IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent. PABLO ULLISSES LARA, JR., Real Party in Interest.	No. S241231

Fourth Appellate District, Division Two, Case No. E067296
Riverside County Superior Court, Case Nos. RIF1601012 and RIJ1400019
The Honorable Richard T. Fields, Judge (Case No. RIF1601012)
The Honorable Mark E. Peterson, Judge (Case No. RIJ1400019)

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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ISSUE PRESENTED

The court is presented with the following question: Do the changes to Welfare and Institutions Code[1] sections 602 and 707, as enacted under Proposition 57, require cases previously filed directly in a court of criminal jurisdiction (hereafter "direct-file cases") to now be returned to the juvenile division of the superior court for a 707 hearing?

INTRODUCTION

All the initial pleadings in this case have been filed by the People and the real party in interest. While the People's opening brief discussed the question of whether Proposition 57 applies retroactively under the rationale of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), real party in interest did not address that question.

On August 23, 2017, this court asked real party to address the issue, and real party's response was filed on August 30, 2017. Amicus has now had an opportunity to review real party's response and we respectfully file this brief to address the error in real party's approach to the *Estrada* rule, and more importantly, to urge this court to consider a new rule of law that, in the interests of justice, would remove this type of retroactivity claim from future litigation. This new judicial rule would indicate to the drafters of future legislation that if they fail to *specifically state* a new law will apply in a retroactive manner, the courts will no longer consider retroactivity claims for such legislation and will conclusively presume the new law to be prospective only. We address the reasons for this position in Argument II, *infra*.

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[1] All further statutory references are to the Welfare and Institutions Code unless stated otherwise.

ARGUMENT

I.

CONTRARY TO REAL PARTY'S CONTENTION, THE RATIONALE OF *ESTRADA* DOES NOT SUPPORT RETROACTIVE APPLICATION OF NEW SECTION 707 AS ENACTED UNDER PROPOSITION 57

Despite real party's appropriate concession that "[a]though the amendments at issue do not fall squarely within the rule articulated in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), particularly as construed by this court in *People v. Brown III* (2012) 54 Cal.4th 314 (*Brown*)" (Real Party's Supplemental Brief [RPSB], p. 2), real party nevertheless attempts to convince this court that it should expand the *Estrada* rule beyond what the court has heretofore allowed. For all the reasons discussed herein, there are sound reasons why this court has limited *Estrada* in the manner articulated in *Brown*.

Indeed, real party has cited few cases that are directly relevant to the issue before this court, and none that support his position. The first of these cases is *People v. Francis* (1969) 71 Cal.2d 66 (*Francis*). In *Francis*, this court held that a change in the law which reduced a specific criminal offense from a straight felony to one with either a felony or misdemeanor disposition was subject to the rule in *Estrada*; namely, the amendment would be considered to apply to every case because the Legislature considered the former penalty provisions for that particular crime to have been too severe, and giving the sentencing judge wider latitude as to that crime should apply to any person convicted of that offense whose case is not yet final. (*Francis*, *supra*, 71 Cal.2d at p. 76.) This remains consistent with *Estrada* in that it creates the potential reduction with respect to the Legislature's determination for a *specific criminal offense*. Indeed, this was the point of *Estrada*, and this court has consistently limited *Estrada* to statutes that reduce the penalty for specific offenses. (*Brown*, *supra*, 54

Cal.4th 314.)

A second case cited in support of real party's position is *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*). But *Conley* is inapposite to *Estrada*. In 2012, the electorate passed the Three Strikes Reform Act of 2012 (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012)), which in part, authorized persons presently serving an indeterminate term of life imprisonment under the prior three-strikes law to seek resentencing under subdivision (a) of Penal Code section 1170.126. (*Id.* at p. 651.) Put differently, the Three Strikes Reform Act (Proposition 36) specifically covered the issue of retroactivity, whereas the legislation considered in *Estrada* did not. (*Id.* at pp. 656-658.) And as this court has consistently held both the legislature and the electorate are free to express their intent to modify or limit the retroactive effect of a statute that reduces punishment for one or more specific offenses. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1048-1049; *People v. Nasalga* (1996) 12 Cal.4th 784, 793.) Simply put, *Estrada* was inapplicable to the sentence reductions authorized by Proposition 36. (*Conley, supra*, 63 Cal.4th at pp. 657-662.)

Finally, the two appellate court decisions that most directly relate to this defendant's position, *People v. Vela* (2017) 11 Cal.App.5th 68, review granted July 12, 2017, S242298 (*Vela*), and *People v. Pineda* (August 14, 2017, B267885) ___ Cal.App.5th ___ [2017 WL 3474811] (*Pineda*), are mentioned only briefly in real party's supplemental pleading, and only in a footnote. (RPSB, p. 7, fn. 4.)

And both the *Vela* and *Pineda* decisions conclude the *Estrada* rule should apply to Proposition 57. But if *Vela* and *Pineda* were successful in their approach, the general standards for determining retroactivity (i.e., where courts are not dealing with statutes that reduce punishment for specific offenses) will inevitably become very blurred because the exceptions created under *Estrada* would begin to distort the entire structure

of the rule. Simply put, if one were to construe new sections 602 and 707 as statutes lessening punishment for a specific offense, statutes that merely define who is eligible for juvenile handling and the procedures necessary to file a case in a court of criminal jurisdiction, it will create a situation in which all new statutes that in some way could be argued to affect punishment, would then become subject to a retroactive challenge under *Estrada*, whether or not they referenced specific crimes or their punishment. That circumstance would rapidly create a situation in which the boundaries of the *Estrada* rule would become more and more difficult to properly discern, contrary to the limitations and constraints emphasized by this court in *Brown, supra*, 54 Cal.4th at pp. 324-325.

Moreover, when the *Estrada* rule is not involved, this court has consistently followed " 'the time-honored principle ... that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature ... must have intended a retroactive application.' " (*Brown, supra*, 54 Cal.4th at p. 319.) In other words, clarity in this context is the key. And as this court has specifically emphasized: "The language in ***Estrada,*** *Mannheim*, and *Marriage of Bouquet* should not be interpreted as modifying this well-established ... principle." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209 (*Evangelatos*), bold added.) Indeed, when discussing the rule in *Estrada*, Brown specifically reemphasized this reference to *Evangelatos*. (*Brown, supra*, 54 Cal.4th at p. 325.)

Furthermore, as the People have more than adequately demonstrated in their opening brief, there is absolutely no clear or sufficient showing the voters intended retroactivity for new sections 602 and 707. (People's Opening Brief, pp. 25-30.) And even if an inspired mind could devise a contrary interpretation, the language in Proposition 57 can only be deemed ambiguous at best, and where that is the case, this court has consistently

held that such provisions are to be treated as "unambiguously prospective." (*Brown, supra*, 54 Cal.4th at p. 320; *Myers v. Phillip Morris Companies* (2002) 28 Cal.4th 828, 841.)

Undaunted, and seeking to expand *Estrada* to Proposition 57, the *Vela* court held: "[W]e find an 'inevitable inference' that the electorate 'must have intended' that the potential 'ameliorating benefits' of rehabilitation (rather than punishment), which now extend to every eligible minor, must now also 'apply to every case to which it constitutionally could apply.' " (*Vela, supra*, 11 Cal.App.5th at p. 78.) In similar fashion, *Pineda* held: "The conclusion that Section 4 is properly seen as a measure reducing the punishment for crimes makes sense in light of the markedly reduced emphasis on punishment in juvenile courts, as compared to courts of criminal jurisdiction." (*Pineda, supra,* ___ Cal.App.5th ___ [slip opn., pp. 17-18].)

But these expansive readings, unrelated to any specific offense, are contrary to this court's longstanding treatment of *Estrada* and the general rules related to retroactive determinations, as discussed above. Indeed, as mentioned earlier, this court recently and clearly addressed the limitations that properly apply with respect retroactivity determinations under the *Estrada* rule. (*Brown, supra*, 54 Cal.4th at pp. 323-326.)

In *Estrada* itself, this court concluded that when the Legislature has amended a statute to reduce the punishment for a particular criminal offense, courts will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. (*Estrada, supra*, 63 Cal.2d at pp. 742-748.) But this court made clear in *Brown* that *Estrada's* retroactivity rule is limited to that purpose. As the court emphasized, "the rule and logic of *Estrada* is specifically directed to a statute that represents ' "a legislative mitigation of the *penalty for a particular crime.*" ' " (*Brown, supra*, 54

Cal.4th at p. 325, italics in the original.)

More specifically, *Brown* concluded, "*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation . . . 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." (*Brown*, *supra*, 54 Cal.4th at p. 324, italics in original.)

The *Brown* court then proceeded to apply the limitations in the *Estrada* rule to the facts before it. In *Brown*, the court addressed a new statute that increased the rate at which eligible defendants could earn post-sentencing conduct credits while housed with the California Department of Corrections and Rehabilitation, thereby reducing the amount of time that such defendants might spend in custody. The defendant argued that since this statute could reduce the punishment an inmate received, it should apply retroactively under the rule in *Estrada*. *Brown* unequivocally rejected the defendant's argument. The court emphasized that the statute before it did "not represent a judgment about the needs of the criminal law *with respect to a particular criminal offense*, and thus does not support an analogous inference of retroactive intent." (*Brown*, *supra*, 54 Cal.4th at p. 325, italics added.)

As the court pointed out, accepting the defendant's "argument would expand the *Estrada* rule's scope of operation in precisely the manner we forbade in *Evangelatos*, *supra*, 44 Cal.3d 1188, 1209." (*Brown*, *supra*, 54 Cal.4th at p. 325.) In other words, the fact that certain defendants sentenced after the law went into effect may receive additional conduct credits did not justify retroactive application under *Estrada* because the additional credits were not directed to the needs of the criminal law *with respect to a specified criminal offense*; and more specifically, the *mitigation in penalty for that*

offense. (*Brown, supra*, 54 Cal.4th at p. 325 ["the rule and logic of *Estrada* is specifically directed to a statute that represents ' "a legislative mitigation of the penalty for a particular crime." ' "].)

As such, the rule in *Estrada* has no application to amended section 707. Indeed, as previously stated, if one were to construe new section 707 as lessening punishment for a specific offense, it would create a situation in which all new statutes that in some tangential way could be argued to affect punishment, would then become subject to a retroactive challenge. This would definitively create far more, rather than far less complications in this arena.

Indeed, nothing in new section 707 addresses the needs of the criminal law with respect to *a particular criminal offense* nor does it mitigate punishment *for any such specific offense*, as required by *Estrada* and *Brown*. New sections 602 and 707 merely define who is eligible for juvenile handling and the procedures that must be followed in order to file a case in adult court after November 8, 2016. New sections 602 and 707 make no reference to punishment at all, let alone to punishment for any specific crime. And whenever a new statute does not involve a reduction in penalty for a specific offense, determinations of retroactivity for such statutes are properly decided by the standard rules applicable to that subject, not by the rule in *Estrada*. And under the standard rules applicable to retroactivity claims, as previously discussed, Proposition 57 is not entitled to retroactive application.

But the constant, complex, and varied arguments that consistently arise in this context are yet another reason why we believe a new rule of law, moving forward, would be in the best interests of the voters, litigants, and the courts.

II.

WE RESPECTFULLY URGE THIS COURT TO ADOPT A NEW RULE OF LAW THAT WOULD DENY RETROACTIVE APPLICATION UNLESS IT IS EXPRESSLY AUTHORIZED IN THE LEGISLATION

Even though we conclude, for all the reasons stated above, that the rule in *Estrada* does not apply to new section 707, we also believe the *Lara* case presents this court with an opportunity to additionally establish an entirely new judicial rule that would help eliminate such retroactivity concerns in the future.

This new rule of law would eliminate the retroactivity problem by simply holding that courts will no longer consider any new statute to apply in a retroactive manner unless the legislation or the initiative clearly and specifically so states. And given the ease with which drafters of legislation can accomplish that task, it is illogical in this day and age to ask courts to sift through whatever documents might exist in a particular piece of legislation in an attempt to ascertain the underlying intent of the Legislature or electorate. Our suggested judicial revision would not only put the burden where it properly belongs, on those drafting legislation, but it would also give those who must vote on new legislation a clear understanding as to when retroactive application is intended. This requirement would additionally give both sides the opportunity to make any arguments they deem important in that regard, arguments the impact of which cannot be properly or fairly assessed after the fact.

Simply put, we believe that using the current procedures to resolve issues of retroactivity will continue to unnecessarily burden courts and significantly detract from an informed voting process. And while we could point to the many statutes and propositions that have previously raised this problematic issue over the years, we have no doubt this court is sufficiently familiar with the underlying problem, and we will refrain from doing so

here. Indeed, to understand the need for a change, one need only observe the number of appellate courts (including the case at bar) that have already struggled to resolve retroactivity under Proposition 57, together with their differing results. (See *People v. Marquez* (2017) 11 Cal.App.5th 816, 826, review granted July 26, 2017, S242660; *People v. Mendoza* (2017) 10 Cal.App.5th 327, 346-349, review granted July 12, 2017, S241647; *People v. Cervantes* (2017) 9 Cal.App.5th 569, 594-595, review granted May 17, 2017, S241323; *People v. Superior Court* (*Walker*) (2017) 12 Cal.App.5th 687, 701-705 (petn. for review pending, petn. filed July 11, 2017, S243072) [all concluding, in the present context, that *Estrada* has no application to Proposition 57]; *Vela*, *supra*, 11 Cal.App.5th at pp. 77-78 & *Pineda*, *supra*, ___ Cal.App.5th ___ [2017 WL 3474811] [*Vela* and *Pineda* coming to opposite conclusions].)

Indeed, this suggested change in the law is the only way to ensure that those voting on new legislation have a proper understanding of the legislation's effect at the time their vote is cast. Stated differently, the time has come to take the uncertainty out of this area of the law. This new judicial rule would be in the best interests of those voting on new legislation, in the best interests of litigants, and certainly, in the best interests of justice itself. [2]

Moreover, instituting a judicial rule that requires a clear statement of retroactive intent would simply reinforce a procedure that has become far more common in recent years. As the dissenting justice recently noted in

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[2] This would not, of course, affect the long-standing rule that if a court overturns a prior decision or invalidates a statute, it will generally permit full retroactive application of that decision (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 400) unless doing so would, in the interest of fairness and equity, fail to protect those who reasonably acted in reliance on the prior law. (*Foster Shipbuilding v. Los Angeles County* (1960) 54 Cal.2d 450, 459; *Kawasaki Motors Corp. v. County of Orange* (1983) 14 Cal.App.3d 780, 783-784.)

Pineda, "[i]n recent years, Propositions 36 and 47 made significant changes in criminal law and procedure. Both initiatives contained express retroactivity provisions, putting the electorate on notice that the proposed changes would affect final and non-final judgments. Proposition 57, on the other hand, is completely silent. . . . The electorate had no reason to believe that a person in defendant's position . . . would retroactively be entitled to a fitness hearing." (*Pineda*, *supra*, ___ Cal.App.5th ___ (conc. & dis. opn. of Kriegler, J.) [conc. & dis. opn. at slip. opn., p.1].)

We fully concur and believe the time has come to mandate that when those drafting new legislation desire to make it retroactive, they must specifically state that intent within the new legislation. As previously noted, such a requirement is especially in the interests of those voting on legislative matters, but it is also in the clear interests of justice itself.

Indeed, if the *Pineda* and *Vela* decisions were allowed to expand *Estrada* beyond what this court has previously permitted, victims and victim's families who have already gone through the full judicial process would have to relive the entire matter with a new and uncertain future, not to speak of the full panoply of legal resources and efforts that would have already been expended, to potentially no end. The drafters of Proposition 57 would certainly have understood these and other arguments that could have been raised against them had retroactivity been included in Proposition 57, arguments that indeed, could very well have affected the outcome of the initiative.

And yet, under current law, this does not prevent those with a concomitant desire to fashion a retroactive outcome, from coming forward and attempting to convince courts, after the fact, that retroactivity must have been intended, despite the fact that retroactive application could so easily have been stated if that had in fact been the intent. While, on the other hand, those who would have raised significant arguments to the voters

against retroactivity, have lost their voice entirely. For all the reasons stated herein, we respectfully believe the current approach to determining retroactive application is no longer in the interests of justice.

We therefore urge this court to conclude that the only appropriate solution to this problem is to place the burden where it properly belongs, on the drafters of legislation, and to hold that courts will no longer consider a new statute to apply in a retroactive manner unless the legislation specifically so states. Put differently, if legislation does not have a specific and express retroactive provision, courts will conclusively presume its provisions are to apply solely in a prospective manner.

CONCLUSION

Based on the forgoing, we again ask this court to find that a minor whose case arose prior to Proposition 57 is not entitled to be returned to the juvenile court for a fitness hearing under new section 707, and that the new rule of law, as suggested, is appropriate.

Dated: September 1, 2017

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

I certify that this **AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER**, including footnotes, and excluding tables and this certificate, contains 3,313 words according to the computer program used to prepare it.

PETER J. CROSS
Deputy District Attorney

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent.	For Court Use Only
PABLO ULLISSES LARA, JR., Real Party in Interest.	Supreme Court No.: S241231 Court of Appeal No.: E067296 Superior Court No.: RIF1601012 and RIJ1400019

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On September 1, 2017, a member of our office served a copy of the within **AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, with postage fully prepaid, in the United States Mail, addressed as follows:

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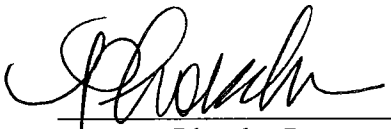
COURT OF APPEAL, FOURTH DISTRICT, DIVISION TWO

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 1, 2017 at 330 West Broadway, San Diego, CA 92101.



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