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LIU, J.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PATRICK LEE CONLEY, Defendant and Appellant.	)	S_____ Court of Appeal No. C070272 Superior Court No. CRF113234

SUPREME COURT
FILED

JUN 10 2013

Frank A. McGuire Clerk

Deputy

On Appeal from the Judgment and Order of the
Superior Court of California, Yolo County

Honorable Stephen L. Mock, Judge

PETITION FOR REVIEW

After Decision by the Court of Appeal
Third Appellate District
Filed and Certified for Partial Publication
on May 2, 2013

CENTRAL CALIFORNIA
APPELLATE PROGRAM
George Bond
Executive Director

Carol Foster
Staff Attorney
State Bar No. 127962
2407 J Street, Suite 301
Sacramento, CA 95816
Tel: (916) 441-3792
Email: cfoster@capcentral.org

Attorneys for Appellant/Petitioner

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Attorneys for Appellant/Petitioner

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PETITION FOR REVIEW

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant, Patrick Lee Conley, by and through his counsel, petitions this court for review of the above entitled matter after decision, certified for partial publication, rendered by the Court of Appeal, Third Appellate District, on May 2, 2013. A copy of the opinion of the court of appeal is attached as Attachment A (*Conley*).

ISSUE PRESENTED

Under the *Estrada*[1] rule, do the ameliorative amendments to Penal Code sections 667 and 1170.12, enacted by the 2012 Three Strikes Reform

[1] *In re Estrada* (1965) 63 Cal.2d 740.

Act, apply to criminal judgments which were not yet final as of the Act's effective date?

NECESSITY FOR REVIEW

A grant of review is necessary for this court to secure uniformity of decision and to settle an important question of law, pursuant to California Rules of Court, rule 8.500(b)(1).

On May 2, 2013, the Court of Appeal, Third Appellate District, in *Conley* held that even though his judgment was not yet final, appellant is not entitled to have his sentence vacated and his case remanded for resentencing under the 2012 Three Strikes Reform Act's ameliorative amendment to section 1170.12. Instead, his recourse is to petition for recall under the Act's newly added Penal Code section 1170.126, because this section acts to preclude application of the *Estrada* rule. (*Conley* at pp. 7-14.) [Agreeing with *People v. Yearwood* (2013) 213 Cal.App.4th 161 (*Yearwood*), review denied May 1, 2013, S209069.]

Reaching an opposite conclusion on the same point, on May 15, 2013, in *People v. Lewis* (2013) ___Cal.App.4th___ [Slip Opn. 9-18] (*Lewis*), certified for partial publication, the Court of Appeal, Fourth District, Division Two, held that under the *Estrada* rule, section 667, applies to defendants whose judgments were not yet final on the effective

date of the Act. (*Lewis* at pp. 4-9.)

To prevent conflicting results throughout the state based solely on the appellate district in which a defendant was sentenced, this court must determine whether under the *Estrada* rule qualifying defendants whose judgments were not yet final of the effective date of the Act are entitled to have their sentences vacated and their cases remanded with direction to impose the lesser sentence authorized in amended Penal Code sections 667 and 1170.12.

STATEMENT OF CASE

On October 28, 2011, appellant was convicted of driving under the influence of alcohol (Veh. Code, sec. 23152, subd. (a)) and driving with a blood alcohol content of .08 percent or more (Veh. Code, sec. 23152, subd. (b)), with enhancements for refusing to take a chemical test (Veh. Code, sec. 23578). (CT 203; RT 581-583.) The jury also sustained allegations that appellant had four prior convictions for violating Vehicle Code section 23152 (Veh. Code, sec. 23550), three prior prison terms (Pen. Code, sec. 667.5), and two prior strike convictions (Pen. Code, secs. 667, subds. (d) and (e), 1170.12). (CT 205, 213-221; RT 618-622.)

On January 3, 2012, the trial court denied appellant's motion to dismiss one or both strike allegations and sentenced appellant to 25 years to

life plus three consecutive one-year terms. (CT 275; RT 649-650.) On January 24, 2012, appellant filed a timely notice of appeal. (CT 279.)

Appellant's counsel filed an opening brief asking the court of appeal to independently review the record and determine whether there were any arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436.) (*Conley* at p. 2.) On November 6, 2012, California voters passed the Three Strikes Reform Act ("Act") which became effective the following day, November 7, 2012. On November 8, 2012, the court of appeal filed its opinion affirming appellant's judgment. (*Conley* at p. 2.)

On November 21, 2012, appellant filed a petition for rehearing asking the court of appeal to vacate his sentencing and remand his case for sentencing under the Act's ameliorative sentencing amendments. The court of appeal initially denied the petition, concluding that appellant was not entitled to sentencing under the Act's amendments to Penal Code section 1170.12, but then granted the rehearing on its own motion to more fully explain its reasoning. (*Conley*. at p. 2.)

STATEMENT OF FACTS

The facts from the court of appeal's decision are incorporated herein. (See *Conley* at p. 2-4.)

ARGUMENT

I.

The Ameliorative Amendments To Sections 667 And 1170.12 Apply To Criminal Judgments Which Were Not Yet Final As Of The Three Strikes Reform Act's Effective Date.

A. Background.

On November 6, 2012, California voters approved Proposition 36, the "Three Strikes Reform Act of 2012," which enacted several changes to California's Three Strikes sentencing scheme. (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012).) Most significant were the Act's amendments to sections 667 and 1170.12, which now state that a life sentence can be imposed only if: (1) a appellant's third strike is for a violent or serious felony conviction or one of several enumerated offenses, or (2) one of appellant's prior strikes is for a conviction listed in section 667, subdivision (e)(2)(C) or section 1170.12, subdivision (c)(2)(C). The Act became effective on November 7, 2012. (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, sec. 10, at p. 109.)

Prior to the Act's effective date of November 7, 2012, appellant was convicted of the non-serious and non-violent offenses of driving under the influence of alcohol (Veh. Code, sec. 23152, subd. (a)) and driving with a blood alcohol content of .08 percent or more (Veh. Code, sec. 21351, subd.

(b)). The court imposed a term of 25 years to life under the then existing Three Strikes Law for these crimes. Appellant's case was pending on appeal on the Act's effective date.

Under the statutes amended by the Act, appellant's most recent convictions would not subject him to an indeterminate term. Appellant does not have any of the disqualifying convictions listed in sections 667, subdivision (e)(2)(C) or 1170.12, subdivision (c)(2)(C). If the Act's amendments to sections 667 and 1170.12 are applied to appellant, appellant's sentence would not be 25 years to life, but "twice the term otherwise provided as punishment for [his] current felony conviction." (Secs. 667, subds. (e)(1), (e)(2)(C), 1170.12, subds. (c)(1), (c)(2)(C).)

The instant case presents the question of whether appellant is entitled to resentencing under *Estrada* because his judgment was not yet final on the Act's effective date.

B. Under the *Estrada* rule, sections 667(e)(2)(C) and 1170.12 (c)(2)(C) apply to defendants whose judgments were not yet final on the effective date of the Act.

In *In re Estrada* (1965) 63 Cal.2d. 740, this court held that when a criminal statute is amended to lessen the punishment for an offense, the lesser punishment should be imposed in cases where judgment is not yet final. This court reasoned that when the Legislature amends a statute to

lessen the punishment for an offense, it has expressly determined that the former punishment was too severe and a lighter punishment is sufficient to satisfy the legitimate ends of law. (*Id.* at 745.) Unless there is a clear indication that the Legislature intended the amendment to apply prospectively only, it must be presumed that the Legislature intended the mitigated punishment to apply to all judgments not yet final as of the effective date of the amended statute. (*Id.* at pp. 744-747.) *Estrada* created a limited exception to Penal Code section 3, which provides that no part of a statute is retroactive unless expressly so declared. (*People v. Brown* (2012) 54 Cal.4th 314, 324.)

The Legislature has never abrogated the *Estrada* rule. (See *People v. Nasalga* (1996) 12 Cal. 4th 784, 792, fn. 7.) This rule was restated by this court last year. "*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments." (*People v. Brown, supra,* 54 Cal.4th 314, 324, citing *People v. Nasalga, supra,* 12 Cal.4th at p. 792, fn. 7.)

"[T]he key date is the date of final judgment. If the amendatory

statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies." (*In re Estrada, supra,* 63 Cal.2d at p. 744; see also, *People v. Wright* (2006) 40 Cal.4th 81, 90; *People v. Floyd* (2003) 31 Cal.4th 179, 184 ["the amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date"].) A case is not reduced to final judgment until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*Teague v. Lane* (1989) 489 U.S. 288, 295-296; *People v Nasalga, supra,* 12 Cal.4th 784, 789, fn 4.) "Cases in which judgment is not yet final include those in which a conviction has been entered and sentence imposed but an appeal is pending when the amendment becomes effective." (*In re N.D.* (2008) 167 Cal.App.4th 885, 891.)

C. Sections 667 and 1170.12 do not contain express savings clauses precluding application of *Estrada* to nonfinal cases.

As the three courts of appeal in *Conley, Yearwood* and *Lewis* agree, the Act contains no express savings clause. (*Conley* at p 8; *People v. Lewis* (May 15, 2013, E055569) __Cal.App.4th__ [Slip Opn. at p 11]; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 175.)

Had there been an express savings clause, of course, *Estrada,* would not apply. (*In re Estrada, supra,* 63 Cal.2d at pp. 744-745.)

A savings clause is a provision that states "the old law should continue to operate as to past acts." (*Id.* at p. 747.) In *People v. Floyd, supra,* 31 Cal.4th 179, this court addressed an amended statute that expressed a clear savings clause: "Except as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provisions shall be applied prospectively." (*Id.* at 182.)

Nothing in the Act even remotely resembles the clear expression of intent.

D. Section 1170.126 and the *Estrada* rule are not mutually exclusive, incompatable remedies.

Yearwood and *Conley* both err in characterizing section 1170.126 as the functional equivalent of a savings clause and in concluding that relief under *Estrada* is excluded. (*Conley* at pp. 9-10; *People v. Yearwood, supra,* 213 Cal.App.4th 161.)

An enacting body is presumed to know about existing relevant judicial decisions, and that applies to the electorate as well as to a formal legislative body. (*People v. Hernandez* (2003) 30 Cal.4th 835, 867; *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 606.)

Although the electorate enacted 1170.126, there is nothing in the Act that indicates that the electorate intended it to be the exclusive method to obtain relief. Presumed to have been aware of the *Estrada* principles, the Act would have included limiting language had it intended section 1170.126 to be the sole means of seeking resentencing.

The rule in *Estrada* applies unless ". . . the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express savings clause or its equivalent." (*People v. Nasalga, supra,* 12 Cal.4th 784, 793.) "'[W]hat is required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.'" (*Ibid.*)

Section 1170.126 provides for the discretionary resentencing of "persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of section 667 or paragraph (2) of subdivision (c) of section 1170.12, whose sentence under this act would not have been an indeterminate life sentence." ((Sec. 1170.126, subd. (a).) A person serving a three strikes sentence for a current conviction that is not a serious or violent felony "may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered

the judgment of conviction in his or her case, to request resentencing in accordance with" the Act. (Sec. 1170.126, subd. (b).) A inmate is eligible for resentencing unless he has prior convictions for certain specified offenses. (*Id.* at subd. (e).) If eligible, then the trial court will resentence the defendant "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Id.* at subd. (f).) (*Conley* at p. 9.)

Because the electorate was presumed to be aware of the *Estrada* principles and did not included language that section 1170.126 applied to both nonfinal and final judgments, section 1170.126 can only be interpreted to apply to those defendants whose judgments are final and is therefore not a mutually exclusive, incompatable remedy to *Estrada*.

In their statutory interpretation, *Conley* and *Yearwood* fail to address the rule that the electorate is presumed to be aware of the *Estrada* presumption at the time of the enactment of the Act. Instead, *Conley* and *Yearwood* circumvent this rule of statutory construction and erroneously hold that section 1170.126 precludes application of the *Estrada* rule in appellant's case because its plain language provides for limited sentencing application of sections 667 and 1170.126 in regards to a person such as appellant who is "presently serving an indeterminate term" under the former

Three Strikes Law. (*Conley* at pp. 9-10; *People v. Yearwood, supra,* 213 Cal.App.4th at pp. 167-169; compare *People v. Lewis, supra,* at p. 16.) *Conley* wrongly reasoned that in order for *Estrada* to apply in appellant's situation, it would have to insert language that the statute "is meant to apply only to those serving a term of imprisonment under a final judgment." (*Conley* at p. 10.) Because *Estrada* is presumed to apply unless otherwise clearly indicated. What the electorate would have done if it intended to preclude *Estrada* is clearly indicate that the presumption does not apply by including language that section 1170.126 was meant to apply whether or not the judgment is final.

The plain language used to craft the postconviction release proceeding set forth in section 1170.126 of the Act cannot be construed as an equivalent to a savings clause so as to preclude application of the *Estrada* rule for another reason. In order to defeat the *Estrada* rule, a savings clause, an equivalent to a savings clause, or a voter intent of prospective application must clearly provide that "the old law should continue to operate as to *past acts*." (*In re Estrada, supra,* 63 Cal. 2d. at p. 746-747, emphasis added.)

In its determination that section 1170.126 clearly precludes the *Estrada* presumption in appellant's case, *Conley* does not rely on the date

of appellant's past acts or offenses, but incorrectly relies on the date of appellant's sentencing, as a reference point as to whether or not the *Estrada* rule is precluded by a clear intent for prospective application. (*Conley* at p. 9.) It was in this false context that *Conley* determined the plain language of section 1170.126, specifically the language "persons presently serving an indeterminate term of imprisonment" defeated the *Estrada* presumption of giving the retroactive benefit of the mitigated punishment in amended sections 667 and 1170.12 in appellant's case. (*Conley* at p. 9.) After determining section 1170.126 defeats the *Estrada* presumption in appellant's case, because he was already sentenced, *Conley* then goes on to state that the *Estrada* rule does apply to provide the lessened punishment under ameliorative amendments but "*only to those people not yet convicted or not yet sentenced.*" (*Conley* at p. 9, italics added.) *Conley* cites no authority for this concept of partial retroactivity.

The question of whether a statutory amendment lessening punishment is to be given retroactive effect or is prospective only, the question addressed by the rule in *Estrada*, relates not to whether the sentencing predates the effective date of the Reform Act, but whether the offense predates the effective date of the Act. (*In re Estrada, supra,* 63 Cal.2d at pp 746-747, *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288-

291.)

Because section 1170.126 relates to whether the sentencing predates the effective date of the Act, it is not a clear provision that "the old law should continue to operate as to *past acts*." (*In re Estrada, supra,* 63 Cal. 2d. at p. 746-747, emphasis added.) It does not evidence a clear intent that sections 667 and 1170.12 should not be applied retroactively to offenses committed prior to the effective date of the Three Strikes Reform Act in cases where the judgment is not yet final. Instead, it can only be reasonably interpreted to provide a recall procedure for those three-strike defendants whose judgments are final.

E. Subdivision (k) of Section 1170.126 explicitly preserves application of the *Estrada* rule.

As further evidence that the *Estrada* rule to applies to the Act's ameliorative amendments to sections 667 and 1170.12, subdivision (k) of section 1170.126 states: "Nothing is this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant." (sec. 1170.126, subd. (k).)

The inclusion of this subsection indicates that the discretionary post-conviction proceeding enacted by section 1170.126, subds. (b)-(g) is not the sole remedy for individuals whose third-strike sentences are not yet final on appeal. Had the electorate intended for section 1170.126 to operate to

preclude application of the *Estrada* rule, subdivision (k) would not explicitly allow for defendants to seek other remedies. A court must giv[e] significance to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) A cardinal rule of construction is that construction making some words surplusage is to be avoided. (*People v. Gilbert* (1969) 1 Cal.3d 475, 480.)

The plain language of subdivision (k) negates any theory that the subdivision (b) recall provision implies a voters' intent to preclude retroactivity under *Estrada.*

F. The legislative history of the 2012 Three Strikes Reform Act contains a clear expression of voter intent that the *Estrada* rule should apply to criminal judgments that were not final as of the Act's effective date.

In *People v. Lewis,* (May 15, 2013) __Cal.App.4th___, the Fourth District Court of Appeal, Division Two, concluded that in passing the 2012 Three Strikes Reform Act, the voters intended the mandatory sentencing provision of sections 667, subdivision (e)(2)(C) and 1170.12, subdivision (c)(2)(C) to apply to qualifying defendants whose judgments were not yet final on the effective date of the act. (*People v. Lewis, supra,* [Slp. Opn. At p. 12].)

"In enacting new laws, both the Legislature and the electorate are 'presumed to be aware of existing laws and judicial construction thereof.' (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.) Accordingly, we presume that in enacting the Reform Act, the electorate was aware of the *Estrada* presumption that a law ameliorating punishment applies to all judgments not yet final on appeal on the effective date of the new statute. We also presume that the electorate was aware that a saving clause may be employed to make it explicit that the amendment is to apply prospectively only, and that in the absence of a saving clause or another clear signal of intent to apply the amendment prospectively, the statute is presumed to apply to all nonfinal judgments. (*Nasalga*, *supra*, 12 Cal.4th at p. 793; *Estrada*, *supra*, 63 Cal.2d at p. 747.) Previous ballot initiatives have employed explicit language making an ameliorative statute prospective." (*People v. Lewis,* May 15, 2013) __Cal.App.4th___ [Slp Opn. At p. 12.] citing *People v. Floyd, supra,* 31 Cal.4th at pp. 183-185 ["Except as otherwise provided, the provisions of this act [Proposition 36 of 2000] shall become effective July 1, 2001, and its provisions shall be applied prospectively."]) The Reform Acts absence of such language is persuasive evidence that the voters did intent to apply sections 667 and 1170.12 to nonfinal judgments. (*Ibid.*)

The ballot arguments in support of the Reform Act stated that its purpose was to ensure that "[p]recious financial and law enforcement resources" were not diverted to impose life sentences for some non-violent offenses, while assuring that violent repeat offenders are effectively punished and not released early. The proponents stated that the act would "help stop clogging overcrowded prisons with non-violent offenders, so we have room to keep violent felons off the streets" and "help[] ensure that prisons can keep dangerous criminals behind bars for life." An additional purpose was to save taxpayers "$100 million every year" by ending wasteful spending on housing and health care costs for "non-violent Three Strikes inmates." Moreover, the act would ensure adequate punishment of non-violent repeat offenders by doubling their state prison sentences. The proponents pointed out that dangerous criminals were being released early because "jails are overcrowded with non-violent offenders who pose no risk to the public." And, the proponents stated that by passing Proposition 36, "California will retain the toughest recidivist Three Strikes law in the country but will be fairer by emphasizing proportionality in sentencing and will provide for more evenhanded application of this important law." The proponents pointed out that "[p]eople convicted of shoplifting a pair of socks, stealing bread or baby formula [*sic*] don't deserve life sentences."

(Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36 and rebuttal to argument against Prop. 36. <http://voterguide.sos.ca.gov/propositions/36/arguments-rebuttals.htm>.)

"Applying section 667(e)(2)(C) to nonfinal judgments is wholly consistent with these objectives, in that doing so would enhance the monetary savings projected by the proponents and would further serve the purposes of reducing the number of non-violent offenders in prison populations and of reserving the harshest punishment for recidivists with current convictions for serious or violent felonies, while still assuring public safety by imposing doubled prison terms on less serious repeat offenders." (*People v. Lewis, supra,* at p. 13.)

CONCLUSION

The Three Strikes Reform Act ameliorates the punishment for persons like the appellant, whose life sentence resulted from a conviction of a nonviolent, nonserious, felony. By providing a means for prisoners who would otherwise have no recourse to gain the benefit of the new provisions (through the sentencing recall petition provisions of section 1170.126), the electorate has strongly indicated its intent that it wishes to apply the Act to as many people as possible. There is absolutely nothing in the Act that supports any conclusion that the electorate intended to foreclose traditional means of relief for defendant's in appellant's position--those whose judgments are not yet final. Subdivision (k) of the recall petition statute specifically declares that nothing is intended to abrogate a defendant's rights or remedies otherwise available. Under the principles firmly established by *In re Estrada, supra*, 63 Cal.2d 740, more than 48 years ago, the appellant and those like him are entitled to resentencing in the trial court under the amended provisions of sections 667.5 and 1170.12.

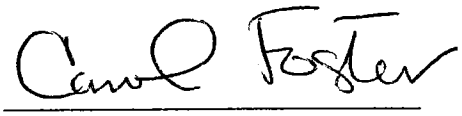
People v. Lewis (May 15, 2013) ___Cal.App.4th___[Slip Opn. 9-18], held defendants with nonfinal judgments are entitled to application of the *Estrada* rule and need not resort to the petition for recall procedure set forth in section 1170.126.

Conley and *Yearwood* held to the contrary.

This court must grant review to settle this point of law and secure uniformity of decision.

DATED: June 7, 2013

Respectfully submitted,
CENTRAL CALIFORNIA
APPELLATE PROGRAM
George Bond
Executive Director



By Carol Foster
Staff Attorney

Certificate of Appellate Counsel
Pursuant to rule 8.204 (c)(1) of the California Rules of Court

I, Carol Foster, appointed counsel for appellant, certify pursuant to rule 8.204 (c)(1) of the California Rules of Court, that I prepared this petition for rehearing on behalf of appellant, Mr. Patrick Lee. Conley, and that the word count for this petition for review is 4,157.

Dated: June 7, 2013

Carol Foster
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

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

On June 7, 2013, I served the attached

PETITION FOR REVIEW

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

Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244

Patrick Lee Conley
AK9239
PO Box 3030 (HDSP)
A-4-203-U
Susanville, CA 96130

Yolo County District Attorney
301 Second Street
Woodland, CA 95695

Yolo County Superior Court
725 Court Street
Woodland, CA 95695

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 7, 2015 at Sacramento, California.

Sheila Brown

ATTACHMENT A

OPINION

THE PEOPLE V. PATRICK LEE CONLEY

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. PATRICK LEE CONLEY, Defendant and Appellant.	C070272 (Super. Ct. No. CRF113234)

APPEAL from a judgment of the Superior Court of Yolo County, Stephen L. Mock, Judge. Affirmed.

Patrick Lee Conley, in pro. per.; and Carol Foster, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Respondent.

Michael S. Romano for Three Strikes Project, Stanford Law School, as Amicus Curiae on behalf of Defendant and Appellant.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part I.

Appointed counsel for defendant Patrick Lee Conley asked this court to review the record to determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) Finding no arguable error that would result in a disposition more favorable to defendant, we will affirm the judgment.

We partially publish this decision, however, to address issues raised in a petition for rehearing that are likely to recur. On November 6, 2012, California voters approved Proposition 36, which modifies the three strikes law. After we filed our decision in this case, defendant filed a petition for rehearing seeking the benefit of the change in law. He asked us to vacate his sentence under the three strikes law and remand the matter for a new sentencing hearing.

We denied his petition for rehearing, concluding that he is not entitled to be sentenced under amended Penal Code section 1170.12. We then granted rehearing on our own motion to more fully explain our reasoning.

BACKGROUND

California Highway Patrol Officer Keerat Lal observed defendant, at about 5:20 p.m., picking up tools in the middle of County Road 27 in Yolo County. Defendant's parked pickup truck and attached utility trailer partially blocked a lane of the two-lane road.

Defendant appeared intoxicated. His eyes were red and watery and his gait was unsteady as he moved to pick up the tools. Officer Lal estimated that defendant was about six feet tall and weighed 210 pounds.

Officer Lal asked defendant to move to the side of the road, but had to ask three times before defendant complied. Defendant said his tool box fell from the bed of his truck. Officer Lal asked for defendant's driver's license, proof of insurance, and registration. Defendant said his license was suspended and he did not have proof of insurance or registration. Defendant's speech was slurred and Officer Lal could smell alcohol on defendant's breath.

Defendant claimed his son was driving the truck and left to get gas when the truck ran out of fuel. When Officer Lal pointed out that the truck was still running, defendant admitted he was the driver. Defendant told the officer that he consumed three to four 8-ounce cans of Four Loko malt liquor at his son's house, which was about 15 to 20 minutes away.

Defendant failed a series of field sobriety tests and also took two preliminary alcohol screening tests. His breath samples revealed a blood-alcohol concentration (BAC) of .167 percent and .171 percent. Officer Lal arrested defendant for driving under the influence.

Defendant refused to submit to a chemical test after he was arrested. His blood was drawn at a hospital at around 6:19 p.m., and his BAC at the time of the draw was .19 percent.

An expert testified that a six foot tall, 210 pound person who consumed 3 to 4 Four Loko's and had his last drink at 4:45 p.m. would have a BAC of .10 percent. A similar individual with a BAC of .19 percent at 6:19 p.m. would have a BAC well over .08 percent between 5:15 p.m. and 5:20 p.m.

In a recorded call from his jail cell, defendant told his girlfriend that he did not know whether the officer asked why his tools were in the middle of the road because defendant "was drunk as fuck right there."

The prosecutor and defense counsel stipulated that undated Department of Motor Vehicle documents listed defendant's height as six foot three inches tall and his weight as 180 pounds. A toxicologist testifying for the defense opined that if a six foot three inch tall and 180 pound person drank an entire 23.5 ounce Four Loko at 5:19 p.m. and had a BAC of .19 percent at 6:19 p.m., then his BAC before drinking the Four Loko at 5:19 p.m. would be .08 percent with a margin of error.

Defendant pleaded no contest to driving with a suspended license with three prior violations within the last five years (Veh. Code, § 14601.2, subd. (a)), failure to provide

proof of insurance (Veh. Code, § 16028), and driving an unregistered vehicle (Veh. Code, § 4000, subd. (a)(1)). Following a jury trial, defendant was convicted of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)) and driving with a BAC of .08 percent or more (Veh. Code, § 23152, subd. (b)), with enhancements for refusing to take the chemical test (Veh. Code, § 23578).

In a bifurcated proceeding, the jury sustained allegations that defendant had four prior convictions for violating Vehicle Code section 23152 (Veh. Code, § 23550), three prior prison terms (Pen. Code, § 667.5),[1] and two prior strike convictions (§§ 667, subds. (d) and (e), 1170.12). The trial court denied defendant's motion to dismiss one or both strike allegations and sentenced defendant to 25 years to life plus three consecutive one-year terms. The trial court also awarded 697 days of presentence credit (465 actual and 232 conduct) and imposed various fines and fees.

Appointed counsel filed an opening brief setting forth the facts of the case and asking this court to review the record and determine whether there are any arguable issues on appeal. (*Wende*, *supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing the opening brief. Defendant filed a supplemental brief.

DISCUSSION

I*

In his supplemental brief, it appears defendant contends the following: (A) the trial court erred in denying his suppression motion, (B) his trial counsel was ineffective, and (C) there is insufficient evidence to support his convictions. We address each contention in turn.

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1 Undesignated statutory references are to the Penal Code.

A

Defendant first contends the trial court erred in denying his suppression motion. The magistrate denied defendant's suppression motion filed at the preliminary hearing. Defendant renewed the issue in a section 995 motion seeking to set aside the charges, but the trial court denied that motion, too. Defendant contends the trial court should have granted his suppression motion because (1) he was illegally detained when Officer Lal directed him to the side of the road, and (2) the probable cause to arrest is based on inadmissible hearsay and the circumstances observed by Officer Lal did not support probable cause to arrest defendant.

The following facts are taken from the preliminary hearing. Officer Lal saw defendant picking up tools in the middle of the road, next to a truck partially obstructing one lane. Officer Lal noticed that defendant had red, watery eyes and looked like other intoxicated persons he had arrested. Smelling alcohol and noticing defendant's staggered gait, Officer Lal asked defendant to move to the side of the road. Officer Lal then commenced an investigation for driving under the influence. After defendant failed various field sobriety tests and tested with a BAC of .167 and .171 percent, Officer Lal arrested him.

1

Defendant argues he was illegally detained when Officer Lal directed him to the side of the road. But "[t]he Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. [Citation.]" (*Florida v. Jimeno* (1991) 500 U.S. 248, 250 [114 L.Ed.2d 297, 302].) "To test the detention against 'the ultimate standard of reasonableness embodied in the Fourth Amendment' [citation], we balance the extent of the intrusion against the government interests justifying it, looking in the final and dispositive portion of the analysis to the individualized and objective facts that made those interests applicable in the circumstances of the particular detention." (*People v. Glaser* (1995) 11 Cal.4th 354,

365.) In light of the brief intrusion on defendant's liberty and the clear threat to defendant's and the public's safety posed by an apparently intoxicated man in the middle of a public road, Officer Lal's directive was reasonable and therefore did not constitute an illegal detention.

2

Defendant next argues that the probable cause to arrest is based on inadmissible hearsay and the circumstances observed by Officer Lal did not support probable cause to arrest defendant. Defendant's hearsay contention is based on Officer Lal's testimony that he changed the arrest from a misdemeanor to a felony after receiving a report from dispatch that defendant had four prior convictions for violating Vehicle Code section 23152. Defendant's argument is based on the rule that precludes the prosecution from relying on hearsay information communicated to the arresting officer "that is not sufficiently specific and fact based to be considered reliable." (*People v. Gomez* (2004) 117 Cal.App.4th 531, 541.)

But the probable cause supporting the arrest was not based on the prior-conviction information received by the arresting officer (information that was subsequently confirmed when the People submitted certified copies of the prior Vehicle Code section 23152 convictions at the preliminary hearing). Rather, probable cause supporting the arrest was based on defendant's red, watery eyes, slurred speech, staggered gait, smell of alcohol, field sobriety test results, preliminary alcohol screening test results, his admission that he drove his truck, and the fact that the vehicle was running and partially obstructing the road.

B

Defendant claims his trial counsel was ineffective for stipulating to his weight being 180 pounds when he in fact weighed 172 pounds within five days of his arrest. He claims this prejudiced him because a lower body weight would have given him a lower

blood-alcohol level according to the hypotheses presented by the prosecution and defense experts.

"To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) Defendant does not point to anything in either expert's testimony showing that a lower body weight would result in a lower blood-alcohol level. Defendant has not carried his burden of proving prejudice.

C

Defendant contends there is insufficient evidence to support his convictions because no one saw him driving. But Officer Lal testified that defendant admitted driving the truck, the vehicle was running and it was partially obstructing the road. Nothing more is needed to establish that element of driving under the influence.

II

After we filed our decision in this case, defendant filed a petition for rehearing seeking the benefit of the change in law enacted by Proposition 36. He asked us to vacate his sentence under the three strikes law and remand the matter to the trial court for a new sentencing hearing.

Defendant was sentenced to 25 years to life under the three strikes law for a crime that was not a serious or violent felony. Proposition 36 limits three strikes sentences to current convictions for serious or violent felonies, or a limited number of other felonies not relevant here. (See §§ 1170.12, subd. (c), 667, subd. (c).) If defendant had been sentenced today, he would not be subject to a 25 to life three strikes sentence.

A

In asking us to vacate his sentence and remand the matter, defendant relies on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

In *Estrada*, the California Supreme Court stated: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Estrada,* 63 Cal.2d at p. 745.) This includes "acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Ibid.*) Accordingly, a statute lessening punishment is presumed to apply to all cases not yet reduced to final judgment on the statute's effective date, unless there is a "saving clause" providing for prospective application. (*Id.* at pp. 744-745, 747-748.)

Section 1170.12 does not have an express saving clause. For example, it does not state that the mitigated punishment shall only apply prospectively to those convicted or sentenced on or after the effective date of the act. But this does not end the inquiry. (*People v. Nasalga* (1996) 12 Cal.4th 784, 793.) The rule in *Estrada* does not apply "where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent." (*People v. Nasalga, supra,* 12 Cal.4th at p. 793, fn. omitted.) " '[W]hat is required is that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.' " (*Ibid.*)

In construing voter initiatives enacted into law, we use the same principles applied to statutes enacted by the Legislature. (*People v. Elliot* (2005) 37 Cal.4th 453, 478.) Statutes dealing with the same subject matter as the one being construed -- commonly referred to as statutes in pari materia -- should be construed together. (*People v. Honig*

(1996) 48 Cal.App.4th 289, 327.) Application of this rule is most justified in cases where statutes relating to the same subject matter were passed at the same time. (*Stickel v. Harris* (1987) 196 Cal.App.3d 575, 590.) Section 1170.126, a related statute added by Proposition 36, defeats the presumption of retroactivity set forth in *Estrada*. It authorizes limited application to prisoners serving three strikes sentences when the measure was enacted, and establishes a specific procedure for defendant to follow in this case.

In particular, section 1170.126 provides for the resentencing of "persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence." (§ 1170.126, subd. (a).) A person serving a three strikes sentence for a current conviction that is not a serious or violent felony "may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with" Proposition 36. (§ 1170.126, subd. (b).) An inmate is eligible for resentencing unless he has prior convictions for certain specified offenses. (*Id.* at subd. (e).) If the prisoner is eligible, then the trial court will resentence defendant "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Id.* at subd. (f).) The factors governing the exercise of the trial court's discretion -- the prisoner's criminal history, record in prison and any other relevant evidence -- are set forth in section 1170.126, subdivision (g).

Because Proposition 36 provides for limited application to prisoners serving three strikes sentences when the measure was enacted, the presumption in *Estrada* does not apply as to them; it applies only to those people not yet convicted or not yet sentenced. Those already sentenced and serving an indeterminate term of imprisonment must petition the trial court for a recall of sentence regardless of whether or not their judgment

is final. Nothing in section 1170.126 states that its reference to "persons presently serving an indeterminate term of imprisonment . . . whose sentence under this act would not have been an indeterminate life sentence" is meant to apply only to those serving a term of imprisonment under a final judgment. (§ 1170.126, subd. (a).) We may not insert such words because it is a cardinal rule of statutory construction that courts may not add provisions to a statute. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827; Code Civ. Proc., § 1858.)

Defendant claims section 1170.126 cannot be construed as a saving clause because the resentencing provisions are impracticable for defendants who have appealed and whose judgments are not final. This is so, he maintains, because of the two-year time limit in section 1170.126, subdivision (b), and the fact the trial court loses jurisdiction once an appeal has been filed.

It is the general rule that the valid filing of an appeal vests jurisdiction of a cause in the appellate court until determination of the appeal and issuance of the remittitur. (*People v. Sonoqui* (1934) 1 Cal.2d 364; *People v. Getty* (1975) 50 Cal.App.3d 101, 107.) Ordinarily " 'the trial court loses jurisdiction during that period to do anything in connection with the cause which may affect the judgment.' [Citations.]" (*People v. Getty, supra,* 50 Cal.App.3d at p. 107.) However, "a trial court is not divested of its limited jurisdiction under section 1170, subdivision (d) to recall a sentence for modification within 120 days of the defendant's commitment by the filing of an appeal notice."[2] (*Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1836.)

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[2] Section 1170 provides in relevant part: "(d)(1) When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, . . . recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the

Thus, at a minimum, those persons who have been sentenced recently may petition the court to recall their sentence within 120 days of the effective date of Proposition 36, even if they have filed a notice of appeal. (§§ 1170, subd. (d), 1170.126, subd. (b).) Those who cannot meet the 120-day time limit can file a petition for recall of sentence in the trial court after their appeal is resolved and their judgment is final. If their appeal results in the reversal of their third strike conviction, resentencing will be unnecessary. And if the appeal is not decided and the judgment does not become final until after the two-year period in section 1170.126, subdivision (b) is exceeded, defendant may assert "good cause" for filing a delayed petition for resentencing.

Defendant maintains that our construction of subdivision (a) of section 1170.126 as a saving clause is at odds with subdivision (k) of the statute, which states: "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant." He argues this language can only be reasonably interpreted to avail defendant, whose judgment is not yet final, his right to relief and remedy under the *Estrada* rule. We disagree. Subdivision (k) simply confirms that the resentencing provision is not intended to prevent defendants from pursuing other substantive or procedural challenges to their three strike conviction, whether by direct appeal or petition for writ of habeas corpus. For example, section 1170.126 does not prevent a defendant from challenging on appeal the denial of a *Romero* motion to dismiss a prior strike conviction (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), as an alternate method of demonstrating he should not be subject to life imprisonment.

Defendant adds that our interpretation of subdivisions (a) and (k) of section 1170.126 is contrary to Section 7 of Proposition 36, which states: "This act is an exercise of the public power of the people of the State of California for the protection of the

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sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served."

health, safety, and welfare of the people of the State of California, and shall be liberally construed to effectuate those purposes." He believes liberal construction requires that we interpret the resentencing provisions as applying only to those persons who are serving a prison term pursuant to a final judgment. Again we disagree.

Liberal construction does not mean interpreting the applicable statutes in a manner contrary to the plain language used. The people of the State of California have decided to mitigate punishment in all future three strike cases and, under the presumption in *Estrada,* some non-final current three strike cases as long as sentence has not been imposed. But they did not vote to immediately reduce the sentence for all persons already serving a prison term under the older version of the law. Rather, they directed the trial court to consider the defendant's behavior in prison, and any other evidence that a new sentence would result in an unreasonable risk of danger to public safety. (§ 1170.126, subd. (g).) Thus, it appears that despite the amendment of section 1170.12, the public does not want three strike prisoners' sentences reduced if their behavior in prison establishes they are a danger to the public. This concern applies equally to those defendants already serving a prison term pursuant to a judgment that is not yet final.

Defendant argues it is not clear that he is "presently serving an indeterminate term" because the phrase is ambiguous. In his view, the ambiguity arises because his judgment is not final. He maintains this ambiguity must be resolved in his favor under the rule of lenity. But the rule of lenity only applies when there is such egregious ambiguity and uncertainty that the court can do no more than guess what the legislative body intended. (*People v. Avery* (2002) 27 Cal.4th 49, 58.) The rule is not applicable " 'unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable.' " (*Id.* at p. 58, quoting *People v. Jones* (1988) 46 Cal.3d 585, 599.) No such egregious ambiguity exists in the present case. Although defendant's judgment is not yet final, he is nonetheless presently serving an indeterminate term in prison. The

possibility that his conviction could be reversed in the future does not render the phrase ambiguous.

Here, defendant is a "person[] presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence." (§ 1170.126, subd. (a).) Accordingly, he is not entitled to a remand for resentencing under amended section 1170.12; defendant's recourse is to petition for a recall of sentence under section 1170.126.

B

In the alternative, defendant argues in his petition for rehearing that retroactive application of Proposition 36 is compelled by equal protection. His argument lacks merit. To the extent Proposition 36 applies prospectively, prospective application of a statute that lessens punishment does not violate equal protection. (*People v. Floyd* (2003) 31 Cal.4th 179, 182, 191 (*Floyd*); *People v. Lynch* (2012) 209 Cal.App.4th 353, 360–361.)

As the California Supreme Court explained in *Floyd*, " 'the ability to elect to be sentenced under a law enacted after the date of the commission of a crime is not a constitutional right but a benefit conferred solely by statute. It is not unconstitutional for the legislature to confer such benefit only prospectively, neither is it unconstitutional for the legislature to specify "a classification between groups differently situated, so long as a reasonable basis for the distinction exists." [Citation.] In this instance, the legislature distinguished between those defendants, on the one hand, who had not yet been accorded any sentencing hearings prior to the cut-off date, and those, on the other hand, whose sentences, already imposed, would require remandments for additional sentencing hearings. We find this to be a reasonable basis for distinction and, therefore, no constitutional denial of equal protection.' " (*Floyd, supra*, 31 Cal.4th at pp. 189-190, quoting *People v. Grant* (Ill. 1978) 71 Ill.2d 551 [377 N.E.2d 4, 9].)

Here, all three strikes prisoners serving time for qualifying offenses are treated the same in that they must seek relief under section 1170.126. But those persons who have not yet been sentenced are entitled to the application of the mitigated punishment in amended section 1170.12. This serves to promote judicial economy and does not deprive defendant of any constitutional rights.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

RAYE, P. J.

MURRAY, J.

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

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

On June 7, 2013, I served the attached

PETITION FOR REVIEW

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

U.S. Court of Appeal
Third District Court of Appeal
914 Capitol Mall
Sacramento, CA 95814

Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244

Patrick Lee Conley
AK9239
PO Box 3030 (HDSP)
A-4-203-U
Susanville, CA 96130

Yolo County District Attorney
301 Second Street
Woodland, CA 95695

Yolo County Superior Court
725 Court Street
Woodland, CA 95695

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 7, 2013 at Sacramento, California.

Sheila Brown