of the current offense sentenced prior to the Act may appear eligible for resentencing under a retroactive application of sections 1170.12 and 667. Without a recall petition under 1170.126, the trial court would have no opportunity to review the record to determine if the defendant acted with such an intent. The result would be the resentencing of an ineligible prisoner.

These two examples demonstrate the potentially absurd results of appellant's proposed construction in which a narrow class of people who were sentenced prior to the effective date of the Act, whose judgments were not yet final, would become exempt from a full review of all factors allowing for a three-strike term on a non-serious and non-violent felony conviction. For those charged and tried after the Act, the People may plead and prove any disqualifying factors. For those with final judgments, the trial court may review the offense to determine whether any factors exist. Yet appellant asserts that he and those similarly situated are entitled to automatic resentencing without a complete review of these factors. Because the principles of *Estrada* cannot be applied to undermine the law

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(...continued)

[7] The Legislature amended section 12022.7 in 1995 to repeal the element of specific intent in the infliction of great bodily injury. (*People v. Carter* (1998) 60 Cal.App.4th 752, 756.)

maker's intent, this absurd result demonstrates the prospective nature of amended sections 1170.12 and 667.

3. The procedure to review a prisoner's custodial record further demonstrates the prospective intent of amended sections 1170.12 and 667

A third indication of the prospective intent of sections 1170.12 and 667 is the Act's emphasis on review of a current prisoner's custodial record prior to resentencing. Again, section 1170.126 provides discretion to the trial court to deny resentencing to an otherwise-eligible prisoner if the court finds that resentencing would pose an unreasonable risk of danger to public safety. In making this dangerousness determination, the Act advises the trial court to consider a prisoner's disciplinary record and record of rehabilitation while incarcerated. (§ 1170.126, subd. (g).) Thus, the electorate demonstrated an intent that a review of a prisoner's custodial record, both positive and negative, be part of the resentencing process and created a specific procedure to effectuate this intent. Like the ineligibility factors discussed above, this procedure promotes the Act's goals of resentencing non-violent criminals such as those "convicted of shoplifting a pair of socks [or] stealing bread or baby formula" while ensuring that "truly dangerous criminals will receive no benefits whatsoever from the reform." (Voter Information Guide, at pp. 52-53.)

In light of these goals, *Yearwood* determined that a retrospective application of amended sections 1170.12 and 667 to current prisoners whose judgments are not yet final undermines the Electorate's intent that a review of a prisoner's custodial records take place:

> If amended sections 667 and 1170.12 are given retroactive application, prisoners in appellant's procedural posture would be entitled to automatic resentencing as second strike offenders without any judicial review to ensure they do not currently pose and unreasonable risk of danger to public safety. The time period between sentencing and finality of the judgment can span

> years. Prisoners can substantially increase in dangerousness during this interval. An increase in dangerousness will not always be reflected in new criminal convictions. Also, prisoners could have been dangerous when the life sentences were imposed and remained unreasonable safety risks. It would be inconsistent with the public safety purpose of the Act to create a loophole whereby prisoners who were sentenced years before the Act's effective date are now entitled to automatic sentencing reduction even if they are currently dangerous and pose an unreasonable public safety risk.

(*Yearwood, supra,* 213 Cal.App.4th at p. 176.)

Here, appellant was sentenced on January 23, 2012, and has spent over two years in post-sentence custody. (CT 275-276.) His actions during this time period are explicitly relevant to the issue of whether he is fit for resentencing. A specific procedure was created to review his actions. But appellant's proposed construction eliminates review of his custodial record and would entitle him to automatic resentencing, which would be contrary to both the intent of the Electorate and the principles of *Estrada*.

E. Section 1170.126, subdivision (k), does not refer to an inherent "*Estrada* right" that trumps the electorate's established intent

Despite these clear indicators of intent, appellant argues that section 1170.126, subdivision (k), which states "[n]othing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant" includes an *Estrada*-based "right" to retroactive application of amended of sections 1170.12 and 667. (AOB 21-22.) But as detailed above, *Estrada* does not create an independent right or remedy; it defines a principle of statutory construction designed to effectuate the law maker's intent. And the principle does not apply where the electorate demonstrates a clear intent for amended statutes to apply prospectively. (See *Floyd, supra,* 31 Cal.4th at pp. 184-186 [The language "except as otherwise provided" does not include an inherent right under *Estrada* that

overrides the electorate's expressed prospective intent].) Therefore, section 1170.126, subdivision (k), does not refer to an inherent *Estrada* right that trumps all other indicators of intent. Instead, "[s]ection 1770.126(k) protects prisoners from being forced to choose between filing a petition for recall of sentence and pursuing other legal remedies to which they might be entitled (e.g., petition for habeas corpus). Section 1170.126(k) does not have any impact in determining amended section 667 and 1170.12 operate retroactively." (*Yearwood, supra*, 213 Cal.App.4th at p. 178.)

In sum, the Act demonstrated a clear intent that amended sections 1170.12 and 667 apply prospectively only, and that the recall procedure created in section 1170.126 be the sole remedy under the Act for current prisoners serving three-strike terms. This intent is first demonstrated by the plain language of section 1170.126 stating that it applies to all prisoners currently serving a three-strike sentence. This unambiguous language includes every qualifying prisoner and makes no distinction between those whose judgments were final at the effective date of the Act and those whose were not.

Further, the new sentencing scheme viewed as a whole also shows a prospective intent for sections 1170.12 and 667. As demonstrated, a retroactive application of sections 1170.12 and 667 creates a loophole where appellant and those similarly situated become entitled to automatic resentencing without a full review of the additional ineligibility factors allowing for a three-strike term on a non-serious and non-violent felony conviction. Similarly, appellant's proposed construction eliminates review of a prisoner's custodial record to determine whether he or she poses an unreasonable risk of danger to public safety upon resentencing. Because this loophole could result in the resentencing of ineligible prisoners, a retroactive application of sections 1170.12 and 667 undermines the electorate's intent. For this reason, the principles of *Estrada* do not apply.

All prisoners, regardless of the finality of their judgment, must seek three-strike sentencing relief under section 1170.126 and for amended sections 1170.12 and 667 must be prospectively applied. Accordingly, appellant's remedy lies within the newly created recall procedure.

CONCLUSION

For the reasons stated above, Respondent respectfully requests this Court to affirm the Court of Appeal's holding.

Dated: March 12, 2014

Respectfully submitted,

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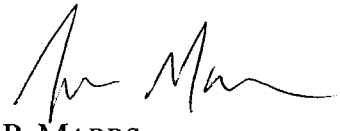

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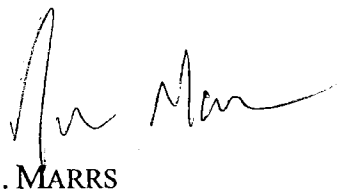
CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON MERITS uses a 13 point Times New Roman font and contains 6,119 words.

Dated: March 12, 2014

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: People v. Conely
No.: S211275

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 12, 2014, I served the attached **Answer Brief on Merits** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 12, 2014, at Sacramento, California.

_____
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