No. S263375

In the Supreme Court of the State of California

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

v.

MARIO SALVADOR PADILLA,
Defendant and Appellant.

Second Appellate District, Division Four, Case No. B297213
Los Angeles County Superior Court, Case No. TA051184
Honorable Ricardo Ocampo, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Much of appellant's answer brief essentially argues that this Court has already decided the question presented. He points to broad language in the *Estrada* decision indicating that the Legislature must presume that a new ameliorative law "should apply to every case to which it constitutionally could apply." (*In re Estrada* (1965) 63 Cal.2d 740, 745.) He reasons that, because there is no constitutional impediment to application of new laws to his reopened, and therefore nonfinal, judgment, the *Estrada* presumption must therefore necessarily apply. (ABM 13-32.) Respondent, however, does not dispute that after a judgment has become final on the conclusion of direct review it may be "reopened" and made nonfinal by various means. But notwithstanding *Estrada*'s broad language, it does not follow that the judicially-created presumption about legislative intent makes sense in the context of such cases, as opposed to cases that are not yet final on direct review. The question before the Court concerns the proper scope of *Estrada*'s presumption about legislative or electoral intent: whether the presumption should apply *even when* a judgment is rendered non-final because it is reopened by some means. This is a question the Court has not confronted until the instant case. For the reasons explained in respondent's opening brief, the presumption should not be so extended.

Appellant's arguments to the contrary are unpersuasive. (ABM 36-49.) They focus largely on the proposition that applying new ameliorative laws to reopened judgments would be salutary

in many cases. But that does not directly address the pertinent question. It is the Legislature or the electorate that decides whether and how to apply a new law, taking into consideration as part of that calculus the beneficial nature of the particular law along with other factors. The *Estrada* presumption is merely a means of ascertaining legislative intent when there is no clear indication as to whether a new law applies prospectively or retroactively. In light of its purpose and rationale, *Estrada*'s blanket presumption that the Legislature intends a new ameliorative law to apply to all nonfinal criminal judgments makes much less sense in the context of reopened judgments than it does in the context of initially nonfinal judgments. Nuanced decisions about application of new laws to reopened judgments are better left to the Legislature and the electorate in the first instance based on the particularities of each individual law.

ARGUMENT

I. A MECHANISTIC FOCUS ON FINALITY DOES NOT ANSWER THE QUESTION PRESENTED, WHICH CONCERNS THE PROPER SCOPE OF *ESTRADA*'S PRESUMPTION ABOUT LEGISLATIVE INTENT

Appellant correctly notes that respondent does not challenge the Court of Appeal's observation that the judgment in this case became nonfinal when appellant was resentenced. (ABM 19.) A criminal judgment is final when "the courts can no longer provide a remedy to a defendant on direct review." (*In re Spencer* (1965) 63 Cal.2d 400, 405; see also *People v. Buycks* (2018) 5 Cal.5th 857, 881 [finality occurs "when the availability of an appeal and the time for filing a petition for certiorari with the United States

Supreme Court have expired"].) After becoming final on direct appeal in 2002, the sentence here was vacated, and appellant was resentenced following the superior court's grant of his habeas petition. Appellant's judgment was therefore initially final and then "reopened," or made nonfinal, through subsequent collateral proceedings.

Respondent also acknowledges that the *Estrada* decision used broad language in describing the scope of its rule, indicating that it applies "to all nonfinal judgments" (see *People v. Brown* (2012) 54 Cal.4th 314, 324) and that the inference of legislative intent when a new ameliorative law is enacted is that it should apply "to every case to which it constitutionally could apply" (*Estrada, supra*, 63 Cal.2d at p. 745). (See ABM 21.)

But these observations do not necessarily answer the question posed by this case. The question is not simply a mechanistic one about the finality of judgments. It is whether it makes sense to apply the judicially-created *Estrada* presumption about legislative intent to "reopened" judgments. In practice, this Court has applied the *Estrada* presumption to new ameliorative laws in cases that were not yet final on direct review. (See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 304-305, 309 [Proposition 57 applies retroactively to nonfinal judgments]; *People v. McKenzie* (2020) 9 Cal.5th 40, 45 [a judgment was not final for *Estrada* purposes where probationer's time to appeal underlying conviction had expired but his case was on appeal following probation revocation and sentencing]; *People v. Frahs* (2020) 9 Cal.5th 618, 624 [Pen. Code, § 1001.36 diversion];

v. Stamps (2020) 9 Cal.5th 685, 699 [Senate Bill 1393].) It has not applied *Estrada* to a judgment that was final and then subsequently reopened.[1]

Respondent does not call into question the *Estrada* rule itself, or ask for any alteration or "abrogation" of that rule. (See ABM 19-20, 27.) Respondent agrees that the *Estrada* presumption makes sense in the context of initially nonfinal judgments. But even recognizing *Estrada*'s broad language, it is far from clear that the Court in that decision contemplated application of the presumption to reopened judgments, a question this Court has not heretofore addressed. Considerations different from those identified in *Estrada* would affect the analysis as to such judgments. (See Arg. II, *post*.)

Appellant himself ultimately acknowledges that uncertainty about the scope of the *Estrada* rule would warrant "clarification" by this Court. (ABM 31.) That is precisely respondent's point.

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[1] Appellant notes that this Court observed in *McKenzie* that the terms "judgment" and "sentence" are generally considered synonymous. (ABM 15.) But *McKenzie* involved a question about the initial finality of a judgment. In that case, the trial court revoked probation and imposed a sentence that included enhancements for prior drug convictions. (*McKenzie*, *supra*, 9 Cal.5th at p. 43.) This Court held that, because the defendant's direct appeal from sentencing was pending, the judgment was not final for *Estrada* purposes even though the statutory time to appeal the underlying conviction had lapsed. (*Id.* at p. 49.) And because the defendant's sentence was not yet final on initial review at the time of the new enactment, the case had not yet been "reduced to final judgment." (*Id.* at pp. 45-46.) Thus, *McKenzie* said nothing about the nature of "reopened" judgments or whether *Estrada* would apply to such judgments.

Not only do this Court's prior decisions applying *Estrada* leave the question here unaddressed, but the Legislature's actual practice tends to indicate that it does not assume new ameliorative laws will apply to reopened judgments. (See ABM 29-31, discussing Senate Bill 620.) The question remains an open one, to be decided in light of the purpose and rationale of the rule.[2]

II. IN LIGHT OF ITS PURPOSE AND RATIONALE, THE *ESTRADA* PRESUMPTION IS BEST APPLIED TO INITIALLY NONFINAL JUDGMENTS BUT NOT TO REOPENED JUDGMENTS

As discussed in the opening brief on the merits, Penal Code section 3 is the default rule regarding retroactivity of Penal Code provisions, providing that no statutory enactment is "retroactive, unless expressly so declared." (See also *Brown*, *supra*, 54 Cal.4th at p. 324 [statute that is ambiguous with respect to retroactive application is construed to be unambiguously prospective].) In

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[2] Relying on *People v. Jackson* (1967) 67 Cal.2d 96, appellant contends that his sentence, at the least, was nonfinal for *Estrada* purposes, even if his underlying conviction remained final when he was resentenced. (ABM 32-36.) But *Jackson* involved bifurcated capital proceedings in which the penalty phase was fully retried. This Court's noncapital precedents addressing finality do not appear to make a distinction like the one appellant draws from *Jackson*. (See e.g., *McKenzie*, *supra*, 9 Cal.5th at p. 46 [the terms "judgment" and "sentence" are generally synonymous in criminal cases].) Moreover, although it addressed the concept of finality, *Jackson* involved a question about the application of new decisional law, rather than new ameliorative legislation. It therefore did not cite or discuss *Estrada*, which was decided just two years earlier. The *Jackson* decision therefore sheds little light on the pertinent question in this case.

Estrada, this Court recognized a "contextually specific qualification" to the ordinary presumption that statutes operate prospectively. (*Id.* at p. 323.) Under *Estrada*, courts will presume that "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." (*Buycks, supra*, 5 Cal.5th at p. 881.) The rationale for this presumption is that "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," and therefore application of a new ameliorative law solely to future cases would be "a product simply of vengeance or retribution." (*Estrada, supra*, 63 Cal.2d at p. 745.)

As also elaborated in the opening brief, inasmuch as the *Estrada* presumption aims to approximate probable legislative intent, there is little reason to assume that the Legislature or the electorate intends all new ameliorative laws to apply to reopened judgments, as opposed to judgments that have not yet reached the point of initial finality. The Legislature and the electorate can, and often do, specify when and how a new ameliorative law applies retroactively, sometimes implementing the new law in a particular way or subject to certain limitations. (See, e.g., Pen. Code, §§ 1170.126 [Proposition 36]; 1170.18 [Proposition 47]; 1170.95 [Senate Bill 1437].) When the Legislature limits application of a new ameliorative law after initial finality, it is certainly not a product merely of "vengeance or retribution";

rather, it reflects that the application of new laws to judgments that have already become final on initial review presents distinct questions from the application of such laws to initially nonfinal judgments. Whether and how a new law should be applied to initially final judgments implicates considerations that depend in large part on the nature of the particular law—for example, how sweeping its effects might be, how important a reform it represents, and how complicated or burdensome it would be to implement retroactively.

Further, extending the *Estrada* presumption to reopened judgments would result in uneven, and sometimes arbitrary, application of new ameliorative laws. Whether a new law applied in this situation would necessarily depend on reopening the judgment for some unrelated reason—including even the correction of a minor and fortuitous error—which would result in sometimes markedly different treatment of otherwise similarly situated defendants. Extending *Estrada* to reopened judgments would also lead to awkward results, as some ameliorative laws—such as those discussed *post* regarding juvenile charging procedures—are ill suited for retroactive application long after a judgment was initially final. It is far from clear that the Legislature or the electorate can be presumed to envision such results when it enacts an ameliorative law. Indeed, that the Legislature specified in Senate Bill 620, for example, that the law applies in any postfinality resentencing is evidence that it does not actually view all new ameliorative laws as applying to reopened judgments under *Estrada*.

In light of these considerations, the rationale for *Estrada*'s exception to the default rule of Penal Code section 3 loses its force when it comes to reopened judgments because the Legislature or the electorate may have sound reasons for withholding the application of a new ameliorative law in that context. In other words, its silence as to retroactivity when it enacts a new law is susceptible to a different inference in this context from the one identified in *Estrada* as the only possible inference: that the failure to apply the law to nonfinal judgments would reflect merely vengeance or retribution. The question whether a new law should apply to reopened judgments is better suited to the decision-making process of lawmakers in the context of each individual new law than to a relatively blunt and imperfect judicial presumption. The ordinary rule of Penal Code section 3 is therefore more suitable after initial finality than is *Estrada*'s exception to that rule.

Appellant makes several counter-arguments, none of which are persuasive.

Appellant contends that failing to extend the *Estrada* presumption to reopened judgments would mean that some convicted persons would be deprived of the salutary benefits of new laws. (ABM 37-40.) In a similar vein, he argues that drawing a line at initial finality for purposes of *Estrada* would unfairly exclude those whose convictions became initially final just before enactment of a new law. (ABM 43-44.) And he points to "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," saying that this "would require two simultaneous, parallel criminal proceedings, one based on current law and the other based on outdated law …." (ABM 45.)

But it is for the Legislature or the electorate to decide whether and how a new ameliorative law will apply to initially final judgments. Penal Code section 3 and the *Estrada* exception are simply tools of statutory interpretation meant to effectuate legislative and electoral intent. The obvious observation that not every currently incarcerated person who could benefit from a particular new law will necessarily be entitled to do so is true wherever the line might be drawn and does not answer the question of whether *Estrada*'s blanket presumption actually approximates legislative intent in the context of reopened judgments.

Appellant provides the following 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." (ABM 43.) Upon resentencing under Penal Code section 1170, subdivision (d)(2), that defendant would be retried in adult criminal court and would not be entitled to a transfer hearing in juvenile court. (ABM 43.) This is correct, and such cases are the inevitable result of any "line-drawing" exercise in statutory application. (See *United States v. Wurzbach* (1930) 280

U.S. 396, 399 ["Whenever the law draws a line there will be cases very near each other on opposite sides"].)

Such line-drawing is also present and inevitable under appellant's proposed expansion of the *Estrada* exception. Under appellant's proposal, if a defendant had an error-free trial and sentencing, and could not avail himself of any subsequent resentencing legislation, then his judgment and conviction would remain final after he exhausted his direct appeal. This defendant would be ineligible to take advantage of any ameliorative legislation unless that legislation specifically provided for retroactive application. In contrast, a second hypothetical defendant, who challenged several errors at trial or sentencing, or who was able to take advantage of unrelated resentencing provisions for example, could extend or reopen the finality of his or her conviction past the enactment date of the ameliorative legislation. The availability of the ameliorative legislation would be entirely dependent on the timing of the defendants' individual actions. In the hypothetical case, the defendant with the error-free trial would not be eligible for the new ameliorative benefit, whereas the defendant whose case had procedural errors that were later addressed would be eligible under the ameliorative laws. Followed to its conclusion, appellant's argument would simply mean that every law should be fully retroactive so that no defendant would fall on the "wrong" side of the line.

Anomalous results are present whenever there are eligibility determinations based on line-drawing. But any such inconsistencies are simply the result of the Legislature's intent as

written in the ameliorative legislation or otherwise ascertained under Penal Code section 3 and *Estrada*. In any event, the *Estrada* presumption as applied to reopened judgments does not involve line-drawing as such, but rather individualized exception-making to an otherwise clear line of finality. This tends to undermine appellant's argument for expanding *Estrada* beyond the relatively clear line of initial finality.

Moreover, contrary to appellant's arguments, the law at issue here does not provide an example showing that the electorate must have intended its application to reopened judgments. According to this Court's reading of the *Estrada* rule to date, a juvenile offender whose judgment became final on November 8, 2016 (the day before Proposition 57 went into effect), but was then reopened shortly thereafter, would fall outside the retroactive scope of Proposition 57. Appellant claims that this would be "exactly the kind of case Proposition 57 was intended to address" and that this reading of the *Estrada* rule would "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." (ABM 43-44.) But as appellant acknowledges, the electorate in Proposition 57 determined that minors should *no longer* be tried in adult court without a transfer hearing in juvenile court, and the Legislature later determined that minors under the age of 16 should *no longer* be prosecuted in adult court. Appellant asserts that this reflects "the will" of the electorate. (ABM 44.) But again, the

argument assumes too much. Prior to Proposition 57 (and prior to Senate Bill 1391 for minors under 16), minors were allowed to be tried directly in adult court, and they properly were. Those whose judgments were final as of November 8, 2016, and never reopened may not avail themselves of the new law. If the Legislature or the electorate intended for the ameliorative changes to apply to all prior matters, regardless of finality, it could have so stated. But limiting the *Estrada* rule to initially nonfinal judgments does not violate "the will" of the Legislature or the electorate any more than expanding it to reopened judgments does. Appellant's argument simply suggests that all new laws should be fully retroactive.[3]

Appellant also argues that the failure to follow the *Estrada* presumption when a judgment is reopened would require the application of a "confusing blend of current and outdated law" in such circumstances. (ABM 40.) But it is unclear how this would be confusing or unworkable in a way that informs the question of

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[3] Appellant also dismisses respondent's observation that extending the *Estrada* presumption to reopened judgments would undermine important principles of finality. (ABM 37.) It is true that reopened judgments necessarily involve upsetting finality to some extent whether or not a new law could be applied. Respondent's point is only that in some instances finality may be upset to a much greater degree than otherwise when a new law is applied to a reopened judgment. For example, recalculation of custody credits could result in a "reopened" judgment. (See *Gonzalez v. Sherman* (9th Cir. 2017) 873 F.3d 763, 769.) But the practical import of such a recalculation would likely be insignificant compared to the application of a new law that, for example, reduced a criminal judgment to a juvenile adjudication.

legislative intent. In fact, it would be true any time the Legislature or the electorate specifies limited application of a new law that in some cases a judgment could be reopened and altered without application of the new law. A defendant who does not qualify under the new law (for example, one who is excluded from Proposition 36 resentencing because of a "super strike," see Pen. Code, § 1170.126) and whose judgment is reopened for some other reason would not be entitled to invoke the new law despite any other applicable changes to the judgment. Similarly, in the ex post facto context, a new, more punitive law would not apply to any reopened judgment, and this has not been considered particularly confusing. (See *Estrada*, *supra*, 63 Cal.2d at p. 747 [discussing saving clause].)

Again, appellant's reference to the particular new law at issue here does not provide a persuasive example of why the Legislature or the electorate must intend all new ameliorative laws to apply to reopened judgments. He complains that in the instant case the court would be required to resentence him according to *Miller v. Alabama* and its progeny while ignoring the transfer provisions of Proposition 57. (ABM 40.) But the *Miller* line of cases imposed constitutional limits on lengthy sentences for juvenile offenders, thereby requiring resentencing. (See *Graham v. Florida* (2010) 560 U.S. 48; *Miller v. Alabama* (2012) 567 U.S. 460; *Montgomery v. Louisiana* (2016) 136 S.Ct. 718.) Our Legislature then enacted a statutory procedure, codified in Penal Code section 1170, subdivision (d)(2), that "provides an avenue for juvenile offenders serving terms of life without parole

to seek recall of their sentences and resentencing to a term that includes an opportunity for parole." (*In re Kirchner* (2017) 2 Cal.5th 1040, 1049-1050.) In this way, the Legislature created an explicit path for juvenile defendants to seek resentencing according to the standards set out in *Miller* and its progeny. Neither the electorate nor the Legislature created a specific procedure for minor defendants to seek a transfer hearing in juvenile court if their matter had been final on direct appeal. There is nothing inconsistent about the two regimes. Nor is applying one without the other particularly confusing or unworkable. In fact, the example only shows how the Legislature may choose to address developments in the law in nuanced ways other than simply through blanket application of ameliorative provisions to reopened judgments.

Appellant objects to respondent's observation that appellant's reading of the *Estrada* rule could even result in some defendants "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.'" (ABM 47, quoting OBM 28, fn. 3.) Respondent does not contend that this is a sufficient reason in itself to support its reading of the *Estrada* rule. But neither is it merely a hypothetical concern. (See, e.g., *Gonzalez, supra*, 873 F.3d at p. 769.) Added to the other considerations discussed in the opening brief, it counsels in favor of the more modest *Estrada* presumption that respondent urges.

Finally, appellant invokes the Court of Appeal's decision in *People v. Lopez* (2020) 56 Cal.App.5th 835, which held that new ameliorative laws may be applied to reopened judgments under *Estrada*. (ABM 48-49.) But *Lopez*, like the court below (as well as the court in *People v. Hwang* (2021) 60 Cal.App.5th 358, 274 Cal.Rptr.3d 536, 542-543, also cited by appellant, see ABM 43) made the same analytical mistake that appellant does in his principal argument. They viewed the question of finality as determinative of whether the *Estrada* presumption applied. But the pertinent question is whether, *even granting* that a judgment is rendered nonfinal when it is reopened, the *Estrada* presumption still applies in such circumstances. None of the lower court decisions persuasively grapples with that question.

Indeed, the *Lopez* court remarked that respondent's argument "could be restated as saying that because not every defendant will benefit from retroactive application of [a new law], no defendant should receive the benefit." (*Lopez*, *supra*, 56 Cal.App.5th at p. 849.) That is not an accurate description of the argument respondent makes here about *Estrada*'s presumption of legislative intent, demonstrating that the *Lopez* court focused on an incorrect analysis. As explained, it is the Legislature or the electorate that decides whether and how a new law applies retroactively, and whenever such a line is drawn cases will fall on either side of it. (*Wurzbach*, *supra*, 280 U.S. at p. 399.) The question here is how best to ascertain that intent, not whether a new law should or should not be beneficially applied retroactively.

Under appellant's proposed construction, the *Estrada* presumption would apply whenever any modification of a defendant's sentence reopened the judgment. But it is doubtful that this reflects actual legislative or electoral intent, which is the ultimate aim of the *Estrada* rule. Appellant's contrary arguments, focusing primarily on the benefits of applying some new ameliorative laws as broadly as possible, fail to answer the critical question of legislative intent. And his expansive interpretation of *Estrada* is also at odds with this Court's recognition that the *Estrada* presumption is an exception that plays a "limited role" in our jurisprudence. (*Brown*, *supra*, 54 Cal.4th at p. 324; see also *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1196.) Appellant's interpretation should be rejected.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 3619 words.

MATTHEW RODRIQUEZ
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April 19, 2021

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: People v. Mario Salvador Padilla No.: S263375

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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The Honorable Ricardo R. Ocampo
Los Angeles County Superior Court
South Central District
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On April 19, 2021, I served the attached **REPLY BRIEF ON THE MERITS** by transmitting a true copy via electronic mail to:

Jonathan E. Demson, Esquire
Attorney for Appellant
Served Via TrueFiling

Beatriz Dieringer
Deputy District Attorney
Served Via Email

I declare under penalty of perjury under the laws of the State of California, the foregoing is true and correct and that this declaration was executed on April 19, 2021, at Los Angeles, California.

Lupe Zavala
Declarant

/s/ Lupe Zavala
Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. PADILLA**
Case Number: **S263375**
Lower Court Case Number: **B297213**

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