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Supreme Court of California
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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	Supreme Court No. S263375
v.	Court of Appeal No. B297213
MARIO SALVADOR PADILLA,	
Defendant and Appellant.	Superior Court No. TA051184

APPEAL FROM THE SUPERIOR COURT
OF LOS ANGELES COUNTY
Honorable Ricardo R. Ocampo, Judge

ANSWER BRIEF ON THE MERITS

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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Supreme Court No. S263375
v.	)	Court of Appeal No. B297213
MARIO SALVADOR PADILLA,	)	
Defendant and Appellant.	)	Superior Court No. TA051184

ISSUE PRESENTED FOR REVIEW

When a judgment becomes final but is later vacated, altered, or amended and a new sentence imposed, is the case no longer final for the purpose of applying an intervening ameliorative change in the law?

INTRODUCTION

In *In re Estrada* (1965) 63 Cal.2d 270, this Court established the presumption that, unless the Legislature or the electorate says otherwise, an ameliorative statutory amendment applies retroactively to every case to which it constitutionally could apply, which includes all cases in which the judgment is not final.

In 1999, appellant was convicted of a special circumstance murder committed when he was 16 years old. In 2015, his sentence was vacated on federal constitutional grounds and he

was resentenced. While his appeal from his new sentence was pending, the electorate passed the Public Safety and Rehabilitation Act of 2016 ("Proposition 57"), which changed the way in which a juvenile offender is charged with crimes such as murder and requires the juvenile court to hold a transfer hearing to determine whether the juvenile offender should remain in juvenile court or be transferred to adult criminal court. Based on this intervening ameliorative change in the law, the court of appeal conditionally reversed appellant's sentence and directed that his case be transferred to juvenile court for a transfer hearing.

Respondent claims that appellant is not eligible for a transfer hearing or any other benefit arising from ameliorative changes to the law enacted after his judgment became final on direct review in 2001. In furtherance of this claim, respondent argues that the *Estrada* presumption should be abrogated in cases like this one in which the judgment became final on direct review but was subsequently reopened.

Respondent's proposed abrogation of the *Estrada* presumption should be rejected. As this Court reasoned in *Estrada*, when a legislative body enacts an ameliorative statutory amendment, it must have determined that the former law was too severe, and to conclude that the framers of the new law intended that the former law should nevertheless continue to apply in existing cases would be to conclude that they were motivated by a desire for vengeance or retribution.

This reasoning applies with equal force to cases like this one in which the judgment has been reopened because the sentence has been vacated and the case remanded for a new sentencing hearing. The *Estrada* presumption is based on the inference that the legislative body intends ameliorative changes to the law to apply to *every* case, past, present, and future, limited only by constitutional constraints on the power of the legislative branch of government. Respondent has offered no reason why the application of Proposition 57 to this case, or more generally why the application of ameliorative statutory amendments to cases in which the judgment has been reopened, would be unconstitutional.

Respondent does offer several "prudential" reasons for its proposed abrogation of the *Estrada* presumption, but the drawbacks of respondent's proposal far outweigh any disadvantages of simply preserving the *Estrada* presumption in cases like this one. Pursuant to respondent's proposal, at appellant's resentencing the trial court would be required to apply a confusing blend of current and outdated law, and the same set of concerns, rooted in evolving notions of juvenile justice, that led to the vacatur of appellant's original sentence and the redetermination of an appropriate sentence would be ignored in relation to Proposition 57, despite the electorate's view that the pre-Proposition 57 legislative scheme was too severe.

Furthermore, the ramifications of respondent's proposed abrogation of *Estrada* would extend well beyond the realm of juvenile justice. In any case in which the judgment becomes final

on the eve of an ameliorative change to the law, the new law would not apply, even if the judgment of conviction is subsequently reversed in its entirety, for example pursuant to a habeas petition, and the case retried. This raises the unsalutary prospect of simultaneous, parallel criminal proceedings, some based on current law and others based on outdated law that the Legislature or electorate has replaced because it was deemed too severe. Indeed, pursuant to respondent's proposal, the retrial of many if not most cases reversed on habeas would be governed by outdated law, a legal and administrative folly wholly inconsistent with the principles that guided this Court's decision in *Estrada*.

Respondent having presented no constitutional or compelling prudential basis for its proposed abrogation of *Estrada*, the *Estrada* presumption should simply apply in all cases in which the judgment is not final, regardless of the history of the case.

STATEMENT OF THE CASE

In 1999, a jury convicted appellant of murder (Pen. Code, § 187, subd. (a)) and conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1)) and found true special-circumstance allegations that the murder was committed by means of lying in wait and in the course of a robbery (Pen. Code, § 190.2, subd. (a)(15), (17)(A)). The trial court imposed an LWOP term on the murder conviction (Pen. Code, § 190.5, subd. (b)) and imposed and stayed a term of 25 years to life on the conviction for conspiracy to commit murder (Pen. Code, § 654). The court of appeal ruled that there was

insufficient evidence to support the lying-in-wait special circumstance finding but otherwise affirmed. (See *People v. Padilla* (2016) 4 Cal.App.5th 656, 660.)

In 2012, the U.S. Supreme Court decided *Miller v. Alabama* (2012) 567 U.S. 460 [132 S.Ct. 2455, 183 L.Ed.2d 407], and in 2014 appellant filed a habeas petition in the superior court, seeking resentencing under *Miller*. In 2015, the court granted the petition, vacated appellant's sentence, and resentenced appellant to an LWOP term. (See *Padilla, supra,* 4 Cal.App.5th at p. 660.) On appeal from the 2015 resentencing, the court of appeal reversed and remanded for a new resentencing hearing in view of the U.S. Supreme Court's decision in *Montgomery v. Louisiana* (2016) 577 U.S. – [136 S.Ct. 718, 193 L.Ed.2d 599]. (*Padilla, supra*, 4 Cal.App.5th at p. 659; C.T. 41-71.) Following a hearing on March 12, 2019, the superior court once again resentenced appellant to LWOP. (C.T. 169-170; R.T. 19-21.)

On appeal from the 2019 resentencing, the court of appeal conditionally reversed appellant's sentence and remanded with directions to transfer the matter to the juvenile court for a transfer hearing pursuant to Proposition 57. (*People v. Padilla* (2020) 50 Cal.App.5th 244, 256, review granted Aug. 26, 2020, S263375.)[1]

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[1] Because the facts of this case have little bearing on the question presented for review, appellant respectfully refers this Court to the court of appeal's summary of the trial evidence set forth in its previous decision in this case. (*Padilla, supra*, 4 Cal.App.5th at pp. 668-669.)

ARGUMENT

I. IN THE ABSENCE OF ANY CLEAR INDICATION OF LEGISLATIVE INTENT REGARDING RETROACTIVITY, AMELIORATIVE STATUTES SHOULD BE APPLIED TO ANY CASE IN WHICH THE JUDGMENT IS NOT FINAL, REGARDLESS OF THE HISTORY OF THE CASE

In *In re Estrada, supra,* 63 Cal.2d 270, this Court established a canon of statutory construction pursuant to which, in the absence of discernible legislative intent regarding retroactive application, ameliorative laws are presumed to apply to any case in which the judgment is not final. Respondent urges this Court to limit the application of the *Estrada* presumption to cases in which the judgment is not final *on direct review*.

A. Unless the Legislature or Electorate Says Otherwise, an Ameliorative Statute Is Presumed To Apply To Every Case To Which It Constitutionally Could Apply, Which Includes Every Case In Which the Judgment Is Not Final

Whether a statute operates retroactively or only prospectively is a matter of legislative intent. (*People v. Brown* (2012) 54 Cal.4th 314, 319.) But what if the legislative body's intent regarding the law's retroactive application cannot be discerned by reviewing the language of the statute or its legislative history?[2] In general, new laws are presumed to apply

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[2] For ease of reference, the terms 'legislative body' and 'enacting body' refer interchangeably to the California Legislature or the electorate, depending on which body authored the ameliorative law in question. (See *People v. Conley* (2016) 63 Cal.4th 646,

prospectively (see Pen. Code, § 3; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1224), but there is an exception to this presumption for ameliorative changes to laws governing criminal offenses and their penalties.

In *Estrada*, this Court held that statutory amendments mitigating punishment for an offense applied retroactively to a petitioner who, at the time of enactment, had committed the offense but had not yet been convicted and sentenced. (63 Cal.2d at pp. 742-743, 748.) The Court reasoned that, when the Legislature makes an ameliorative change to criminal law, it must have determined that the former law was too severe. (*Id*. at pp. 744-745.) As a result, pursuant to *Estrada*, an ameliorative statute is presumed to apply to every case to which it constitutionally could apply, which includes any case in which the judgment is not final. (*Id*. at p. 745.) "The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*Conley, supra,* 63 Cal.4th at p. 657; see *People v. Rossi* (1976) 18 Cal.3d 295, 304 [*Estrada* presumption is consistent with 'universal common-law rule,' citing *Bell v. Maryland* (1964) 378 U.S. 226, 230 [84 S.Ct. 1814, 12 L.Ed.2d 822]].).)

657.) This Court's approach in assessing intent regarding retroactivity has been substantially the same in either case. (See, e.g., *id*. at pp. 657-659.)

The *Estrada* rule is thus based on the inference that ameliorative laws are intended to apply to *all* cases, past, present, and future, subject only to constitutional limitations on the power of the legislative branch of government. The legislative body can, of course, choose to apply an ameliorative law more narrowly, but unless it makes clear such an intention, the default position is that the new law applies to every case within the legislative body's power to reach. This Court ruled long ago that, in this context, the outer limits of the legislative body's constitutional powers are demarcated by whether the judgment in a case is final or not.

Hence, both the reasons for, and the scope of, the *Estrada* presumption as applied over the past 56 years are straightforward: Unless the enacting body says otherwise, an ameliorative statutory amendment applies retroactively to every case to which it constitutionally could apply because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance.

B. The Judgment In a Criminal Case Is the Sentence, Which Becomes Final When All Available Appeals Are Exhausted Or Expire; If the Sentence Is Subsequently Vacated, There Is No Longer a Final Judgment

In *People v. McKenzie* (2020) 9 Cal.5th 40, this Court recently observed that, "In criminal actions, the terms 'judgment' and ' "sentence" ' are generally considered 'synonymous' [citation], and there is no 'judgment of conviction' without a sentence [citation]." (*Id*. at p. 46; accord *Burton v. Stewart* (2007)

(per curiam) 549 U.S. 147, 156-157 [127 S.Ct. 793, 166 L.Ed.2d 628] [" 'Final judgment in a criminal case means sentence. The sentence is the judgment' " (quoting *Berman v. United States* (1937) 302 U.S. 211, 212 [58 S.Ct. 164, 82 L.Ed. 204])].)

This Court has also long held that, for purposes of the *Estrada* presumption, a judgment becomes final when all avenues of appeal, including a petition for writ of certiorari in the U.S. Supreme Court, have been exhausted or the time in which to seek review has elapsed. (*People v. Vieira* (2005) 35 Cal.4th 264, 306 [for purposes of *Estrada* rule, " 'a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed' " (quoting *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5)]; see *Rossi, supra,* 18 Cal.3d at p. 304.)

As the U.S. Supreme Court has observed, however, a judgment that has become final may become non-final once again if reopened. (*Jimenez v. Quarterman* (2009) 555 U.S. 113, 119-120 [129 S.Ct. 681, 172 L.Ed.2d 475]; see *People v. Lizarraga* (2020) 56 Cal.App.5th 201, 207 ["We acknowledge that a grant of habeas corpus to resentence a defendant may change the finality date for purposes of retroactivity of later passed ameliorative laws. . . . When a defendant is resentenced, there is no longer a final judgment of conviction because there is no existing sentence"]; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1769 ["The first sentence had been vacated—for good reason . . . . It was a nullity. The trial court properly resentenced defendant 'from scratch' "].)

C. Because Appellant's Sentence Was Vacated In 2015 and His Direct Appeal from His New Sentence Is Still Pending, the Judgment In His Case Is Not Final, and Proposition 57 Can Therefore Be Applied Constitutionally To His Case Pursuant To Estrada

Proposition 57 changed the way juvenile offenders are charged in California: "Proposition 57 prohibits prosecutors from charging juveniles with crimes directly in adult court. Instead, they must commence the action in juvenile court. If the prosecution wishes to try the juvenile as an adult, the juvenile court must conduct what we will call a 'transfer hearing' to determine whether the matter should remain in juvenile court or be transferred to adult court. Only if the juvenile court transfers the matter to adult court can the juvenile be tried and sentenced as an adult. (See Welf. & Inst. Code, § 707, subd. (a).)" (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303 [footnote omitted].)[3]

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[3] Appellant was charged in 1998. Under the law at that time, appellant's case had to be brought in juvenile court. (See former Welf. & Inst. Code, § 707; *Juan G. v. Superior Court* (2012) 209 Cal.App.4th 1480, 1489 & fn. 4.) In order to try appellant as an adult, the district attorney had to file a motion pursuant to former Welfare and Institutions Code section 707, subdivision (c), for a judicial determination that appellant was not fit to be dealt with under juvenile court law. Since that time, the basic legal framework has changed twice: "Amendments to former [Welfare and Institutions Code] sections 602 and 707 in 1999 and 2000, some by initiative, changed this historical rule. Under the changes, in specified circumstances, prosecutors were permitted, and sometimes required, to file charges against a juvenile directly in criminal court, where the juvenile would be treated as an adult. . . . Proposition 57 changed the procedure again, and largely returned California to the historical rule. 'Among other

In *Lara*, noting the absence of any indication of the electorate's intent regarding retroactivity, this Court held that Proposition 57 applies retroactively pursuant to *Estrada* to cases not final on appeal. (*Lara, supra,* 4 Cal.5th at pp. 303, 314.) The Court also addressed how such cases are to be handled when the juvenile offender has already been tried in adult court: A juvenile court's decision in a retroactive transfer hearing to treat the defendant as a juvenile does not disturb the jury's findings; rather, the court must treat the defendant's convictions as juvenile adjudications and impose an appropriate disposition. (*Id*. at pp. 309-310; see *id*. at p. 313 [such remedies "are readily understandable, and the courts involved can implement them without undue difficulty"].)

1. The Judgment In This Case Is Not Final

Appellant's sentence was vacated by the superior court in 2015. (See *Padilla, supra,* 50 Cal.App.5th at p. 248, rev. gr.) As the court of appeal explained: "We begin with the simple observation that appellant's sentence is not final: the superior court vacated his original sentence and resentenced him, we then

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provisions, Proposition 57 amended the Welfare and Institutions Code so as to eliminate direct filing by prosecutors. Certain categories of minors . . . can still be tried in criminal court, but only after a juvenile court judge conducts a transfer hearing to consider various factors such as the minor's maturity, degree of criminal sophistication, prior delinquent history, and whether the minor can be rehabilitated.'" (*Lara, supra,* 4 Cal.5th at pp. 305-306; see *People v. Superior Court (Alexander C.)* (2019) 34 Cal.App.5th 994, 997-998.)

reversed his new sentence and remanded for another resentencing, and appellant has taken this direct appeal from his second resentencing. Because appellant's sentence is still pending on direct appeal, his judgment is not final under our Supreme Court's definition of finality for retroactivity purposes." (*Id*. at pp. 253-254; see *Lizarraga, supra,* 56 Cal.App.5th at p. 207; *Garcia, supra,* 32 Cal.App.4th at p. 1769.)

Respondent does not appear to contest the court of appeal's observation that the sentence –and therefore the judgment– in this case is not final. Respondent's contention is rather that the *Estrada* presumption "should not be extended to reopened judgments." (OBM at p. 11.)[4]

2. Respondent Offers No Reason Why Proposition 57 Cannot Constitutionally Be Applied To This Case

In several places in its opening brief on the merits, respondent argues that it is better for the legislative body to decide whether and to what extent a law applies retroactively than to leave such decisions to the courts: "The Legislature or the electorate may wish to direct, as they often do, that a new law

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[4] Respondent expresses the concern that "a rule that extends the *Estrada* presumption beyond initial finality might also pose complexities for reviewing courts in determining what qualifies as a 'reopened' judgment for these purposes." (OBM at p. 31.) No such complexities are presented in this case, however, given that appellant's original sentence was vacated. Whether certain minor sentence modifications might not constitute a reopening of the judgment is not at issue in this case.

be implemented retroactively in a particular way, subject to certain limitations or operative in only in a class of cases. Or they may determine that a law is more appropriately applied retroactively in a blanket manner—or perhaps not at all. These considerations depend largely on the nature of the new law, and selection of the most appropriate path is better suited to the decisionmaking process of lawmakers than to a judicial presumption." (OBM at p. 22; see also p. 23 ["nuanced questions about the applicability of new laws to cases that have already become final on initial direct review are best left to the Legislature and the electorate"], p. 25 ["The application of a new ameliorative law to judgments that have already become final on initial review may often present questions of judgment that are better addressed by the Legislature or the electorate"], p. 31 ["In contrast to *Estrada*'s less nuanced presumption, lawmakers are better equipped to balance concerns about both the scope and the uniformity of application of a new law to already-final judgments"].)

But the *Estrada* presumption is not based on a preference for the judiciary over the Legislature or the electorate. It is rather a canon of statutory construction to be applied only in the absence of discernible intent of the enacting body regarding the retroactive application of the statute. (See *Lara, supra,* 4 Cal.5th at p. 307.) Respondent's arguments amount to a wish that lawmakers would always specify whether and to what extent a new law applies retroactively, so that such decisions are not left to the courts. But regardless of the wisdom of such a wish,

respondent's preference for a clear expression by the Legislature or electorate as to retroactivity has no bearing on the issue here, which is how courts should apply a new law in the absence of any clear indication of intent. As this Court explained in *Estrada*, "Had the Legislature expressly stated which statute should apply, its determination, either way, would have been legal and constitutional. It has not done so. We must, therefore, attempt to determine the legislative intent from other factors." (*Estrada, supra,* 63 Cal.2d at p. 744.)

Among those other factors, "There is one consideration of paramount importance. It leads inevitably to the conclusion that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail." (*Id*. at pp. 744-745.) "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." (*Id*. at p. 745.) It is therefore "an inevitable inference" that the legislative body "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." (*Ibid*.) "This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Ibid*.)[5]

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[5] In 1996, this Court rejected the Attorney General's invitation to reconsider the penological underpinnings of *Estrada*: "As we

The *Estrada* presumption is thus based on "an inevitable inference" that arises whenever an ameliorative law is passed, an inference regarding the "obvious" intent of the legislative body with respect to the law's retroactive application: "We have 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." (*Lara, supra*, 4 Cal.5th at p. 308, fn. 5.)

When the enacting body does not specify to what extent a particular ameliorative statute applies retroactively, the *Estrada* rule extends the law's reach to the maximum extent constitutionally permissible, based not on what California's judiciary considers fair or just –"a judicial presumption" as respondent puts it (OBM at p. 22), but rather on broader observations concerning the implicit –what this Court described

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noted in *Pedro T.,* 'the development of modern theories of penology has continued to unfold,' and, in California, the Legislature has expressly declared the purpose of imprisonment for crime to be punishment. ([*In re Pedro T.* (1994) 8 Cal.4th 1041, 1045, fn. 1], citing § 1170.1, subd. (a)(1).) At oral argument the Attorney General invited us to reconsider *Estrada* in light of the change in the philosophy of the purpose of imprisonment reflected in section 1170, subdivision (a)(1). In the 31 years since this court decided *Estrada,* and its companion case, [*People v. Kirk* (1965) 63 Cal.2d 761], the Legislature has taken no action, as it easily could have done, to abrogate *Estrada.* We therefore decline the invitation." (*Nasalga, supra,* 12 Cal.4th at p. 792, fn. 7; see *Brown, supra,* 54 Cal.4th at p. 324.) Nor has the Legislature taken any action to abrogate *Estrada* during the 25 years since *Nasalga* was decided.

as the "obvious"– intent of any rational legislative body moved to enact statutory amendments of an ameliorative nature.

Respondent describes the *Estrada* rule as "a presumption that the Legislature intends a new ameliorative law to apply to all nonfinal criminal judgments." (OBM at p. 10.) Though technically correct, this articulation of the rule skips a critical step: An ameliorative statute applies to all nonfinal criminal judgments under *Estrada* because that is the category of cases that includes "every case to which it constitutionally could apply." The limits of the retroactive application of ameliorative laws under *Estrada* are thus constitutional in nature, which means that the only cases beyond the scope of the *Estrada* presumption are those to which the new law *could not constitutionally apply*. (See *McKenzie, supra,* 9 Cal.5th at p. 48 ["the People offer no basis for concluding that the revisions to section 11370.2 may not 'be applied constitutionally' to defendant. . . . Thus, applying those revisions in this case is fully consistent with *Estrada*"]; *People v. Community Release Bd*. (1979) 96 Cal.App.3d 792, 799 ["Can the new ameliorated punishment for kidnapping for robbery constitutionally be applied to real party? Clearly it can"].)

Respondent misses the near universal, comprehensive nature of the *Estrada* presumption by describing it as a "rule of convenience" and a "useful expedient" (OBM at p. 30). Such descriptions obscure and downplay the compelling basis for the presumption –this Court's observation that "to hold otherwise would be to conclude that the Legislature was motivated by a

desire for vengeance"– and the "inevitable inference" that the legislative body "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 [emphasis added].) The *Estrada* presumption is thus an inevitable inference regarding legislative intent, not a useful expedient.

In applying an ameliorative statute to "every case to which it constitutionally could apply," this Court observed that "The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Estrada, supra,* 63 Cal.2d at p. 745; see *McKenzie, supra,* 9 Cal.5th at p. 44 [describing this formulation as "consistent with the common law rule"].) In this context, such constitutional limitations are generally rooted in the separation of powers provisions in Article III, section 3, of the California Constitution, which prevent the Legislature from encroaching on the core functions of the judicial branch: "We have held that the separation of powers doctrine is violated only when the actions of a branch of government defeat or materially impair the inherent functions of another branch." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 663.)[6]

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[6] One court has advanced an additional basis for *Estrada*'s incorporation of the final judgment rule: "[A]s indicated by its clearly expressed limitation, the *Estrada* holding does not apply to cases where, as here, the judgment became final prior to enactment of the ameliorative law. [Citations.] The date of final

Although respondent offers several "prudential reasons" (OBM at p. 18) for its proposed abrogation of the *Estrada* presumption, nowhere in its brief does respondent offer any argument as to why the application of an ameliorative statute such as Proposition 57 to cases like this one, in which the sentence has been vacated, would be unconstitutional. (Cf. *People v. Lynch* (1999) 69 Cal.App.4th 313, 318-319 [Under separation of powers doctrine, legislative amendment of statute of limitations that revived certain offenses on which limitations had previously expired could not be applied to permit re-prosecution of defendant whose earlier prosecution on identical lewd conduct charges, after original limitations period had expired, had been dismissed].)

Respondent would have a hard time making such an argument in view of recent precedent holding that retroactive application of ameliorative statutes is not unconstitutional even when applied to cases with *final* judgments. (See *People v. Lippert* (2020) 53 Cal.App.5th 304, 313 ["the legal landscape is rife with legislation allowing petitioners to reopen final judgments of conviction without regard to their finality as of the effective date of the legislation, for example, Propositions 36 and 47"]; *People v. Alaybue* (2020) 51 Cal.App.5th 207, 221 ["section

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judgment is determinative, because the sentence then becomes res judicata. Thereafter the court has no further jurisdiction over the punishment." (*In re Moreno* (1976) 58 Cal.App.3d 740, 742.) Here, the court's jurisdiction over appellant's case was restored by appellant's successful collateral challenge to his original sentence on constitutional grounds, which prompted vacatur of that sentence and the imposition of a new sentence.

1170.95 represents an appropriate exercise of the Legislature's power to permit judicial revision of final judgments to reduce punishment for those convicted of murder offenses under the felony-murder rule or natural and probable consequences doctrine. Such legislation is not uncommon. Indeed, it 'appears settled that a final judgment is not immune from the Legislature's power to adjust prison sentences for a legitimate public purpose.' [Citations.] . . . Thus, we conclude that section 1170.95 does not violate separation of powers principles"]; *People v. Lamoureux* (2019) 42 Cal.App.5th 241, 271 ["there is substantial precedent for remedial legislation authorizing the ameliorative reopening of final judgments of conviction to benefit criminal defendants"].)

Nor is this precedent limited to recent cases. (See *Community Release Bd., supra,* 96 Cal.App.3d at p. 800 ["We therefore take it as settled that legislation reducing punishment for crime may constitutionally be applied to prisoners whose judgments have become final"]; see also *Way v. Superior Court* (1977) 74 Cal.App.3d 165, 181 (conc. opn. of Friedman, J.) [describing *Estrada*'s final judgment limitation as an "archaic dictum" that "accords too much sanctity to the rule insulating final criminal judgments from the collective impact of penal law revisions. . . . There is nothing sacred about a final judgment of imprisonment which immunizes it from the Legislature's power to achieve equality among past and new offenders"].)

Furthermore, there is no logic to respondent's argument (OBM at pp. 25-26) that a new ameliorative statute should not

apply retroactively to reopened judgments because the lawmakers did not specify whether it should or not. (See *People v. Lopez* (2020) 56 Cal.App.5th 835, 849 ["given that the voters did not address retroactivity at all in the text of Proposition 57 or its ballot materials (*Lara, supra*, 4 Cal.5th at p. 309 . . .), we decline to construe the voters' silence as indicating an intent to limit the reach of the act's reforms. Like *Lara*, we will instead heed the voters' intent that Proposition 57 be liberally construed to accomplish its purpose of emphasizing rehabilitation, especially for juveniles"], review granted Jan. 27, 2021, S265936.)

Respondent contends that, "Because a decision about retroactivity is always in the hands of the framers of a new law, there is little need to extend the *Estrada* presumption to reopened judgments." (OBM at p. 22.) But this argument could be made in opposition to *any* retroactive application of an ameliorative law, including to cases with nonfinal judgments, and simply calls into question the *Estrada* ruling itself.

In fact, the reverse argument is more consistent with the fundamental concerns set forth in *Estrada*: Because the framers of an ameliorative law are always free to specify that it *does not* apply retroactively to reopened judgments, there is little need to abrogate the *Estrada* presumption in such cases. *Estrada* establishes a default presumption that ameliorative laws are intended to apply to every case, past, present, and future, limited only by constitutional constraints. Respondent's proposed abrogation of the *Estrada* rule carves out an exception that only complicates matters, especially since the proposed exception is

not based on the same constitutional limitations (every case to which the new law could constitutionally apply) set forth in *Estrada*.

What respondent describes as the "less nuanced" nature of the *Estrada* presumption (OBM at p. 31) is precisely what makes it so straightforward. *Estrada* established a default presumption of retroactive application of ameliorative amendments based on a "consideration of paramount importance" that applies with equal force in cases with reopened judgments. Any decision to limit the retroactive scope of an ameliorative amendment to a smaller category of cases (presumably based on considerations other than vengeance or retribution) should be left to the legislative body, not the courts.[7]

Nor does the "decades-long" litany of cases cited by respondent in which this Court has applied the *Estrada* presumption in the context of cases not final on direct appeal somehow demonstrate this Court's disinclination to apply the presumption to reopened judgments, as respondent claims (OBM at p. 24). As respondent points out, none of those cases involved the question presented for review in this case, and "it is axiomatic that a decision does not stand for a proposition not considered by the court." (*People v. Barker* (2004) 34 Cal.4th 345,

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[7] Respondent asserts that "Application of new laws to judgments that have already become final on initial review presents distinct questions from the ordinary implementation of the *Estrada* presumption in cases that are not yet initially final." (OBM at p. 22.) But respondent never explains the nature of such distinctions or why *Estrada*'s 'paramount consideration' does not apply with equal force in such cases.

354.) The court in *People v. Lopez* recently rejected the very same argument: "The People argue the California Supreme Court has considered the retroactivity of statutes only in cases where the defendants were pending trial or on their first appeal, not when a defendant's judgment was final. The absence of a definitive precedent on point is of course no reason to deny defendant's request for a transfer hearing." (*Lopez, supra*, 56 Cal.App.5th at p. 848, rev. gr.)[8]

Respondent also claims that the *Estrada* presumption should not apply to reopened cases because neither the Legislature nor the electorate would expect it to. Respondent argues that language included in Senate Bill No. 620, which gave trial courts discretion to strike certain firearm enhancements, provides "at least some affirmative evidence" that neither the Legislature nor the electorate "view the Estrada presumption as applying to reopened judgments." (OBM at pp. 24-25.) Specifically, respondent points to language in the bill providing that "The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Pen. Code, § 12022.5, subd. (c), § 12022.53, subd. (h), as amended by Sen. Bill No. 620 (2017-2018 Reg. Sess.), Stats. 2017, ch. 682 [identical provisions appear in both subdivisions].) Respondent contends that, "Had the Legislature thought that the *Estrada*

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[8] As the *Lopez* court pointed out, "In any event, the People's desire for a definitive ruling on this question will likely be satisfied soon enough, because the California Supreme Court granted review in both *Padilla* and *Federico* to consider these issues." (*Id*. at p. 848, fn. 7, rev. gr.)

presumption would ensure that the law applied to matters that are 'reopened' because of unrelated resentencing, there would have been no need to include that particular language." (OBM at p. 25.)

Yet, courts interpreting S.B. 620's amendments have consistently relied on *Estrada*, not the language cited by respondent, as authority for applying them retroactively. (See *People v. Harris* (2018) 22 Cal.App.5th 657, 659 [noting that, in holding that S.B. 620 applies retroactively to all nonfinal cases, "We reached this conclusion by following our Supreme Court's directive in *In re Estrada*"]; accord, *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56-57; *People v. Valenzuela* (2018) 23 Cal.App.5th 82, 87-88; *People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679.) If respondent were correct, reliance on *Estrada* would have been unnecessary, if not misplaced.

Courts appear to have viewed the language cited by respondent as referring broadly to the reason for the resentencing proceeding, not limited to the issue of retroactivity. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424 [noting that "The discretion conferred by the statute 'applies to any resentencing that may occur pursuant to any other law' . . ., *and* it applies retroactively to non-final judgments" (emphasis added)].) In *People v. Arredondo* (2018) 21 Cal.App.5th 493, the court identified resentencing after a successful habeas challenge as one type of resentencing to which S.B. 620 applied: "By its express

terms, this provision extends the benefits of Senate Bill 620 to defendants who have exhausted their rights to appeal and for whom a judgment of conviction has been entered but who have obtained collateral relief by way of a state or federal habeas proceeding." (*Id*. at p. 507; accord, *People v. Zamora* (2019) 35 Cal.App.5th 200, 207-208.) But nothing in *Arredondo* suggests that this was the sole purpose of this provision.

Respondent's argument is that such language would have been unnecessary had the Legislature been confident that S.B. 620's amendments would be applied to such cases anyway pursuant to *Estrada*. But to the extent the Legislature was unsure whether S.B. 620 would be applied to re-sentencings following successful habeas challenges, such uncertainty does not favor respondent's proposed abrogation of *Estrada*, but merely warrants clarification. (See *Lopez, supra*, 56 Cal.App.5th at p. 848, fn. 7 ["the People's desire for a definitive ruling on this question will likely be satisfied soon enough"], rev. gr.)

In any event, constitutional limitations are not defined by the Legislature's expectations or lack of certainty. Retroactive application of Proposition 57 to cases in which the sentence has been vacated and the case remanded for a new sentencing hearing does not amount to unconstitutional encroachment on core judicial functions. Indeed, as noted previously, the law could reach even further without violating constitutional limitations. (See *People v. Bucio* (2020) 48 Cal.App.5th 300, 314 ["The District Attorney argues the Legislature may not reopen a judgment of conviction once the case has become final. But where legislation

reopening a final judgment of conviction is no ‘risk to individual liberty interests’ and provides ‘potentially ameliorative benefits to the only individuals whose individual liberty interests are at stake in a criminal prosecution,’ such legislation is permissible”].)

3. Even If Proposition 57 Cannot Constitutionally Be Applied To Appellant’s Convictions, It Can Still Be Applied To His Sentence

Appellant’s sole claim concerns his eligibility for a transfer hearing pursuant to Proposition 57. This Court has already addressed the situation presented in cases like this one in which the defendant has been tried and convicted in adult court before Proposition 57 went into effect. If, after conducting the transfer hearing, the juvenile court determines that it would have transferred the juvenile offender to a court of criminal jurisdiction because he or she is not a fit and proper subject to be dealt with under the juvenile court law, then the juvenile offender’s convictions and sentence are reinstated. On the other hand, if the juvenile court finds that it would not have transferred the juvenile offender to a court of criminal jurisdiction, then it treats the convictions as juvenile adjudications and imposes an appropriate ‘disposition’ within its discretion. (See *Lara, supra,* 4 Cal.5th at pp. 310-311; see *id.* at p. 313 [“we believe [such] remedies . . . are readily understandable, and the courts involved can implement them without undue difficulty”].)

This remedy significantly reduces the extent to which the

finality of matters previously adjudicated is disturbed. The remedy also aligns with this Court's remedy in *People v. Jackson* (1967) 67 Cal.2d 96. In *Jackson*, the defendant's judgment of death became final when he failed to seek certiorari, but in a subsequent habeas corpus proceeding this Court reversed Jackson's death sentence and remanded for a penalty retrial.[9] (*Id*. at p. 97.) Jackson was again sentenced to death and, on appeal from his new sentence, sought to raise both guilt-phase and penalty-phase claims based on *Escobedo v. Illinois* (1964) 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977], which was decided after his original judgment became final but before his penalty retrial. (*Jackson, supra*, 67 Cal.2d at pp. 98-99.)

Because *Escobedo* applied retroactively only to judgments not final at the time it was decided, this Court rejected Jackson's attempt to challenge his convictions based on that decision, noting that it had reversed only his death sentence: "The scope of this retrial is a matter of state procedure under which the original judgment on the issue of guilt remains final during the retrial of the penalty issue and during all appellate proceedings reviewing the trial court's decision on that issue." (*Id*. at p. 99; accord, *People v. Kemp* (1974) 10 Cal.3d 611, 614 [applying *Jackson* to preclude capital defendant's *Escobedo*-based challenge to his final judgment on guilt following penalty retrial].) At the

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[9] Respondent's assertion that "*Jackson* did not involve a reopened judgment" (OBM at p. 35) is somewhat baffling in view of the reversal of Jackson's sentence on habeas and the equivalence between 'judgment' and 'sentence' that respondent acknowledges elsewhere in its brief.

same time, however, the Court ruled that Jackson could rely on *Escobedo* to challenge his new *sentence*, notwithstanding that his "conviction was final" before *Escobedo* was decided. (*Jackson, supra*, 67 Cal.2d at p. 100.) The *Jackson* court thus permitted a collateral proceeding to reopen the finality of a sentence for retroactivity purposes while preserving the finality of the conviction. (See *Lopez, supra*, 56 Cal.App.5th at p. 848 ["Resentencing need not make an entire judgment non-final, because the guilt portion of a judgment may be treated as final even if the penalty or sentence is later re-opened"], rev. gr.)

Respondent attempts to distinguish *Jackson* on the grounds that the case was remanded for a jury trial on the penalty phase of his prosecution. (OBM at pp. 35-36.) But here, appellant's resentencing required the trial court to evaluate the *Miller* factors in choosing which sentence to impose, based on testimony and evidence relevant to those factors presented at the resentencing hearing. (See *Padilla, supra,* 4 Cal.App.5th at p. 674 ["In view of the evolving standards for sentencing juveniles reflected in *Montgomery*, the parties were not fully apprised in advance of the resentencing hearing of the types of evidence potentially relevant to the trial court's determination. . . . We therefore remand the matter for resentencing"].) Regardless of any incidental relevance such testimony and evidence might have had at appellant's original trial, the issues the court was required to consider at appellant's resentencing hearing were distinct from the issues previously adjudicated in his case. Hence, the penalty phase retrial in *Jackson* does not appear to be different in any

material procedural sense from appellant's resentencing hearing.[10]

Applying the ameliorative provisions of Proposition 57 to appellant's sentence while preserving the finality of his convictions is also consistent with this Court's recent decision in *People v. McKenzie, supra*, 9 Cal.5th 40, which involved a sentence of probation. Even though McKenzie's convictions were final, this Court held that later-enacted ameliorative amendments could be applied to his sentence following revocation of his probation because an order granting probation that has become final has only 'limited finality' and does not constitute a final judgment for purposes of *Estrada*. (*Id*. at p. 47.) "*McKenzie* indicates that finality is not a binary concept and judgments can be final for some purposes but not others. . . . Although not squarely on point, *McKenzie* shows the California Supreme Court's willingness to allow defendants to take advantage of ameliorative legislation that occurs after their first opportunity for post-conviction review. This demonstrates the continuing vitality of *Estrada*'s inference that ameliorative legislation is intended to lighten the punishment for as many defendants as possible rather than holding defendants to existing sentences out

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[10] Respondent notes that, "The *Jackson* decision did not analyze or even mention the *Estrada* presumption" (OBM at p. 36). But the intervening law in *Jackson* was U.S. Supreme Court precedent (*Escobedo*), not an ameliorative statute, so *Estrada* was not implicated in that case and there was no reason to mention it. The point here is merely that the court of appeal's ruling in this case, which did not contemplate renewed challenges to appellant's verdicts, is consistent with *Jackson*.

of vengeance." (See *Lopez, supra*, 56 Cal.App.5th at pp. 847-848, rev. gr.)

4. The Drawbacks of Respondent's Proposed Abrogation of the *Estrada* Presumption Outweigh Any Disadvantages of Applying It In Cases Like This One

As discussed previously, the *Estrada* presumption is based on the "inevitable inference" that, when a legislative body enacts ameliorative statutory amendments, it "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.) This inference arises "because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Ibid*.) The Court described this as the "consideration of paramount importance." (*Id*. at p. 744.)

Not only has respondent offered no argument why applying an ameliorative statute such as Proposition 57 to cases like this one would be unconstitutional, it has also failed to explain why the "prudential" concerns it raises should take precedence over the "consideration of paramount importance" in cases in which the judgment has been reopened. Respondent asserts that "there is nothing necessarily vengeful or retributive about a choice to limit the application of a new ameliorative law to cases not yet final on initial review" (OBM at p. 22), yet fails to explain why *Estrada*'s paramount consideration has any less application to

cases with reopened judgments.

Respondent claims that "Considerations of uniformity and finality also counsel against extending *Estrada* to reopened judgments," citing references in California's Constitution to society's legitimate interest, and the interest of crime victims, in the finality of criminal judgments. (OBM at p. 26.) Yet, it is not the *Estrada* rule that rendered appellant's judgment no longer final, but rather U.S. Supreme Court jurisprudence on the intersection of juvenile justice with the Eighth Amendment prohibition against cruel and unusual punishment, as well as this Court's application of those cases to California's sentencing laws. Respondent's proposed abrogation of *Estrada* in cases like this one would not have prevented the vacatur of appellant's original sentence or the return of his case to the trial court for a new sentencing hearing.

Moreover, pursuant to respondent's proposal, in cases like this one the trial court would be required to apply whatever outdated, superseded laws existed at the time that all opportunities for direct review were exhausted or expired, notwithstanding the view of the Legislature or electorate that such laws were too severe.

Here, such a result would be especially unsalutary. As one court recently observed, "there has been a sea change in the law, procedurally and substantively, with respect to juvenile offenders (*Montgomery v. Louisiana* (2016) – U.S. – [136 S.Ct. 718, 734-735, 193 L.Ed.2d 599]), grounded in the recognition that children differ from adults because of their ' "diminished culpability and

greater prospects for reform" ' (*id*. at p. 733)." (*People v. Nash* (2020) 52 Cal.App.5th 1041, 1081.) And as this Court recently recounted: "In the years after the passage of Proposition 21, there was 'a sea change in penology regarding the relative culpability and rehabilitation possibilities for juvenile offenders, as reflected in several judicial opinions.' [Citation.] These changes were based upon developments in scientific research on adolescent brain development confirming that children are different from adults in ways that are critical to identifying age-appropriate sentences. [Citations.] In the same period, the California Legislature enacted numerous reforms reflecting a rethinking of punishment for minors. [Citations.]" (*O.G. v. Superior Court* (Feb. 25, 2021, S259011) – Cal.5th – [2021 WL 728368], at p.*2.)

Notwithstanding respondent's characterization of appellant's resentencing as "unrelated" to Proposition 57 (OBM at p. 18), both Proposition 57 and the aforementioned Eighth Amendment jurisprudence are part of this sea change. With respect to the evolution of high court jurisprudence concerning juvenile justice, as this Court explained: "At the core of *Miller*'s rationale is the proposition—articulated in *Roper*, amplified in *Graham*, and further elaborated in *Miller* itself—that constitutionally significant differences between children and adults 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.' (*Miller, supra*, 567 U.S. at p. –, 132 S.Ct. at p. 2465.) The high court said in plain terms that because of 'children's diminished culpability and

heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.' (*Id*. at p. –, 132 S.Ct. at p. 2469.) 'That is especially so because of the great difficulty . . . of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." [Citations.]' (*Ibid*.)" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1379.)[11]

Parallel concerns motivated the passage of Proposition 57 in 2016: "Sixteen years after Proposition 21, the electorate approved Proposition 57, which repealed both discretionary and mandatory direct filing by prosecutors and emphasized juvenile rehabilitation. During that time there had been a sea change in penology regarding the relative culpability and rehabilitation possibilities for juvenile offenders, as reflected in several judicial opinions." (*People v. Vela* (2018) 21 Cal.App.5th 1099, 1106.) "[W]hile the intent of the electorate in approving Proposition 21 was to broaden the number of minors subject to adult criminal prosecution, the intent of the electorate in approving Proposition 57 was precisely the opposite. That is, the intent of the electorate in approving Proposition 57 was to broaden the number of minors who could potentially stay within the juvenile justice system, with its primary emphasis on rehabilitation rather than punishment." (*Id*. at p. 1107.)

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[11] *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1]; *Graham v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011, 176 L.Ed.2d 825].

"The major and fundamental purpose of Proposition 57's juvenile justice provisions — as evidenced by its express language and enumerated purposes, the ballot materials, and its historical backdrop and the changes it made to existing law — was an ameliorative change to the criminal law that emphasized rehabilitation over punishment." (*O.G., supra*, – Cal.5th – [2021 WL 728368], at p.*23.) "One stated purpose of the act is to '[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles.' (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 2, p. 141.) Proposition 57 also provides that the 'act shall be liberally construed to effectuate its purposes.' (*Id*., § 9, p. 146.)" (*Lara, supra*, 4 Cal.5th at p. 309.)

Pursuant to respondent's proposed abrogation of *Estrada* in cases like this one, at appellant's resentencing the trial court would be required to follow *Miller* and its progeny but ignore Proposition 57. In applying this confusing blend of current and outdated law, the same set of concerns that ultimately led to the vacatur of appellant's original sentence, and the redetermination of an appropriate sentence, would be ignored in relation to Proposition 57, despite the electorate's view that the pre-Proposition 57 legislative scheme was too severe: " 'Applying the reasoning of *Estrada*, we find that by its approval of Proposition 57, . . . the electorate has "expressly determined" that the former system of direct filing was "too severe." . . . Further, we find an "inevitable inference" that the electorate "must have intended" that the potential "ameliorating benefits" of rehabilitation (rather than punishment), which now extend to every eligible minor,

must now also "apply to every case to which it constitutionally could apply." . . .' " (*Lara, supra*, 4 Cal.5th at p. 309, quoting *People v. Vela* (2017) 11 Cal.App.5th 68, 77-78, review granted July 12, 2017, S242298; see *ibid*. ["We agree with *Vela* that *Estrada*'s inference of retroactivity applies here. Proposition 57 is an 'ameliorative change[ ] to the criminal law' that we infer the legislative body intended 'to extend as broadly as possible' "].)

Such an awkward and manifestly inconsistent result could not be justified by society's interest in the finality of criminal judgments since, as previously mentioned, the finality of appellant's judgment has already been disrupted by the vacatur of his original sentence –for substantially the same basic reasons, the 'sea change' in prevailing notions of juvenile justice, that motivated the electorate to enact Proposition 57. Instead, the selective application of new and outdated laws would be based on a relatively obscure legal technicality –*i.e.*, respondent's proposed limitation on *Estrada*.

Noting that appellant "is now well past the age of juvenile court jurisdiction" (OBM at p. 29), respondent argues that "it is unlikely that the electorate in enacting Proposition 57 would have envisioned retroactive transfer hearings years—or, as in this case, more than a decade— after a conviction became final" (OBM at p. 30). But this argument overlooks the fact that juvenile offenders who elude capture or whose proceedings are otherwise delayed are eligible for a transfer hearing no matter how many years after they have aged out of the juvenile court system. (See *People v. Ramirez* (2019) 35 Cal.App.5th 55, 60-61

[affirming referral for transfer hearing for defendant who was 28 years old]; *People v. Garcia* (2018) 4 Cal.App.5th 299, 321, 330 [ordering transfer hearing for defendant who was over 40 years old]; *Lara, supra*, 4 Cal.5th at p. 313 [courts can implement retroactive transfer hearings "without undue difficulty," and the potential complexity in providing such hearings "is no reason to deny the hearing"].)[12]

"Because the juvenile court's jurisdiction is based on age at the time of the violation of a criminal law or ordinance, '[i]t is therefore possible that a person might commit a murder at age 17, be apprehended 50 years later, and find himself subject to juvenile court jurisdiction at age 67.' " (*Ramirez, supra,* 35 Cal.App.5th at p. 66, quoting *Rucker v. Superior Court* (1977) 75 Cal.App.3d 197, 200.) Such cases do in fact arise in California.[13]

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[12] As the court of appeal observed in this case, "we see no reason why the juvenile court cannot adapt Proposition 57's criteria to assess whether a person like appellant, who committed a crime as a minor but is now an adult, should or should not have been tried as an adult." (*Padilla, supra,* 50 Cal.App.5th at p. 255, rev. gr.)

[13] See Svoboda, *New suspect in 35-year-old murder makes appearance in El Dorado County court*, Tahoe Daily Tribune (Feb. 20, 2020) ["Michael Green, the new suspect in the 1985 Jane Hylton murder case, made his first appearance in El Dorado County juvenile court Wednesday. Prosecutors are aiming to try the defendant, who was 17 years old at the time of Hylton's death, in adult criminal court. Green is scheduled to appear again in court March 20 in El Dorado County Superior Court, following the county probation department's completion of a 'transfer hearing report.' The report is the first move in transferring a defendant from juvenile to adult court. As a teen at the time of the murder, the now-51-year-old's trial is especially

Nor is the prospect of rehabilitation the sole issue in deciding which court should have jurisdiction over a juvenile offender. (See *People v. Hwang* (2021) 60 Cal.App.5th 358, at p.*4 ["Although defendant here may no longer receive rehabilitation in the juvenile justice system, he could receive the benefit of a lesser sentence based on his lesser culpability when he committed his crimes as a 15-year-old"].)

Moreover, respondent's proposed abrogation of *Estrada* would result in a far more deleterious distortion in what is likely a more common situation: a defendant who is the quintessential target of an ameliorative amendment but who is excluded from the new law's benefits because his or her judgment becomes final on the eve of the amendment's effective date, even though the judgment is subsequently reopened. For example, a juvenile offender whose judgment became final on November 8, 2016 (the day before Proposition 57 went into effect), but was reopened shortly thereafter, would fall outside the retroactive scope of Proposition 57. Pursuant to respondent's proposal, that juvenile offender, conceivably still a minor at the time the case was remanded for further proceedings, might have to be re-tried in adult court, depending on the offense, or could be re-tried in adult court at the discretion of the prosecutor and would have no right to a transfer hearing (see *O.G., supra,* – Cal.5th – [2021 WL 728368], at p.*1), despite the fact that his or her case is exactly the kind of case Proposition 57 was intended to address. In the

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unusual, according to El Dorado County District Attorney Vern Pierson"].

most extreme version of this scenario, certain 14 or 15-year-old offenders would have to be retried in adult court, depending on the offense (see *ibid*. ["For specified murders and sex crimes, Proposition 21 required prosecutors to charge minors 14 years old or older directly in criminal court"]), despite the Legislature's determination that minors under the age of 16 should no longer be prosecuted for any crime in adult court. Respondent's proposed limitation on the *Estrada* rule would thus forgo the will of the Legislature and the electorate in such cases for the sake of avoiding the occasional additional challenge of conducting a transfer hearing for the rare juvenile offender who has aged out of the juvenile court system.

Such a trade-off would entail a re-balancing of priorities entirely inconsistent with *Estrada*. Indeed, highlighting the paramount importance of applying ameliorative amendments to every possible case, this Court long ago ruled that the *Estrada* presumption applies even when the defendant has wrongfully delayed the finality of the judgment entered against him. (See *In re Fink* (1967) 67 Cal.2d 692, 694 [where sentence delayed because defendant escaped from jail, "that fact is immaterial. It ignores the basic rationale of the rule announced in the Estrada case. . . . The controlling consideration is not that petitioner may receive a lesser sentence due to his second escape but that he suffer the punishment deemed appropriate by the Legislature, no more and no less"]; *Moreno, supra,* 58 Cal.App.3d at p. 742, fn. 2.)

The ramifications of respondent's proposed abrogation of *Estrada* would also extend well beyond the realm of juvenile

justice. In any case in which the judgment becomes final on the eve of an ameliorative amendment, the new law would not apply, even if the judgment of conviction is subsequently reversed in its entirety, for example pursuant to a habeas petition, and the case retried. This, of course, raises the specter of two substantially indistinguishable defendants, one whose proceedings are delayed for any number of possible reasons (e.g., cooperation, competency, mistrial), and the other whose proceedings move swiftly to final judgment but are restarted following reversal on habeas.

In this scenario, respondent's proposed abrogation of *Estrada* would require two simultaneous, parallel criminal proceedings, one based on current law and the other based on outdated law that the Legislature or electorate has replaced because it was deemed too severe. This would hardly promote "uniform application of new laws," as respondent claims (OBM at p. 26) and seems instead like the "clumsy and uneven" (OBM at p. 22), "arbitrary, and sometimes awkward" (OBM at p. 27) application of new ameliorative laws that respondent seeks to avoid. In fact, none of the situations or scenarios presented by respondent as disfavoring the application of *Estrada* to cases with reopened judgments seems anywhere near as clumsy, uneven, arbitrary, or awkward as the aforementioned scenario, which seems just as likely to arise, and probably with greater frequency. Indeed, pursuant to respondent's proposal, the retrial of many if not most cases reversed on habeas would be governed by outdated law, a paradigm wholly inconsistent with the principles that guided this Court's decision in *Estrada*.

Respondent also claims that "It would be questionable to presume that the electorate necessarily envisioned a renewed fitness hearing under Proposition 57 for those in appellant's position" (OBM at p. 26, fn. 2) since he already had a fitness hearing as governed by the law at the time before his case was originally transferred to adult court. As one court recently explained, however, "there are key differences between a Proposition 57 transfer hearing and the analogous fitness hearing under prior law. Most notably, Proposition 57 shifts the burden of proof in the hearing. Under prior law, the juvenile court was bound by a rebuttable presumption that the defendant was not fit for the juvenile court system, whereas under current law there is no such presumption. (Welf. & Inst. Code, § 707, subd. (a).) In addition, the court at appellant's fitness hearing could not retain jurisdiction unless it found him fit for juvenile court under all five criteria. (Former Welf. & Inst. Code, § 707, subd. (c).) In a transfer hearing under current law, the court must consider all five factors, but has broad discretion in how to weigh them. (Welf. & Inst. Code, § 707, subd. (a)(2).)" (*Garcia, supra,* 4 Cal.App.5th at pp. 324-325.)

Any claim that a previous hearing conducted pursuant to an older legislative scheme should be good enough flouts the importance of the revised criteria set forth in the current statute and ignores the electorate's determination that older legislative schemes that have been superseded by Proposition 57 are no longer adequate. (See *Lara, supra,* 4 Cal.5th at p. 309.)

Lastly, respondent argues that its proposed abrogation of

Estrada in cases like this one is necessary to avoid "mischief" in the form of defendants gaming the system by deliberately ignoring "minor errors as an initial matter, hoping to invoke them later in the event of a new ameliorative law that might provide a greater benefit." (OBM at p. 28, fn. 3.)

As a practical matter, it seems unlikely that such tactics would overcome with any regularity the scrutiny of prosecutors and trial and reviewing courts and the limitations imposed by the doctrines of waiver and forfeiture. The Attorney General made analogous arguments in *McKenzie*, pointing out that retroactive application of ameliorative laws would encourage defendants to violate the terms of their probation in the hopes of extending the probation term to take advantage of any beneficial changes in the law during the probationary period. (*McKenzie, supra*, 9 Cal.5th at p. 48.) As this Court recalled in *McKenzie*, in deciding *Estrada* the Court confronted the dissenting view that its ruling would "give 'those contemplating and subsequently committing crime' incentive to 'seek[ ] every avenue of delay through appeals and legal maneuvers of all kinds' in the hope that 'the Legislature might in the meantime reduce the punishment.' . . . In other words, it would 'encourag[e] appeals and delays not related to guilt or innocence but employed solely to keep open the possibility of subsequent windfalls' through application of 'an ameliorating legislative act.' . . . Finally, it would create 'a gross inequity' and 'unequal treatment under the law' as to defendants who 'plead[ ] guilty to an offense' and whose 'conviction[s] promptly become[ ] final, thereby effectively shutting the door to

[their] ever receiving any benefit' from the ameliorative revision." (See *McKenzie, supra*, 9 Cal.5th at p. 49.)

This Court was unmoved by such arguments: "These policy arguments did not persuade us in *Estrada* not to apply ameliorative revisions to defendants who have already committed criminal acts *if* the revisions take effect *before* their 'cases' are 'reduced to final judgment.' . . . The People's similar arguments are no more persuasive today, more than 50 years later, in the context of determining whether *Estrada*'s rule includes defendants who are, when ameliorative statutory revisions take effect, appealing from a judgment entered upon revocation of probation. Indeed, we find it highly doubtful that a probationer would, as the People suggest, violate probation — and face probation revocation and imprisonment — simply in the hope that (1) the court would extend probation notwithstanding the violation, *and* (2) the Legislature would enact some ameliorative statute during the extended probationary term." (*McKenzie, supra*, 9 Cal.5th at p. 49.)

Lower courts have also been unmoved by such arguments: "The People finally argue on policy grounds that granting transfer hearings to individuals in defendant's position will create windfalls for those defendants who, due to fortuitous circumstances, are resentenced under section 1170, subdivision (d)(1), while others languish in prison without Proposition 57's benefit because there was no error in their original sentence that required resentencing. This argument could be restated as saying that because not every defendant will benefit from

retroactive application of Proposition 57, no defendant should receive the benefit. On its face, this argument runs contrary to the electorate's stated intent that Proposition 57 ' "shall be liberally construed to effectuate its purposes," ' one of which is to ' "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles." ' [Citation.] Moreover, our Supreme Court has repeatedly rejected similar arguments made against the *Estrada* rule itself." (*Lopez, supra*, 56 Cal.App.5th at p. 849, rev. gr.)

Respondent's policy arguments are no more persuasive in the context of applying the *Estrada* presumption to cases like this one in which the judgment is not final because the defendant's original sentence was subsequently vacated.

CONCLUSION

For the reasons set forth above, the decision of the court of appeal should be affirmed.

Respectfully Submitted,

Dated: February 26, 2021

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JONATHAN E. DEMSON
Attorney for Appellant

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Supreme Court No. S263375
v.	)	Court of Appeal No. B297213
MARIO SALVADOR PADILLA,	)	
Defendant and Appellant.	)	Superior Court No. TA051184

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.360(b)(1) of the California Rules of Court, appellant certifies that his answer brief on the merits filed in connection with the above-captioned matter consists of approximately 10,885 words, as determined by using the "word count" feature of the Microsoft Word program used in drafting the brief.

Respectfully Submitted,

Dated: February 26, 2021

JONATHAN E. DEMSON
Attorney for Appellant

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 2/26/2021 by M. Alfaro, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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