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.	S211275 Court of Appeal No. C070272 Superior Court No. CRF113234

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

Honorable Stephen L. Mock, Judge

REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	S211275
vs.	)	Court of Appeal No. C070272
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Defendant and Appellant.	)	Superior Court No. CRF113234

REPLY BRIEF ON THE MERITS

RESTATEMENT OF QUESTION PRESENTED

Does the Three Strikes Reform Act of 2012 ("Reform Act") (Pen. Code, secs. 667, subd. (e)(2)(C) and 1170.12, subd. (c)(2)(C))[1], which reduces punishment for certain non-violent/non-serious third-strike offenders, apply retroactively to a defendant who was sentenced before the Reform Act's effective date but whose judgment was not final until after that date?

INTRODUCTION

Appellant, Mr. Conley, submits this Reply Brief on the Merits in response to certain arguments and authorities raised in Respondent's

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

Answer Brief on the Merits. Appellant continues to rely on the arguments advanced in his Opening Brief on the Merits and incorporates those arguments herein.

ARGUMENT

I.

THE THREE STRIKES REFORM ACT OF 2012 MITIGATES PUNISHMENT; THE VOTERS INTENDED AMENDED SECTIONS 667 AND 1170.12 TO APPLY RETROACTIVELY UNDER BOTH *ESTRADA* AND THE RECALL PROCEDURE IN SECTION 1170.126.

A. The mitigating amendments to sections 667 and 1170.12 apply retroactively under the *Estrada* rule to benefit defendants whose judgments were not final when the Reform Act took effect.

Appellant and respondent agree that in interpreting the Reform Act[2], the principles governing statutory construction apply. The first rule of construction is to give a statute its ordinary and plain meaning. (Respondent's Answer Brief on the Merits (hereafter "RABM") 4, 9 citing *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.)

Respondent concedes that amended sections 667 and 1170.12 do not expressly state in plain language that the mitigating amendments to these statutes are to be applied prospectively only. (RABM 6, 9.) Because amended sections 667 and 1170.12 lack an unequivocal signal to make the amendments prospective, the common law principle of statutory construction set forth in *Estrada* is invoked.

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[2] The Three Strikes Reform Act of 2012 is from this point forth referred to as the "Reform Act" in this brief.

In *In re Estrada* (1965) 63 Cal.2d 740, 744-745, this Court re-affirmed this well-established common law rule of statutory construction: "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, italics added, disapproving *People v. Harmon* (1960) 54 Cal.2d 9 [an earlier decision which held that the punishment in effect when the act was committed should prevail].)

In *People v. Rossi* (1976) 18 Cal.3d 295, this Court concluded that *Estrada* upheld the common law principle that ameliorative provisions were to be retroactively applied to judgments not final. "At common law, a statute mitigating punishment applied to acts committed before its effective date as long as no final judgment had been rendered. (See *People v. Hayes* (1894) N.Y. 484 [35 N.E. 951].)" (*People v. Rossi, supra,* 18 Cal.3d at p. 296.)

This Court and the Courts of Appeal have continued to rely on and cite *Estrada* and *Rossi* as authority for this enduring common law principle. (*People v. Wright* (2006) 40 Cal.4th 81, 94-95 [statutory amendment that created a new defense to marijuana transportation charges by voter initiative]; *People v. Nasalga* (1996) 12 Cal.4th 784, 792-793 [statutory amendment increased amount of loss necessary to trigger a two-year

enhancement under section 12022.6]; *People v. Wade* (2012) 204 Cal.App.4th 1142, 1151-1152 [statutory amendment that increased the monetary limit for misdemeanor petty theft, which reduced some felonies to misdemeanors]; *People v. Vinson* (2011) 193 Cal.App.4th 1190, 1197-1199 [statutory amendment that increased the number of prior convictions required to invoke the alternative penalty provision that elevates petty theft to a felony, which reduced some felonies to misdemeanors].)

Under *Estrada,* absent plain language that can be construed as a savings clause or its equivalent, retroactive application of the amendatory statute prevails. (*In re Estrada, supra,* 63 Cal.2d at pp. 744-745.) Where an amendatory statute mitigates punishment, and there is no savings clause or its equivalent, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed. (*Id.* at p. 748; *People v. Nasalga, supra,* 12 Cal.4th 784, 793.)

Respondent claims "*Estrada* harmonizes section 3 so as not to ignore factors demonstrating a clear retroactive intent. (*In re Estrada, supra,* 63 Cal.2d at p. 746.)" (RABM 11.) This claim inverts the presumption established by this Court in *Estrada.* Under *Estrada*, it is presumed that an amendment to a statute which mitigates punish for a crime was intended to

retroactively apply absent a clear prospective intent. (*Id.* at pp. 744-747.)

In the context of ameliorating statutes, *Nasalga* does not support the Respondent's claim that ambiguities on the application of amendments are presumed to be prospective. Respondent's position reflects a complete misunderstanding of *Estrada* and *Nasalga.* (RABM 11.)

In *Nasalga*, this Court places the burden on the Legislature to clearly signal its intent to make the ameliorative amendment prospective. *Nasalga, supra*, 12 Cal.4th at p. 793, expressly states "[t]he rule in *Estrada*, of course, is not implicated ***where the Legislature clearly signals its intent to make the amendment prospective***, by the inclusion of either an express saving clause or its equivalent." (*Ibid.,* emphasis, italics and underscore added.)

In *People v. Brown* (2012) 54 Cal.4th 314, this Court applied section 3 in holding a mitigating amendment to section 4019, a presentence custody credits statute, did not retroactively benefit prisoners who served time in local custody before its operative date, because statutes regulating conduct credits are not ameliorative. This Court held that the *Estrada* rule did not apply to an amendment to a statute governing presentence custody credits because the amendment did not mitigate the penalty for a particular crime.

(*Brown, supra,* 54 Cal.4th at p. 325.)[3]

The voters enacted the Reform Act to shorten state prison sentences for particular crimes. Amendatory sections 667, subdivision (e) and 1170.12, subdivision (c), mitigate punishment for certain nonserious, nonviolent felonies. As this Court in *Brown* explained, " . . . the rule and logic of *Estrada* is specifically directed to a statute that represents '*a legislative mitigation of the penalty for a particular crime*' (*In re Estrada*, at p. 745, italics added) because such a law supports the inference that the Legislature would prefer to impose the new, shorter penalty rather than to 'satisfy a desire for vengeance' (*ibid.*)." (*Brown, supra,* 54 Cal.4th at p. 325.)

Estrada establishes a contextually specific exception to the codified presumption that law makers intend new statutes to operate prospectively. (*In re Estrada, supra,* 63 Cal.2d at p. 746; *People v. Brown, supra,* 54 Cal.4th at p. 319.) This exception is premised upon an enduring principle

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[3] "In contrast, a statute increasing the rate at which prisoners may earn credits for good behavior does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent. Former section 4019 does not alter the penalty for any crime; a prisoner who earns no conduct credits serves the full sentence originally imposed. Instead of addressing punishment for past criminal conduct, the statute addresses future conduct in a custodial setting by providing increased incentives for good behavior." (*Brown, supra,* 54 Cal.4th at p. 325.)

of criminal jurisprudence: "A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legislative ends of the criminal law." (*In re Estrada, supra,* 63 Cal.2d at p. 745.)

The Legislative judgment that this Court explained in *Estrada* has remained fully intact to this day. In the *Nasalga* case, on which respondent has relied (RABM 11), this Court said: "In the 31 years since this court decided *Estrada*, and its companion case, *In re Kirk, supra,* 63 Cal.2d 761, the Legislature has taken no action, as it easily could have done, to abrogate *Estrada.* We therefore decline the invitation." (See *Nasalga, supra* 12 Cal.4th 784, 792, fn. 7.)

Instead of blindly applying section 3, as respondent seems to suggest, the court's duty is to interpret and apply the language of the Reform Act "so as to effectuate the electorate's intent." (*Robert L., supra,* 30 Cal. 4th at 900.)

Prior to enactment of the Reform Act, the 1994 version of the Three Strikes law prescribed an indeterminate term of at least 25-years-to-life for *any* current felony committed by a defendant with two or more prior convictions for "violent" or "serious" felonies. Under the old Three Strikes law, a "third strike" conviction for a simple felony drug possession or a

felony minor theft, or in Mr. Conley's case, felony driving under the influence of alcohol, yielded the same punishment as a conviction for first-degree murder. (See, e.g. *Lockyer v. Andrade* (2003) 538 U.S. 63 [50-to-life for thefts of videotapes totaling $150]; *Ewing v. California* (2003) 538 U.S. 11 [25-to-life for theft of 3 golf clubs]; cf. sec. 190, subd. (a) [25-to-life for first degree murder].)

The enactment of the Reform Act codifies an express determination by the voters substantially different than that behind the 1994 Three Strikes law. Proposition 36's "Findings and Declarations" state that the initiative represents the electorate's judgment that a doubled determinate term rather than an indeterminate 25-to-life term provides sufficient punishment for repeat offenders whose current offenses are nonviolent and nonserious. (Proposition 36, (enacted Nov. 6, 2012, sec. (1.))

By enacting the Reform Act, the voters have inverted the old law's framework by both barring life terms for current nonserious, non-violent offenses, and reducing the punishment for current nonserious, nonviolent offenses to doubled determinate terms, subject to certain statutory exceptions not relevant here. These ameliorative changes redress the provision of the former Three Strikes law that was obviously most controversial and most repugnant – requiring a 25-to-life "third strike" term, even when the current offense was not violent or serious.

In the spirit of *Estrada*, the voters amended the three strikes law so as to lessen the punishment for current non-violent, non-serious offenses. By so doing the voters have *expressly* determined that the former penalty *was too severe* and that *a lighter punishment is proper as punishment for the commission of the prohibited act.* (See *Estrada, supra,* at p. 745, italics added.)

In analyzing the Reform Act, there is an inevitable inference that the voters must have intended the lighter punishment set forth in the amendments to sections 667, subdivision (e) and 1170.12, subdivision (c) to apply in every case in which these amendments constitutionally could apply. *The amendatory act imposing lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.* (See *Estrada, supra,* at p. 745, italics added.)

Regardless of whether a defendant's sentence was imposed before or after the Reform Act's enactment, a defendant who committed a qualifying current crime before passage of the Reform Act, but whose sentence was not final on the Reform Act's effective date, is entitled under the *Estrada* rule to the retroactive application of the reduced punishment provided in the amendments to sections 667, subdivision (e) and subdivision (c).

B. Retroactive application of sections 667 and 1170.12 under the *Estrada* rule is consistent with the practical application of the Reform Act's amendatory changes.

Respondent mistakenly argues that giving effect to *Estrada* results in depriving the prosecution of the opportunity to prove the specified disqualifying current offenses and prior convictions under sections 667 and 1170.12 because an inmate serving an indeterminate term under the former three-strikes law is past the pleading and proof stage of proceedings. (RABM 15-17.)

Under the Reform Act, the prosecution must "plead and prove" additional factors, which include specified current offenses and specified prior strikes, in order to disqualify a defendant whose current offense is otherwise a nonserious or nonviolent from a doubled determinate term. (Secs. 667, subd. (e)(2)(C) and 1170.12, subd. (c)(2)(C).)

Giving effect to *Estrada* does not result in the deprivation posited by respondent.

First, respondent's pleading and proof concern in the context of application of *Estrada* was addressed and decided in *People v. Figueroa* (1992) 20 Cal.App.4th 65. *Figueroa* held that the defendant was entitled under *Estrada* to retroactive application of a mitigating amendment that added an extra element to an enhancement that was found true in the

defendant's trial. In addressing the "extra element" concern, the court held that on remand, the prosecution would be allowed the opportunity to prove up the new element. In *Figueroa,* the defendant was given a three-year sentencing enhancement for drug trafficking near school yards. After his conviction, the relevant statute was amended to add an additional requirement for the enhancement to apply. (*Id.* at p. 69.) The court held that, under *Estrada,* the amendment applied retroactively. But during trial, the People had no occasion to present evidence on the additional requirement. (*Figueroa,* at p. 70.) Therefore, the *Figueroa* court held that the defendant was only potentially entitled to the benefit of the amended statute, and remanded to the trial court for an additional evidentiary hearing to make that determination.

Figueroa defeats respondent's argument that it is too late now to plead and prove disqualifying factors. Should the People have proof of disqualifying factors, they would be entitled to a similar type of resentencing hearing. In other words, retroactive application of the mitigating amendments to section 667 and 1170.12 under *Estrada* does not exempt a defendant from application of the disqualifying factors.

Second, the disqualifying factors under sections 667 and 1170.12 refer to specific offenses and prior convictions that existed prior to the

Reform Act. (Secs. 667, subd. (e)(2)(C) and 1170.12, subd. (c)(2)(C).) None of the referenced offenses or prior convictions are newly added to the Penal Code by the Reform Act. These offenses and prior convictions were charging options for the prosecutor when he or she originally filed the accusatory pleading that resulted in the defendant being sentenced under the former three strikes law. (Sec. 954.)

Prosecutors had sufficient incentive to plead and prove as many of these offenses and prior strikes as possible at the time of the original proceedings. Prosecutors must always consider that any conviction is subject to being overturned on appeal. As to any arguable deprivational effects caused by a prosecutor's choice to plea bargain or his or her election not to retry a hung count, a prosecutor's decision to dismiss a particular count is often because the evidence for the dismissed offense is problematic.

Prior strike convictions are subject to being stricken on the court's own motion in the interest of justice. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 518.) Thus, prosecutors had incentive to plead and prove any of the enumerated strikes that would disqualify a defendant from the benefits of the Reform Act, because such strikes are more likely to persuade a judge that striking a strike would not serve the interests of

justice. (See *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 505 [When dismissing a case in furtherance of justice, the court must balance the defendant's interests with the interests of society.]) Also, each strike resulting in a prison term may be a "prison prior" under section 667.5, which is another incentive prosecutors had to plead and prove additional prior strikes.

The prosecutor does not need a second bite at the apple to plead and prove disqualifying offenses or prior strikes he of she had reason to originally pled and prove. In fact, respondent agrees that review of the entire record of conviction is sufficient to determine whether the defendant qualifies under these factors for a shorter term under the Reform Act. (RABM 16, 17.) Respondent's concern that retroactive application of the Reform Act under *Estrada* would create a "loophole" allowing resentencing without full application of the Reform Act's safeguards is therefore unfounded. (RABM 16, 17.)

Retroactive application of sections 667 and 1170.12 under the *Estrada* rule to a defendant whose cause is pending appeal is therefore consistent with the ameliorative purpose and practical application of the Reform Act. As such, retroactive application of sections 667 and 1170.12 under the *Estrada* rule makes sense and can soundly be interpreted to reflect

the intent of the voters.

C. Section 1170.126 defines the type of defendant subject to ameliorative resentencing, embraces application of the *Estrada* rule, and creates a remedy for those with final judgments.

Respondent misinterprets section 1170.126, subdivision (a) as providing the exclusive retroactive remedy for those sentenced before the Reform Act, even if their judgments were not yet final when the Reform Act took effect. Respondent cites *People v. Yearwood* (2013) 213 Cal.App.4th 161 in support of this position. (RABM 13-14.)

Section 1170.126 subdivision (a) provides:

> "The resentencing provisions under this section and related statutes are intended to apply exclusively to 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."

Respondent and *Yearwood* misread the significance of the word "exclusively" in subdivision (a) of section 1170.126. Use of the word "exclusively" in subdivision (a) does not mean that the petition procedure outlined in subdivisions (b) through (g) is the *exclusive* remedy for retroactive sentencing relief under the Reform Act. The word "exclusively" as used in subdivision (a) defines the class of persons who may seek resentencing [those defendants who are serving an indeterminate term under

the old law whose term would be a doubled determinate term under the new law]. It does not modify the verb "apply" to mean that its resentencing provisions in subdivisions (b) through (g) provide the exclusive remedy for those defendants sentenced before the Reform Act, but whose judgment is not final as of the Reform Act's effective date.

The plain language of section 1170.126, subdivision (k) makes it clear that "exclusively" defines who is eligible to file petitions, and does not limit the recall petition as the sole right or remedy. "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant." (*Ibid.*)

Nowhere does section 1170.126 clearly express that its recall procedure is the exclusive remedy under the Reform Act. The Penal Code contains many examples of statutes that clearly express an exclusive remedy. For instance, section 299.5, subdivision (i)(2)(B)(i) states, "Notwithstanding any other law, this *shall be the sole and exclusive remedy* against the Department of Justice and its employees available to the donor of the DNA." (Italics added.) Similarly, section 14250, subdivision (g)(2) states, "Notwithstanding any other law, the remedy in this section *shall be the sole and exclusive remedy* against the department and its employees." (Italics added.) Section 1538.5, subdivision (m) states, "The proceedings

provided in this section, and Sections 871.5, 995, 1238 and 1466 *shall constitute the sole and exclusive remedies* prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered a evidence against him or her." (Italics added.) And, section 2676, subdivision (b) states, "The response shall not constitute a petition for an order to proceed with any organic therapy pursuant to Section 2675, which *shall be the exclusive procedure* for authorization to administer any organic therapy." (Italics added.)

Section 1170.126 extends retroactive relief to those defendants whose indeterminate sentences were rendered under the former Three Strikes law and whose final judgments fall within the provisions of the Reform Act. (See subdivision (l) ["Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act."]) (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal. 4th 607, 683 [recognizing strong public interest in the finality of judgments].) Subdivision (l) indicates that the purpose of section 1170.126 is to provide a limited exception to the finality of judgment rule in order to bring within the Reform Act's ameliorative reach those qualifying defendants whose judgments were final on the Reform

Act's effective date. The petition for recall procedure, specifically set forth in subdivision (b) through (g), practically effectuates that purpose.

As stated above, subdivision (k) defeats respondent's claim that section 1170.126 is a clear expression that its remedy is exclusive. Subdivision (k) expressly states that defendants are free to take advantage of any other remedies and rights available to them.

Respondent claims that subdivision (k) cannot be interpreted to include the right to retroactive application which necessarily arises from the *Estrada* rule where the voters demonstrate a clear intent for amended statutes to apply prospectively. (RABM 20.) Section 1170.126 contains no directive that the mitigating amendments in the Reform Act were intended to apply prospectively only as is required to overcome the presumption in *Estrada.*

The *Estrada* retroactivity rule is an "express[] determin[ation]" of the legislative body that its former penalty was too severe" (*In re Estrada*, *supra*, 63 Cal.2d at p. 745; accord, e.g. *Nasalga*, *supra,* 12 Cal.4th at pp. 791-792). The presumption of retroactivity is only overturned when there is an express prospectivity directive in the legislation or its supporting materials. (*Nasalga, supra,* at pp. 795, 797-798.) The voters intended the enactment of the Reform Act to "[r]estore the Three Strikes law to the

public's original understanding by requiring life sentences only when a defendant's current offense is for a violent or serious crime." (Proposition 36, Findings and Declarations, sec. 1(2).)

Section 1170.126, subdivision (k) expressly preserves any rights or remedies otherwise available to the defendant. Subdivision (k) specifically states that any such rights or remedies are not intended to be diminished or abrogated by any other language found within section 1170.126. (Sec. 1170.126, subd. (k).) Where there is no clear indication of legislative intent to the contrary, a defendant whose judgment is not final as of the effective date of the amendatory legislation is *entitled to the benefit*, i.e., has the right to the benefit of a statutory amendment that mitigates punishment for a particular crime. (See *In re Estrada, supra,* 63 Cal.2d at p. 748.)

Respondent too narrowly interprets *Estrada* as solely defining a principle of statutory construction without creating an independent right or remedy. (RABM 20.) This interpretation does not make sense because it would render the principle articulated in *Estrada* meaningless.

Inherent in the *Estrada* rule is a right. Under *Estrada,* a defendant whose judgment is not final is *entitled* to the benefit of the lighter penalty in the absence of a clear indication to the contrary. "It is alleged that petitioner is being held under statutes as they read prior to September of 1963, but he

is *entitled* to the ameliorating benefits of the statutes as amended in that month. This contention is sound." (*In re Estrada, supra,* 63 Cal.2d at p. 744, *italics* added.) "Thus petitioner is *entitled* to some relief on this issue." (*Id.* at p. 748, *italics* added.)

Subdivision (k) provides for "rights and remedies" otherwise available to the defendant. The ordinary usage or meaning of the verb "entitle" is: "to give a right or legal title to" (Webster's New Internat. Dict. (3 ed. 1964) p. 758; "To give (a person or thing) the right to ... do something; qualify or authorize" (Funk & Wagnalls Standard College Dict. (1974) p. 442). Legal Usage is no different. (Black's Law Dict. (5th ed. 1979) p. 477.)

Application of *Estrada* redresses imposition of punishment which the voters later deemed was too severe. The *Estrada* rule requires retroactive application of the mitigating amendment to sections 667 and 1170.126 to a qualifying defendant whose judgment was not yet final on the Reform Act's effective date in order that his or her sentence be reduced from an indeterminate term to the appropriate doubled determinate term.

D. The procedure to review a prisoner's custodial records is a discretionary aspect of the non-exclusive remedy set forth in section 1170.126, subdivisions (b) through (g); it is not a clear indication that the voters intended sections 667 and 1170.12 to prospectively apply.

Respondent is wrong to construe a court's discretionary review of custodial records under subdivision (g) of section 1170.126 as demonstrating the prospective intent of amended sections 667 and 1170.12. (RABM 19-20.)

The non-exclusive recall procedure in section 1170.126 provides that a court shall re-sentence an eligible inmate to a doubled determinate term unless the court determines, within its discretion, that a new sentence would result in an unreasonable risk of danger to public safety. (Sec. 1170.126, subds. (f) and (g).) As a part of this procedure, the court may review and consider the custodial records of the defendant. (Sec. 1170.126, subd. (g)(2).)

Contrary to respondent's suggestion, the review procedure does not require the court to review the custodial records of *all* eligible inmates, including those whose judgments were not final on the Reform Act's effective date.

As addressed above in Subargument C of this brief at pp. 15-20 and in Appellant's Opening Brief on the Merits at pp. 21-25, the recall

procedure in section 1170.126, is not the exclusive avenue for retroactive sentencing relief under the Reform Act. It is an additional remedy to expand retroactive application of the Reform Act's ameliorative amendments. (Sec. 1170.126, subd. (k) ["Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant."].)

Within subdivision (b) through (g) of section 1170.126, the Reform Act created a *sui generis* collateral remedy that permits reopening of final judgments if a court in its discretion deems it appropriate. Collateral proceedings are provided only in situations where there is no adequate remedy at law, such as by appeal. (See, e.g., *Langford v. Superior Court* (1987) 43 Cal.3d 21, 27; *In re Florance* (1956) 47 Cal.2d 25, 27-28; *Riverside County Sheriff's Dep't v. Stiglitz* (2012) 209 Cal.App.4th 883, 894; *Fleur du Lac Estates Ass'n v. Mansouri* (2012) 205 Cal.App.4th 249, 258-259.) Because the remedy procedure set forth in section 1170.126, subdivisions (b) through (g) is initiated by a special petition and requires extra evidence under subdivision (g), it is a collateral proceeding outside the appeal process. (See also sec. 1170.126, subd. (m).)

The procedure to review custodial records in subdivision (g) of section 1170.126 applies to those inmates with final judgments who petition

for recall of sentence under section 1170.126. The review of custodial records occurs at the stage of the recall process where a court exercises its discretion as to whether or not to reopen a final judgment and resentence the petitioner.

The voters, as the legislative body, chose to limit the custodial record review procedure to the recall procedure in section 1170.126, subds. (b) through (g). A legislative body is certainly entitled to make limiting choices of this nature as long as such choices are constitutional, since the power to determine criminal penalties is vested solely with the legislative branch. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552; *People v. Superior Court (Romero)* (1996) 13 Cal. 4th 497.)

In the context of the Reform Act, the *Estrada* rule logically applies to those defendants whose judgments were pending on appeal on the Reform Act's effective date. A judgment that is pending appeal does not require re-opening because it is not final. This interpretation is in keeping with both the ameliorative spirit of the Reform Act and the principles of finality of judgments.

Nothing in section 1170.126 clearly indicates the voters intended amended sections sections 667 and 1170.12 to prospectively apply.

Therefore retroactive application of sections 667 and 1170.12 under the *Estrada* rule prevails.

CONCLUSION

For the reasons set forth in this Reply Brief on the Merits and the Opening Brief on the Merits, Mr. Conley's judgment must be reversed and remanded to the trial court for resentencing in compliance with sections 667, subdivision (e)(2)(C) and 1170.126, subdivision (c)(2)(C).

DATED: May 5, 2013

Respectfully submitted,

CENTRAL CALIFORNIA
APPELLATE PROGRAM

George Bond
Executive Director

Carol Foster

By Carol Foster
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DECLARATION OF SERVICE

People v. Patrick Lee Conley - S211275

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 May 6, 2014, I served the attached

REPLY BRIEF ON THE MERITS

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.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 6, 2014, at Sacramento, California.

Sheila Brown