No. S274743

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

FRANCISCO BURGOS, ET AL.,
Defendants and Appellants.

Sixth Appellate District, Case No. H045212
Santa Clara County Superior Court, Case Nos. C1518795, C1756994
The Honorable Cynthia A. Sevely, Judge

OPENING BRIEF ON THE MERITS

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January 12, 2023

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ISSUE PRESENTED

Does the provision of Penal Code section 1109 governing the bifurcation of gang enhancements from the substantive offense or offenses apply retroactively to cases that are not yet final?

INTRODUCTION

The Court of Appeal majority held that newly enacted Penal Code section 1109—which requires trial courts to conduct bifurcated trials on the truth of a gang enhancement alleged under Penal Code section 186.22, subdivisions (b) or (d), if requested by the defense (Pen. Code, § 1109, subd. (a))[1]—operates retroactively under the rule of *In re Estrada* (1965) 63 Cal.2d 740. That holding extends the *Estrada* rule far beyond what this Court's decisions have sanctioned and, indeed, farther than *Estrada*'s rationale can support.

When, as here, the Legislature is silent on the question of retroactivity, a default rule of prospectivity generally applies. (§ 3.) *Estrada* recognizes, however, that the default statutory rule of prospectivity can be overcome where a new enactment ameliorates punishment in such a way as to give rise to the inevitable inference that the new, lower penalty must have been intended to apply retroactively. Section 1109 is not that kind of change in the law. Rather, it is a procedural rule governing the conduct of trial. The new bifurcation rule is aimed at alleviating "unfair prejudice in juries and convictions of innocent people."

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

(Assem. Bill No. 333 (2021-2022 Reg. Sess.) § 2, subds. (d)(6), (f);Stats. 2021, ch. 699, § 2, subds. (d)(6), (f).) But it does not implicate a judgment about proper punishment that would compel *Estrada*'s presumption of retroactivity.

The Court of Appeal majority below incorrectly understood the *Estrada* rule as applying to any new legislation that provides a "possible benefit" to criminal defendants. (Opn. 16-17.) As the dissent properly observed, however, that approach "expand[s] the *Estrada* rule beyond its rationale [and] would permit the exception to swallow the general rule of nonretroactivity." (Dis. Opn. 7.) Assuring a fair trial is implicit in virtually every rule of evidence and trial procedure, and augmentation of such protections may always be said to provide some benefit to criminal defendants. The holding below would therefore represent a significant expansion of the *Estrada* rule, placing a concomitant burden on the courts to implement new rules governing trial procedure in all nonfinal cases.

To be sure, the Legislature is free to say whether any particular enactment, including one involving a rule of trial procedure like section 1109, is meant to apply retroactively. And the Legislature could even choose as a matter of policy to amend section 3's default rule of prospectivity. Given that it has not done so, however, departure from that express statutory rule is justified only where, as this Court has stated, the inference described in *Estrada* is clear and unavoidable: that the change in law reflects a judgment about proper punishment, which the Legislature could have had no legitimate reason for withholding

from nonfinal cases. A bifurcation requirement like that established by section 1109 does not support such an inference, and the Court of Appeal majority's more expansive view cannot be squared with section 3 or the logic of *Estrada*.

LEGAL BACKGROUND

To combat criminal activity by street gangs, the Legislature in 1988 enacted the California Street Terrorism Enforcement and Prevention Act. (STEP Act; § 186.20 et seq.) "Among other things, the STEP Act created a sentencing enhancement for a felony committed 'for the benefit of, at the direction of, or in association with any criminal street gang' (§ 186.22, subd. (b)(1))." (*People v. Tran* (2022) 13 Cal.5th 1169, 1205-1206, some citations and internal quotation marks omitted.) The STEP Act also added, in section 186.22, subdivision (a), "a particular offense to which only gang members are subject" and which requires, among other things, "that the defendant 'actively participates in any criminal street gang.'" (*People v. Robles* (2000) 23 Cal.4th 1106, 1109.)

In 2021, the Legislature passed Assembly Bill 333, which became effective on January 1, 2022. The bill made changes to the law on gang enhancements, including narrowing the definition of a criminal street gang and limiting what constitutes conduct that benefits the gang. (See *Tran*, *supra*, 13 Cal.5th at p. 1206; see Stats. 2021, ch. 699, § 3.)

Assembly Bill 333 also added section 1109 (Stats. 2021, ch. 699, § 5), "which requires, if requested by the defendant, a gang enhancement charge to be tried separately from all other counts

that do not otherwise require gang evidence as an element of the crime. If the proceedings are bifurcated, the truth of the gang enhancement may be determined only after a trier of fact finds the defendant guilty of the underlying offense." (*Tran*, *supra*, 13 Cal.5th at p. 1206.) Section 1109 states:

> (a) If requested by the defense, a case in which a gang enhancement is charged under subdivision (b) or (d) of Section 186.22 shall be tried in separate phases as follows:
>
> (1) The question of the defendant's guilt of the underlying offense shall be first determined.
>
> (2) If the defendant is found guilty of the underlying offense and there is an allegation of an enhancement under subdivision (b) or (d) of Section 186.22, there shall be further proceedings to the trier of fact on the question of the truth of the enhancement. Allegations that the underlying offense was committed for the benefit of, at the direction of, or in association with, a criminal street gang and that the underlying offense was committed with the specific intent to promote, further, or assist in criminal conduct by gang members shall be proved by direct or circumstantial evidence.
>
> (b) If a defendant is charged with a violation of subdivision (a) of Section 186.22, this count shall be tried separately from all other counts that do not otherwise require gang evidence as an element of the crime. This charge may be tried in the same proceeding with an allegation of an enhancement under subdivision (b) or (d) of Section 186.22.

(§ 1109.)[2]

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[2] Not every provision in section 186.22 is an enhancement. (*People v. Brookfield* (2009) 47 Cal.4th 583, 592 [the Court's cases (continued…)

Whether new criminal legislation like Assembly Bill 333 applies prospectively or retroactively is a matter of statutory interpretation. (*Estrada*, *supra*, 63 Cal.2d at p. 744; see also *People v. Brown* (2012) 54 Cal.4th 314, 319; Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) p. 262.) "When the Legislature has not made its intent on the matter clear with respect to a particular statute, the Legislature's generally applicable declaration in section 3 provides the default rule . . . ." (*Brown*, at p. 319.) That section, a part of the Penal Code since 1872, provides, "No part of it is retroactive, unless expressly so declared." (See generally *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207; see also 2 Sutherland, Statutory Construction (8th ed.) § 41:2 ["Courts ordinarily presume that statutes operate prospectively"].)

(…continued)

have "drawn a distinction between penalty provisions and sentence enhancements" when "construing various subdivisions of section 186.22"].) The effect of the Legislature's choosing to use "enhancement" after *Brookfield* and the cases it discussed is outside the scope of the issue presented. (Cf. *id.* at pp. 592-593 [identifying circumstances in which Court might infer "that the Legislature was aware of the distinction this court has drawn between the sentence enhancements and the penalty provisions set forth in section 186.22, and that the Legislature intended the word 'enhancement' . . . to have the narrow meaning articulated by this court"].) Bifurcation of the trial of gang enhancement allegations is covered by section 1109, subdivision (a), and bifurcation of the trial of the crime of participating in a gang in violation of section 186.22, subdivision (a) is governed by section 1109, subdivision (b). In accord with the issue presented, the People refer to section 1109 as applying in both contexts.

Section 3's default rule can be overcome, however, when the ameliorative nature of new legislation compels a contrary inference as to retroactivity. As this Court explained in *Estrada*, "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." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) *Estrada* reasoned, "'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. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance. As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts.'" (*Id.* at pp. 745-746.)

When legislation is ameliorative in the way *Estrada* described, then, "in order to rebut *Estrada*'s inference of retroactivity concerning ameliorative statutes, the Legislature must demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it." (*People v. Frahs*

(2020) 9 Cal.5th 618, 634.)[3] Accordingly, when an amendment to the criminal law is silent on retroactivity, the question of legislative intent as to that question may hinge initially on whether the amendment "constitutes an ameliorative change within the meaning of *Estrada*." (*People v. Stamps* (2020) 9 Cal.5th 685, 699; see *People v. Esquivel* (2021) 11 Cal.5th 671, 675-676 [identifying different aspects of the *Estrada* rule that this Court's cases have addressed].) This Court has suggested that making that determination is informed by whether a change to the law is "analogous to the *Estrada* situation" such that "*Estrada*'s logic" applies. (*Lara*, *supra*, 4 Cal.5th at p. 312.)

STATEMENT OF THE CASE

A. The trial

In March 2016 the Santa Clara County District Attorney filed an information charging appellants Francisco Burgos, Damon Stevenson, and James Richardson, along with

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[3] The Court has used different terms, including "inference" and "presumption," when referring to the principle identified in *Estrada*. (E.g., *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308, fn. 5 [the Court has "occasionally referred to *Estrada* as reflecting a 'presumption.' [Citations.] We meant this to convey that ordinarily it is reasonable to infer for purposes of statutory construction the Legislature intended a reduction in punishment to apply retroactively"].) Both "inference" and "presumption" appear apt given that the "inevitable inference" identified in *Estrada* operates much like a presumption (Evid. Code, § 600, subd. (a) ["A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action"].) This brief does not favor one term over the other.

codefendants Derrick Lozano and Gregory Byrd, with two counts each of second degree robbery (§§ 211, 212.5, subd. (c)). The information included gang enhancement allegations as to each defendant (§ 186.22, subd. (b)(1)(C)) and further alleged that a principle in the commission of the crime personally used a firearm (§ 12022.53, subds. (b) & (e)(1)). (1CT 14-17.) Lozano pleaded guilty prior to trial. (3CT 782-789; 5CT 1396-1401.)

The trial evidence showed that, in August 2015, a group of men that included Burgos, Stevenson, and Richardson left a San Jose apartment complex and went to a nearby 7-Eleven. (24RT 6912-6913, 6915; 29RT 8424, 8436-8437, 8456; 42RT 12316, 12340, 12342, 12346; 44RT 12963-12964.) As the men walked away from the store, they encountered Gabriel Cortez and Danny Rodriguez. (4CT 1128-1131, 1134, 1146, 1174-1176; 21RT 6024-6025; 22RT 6369; 23RT 6631.) One of the group asked Rodriguez and Cortez whether they were from "Meadowfair," and announced that he and his group were "Crips." (4CT 1129-1130, 1174-1175, 1185; 21RT 6042, 6045; 22RT 6354; see 28RT 8175-8176.) The men took Cortez's and Rodriguez's wallets and cell phones at gunpoint. (4CT 1130-1131, 1177-1178, 1185-1186.) One of the robbers told Rodriguez and Cortez that they had 30 seconds to leave or he would shoot them. (4CT 1131, 1195-1196; 21RT 6045; 28RT 8176.) Rodriguez and Cortez ran. (21RT 6046; 22RT 6362.)

Police found appellants and some of the stolen property in an apartment at the complex two hours later. (24RT 6950-6951, 6955-6958, 6960-6961; 25RT 7233-7234; 26RT 7513-7514; 28RT

8136, 8141.) Cortez identified Burgos, Stevenson, and Richardson as among the robbers during an in-field show-up. (4CT 1176-1183; 28RT 8148-8151, 8153-8154.) Rodriguez viewed Stevenson and Burgos but was uncertain about their involvement, and he told police that Richardson was not among the perpetrators. (4 CT 1165; 28RT 8138-8139; 32RT 9310, 9373.)

In addition to evidence that appellants acted in concert to commit the robberies, the prosecution presented evidence, through an expert witness, that the crimes were committed in association with a criminal street gang to facilitate the gang's criminal activities. (36RT 10547-10550.) According to the expert, Crip gangs in San Jose were criminal street gangs whose members engage in a pattern of criminal activity. (34RT 9949-9950.) The primary activities of Crip gangs in San Jose included the commission of robbery, felony assault, and illegal weapon possession. (35RT 10214.) A Crip gang claimed territory in the area where the robberies took place. (36RT 10526.) Varrio Meadowfair, a Norteño criminal street gang, was also active in the area. (32RT 9332-9333; 34RT 9979-9980.) Crips and Norteños might have been rivals in San Jose, and "Crips will prey on people who are non-Crips." (34RT 9955.) To achieve status ("the currency of the streets") among Crips, one had to "victimize the community in multiple ways." (34RT 9957.) Crip members contributed to the gang by committing robbery and other criminal acts. (34RT 9961-9962.)

The expert further explained that announcing Crip affiliation in the course of criminal activity signaled that the activity fell "under the [gang] banner." (34RT 9957.) Asking a potential victim, "Do you bang?" or, "Where are you from?" often preceded a gang-related assault. (34RT 9958; 36RT 10551-10552.) "It's basically you're checking the individual because you deem them to either be a target, a rival, and you're either going to hurt them, rob them, or threaten them in some way to show you are controlling the territory." (34RT 9958.) The expert opined that robberies such as those committed in this case would have been perpetrated at the direction, and for the benefit, of the Crip gang. (36RT 10552-10553.)

In addition, to support the "pattern of criminal gang activity" requirement of the gang enhancement statute (§ 186.22, subd. (e)), the prosecution introduced certified records of convictions relating to four prior offenses committed by Crip gang members. (6CT 1524-1534, 1643-1673; 35RT 10307-10311, 10314-10315.)

The jury convicted appellants of the robberies, found true the gang enhancement allegations, and deadlocked on the firearm use allegations. (7CT 1984, 1986, 1987, 1989, 1991, 1993, 1994, 1996, 1997, 1999, 2000, 2002, 2006; 50RT 14703.) The jury acquitted Byrd. (7CT 2006; 6 Augmented RT 317-318.)

The court sentenced each appellant to 21 years in state prison. (8CT 2307-2312 [abstracts of judgment]; 51RT 15022 [Stevenson], 15042 [Burgos], 15063 [Richardson].)

B. The Court of Appeal's decision

On appeal, appellants asserted that the amendments to section 186.22 and the enactment of section 1109, both made by Assembly Bill 333 after trial, are ameliorative changes that should apply retroactively to their nonfinal cases under *Estrada*. (Opn. 1, 14.) The People agreed that the amendments to section 186.22 are ameliorative within the meaning of *Estrada* and therefore retroactive, but maintained that section 1109 operates prospectively because it is a "'prophylactic rule of criminal procedure' designed to enhance the fairness of proceedings, not to ameliorate punishment as defined under *Estrada*." (Opn. 13, 14, 17.)

The Court of Appeal reversed. It unanimously agreed that the changes to section 186.22 apply retroactively to nonfinal cases, requiring reversal of the gang enhancements in this case. (Opn. 13; Dis. Opn. 6.)

In addition, a majority of the court rejected the People's argument as to section 1109, holding that it is an ameliorative change to the law that must be applied retroactively under *Estrada*. (Opn. 17-19.) The majority reasoned that the statute provides a possible benefit to a class of defendants charged with gang enhancements under subdivisions (b) or (d) of section 186.22 in two ways. First, there is an increased possibility of acquittal "absent the prejudicial impact of gang evidence." (Opn. 18.) Second, defendants "charged" with a gang enhancement will feel less "pressure to accept longer sentences" as part of a plea bargain because they will know that their trials will not be "'filled with prejudicial evidence.'" (Opn. 16, 18.) And "[b]y reducing the

pressure to accept longer sentences, the new bifurcation statute will necessarily reduce the degree of punishment . . . ." (Opn. 18.) The Court of Appeal majority also reasoned that, because part of the session law that created section 1109 (Stats. 2021, ch. 699) retroactively amended the proof requirements in section 186.22 for gang enhancement allegations, the Legislature must have intended all of the session law's components to operate retroactively. (Opn. 18.)

Finally, the Court of Appeal majority held that the change in law required reversal even under the standard for state law error articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, reasoning that "it is likely the jury relied on evidence of appellants' gang membership in considering the identity issues" raised at trial. (Opn. 20-21.)[4]

Justice Elia dissented. He concluded that section 1109 operates prospectively: "While section 1109 clearly applies to a class of defendants, those facing gang enhancement allegations, and was intended to promote fairness and reduce the potential for prejudice, the same could be said for virtually any procedural change, and the bifurcation provisions themselves do not reduce punishment or create the possibility of reduced punishment."

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[4] The Court of Appeal majority began its analysis by asserting that the absence of a bifurcated trial "likely constitutes 'structural error' because it 'defies analysis by harmless-error standards.'" (Opn. 19, alteration omitted.) That possibility has since been rejected by this Court, which recently held that any error under section 1109 is reviewed under the *Watson* standard. (*Tran*, *supra*, 13 Cal.5th at p. 1209.)

(Dis. Opn. 5.) Justice Elia criticized the majority's disregard for the statutory presumption that amendments to the Penal Code have exclusively proactive application and its "unsupported" refusal to "separately analyze the retroactivity of each amendatory statute contained in a single legislative bill." (Dis. Opn. 6-7.) He concluded that "[t]he majority opinion's attempt to expand the *Estrada* rule beyond its rationale would permit the exception to swallow the general rule of nonretroactivity." (Dis. Opn. 7.)[5]

ARGUMENT

I. SECTION 1109 IS NOT RETROACTIVE UNDER THE *ESTRADA* RULE

The new mandate in section 1109 to bifurcate the trial of a gang enhancement allegation on the defendant's request is not an

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[5] The disagreement below mirrors disagreement in the Courts of Appeal. (Compare *People v. Montano* (2022) 80 Cal.App.5th 82, 108 ["we conclude section 1109 applies retroactively to nonfinal judgments"], and *People v. Ramos* (2022) 77 Cal.App.5th 1116, 1128 ["We agree . . . that section 1109 should apply retroactively] with *People v. Boukes* (2022) 83 Cal.App.5th 937, 948 ["section 1109 does not reduce punishment imposed on gang enhancements and, therefore, does not apply retroactively"], review granted and held Dec. 14, 2022, S277103, *People v. Ramirez* (2022) 79 Cal.App.5th 48, 65 [different panel of the Sixth District concluding over a dissent that "the *Estrada* presumption does not apply to section 1109"], review granted and held Aug. 17, 2022, S275341, and *People v. Perez* (2022) 78 Cal.App.5th 192, 207 ["Although section 1109 is designed to minimize the prejudicial impact of gang evidence, it does not reduce the punishment or narrow the scope of the application of the gang statute. We therefore conclude that the statute does not apply retroactively to a trial that has already occurred"], review granted and held Aug. 17, 2022, S275090.)

ameliorative change to the law within the meaning or logic of *Estrada*, *supra*, 63 Cal.2d 740. The *Estrada* rule requires a presumption of retroactivity based on the inevitable inference that a legislative change reducing punishment must have been intended to apply retroactively because prospective application would amount only to vengeance. (*Id*. at pp. 745-746.) Section 1109 is not the kind of punishment-reducing change that leads inevitably to that inference. Rather, it is a prophylactic procedural protection that further enhances the fairness of trials. It is not, therefore, subject to the inference described in *Estrada* that can overcome the default rule of prospectivity set out in section 3.

A. The defining features of an ameliorative change to the law within the meaning of *Estrada*

This Court's decisions have addressed a variety of changes to the law that qualified as "ameliorative" so as to support the presumption of retroactivity described in *Estrada*. (See *Esquivel*, *supra*, 11 Cal.5th at pp. 675-676.) Common to such laws is that they create a new pathway to lower punishment or more favorable treatment of a person who engages in certain conduct.

Estrada's "inevitable inference" that the Legislature or electorate could only have intended retroactive application of a new law is premised on punishment reduction—changes that "lessen the punishment" or result in a "lighter penalty" for a crime. (*Estrada*, *supra*, 63 Cal.2d at p. 745.) Conduct and punishment are central to *Estrada*'s conception of amelioration because a "crime" is conduct for which the law prescribes punishment on conviction. (§ 15 ["A crime . . . is an act

committed or omitted in violation of law . . . to which is annexed, upon conviction, . . . punishment[] . . .”].)[6] The law, moreover, has long recognized classes of persons who, although they engage in criminal conduct, are precluded from being punished. Punishment preclusion can occur if members of a class cannot be charged; or if charged, they cannot be convicted; or if convicted, they cannot be punished. (E.g., §§ 25, subd. (b) [insanity], 26 [capacity], 1000 et seq. [pretrial diversion after not guilty plea], 1026 [insanity]; former § 1000 et. seq. [deferred entry of judgment after guilty plea]; Welf. & Inst. Code, § 602 [juvenile wardship].)

Accordingly, this Court has held that new legislation compels *Estrada*’s presumption of retroactivity where it alters the circumstances in which conduct is unlawful by, for example, entirely repealing a penal provision (*People v. Rossi* (1976) 18 Cal.3d 295, 302 [addressing repeal of section 288a’s criminalization of oral copulation between consenting adults]), adding an element to an offense or an enhancement (*Tran*, *supra*, 13 Cal.5th at pp. 1206-1207 [addressing Assembly Bill 333’s addition of “new elements to the substantive offense and

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[6] The Legislature has also enacted provisions that do not define crimes but do attach more punishment to conduct under certain circumstances. (*Brookfield*, *supra*, 47 Cal.4th at p. 592; 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) § 344 [enhancement “does not define a crime but instead imposes an added penalty when the crime is committed under specified circumstances”].) Those provisions are also subject to the *Estrada* rule. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.)

enhancements in section 186.22"]), or establishing a new affirmative defense (*People v. Wright* (2006) 40 Cal.4th 81, 84-85, 94 [addressing Medical Marijuana Program Act's enactment of affirmative defense to transportation of marijuana]). The Court has also determined that *Estrada*'s presumption of retroactivity is supported where an ameliorative change is directed at the punishment annexed to the conduct by, for example, lowering the specified punishment for a crime (*Estrada, supra*, 63 Cal.2d at p. 744 [addressing amendment of escape statute to reduce penalty for escape committed without force or violence]), adding a lower tier of punishment (*People v. Francis* (1969) 71 Cal.2d 66, 75-76 [addressing statutory amendment permitting discretion to impose more lenient punishment for narcotics offenses under certain circumstances]), rendering enhancements inapplicable to a crime by making the crime a misdemeanor rather than a felony (*Buycks*, *supra*, 5 Cal.5th at pp. 890-891 [addressing initiative reclassifying as misdemeanors certain felonies that would have supported particular enhancements]), or giving trial courts discretion to strike an enhancement (*Stamps*, *supra*, 9 Cal.5th at pp. 692, 699 [addressing legislation giving courts discretion to dismiss certain enhancements in furtherance of justice]).

In addition, this Court has determined that the opening of an avenue that can lead to more lenient punishment may support a presumption of retroactivity under the rationale of *Estrada*. In *Lara*, for example, this Court considered new legislation that restricted the circumstances under which juveniles could be transferred to adult court. (*Lara*, *supra*, 4 Cal.5th at p. 303.)

The Court determined that, while the legislation "did not ameliorate the punishment, or possible punishment, for a particular crime" it nonetheless "ameliorated the possible punishment for a class of persons, namely juveniles" (*id.* at p. 308) because "'the potential benefit of a juvenile transfer hearing is that it may, in fact, dramatically alter a minor's effective sentence'" (*id.* at p. 311). Under those circumstances, the Court held, the new legislation was "analogous to the *Estrada* situation," and therefore "*Estrada*'s logic" applied, requiring an inference that the Legislature must have intended retroactive application. (*Id.* at pp. 308-309, 312.)

Similarly, in *Frahs*, this Court considered new legislation that offered certain defendants with mental disorders "an opportunity for diversion and ultimately the dismissal of charges" (*Frahs*, *supra*, 9 Cal.5th at p. 624), thereby precluding conviction and, consequently, precluding punishment "upon conviction" (§ 15). The Court concluded that the legislation was similar to that at issue in *Lara*, "in that the possibility of being granted mental health diversion rather than being tried and sentenced 'can result in dramatically different and more lenient treatment.'" (*Frahs,* at p. 631.) Thus, like the juvenile-transfer legislation in *Lara*, "the ameliorative nature of the diversion program place[d] it squarely within the spirit of the *Estrada* rule" (*ibid.*) and, in the absence of a clear signal to the contrary, the Legislature was presumed to have intended retroactive application (*id.* at pp. 631-637).

Conversely, the Court has declined to apply new legislation retroactively where the nature of the law gives rise to no "clear and unavoidable implication" that the Legislature must have intended retroactive application. (*Brown*, *supra*, 54 Cal.4th at p. 320.) In *Brown*, the Court held that an amendment to section 4019, enacted during a state fiscal emergency to temporarily increase the rate at which local prisoners could earn conduct credits, did not apply retroactively under *Estrada*. The Court reasoned that the indicia of intent that could be gleaned from the legislative history were ambiguous and that "[t]o resolve such ambiguities in favor of prospective operation is precisely the function of section 3 and the default rule it embodies." (*Id.* at p. 322.)

The Court further reasoned that the nature of the conduct-credit law itself did not support an inference of retroactivity, observing that *Estrada*'s presumption of retroactivity was based on the premise that "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" as well as "the corollary inference that the Legislature intended the lesser penalty to apply to crimes already committed." (*Brown*, *supra*, 54 Cal.4th at p. 325, internal quotation marks and citations omitted.) The Court observed that the conduct-credit law did not alter the penalty for any crime or address punishment for past criminal conduct and concluded that "a statute increasing the rate at which prisoners may earn credits for good behavior does not

represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an . . . inference of retroactive intent" analogous to the one described in *Estrada*. (*Ibid*.)

Thus, an ameliorative change, as that concept has been understood under *Estrada* and subsequent cases, may be described as eliminating the State's ability to—on the same terms as existed before the change—charge a defendant (e.g., *Rossi, Buycks*, *Lara*, *Tran*), obtain a conviction (e.g., *Rossi*, *Wright*, *Lara*, *Frahs*, *Tran*), or punish the defendant (e.g., *Estrada*, *Francis*, *Lara*, *Frahs*). In other words, an ameliorative enactment supporting *Estrada*'s inference of retroactivity changes the law: so that particular conduct is no longer criminal under any circumstances or is criminal only in the presence or absence of additional facts (e.g., *Rossi*, *Wright*, *Tran*); or so that the punishment for a person who engages in criminal conduct is actually or potentially reduced by a change to the punishment annexed to the conduct (e.g., *Estrada*, *Francis*, *Buycks*) or actually or potentially eliminated by a new class exclusion from being criminally charged, tried, convicted, or punished (e.g., *Lara*, *Frahs*).

Such changes by their nature implicate "*Estrada*'s logic." (*Lara*, *supra*, 4 Cal.5th at p. 312.) This Court has continued to adhere to that logic, recognizing that a presumption of retroactivity in the face of legislative silence is justified by the "inevitable inference" that the Legislature "must have intended" retroactivity where the change in law reflects a judgment that a

former criminal penalty was too severe. (*Id.* at p. 309; see also *Frahs*, *supra*, 9 Cal.5th at pp. 627-628; *Estrada*, *supra*, 63 Cal.2d at p. 745.) As this Court has observed, absent the express statement required by section 3, extrinsic indicia of legislative intent regarding retroactivity must be "clear and unavoidable." (*Evangelatos*, *supra*, 44 Cal.3d at pp. 1208-1209.) *Estrada* properly demands this strong inference of retroactivity because Penal Code section 3 establishes an unambiguous default rule of prospectivity and the Legislature may always—and quite easily—declare its intent that a new law be applied retroactively. (See § 3; *Brown*, *supra*, 54 Cal.4th at pp. 319, 324.) To infer retroactive intent absent a clear and unavoidable indication—in other words, to treat section 3 as simply a "tie-breaking principle of last resort"—would be to improperly "justify retroactive operation on evidence of less dignity and reliability than the express legislative declaration, or clear implication from extrinsic evidence, that we now require under section 3" and to "endanger the default rule of prospective operation" altogether. (*Brown*, at p. 324.)

B. Section 1109 has none of the attributes of an ameliorative enactment that would support *Estrada*'s inference of retroactivity

Section 1109 is a prophylactic, procedural protection against guilty verdicts arising from juror bias rather than unbiased consideration of the evidence. It does not alter prohibited conduct or the possible punishment for engaging in particular conduct, nor does it create a class-based punishment preclusion. It thus performs none of the functions of ameliorative legislation

as understood under *Estrada* and other cases that would give rise to a clear and unambiguous inference that the Legislature must have intended the statute to operate retroactively.

Unlike amended section 186.22, section 1109 does not eliminate the State's ability to charge or prove a gang enhancement allegation on the same terms that it could absent the statutory bifurcation provision. (Cf. *Tran*, *supra*, 13 Cal.5th at pp. 1206-1207.) Nor does section 1109 eliminate the State's ability to charge and prove the underlying substantive crime on the same terms that it could absent the statutory bifurcation provision. Section 1109 leaves untouched the process of charging both the offense and the enhancement, the elements of both, and the defenses to them.

The statute also does not affect the punishment that may be imposed. The trial court's sentencing options for the offense and the gang enhancement are the same as they were before enactment of the bifurcation provision and remain the same regardless of whether the trial is bifurcated. And section 1109 does not erect a class-based preclusion on punishment. Unlike a juvenile who cannot be charged in criminal court without additional procedural protections (*Lara*) or a person with a mental health disorder who can potentially avoid trial, conviction, and punishment (*Frahs*), a defendant who is charged with a crime to which a gang enhancement allegation is appended and who invokes bifurcation under section 1109 is still tried in criminal court; is still subject to conviction for the crime, and to a true finding on the enhancement allegation, with no new

elements or affirmative defenses under section 1109; and is still punished without regard to section 1109.

In short, section 1109 does not enact a "new lighter penalty." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) It does not represent a "'legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.'" (*Ibid*.) Thus, its enactment does not lead to an "inevitable inference" that the Legislature intended retroactive application of the new bifurcation provision and that ordinary prospective application would amount only to vengeance. (*Ibid*.) Because section 1109 does not alter the legally available consequences for a defendant's prior behavior, create a new opportunity for reduced or eliminated punishment, or alter what must be proved (or disproved) under section 186.22 or any substantive crime, it is not "analogous to the *Estrada* situation" and "*Estrada*'s logic" does not apply. (*Lara*, *supra*, 4 Cal.5th at p. 312.)

Instead, section 1109 addresses something other than ameliorating punishment. It governs the conduct of trials in a manner designed to promote fairness and protect the fundamental right to an impartial jury. (See *People v. Nesler* (1997) 16 Cal.4th 561, 578 (plur. opn. of George, C.J.) ["A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors"].)

Bifurcation is properly understood as facilitating jurors' unbiased evaluation of the evidence by avoiding the risk of undue prejudice. In *People v. Calderon* (1994) 9 Cal.4th 69, this Court recognized, for example, that "[h]aving a jury determine the truth

of a prior conviction allegation at the same time it determines the defendant's guilt of the charged offense often poses a grave risk of prejudice." (*Id.* at p. 75.) And it held that, under section 1044, "which vests the trial court with broad discretion to control the conduct of a criminal trial," trial courts possess broad authority to grant bifurcation of such allegations when requested. (*Ibid.*) In *People v. Hernandez* (2004) 33 Cal.4th 1040, the Court later invited trial courts to consider bifurcating gang enhancement trials to avoid undue prejudice: "The authorization we found in *Calderon* . . . for bifurcation of a prior conviction allegation also permits bifurcation of the gang enhancement. The predicate offenses offered to establish a 'pattern of criminal gang activity' [citation] need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation." (*Id.* at p. 1049.)

The Legislature's uncodified findings in Assembly Bill 333 confirm its understanding that section 1109 is designed to augment procedural fairness by providing additional protection against wrongful convictions by biased juries. Those findings reflect the Legislature's view that "[g]ang enhancement evidence can be unreliable and prejudicial to a jury because it is lumped into evidence of the underlying charges which further perpetuates unfair prejudice in juries and convictions of innocent people." (Stats. 2021, ch. 699, § 2, subd. (d)(6).)[7] Further,

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[7] Courts typically "must give legislative findings great weight and should uphold them unless unreasonable or arbitrary." (*Professional Engineers v. Department of*

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"[s]tudies suggest that allowing a jury to hear the kind of evidence that supports a gang enhancement before it has decided whether the defendant is guilty or not may lead to wrongful convictions." (*Id*., § 2, subd. (e).) The Legislature also cited *People v. Williams* (1997) 16 Cal.4th 153, 193 (Stats. 2021, ch. 699, § 2, subd. (e)), in which this Court "recognized that admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*Williams*, at p. 193.) The Legislature found that "[t]he mere specter of gang enhancements pressures defendants to accept unfavorable plea deals rather than risk a trial filled with prejudicial evidence and a substantially longer sentence." (Stats. 2021, ch. 699, § 2, subd. (e).)

At the same time, the Legislature was aware when it enacted Assembly Bill 333 that introduction of potentially prejudicial gang evidence has long been a feature of criminal trials and that courts have sanctioned various procedural safeguards relating to the admission of such evidence. (See

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Transportation (1997) 15 Cal.4th 543, 569.) Resolution of the issue presented does not require rejection of any legislative finding. It bears noting, however, that the Legislature did not explain the basis for its assertion that gang evidence presented in a unified proceeding is potentially less reliable than the same evidence presented in a bifurcated proceeding. (Cf. *People v. Hayes* (1989) 49 Cal.3d 1260 [retroactivity of Evid. Code, § 795, governing admissibility of testimony of witness who had been hypnotized].)

People v. Scott (2014) 58 Cal.4th 1415, 1424 [Legislature is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof].) Such procedures include jury voir dire (see *In re Hamilton* (1999) 20 Cal.4th 273, 295 ["Voir dire is the crucial means for discovery of actual or potential juror bias"]), the need for similarity if evidence is admitted under Evidence Code section 1101 (see *People v. Ewoldt* (1994) 7 Cal.4th 380, 402), balancing probative value against the risk of undue prejudice under Evidence Code section 352 (see *People v. Valdez* (2012) 55 Cal.4th 82, 133 [Evidence Code section 352 permits exclusion of evidence that "'tends to evoke an emotional bias against the defendant with very little effect on issues'"]), and limiting instructions to the jury (see *People v. Homick* (2012) 55 Cal.4th 816, 866-867 ["'Any prejudice that the challenged information may have threatened must be deemed to have been prevented by the court's limiting instruction to the jury'"]). The function of each of those procedures—and now of section 1109 as well—is to ameliorate the potential for trial prejudice, not punishment, by governing the conduct of trial. (See, e.g., *People v. Gonzalez* (2021) 12 Cal.5th 367, 409 ["Our courts have acknowledged that '[a] limiting instruction can ameliorate section 352 prejudice by eliminating the danger the jury could consider the evidence for an improper purpose'"].)[8]

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[8] In addition, the Legislature would have been aware of the decision in *People v. Bracamonte* (1981) 119 Cal.App.3d 644, in which the Court of Appeal announced a rule that a defendant is

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Indeed, bifurcation can enhance fairness to both parties. Just as there may be jurors who, when confronted with gang evidence, might succumb to bias in favor of conviction despite their duty to fairly assess the evidence according to the court's instructions, there may be jurors who, believing that gang enhancements are used unfairly by prosecutors, vote to acquit notwithstanding proof beyond a reasonable doubt. A defendant who requests bifurcation may mitigate the risk a prosecutor faces of jury nullification. (Cf. *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334 [trial court can grant the People's request for bifurcation of trial of three strikes allegation out of concern for nullification].)

Section 1109's bifurcation provision is thus not properly understood as mitigating punishment in the sense in which *Estrada* used that term to draw its inference about legislative intent. The provision is part of an array of rules and procedures governing the conduct of criminal trials and aimed at facilitating unbiased verdicts. These provisions enhance the fairness of

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entitled to have the truth of a prior conviction allegation decided in a bifurcated proceeding but held that the rule would apply prospectively only. (*Id.* at p. 655; but see *Calderon*, *supra*, 9 Cal.4th at pp. 79-80 [disapproving *Bracamonte* to the extent it held that bifurcation was required rather than permitted].) In this respect, the situation in this case is the opposite of the situation in *Frahs*, where the Legislature would have been aware that this Court had recently held that the similar law at issue in *Lara* applied retroactively under the *Estrada* rule. (See *Frahs*, *supra*, 9 Cal.5th at pp. 634-635.)

criminal trials, but they do not "lessen the punishment" for a particular crime or a class of offenders. (*Estrada*, *supra*, 63 Cal.2d at p. 745.) Section 1109 therefore does not support a clear and unambiguous, or inevitable, inference that the Legislature must have intended retroactive application.

C. The Court of Appeal majority's reasoning is incorrect

The decision by the Court of Appeal majority below misapprehends the nature of the *Estrada* rule and extends that rule much farther than its rationale can support.

1. A "possible benefit" resulting from new legislation governing trial procedure is not sufficient to support *Estrada*'s presumption of retroactivity

The Court of Appeal majority observed "that the *Estrada* rule may apply to a change in the law even where the defendants in question are not expressly given a lesser punishment" and "that a new statute may apply retroactively even if it concerns purely procedural changes that do not directly reduce the punishment for a crime" (Opn. 15) but that provide a "possible benefit to a class of criminal defendants" (Opn. 16). The court noted that section 1109 "is applicable to a distinct class of defendants" (Opn. 16), and the court recited the Legislature's uncodified findings relating to the bill as a whole, concluding that "one of the Legislature's foremost reasons for enacting Assembly Bill 333 was to ameliorate the disparate levels of punishment suffered by people of color" (Opn. 16-17).

From those premises, the majority reasoned that section 1109 is sufficiently ameliorative to trigger *Estrada*'s presumption

of retroactivity. It reached that conclusion not because the Legislature created a new dispositional pathway to reduced punishment or nonpunitive treatment, but rather because jurors in a bifurcated trial have a greater chance of doing their jobs in the way they are supposed to do them: "[O]ne of the ameliorative effects of bifurcation is that some defendants will actually be *acquitted* of the underlying offense absent the prejudicial impact of gang evidence. This increased possibility of acquittal—which necessarily reduces possible punishment—is sufficient to trigger retroactivity under the *Estrada* rule." (Opn. 18.)

The Court of Appeal majority's reasoning does not withstand scrutiny. The majority was correct that section 1109 applies "to a distinct class of defendants—those charged with gang enhancements." (Opn. 16.) But class identification does not establish amelioration for purposes of *Estrada*'s presumption about legislative intent. Legislative amelioration *always* applies to a class of defendants, either those who engaged in the particular conduct to which punishment is (or was) annexed (*Estrada*, *Francis*, *Rossi*, *Wright*) or those who are granted new punishment-preclusive procedural protections (*Lara*, *Frahs*). (See Dis. Opn. 5 ["the same could be said for virtually any procedural change"].) The presence of a class, therefore, is of minimal significance compared to the presence of the kind of amelioration described in *Estrada*.

And section 1109 is not ameliorative in the sense that *Estrada* explained would inevitably lead to the inference of retroactivity. Section 1109 does not establish a different

procedural pathway that alters the State's ability to charge, convict, or punish on the same terms as existed before its enactment, unlike the procedural ameliorative legislation considered in *Lara* and *Frahs*, cases the Court of Appeal thought most apposite. (E.g., Opn. 16, 19.) Instead, it establishes a trial procedure to limit a jury's misuse of otherwise admissible evidence so that there is greater confidence that any conviction is *warranted*, which is at a far remove from legislation that could procedurally *preclude* a criminal trial from even being held.[9] Section 1109 does not cure an "excess in punishment" (*Estrada*,

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[9] Compare Stats. 2021, ch. 699, § 2, subds. (d)(5) ["Gang enhancement evidence can be unreliable and *prejudicial to a jury* because it is *lumped into evidence* of the underlying charges which further perpetuates *unfair prejudice in juries* and *convictions of innocent people*" (italics added)] and (e) ["allowing a jury to hear the kind of evidence that supports a gang enhancement before it has decided whether the defendant is guilty or not may lead to *wrongful convictions*" (italics added)] with Pen. Code, § 1001.36, subds. (c) ["'pretrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication"] and (e) ["If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion"]; see also *Frahs*, *supra*, 9 Cal.5th at p. 631 ["diversion can spell the difference between, on the one hand, a defendant receiving specialized mental health treatment, possibly avoiding criminal prosecution altogether, and even maintaining a clean record, and on the other, a defendant serving a lengthy prison sentence"]; Cal. Rules of Court, rule 5.770(d)(1) [after Welf. & Inst. Code, § 707 transfer hearing, juvenile court that retains jurisdiction "must proceed to jurisdiction hearing under rule 5.774"].

supra, 63 Cal.2d at p. 745) because it does not alter the punishment for the underlying offense or the gang enhancement and it does not alter the prescribed treatment of a defendant against whom a gang enhancement is alleged. It simply enhances procedural fairness in a way that does not implicate the logic of *Estrada*.

The majority below relied on *Frahs*, *supra*, 9 Cal.5th at page 631, stating that, there, the Court "reiterated the principle that a statute that provides a 'possible benefit to a class of criminal defendants' should be applied retroactively." (Opn. 16.) But the "possible benefit" referred to in *Frahs* does not, in context, mean that any change that might benefit criminal defendants will require *Estrada*'s presumption of retroactivity. Rather, *Frahs* addressed the particular benefit of pretrial diversion, a procedure the People conceded had "'a potentially ameliorative effect: defendants who successfully complete the program would be able to have criminal charges wiped clean.'" (*Frahs*, at p. 631.) Thus, the "possible benefit" was a benefit that was "squarely within the spirit of the *Estrada* rule" (*ibid.*) because it established a new punishment-preclusive pathway that prevented a trial in favor of nonpunitive treatment of certain defendants. The Court of Appeal majority's analysis, however, unmoors *Frahs* from the issue it considered and incorrectly treats *Frahs* as if it held that *any* benefit to a class of defendants would implicate the logic of *Estrada*.

Indeed, to hold that any new legislation providing a "possible benefit" to criminal defendants is presumptively retroactive

would be difficult or impossible to square with *Estrada*'s rationale. This Court has recognized that the *Estrada* rule is a "contextually specific qualification to the ordinary presumption that statutes operate prospectively." (*Brown*, *supra*, 54 Cal.4th at p. 323.) The exception is justified because, when the Legislature ameliorates punishment, it has made a judgment that "the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law" and "nothing is to be gained . . . by imposing the more severe penalty after such a pronouncement . . . other than to satisfy a desire for vengeance"—a motive this Court is "unwilling to attribute to the Legislature." (*Ibid*., internal quotation marks omitted.)

Legislation that yields a "possible benefit" to criminal defendants is a category that far exceeds the justification for presuming, counter to section 3's clear statutory command, that the Legislature must have intended retroactive application. For example, the Legislature could reinstate the mandate for individual, sequestered voir dire in capital cases (cf. *People v. Waidla* (2000) 22 Cal.4th 690, 713 [legislation abrogated rule of *Hovey v. Superior Court* (1980) 28 Cal.3d 1 requiring such voir dire].)[10] Or it could preclude prosecutorial use of the labels

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[10] *Hovey* was concerned that "[a] capital jury, which has been predisposed by virtue of the very process by which it has been selected to think the accused guilty in advance of trial, is unlikely to function properly or maintain its neutrality. As a jury's neutrality decreases, the quantum of evidence necessary to prove guilt also decreases." (28 Cal.3d at pp. 72-73; cf. Stats. 2021, ch. 699, § 2, subds. (d)(5) & (e) [unitary gang enhancement

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"defendant" and "victim" in front of the jury to eliminate subtle psychological juror bias against defendants. Or it could provide more peremptory challenges to ensure that a defendant is less likely to be tried by jurors the defendant suspects will be biased. Or it could conclude that defendants would benefit from better cross-sectional representation and provide a rideshare for any prospective juror who has difficulty getting to the courthouse. (Cf. *People v. Currie* (2001) 87 Cal.App.4th 225, 236 [cross-sectional claim urging "affirmative measures as 'insuring direct transportation'" to trial].)

Moreover, the Legislature could enact other procedures unrelated to juror bias that it finds will enhance fairness and might lead to a greater possibility of acquittal. The Legislature could mandate that any person being tried for a felony be represented by two attorneys. (Cf. § 987, subd. (d) ["In a capital case, the court may appoint an additional attorney as a cocounsel upon a written request of the first attorney appointed"].) Or it could ensure a defendant's right to a speedy trial by requiring

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trial leading to wrongful conviction].) To avoid such prejudice, the Court announced, "pursuant to its supervisory authority over California criminal procedure," "that in *future* capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration." (*Hovey*, at p. 80, italics added.) Thus, "[t]he rule of *Hovey* was prospective only" (*People v. Walker* (1988) 47 Cal.3d 605, 624), just like the fairness-enhancing bifurcation rule of *Bracamonte*, and of section 1109.

trial be had in 55 days (or some other number) rather than 60. (§ 1382, subd. (a)(2).)

All of these hypothetical enactments, like section 1109, would provide a "'possible benefit to a class of criminal defendants.'" (Opn. 16.) They, like section 1109, would augment existing procedural protections and, in theory, increase the possibility of acquittal. They, like section 1109, would not alter punishment or establish a pathway to different, punishment-preclusive treatment. And they would, under the Court of Appeal's analysis, be retroactive.

Yet prospective application of such procedures, including bifurcation under section 1109, may readily be explained on grounds other than simply "a desire for vengeance." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) The Legislature may legitimately determine, for example, that a new procedural protection, even though it promotes fairness in criminal trials, is not, on balance, worth applying retroactively because of the burden that would place on courts to potentially retry many nonfinal criminal cases. Such a judgment might depend on the nature of the change, the backdrop of existing procedures against which the change operates, and the extent of the new procedure's application.

In that critical way, legislation that provides simply some "possible benefit" unconnected to a judgment about proper punishment does not fall within *Estrada*'s logic. Unlike the prospective-only application of a punishment-preclusive enactment, which "can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance" (*Estrada*, *supra*, 63 Cal.2d

at p. 745), the prospective-only application of a non-punishment-preclusive enactment is not inevitably incompatible with "modern theories of penology" (*ibid.*).

Indeed, in *Brown*, this Court held that an enactment increasing the rate at which conduct credits are earned—surely a "possible benefit"—was not retroactive precisely because such legislation "does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent" to that described in *Estrada*. (*Brown*, *supra*, 54 Cal.4th at p. 325.) To draw an inference of retroactivity from any legislation that provides a "possible benefit" to criminal defendants would be, contrary to this Court's observations in *Brown*, to improperly "justify retroactive operation on evidence of less dignity and reliability than the express legislative declaration, or clear implication from extrinsic evidence, that we now require under section 3" and to "endanger the default rule of prospective operation" altogether. (*Brown*, at p. 324.)

In this case, there is no reason to infer that the Legislature must have intended section 1109 to operate retroactively on the ground that withholding the bifurcation rule from nonfinal cases would only be vengeful. Enhancing a protection or improving a procedure does not imply dysfunction of predecessor procedures—particularly ones that have long served their purpose and are foundational to the fair administration of justice. Although section 1109 enhances procedural fairness, that does not mean that trials held before section 1109's enactment were unfair. All

trials are presumptively fair. (*People v. Chessman* (1950) 35 Cal.2d 455, 462 ["On this appeal, as in every appeal, it is to be presumed that defendant has been accorded a fair trial and that the judgment of conviction is valid"].) And admission of evidence at a unitary trial to prove an enhancement does not, by itself, render a trial unfair. (*Spencer v. Texas* (1967) 385 U.S. 554, 565-566 [no "due process decision of this Court even remotely supports the proposition that the States are not free to enact habitual-offender statutes of the type Texas has chosen and to admit evidence during trial tending to prove allegations required under the statutory scheme"].)

Thus, even though section 1109 provides a "possible benefit" to criminal defendants in the form of improved trial procedure, it does not compel the inevitable inference that the Legislature, despite its silence on the matter, must have intended retroactive application.

2. A possible advantage in plea bargaining resulting from new legislation is not sufficient to support *Estrada*'s presumption of retroactivity

The Court of Appeal majority posited a second basis for concluding that section 1109 is ameliorative within the meaning of *Estrada*: "The Legislature further found, 'The mere specter of gang enhancements pressures defendants to accept unfavorable plea deals rather than risk a trial filled with prejudicial evidence and a substantially longer sentence.' ([Stats. 2021, ch. 699], § 2, subd. (e).) By reducing the pressure to accept longer sentences, the new bifurcation statute will necessarily reduce the degree of punishment for many defendants charged with gang

enhancements, even if they never have to invoke its prophylactic protections at trial." (Opn. 18.)

The Court of Appeal majority's plea-bargain theory of amelioration is derivative of, and shares the same essential defect as, its "possible benefit" theory: That an enactment might give defendants a new procedural advantage does not lead to the "clear and unavoidable inference" of retroactivity described in *Estrada* and other cases. Even if section 1109 advantages defendants during plea bargaining by providing additional reassurance against unfairness, it does not change the amount of punishment statutorily available or establish a punishment-preclusive pathway to different treatment. It does not, therefore, support the conclusion that prospective application would only be motivated by a desire for vengeance. In short, "*Estrada*'s logic" (*Lara*, *supra*, 4 Cal.5th at p. 312) is not implicated by the fact that section 1109 might aid criminal defendants during plea bargaining. (See Arg. I.C.1., *ante*.)

Indeed, the effect of section 1109 during plea bargaining may be slight and hard to predict. Overall, the "mere specter of gang enhancements" will arise in fewer cases because, concurrently with the enactment of section 1109, section 186.22 was amended to narrow the circumstances in which the gang enhancement will apply at all. And in many cases, gang evidence will still be admissible to prove the underlying charges inasmuch as that evidence is relevant to issues such as identity and motive, diminishing the need for bifurcation.

Beyond that, "[p]lea bargains are the result of complex negotiations suffused with uncertainty . . . ." (*Premo v. Moore* (2011) 562 U.S. 115, 124.) The defendant (presumptively competently advised by counsel) will know that because of bifurcation under section 1109, if the case is tried, the jury will not act contrary to its instructions and thus will not convict based on prejudice arising from the admission of evidence to prove the gang enhancement allegation, thereby eliminating one source of uncertainty and risk. The Court of Appeal's statement about defendants "never having to invoke its prophylactic protections at trial" (Opn. 18) seems to acknowledge this effect. But such a defendant will also know: that otherwise permissible gang evidence may still be admitted at the guilt phase of a bifurcated trial for other purposes, thereby reintroducing some of the uncertainty about bias; that bifurcation does not alter the statutory punishment for the offense and for the enhancement; that, for some offenses, such as the robberies charged here, the ability to plea bargain once the information is filed will be sharply curtailed (§ 1192.7, subds. (a)(2) [limitation on plea bargaining for charged serious felony], (c)(19) [robbery as serious felony]); and that at the point when the jury would be considering the gang charges and enhancements, it will have already found the defendant guilty of at least one charged offense, which carries the potential for prejudice in the inverse direction and which necessitates a distinct calculus for evaluating possible outcomes.

The prospect of bifurcation must therefore be considered by each party as one component of its multifaceted calculation

during plea bargaining. Section 1109 affects bargaining insofar as it factors into the parties' understanding of how the trial might unfold, much as any procedural requirement governing the conduct of trial. But such a consideration falls well short of the kind of punishment-altering change in the law that by its nature inevitably leads to a presumption of retroactivity under the rationale of *Estrada*.

3. A legislative act need not be considered either entirely prospective or entirely retroactive

The Court of Appeal majority also believed it was significant for purposes of analyzing section 1109 that the parties had agreed that Assembly Bill 333's amendments to section 186.22 are retroactive, stating, "We reject the argument that different parts of Assembly Bill 333 should be treated differently under *Estrada*." (Opn. 18.) The court thought it "especially incongruous for the Legislature to make one isolated section of a bill prospective-only without stating so expressly, expecting instead that a court would somehow discern this anomaly." (Opn. 19.)

But it is hardly incongruous for a court to assess one section of a session law to determine its retroactivity. Indeed, this Court long ago rejected the argument "that the legislative intent applicable to the entire chapter [law] is 'presumptively the same'" and instead held that "the Legislature manifestly could have different intents with respect to different sections contained in one chapter" law—and it did so in the very context of statutory retroactivity. (*Francis*, *supra*, 71 Cal.2d at p. 78; see also *Tapia*

v. Superior Court (1991) 53 Cal.3d 282, 297 [analyzing four categories of provisions in Proposition 115 for retroactivity].)

Retroactivity is a question of statutory construction, and it may well make sense to draw different inferences about retroactivity from different parts of an act where the Legislature is silent on the question. The opposite approach would itself be incongruous where, for example, a single act or initiative, contains provisions that make both procedural and substantive changes that are alternately beneficial to defendants and more punitive. Proposition 115 is a prime example. This Court in *Tapia* reviewed the various provisions of Proposition 115 and concluded that they fell within four distinct categories of retroactivity. (*Tapia*, *supra*, 53 Cal.3d at pp. 297-302.) The Court held that provisions adding a new mens rea requirement to special circumstances ameliorated the legal consequences of a defendant's conduct, and was therefore retroactive under *Estrada*. (*Id*. at pp. 300-301.) By contrast, the Court held that provisions which "address the conduct of trials rather than the definition of, punishment for, or defenses to crimes" were prospective (*id*. at pp. 299-300), notwithstanding that some of them were beneficial to the defense, such as provisions mandating appointment only of counsel ready to proceed (§ 987.05), requiring the trial commence in 60 days (§ 1049.5), and authorizing immediate writ review of an order setting a trial beyond 60 days (§ 1511).

Similarly, the legislative enactment at issue in *Francis* granted the trial court authority to *reduce* punishment for one

drug offense while simultaneously "vesting in the trial judge discretion to impose a state prison sentence [for a different offense, for which] before the amendment only a misdemeanor sentence could be imposed." (*Francis*, *supra*, 71 Cal.2d at p. 78.) This Court had no difficulty recognizing in *Francis* that the Legislature harbored two distinct unstated intents with respect to retroactivity in a single bill. (*Ibid*.; see also Dis. Opn. 7 ["Many [statutes] amend numerous (sometimes hundreds of) [code sections], and whether a specific amendatory [part of a] statute is subject to the *Estrada* rule depends on the nature of the amendment, not the mere fact that the amendment was enacted in the company of other amendments in a single [statute]"].)[11]

There is, therefore, neither special incongruity nor anomaly in expecting a court to determine individually the retroactivity of different sections of a session law. Nor is there anything about Assembly Bill 333 in particular suggesting that, in the face of the Legislature's silence, the same inference about retroactivity must necessarily be drawn from its quite different provisions. Under

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[11] Justice Elia used slightly different terms, modified here for precision. Not all bills become statutes. (E.g., Cal. Const., art. IV, §§ 8, subd. (b)(1) ["The Legislature may make no law except by statute and may enact no statute except by bill"], 10, subd. (a) ["Each bill passed by the Legislature shall be presented to the Governor. It becomes a statute if it is signed by the Governor"].) The statute's law may or may not be included in one of the codes the Legislature has created. (E.g., *Estate of Joseph* (1998) 17 Cal.4th 203, 208-209 ["In 1931, the Legislature enacted the original Probate Code. (Stats. 1931, ch. 281.) It incorporated therein the substance of provisions from the Civil Code, the Code of Civil Procedure, and two uncodified statutes . . ."].)

Estrada, the amendments to section 186.22 that narrow the scope of the gang enhancement plainly support the inference that the Legislature's judgment about reducing punishment must have been intended to operate retroactively. The same inference cannot be drawn from the nature of section 1109's new bifurcation rule.[12]

Necessarily, then, the Court of Appeal erred in concluding that an inference under *Estrada* of retroactive effect for one portion of Assembly Bill 333 must extend to all provisions of Assembly Bill 333, including section 1109. Because neither the rule nor the logic of *Estrada* supports retroactive application of section 1109, sections 3 controls, and section 1109 is prospective only.

II. IF THE COURT HOLDS THAT SECTION 1109 IS RETROACTIVE, APPELLANTS' ROBBERY CONVICTIONS WERE NOT PREJUDICED BY THE ABSENCE OF BIFURCATION

If the Court concludes that section 1109 is retroactive, the question arises whether reversal of appellants' convictions is required. The Court of Appeal below held that the lack of potential bifurcation was prejudicial even as to the robbery

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[12] The Court of Appeal majority reasoned that "the legislative findings setting forth the ameliorative purposes of the bill apply to the entire bill, and they specifically address the reasons for the new bifurcation rules." (Opn. 18.) Those findings, however, do not say anything about retroactivity, and, for the reasons already explained, the majority's conception of what sort of legislative change qualifies as "ameliorative" for purposes of requiring courts to draw *Estrada*'s presumption of retroactivity is overbroad and incorrect.

convictions. (Opn. 20.) The Court of Appeal's prejudice analysis, however, was deficient.

In a single-paragraph assessment, the Court of Appeal concluded that the "evidence identifying [appellants] as the robbers was not overwhelming" and, therefore, "it is likely the jury relied on evidence of appellants' gang membership in considering the identity issues." (Opn. 20.) Notably absent from this analysis is any acknowledgment that the trial court gave numerous limiting instructions to guard against that precise concern.

CALCRIM No. 1403 directed jurors to consider evidence of gang activity for specified evidentiary purposes only, and forbade them from using it to "conclude . . . that the defendant is a person of bad character or that he has a disposition to commit a crime." (7CT 1926.) The court instructed the jury with CALCRIM No. 303 that "certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." (45RT 13243; 7CT 1883.) Another instruction limited the jury's consideration of prior conviction evidence only to "the gang allegation," and reminded the jury, "You may not consider this evidence as proof that the defendants engaged in the robbery alleged to have occurred on August 29th, 2015." (7CT 1886; 45RT 13243-13244.) The court further directed the jury pursuant to CALCRIM No. 1401 that it could consider the gang enhancement allegations only after returning guilty verdicts on one or both of the robbery counts. (7CT 1918; 45RT 13262-13263.) And the court gave CALCRIM No. 200, directing jurors to not let bias,

sympathy, prejudice, or public opinion influence their decision, including based on a variety of factors. (7CT 1866; 45RT 13232-13233.)

The ordinary and "crucial" presumption is "that jurors understand and follow instructions." (*People v. Yeoman* (2003) 31 Cal.4th 93, 139; see also *Romano v. Oklahoma* (1994) 512 U.S. 1, 13 ["if the jurors followed the trial court's instructions, which we presume they did [citation], this evidence" of a death sentence for a different murder "should have had little—if any—effect on their deliberations"].) That presumption controls unless affirmatively rebutted by the record. (*Waidla*, *supra*, 22 Cal.4th at p. 725; see *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["We presume that jurors comprehend and accept the court's directions. [Citation.] . . . Defendant's assertion to the contrary notwithstanding, that presumption stands unrebutted here"].)

In this case, there is strong evidence that the jury indeed followed the instructions and was not unduly influenced by the gang evidence in deciding the nongang charges. Tellingly, the jury hung on the firearm enhancement allegations and acquitted one of the defendants of all charges, notwithstanding its exposure to gang evidence. (7CT 2006-2007; 50RT 14703.) The split verdict demonstrates that the jury independently evaluated each charge and allegation as directed by the court without being biased or improperly influenced by evidence relating to the other allegations. (See, e.g., *People v. Harris* (2013) 57 Cal.4th 804, 831 ["the jury did not convict defendant of sodomy and burglary, which tends to show that it was not prejudiced against him, but

rather was able to fairly evaluate the evidence before it"]; *Ramos*, *supra*, 77 Cal.App.5th at pp. 1131-1132 ["Any inference of prejudice resulting from the gang evidence is dispelled by the fact the jury acquitted all the defendants of attempted murder and could not reach a verdict on the attempted voluntary manslaughter charges. It is apparent from this record the jury did not simply rely on the gang evidence to convict the defendants of the charged crimes"]; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1312 ["that defendant was acquitted of any of the offenses suggests the lack of prejudice and the jury's clear ability to consider each count on the evidence presented and nothing else"]; cf. *Skilling v. United States* (2010) 561 U.S. 358, 383 ["Finally, and of prime significance, Skilling's jury acquitted him of nine insider-trading counts. . . . It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption"].)

The Court of Appeal's suggestion that the victims' identification of appellants was weak likewise ignores the greater context of the evidence. The victims testified that the group appeared to have just come from the 7-Eleven across the street before the encounter. (4CT 1129, 1146; 22RT 6369; 23RT 6631.) Video cameras in the 7-Eleven captured appellants in the store around the time of the robberies. (29RT 8424, 8436-8437, 8455, 8456; 42RT 12316.) Byrd testified that appellants were at his apartment that evening, all left together for the store, and they then returned together a short time later. (42RT 12347-12348; 43RT 12617.) One of the victims' cell phones was subsequently

recovered from Byrd's apartment. (24RT 6960-6961; 25RT 7233-7234; 26RT 7513-7514; 27RT 7892.) The other victim's cell phone was recovered from Byrd's girlfriend's car in the adjacent apartment parking lot, with Lozano's fingerprint on it. (21RT 6040; 24RT 6926-6927, 6971; 25RT 7334, 7348-7350, 7351-7352; 26RT 7543, 7553-7554; 27RT 7892; 40RT 11742, 11744.) The evidence and inferences compellingly support the identification of appellants as the robbers.

Finally, any assessment of prejudice must acknowledge that some gang evidence would still be admitted during the initial phase as relevant to show intent and identity, as well as witness bias. (See Opn. 7-10 [acknowledging relevance of gang evidence in evaluating sufficiency of the evidence as to identification and intent for the robberies]; see generally *Tran*, *supra*, 13 Cal.5th at p. 1208 ["We have held that gang evidence, even if not admitted to prove a gang enhancement, may still be relevant and admissible to prove other facts related to a crime"].) Here, the defendants began their encounter with the victims by identifying themselves as gang members, and the gang evidence showed their connection to each other and motivation to act in concert. This evidence would have been relevant and admissible for the robbery offenses irrespective of the bifurcation statute. Moreover, as in *Tran*, there was nothing about the prosecutor's use of the gang evidence that rendered the trial on the robbery counts fundamentally unfair. (*Id*. at p. 1209.)

Ultimately, the Court of Appeal's assumption that the gang evidence was misused to establish identity appears to have been

predicated on the court's skepticism about the error's susceptibility to any form of harmless error analysis, a skepticism debunked by this Court in *People v. Tran*, *supra*, 13 Cal.5th at pages 1208-1210. As in *Tran*, the strength of the evidence, coupled with the presumption that the jury followed the court's limiting instructions, and the fact that the jury acquitted one defendant and hung on several enhancements as to all defendants, demonstrates that a different result was not reasonably probable had the trial of the gang enhancement allegations been bifurcated. The Court of Appeal erred in concluding that appellants had met their burden of showing prejudice as to the robbery convictions warranting reversal under *Watson*, *supra*, 46 Cal.2d 818.[13]

[13] Alternatively, given the flaws in the Court of Appeal's prejudice analysis, the Court should not leave the Court of Appeal's decision citable once it issues its opinion in this case. (Cal. Rules of Court, rule 8.1115(e)(3).)

CONCLUSION

The judgment of the Court of Appeal should be reversed insofar as it holds that section 1109 applies retroactively to this nonfinal case, and the matter should be remanded for resolution of the remainder of appellants' claims. (See Opn. 2 ["Appellants raise numerous other claims . . . , but we do not reach those claims"]; Cal. Rules of Court, rule 8.528(c) [Court may remand to "Court of Appeal for decision on any remaining issues"].)

Respectfully submitted,

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January 12, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13-point Century Schoolbook font and contains 11,814 words.

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January 12, 2023

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DECLARATION OF ELECTRONIC SERVICE

Case Name: ***People v. Francisco Burgos et al.***

No.: **S274743**

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 collecting and processing electronic and physical correspondence.

On January 12, 2023, I electronically served the attached **OPENING BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system as follows:

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Sixth District Court of Appeal	

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on January 12, 2023, at San Francisco, California.

S. Chiang	*/s/ S. Chiang*
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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1/12/2023

Date

/s/Susan Chiang

Signature

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Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

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