COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S241231

THE PEOPLE,
Petitioner,

v.

SUPERIOR COURT OF RIVERSIDE COUNTY,
Respondent,

PABLO ULLISSES LARA, JR.,
Real Party in Interest.

Court of Appeal of California
Fourth District, Division Two
E067296

Superior Court of California
Riverside County
RIF1601012

APPLICATION OF THE OFFICE OF THE LOS ANGELES COUNTY PUBLIC DEFENDER & PACIFIC JUVENILE DEFENDER CENTER FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF REAL PARTY IN INTEREST, PABLO ULLISSES LARA, JR.; AND AMICUS BRIEF

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF REAL PARTY IN INTEREST

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, SUPREME COURT OF THE STATE OF CALIFORNIA:

The Office of the Los Angeles County Public Defender & the Pacific Juvenile Defender Center through their attorneys and pursuant to California Rules of Court, rule 8.200 and rule 8.487(e), respectfully apply for leave to file the following Amicus Curiae Brief in support of Real Party in Interest, Pablo Ullisses Lara, Jr.

At issue in this case is whether the provisions of Proposition 57 that eliminated the direct filing of juvenile cases in adult court are applicable to cases already filed. On August 23, 2017, this court issued an order calling for Real Party to submit additional briefing on the question of whether Proposition 57 applies retroactively under the rationale of *In re Estrada* (1965) 63 Cal.2d 740.

As explained in further detail below, Amici are recognized authorities on juvenile transfer issues, and have been closely involved in developing and enacting the legislation at issue in this case. We present this brief to provide the court with a clear understanding of the legislative history and relevant extrinsic information surrounding the changes made by Proposition 57, as well as the ways the changes fit squarely within the *Estrada* doctrine.

The Office of the Los Angeles County Public Defender represents more than 35,000 children in delinquency proceedings each year in twenty-nine delinquency courts throughout the county. The juvenile division includes deputy public defenders, paralegals, investigators, psychiatric social workers, and special units of resource and Division of Juvenile Justice attorneys, reentry advocates, and appellate specialists. Together they collaborate to provide effective, holistic representation of children from the earliest stage of the juvenile delinquency proceedings through post-disposition planning. Specifically, the Juvenile Division is recognized both statewide and nationally as providing cutting edge, innovative legal representation to children charged with crimes and is considered a preeminent leader in juvenile delinquency representation.

The Pacific Juvenile Defender Center is a regional affiliate of the Washington, D.C.-based National Juvenile Defender Center. It works to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. The Pacific Juvenile Defender Center provides support to more than 1000 juvenile trial lawyers, appellate counsel, law school clinical programs and non-profit law centers to ensure quality representation for children throughout California and around the country. It is the only organization in California completely dedicated to juvenile delinquency defense. The Center is actively involved in legislative and policy discussions on juvenile justice issues. It also provides training and litigation support to lawyers around the state. Center members represent thousands of youth in juvenile court delinquency cases in California each year.

Both amicus organizations have played a significant role in the drafting and enactment of the measures at issue in this case. In 2015, as part of a statewide collaborative working group, attorneys for the Pacific Juvenile Defender Center and Office of the Los Angeles County Public Defender helped to draft and provided extensive support for the enactment of S.B. 382 (amending Welf. & Inst. Code, § 707, Stats. 2015, ch. 234, § 2). That legislation clarified Welfare and Institutions Code section 707 to provide comprehensive guidance on the factors to be considered by courts in deciding whether a young person should remain in juvenile court. Much of the language reflected principles of adolescent development recognized in recent California and United States Supreme Court cases.

In 2016, again working with a statewide collaboration of juvenile justice advocates, attorneys associated with the Office of the Los Angeles County Public Defender, and the Pacific Juvenile Defender Center helped to draft the juvenile justice portion of Proposition 57 (Prop 57, § 4.2, approved Nov. 8, 2016); assisted in shaping it through several revisions; and provided public education as it was considered by the electorate. After Proposition 57 was enacted, the Pacific Juvenile Defender Center submitted comments on the proposed California Rules of Court needed to implement recent legislative changes. Many of our suggestions were incorporated into California Rules of Court, rule 4.116, rule 5.764, rule 5.766, rule 5.768, rule 5.770 and rule 5.772 (effective May 22, 2017).

Since the November 28, 2017, attorneys for the Office of the Los Angeles County Public Defender and Pacific Juvenile Defender Center have provided training, individual case support,

and practice materials to attorneys around California on the changes resulting from S.B. 382 and Proposition 57. Amici are leading experts in the state about the changes that have been made to transfer law in California.

Both organizations have a long history of involvement with amicus support aimed at ensuring that the treatment of young people in the juvenile system, as well as for those transferred to adult court, is developmentally appropriate, and consistent with the goals and purposes of the juvenile justice system. The Pacific Juvenile Defender Center has filed amicus briefs on its own or with other organizations in a series of cases, including *In re Kirchner* (2017) 2 Cal.5th 1040 [whether the discretionary review under Penal Code section 1170, subdivision (d)(2) provides an adequate remedy for juveniles illegally sentenced to LWOP]; *In re R.V.* (2015) 61 Cal.4th 181 [burden of proof in juvenile competence cases; reversal of judgment for insufficient evidence]; *People v. Gutierrez* (2014) 58 Cal.4th 1354 [whether California's juvenile LWOP statute is improperly "mandatory"]; *People v. Caballero* (2012) 55 Cal.4th 262 [whether a 110 year sentence in non-homicide case is an impermissible de facto life sentence]; *People v. Nelson* (2012) 53 Cal.4th 367 [invocation of *Miranda* rights in juvenile interrogation]; *People v. Lessie* (2010) 47 Cal.4th 1152 [request to see parent in juvenile interrogation]; *In re Greg F.* (2012) 55 Cal.4th 393 [prosecutorial dismissal of petitions to establish eligibility for DJF commitment]; *People v. Nguyen* (2009) 46 Cal.4th 1007 [whether absence of a right to jury trial precludes the use of a prior juvenile adjudication under California's Three Strikes law]; and *In re Albert C.* (2017) 3 Cal.5th 483 [significance of county protocols on juvenile

competence, due process standards for competence]. We are also involved in a number of California Supreme Court cases that are still pending. Likewise, the Office of the Los Angeles County Public Defender has been involved in many of the briefs listed above and a host of other briefs on a variety of criminal justice issues.

Our interest in this case stems from our close involvement in the development of current Welfare and Institutions Code section 707 over several decades, and Proposition 57 itself. As this court considers the intent of the electorate, we want to be sure it has as much information as possible to make its decision. Our expertise in transfer law generally and our specific knowledge of the legislative history at issue in this case enables us to provide a unique perspective that may not otherwise be presented to the court.

Amici do not intend to duplicate arguments already made, but will present additional legal arguments and authority. Counsel for Real Party in Interest is aware of our interest. Moreover, no party or attorney for any party authored any part of this amicus brief, or made any monetary contribution to fund the preparation or submission of this brief. In addition, no other person or entity made any financial contributions to fund the amicus brief.

For all of the foregoing reasons, we respectfully request that this court grant the Application of the Office of the Los Angeles County Public Defender and Pacific Juvenile Defender Center to File Amicus Curiae Brief on Behalf of Real Party in Interest, Pablo Ullisses Lara, Jr., and accept the enclosed brief for filing and consideration.

Dated: September 14, 2017 By: /s/ Rourke F. Stacy

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On behalf of Amici Curiae:
Office of the Los Angeles County Public Defender & Pacific Juvenile Defender Center.

AMICUS CURIAE BRIEF

INTRODUCTION

Since its inception in 1903, juvenile courts have focused on rehabilitation of youth who come into contact with the system. In stark contrast, courts of criminal jurisdiction[1] have addressed adult criminal conduct through the penological principles of punishment, deterrence and uniformity in sentencing.[2] In Argument I, this brief demonstrates that the juvenile system has consistently retained its focus on rehabilitation, and that transfer to adult court has served as a mechanism to punish youth who commit violent crimes when public sentiment has demanded it.

Argument II details how direct filing in adult court by prosecutors emerged and was implemented in California, and shows its inextricable relationship with punishment. In addition, this section present recent jurisprudence that has prompted legislative changes relying on adolescent development principles to retain more youth in the juvenile court.

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[1] For purposes of this brief, "courts of criminal jurisdiction" will be referenced as "adult court."

[2] *Manduley v. Superior Court* (2002) 27 Cal.4th 537, pp. 592–593 (dis. opn. of Kennard, J.))

Moreover, it demonstrates that the juvenile justice portion[3] of Proposition 57, with its amendments to Welfare and Institutions Code section 707,[4] was intended to reduce punishment.

Argument III explains that the text of the Initiative along with extrinsic materials indicate a retrospective application to youth subject to direct file who have cases pending in court or on appeal.

Argument IV gives the reasons that, even if this court finds it necessary to go beyond the text of the initiative as to intent *In re Estrada* (1965) 63 Cal.2d 740 and its progeny require a finding that Proposition 57's elimination of direct file was ameliorative legislation designed to lessen punishment.

In Argument V, Amici explain how the genesis and underlying rationale of the *Estrada* rule prevent an interpretation that permits application to an amended statute that lessens (or could

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[3] Since the issue before this court pertains to direct file and transfer, this brief only addresses the portions of Proposition 57 applicable to juveniles.

[4] Unless otherwise specified, all statutory references are to the Welfare and Institutions Code. Also, a note about terminology, while statutory and case law going back to at least 1909 characterized children as being "fit" or "unfit" to remain in juvenile court, Proposition 57 has eliminated these archaic terms and refers, instead, to whether a young person should be transferred to adult court. The terms "fit" and "fitness" are used in this brief only when called for by reference to specific statutory language or cases. Moreover, within this brief the term "transfer" references a transfer hearing in juvenile court and "direct file" embraces both mandatory (Welf. & Inst. Code, § 602, subd. (b) and discretionary direct file (Welf. & Inst. Code, § 707, subd. (d).

lessen) punishment, if it is offense specific, but denies its application to a whole class of youth who have the opportunity for rehabilitative juvenile court treatment.

Within Argument VI, Amici provide data and policy arguments to confirm that retroactive application of Proposition 57 is not unduly burdensome.

ARGUMENT

I. THE EVOLUTION OF JUVENILE COURT DEMONSTRATES THAT JUVENILE COURT AND ADULT COURT SERVE FUNDAMENTALLY DIFFERENT GOALS

A. California Transfer Laws Have Focused on the Concept of Rehabilitation Versus Punishment

Until the latter part of the 19th Century, children who got into trouble were tried in the adult court and if convicted, were sent to adult jails and prisons. (Nunn and Cleary, *From the Mexican California Frontier to Arnold-Kennick: Highlights in the Evolution of the California Juvenile Court, 1850–1961* (hereafter "Nunn and Cleary"), 5 J. of Center for Fam., Children & the Courts (2004) 3–34, at pp. 7, 10–11.) The first glimmerings of interest in treating children differently than adults focused on developing gentler and more supportive institutions for youth. (*Ibid.*) Between 1858 and 1889, reform schools and industrial schools that prevented children from being incarcerated in adult prisons were established in San Francisco, Marysville, Whittier,

Preston and Los Angeles. (*Id.*, at pp. 6–9.) The move to have a separate juvenile court system came later, and was successful in 1903. (*Id.*, at pp. 12–13; Stats. 1903, ch. 43, pp. 44–48.)

The first juvenile court law provided, with respect to children under the age of 16 who were tried in the superior court, that the court may "commit the child to the care and custody of a probation officer, and may allow the child to remain in the home of such child subject to the visitation of the probation officer;" or may "commit the child to the care or custody of the probation officer to be placed in a suitable family home, subject to the friendly supervision of such probation officer;" or may commit the child to "the care and custody of some association, society, or corporation that will receive it, embracing in its objects the care of neglected, dependent, or delinquent children;" or may commit the child to a state reform school. (Stats 1903, ch. 43, § 8, p. 47.)

The 1903 law also prohibited holding children who were confined in adult institutions from being held in the same room or area, and from being within sight or sound of the adults. (Stats. 1903, ch. 43, § 9, p. 47.) The Legislature stated that the purpose of the Juvenile Court Law was this: "That the care, custody and discipline of a child shall approximate as nearly as may be that which should have been given by its parents, and in all cases where it can be properly done, the child placed in an approved family home, with people of the same religious belief, and become a member of the family by legal adoption or otherwise." (Stats. 1903, ch. 43, § 13, p. 48.) The desire to protect children from the punitive adult system has been a consistent theme throughout California juvenile court history.

B. From 1909 to 1976 the Legislature Intended Protect Children From the Punitive Adult System

The first provisions for transfer from the juvenile to the adult court appeared in the 1909 amendments to the law. (Stats. 1909, ch. 133, § 16–18, pp. 219–222).[5] The 1909 statute applied to children under the age of 18, and provided that if the court, "shall determine that said child is not a fit and proper subject to be dealt with under the reformatory provisions of this act, said court may dismiss the petition hereunder and direct that such child be presented under the general law." (Stats. 1909, ch. 133, § 17, p. 220.) Further, the 1909 statutes provided for youth 18 to 21 years of age to be treated as delinquents by consent, or by order of the court after conviction. (Stats. 1909, § 18, pp. 221–222.) The 1911 amendments retained the same provisions. (Stats. 1911, ch. 369, § 16–18, pp. 666–669), and the 1915 amendments reorganized but retained the same provisions for transfer. (Stats. 1915, ch. 631, § 4d, §§ 6–7, pp. 1228–1231.) Again, the focus was on whether the young person should receive the benevolent "reformatory" services of the juvenile system or be relegated to the adult system.

Cases during this early period confirmed that the purpose of the juvenile system was rehabilitative, as contrasted with the

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[5] California's laws on transfer have been amended dozens of times since 1903. This legislative history includes the most significant statutes over time, to show the persistent intent to maintain a separate protective and rehabilitative juvenile system and, except for a relatively short period of time, to limit exposure of children to the punitive adult system.

punitive adult system. In *People v. Wolff* (1920) 182 Cal. 728, 732–733, this court upheld the judicial power to remand a case for criminal proceedings if the judge were to conclude that "such person is not a fit subject for further consideration" under the juvenile court law. *In re Daedler* (1924) 194 Cal. 320, 332, upheld the denial of a jury trial to juveniles on the grounds that, "The processes of the Juvenile Court Law are . . . not penal in character, and hence said minor has no inherent right to a trial by jury in the course of the application of their beneficial and merciful provisions to his case."

The 1937 statutes created the Welfare and Institutions Code, and Section 734 addressing fitness. (Stats. 1937, ch. 369, p. 1005, and Art. 5, p. 1037 enacting Welf. & Inst. Code § 734.) That enactment again focused only on amenability to juvenile court treatment. It provided that if "the court determines that any person alleged to come within the jurisdiction of juvenile court "is not a fit and proper subject to be dealt with under the provisions of this chapter, the court may dismiss the petition, and order that the person be prosecuted under the general law." (*Id.*, at p. 1037.)

By the 1950's, there was concern that the original *parens patriae* concept for juvenile court was "fraying," and that the courts had failed to evolve with modern conditions. (Nunn and Cleary, *supra*, at p. 23.) A Governor's Special Study Commission was convened, and in 1960 issued its findings and recommendations. The report stated that:

> . . . the Commission is of the firm conviction that the protective and rehabilitative philosophy of the juvenile court law is sound and should remain unchanged.

(*Report of the Governor's Special Study Commission on Juvenile Justice*, Part I: Recommendations for Changes in California's Juvenile Court Law (1960), p. 12.) Certification to adult court was to be limited to those youth who could not be rehabilitated: "Transfers to criminal court should be decided solely on the question as to whether the minor can benefit from the juvenile court's rehabilitative services. (*Id.*, at p. 17.) When the ensuing Arnold-Kennick Juvenile Court Law was enacted in 1961, the sole criterion for transfer continued to be whether the young person would be "amenable to the care treatment and training program available through the facilities of the juvenile court." (Stats. 1961, ch. 1616, Art. 8, p. 3485, adding Welf. & Inst. Code § 707.) The now-familiar five criteria for determining "fitness" for juvenile court were added in 1975. (Stats. 1975, ch. 1266, § 4, p. 3325, amending Welf. & Inst. Code, § 707.) They included: (a) The degree of criminal sophistication exhibited by the minor; (b) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction; (c) The minor's previous delinquent history; (d) Success of previous attempts by the juvenile court to rehabilitate the minor; and (e) The circumstances and gravity of the offense alleged to have been committed by the minor. (*Ibid.*) The juvenile court was to use those criteria in determining whether the young person would be "amenable to the care, treatment and training program available through the juvenile court." (*Ibid.*)

C. From 1976 to 1999 Public Perception of Youth Influenced Legislative Amendments to Expand Transfer

Beginning in 1976, and continuing into the new century, social attitudes toward juveniles entered what has been described as a "get tough" period. Initially, this was prompted by crime rates. There had been a spike in crime from 1960 to 1980, after which California's violent and property crime rates steadily declined. (Cal. Dept. of Justice, Open Justice, *Crime Rates From 1980 to 2014*, https://openjustice.doj.ca.gov/crimes/overview.) Juvenile felony arrest rates peaked in the mid-1970s, dropped briefly during the mid-1980s, rose again slightly during the late 1980s and then gradually fell throughout the 1990s. (Cal. Dept. of Corrections and Rehabilitation, *General California Juvenile Crime Trends and CYA* Commitments, http://www.cdcr.ca.gov/Reports_Research/trends/slide001.html.)

During this period, there was also growing concern about juvenile gangs. Although experts attempted to deconstruct misconceptions about youth gangs, (see, for example, Howell and Decker, *The Youth Gangs, Drugs, and Violence Connection*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin (Jan. 1999), p. 1), there was rampant fear that they were multiplying across the country. This perception was also driven by the militaristic law enforcement approach to youth gangs. Los Angeles Police Chief Darryl Gates said, "It's like having the Marine Corps invade an area that is still having little pockets of resistance...We can't have it...We've got to wipe them out." (Freed, *Gates Blames Drugs, Gangs for 4% Rise in L.A. Crime*, L.A. Times (Dec. 26, 1986), at p. II-1, col. 6.)

The public's perceptions about violent juvenile crime were also fueled by prominent social scientists' predictions. James A. Fox, a criminologist, warned of "a blood bath of violence" that could soon wash over the land. (Haberman, *When Youth Violence Spurred 'Superpredator' Fear* (hereafter "Haberman"), N.Y. Times (Apr. 6, 2014).) John J. Dilulio Jr., then a political scientist at Princeton, proclaimed in scholarly articles and television interviews that we were about to be overwhelmed by violent juvenile superpredators. (*Ibid.*) Soon there "would be hordes upon hordes of depraved teenagers resorting to unspeakable brutality, not tethered by conscience." (*Ibid.*) The media and politicians from both parties picked up on this fear and ran with it (*Ibid.*), using it to justify harsher, more punitive penalties and procedures.

This shift in public perception was reflected in successive changes to Section 707 that made it easier to try youth as adults. Beginning in 1976, the Legislature divided transfer cases into two categories – Section 707(a) applied to less serious cases [age 16 and commission of any criminal statute or ordinance], and Section 707, subdivision (b) applied to more serious cases [age 16 and alleged to have committed one of 11 listed offenses]. (Stats. 1976, ch. 1071, § 28.5, p. 4825–4827, amending Welf & Inst. Code, § 707.) This was the first time the Legislature specified the offenses that would make it more difficult to remain in juvenile court. (This list has grown over time and the offenses on the list are commonly referred to as "707(b) offenses".)

From the late 1970's to the late 1990's transfer was made easier by expanding the list of 707(b) offenses, the ages for eligibility, and making the findings more stringent for retention

in juvenile court.[6] By the beginning of 1999, there were 29 offenses on the list of 707(b) offenses that rendered a young person presumptively "unfit" for juvenile court. (Stats.1998, ch. 936 (A.B.105), § 21 and § 21.5), pp. 6908–6909.)

II. THE EMERGENCE AND EVOLUTION OF DIRECT FILE

Despite legislation dramatically expanding the transfer of youth to adult court, many felt that simply expanding the ages and offenses providing eligibility for transfer was insufficient to ensure public safety. Using the concept that "Adult Crimes = Adult Time," policymakers pushed legislation to mandate certain crimes being prosecuted in adult court. In this atmosphere, legislation was enacted in 1999, adding Welfare and Institutions Code section 602, subdivision (b), *requiring* adult court prosecution of youth 16 and older who committed specified homicide and sex offenses if they had previously been made a ward of the court for a felony at age fourteen and older. (Stats. 1999, ch. 996 (S.B. 334), § 12.2, pp. 7560–7561.) This legislation

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[6] Stats. 1977, ch. 1150, § 2, p. 3694; Stats. 1979, ch. 944, § 19, p. 3264; Stats 1979, ch. 1177,§ 19, Stats 1979, ch. 1177,§ 2, pp. 4509–4601; Stats. 1982, ch. 283, § 2, p. 924; Stats. 1982, ch. 1094, § 2, p. 3982; Stats.1982, ch. 1282, § 4.5, p. 4750; Stats. 1983, ch. 390, § 2, p. 1632; Stats.1986, ch. 676, § 2, p. 2296; Stats. 1989, ch. 820, , § 1, p. 2700; Stats.1990, ch. 249 (A.B.2601), § 1, p. 1515; Stats.1991, ch. 303 (A.B. 1780), § 1, p. 1872; Stats.1993, ch. 610 (A.B.6), § 30, p. 3422; Stats.1993, ch. 611 (S.B.60), § 34, p. 3587; Stats.1994, ch. 448 (A.B.1948), § 3, p.2427; Stats.1994, ch. 453 (A.B.560), § 9.5, p. 2528; Stats.1997, ch. 910 (S.B. 1195), § 2, p. 6532; Stats.1998, ch. 925, (A.B.1290), § 7, p.6194; Stats.1998, ch. 936 (A.B.105), § 21 and § 21.5,), pp. 6909, 6914.)

reflected a huge shift in public sentiment and struck the first blow in depriving juvenile judges of their ability to determine which youth are amenable to juvenile court.

The culmination of the "get tough" era arrived in 2000, when the voters enacted Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998. (Initiative Measure (Prop 21, § 26, approved March 7, 2000, effective March 8, 2000, amending Welf. & Inst. Code, § 707.) The measure made dozens of changes to juvenile and criminal laws, primarily directed at increasing penalties, creating new crimes, reducing traditional protections juveniles enjoyed, broadening the kinds of cases that could result in transfer, and most notably, allowing prosecutors to file cases against juveniles directly in criminal court without a judicial hearing. (Initiative Measure (Prop 21, § 26, approved March 7, 2000, effective March 8, 2000.) [7]

Proposition 21 indisputably intended to increase punishment for young people. The Findings and Declarations for Proposition 21 set the stage for more punitive measures, informing voters that, "The juvenile justice system is not well-equipped to adequately protect the public from violent and repeat serious juvenile offenders. (Ballot Pamp., Primary Elec. (2000), Proposition 21: Text of Proposed Law, § 2, p. 119.)[8]

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[7] Proposition 21 was almost identical to unsuccessful legislation sponsored by Governor Pete Wilson in the 1998 legislative session. (S.B. 1455 (Rainey 1998), and see Sen. Subcom. on Juv. Justice, Analysis of S.B. 1455 (1997- 1998 Reg. Sess.) as amended Apr. 17, 1998.)

[8] This ballot pamphlet is posted as Voter Information Guide for 2000, Primary http://repository.uchastings.edu/ca_ballot_props/1188/

The Findings embodied in Proposition 21, in a series of assertions reminiscent of Dilulio, went on to avow that murders committed by juveniles had more than doubled; that criminal street gangs have become more violent, bolder, and better organized in recent years; that "the adoption of more meaningful criminal sanctions" such as the 'Three Strikes" law had resulted in a decline in overall crime; that violent juvenile crime had proven resistant to this positive trend; and that the problem of youth and gang violence would, without active intervention, increase, because the juvenile population was projected to grow substantially by the next decade; that juvenile arrest rates for weapons-law violations and killings with firearms had increased; and that juveniles tend to murder strangers at disproportionate rates. (*Ibid.*)

The Argument in Favor of Proposition 21 in the official ballot pamphlet focused heavily on increasing punishment for juveniles:

> As a parent, Maggie Elvey refused to believe teenagers were capable of extreme violence, until a 15 year-old and an accomplice bludgeoned her husband to death with a steel pipe. Ross Elvey is gone forever, but his KILLER WILL BE FREE ON HIS 25TH BIRTHDAY, WITHOUT A CRIMINAL RECORD. Her husband's killer will be released in three years, but she will spend the rest of her life in fear that he will make good on his threats to her. Frighteningly, Maggie's tragedy because of the current juvenile justice system could be repeated today.
>
> Proposition 21—the Gang Violence and Juvenile Crime Prevention Act—will toughen the law to safeguard you and your family.

(Ballot Pamp., Primary Elec. (2000), *supra*, p. 48, emphasis in original.)

The Argument went on to inform voters that:

> Ask yourself, if a violent gang member believes the worst punishment he might receive for a gang-ordered murder is incarceration at the California Youth Authority until age 25, will that stop him from taking a life? Of course not, and THAT'S WHY CALIFORNIA POLICE OFFICERS AND PROSECUTORS OVERWHELMINGLY ENDORSE PROPOSITION 21.
>
> Proposition 21 ends the "slap on the wrist" of current law by imposing real consequences for GANG MEMBERS, RAPISTS AND MURDERERS who cannot be reached through prevention or education.
>
> Californians must send a clear message that violent juvenile criminals will be held accountable for their actions and that the punishment will fit the crime. YOUTH SHOULD NOT BE AN EXCUSE FOR MURDER, RAPE OR ANY VIOLENT ACT—BUT IT IS UNDER CALIFORNIA'S DANGEROUSLY LENIENT EXISTING LAW.

(*Ibid.*, emphasis in original.)

The Argument Against Proposition 21 also focused on the punishment aspects of the transfer provisions in the measure:

> PROPOSITION 21 WILL PUT KIDS IN STATE PRISONS. Proposition 21 will send a new wave of 16 and 17 year olds to state prison. In prison, without the treatment and education available in the juvenile system, they will be confined in institutions housing adult criminals. What will these young people learn

> in state prison—how to be better criminals? Our nation has a tragic record of sexual and physical assault on children who are jailed with adults.

(Ballot Pamp., Primary Elec. (2000), *supra*, p. 49, emphasis in original.) The Legislative Analyst confirmed in the Ballot Pamphlet, that Proposition 21 "[r]equires more juvenile offenders to be tried in adult court." (Ballot Pamp., Primary Elec. (2000), *supra*, p. 45.)

These arguments made it clear that in voting for Proposition 21, voters knew they were calling for increased punishment by expanding eligibility for transfer and allowing prosecutors to file cases directly in adult court.

A. Public Policy and Law Has Shifted Since Proposition 21

1. Public Perceptions About Juvenile Crime Have Changed

Ironically, by the time voters enacted Proposition 21, juvenile crime had already been dropping for several years. By the year 2000, California's juvenile felony offense rate reached its lowest level since the mid-1960s - half the level of the peak period of the mid-1970s. (Cal. Dept. of Corrections and Rehabilitation, *General California Juvenile Crime Trends and CYA Commitments*, *supra*, http://www.cdcr.ca.gov/Reports_Research/trends/slide001.html.) Moreover, as the new century progressed, juvenile crime rates continued to decline. A report on crime from 1989 to 2009, found

that juvenile felony arrests had declined 34.2%. (Cal. Dept. of Justice, Criminal Justice Statistics Center, *Crime in California 2009 - Advance Release* (2009), p. 3.)[9]

As it became clear that the decline in juvenile crime was real and substantial, voters and policymakers gradually relaxed their fear about violent juveniles. A contrite John Dilulio publicly admitted that he had been wrong about the scourge of superpredators. (Haberman, *supra.*)

Polls on juvenile justice also reflected shifting attitudes among voters. For example, a Youth First Initiative Poll of 1,000 Americans in early 2016 found that 78% of those polled supported proposals to reform the youth justice system because youth who commit delinquent acts have the ability to change for the better, and 79% felt that the best thing for society is to rehabilitate these youth so they can become productive members of society instead of incarcerating them. (*Poll Results on Youth Justice Reform*, GBA Strategies (Feb. 1, 2016).)

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[9] California juvenile arrest rates have continued to fall dramatically. As a point of reference, in 2009, there were 204,696 juvenile arrests and 58,555 of those arrests were for felonies. (Cal. Dept. of Justice, Criminal Justice Statistics Center, *Juvenile Justice in California 2009* (2010), p. 2.) In 2016, there were 62,743 juvenile arrests and 19,656 of those arrests were for felonies. (Cal. Dept. of Justice, Criminal Justice Statistics Center, *Juvenile Justice in California 2016* (2017), p. 2.)

2. The United States Supreme Court Relied on Adolescent Development Research to Drastically Reduce Punishment of Youth in the Adult System

Beginning in 2005 with *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court turned the tide of 1980's and 1990's punitive measures against juveniles in a series of decisions incorporating the modern science of adolescent development. *Roper* observed that a lack of maturity and underdeveloped sense of responsibility are more understandable in the young, and that these qualities often result in impetuous and ill-considered actions and decisions. (*Id.* at p. 569.)

In *Graham v. Florida* (2010) 560 U.S. 48, 68, the Supreme Court reiterated that compared with adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed. The court noted that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. (*Ibid.*, quoting from *Roper v. Simmons*, *supra*, 543 U.S. at p. 573.) The court concluded that a juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult. (*Graham v. Florida*, *supra*, at p. 68.)

These adolescent development principles were crystallized in *Miller* v. *Alabama* (2012) 567 U.S. 460. In *Miller*, the court looked

to research showing that only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. (*Id.* at p. 2464.) The court reasoned that the fundamental differences between juvenile and adult minds meant that the child's moral culpability was lessened, and that as neurological development occurs, the deficiencies will be reformed. (*Id.* at pp. 2464–2465.) The court's summary of the hallmark features of youth has been widely applied,[10] and *Miller* held that sentencing schemes must allow consideration of these factors before permitting the imposition of imposing life without the possibility of parole on juveniles.

These adolescent development principles have been recognized and adopted in a series of this court's opinions, including *People v. Caballero* (2012) 55 Cal.4th 262; *People v. Gutierrez* (2014) 58 Cal.4th 1354; and *In re Kirchner* (2017) 2 Cal.5th 1040.

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[10] The *Miller* factors are:
- Immaturity, impetuosity, and failure to appreciate risks and consequences;
- Family and home environment that surrounds the youth—and from which he cannot usually extricate himself;
- Circumstances of the homicide offense, including the extent of participation in the conduct, and the way familial and peer pressures may have affected the youth;
- Incompetencies associated with youth—for example, inability to deal with police officers, prosecutors (including on a plea agreement), or incapacity to assist one's own attorneys;
- Capacity for rehabilitation.

(*Miller v. Alabama*, *supra*, 132 S.Ct. 2455 at p. 2468.)

B. *Roper, Graham, and Miller* impacted Legislation Addressing Transfer

The Supreme Court decisions and the decisions of this court prompted policymakers to find ways to embed modern concepts of adolescent development in law, and to shorten confinement time. California first explored these issues by enacting sentencing review for youth receiving life without the possibility of parole sentences, (Stats. 2012 (S.B. 9), ch. 828, § 27, adding Pen. Code, § 1170.2, subd. (d)(2)), and then for parole of juveniles tried in the adult system by incorporating adolescent development factors. (Stats. 2013 (S.B. 260), ch. 312, adding Pen. Code, § 3051 and Pen. Code, § 4801 (c), establishing youth offender parole; and Stats. 2014 (S.B. 261), ch. 471, amending Pen. Code, §§ 3051, 4081, to afford youth offender parole to youth up to age 23 at the time of their offense.)

There was further evidence of a shift away from the "get tough" years in 2015, just a year before Proposition 57 took center stage. That year, the Legislature passed S.B. 382 (Stats. 2015, (S.B. 382), ch. 234), which clarified the Section 707 criteria for transfer to adult court. The fitness criteria had not been touched for forty years, and the bill expanded the factors to be considered in relation to each criterion.[11] The guidance focused

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[11] As amended by S.B. 382, Welfare and Institutions Code section 707, subdivision (c) provided that the court may consider age, maturity, intellectual capacity, physical, mental, and emotional health at the time of the alleged offense, the minor's impetuosity or failure to appreciate risks and consequences, the effect of familial, adult, or peer pressure on the minor's actions, the effect of the minor's family and community environment and childhood trauma, the minor's potential to grow and mature, the

attention on the characteristics of the young person and their capacity for change, and on factors that would potentially mitigate the gravity of the offense. Much of what is included in the S.B. 382 language parallels the language in the opinion of the Supreme Court and this court. State Senator Lara, the author of the bill, stated that the bill was needed because:

> The decision to send a juvenile to the adult system is a very serious one. The juvenile court system is focused on rehabilitation and provides far more supports and opportunities for juvenile offenders compared to adult criminal facilities. Recent U.S. and California Supreme court cases, as well as cognitive science has found that juveniles are more able to reform and become productive members of society, if allowed to access the appropriate rehabilitation.

(Sen. Com. on Pub. Safety, Analysis of S.B. 382 (2015–2016 Reg. Sess.) as amended Apr. 20, 2015, *Juvenile: Fitness Criteria*, p. 5.)

In enacting S.B. 382, the Legislature intended to narrow the group of youth subjected to the punitive adult system.

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adequacy of the services previously provided to address the minor's needs, the minor's actual behavior, mental state, degree of involvement in the crime, level of harm actually caused, and the minor's mental and emotional development. (Welf. & Inst. Code, § 707, subd. (c), as amended by S.B. 382, Stats. 2015, ch. 234, § 2.)

C. Proposition 57 Eliminated Direct File and Made Made Substantive Changes to Transfer Hearings to Greatly Reduce the Prosecution of Youth in Adult Court

The juvenile justice sections of Proposition 57 were drafted in this new era of recognition that developmental differences between juveniles and adults require different treatment of youth in the justice system.

On November 8, 2016, the voters of California enacted Proposition 57, "The Public Safety and Rehabilitation Act of 2016." (Prop 57, § 4.2, approved Nov. 8, 2016; Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, pp. 141–146, repealing Welf. & Inst. Code, §§ 602, subd. (b), and 707, subd. (d).) The measure eviscerated some of the most significant changes to transfer law made by Proposition 21 in 2000, and also ratified the S.B. 382 language that focusing more attention on the young person, rather than the nature of the offense.

The overarching goal of Proposition 57 was to reduce the number of youth prosecuted in the adult system. Section "2" of Proposition 57, specifically called for California to "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 141.)

To achieve this goal, Proposition 57 did a number of things. Perhaps most famously, it repealed previously existing Section 707, subdivision (d), which gave prosecutors the power to directly file certain cases in adult criminal court. (Prop 57, § 4.2, approved Nov. 8, 2016; Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, pp. 144–145.) It also repealed Welfare and

Institutions Code section 602, subdivision (b), which provided for automatic filing in criminal court for a limited class of cases. (Prop 57, § 4.1, approved Nov. 8, 2016; Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, pp. 141–142.) Instead, going forward, Proposition 57 enacted a new Section 707, subdivision (a), providing that youth may only be transferred to adult court if a judicial officer rules that transfer should occur. (Prop 57, § 4.2, approved Nov. 8, 2016; Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 142.)

The Initiative also narrowed the circumstances in which a young person may be transferred to adult criminal court. It collapsed previously existing sections into one eligibility section that allows transfer only if the person is 16 years of age or older and accused of a felony, or is 14 or 15 and accused of committing one of the listed serious offenses. (Prop 57, § 4.2, approved Nov. 8, 2016; Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 142.)

These changes were explained to the voters in the Official Voter Information Guide, which graphically presented both the existing language and what would be deleted or changed. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, pp. 141–146.) The Analysis by the Legislative Analyst began by explaining how youth were transferred to adult court under then current law. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016), Analysis by the Legislative Analyst, p. 55.) The Analysis specifically explained the difference between the rehabilitative juvenile system and the punitive adult system:

> . . . juvenile court judges do not sentence a youth to a set term in prison or jail. Instead, the judge determines the appropriate placement and rehabilitative treatment (such as drug treatment) for the youth, based on factors such as the youth's offense and criminal history . . . In certain circumstances, youths accused of committing crimes when they were age 14 or older can be tried in adult court and receive adult sentences.

(*Ibid.*)

The Analysis then explained the three mechanisms by which juveniles could be tried in adult court – automatic[12], prosecutorial direct file, and judicial transfer. (*Ibid.*) The Analysis made it clear that youth in the juvenile justice system are held in juvenile facilities, while youth convicted in adult court are generally sent to state prison as soon as they turn 18. (*Ibid.*)

III. THE LANGUAGE AND INTENT OF THE INITIATIVE SUPPPORT A RETROSPECTIVE APPLICATION

Amici disagree with petitioner's assertions that a retrospective application of Proposition 57 cannot be supported by the text of the Ballot Measure or extrinsic materials. (Opening Brief on the Merits herein "OBM," pp. 25–30, and Petitioner's Supplemental Reply Brief herein "SRB," pp. 11–13.)

Prior to adoption of Proposition 57, certain crimes were subject to mandatory direct filing (Welfare and Institutions Code section 602, subdivision (b)) or discretionary direct file (Welfare and Institutions Code, section 707 (d))Youth as young as 14 years old

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[12] Commonly referred to as "mandatory direct file."

could be directly filed in adult criminal system and ultimately face adult punishments. (See *Manduley v. Superior Court, supra,* 27 Cal.4th at pages 548–550.) Proposition 57 explicitly repealed those provisions.

Proposition 57 provided in Section 2, in relevant part:

> In enacting this act, *it is the* ***purpose and intent*** of the people of the State of Califor-nia *to*: . . . [¶] 2. *Save money by reducing wasteful spending on prisons.* [¶] 4. *Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.* [¶] 5. *Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court.*

(Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 141, emphasis added.)

Proposition 57 provided further, in Section 5: "*This act shall be broadly construed to effect its purposes.*" (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 146, emphasis added.) Proposition 57 provides finally, in Section 9: "*This act shall be liberally construed to effect its purposes.*" (*Ibid.,* emphasis added.)

While neither "retroactive" or "retrospective" appears in the initia-tive, the text and the statement of "purpose and intent" indicate clearly that Proposi-tion 57 should receive as broad an application as reasonable, which would include retrospective application to individuals such as real party Lara and other youth subject to direct file whose cases are not final. The "purpose and intent" of the initiative are clear: to "[s]ave money by reducing wasteful spending on prisons," "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles," and to "[r]equire a judge, not a prosecutor, to decide

whether juveniles" will be rehabilitated through the juvenile system or punished in the adult system. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop 57, p. 141, emphasis added.) The enumerated "purposes" and "intents" are best served by retroactive application of the initiative, and when the "broadly/ liberally construed" language is added to the calculus, the intent of retrospectivity is clear. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 146.) Petitioner intimates that the omission of a specific "retroactive application clause" in Proposition 57 precludes its retrospec-tive application, notwithstanding the stated "purpose and intent" and the "broadly/liberally construed" language. (SRB at pp. 10–13.) That argument fails to recognize that the above aspects of the initiative are not random phrases buried in the text. They are clear statements of the voters' intentions, and they reveal what has motivated the enactment of Proposition 57. A "broad," and "liberal" reading of the initiative, in light of its "purpose and intent," mandates a retrospective application.

The electorate is "presumed to be aware of existing laws and judicial construction thereof." (*In re Lance W.* (1985) 37 Cal.3d 873, 890 fn. 11.) This court should presume that in enacting Proposition 57, the electorate was aware of the *Estrada* rule and was aware of the lack of a "prospective only" saving clause. (See *People v. Nasalga* (1996) 12 Cal.4th 784, 793.)

Previous ballot initiatives employed explicit language making an ameliorative statute prospective. For example, in *People v. Floyd* (1983) 31 Cal.4th 179, the California Supreme Court held that the previous Proposition 36, approved by voters on November 7, 2000, applied prospectively only, despite its

ameliorative effect, because it expressly stated, "'Except as otherwise provided, the provisions of this act shall become effective July 1, 2001, and its provi-sions shall be applied prospectively.'" (*Id.* at pp. 183–185.) Unlike the inclusion of retrospective or prospective clause, *the absence* of a retrospective or prospective clause *is not* determinative of intent.

Further, the accompanying ballot materials provide greater context for the initiative's statements of "purpose and intent" and "broadly/liberally construed" mandates. The "Argument in Favor of Proposition 57" explained that "Prop. 57 focuses resources on keeping dangerous criminals behind bars, while rehabilitating juvenile and adult inmates and saving tens of millions of taxpayer dollars." The Argument in Favor continued:

> [Prop. 57] [r]equires judges instead of prosecutors to decide whether minors should be prosecuted as adults, emphasizing rehabilitation for minors in the juvenile system.
>
> *We know what works.* Evidence shows that the more in-mates are rehabilitated, the less likely they are to re-offend. Further evidence shows that *minors who remain under juvenile court supervision are less likely to commit new crimes. Prop. 57 focuses on evidence-based rehabilitation* and allows a juvenile court judge to decide whether or not a minor should be prosecuted as an adult.

(Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument in favor of Prop. 57, p. 57, emphasis added.) The Argument in Favor also informed the voters, as follows:

> Prop. 57 focuses our system on *evidence-based rehabilitation for juve-niles* and adults because it *is better for public safety than our current system*"; and "Prop. 57 saves tens of millions of taxpayer dollars by reducing wasteful prison spending, *breaks the cycle of crime by rehabili-tating deserving juvenile* and adult *inmates*, and keeps dangerous crimi-nals behind bars.

(Ballot Pamp., Gen. Elec. (Nov. 8, 2016) Argument in Favor of Prop. 57, pp. 58–59, emphasis added.)

The voters were on clear notice that in voting for Proposition 57, they were voting to roll back previous punitive measures and assuring that as many youth as possible would be handled in the rehabilitative juvenile system.

In short, Proposition 57 seeks "rehabilitation for juveniles," and *promotes continued juvenile court supervision, not the sentencing of youth in adult court* to better serve public safety. Those goals are served by retroactive application and dis-served by a prospective-only application. They further illuminate the intention of the voters--as revealed in the "purpose and intent" and "broadly/liberally construed" language -- that retroactive application of Proposition 57 was intended.

IV. BECAUSE DIRECT FILE HAS A NEXUS WITH PUNISHMENT, THE RATIONALE OF *ESTRADA* AND ITS PROGENY CONTROLS

Although the law presumes a statutory change is prospective (Pen. Code, § 3.), absent a clear indication of prospective or retrospective application within the statute, this court is not

constrained to a prospective application when the change in the law relates to a reduction in punishment. (*In re Estrada, supra,* 63 Cal.2d at p. 745.)

A. Because Direct File is Intertwined with Punishment, the *Estrada* Rule Must Apply

The raison d'être of direct file by prosecutors is to ensure that youth have *no opportunity* to have a juvenile disposition. By eliminating a transfer hearing in juvenile court, direct file operates as a virtual guarantee that youth will be sentenced in adult court to considerably harsher sentences than what could be obtained in the juvenile system.[13] Because direct file originates from the concept that certain youth cannot be punished severely enough in the juvenile system, direct file is inextricably linked with punishment. As noted by Justice Kennard in her dissent in *Manduley v. Superior Court, supra,* 27 Cal.4th 537:

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[13] For certain youth subject to direct file, Penal Code section 1170.17 provides an opportunity to obtain a juvenile court disposition. However, the statute as written applies to a miniscule number of direct filed youth. In the five years from 2011 through 2015, only 11 cases were certified back to juvenile court by "reverse remand," out of a total of 2,889 cases that were directly filed in adult court. (Cal. Dept. of Justice, Criminal Justice Statistics Center, *Juvenile Justice in California 2011* (2012), Table 16, p. 75 and Table 31, page 94; *Juvenile Justice in California 2012* (2013), Table 16, p.75 and Table 31, page 94; *Juvenile Justice in California 2013* (2014), Table 16, p. 75 and Table 31, page 94; *Juvenile Justice in California 2014* (2015), Table 16, p. 75 and Table 31, page 94; and *Juvenile Justice in California 2015* (2016), Table 16, p. 75 and Table 31, page 94.)

> The juvenile court system and the adult criminal courts serve fundamentally different goal . . . California Rules of Court, rule 4.410 identifies seven objectives in sentencing a criminal defendant. They include punishment, deterrence, isolation, restitution, and uniformity in sentencing, but they do not include goals important in the treatment of juvenile offenders such as maturation, rehabilitation, or preservation of the family.

(*Manduley v. Superior Court*, *supra*, 27 Cal.4th at pp. 592–593 (dis. opn. of Kennard, J.).)

Unquestionably, the consequences of proceeding in adult court are punitive when compared with juvenile court. The differences in "sentencing" in juvenile[14] and adult court alone compel a conclusion that it is about punishment within the meaning of *In re Estrada*, *supra*, 63 Cal.2d 740. The potential length of confinement in each system makes this distinction clear. In the juvenile system, a young person may be held only up to age 23. (Welf. & Inst. Code, §§ 607, subd. (f), 1769, subd. (c).) In the adult system, youth are subjected to the adult sentencing statutes (Pen. Code, §§ 1168, 1170), up to and including a sentence of life without the possibility of parole. (Pen. Code, §190.5, subd. (b).) Direct file bars a young person from receiving the individualized rehabilitative care and treatment required by Welfare and

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[14] Juvenile court law does not even use the term "sentencing." Instead, children receive a disposition from the juvenile court that makes "reasonable orders for the care, supervision custody, conduct, maintenance, and support of the minor or nonminor, including medical treatment..." (Welf. & Inst. Code, § 727.)

Institutions Code, section 202, subdivision (a).[15] If the allegations are sustained, the court may order that the child receive a huge array of services and programs, and/or be placed in one of many residential settings or institutions designed for children. (Welf. & Inst Code, §§ 725, 726, 727.) In the adult system, the court's primary sentencing options are jail and state prison. Parents are an important part of the proceedings in juvenile court (see, for example, Welf. & Inst. Code § 630, § 633, § 675, § 706), but nothing in the adult court law requires that parents be present or involved.

Sentencing, in the adult system, is focused on punishment. Until just this year, the purpose clause for the Determinate Sentencing Act unabashedly provided that, "the purpose of imprisonment for crime is punishment." (Pen. Code, § 1170, subd. (a)(1).) Effective January 1, 2017, Penal Code section 1170, subdivision (a)(1) was amended to provide that "purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice." (Stats. 2015 (AB 2590),

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[15] Welfare and Institutions Code section 202, subdivision (b) provides, in pertinent part:
Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall . . . receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter . . . family preservation and family reunification are appropriate goals for the juvenile court to consider when determining the disposition of a minor under the jurisdiction of the juvenile court as a consequence of delinquent conduct when those goals are consistent with his or her best interests and the best interests of the public. . . .

ch. 378. § 1.) However, no one familiar with California's state prison system would suggest that this purpose has been realized or will be meaningfully attained in the foreseeable future. (See, e.g., Cal. Rehabilitation Oversight Board, *C-ROB Report* (Sept. 2016), hereafter "*C-ROB Report* (Sept. 2016)", pp. 21–37, 45–47, detailing the number of inmates receiving rehabilitative programming and the number program slots available.)

For example, the most recent report indicates that in a prison system with 124,081 inmates (*C-ROB Report* (Sept. 2016), at p. 17), there were only 475 actual academic teachers (roughly 1 teacher for every 261 students), and an actual capacity of only 36,531 academic slots. (*C-ROB Report* (Sept. 2016), at p. 24–25, Appendix B.) Even then, the focus is only on helping people attain a 9th grade reading level or obtaining a GED; more advanced study is handled through volunteer programs. (*Id. at pp. 24–25.*)

In contrast, a young person who is retained in the juvenile system and committed to the Division of Juvenile Facilities faces much brighter prospects. He or she is required to have an education plan directed at academic, vocational and life survival skills, with an annual assessment of needs. (Welf. & Inst. Code, § 1120.) The Division of Juvenile Facilities education program complies with state curriculum and minimum minutes of instruction requirements (Welf. & Inst. Code, § 1120.2), just as would be the case in a public high school. For the many youth who have disabilities, there is an expansive special education program. (*Ibid.*)

The environmental difficulties for young inmates in state prison are well documented. Youth in adult prison report that

much of their time is spent learning criminal behavior from other inmates and proving how tough they are. (Redding, *Juvenile Transfer Laws: An Effective Deterrent?*, OJJDP Juvenile Justice Bulletin (June 2010), at p. 7.) More than 30 percent report having been assaulted or having witnessed assaults by prison staff. (*Ibid.*) As compared with those in juvenile facilities, juveniles incarcerated in adult prison are eight times more likely to commit suicide, five times more likely to be sexually assaulted, and almost twice as likely to be attacked with a weapon by inmates or beaten by staff. (*Ibid.*, citation omitted.) These concerns are confirmed in studies of young inmates in California prisons. (See, for example, Human Rights Watch, "*When I Die...They'll Send Me Home,*" (2008), at pp. 54–56.)[16]

Not surprisingly, the decision whether to transfer a child to the adult system has been described by this court as "the worst punishment the juvenile court is empowered to inflict." (*Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 810.) And when prosecutors were allowed to bypass the juvenile court and direct file matters into the adult court, they guaranteed those youth would receive "the worst punishment" available in the *adult system.*

Because of this connection between direct file and punishment, the rule of *In re Estrada*, *supra*, 63 Cal.2d 740 must apply to youth who were subject to direct file. In *Estrada* this Court held that changes impacting sentencing, which mitigate

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[16] Found at https://www.hrw.org/sites/default/files/reports/us0108_0.pdf

punishment, apply to defendants even if those changes were made after the date of the offense, as long as judgment is not final. (*Id.* at p. 742.)

Estrada was initially convicted of a drug offense and was committed to a rehabilitation center. (*In re Estrada*, *supra*, 63 Cal.2d at pp. 742–743.) At some point he left the center and was captured and eventually pled to escape without force or violence. (*Id.* at p. 744) After his escape but before his conviction, the Legislature amended the statute impacting punishment for escape without force or violence that resulted in a lesser minimum sentence and eliminated the delay in parole eligibility. (*Id.* at pp. 743–744.)

This court reasoned that Estrada was "entitled to the ameliorating benefits of the [amended] statutes," and found that a "legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or *different treatment* is sufficient to meet the legitimate ends of criminal law." (*In re Estrada*, *supra*, 63 Cal.2d at pp. 744–745, emphasis added.) Therefore, "the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id.* at p. 748)

B. The *Estrada* Rule Only Requires the Possibility of a Lesser Punishment

Although the *Estrada* case addressed a statute that ameliorated the punishment for a specific offense, this court has applied *Estrada* in broader contexts, demonstrating that *Estrada* is applicable to direct filed youth.

1. The *Estrada* Rule Applied When the Minimum Term of Imprisonment was Ameliorated

This court decided *In re Griffin* (1965) 63 Cal.2d 757 the same day it decided *Estrada*. In *Griffin*, the Court examined the effect of the *Estrada* rule upon a statute that changed the minimum term of imprisonment but increased the fixed minimum term of parole. (*Id.* at p. 760.) Griffin, convicted of three counts of sales of marijuana in violation of Health and Safety Code section 11531 was sentenced to 10 years to life, which was the proper sentence for that offense. (*In re Griffin, supra*, at p. 757.) Before his conviction was final, the Legislature reduced the minimum sentence for that offense from "10 years to life" to "five years to life." (*Id.* at p. 759.)

Even though there was no guarantee that this amended statute would directly impact his overall sentence, this court applied *Estrada*. (*In re Griffin, supra*, 63 Cal.2d at p. 759.) After noting the lesser minimum sentence triggered the *Estrada* rule, this court then grappled with another section of the amended statute that imposed a fixed minimum term of five years before parole could be considered. (*Id.* at p. 760.) Under the original statute, although the minimum of the sentence was "10 years to life," because there was no minimum eligibility for parole the Adult Authority fixed the time of three years and four months for his parole eligibility. (*Ibid.*)

Under the amended statute, the lesser minimum sentence was a benefit to Griffin, but the additional requirement of a minimum parole eligibility requirement was to his detriment, since he was released after three years and four months. If the court applied

the new statute, Griffin would have to return to custody to serve additional time in custody before being released due to the change in minimum parole eligibility. This would constitute an ex post facto punishment. (*In re Griffin*, *supra*, 63 Cal.2d at p. 760.) Even though this court found *Estrada* applied due to the change in minimum sentence, it did not apply the rule to Griffin because the increase in the amount of time served prior to parole eligibility would run afoul of the established prohibition against ex post facto laws.

Griffin is instrumental in demonstrating that the *Estrada* rule applies even if there is no guarantee that the ameliorative change would actually lessen the punishment. The fact that a lesser punishment *could occur* triggers application of the rule. By providing youth subject to direct file a transfer hearing, a lesser punishment *could occur* due to the significant differences between the punishment schemes of the juvenile and adult systems. Therefore, Proposition 57, with its resulting elimination of direct file, triggers the *Estrada* rule.

2. The *Estrada* Rule Has Been Applied When the Amended Statute Did not Lessen the Penalty But Provided the Trial Court Discretion to Impose the Same Penalty or a Lesser Penalty

In *People v. Francis* (1969) 71 Cal.2d 66, this court found that the *Estrada* rule applied to an amended statute even though that statute did not lessen the penalty, but merely provided an opportunity for a lesser penalty. Francis was convicted of Section 11530 (possession of marijuana) and the proscribed punishment

per statute was from 1–10 years in state prison, *or* probation and one year of county jail. (*People v. Francis*, *supra*, at p. 76.) While Francis' case was pending on appeal, the Legislature amended the punishment for Section 11530 to include an alternative sentence of imprisonment in the county jail for not more than one year *or* imprisonment from one to 10 years in the state prison, in addition to the previous option of probation and county jail. (*Ibid.*) Despite the fact that the trial court did not initially grant Francis a probationary sentence, and that the amended statute did not *guarantee* Francis any lesser sentence, this court found that the possibility that of an alternative punishment triggered the *Estrada* rule; thereby compelling the return of the case to the trial court for reconsideration of the sentencing. (*People v. Francis*, *supra*, at p. 75.)

This court noted that "the amendment does not revoke one penalty and provide for a lesser one but rather vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty." (*People v. Francis*, *supra*, 71 Cal.2d at p. 76.) Moreover, as the court stated the inference from the amended statute was that "the former penalty provisions [were] too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*Ibid.*) This court was persuaded that, "the mere fact that the Legislature changed the offense from a felony to a felony-misdemeanor *conceivably might* cause a trial court to impose a county jail term or grant probation in a case where before the amendment the court denied probation . . . and sentenced the defendant to prison." (*Id.* at p. 77, emphasis added.)

Even though the benefit to Francis seemed rather attenuated, considering the judge did not impose a probationary sentence at the outset, this court applied the *Estrada* rule.

Direct filed youth who are provided with a meaningful transfer hearing are similarly situated to the defendant in *Francis.* If a judge exercised his or her discretion to have the youth remain in the juvenile court, the youth has the potential, as in *Francis,* to have a disposition tailored "to fit the particular circumstances." Juvenile court, with its focus on rehabilitation and consequent limitations on custody time, results in a significantly different and lesser penalty than if the youth was sentenced in the adult system.

Unlike Francis, real party Lara does not have a mere hope that he *might* receive a juvenile disposition--he has *certainty* because the juvenile court conducted his transfer hearing and found he should remain in juvenile court. (OBM p. 14.) In all likelihood, he will be released by the time of his 23rd birthday.[17] Real party Lara was charged by information with four counts: kidnapping for rape, oral copulation, and sodomy (count 1; Pen. Code, § 209, subd. (b)(1)); forcible oral copulation with a child under 14 years of age (count 2, Pen Code § 288(a), subd. (c)(2)(B); and two counts of forcible sodomy; Pen. Code, § 286, subd. (c)(2)(B)). Assuming no other allegations, dismissed counts, or merger, the maximum exposure in adult court would be 38 years

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[17] Welfare & Institutions Code section subdivision (f). This confinement time could be extended only if a petition were filed pursuant to Welfare and Institutions Code, section 1800 alleging that his release would result in a danger to the public.

plus life with the possibility of parole.[18] As noted previously in this brief, the differences between services offered at the Division of Juvenile Facilities and state prison are marked, and Lara would have far fewer rehabilitative opportunities if he was sentenced to state prison.

With its elimination of direct file and emphasis on rehabilitation, Proposition 57 and the amendments it made to Welfare and Institutions code sections 602 (b) and 707 (d) are ameliorative to a far greater degree than was the amendment of Section 11530 in the *Francis* case.[19] Therefore, the *Estrada* rule controls.

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[18] Count one of the Information is a life sentence per the Penal Code. Counts two-four are determinate sentences. However, due to the nature of the offenses, pursuant to Penal Code section 667.6, subdivision (d), the counts must be sentenced as full-term consecutive counts.

[19] *Francis* was decided the same day as *People v. White* (1969) 71 Cal.2d 80. *White* addressed the same statute and subsequent amendment discussed in the *Francis* case. This Court, relying on *Estrada* and *Francis,* found that White should have another sentencing hearing to have the opportunity to benefit from the ameliorative change to the law even though there was no guarantee he would receive a different sentence. (*Id.* at p. 83.)

3. *Estrada* Applied to an Amended Statute That did not Lessen Punishment for Any Particular Crime, but Provided an Amenability Assessment by the California Youth Authority[20]

In re Benefield (1977) 67 Cal.App.3d 51, addressed whether the enactment and subsequent changes to Welfare and Institutions Code section 707.2 constituted a mitigation of punishment triggering the *Estrada* rule. (*In re Benefield, supra,* at pp. 56–57.) Benefield was transferred to adult court after the juvenile court judge found that he was not amenable to continued juvenile court treatment. (*Id.* at p. 54.) Benefield was subsequently convicted in adult court and sentenced to state prison. After his conviction, Welfare and Institutions Code section 707.2 was enacted and provided that a youth under 18 could not be directly sentenced to adult prison. Within a year, Section 707.2 was amended to provide a discretionary remand to CYA for 90 days for a diagnostic report on the youth's amenability to training and treatment at CYA. Under the amendment, the court could only commit a youth directly to prison, if, after reading and considering the diagnostic report, the court found the youth was not suitable for placement at CYA. (*In re Benefield, supra,* at pp. 56–57.)

There was no guarantee that a diagnostic report would be favorable or that the trial court would find Benefield suitable for

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[20] The California Youth Authority (CYA) is now called the Division of Juvenile Facilities (DJF).

CYA. However, the Court of Appeal found that the *potential* for a commitment to CYA mitigated the punishment, thereby triggering the *Estrada* rule.

The rationale underlying the *Benefield* decision and the issue in this case are remarkably similar. Even though Section 707.2 did not change the statutory punishment for the particular charges involved in the case, it was obvious to the *Benefield* court that the potential for a CYA disposition mitigated an initial commitment to prison. Clearly, an opportunity to be housed with other juveniles, with mandated schooling and programming suitable for young adults, is far less punitive than commitment to an adult prison.

Direct file juveniles are similarly situated to Benefield. Instead of a diagnostic report and potential commitment to CYA/ DJF, the ameliorating aspect for youth subject to direct file is a thorough transfer hearing by a judicial officer. The juvenile court determines at the transfer hearing whether the youth should have continued juvenile court treatment, with its host of dispositional options geared toward rehabilitation, or face punishment in the adult court. If the potential for a CYA commitment from adult court was found to be ameliorating in *Benefield*, the same should be found with respect to a transfer decision affecting the potential for a juvenile court treatment. Under *Benefield*, the changes from the passage of Proposition 57 mandate the application of *Estrada.*

Ultimately, when a change in the law allows a court to exercise sentencing discretion more favorably for a particular defendant, the reasoning of *Estrada* must apply. It is immaterial whether the court would actually exercise its discretion favorably

for the defendant. The mere ability to have a potentially lesser sentence has been found to trigger the *Estrada* rule. Since a transfer hearing has the potential to greatly mitigate a youth's sentence and save the youth from adult prison, *Estrada* and its progeny control.

V. THIS COURT'S HOLDING IN *BROWN* DOES NOT BAR THE APPLICATION OF *ESTRADA* TO DIRECT FILED YOUTH

Petitioner relies on the dicta in *People v. Brown* (2012) 54 Cal.4th 314, to argue that this Court cannot apply the *Estrada* rule to Proposition 57 and the statutory changes it enacted. (OBM pp. 25–29.) In *Brown,* this court found that the *Estrada* rule did not apply to a statutory change affecting conduct credits for prisoners. (*Id.* at p. 320.) As this court correctly decided, application of the *Estrada* rule was inappropriate in that case because the legislative history of the amended statute did not indicate retroactivity. (*Ibid.*) Moreover, the amended statute involved the awarding of custody credits earned for *future* conduct and did not mitigate punishment. (*Id.* at p. 328.) As this court noted, "[i]nstead of addressing punishment for past criminal conduct, the statute addresses *future conduct* in a custodial setting by providing increased incentives for good behavior." (*Id.* at p. 325.)

Because the sole purpose of transfer is to evaluate *past criminal conduct* and determine whether a rehabilitative system or a punitive system is appropriate, petitioner's reliance on

Brown is misguided and ignores the underlying rationale of the *Estrada* rule and the distinct facts that distinguish *Brown* from this case.

A. *Brown* Does Not Impact the Rationale Underlying *Estrada*

1. The Penological Principles Relied on by This Court in *Estrada* Have Not Changed

The *Estrada* rule was grounded in sound penological principles that are as pertinent today as they were when *Estrada* was decided in 1965. As this court noted when discussing the amendment of a statute to ameliorate punishment:

> It is an *inevitable inference* that the Legislature [or electorate] 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 . . . This intent seems obvious, because to hold otherwise would be to conclude that the Legislature [or electorate] was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.

(*In re Estrada, supra*, 63 Cal.2d at p. 745.)

This conclusion was based on the best modern theories on the function of punishment in criminal law:

> According to these theories, the punishment of treatment of criminal offenders is directed toward one or more of the three ends: (1) to discourage and act as a deterrent upon future criminal activity, (2) to

> confine the offender so that he may not harm society and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution.

(*In re Estrada*, *supra*, 63 Cal.2d at p. 745, citing *People v. Oliver* (1956) 1 N.Y.2d 152 [134 N.E.2d 197], citing Michael & Weschler on Criminal Law & Its Administration [1940] pp. 6–11; Note, 55 Col.L.Rev., pp 1039, 1052.)

In evaluating *Oliver* and modern penological theories this court found that:

> [a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the *different treatment* is sufficient to meet the legitimate ends of criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance.

(*In re Estrada*, *supra*, 63 Cal.2d at p. 745, emphasis added.)

The application of modern penological theories to the statutory amendments accomplished by Proposition 57 dictate that direct filed youth whose cases are not final receive the benefit of the "different treatment" that they would receive if they prevailed at a transfer hearing.

To hold otherwise would be to disregard the sound principles underlying the *Estrada* rule. It is difficult to understand how treating youth under the age of 18 the *same* as their adult counterparts would serve penological goals of the system when the neuroscience repeatedly relied upon by the United States

Supreme Court has concluded that youth are not the same as their adult counterparts and that the traditional concepts of deterrence and retribution are inappropriate for them.

Because *Brown* involved a statute awarding prisoners additional credits for *future* conduct, the penological theories that constituted the heart of the *Estrada* decision were not relevant to this court's decision. More importantly, because the *Brown* decision involved future conduct credits, its refusal to apply the *Estrada* rule and its underlying penological basis does not bar the application of the *Estrada* rule to direct filed youth. A youth who is transferred to adult court faces far greater punishment than if retained in the juvenile system. Future conduct is not the issue in transfer hearings or direct file cases. Accordingly, the issues surrounding direct file and transfer hearings have a far stronger connection to *Estrada* with its focus on reducing punishment for past conduct, than a statute addressing *future* conduct and providing incentives for good behavior *after* the commission of the criminal offense.

B. *Estrada's* Reliance on *Oliver* Is Crucial to the Creation of the *Estrada* Rule

In *Estrada,* this Court premised its reasoning on *People v. Oliver, supra,* 1 N.Y.2d 152, in considering the interplay among underlying penological issues, amended ameliorating statutes, crime, and punishment. *Oliver* specifically dealt with an issue closely related to the case at hand—how a juvenile is to be punished. When Oliver was 14 years old he committed a murder, and at that time New York law provided for him to be prosecuted

in adult court. (*Id.* at p. 155.) However, before his case was final, New York amended its statute and provided that youth under 15 may only be prosecuted in juvenile court. (*Id.* at pp. 155–156.) The question presented to the Court of Appeals of New York was significant for the fate of Oliver. The old law provided for prosecution in adult court, and the amended statute mandated treatment in the juvenile system. New York has statutory presumptions similar to California's regarding the prospective application of new laws. (*Id.* at p. 158)

The *Oliver* court considered the conflict between the general rule of prospective application versus the benefit conferred by ameliorative statutes. (*People v. Oliver*, *supra*, 1 N.Y.2d at pp. 158–164.) The court's analysis is instructive for this case. The *Oliver* court found that the change brought about by the amended statute did not ameliorate the specific punishment for an enumerated crime, but affected *a class of youth*—those under 15 and older than 7. (*Id.* at p. 161.) Unlike California, where juvenile petitions can still result in strike offenses, lifetime sex offender registration, and a host of lifetime collateral consequences,[21] the ameliorative statute in *Oliver* "relieved children 14 or less from criminal responsibility altogether." (*Ibid.*) Moreover, the *Oliver* court reasoned:

> The amendatory statute unquestionably falls within the category of legislation reducing penalties for criminal activity. Its object and effect were to relieve

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[21] See generally, Burrell & Stacy, edits., Collateral Consequences of Juvenile Delinquency Proceedings in California, A Handbook for Juvenile Law Professionals (2011).

> children of a certain age from *punishment as criminals*, and subject them, *instead to corrective treatment as juvenile delinquents.* [22]

(*People v. Oliver*, *supra*, 1 N.Y.2d at p. 161, emphasis added.)

The *Oliver* court determined that whether a statute was ameliorative for a specific punishment or whether it affected how a class of youth were treated in the system, the strong penological considerations mandated that those charged get the benefit of the amended ameliorative statute. (*People v. Oliver*, *supra*, 1 N.Y.2d at pp. 161–163.)

The reliance upon *Oliver* in the *Estrada* case is significant because the *Oliver* case undoubtedly led this court to reconsider its previous decision denying defendants the benefit of an ameliorative statute. (See *People v. Harmon* (1960) 54 Cal.2d 9.) Although *Harmon mentioned Oliver* in passing, it was considered unpersuasive. (*People v. Harmon*, *supra*, at p. 24.) However, the majority opinion in *Harmon* did not address penological underpinnings and the interplay between ameliorative statutes and punishment. Justice Peters, later the author of *Estrada*, discussed *Oliver* in his *Harmon* dissent, and noted the importance of addressing the issues the *Oliver* court raised with

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[22] The *Oliver* court also noted that the amended statute constituted a legislative determination that the "afflictive sanctions" found in the adult system do not properly address the needs of youth; and that the State was shifting its focus on providing "erring children" in the formative years of their lives with remedial and corrective services of the juvenile system. (*Oliver* at p. 161.)

respect to reviewing ameliorating statutes and their applications to cases not final. (*Id.* at pp. 32–33 (dis. opn. of Peters, J.).)

Because the *Oliver* case is the obvious genesis of the *Estrada* rule, one really cannot apply *Estrada* and ignore the principles or facts of the *Oliver* case. Further, because the issues in the *Oliver* case are nearly identical to the issues presented in the instant case, the facts and application of the penological concerns to the ultimate decision in *Oliver,* that were echoed by this court in *Estrada*, remain. They are consonant with this court's decision in *Brown* and do not prevent application to real party Lara and other direct filed youth whose cases are not final. In fact, although *Oliver* is not specifically cited in *Brown,* as the below example shows, this court has relied on the same language originating in *Oliver* for over 50 years.

> The holding in *Estrada* was founded on the premise that [a] legislative mitigation of the penalty for a *particular crime* represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law.

(*People v. Brown*, *supra*, 54 Cal.4th at p. 325, citing *In re Estrada*, *supra*, 63 Cal.2d 740, emphasis in the original.)

Compare with *Oliver*:

> A legislative mitigation of the penalty for a particular crime represents a legislative judgment that he lesser penalty or the *different treatment* is sufficient to meet the legitimate ends of the criminal law.

(*People v. Oliver*, *supra*, 1 N.Y.2d at p. 160, emphasis added.)

The *Estrada* court relied on the underlying penological principles of *Oliver* in addressing a particular statute. It did not limit the application of these core principles to cases where the amending statute applied to specific crime. For more than 50 years this court has applied the principles originating in *Oliver* to statutes that mitigated the penalty for a particular crime, and as cited previously, to cases where the ameliorative statute did not lessen the penalty for a particular crime. *Brown* did not create a new limitation, its emphasis on *particular crime* was germane to the issue in *Brown,* but it did not create bar for future cases where the ameliorative statute may not lessen the penalty for a particular crime.

In fact, *Oliver* and *Estrada* mandate that this court view the elimination of direct file as an ameliorative statute that mitigates punishment and provide transfer hearings for direct filed youth whose cases are not final. This would provide those youth a potential opportunity "*for corrective treatment as juvenile delinquents.*" (*People v. Oliver*, *supra*, 1 N.Y.2d at p. 161, emphasis added.)

C. Petitioner's Reliance on the Facts and Dicta of *Brown* is Misguided

The heart of petitioner's *Estrada* argument is that the facts and language of *Brown* defeat application of the *Estrada* rule to this case. (See OBM p. 30 and SRB p. 8.) In Argument, IV-A-1 of this brief, *supra*, Amici have distinguished the facts of the amended statute in question in *Brown* from the amended statute in this matter. Without a doubt, a statute that addresses *future*

conduct like the statute in *Brown* runs afoul of the *Estrada* rationale. But that scenario has little if anything to do with the issue before this court.

Petitioner relies upon dicta in *Brown* to argue that *Brown* limited the application of the *Estrada* rule. (SRB, p. 8.) Petitioner includes this quote:

> *Estrada* is today properly understood, not as weakening or modifying the default rule of prospective application codified in [Penal Code] 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 at p. 324.)

There are several problems with this position. First, the selected language is dicta and not probative of how *Estrada* applies to the facts of this case because the issue presented in this case was not even remotely before the court in *Brown*.

Second if petitioner's interpretation of this dicta was appropriate, then the logical extension of petitioner's argument would be that all *Estrada* cases that did not directly lessen the punishment for a particular crime must be overruled. For example: *People v. Uriziceanu* (2005) 132 Cal.App.4th 747, 785–786, and *People v. Trippet* (1997) 56 Cal.App.4th 152, 1544–1545 [applying *Estrada* to laws that created affirmative defenses]; *In re Benefield*, *supra*, 67 Cal.App.3d 51[applying *Estrada* to an enacted statute mandating a diagnostic exam prior to prison commitments for youth under 18]; and other cases

omitted for brevity. The unique facts of *Brown* did not result in this Court imposing limits on the *Estrada* rule that would bar its application to real party's matter.

Third, petitioner's strained application of facts and dicta are not consistent with the *ratio decidendi* of *Brown.*

> The ratio decidendi is the principle or rule that constitutes the ground of the decision, and it is this principle or rule that has the *effect of precedent.* It is therefore necessary to read the language of an opinion in *the light of its facts and the issues raised* to determine (a) which statements of law were necessary to the decision, and therefore binding precedents, and (b) which were arguments and general observations, unnecessary to the decision, i.e. dicta with no force as precedents.

(*Ratio Decidendi and Dicta,* 9 Witkin, Cal. Proc. (5th ed. 2008) Appeal § 509.)

As this court noted in *Ginns v. Savage* (1964) 61 Cal.2d 520, "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Id.* at p. 524, fn. 2.) Petitioner's attempts to extend the facts and dicta of *Brown* as a bar to the application of the *Estrada* rule to the present case is illogical. Such use fails to "understand" the language "in the light of the facts and issue before the court." Moreover, such an interpretation of *Brown* creates imaginary limits on *Estrada* that are not only confounding but unsound.

When confronted with whether an ameliorating statute has to mitigate a specific crime to be applied, or whether such a statute can affect how a class of youth will be treated but not lessen the punishment for a specific crime, the court in *Oliver* noted:

> It would be anomalous to give retroactive force, as the law does, to a legislative judgment reducing the penalty for a particular crime and to deny such effect to a judgment...invoking only the corrective processes employed by the children's court.

(*People v. Oliver*, *supra*, 1 N.Y.2d at pp. 161–162.)

It defies logic and reason to say that the underlying rationale of *Estrada* can be applied to an amended statute that lessens punishment or could lessen punishment if it is offense specific, but then bar application to a whole class of youth who have the opportunity for juvenile court treatment.

Aside from the general logical flaws in petitioner's application of *Brown*, there is a fundamental misunderstanding of direct file when petitioner argues that the language used in *Brown,* specifically "mitigating the punishment for a particular *criminal offense*, (*People v. Brown*, *supra*, 54 Cal.4th at p. 324, emphasis added) bars application of the *Estrada* rule because the elimination of direct file is not offense specific. (SRB p. 9.) Actually, direct file exists because *it is offense specific.* Former Welfare and Institutions Code Section 602, subdivision (b) mandated that a small handful of offenses must be directly prosecuted in adult court. Former Welfare and Institutions Code section 707, subdivision (d) which detailed offenses eligible for discretionary direct file involved approximately 30 specific

offenses for those 16 and 17 years of age at the time of the alleged commission of the offense. The list of specific offenses for those 14 and 15 years of age is smaller.

Because punishment is the heart of direct file, it has to be offense specific, or else the entire juvenile system would be imported wholesale into the adult court. Therefore, the argument that Proposition 57 did not ameliorate punishment for specific "criminal offenses" and barring application of *Estrada* is fundamentally flawed.

VI. PROVIDING TRANSFER HEARINGS FOR DIRECT FILED YOUTH WITH PENDING CASES IS NOT UNDULY BURDENSOME

Petitioner argues that the retrospective application of Proposition 57 to cases pending in adult court or after conviction would be burdensome. (SRB at p. 10.) However, data and current practice demonstrate that the application of *Estrada* to direct filed youth whose cases are not final would not be burdensome.

A. Data Indicates the Number of Direct Filed Youth Who Will Benefit From A Retrospective Application is Not Burdensome to the System as a Whole

The number of youth who will potentially be affected by this court's ruling on retroactivity is small. Department of Justice data indicates that in 2015 there were 492 cases involving juveniles filed directly in adult court (Cal. Dept. of Justice, Criminal Justice Statistics Center, *Juvenile Justice in California 2015* (2016), Table 16, p. 75). Of the 416 cases (involving juvenile

tried as adults) that resulted in a disposition in 2015, 46 cases were dismissed, two resulted in acquittals, one resulted in diversion, and one was certified back to juvenile court.[23] (*Id.*, at Table 30, p. 93.) Of the remaining cases, it is fair to say that most resulted in pleas, and even the small proportion that resulted in an appeal are likely to have final judgments by now.

Department of Justice Data also indicates that in 2016, up until the November 8th election (when direct filing was repealed), there were 340 cases involving juveniles filed directly in adult court.

(Cal. Dept. of Justice, Criminal Justice Statistics Center, *Juvenile Justice in California 2016* (2017), Table 16, p. 75). Of the 376[24] cases involving juveniles tried as adults that resulted in a disposition in 2015, 51 cases were dismissed, two resulted in acquittals, and 33 were certified back to juvenile court. (*Id.*, at Table 30, p. 93.) The 2016 report specifically notes that the youth certified back to juvenile court after having had their case directly filed in adult court were sent back because of the passage of Proposition 57. (*Id., at p. 50.*) Again, many of the remaining 2016 cases have probably been disposed of by plea, and the number of cases still in litigation or on appeal is relatively small.

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[23] Note that Department of Justice data reports the number of direct file cases filed, and number of adult court dispositions; but the totals for those categories are slightly different because cases filed in a particular year might not be disposed of the same year.

[24] This number includes the youth who were also prosecuted in adult court after a transfer hearing in juvenile court.

B. Mechanisms Currently Exist to Address Transfer Hearings for Direct Filed Youth

Petitioner offers many policy reasons why Proposition 57 should be applied prospectively only. (OBM at pp. 58–60.) We disagree with petitioner's contentions, and especially with the assertion that providing transfer hearings for direct filed youth would "invalid[ate] prior lawful decisions to move these cases into adult court and require "ascertaining a mechanism by which to apply the newly enacted procedural requirements in adult court." (SRB at p. 10.)

What petitioner fails to appreciate is that many of the issues raised would *not* be resolved by a prospective only application. For example, petitioner references issues regarding: hearsay, prosecution of individuals where the underlying criminal conduct occurs as a juvenile and as an adult, and codefendant matters. (OBM at pp. 58–60)

Petitioner's arguments fail to recognize that some of the articulated concerns are not generated by Proposition 57, but by the nature of two different systems that address criminal conduct. Petitioner's concerns have little to do with retrospective application of Proposition 57, because a prospective only application would engender the same problems. Prior to direct file all participants in the criminal justice system faced these challenges—prosecutors struggled when co-defendants were in both systems on different cases including how to address hearsay issues in different proceedings, accounting for some charges being

subject to transfer and other charges not being eligible. These issues would exist irrespective of prospective or retroactive application of Proposition 57.

Moreover, this argument ignores the reality that, since the enactment of Proposition 57, prosecutors in a number of counties have voluntarily agreed to return direct filed youth into juvenile court for a transfer hearing. Because of Amici's involvement with transfer and direct filed cases statewide, we are aware that upon the passage of Proposition 57 a number of county prosecutorial agencies voluntarily agreed to provide youth with a pending direct file case a transfer hearing, and most of them agreed to a remand to the juvenile court for the transfer determination.[25] The Santa Clara County District Attorney issued a memo on cases for Santa Clara County (see Exhibit "A" Santa Clara County District Attorney Memo, herein "DA Memo") and other counties used that memo to guide them in addressing the remand of direct filed youth to the juvenile court for transfer hearings. Some youth, like real party Lara, were found to be amenable to continued juvenile court treatment. If the policy concerns petitioner raised were that novel, or burdensome, it is unlikely that prosecutors would have voluntarily agreed to transfer hearings.

As discussed earlier, "Reverse Remand" is a mechanism that existed prior to Proposition 21. (See Pen. Code, § 1170.17.) It allowed youth who were convicted to have a transfer hearing after jeopardy had attached. Although few youth qualified, this

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[25] Amici are not aware of any memo addressing retrospective application to cases which are pending in the Court of Appeal.

statute has existed for over 17 years, and the system has not been unduly burdened or flummoxed by the need for new procedures.

For those youth who are in various stages of appellate review, a remand to the juvenile court would not result in the vacating of any sentencing made in the adult court unless the youth was found amenable for juvenile court. Even then, only sentencing would be affected. Although, this might render other pending appellate issues in the case moot, given the small number of the cases statewide, it is difficult to argue that providing a transfer hearing is a burden on the system.

CONCLUSION

More than three decades ago, this court characterized the decision of a juvenile judge to transfer a child to the adult system as the "worst punishment the juvenile court is empowered to inflict." (*Ramona R. v. Superior Court*, *supra*, 37 Cal.3d at p. 810.) For a brief period, driven by public fears and faulty science, legislators and voters provided prosecutors the ability to directly file juvenile cases in the adult system–to ensure that direct filed youth received the worst punishment the *adult* system could inflict. Public sentiment has now shifted back to a focus on rehabilitation and protection of children from the punitive adult system. Given the language of Proposition 57 and the context in which it was enacted, the *Estrada* rule applies. Nothing in *Brown* requires a different conclusion. For 50 years this court has applied the *Estrada* Rule because the underlying penological principles achieve the ends of justice. The "object and effect" of

Proposition 57 was to "relieve children of a certain age from punishment as criminals" (*People v. Oliver*, *supra*, 1 N.Y.2d at p. 161), therefore this court must apply the *Estrada* rule.

Respectfully submitted,

Dated: September 14, 2017 By: /s/ Rourke F. Stacy

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On behalf of Amici Curiae: Office of the Los Angeles County Public Defender & Pacific Juvenile Defender Center.

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **13,879** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.520(c) or by Order of this Court.

Dated: September 14, 2017 By: /s/ Rourke F. Stacy

Exhibit A

County of Santa Clara

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Jeffrey F. Rosen
District Attorney

November 14, 2016

The Honorable Risë Pichon
Superior Court of California
Santa Clara County

Dear Judge Pichon,

This letter is intended to respond to an inquiry from Judicial Officers at the Hall of Justice seeking guidance in handling cases involving direct-filed juvenile defendants post-Proposition 57, and to advise the defense bar of the District Attorney's position on the issue.

In the wake of Prop 57's passage, the District Attorney's Office is taking a very cautious approach to proceeding in direct-filed juvenile cases in order to avoid any potential appellate issues as we await possible clarification by the Courts or the Judicial Council. Without conceding that the following procedure is *required*, we will agree to and respectfully suggest the following procedure for the Court to follow in referring direct-filed defendants for transfer (formerly known as "fitness") hearings:

1) **For cases that have not yet been resolved by trial or by negotiated disposition:**

   a) Allow the Deputy District Attorney to withdraw the 707(d) allegation in the Complaint or Information;
   b) Order that the case be "certified" to Juvenile Court pursuant to Welfare and Institutions Code section 604(a);
   c) Make the findings set forth in local form "Juvenile Certification and Order";

   The certification order must include the following:

   - The crime with which the person is charged;
   - The person was under the age of 18 at the time it was committed;
   - The person's date of birth, if known;
   - That criminal proceedings were suspended and the date; and
   - The date and time the matter was certified to juvenile court.

   (California Rule of Court 4.116(b)/(c))

d) Direct that the Complaint or Information be transferred to Juvenile Court where the Juvenile Court Clerk will notify probation, who will then follow their procedures to commence juvenile proceedings;

Copies of the certification, the complaint, and any police reports must immediately be transmitted to the clerk of the Juvenile Court. (See Rule of Court 4.116(c)). If the person is in custody, he or she must immediately be transported to juvenile hall, even if they are over age 18 and even if they will be housed in jail. No bail is allowed. (See Rule of Court 4.116(d)).

2) **For cases where the defendant has been found guilty by trial or plea and has not yet been sentenced**:

PC 1170.17 and 1170.19 apply to post-conviction fitness hearings. Per PC 1170.17, the Court can either conduct a fitness hearing in adult court or suspend the proceedings and remand the matter to Juvenile Court for a fitness hearing. (The Deputy District Attorney will argue that the fitness hearing should be heard by the Judicial Officer who heard the trial or took the plea. We understand that the Court will decide which Judicial Officer will hear the matter.)

Procedure per PC 1170.17(c) for post-conviction fitness hearings:

- The adult court must order Probation to prepare a fitness report.
- The adult court may then conduct a fitness hearing or remand the matter to the Juvenile Court for a fitness hearing.
- If the defendant is found fit under Rule 5.770, he or she must be given a juvenile dispositional hearing.
- If the defendant is found unfit, he or she must be sentenced as an adult.

In stipulating to this process the Deputy District Attorney will be requesting from the defense a **time waiver** in the event that the case is not already in a time-waived posture. If the defendant's case is in a time-not-waived posture and the defendant elects not to waive time, then the Deputy District Attorney will urge the Court to proceed with the adjudication of the matter in adult court and address the issue of fitness prior to sentencing, if any. The Deputy District Attorney will also request a stipulation from the defense that in the event that the defendant is found unfit for Juvenile Court then the case will return to adult court in the same posture whence it left. We are confident that this would be the legal and logical result but out of an abundance of caution, we would like the parties to agree.

We have identified dozens of potentially qualifying defendants. To put that in perspective, I am informed that there have been few if any fitness hearings in Juvenile Court so far in 2016. We have a lot of work ahead, which I trust the justice partners will handle well, though some staggering and prioritizing of hearings might be in order. We look forward to future conversations on this and other related topics.

Sincerely,

Cindy Hendrickson
Assistant District Attorney
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S241231

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 320 W Temple St Ste 590, Los Angeles, CA 90012-3218. I served document(s) described as Amicus Curiae Brief as follows:

By U.S. Mail

On September 14, 2017, I enclosed a copy of the document(s) identified above in an envelope and deposited the sealed envelope(s) with the US Postal Service with the postage fully prepaid, addressed as follows:

Hon Mark E. Petersen, Dept. J2
Superior Court of Riverside County
Hon. Mark E. Petersen, Dept. J2
9991 County Farm
Riverside, CA 92501
(for Respondent)

Donald W. Ostertag
Office of the District Attorney
3960 Orange Street
Riverside, CA
(for Petitioner)

Laura Arnold
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Attention: Writs & Appeals
30755-D Auld Road, Suite 2233
Murrieta, CA
(for Pablo Ullisses Lara, Jr.)

Fourth District Court of Appeal, Division Two
3389 12th Street, Riverside, CA 92501

I am a resident of or employed in the county where the mailing occurred (Los Angeles, CA).

By email

On September 14, 2017, I served by email (from rstacy@pubdef.lacounty.gov), and no error was reported, a copy of the document(s) identified above as follows:

California Department of Justice
sdag.docketing@doj.ca.gov

Appellate Defender's Inc.
eservice-court@adi-sandiego.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 14, 2017 By: /s/ Rourke F. Stacy