IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent,

PABLO ULLISSES LARA, JR.,

Real Party in Interest.

S241231

Court of Appeal 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)

OPENING BRIEF ON THE MERITS

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INTRODUCTION

Proposition 57 ("The Public Safety & Rehabilitation Act of 2016") was passed by the voters on November 8, 2016, and became immediately effective the following day. Among other things, Proposition 57 eliminated mandatory and discretionary direct filing by prosecutors, and enacted various procedural requirements that must take place in juvenile court before a case may be transferred to a court of criminal jurisdiction. As

such, any prosecution of a minor offender initiated on or after November 9, 2016 must begin in juvenile court, and the newly enacted conditions precedent must be satisfied before the case may be transferred to a court of criminal jurisdiction.

The present case raises two related issues: (1) are the conditions precedent enacted by Proposition 57 retroactively applicable to cases that were lawfully pending in a court of criminal jurisdiction prior to the law's effective date?; and (2) if not, can those conditions precedent properly be applied in a prospective manner once a case is already lawfully pending in a court of criminal jurisdiction? For the reasons outlined below, both questions must be answered in the negative.

First, Proposition 57 cannot be applied retroactively to cases lawfully pending in a court of criminal jurisdiction at the time the new law was enacted because the voters did not intend a retroactive application. Rather, Proposition 57 is wholly silent regarding retroactivity of the juvenile-law amendments, and provides no procedural mechanism by which to apply the new law retroactively. In fact, portions of the ballot materials demonstrate an intent for those new provisions to apply prospectively only. In any event, and as is well established, in the absence of an express retroactivity provision, a statute must be applied prospectively only.

Second, Proposition 57 cannot properly be applied in a prospective manner to cases that were lawfully pending in adult court prior to the law's effective date. That is because the changes enacted by Proposition 57 relate to procedural requirements that must take place *before* prosecution against a minor offender may be transferred into adult court. Once a case is already pending in adult court, however, the only manner in which to apply those pre-transfer procedural requirements would be to halt the pending adult-

court proceedings and send the case backwards to juvenile court, after which necessary conditions precedent must be satisfied before the case may be returned to where it started. This is by its very nature an impermissible retroactive application of the new law.

Ultimately, a bright-line rule must be drawn regarding application of the juvenile-law amendments enacted by Proposition 57. Applicable authority provides such a rule: For any criminal prosecution initiated on or after November 9, 2016, or any fitness or transfer hearing conducted on or after November 9, 2016, the juvenile-law amendments enacted by Proposition 57 are fully applicable in a properly prospective manner. Those amendments cannot be retroactively applied, however, to cases that were lawfully pending in a court of criminal jurisdiction prior to November 9, 2016.

ISSUE PRESENTED

Do the juvenile-law amendments enacted by Proposition 57 ("The Public Safety & Rehabilitation Act of 2016") apply retroactively to cases pending in a court of criminal jurisdiction before the law's effective date?

STATEMENT OF FACTS[1]

On various occasions in 2014 and 2015, real party sexually assaulted Jane Doe, who was seven and eight years old at the time. (Exhibits 2 & 5.) On one occasion, real party pointed a gun at Jane Doe and stated, "If you tell your Mom or Dad, I will shoot you with [this] gun." (Exhibit 5, at p. 9.) On a subsequent occasion, real party pointed a gun at Jane Doe and forced her to orally copulate him, threatening that he would shoot her in the head if she did not comply. (Exhibit 5, at pp. 14-15.) On another occasion, real party forcibly and painfully sodomized Jane Doe, causing her to bleed from her anus. (Exhibit 5, at pp. 16-21.) Real party sodomized Jane Doe multiple times. (Exhibit 5, at pp. 17-18.)

PROCEDURAL HISTORY[2]

On June 10, 2016, following a preliminary hearing, the Riverside County District Attorney filed an information charging real party with kidnapping for rape, oral copulation, and sodomy (count 1; Pen. Code, §

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[1] The underlying facts are not relevant to the issues raised in the petition for writ of mandate/prohibition and certified for review by this Court. As such, this Statement of Facts—taken from the Reporter's Transcript of the Preliminary Hearing, which was included as Exhibit 5 to the initial petition—is abbreviated and included for context. All citations to Exhibits are to those exhibits filed in support of the petition for writ of mandate/prohibition in the Court of Appeal.

[2] As stated above, all citations to Exhibits are to those exhibits filed in support of the petition for writ of mandate/prohibition in the Court of Appeal. In addition, petitioner has filed a concurrent request for judicial notice of the underlying Riverside County Superior Court records in *People v. Pablo Ullisses Lara, Jr.* (case number RIF1601012) and *In re Pablo Ullisses Lara, Jr.* (case number RIJ1400019), which contain additional procedural actions that took place subsequent to the filing of the initial petition for writ of mandate/prohibition.

209, subd. (b)(1)); forcible oral copulation with a child under 14 years of age (count 2; Pen. Code, § 288a, subd. (c)(2)(B)); and two counts of forcible sodomy (counts 3 & 4; Pen. Code, § 286, subd. (c)(2)(B)). The information (and the previous complaint) was directly filed in adult court within the meaning of then-applicable Welfare and Institutions Code section 707, subdivision (d)(2)(A). (Exhibits 1 [superior court case print], 2 [information], & 5 [reporter's transcript of preliminary hearing].)

On November 8, 2016, the voters passed Proposition 57 ("The Public Safety & Rehabilitation Act of 2016"), which became immediately effective November 9, 2016 (Cal. Const., art. II, § 10, subd. (a) [an initiative approved by the voters takes effect the day after the election unless the measure provides otherwise].)

On November 16, 2016, real party filed a motion requesting his case be transferred to juvenile court for a "fitness hearing" in light of Proposition 57. (Exhibit 3.) On November 22, 2016, the People filed an opposition to the motion to transfer the case to juvenile court, arguing that Proposition 57 was not retroactive to cases that were lawfully pending in adult court prior to the new law's effective date. (Exhibit 4.)

On November 29, 2016, the trial court conducted a hearing regarding Proposition 57's application to this case. (Exhibits 1 & 7.) Following argument by the parties, the trial court granted real party's motion to transfer the case to juvenile court, ruling that the juvenile-law amendments enacted by Proposition 57 are retroactively applicable to cases pending in adult court before the law's effective date. (Exhibit 7, at pp. 14-16.) At the conclusion of the hearing, the trial court granted the People's request for a brief stay of the proceedings to file a petition for writ of mandate/prohibition in the Court of Appeal in an effort to obtain appellate guidance. (Exhibit 7, at pp. 16-17.)

On December 2, 2016, the People filed a petition for writ of mandate/prohibition in the Court of Appeal, Fourth Appellate District, Division Two, and requested a further stay of the trial court proceedings.

On December 16, 2016, the Court of Appeal issued an order stating, in its entirety, as follows:

> Real party in interest is requested to file, within 10 days from the date of this order, an informal letter response to the petition for writ of mandate filed by the People on December 2, 2016. [¶] A copy of the informal response shall be served upon petitioner. [¶] Petitioner shall have 10 days after service to respond thereto.

The Court of Appeal did not rule on the People's request for a further stay of the trial court proceedings.

On December 21, 2016, because there was no intervening stay issued by the Court of Appeal, the trial court formally "certified" the matter for juvenile court and ordered the defendant released from custody unless the People filed a juvenile delinquency petition within 48 hours. The trial court ordered the adult-court proceedings suspended indefinitely. (Riverside County Superior Court case print for case number RIF1601012.)

On December 22, 2016, the People filed a juvenile delinquency petition against real party in case number RIJ1400019. The charges in the delinquency petition mirrored the previously pending charges in adult court. The People also filed a concurrent request for a transfer hearing. On December 23, 2016, a detention hearing was conducted in juvenile court and real party denied the allegations. All constitutional and statutory timing requirements were reset as if the case had started anew in juvenile

court. (Riverside County Superior Court case print for case number RIJ1400019.)

Meanwhile, on December 20, 2016, real party filed an informal response to the petition for writ of mandate/prohibition in the Court of Appeal. On December 29, 2016, the People filed an informal reply.

On January 19, 2017—without having issued an order to show cause or a request for formal briefing, without holding oral argument, and without providing notice under *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171—the Court of Appeal issued a published opinion denying the petition for writ of mandate/prohibition. Specifically, the Court of Appeal held that Proposition 57 was properly applied in the present case because the new law enacted a procedural change "governing the conduct of trials." (*Lara* slip opn. #1, at p. 5, citing *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289 (*Tapia*).) Because trial had not yet occurred in this case, the Court of Appeal concluded the changes enacted by Proposition 57 could be properly applied prospectively. (*Lara* slip. opn. #1, at p. 5.)

On February 15, 2017—shortly before the People would have been able to file a petition for review with this Court—the Court of Appeal issued an order stating as follows:

> On the court's own motion, REHEARING IS ORDERED, thereby vacating the opinion filed January 19, 2017, and setting the cause at large in this court. (Cal. Rules of Court, rule 8.268(a)(1), (d).)
>
> Good cause appears in that the court has determined that a fuller treatment is required of the issues related to the denial of a petition by an opinion after issuance of a notice that the court may issue a peremptory writ in the first instance. (See Opn. filed Jan. 29, 2017, p. 2.)

> Because the cause has been set at large again, and to give the parties the opportunity to address these issues and the merits more thoroughly, real party in interest is invited to serve and file, within 10 days of this order, an informal letter response to the petition for writ of mandate filed by the People on December 2, 2016. Petitioner may serve and file an informal letter reply within 10 days after the filing of real party's response. The court may issue a peremptory writ in the first instance, or the court may deny the petition by a written opinion on the merits that determines a cause and constitutes law of the case.

The following day, on February 16, 2017, real party filed an informal response. On February 23, 2017, petitioner filed an informal reply.

On March 13, 2017, the Court of Appeal filed a second published opinion. The distinction between the two opinions related to the procedural history of the writ proceedings, and the Court of Appeal's previous issuance of a reasoned opinion without providing notice to the parties under *Palma v. U.S. Industrial Fasteners, Inc., supra,* 36 Cal.3d at page 178. The Proposition 57 analysis contained in the second *Lara* opinion was identical to the Proposition 57 analysis contained in the first *Lara* opinion. (See *Lara* slip opn. #1, at pp. 3-11; *Lara* slip opn. #2, at pp. 28-36.)

Meanwhile, the proceedings continued to progress in the juvenile court. Specifically, on January 25, 2017, the Probation Department filed a 43-page "fitness report" recommending that real party be transferred back to adult court. On March 9, 2017, the juvenile court conducted a transfer hearing, after which it took the matter under submission. On March 30, 2017, the juvenile court issued a written decision denying the People's

request to transfer real party back to adult court. A contested jurisdictional hearing was scheduled in juvenile court for April 20, 2017.

On April 13, 2017, the People filed a petition for review in this Court and requested a stay of the lower court proceedings. On April 19, 2017, this Court issued a stay of the lower court proceedings. On May 17, 2017, this Court granted the petition for review.

ARGUMENT

THE JUVENILE-LAW AMENDMENTS ENACTED BY PROPOSITION 57 ARE INAPPLICABLE TO CASES THAT WERE LAWFULLY PENDING IN COURTS OF CRIMINAL JURISDICTION PRIOR TO THE LAW'S EFFECTIVE DATE

The procedural transfer requirements enacted by Proposition 57 cannot be lawfully applied to cases properly pending in adult court at the time the new law became effective because doing so would necessitate an impermissible retroactive application of the law. As such, for any criminal prosecution initiated on or after November 9, 2016, or any fitness or transfer hearing conducted on or after November 9, 2016, the juvenile-law amendments enacted by Proposition 57 are fully applicable in a properly prospective manner. But for the reasons set forth below, those amendments cannot be retroactively applied to cases that were lawfully pending in a court of criminal jurisdiction prior to November 9, 2016.

A. Proposition 57 – The Public Safety And Rehabilitation Act Of 2016

Historically, California required a judicial determination of unfitness for juvenile court before a minor could be prosecuted in adult court. (See Stats. 1961, ch. 1616, § 2, p. 3485; Stats. 1975, ch. 1266, § 4, p. 3325; *Juan G. v. Superior Court* (2012) 209 Cal.App.4th 1480, 1489, & fn. 4.) With

the passage of Proposition 21 in March 2000, however, a local district attorney was authorized, under certain defined circumstances, to file a criminal action against a minor offender directly in adult court—a procedure known as "discretionary direct filing." (Former Welf. & Inst. Code, § 707, subd. (d)[3]; see Voter Information Guide, Primary Elec. (Mar. 7, 2000) Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, § 26, pp. 126-127; see generally *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 548-550; *Juan G. v. Superior Court, supra,* 209 Cal.App.4th at p. 1489 & fn. 4.) In addition, some crimes were considered so serious by the voters that direct filing in adult court was required—a procedure known as "mandatory direct filing." (Former § 602, subd. (b); see Proposition 21, § 18, p. 125; *Juan G. v. Superior Court, supra,* 209 Cal.App.4th at pp. 1488-1489.) Mandatory direct filing had previously been in place for minor offenders 16 years of age or older (Stats. 1999, ch. 996, § 12.2, p. 7560), but was reduced to 14 years of age by Proposition 21 (Proposition 21, § 18, p. 125).

On November 8, 2016, the voters passed Proposition 57 ("The Public Safety & Rehabilitation Act of 2016"), which became immediately effective November 9, 2016. (Cal. Const., art. II, § 10, subd. (a) [an initiative approved by the voters takes effect the day after the election unless the measure provides otherwise].) As relevant here, the declared purposes of Proposition 57 included "[s]top[ing] the revolving door of crime by emphasizing rehabilitation, especially for juveniles"; and "[r]equir[ing] 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, § 2, p. 141.) As stated in the legislative analysis provided to the

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[3] All further unspecified statutory references are to the Welfare and Institutions Code.

voters, Proposition 57 was intended to change state law "to require that, before youths can be transferred to adult court, they must have a hearing in juvenile court" and to ensure that youths "accused of committing certain severe crimes would no longer automatically be tried in adult court . . ." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) analysis by the legislative analyst, p. 56.)

To achieve those purposes, Proposition 57 made various changes to the Welfare and Institutions Code, such as eliminating mandatory and discretionary direct filing of juvenile cases in adult court, and eliminating various presumptions that a juvenile is not fit to be prosecuted in juvenile court under certain circumstances.

Specifically, Proposition 57 eliminated former section 602, subdivision (b), which mandated that juveniles 14 years of age or older who personally commit murder with a special circumstance, or who personally commit one of a number of enumerated sex offenses, be prosecuted in adult court. Proposition 57 also eliminated former section 707, subdivision (d), which gave prosecutors discretion to direct file a juvenile case involving a serious or violent felony in adult court.

In addition, Proposition 57 eliminated all presumptions that a minor with a felony criminal history, or a minor who commits a particular serious or violent felony, is not fit for juvenile court. Specifically, Proposition 57 eliminated the following presumption that was contained in former section 707, subdivision (a)(2)(B): A juvenile 16 years of age or older who commits a new felony after having committed two or more felonies when he or she was 14 years of age or older is presumed unfit for juvenile court. In addition, Proposition 57 eliminated the following presumption that was contained in former section 707, subdivision (c): A juvenile 14 years of

age or older who commits a serious or violent felony as enumerated in section 707, subdivision (b), is presumed unfit for juvenile court.

Finally, Proposition 57 eliminated the term "fitness hearing" and replaced it with the term "transfer hearing." (§ 707, subd. (a).) Following the enactment of Proposition 57, there are two types of cases for which a juvenile may be transferred to a court of criminal jurisdiction: (1) the commission of any felony crime by a minor who was 16 years of age or older at the time of the crime; or (2) the commission of an offense enumerated in section 707, subdivision (b), by a minor who was 14 or 15 years of age at the time of the crime. (§ 707, subd. (a)(1).) The case must be first filed in juvenile court and the prosecutor may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction. (*Ibid.*) Upon such a motion, the juvenile court shall order the probation officer to submit a report on the behavioral patterns and social history of the minor. (*Ibid.*)

Following consideration of the probation officer's report, in addition to any other relevant evidence that the prosecution or the minor submit, the juvenile court shall decide whether the minor should be transferred to a court of criminal jurisdiction. (§ 707, subd. (a)(2).) In making its determination, the court shall consider the criteria set forth in section 707, subdivision (a)(2)(A) through (E). (§ 707, subd. (a)(2).) Specifically, the court must consider: (1) The degree of criminal sophistication exhibited by the minor; (2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction; (3) The minor's previous delinquent history; (4) Success of previous attempts by the juvenile court to rehabilitate the minor; and (5) The circumstances and gravity of the offense

alleged in the petition to have been committed by the minor. (§ 707, subd. (a)(2)(A)-(E).)[4]

B. General Principles Of Statutory Construction

The interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796.) First, the language of the statute is given its ordinary and plain meaning. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) Second, the statutory language is construed in the context of the statute as a whole and within the framework of the overall statutory scheme to effectuate the voters' intent. (*Ibid.*) In this regard, statutes addressing the same subject matter and enacted at the same time should be construed together. (*People v. Honig* (1996) 48 Cal.App.4th 289, 327; *Stickel v. Harris* (1987) 196 Cal.App.3d 575, 590.) Third, where the language is ambiguous, the court will look to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L. v. Superior Court, supra*, 30 Cal.4th at p. 900; see *People v. Floyd* (2003) 31 Cal.4th 179, 187-188 [The ballot pamphlet information is a valuable aid in construing the intent of voters].) Any ambiguities in an initiative statute are "not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent [electorate] intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782, internal citation and quotation omitted.) Ultimately, a reviewing court's duty is to interpret and apply the language of the

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[4] As mentioned below, Proposition 57 also enacted various substantive changes in the law regarding parole eligibility and the operation of the California Department of Corrections and Rehabilitation. Petitioner respectfully omits an exhaustive summary of those changes because they are not relevant to the issues presented in the instant case.

initiative "so as to effectuate the electorate's intent." (*Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 900.)

C. Standard Of Review

When interpreting a voter initiative, reviewing courts apply the same rules that govern statutory construction, looking first to the language of the enactment, giving the words their ordinary meaning, and if the law is ambiguous, referring to other sources of voter intent, such as the arguments and analyses contained in the official voter information guide. (*People v. Arroyo* (2016) 62 Cal.4th 589, 593.) Whether a voter initiative such as Proposition 57 applies retroactively is a pure question of law involving statutory construction and ascertaining the intent of the electorate. Accordingly, the ruling of the lower courts is reviewed de novo. (See, e.g., *People v. Tran* (2015) 61 Cal.4th 1160, 1166.)

D. Proposition 57 Is Not Retroactively Applicable To Cases Lawfully Pending In A Court Of Criminal Jurisdiction Prior To The Law's Effective Date

Generally, a new law will apply prospectively only unless the Legislature or electorate expressly manifests an intent for the law to apply retroactively. A limited exception to that general rule exists in situations where a legislative act lessens the punishment for a particular criminal offense, in which case the new law will be applicable to all nonfinal judgments. Proposition 57 neither expressly manifested a retroactive intent, nor did it lessen punishment for a particular criminal offense. As such, the juvenile-law amendments enacted by Proposition 57 may only be applied prospectively.

1. General Legal Principles Regarding Retroactivity

Penal Code section 3 specifies that no statute is retroactive, "unless expressly so declared." (Pen. Code, § 3.) The Civil Code and Code of Civil Procedure contain identical mandates. (Civ. Code, § 3; Code Civ. Proc., § 3.) Penal Code section 3 "provides the default rule" regarding retroactivity, "codifying '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 [or electorate] . . . must have intended a retroactive application.' [Citations.]" (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*).)

An "important, contextually specific qualification" to the prospective-only presumption regarding statutory amendments was set forth by this Court in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). (*Brown*, *supra*, 54 Cal.4th at p. 323.) That qualification is: "When the Legislature [or electorate] has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature [or electorate] intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. [Citation.]" (*Ibid.*, fn. omitted.)

In *Estrada*, the defendant was convicted of escape without force or violence in violation of former Penal Code section 4530. (*Estrada*, *supra*, 63 Cal.2d at p. 743.) After his commission of the act, but before his conviction and sentence, the applicable statutes were amended so as to reduce the penalties for an escape without force or violence. (*Ibid.*) *Estrada* identified "[t]he problem" as "one of trying to ascertain the legislative intent," and it specified that "the problem" would be the same even if the amendment had become effective while an appeal was pending. (*Id.* at p. 744.)

Estrada concluded that the Legislature must have intended that the amended statutes "should prevail," explaining:

> When the Legislature amends a statute so as to lessen the punishment[,] it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.

(*Estrada*, *supra*, 63 Cal.2d at p. 745.)[5]

"The rule in *Estrada*, of course, is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent." (*People v. Nasalga* (1996) 12 Cal.4th 784, 793, fn. omitted (*Nasalga*); see *Estrada*, *supra*, 63 Cal.2d at p. 747 ["where there is an express or implied saving

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[5] Courts have relied upon *Estrada* in concluding that a change in the law that decriminalizes conduct or provides a defendant with a new defense applies retroactively to cases that are not yet final. (See, e.g., *People v. Rossi* (1976) 18 Cal.3d 295, 299-302 ["the common law principles reiterated in *Estrada* apply a fortiori when criminal sanctions have been completely repealed before a criminal conviction becomes final"]; *People v. Wright* (2006) 40 Cal.4th 81, 94-95 [discussing *Rossi* and related cases].)

clause," the prior statute "should continue to operate as to past acts"].) If there is no express saving clause, one will be implied if the Legislature or electorate has "demonstrate[d] its intention with sufficient clarity that a reviewing court can discern and effectuate it." (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 (*Pedro T.*).)

The "functional equivalent of a saving clause" was included in Proposition 36, the Three Strikes Reform Act of 2012 (the Reform Act). (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 172 (*Yearwood*).) The Reform Act "change[d] the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life imprisonment" by amending Penal Code sections 667 and 1170.12. (*Yearwood, supra*, 213 Cal.App.4th at p. 167.) Pursuant to those amendments, life sentences now may be imposed only in "cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor." (*Ibid.*) The Reform Act also enacted a new statute, Penal Code section 1170.126, which, as the Court of Appeal stated:

> [c]reated a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. [Citation.]

(*Yearwood, supra*, 213 Cal.App.4th at p. 168.)

The defendant in *Yearwood* had been convicted of unlawfully possessing marijuana in prison and sentenced as a third strike offender prior to the Reform Act, but his conviction was not yet final. (*Yearwood, supra*,

213 Cal.App.4th at p. 167.) Had he been sentenced after the Reform Act, it was "undisputed" that he would not have been sentenced to an indeterminate life term. (*Id.* at p. 168.) The appellate court considered whether it could issue an order that he be resentenced, or whether his remedy was "limited to filing a petition for a recall of his sentence in compliance with [Penal Code] section 1170.126." (*Ibid.*) The court acknowledged that the petition procedure could potentially have different consequences for the defendant, since under Penal Code section 1170.126, the trial court could deny his resentencing petition if it found that he posed "an unreasonable public safety risk," whereas that "discretionary finding" was not a component of the amended versions of Penal Code sections 667 and 1170.12. (*Ibid.*)

The *Yearwood* defendant argued that the Reform Act should apply retroactively, based on *Estrada*, because the Reform Act reduced the punishment for his offense. The *Yearwood* court disagreed, finding that "[t]he *Estrada* rule does not apply to the [Reform] Act because Penal Code section 1170.126 operates as the functional equivalent of a saving clause." (*Yearwood*, *supra*, 213 Cal.App.4th at p. 172.) The court examined the language of Penal Code section 1170.126, subdivision (b), which provides, "Any person serving an indeterminate term of life imprisonment" imposed for a third strike conviction "may file a petition for a recall of sentence." The court found this phrase was "not ambiguous" and that Penal Code section 1170.126 "is correctly interpreted to apply to all prisoners serving an indeterminate life sentence imposed under the former three strikes law." (*Id.* at p. 175.)

2. Proposition 57 Must Be Applied Prospectively Because It Does Not Contain An Express Retroactivity Provision

As this Court has stated: "The basis of our decision in *Estrada* was [a] quest for legislative intent." (*Pedro T., supra*, 8 Cal.4th at p. 1045.) That is because the general rule remains: "a statute is not retroactive in operation unless the legislative intent to the contrary is clear. [Citation.]" (*Estate of Childs* (1941) 18 Cal.2d 237, 246.)

> California continues to adhere to the time-honored principle, codified by the Legislature in Civil Code section 3 and similar provisions, 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 or the voters must have intended a retroactive application.

(*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209; see Pen. Code, § 3; Civ. Code, § 3.)

Legislative intent is determined through a review of the statutory scheme as a whole with any ambiguities presumed to be prospective. (*Brown, supra*, 54 Cal.4th at pp. 319-320 ["[A] statute that is ambiguous with respect to retroactivity application is construed . . . to be unambiguously prospective"]; *People v. Nasalga, supra,* 12 Cal.4th at p. 793.) As stated, when a court is determining the intent behind a law, it should look to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L., supra*, 30 Cal.4th at p. 900; *People v. Floyd, supra,* 31 Cal.4th at pp. 187-188 [The ballot pamphlet information is a valuable aid in construing the intent of voters].)

Here, there is nothing in the text of Proposition 57, or in the ballot materials submitted to the voters, that demonstrates an intent for the juvenile-law portions of the law to apply retroactively to cases that were lawfully pending in adult court at the time the law became effective. But there is temporal language contained in the ballot materials demonstrating an intent for the amendments to apply prospectively only. Specifically, the legislative analysis provided to the voters in the ballot pamphlet includes the stated intent of ensuring that minors "accused of committing certain severe crimes would *no longer* automatically be tried in adult court" and that a judge would need to make a determination "*before* youths can be transferred to adult court." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) analysis by the legislative analyst, p. 56, emphasis added.)

Certainly a large impact of Proposition 57 was the elimination of mandatory and discretionary direct filing in adult court. The use of temporal language such as "before" and "no longer" demonstrates that the changes were not intended to apply to cases that were already pending in adult court, but to new cases that had not yet been initiated. Indeed, a voter presented with the above ballot pamphlet would rightly believe that if the new law upon which he or she was voting would require a judicial determination "*before* youths can be transferred to adult court," the law would not apply *after* a case was lawfully pending in adult court. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) analysis by the legislative analyst, p. 56, emphasis added.)

In *People v. Mendoza, et al.* (2017) 10 Cal.App.5th 327, 344-350 (*Mendoza*), review granted July 12, 2017, S241647, the Court of Appeal, Sixth Appellate District, held that Proposition 57 cannot be applied retroactively. Specifically, *Mendoza* cited Penal Code section 3 and this Court's decision in *Brown* to reiterate that a new law must be applied

prospectively unless expressly so declared, and that any ambiguity in that regard must be resolved in favor of prospective application. (*Id.* at p. 344, citing *People v. Brown, supra,* 54 Cal.4th at p. 319, and Pen. Code, § 3.) *Mendoza* explained that Proposition 57 did not contain an express statement of intent regarding retroactive application, and that certain text of Proposition 57 arguably supported an inference of prospective intent. (*People v. Mendoza, supra,* 10 Cal.App.5th at pp. 344-345 ["[N]one of the stated purposes [of Proposition 57] provide a reference to timing from which retroactive intent can be inferred. In fact, there is arguably textual support for an inference of *prospective* intent."].)

In considering the ballot materials provided to the voters regarding Proposition 57, *Mendoza* concluded that although those materials "express voter intent to focus on rehabilitation, they are silent as to intent regarding retroactivity." (*People v. Mendoza, supra,* 10 Cal.App.5th at p. 345.) In fact, *Mendoza* pointed out that, like the text of Proposition 57 itself, the supporting ballot materials also gave rise to an inference that the voters intended the new law to apply prospectively. (*Ibid.*) As such, *Mendoza* held that under *Brown* and Penal Code section 3, Proposition 57 must be applied prospectively unless *Estrada* applies. (*Ibid.*, citing *People v. Brown, supra,* 54 Cal.4th at p. 319, and Pen. Code, § 3.)

More recently, in *People v. Superior Court (Walker)* 12 Cal.App.5th 687 (*Walker*), the Court of Appeal, Fourth Appellate District, Division One, similarly held that Proposition 57 cannot be applied retroactively. Specifically, *Walker* concluded: "Neither the text nor the ballot materials establish that the electorate intended for Proposition 57 to be applied retroactively." (*Id.* at p. 699.) Rather, "'the voters did not make their intent clear regarding retroactive application in the text of Proposition 57 nor can we clearly discern their intent from the voter information guide.'" (*Id.* at p.

700, quoting *People v. Mendoza, supra,* 10 Cal.App.5th at p. 345; accord *People v. Marquez* (2017) 11 Cal.App.5th 816 (*Marquez*) [Proposition 57 is not retroactive because, among other reasons, both the text of the proposition and the underlying ballot materials are silent regarding whether the new law was intended to apply retroactively].)

In any event, and as stated, to the extent there is any ambiguity in the intent of the electorate, that ambiguity must be resolved in favor of the law applying prospectively only. (*Brown*, *supra*, 54 Cal.4th at pp. 319-320 [legislative intent is determined through a review of the statutory scheme as a whole with any ambiguities presumed to be prospective].) Indeed, it is well established that both the Legislature and the electorate by the initiative process are deemed aware of laws in effect at the time they enact new laws, and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them. (See, e.g., *People v. Weidert* (1985) 39 Cal.3d 836, 844 [the enacting body is deemed to be aware of existing laws and judicial constructions in effect at time legislation is enacted, and this principle applies equally to legislation enacted by initiative].)

As one appellate court has stated:

> Under these circumstances, "there is no reason to believe that the electorate harbored any specific thoughts or intent with respect to the retroactivity issue at all." (*Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at p. 1212, [].) "Because past cases have long made it clear that initiative measures are subject to the ordinary rules and canons of statutory construction [citations], informed members of the electorate who happened to consider the retroactivity issue would presumably have concluded that the measure—like other statutes—would be applied

> prospectively because no express provision for retroactive application was included in the proposition." (*Id.* at pp. 1212–1213, [].)

(*People v. Litmon* (2008) 162 Cal.App.4th 383, 411.)

Here, similarly, had the electorate intended for the juvenile-law amendments of Proposition 57 to apply retroactively to already-filed cases, they would have rightly expected the initiative to include an express provision regarding retroactive application. (See, e.g., § 1769, subd. (d) ["The amendments to this section made by the act adding this subdivision shall apply retroactively"]; § 1771, subd. (c) [same].) Indeed, the portion of Proposition 57 relating to resentencing state prison inmates *does* expressly include retroactivity language. Specifically, section 3 of Proposition 57 added section 32 to Article I of the California Constitution, allowing any person currently "convicted of a non-violent felony offense and sentenced to state prison to be eligible for parole consideration after completing the full term for his or her primary offense."

No such provision was included in the juvenile-law portion of Proposition 57. The electorate, presumed aware of the general rule that newly enacted laws apply prospectively only, must have intended for the juvenile amendments to apply prospectively only.[6] And in fact, as stated above, the ballot pamphlet that was provided to the voters specifically

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[6] California voters are familiar with laws that express an intent to apply retroactively. For example, at the same election at which the voters adopted Proposition 57, they also voted on Proposition 62, the text of which stated: "SEC. 10. Retroactive Application of Act. (a) In order to best achieve the purpose of this act . . . and to achieve fairness, equality, and uniformity in sentencing, this act shall be applied retroactively." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 62, p. 163; *Walker, supra*, 12 Cal.App.5th at p. 699, fn. 15.) In addition, and also at the same election, the voters passed Proposition 64, which similarly contained express language applying the law retroactively.

included language demonstrating a prospective intent. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) analysis by the legislative analyst, p. 56; see *People v. Mendoza, supra,* 10 Cal.App.5th at pp. 344-345 ["[T]here is arguably textual support for an inference of *prospective* intent."].) Plainly stated, because there is no clear intent that the legislature intended Proposition 57 to apply retroactively, it must be applied prospectively unless *Estrada* applies. (See, e.g., *Estate of Childs, supra,* 18 Cal.2d at p. 246 ["a statute is not retroactive in operation unless the legislative intent to the contrary is clear."].)

3. *Estrada* Is Inapplicable Because Proposition 57 Did Not Lessen Punishment For A Specific Criminal Offense

In *Brown*, this Court explained the limited nature of the *Estrada* rule:

> *Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation 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.

(*Brown, supra*, 54 Cal.4th at p. 324, italics in original.)

Brown rejected the defendant's argument that, under *Estrada*, a statute increasing the rate at which eligible defendants could earn conduct credits (thereby reducing the amount of time such defendants were required to spend in custody) applied retroactively. (*Id.* at p. 325.) *Brown* reasoned that 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,"'" and concluded that the statute at issue 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." (*Ibid.*)

Here, just as in *Brown*, Proposition 57 neither represents a change regarding a particular criminal offense, nor does it mitigate punishment for a particular criminal offense. Rather, Proposition 57 alters only the procedural aspects of prosecuting minor offenders, dictating the manner and method by which such prosecutions may be transferred to courts of criminal jurisdiction. Just as in *Brown*, this type of change is outside the rule of *Estrada*, and is therefore subject to the general rule that newly enacted laws apply prospectively only.

Several recent published cases support this position. Including the present case, there have been six published Court of Appeal decisions addressing whether *Estrada* is applicable to Proposition 57. With one exception, all of those cases, including the present case, correctly concluded that *Estrada* does not apply to Proposition 57.

In the present case, the Court of Appeal, Fourth Appellate District, Division Two, initially cited both Penal Code section 3 and this Court's decision in *Tapia* to support its conclusion that Proposition 57 cannot be applied retroactively. (*People v. Superior Court (Lara)* (2017) 9 Cal.App.5th 753, 773-774 (*Lara*), review granted May 17, 2017, S241231, citing *Tapia v. Superior Court, supra,* 53 Cal.3d at p. 287, and Pen. Code, § 3.) The Court of Appeal also cited this Court's decision in *Brown* to support its conclusion that *Estrada* is inapplicable to Proposition 57. (*People v. Superior Court (Lara), supra,* 9 Cal.App.5th at p. 774, citing *In*

re Estrada, supra, 63 Cal.2d 740, and *People v. Brown, supra,* 54 Cal.4th at p. 324.)[7]

In *People v. Cervantes* (2017) 9 Cal.App.5th 569 (*Cervantes*), review granted May 17, 2017, S241323, the Court of Appeal, First Appellate District, Division Four, held that Proposition 57 is not retroactive and *Estrada* is inapplicable. (*People v. Cervantes, supra,* 9 Cal.App.5th at pp. 599-602.) *Cervantes* was in a different procedural posture than the present case in that the defendant had been convicted, sentenced, and the case was pending on appeal when Proposition 57 was passed by the voters. (See *id.* at p. 594.) Although the Court of Appeal ultimately held that the defendant in *Cervantes* was entitled to a Proposition 57 transfer hearing upon remand (the Court of Appeal reversed several of the defendant's many convictions for reasons unrelated to Proposition 57), the court categorically concluded that Proposition 57 is not retroactive and *Estrada* is inapplicable. (*Id.* at pp. 599-602.)

Similar to *Cervantes*, and as mentioned above, in *People v. Mendoza, supra,* 10 Cal.App.5th at pages 344-350, the Court of Appeal, Sixth Appellate District, held that Proposition 57 cannot be applied retroactively. *Mendoza* held that *Estrada* was inapplicable to Proposition 57 because the new law "does not expressly mitigate the penalty for any particular crime." (*People v. Mendoza, supra,* 10 Cal.App.5th at p. 347.) In this regard, *Mendoza* agreed with *Cervantes* in concluding that this Court's decision in *Brown* dictated that the *Estrada* rule was inapplicable to

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[7] Confusingly, although the Court of Appeal here expressly held that *Estrada* "does not apply" to Proposition 57, the court went on to state it was not considering "whether Proposition 57 amounts to a legislative reduction in the punishment for a crime." (*People v. Superior Court (Lara), supra,* 9 Cal.App.5th at p. 774.) *Walker* noted that *Lara* was "not entirely clear" regarding whether *Estrada* applied to Proposition 57. (*Walker, supra,* 12 Cal.App.5th at p. 703, fn. 18.)

Proposition 57. (*Id.* at pp. 348-349, citing *People v. Cervantes, supra,* 9 Cal.App.5th at pp. 601-602, and *People v. Brown, supra,* 54 Cal.4th at pp. 324-325.)

Furthermore, *Mendoza* considered this Court's decision in *People v. Francis* (1969) 71 Cal.2d 66 (*Francis*) where the defendant committed a drug offense that was later amended by the Legislature from being punished only as a felony to being punished as a wobbler. (*People v. Mendoza, supra,* 10 Cal.App.5th at pp. 348-349.) *Mendoza* distinguished *Francis* "because [that case] involved a legislative mitigation of the potential punishment for a specific crime," whereas under Proposition 57 "the potential benefit inures to a class of offenders based on their age rather than on the offenses they commit . . ." (*Ibid.*)

Similarly, in *People v. Marquez, supra,* 11 Cal.App.5th at pp. 820-822, the Court of Appeal, Fifth Appellate District, addressed a situation similar to *Cervantes* and *Mendoza* in that Proposition 57 was passed while the case was pending on appeal. And like *Cervantes* and *Mendoza*, *Marquez* held that *Estrada* was inapplicable to Proposition 57 because the new law did not reduce punishment for a specific criminal offense. (*Id.* at pp. 823-827.) As *Marquez* stated, "Proposition 57 'may or may not in some attenuated way affect punishment, but it is not a direct reduction in penalty as required for retroactivity under *Estrada.*'" (*Id.* at p. 826, quoting *People v. Cervantes, supra,* 9 Cal.App.5th at p. 602.)

Most recently, in *Walker, supra,* 12 Cal.App.5th at pp. 703-705, the Court of Appeal, Fourth Appellate District, Division One, held that *Estrada* was inapplicable to Proposition 57. In support of its conclusion, *Walker* cited this Court's recent decision in *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*), in which this Court concluded the Three Strikes Reform Act could not be applied retroactively under *Estrada* so as to mandate

"'automatic resentencing for third strike defendants serving nonfinal sentences imposed under the former version of the Three Strikes law.'" (*Walker, supra,* 12 Cal.App.5th at p. 702, quoting *People v. Conley, supra,* 63 Cal.4th at p. 657.) *Walker* reasoned that, similar to *Conley*, applying Proposition 57 to cases pending in adult court prior to the law's effective date "would require much more than simply substituting in a more lenient sentence upon a defendant's conviction." (*Walker, supra,* 12 Cal.App.5th at p. 704, citing *People v. Conley, supra,* 63 Cal.4th at p. 660.) As *Walker* stated:

> [b]oth the procedural difficulties with respect to *how* to apply Proposition 57 retroactively, as well as the existence of a legitimate motive that voters may have had for intending that the proposition only apply prospectively, support our conclusion that *Estrada* does not require a retroactive application of the new law.

(*Walker, supra,* 12 Cal.App.5th at p. 705, citing *People v. Conley, supra,* 63 Cal.4th at pp. 658-660.) As such, "*Estrada* and its progeny do not support the conclusion that Proposition 57 should be applied retroactively . . ." (*Walker, supra,* 12 Cal.App.5th at p. 705.)

The outlier in the recent published cases addressing this issue is *People v. Vela* (2017) 11 Cal.App.5th 68 (*Vela*), review granted July 12, 2017, S242298, in which the Court of Appeal, Fourth Appellate District, Division Three, held that the "implied intent" of the electorate was to apply Proposition 57 retroactively, and that *Estrada* was applicable because the "possibility for a minor's rehabilitation within the juvenile justice system is analogous to the possible reduction of a criminal defendant's sentence." (*People v. Vela, supra,* 11 Cal.App.5th at pp. 76, 78.) For the reasons outlined above, *Vela* was incorrectly decided and should be overruled. The

only published cases after *Vela* that addressed the issue are *Marquez* and *Walker*, both of which expressly disagreed with *Vela* and, as stated above, aligned with the reasoning of *Cervantes* and *Mendoza.* (*Marquez, supra,* 11 Cal.App.5th at p. 827; *Walker, supra,* 12 CalApp.5th at pp. 704-705.)

Plainly stated, Proposition 57 cannot be applied retroactively because: (1) the electorate did not express an intent for the new law to apply retroactively; and (2) the new law did not lessen punishment for a particular criminal offense. As such, the juvenile-law amendments enacted by Proposition 57 may only be applied prospectively. (See, e.g., Pen. Code, § 3; *People v. Brown, supra,* 54 Cal.4th at p. 324.)

E. Proposition 57 Cannot Be Properly Applied Prospectively To Cases Lawfully Pending In A Court Of Criminal Jurisdiction Prior To The Law's Effective Date

Given that Proposition 57 cannot be applied retroactively, the issue shifts to whether it can be properly applied prospectively to cases lawfully pending in adult court prior to the law's effective date. The Court of Appeal in the present case concluded that it could. But that decision was based upon an overbroad interpretation of this Court's ruling in *Tapia, supra,* 53 Cal.3d 282, and a fundamental misapplication of the term of art "conduct of trials" as used by this Court in *Tapia.*

In *Tapia,* this Court considered whether the many criminal-law amendments enacted by then-recent Proposition 115 ("Crime Victims Justice Reform Act") applied to prosecutions for crimes committed before the measure's effective date. (*Tapia, supra,* 53 Cal.3d at p. 297.) In analyzing the issue, this Court considered previous cases involving the application of newly enacted laws that changed the conduct of trials. (*Tapia, supra,* 53 Cal.3d at pp. 288-291.) For example, *Tapia* noted how one such newly enacted law "applies only to trials which take place after its

enactment. It can have no effect whatever on previous trials or enactments. It is prospective only in nature." (*Id.* at p. 289, citing *Estate of Patterson* (1909) 155 Cal. 626, 638.) As this Court explained, there remains a "general rule that statutes addressing the conduct of trials are prospective." (*Id.* at pp. 290-291.) Thus, to the extent a newly enacted statute alters a procedural aspect that has not yet occurred, it must be applied; however, it is inapplicable to procedural aspects that have already taken place. (See *id.* at pp. 291-299.)

More specifically, in considering the changes enacted by Proposition 115, *Tapia* drew a distinction between: (1) new provisions which change the legal consequences of criminal behavior to the detriment of defendants; and (2) new provisions that address the "conduct of trials," which *Tapia* went on to explain included any change altering a procedural aspect of a criminal prosecution. (*Tapia, supra,* 53 Cal.3d at pp. 297-300.) Whereas the former cannot be applied to conduct that occurred before the measure's effective date, the latter can be properly applied prospectively to procedural aspects of a criminal prosecution that have yet to take place when the measure became effective. (*Ibid.*)

Tapia explained that a number of the changes enacted by Proposition 115 were procedural changes falling into the "conduct of trials" category, including, among others: (1) the elimination of postindictment preliminary hearings; (2) the admissibility of hearsay at preliminary hearings; (3) the requirement for reciprocal discovery; (4) altering the rules regarding severance; and (5) altering the manner in which voir dire is conducted. (*Tapia, supra,* 53 Cal.3d at p. 299.) *Tapia* went on to hold that these procedural "conduct of trial" changes could be properly applied prospectively so long as the altered procedural aspect of the proceedings had not yet occurred on the date the measure became effective. (*Id.* at pp.

299-300.)

In the present case, the Court of Appeal began its analysis by properly concluding that the juvenile-law amendments enacted by Proposition 57 were procedural "conduct of trial" changes. (*Lara, supra,* at pp. 774-775, quoting *Tapia, supra,* 53 Cal.3d at p. 289 ["Requiring a juvenile judge to assess whether real party in interest is tried in adult court strikes us as a 'law governing the conduct of trials.'"].) Where the Court of Appeal erred, however, is assuming that any "conduct of trials" change can be properly applied prospectively so long as the actual trial itself, whether that be a bench trial or jury trial, has yet to occur. (*Lara, supra,* at p. 775 ["Because Proposition 57 can only apply to trials that have yet to occur, it can only be applied prospectively."].) That position is belied by *Tapia* itself.

As stated, *Tapia* involved a number of "conduct of trials" changes that had nothing to do with the actual trial itself, such as requiring pretrial reciprocal discovery and altering the requirements relating to preliminary hearings. (*Tapia, supra,* 53 Cal.3d at p. 299.) Particularly instructive here is this Court's analysis regarding the pretrial reciprocal discovery requirement enacted by Proposition 115. As *Tapia* stated: "Application of the [pretrial reciprocal] discovery provisions to compel production of evidence obtained . . . before Proposition 115's effective date would be retroactive under the principles we have already discussed." (*Id.* at p. 300.) Thus, the Court of Appeal in the present case was incorrect in believing that any "conduct of trials" change enacted by new legislation can be applied prospectively so long as the trial itself has yet to occur.

This Court reached a similar result in *People v. Ledesma* (2006) 39 Cal.4th 641 (*Ledesma*). *Ledesma* considered whether a change in the law reducing the number of permitted peremptory challenges in death penalty

trials could be properly applied prospectively to the defendant. (*Id.* at p. 663.) The new law became effective after pretrial proceedings had started—such as motions and discovery—but before jury selection began. (*Ibid.*) *Ledesma* concluded the new law could be properly applied prospectively because the conduct regulated by the law—the selection of jurors—had yet to occur: "The operative date for determining prospective application of a statute is the 'date of the conduct regulated by the statute.'" (*Id.* at p. 664, citing *Tapia, supra,* 53 Cal.3d at p. 291, and *People v. Hayes* (1989) 49 Cal.3d 1260, 1274 (*Hayes*) [holding that a new statute specifying conditions under which the testimony of a witness who has undergone hypnosis may be admitted could not be applied in a retrial after the effective date of the statute when the witness had been interviewed under hypnosis before the effective date of the statute."].)

Conversely, the conduct regulated by Proposition 57 relates to procedural acts that must take place before a case may find itself pending in adult court. Stated another way, the changes enacted by Proposition 57 have no bearing whatsoever on the trial itself, but rather relate entirely to procedural requirements that must take place *before* prosecution against a minor may be transferred into adult court. Once a case is lawfully pending in adult court, however, the only manner in which to apply those pre-transfer procedural requirements to an already-pending direct-filed case would be to do exactly what the trial court did in this case: Halt the pending adult-court proceedings and send the case backwards to juvenile court, after which necessary preconditions must be satisfied before the case may be returned to where it started. As *Tapia* dictates, that would be an improper retroactive application of the new law. (See *Tapia, supra,* 53 Cal.3d at pp. 299-300; see also *People v. Ledesma, supra,* 39 Cal.4th at pp. 663-664.)

In *Walker*, the Court of Appeal explained how a primary function of Proposition 57 was eliminating the ability to directly file charges against a juvenile in adult court, and thus:

> [t]o apply Proposition 57's new *filing* provisions to conclude that a case properly *filed* in Adult Court *before* Proposition 57's effective date must be transferred to Juvenile Court would be a retroactive application of Proposition 57 under *Tapia*. (See *Tapia, supra,* 53 Cal.3d at p. 300 ['Application of the discovery provisions to compel production of evidence obtained by defense counsel *before* Proposition 115's effective date would be retroactive' (italics added)].) Stated differently, 'the conduct regulated by [Proposition 57]' (*id.* at p. 291, discussing *Hayes*) is the *filing* of charges against a juvenile defendant, and thus, Proposition 57's changes to the law governing the *filing* of charges may not be applied to cases properly filed in Adult Court '*before* the effective date of the statute.' (*Ledesma, supra,* 39 Cal.4th at p. 664, discussing *Hayes*, italics added.)

(*Walker, supra*, 12 Cal.App.5th at p. 710, emphasis in original.) *Walker* went on to explain that because the amendments to sections 602 and 707 brought about by Proposition 57 pertain to the filing of criminal charges, they do not relate to a procedure to be followed in the future once a case is already properly pending in adult court. (*Ibid.*, citing *Tapia, supra,* 53 Cal.3d at p. 288, and *People v. Sandoval* (2007) 41 Cal.4th 825, 845 ["a change in procedural law is not retroactive when applied to proceedings

that take place after its enactment."].)[8]

Also instructive is *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275 (*Bourquez*), in which the Court of Appeal addressed a then-recent amendment to the Sexually Violent Predator Act (SVPA) that extended commitments from renewable two-year periods to indeterminate periods. (*Bourquez, supra*, 156 Cal.App.4th 1275.) Specifically, the new law amended section 6604 to provide, in part: "If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health." (§ 6604, emphasis added.) Citing the retroactivity standard enunciated by this Court in *People v. Grant* (1999) 20 Cal.4th 150, 157, *Bourquez* determined that application of this new commitment provision to SVPA petitions already pending in the superior court on the initiative's effective date was not retroactive

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[8] Petitioner agrees with *Walker* that the primary function of Proposition 57 in relation to juvenile law was the elimination of mandatory and discretionary direct filing by prosecutors. But an additional function of Proposition 57 was the elimination of presumptions at the transfer hearing, which presumably places the burden on the prosecution at every such hearing to establish that the minor offender should be transferred to adult court. (See *Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 804-805 [absent a presumption, the burden of proving that a minor accused of committing a crime is unfit to be tried in juvenile court is on the prosecution].) As such, for cases that were filed in juvenile court with a request for a fitness hearing prior to November 9, 2016, but where the fitness hearing had not yet taken place before November 9, 2016, Petitioner acknowledges that the subsequent fitness/transfer hearing must be conducted under the new standard enacted by Proposition 57. Stated another way, for any fitness or transfer hearing conducted after November 9, 2016—regardless of when the case was filed—the juvenile-law amendments enacted by Proposition 57 are properly applicable in a prospective manner. (*Tapia, supra,* 53 Cal.3d at pp. 299-300; *People v. Ledesma, supra,* 39 Cal.4th at pp. 663-664.)

because "the last act or event necessary to trigger application" of the new commitment period was the court or jury's determination that the person is a sexually violent predator, a determination which came after the statute's effective date. (*Bourquez, supra,* 156 Cal.App.4th at p. 1289.)

Conversely, with Proposition 57, the last act or event necessary to trigger application of the new transfer provisions is completed before the case finds itself lawfully pending in adult court. Specifically, once a case has been properly filed in adult court under then-valid requirements, the only way in which proposition 57 can be applied is in an impermissibly retroactive manner. Plainly stated, after a case is lawfully pending in adult court, there is no remaining act or event subject to the amendments enacted by Proposition 57, and therefore the new law cannot have a permissible prospective application. (See, e.g., *Tapia, supra,* 53 Cal.3d at pp. 299-300; *People v. Ledesma, supra,* 39 Cal.4th at pp. 663-664; *Bourquez, supra,* 156 Cal.App.4th 1289.)

Similarly, in *John L. v. Superior Court* (2004) 33 Cal.4th 158, 171 (*John L.*), this Court concluded that certain changes regarding the standard of proof at, and the admissibility of evidence in, juvenile probation proceedings conducted pursuant to section 777 could be lawfully applied to *future proceedings*. The *Walker* court found *John L.* persuasive in that this Court expressly stated the new law could be properly applied to "*procedure to be followed in future* section 777 proceedings . . ." (*Walker, supra,* 12 Cal.App.5th at p. 712, emphasis in original, quoting *John L., supra,* 33 Cal.4th at p. 171; citing *In re Chong K.* (2006) 145 Cal.App.4th 13, 18-19 [relying on *John L.* to conclude that an amendment to section 781 regarding petitions to seal juvenile records only applied to such petitions brought on or after the effective date of the new law].)

Furthermore, the Court of Appeal in the present case placed undue reliance upon *Strauch v. Superior Court* (1980) 107 Cal.App.3d 45 (*Strauch*), a case that considered a situation readily distinguishable from the changes enacted by Proposition 57. (*Lara, supra,* 9 Cal.App.5th at pp. 775-776.) In *Strauch*, a medical malpractice complaint was filed without a then-required accompanying certificate of merit. (*Strauch, supra,* 107 Cal.App.3d at p. 47.) After the complaint was filed, however, the law was amended to permit the late filing of a certificate of merit, after which the moving party complied with the newly-amended law. (*Ibid.*) In considering whether the new law could properly apply, the Court of Appeal held that because the law amended a procedural statute, and because the moving party easily cured the defect by subsequently complying with the new law, the law was being applied prospectively. (*Id.* at p. 49.)

Following from this, the Court of Appeal here reasoned that Proposition 57's amendment of the filing requirements for juvenile cases can be applied prospectively to any pending case. (See *Lara, supra,* 9 Cal.App.5th at p. 776.) What the Court of Appeal failed to address, however, is that *Strauch* considered statutory expansion of a procedural requirement, broadening the ability of the filing party to comply by allowing the filing party to submit a certificate of compliance after the law's effective date and after the initial filing of the case. (*Strauch v. Superior Court, supra,* 107 Cal.App.3d at pp. 47-49.) Conversely, Proposition 57 narrowed a procedural requirement, mandating the prosecution to file in juvenile court before the case may move to adult court. Unlike *Strauch*—which permitted relevant procedural actions *after* the law's effective date and *after* filing of the complaint—Proposition 57 mandated procedural requirements necessary *before* a case can move into adult court. Once a case is already properly pending in adult court,

however, there is no way to apply the procedural requirements enacted by Proposition 57 without applying those requirements retroactively. In fact, *Tapia* specifically cited *Strauch* for the proposition that the effect of newly-enacted statutes is "'prospective in nature since they relate to the procedure to be followed *in the future*.'" (*Tapia*, *supra*, 53 Cal.3d at p. 288, quoting *Strauch v. Superior Court, supra,* 107 Cal.App.3d at p 49, emphasis added; see also *Walker, supra,* 12 Cal.App.5th at p. 712 [*Strauch* is distinguishable because there, unlike with Proposition 57, the altered procedural requirement remained pending at the time the law was enacted].) Accordingly, the Court of Appeal's reliance upon *Strauch* was misplaced.

Like the Court of Appeal in the present case, the *Cervantes* court also erroneously believed that applying Proposition 57 to cases already pending in adult court at the time the law became effective did not amount to retroactive application. (*People v. Cervantes, supra,* 9 Cal.App.5th at p. 621.) In *Cervantes*, the defendant was 14 years old when he attacked a 13-year-old girl and her 20-month-old brother. (*Id.* at p. 579.) After breaking into their home in the middle of the night, the defendant stabbed both children repeatedly as they slept, after which he raped and sodomized the girl. (*Ibid.*) The prosecution directly filed a complaint in adult court and, following a jury trial, the defendant was convicted of 15 charges, including various sex offenses and two counts each of attempted murder, torture, and aggravated mayhem. (*Id.* at pp. 582-583.) On direct appeal, the court concluded the defendant's trial attorney rendered ineffective assistance of counsel relating to investigating the defendant's mental state and therefore reversed 8 of the 15 convictions; the remaining convictions were affirmed. (*Id.* at p. 580.)

As relevant here, *Cervantes* was tasked with determining whether Proposition 57 applied not only to pretrial cases lawfully pending in adult

court prior to the law's effective date, but also to post-conviction cases that were awaiting sentencing when the new law became effective. *Cervantes* ultimately held the juvenile-law amendments enacted by Proposition 57 entitled defendants to a "fitness hearing" prior to being sentenced in adult court. (*People v. Cervantes, supra,* 9 Cal.App.5th at pp. 612-613.)

For the reasons set forth above, *Cervantes* was wrongly decided in that, like the Court of Appeal in the present case, it misinterpreted *Tapia*. In fact, *Cervantes* assumed without discussion that, under *Tapia*, Proposition 57 applied prospectively to any pretrial case that was lawfully pending in adult court prior to the new law's effective date. (*People v. Cervantes, supra,* 9 Cal.App.5th at pp. 600-601 ["[T]he transfer procedure dictated by Proposition 57 is not one that addressed 'criminal behavior which has already taken place,' but is more correctly identified as one 'address[ing] the conduct of trials which have yet to take place.' (*Tapia*, at p. 288.) This suggests its application should be prospective only."].) For the reasons set forth above, the *Cervantes* court's reasoning in this regard was flawed and premised upon an overbroad interpretation of *Tapia* that necessitates an improper retroactive application of Proposition 57.

Further flawed was the *Cervantes* court's reliance upon broad, general language within the Proposition 57 ballot materials to reach the conclusion that the electorate must have intended the new law to apply to cases properly pending in adult court when the law was enacted. Specifically, *Cervantes* found persuasive passages in the Voter Guide stating that Proposition 57 was to be "broadly construed to accomplish its purposes," and that courts should "liberally construe [Proposition 57] to effectuate its purposes." (*People v. Cervantes, supra,* 9 Cal.App.5th at p. 604, citing 2016 Voter Guide, *supra*, text of Prop. 57, §§ 5 and 9, pp. 145-146.) What *Cervantes* failed to note, however, is that these passages from

the Voter Guide do not speak to, or indicate, an intent for the new law to apply *retroactively*. Indeed, this Court has specifically rejected similar reasoning: "The statement in the Education Code that its provisions are to be liberally construed with the view to effect its objects and promote justice (§ 2) cannot be interpreted as a declaration that any of its sections is to be given retroactive effect." (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 173.)

What *Cervantes* aptly demonstrates, however, is the confusion inherent with attempting to apply Proposition 57 in a patently retroactive manner. *Cervantes* began its analysis by correctly concluding that Proposition 57 cannot lawfully be applied retroactively (*People v. Cervantes, supra,* 9 Cal.App.5th at p. 598), but then completed its analysis with a holding that in effect necessitated a retroactive application of the law, not only to the pending retrial in adult court, but also to the standing convictions that were completely unaltered by the appeal (*Id.* at pp. 609-614). As *Walker* noted: "One need only read the disposition in *Cervantes* . . . to appreciate the complexity of attempting to apply Proposition 57 to cases that were filed in Adult Court prior to its enactment." (*Walker, supra,* 12 Cal.App.5th at p. 705, fn. 20.) The disposition from *Cervantes*, as referenced by *Walker*, is as follows:

> The judgment is affirmed as to counts 3, 8, 9, 11, 12, 13 and 14 and their accompanying enhancements and findings. The judgment is reversed as to counts 1, 2, 4 through 7, 10 and 15, together with accompanying enhancements and findings, as is the sentence on all counts. The true findings on section 667.61, subdivision (d)(4) are stricken and shall not be considered for any purpose. The cause is remanded for further proceedings in accordance with this

opinion.

> Before any further proceedings are conducted in criminal court, Cervantes may avail himself of a fitness hearing, and if he does so, the matter shall be transferred to the juvenile court for a transfer hearing under Welfare and Institutions Code section 707. The trial court shall suspend criminal proceedings pending the outcome of that hearing. The transfer hearing shall be conducted substantially in compliance with the views expressed in this opinion. Copies of the transfer order, the amended information, and this opinion must be transmitted by the trial court to the clerk of the juvenile court. (Cf. Cal. Rules of Court, rule 4.116(c).)
>
> After the transfer hearing, if the case is transferred to the criminal court, the district attorney may elect to retry the reversed counts within the time allowed by statute. The time limit shall run from the date of the juvenile division's order on the fitness hearing. If the district attorney elects not to retry those counts, the charges shall be dismissed. After retrial, or after dismissal of the reversed counts, Cervantes shall be resentenced . . .

(*People v. Cervantes, supra,* 9 Cal.App.5th at p. 621; see *Walker, supra,* 12 Cal.App.5th at p. 705, fn. 20, and p. 718, fn. 32.)

Indeed, the complexity with attempting to apply Proposition 57 in a patently retroactive manner—as encountered by *Cervantes* and noted by *Walker*—is due to Proposition 57's failure to provide a procedural mechanism by which to apply the new law to cases previously pending in adult court. As noted by *Walker*, "the absence of any mechanism *within* Proposition 57 to effectuate such transfers further demonstrates that the proposition was not intended to be applied to cases filed in Adult Court

prior to the effective date of the proposition." (*Walker, supra*, 12 Cal.App.5th at p. 718, emphasis in original.)

The lack of a procedural mechanism by which to apply Proposition 57 to cases previously pending in adult court prior to the law's effective date is readily apparent in the present case. Here, on November 29, 2016, the trial court conducted the initial hearing regarding whether Proposition 57 applied retroactively. (Exhibit 7.) The trial court ultimately ruled that Proposition 57 applied retroactively to cases already pending in adult court at the time the new law became effective, and granted real party's request to "transfer the matter to juvenile court." (Exhibit 7, at pp. 15-16.) At the conclusion of the hearing, the trial court issued a 21-day stay to permit the People an opportunity to file a petition for writ of mandate in the Court of Appeal. (Exhibit 7, at pp. 16-17.)

On December 14, 2016—after the petition for writ of mandate was filed in the Court of Appeal but before the trial court's 21-day stay expired—real party filed a motion to modify the court's order. (Riverside County Superior Court case print, case number RIF1601012.) Specifically, real party requested the trial court modify its previous order "transfer[ing]" the matter to juvenile court, and asked the court to instead invoke section 604 to suspend criminal proceedings and "certify[] the cause to the juvenile court." (*Ibid.*) The trial court granted the request over the People's objection and, on December 21, 2016—when no intervening stay had been issued by the Court of Appeal—the trial court imposed its previously stayed order and the matter was "certified" for juvenile court within the meaning of section 604. (*Ibid.*)

Initially, the problem with applying section 604 in such a manner is that section 604—which is intended to apply in situations where, unlike here, a case is filed in adult court under the incorrect belief that the

defendant was 18 years of age or older at the time he or she committed the offense—is expressly inapplicable to directly filed cases. (See § 604, subd. (d) ["This section does not apply to any minor who may have a complaint directly filed against him or her in a court of criminal jurisdiction . . ."].) The reason for this limitation is presumably because directly filed cases would always involve defendants who were knowingly under the age of 18 at the time the offense was committed. As such, the aim of section 604—providing redress for defendants who were erroneously believed to be over 18 years of age at the time the offense was committed—would never be applicable in directly filed cases.

Moreover, and as stated above, it is well established that both the Legislature and the electorate by the initiative process are deemed aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws. (See, e.g., *People v. Weidert, supra,* 39 Cal.3d at p. 844 [the enacting body is deemed aware of existing laws and judicial constructions in effect at the time legislation is enacted, and this principle applies equally to legislation enacted by initiative].) As such, had the electorate intended section 604 be employed as a means to apply Proposition 57 to all directly filed cases pending in adult court at the time the new law became effective, it would have eliminated that section's express exemption for directly filed cases. Plainly stated, section 604 does not create the ability to apply Proposition 57 in a properly prospective manner; rather, it outlines an unrelated procedural framework by which to apply Proposition 57 in an improperly retroactive manner.

In a similar vein, Penal Code section 1170.17—a preexisting law that applies exclusively to pending direct-filed cases—was unaltered by

Proposition 57. Specifically, Penal Code section 1170.17, subdivision (a), provides:

> When a person is prosecuted for a criminal offense committed while he or she was under 18 years of age and the prosecution was *lawfully initiated in a court of criminal jurisdiction* without a prior finding that the person is not a fit and proper subject to be dealt with under the juvenile court law, upon subsequent conviction for any criminal offense, the person shall be subject to the same sentence as an adult convicted of the identical offense, in accordance with subdivision (a) of Section 1170.19, except under the circumstances described in subdivision (b), (c), or (d).

(Pen. Code, § 1170.17, subd. (a), emphasis added.)

In practice, it is Penal Code sections 1170.17 and 1170.19 that permit courts to impose "adult" sentences for minors who were prosecuted as adults via direct filing. That authority is subject to the three exceptions set forth in Penal Code section 1170.17, subdivisions (b), (c), and (d). Each of those exceptions were created for situations where the conviction does not mirror the charge, such as when a defendant is convicted of a lesser-included offense (see *People v. Villa* (2009) 178 Cal.App.4th 443, 450-451), or when an appellate court modifies a judgment by reducing the conviction offense to an offense for which direct filing would not have been available and remands the matter for resentencing (see Pen. Code, § 1260).

In the event one of the exceptions applies and a post-conviction transfer hearing is conducted pursuant to Penal Code section 1170.17, the criteria to be considered at that hearing are identical to the criteria set forth in Welfare and Institutions Code section 707 for a pre-trial transfer hearing. Specifically, both Penal Code section 1170.17 and Welfare and Institutions

Code section 707 set forth the following five criteria for consideration at a transfer hearing: (1) The degree of criminal sophistication exhibited by the person; (2) Whether the person can be rehabilitated prior to the expiration of the juvenile court's jurisdiction; (3) The person's previous delinquent history; (4) Success of previous attempts by the juvenile court to rehabilitate the person; and (5) The circumstances and gravity of the offense for which the person has been convicted/alleged to have committed. (Pen. Code, § 1170.17, subd. (b)(2)(A)-(E); § 707, subd. (a)(1)(A)-(E).)[9]

The importance of Penal Code section 1170.17 is that Proposition 57's intentional act of leaving it unaltered further evinces an intent for the new law to apply prospectively only. Indeed, had the electorate, presumed aware of existing laws, intended for Proposition 57 to reach back to previously pending direct filed cases, it could have easily abrogated Penal Code section 1170.17. As stated, Penal Code section 1170.17 applies exclusively to pending direct filed cases, and is expressly inapplicable anytime there has been a previous fitness or transfer hearing. (Pen. Code, §1170.17, subd. (a).) But the electorate took no action to address Penal Code section 1170.17, which not only indicates an intent for the new law to apply prospectively only, but also leaves in place a manner in which certain defendants who are not entitled to a retroactive pretransfer fitness hearing under Proposition 57 may nonetheless receive a transfer hearing—prospectively under the new standard—prior to sentencing.

Furthermore, applying Proposition 57 in the manner urged by real party—to all cases lawfully pending in adult court prior to the law's effective date—would largely render section 1170.17 a nullity in that no

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[9] Penal Code section 1170.17 and Welfare and Institutions Code section 707 were recently and simultaneously amended effective January 1, 2016, to modify the five criteria for consideration at the transfer hearing. (Stats. 2015, c. 234 (S.B. 382), § 1, eff. Jan. 1, 2016.)

pretrial pending cases could have been "lawfully initiated in a court of criminal jurisdiction." (Pen. Code, § 1170.17, subd. (a).) Similarly, the exceptions set forth in Penal Code section 1170.17—which all turn on the previous presumptions of fitness/unfitness under the pre-Proposition 57 standard—can necessarily *only* apply to pre-Proposition 57 direct-filed cases, and could *never* apply to a case filed after Proposition 57. (See Pen. Code, § 1170.17, subds. (b), (c), (d).) As this Court has consistently stated, statutory construction that renders statutory language a nullity is "obviously to be avoided." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038-1039, citing *California Teachers Assn. v. Governing Bd. Of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 634, and *Williams v. Superior Court* (1993) 5 Cal.4th 337, 357.)

For these reasons, in addition to the reasons set forth above, both *Cervantes* and the Court of Appeal in the present case were incorrect in concluding that Proposition 57 could be properly applied prospectively to cases lawfully pending in adult court prior to the law's effective date. In fact, in *Walker*—the most recent case addressing this issue—the Court of Appeal expressly disagreed with the reasoning of *Cervantes* and the Court of Appeal in the present case. (*Walker, supra*, 12 Cal.App.5th at p. 713 ["We have carefully considered the decisions of the Courts of Appeal in *Cervantes* and *Lara* concluding that Proposition 57 properly applies prospectively to cases directly filed in Adult Court before the effective date of Proposition 57. [Citations.] We respectfully disagree with the reasoning and conclusions in both cases."].) *Walker* thoroughly discussed the flawed reasoning of *Cervantes* and the present case and ultimately concluded:

> [T]he procedure approved in *Cervantes* and *Lara*—the transfer of a minor's case from Adult Court to Juvenile Court to permit the People to

> bring a motion to transfer the case back to Adult Court under the new law—does not constitute a proper *prospective* application of Proposition 57. Rather such a procedure is premised on . . . an impermissible *retroactive* application of Proposition 57 . . .

(*Id.* at p. 718.) The *Walker* court's reasoning in this regard not only avoids the complexity of attempting to apply Proposition 57 in a patently retroactive manner, but also comports with this Court's long history of jurisprudence regarding the prospective application of newly enacted laws (see, e.g., *Tapia, supra,* 53 Cal.3d at pp. 299-300; *People v. Ledesma, supra,* 39 Cal.4th at pp. 663-664; *John L. v. Superior Court, supra,* 33 Cal.4th at p. 171), in addition to the Legislature's long history of memorializing the common law principle that new laws are presumed prospective absent a clear contrary intent (see, e.g., Pen. Code, § 3; Civ. Code, § 3; Code Civ. Proc., § 3).

F. Failing To Apply Proposition 57 To Cases Lawfully Pending In Adult Court Prior To The Law's Effective Date Does Not Constitute A Denial Of Equal Protection Of The Law

In the Court of Appeal, real party claimed that failure to apply Proposition 57 to cases pending in adult court prior to its effective date would deny him equal protection of the law. However, even to the extent real party is similarly situated to other persons to whom Proposition 57 is applicable, he cannot establish that any such disparate treatment is not rationally related to a legitimate governmental purpose. As such, failure to apply Proposition 57 to real party's case does not constitute a denial of equal protection of the law.

Both the United States Constitution and the California Constitution guarantee equal protection of the law. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7.) The first step in analyzing an equal protection claim is determining whether two classes of similarly situated persons are treated differently under the law in question. (*Manduley v. Superior Court, supra,* 27 Cal.4th at p. 568, citing *In re Eric J.* (1979) 25 Cal.3d 522, 530; see also *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

Initially, it is not clear that real party is similarly situated to any other persons to whom Proposition 57 is applicable. In the Court of Appeal, real party based his claim upon a set of hypothetical facts—unrelated to the facts of the present case—in an effort to argue that two hypothetical persons might be similarly situated in certain circumstances. But real party has not made any effort to establish how *he* is similarly situated to other persons to whom Proposition 57 is applicable. As is well established, "'[o]ne who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation.' [Citation.]" (*People v. Cortez* (1992) 6 Cal.App.4th 1202, 1212, quoting *People v. Black* (1941) 45 Cal.App.2d 87, 96.) Real party cannot raise equal protection claims of other hypothetical juvenile offenders. (See *People v. Superior Court (Manuel G.)* (2002) 104 Cal.App.4th 915, 934.)

In any event, even assuming real party is able to establish he is similarly situated to other persons to whom Proposition 57 is applicable, he cannot establish that any such disparate treatment is not rationally related to a legitimate governmental purpose. In resolving equal protection issues, both this Court and the United States Supreme Court have set forth three levels of analysis based on the nature of the classification:

> Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. Classifications based on gender are subject to an intermediate level of review. But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose.

(*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200, overruled on other grounds in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, citing *Romer v. Evans* (1996) 517 U.S. 620, 635; *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482 (*Kasler*); *Warden v. State Bar* (1999) 21 Cal.4th 628, 641.)

Here, real party has not identified any classification that would be subject to strict or intermediate scrutiny. Indeed, not only has age been held not to be a suspect class (see *Hicks v. Superior Court* (1995) 26 Cal.App.4th, 1649, 1657-1658), but Proposition 57 does not alter the law based on age, but on whether prosecution against a minor offender was lawfully pending in adult court prior to the law's effective date. As such, real party must establish that the change in law enacted by Proposition 57 does not bear a rational relationship to a legitimate governmental purpose. (See *People v. Hofsheier, supra,* 37 Cal.4th at p. 1200.)

In *Kasler*, this Court described the rational relationship test as follows: """[I]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are 'plausible reasons' for [the classification], 'our inquiry is at an end.'"""

(*Kasler, supra*, 23 Cal.4th at pp. 481-482; see *Warden v. State Bar, supra*, 21 Cal.4th at p. 644, both quoting *FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313.)

Here, and as discussed in more detail below, applying Proposition 57 to cases that were lawfully pending in adult court prior to the law's effective date would consume considerable judicial and governmental resources. Much of those resources will have been unnecessarily expended on cases that were lawfully pending in adult court prior to the enactment of Proposition 57. Indeed, in the present case, application of Proposition 57 would render the entire adult court procedural history—including, among other things, a preliminary hearing, multiple settlement conferences and readiness conferences, an arraignment, and a bail hearing—an unnecessary expenditure of scarce resources. In exchange, the parties and the court would be required to proceed under the legal fiction that the case had no prior procedural history, and rather was first initiated in juvenile court after the enactment of Proposition 57. This would then consume yet additional resources to repeat the juvenile-law versions of previously completed actions in adult court.

As such, the electorate could very well have concluded that a prospective application of the new law would serve the legitimate goals of, among others: (1) not invalidating proper governmental actions taken prior to the law's effective date; and (2) maintaining judicial economy by avoiding the invalidation of such actions. Indeed, the appellate courts have repeatedly upheld juvenile justice amendments that result in minors being treated differently based on the timing of the new statutory reform measure or based on the exercise of prosecutorial discretion. (See, e.g., *Manduley v. Superior Court, supra,* 27 Cal.4th at pp. 567-573 [Proposition 21's amendments to section 707 do not violate a minor defendant's right to

equal protection, since the statute contains no overtly discriminatory classification, and speculation about possible discrimination by prosecutors is insufficient to establish an equal protection violation]; *People v. Superior Court (Manuel G.), supra,* 104 Cal.App.4th at p. 934 [Proposition 21's amendment to section 781 does not violate equal protection]; *Hicks v. Superior Court, supra,* 36 Cal.App.4th at pp. 1657-1661 [upholding the Legislature's 1995 amendment to the Welfare and Institutions Code which allowed 14- and 15-year-olds to be prosecuted as adults for certain crimes and finding no equal protection violations].) As the United States Supreme Court stated long ago: "[T]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time." (*Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505; see *Califano v. Webster* (1977) 430 U.S. 313, 314-316, 321; accord *People v. Floyd, supra,* 31 Cal.4th at p. 191.)

In the present case, the Court of Appeal did not address real party's equal protection claim: "We do not address the equal protection argument real party in interest advanced in his informal response." (*Lara, supra,* 9 Cal.App.5th at p. 778, citing *People v. Pantoja* (2004) 122 Cal.App.4th 1, 10 [courts must avoid reaching constitutional issues if the case can be resolved on statutory grounds].) But of the three Courts of Appeal that have addressed the issue—*Mendoza*, *Walker*, and *Cervantes*—all three concluded there was no equal protection violation. Specifically, in *Mendoza*, the Court of Appeal concluded the defendant there was similarly situated to persons subject to Proposition 57's newly enacted requirements, but that there was a rational basis for any disparate treatment. (*People v. Mendoza, supra,* 10 Cal.App.5th at pp. 350-352.) Similarly, in *Walker*, the Court of Appeal assumed without deciding that the defendant there was

similarly situated to persons subject to Proposition 57, but also concluded there was a rational basis for any disparate treatment. (*Walker, supra,* 12 Cal.App.5th at pp. 720-722.) Finally, in *Cervantes*, the Court of Appeal concluded the defendant there was not similarly situated to persons subject to Proposition 57 and therefore his equal protection argument was without merit. (*People v. Cervantes, supra,* 9 Cal.App.5th at p. 598, fn. 38.)[10]

In the present case—just as in *Mendoza*, *Walker*, and *Cervantes*—real party is unable to establish an equal protection violation. Even assuming for the sake of argument that real party is similarly situated to other persons to whom Proposition 57 is applicable, any such disparate treatment is rationally related to legitimate state interests. As such, failure to apply Proposition 57 to real party's case does not constitute a denial of equal protection of the law. (See, e.g., *Manduley v. Superior Court, supra,* 27 Cal.4th at pp. 567-573.)

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[10] In *Cervantes*, the appellate court stated that the defendant was "not similarly situated with a juvenile felon who committed his crimes after Prop 57 was enacted." (*People v. Cervantes, supra,* 9 Cal.App.5th at p. 598, fn. 38.) While that is certainly true, it fails to acknowledge that Proposition 57's application does not turn on when the crime was committed, but on when the case was lawfully pending in adult court. Indeed, any crime committed by a minor offender after Proposition 57's effective date will undoubtedly be subject to the new procedural requirements because it cannot have been lawfully pending in adult court prior to the law's effective date. The proper focus should be on whether real party is similarly situated to persons who commit crimes *before* the enactment of Proposition 57, but because their cases were not yet lawfully pending in adult court at the time Proposition 57 became effective, are subject to the newly enacted procedural requirements.

G. Policy Considerations Mandate The Juvenile-Law Changes Enacted By Proposition 57 Be Applied Prospectively Only

The electorate has spoken, and regardless whether a prosecutor agrees or disagrees with the juvenile-law amendments enacted by Proposition 57, it is the current and future state of the law. Like the court in *Walker*, petitioner is "not hostile" to the changes effectuated by Proposition 57, but recognizes the numerous negative consequences inherent with attempting to apply the new law in an unintendedly retroactive manner. These unintended consequences not only pose a risk of upending the fair administration of justice in numerous pending cases across the state, they also drive a firm policy rationale in support of adhering to the time-honored principle of applying new laws prospectively absent an express contrary intent. As is well established: "'For a court to construe an initiative statute to have substantial unintended consequences strengthens neither the initiative power nor the democratic process . . .'" (*People v. Valencia* (July 3, 2017, S223825) ____ Cal.5th ____ [2017 Cal. Lexis 4893] (conc. opn. of Kruger, J.), quoting *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 930.) .)

As stated above, neither the text of Proposition 57, nor the supporting ballot materials, provide a procedural mechanism by which to apply the new law to cases previously pending in adult court. And while the judiciary is often tasked with the nuances of implementing newly enacted laws, the lack of an applicable procedural mechanism by which to apply Proposition 57 retroactively becomes glaring when considering the complexity involved with attempting to apply the law to previously pending cases. As *Walker* stated, "applying Proposition 57 to cases pending in Adult Court . . . would, in many cases, be procedurally complex." (*Walker, supra*, 12 Cal.App.5th at p. 705.)

In effect, application of Proposition 57 to cases that were lawfully pending in adult court prior to its effective date requires the parties and the court to adopt the legal fiction that the case was first initiated in juvenile court—with no prior procedural history in adult court—after the effective date of Proposition 57. Indeed, in the present case, after the trial court ruled that Proposition 57 should be applied retroactively, a juvenile delinquency petition was filed in juvenile court, a detention hearing was conducted within 48 hours (juvenile version of an adult arraignment), and all statutory dates were reset as if the case had no prior procedural history in adult court. But yet these cases *do* have a procedural history in adult court, and the nature and extent of that history will necessarily influence the ability of the courts to implement the requirements enacted by Proposition 57. For example, would hearsay evidence properly admitted at a preliminary hearing in adult court be subsequently admissible at a transfer hearing in juvenile court? What recourse would be available if a witness testified inconsistently between a preliminary hearing in adult court and a subsequent transfer hearing in juvenile court? If a defendant in adult court posted bail and was released from custody pending trial, would a subsequent transfer to juvenile court entitle him or her to an immediate return of the bail amount? Similar examples abound. And while Proposition 57 did not address these, or the many similar, examples of complexity inherent with applying the new law in a retroactive manner, the new law was clear about one thing: Establishing procedural requirements that must take place *before* a case may be transferred to adult court. It is only once an effort is made to apply the new law to cases *after* they are already pending in adult court that complexity arises.

Consider, for example, a prosecution that was lawfully initiated in adult court prior to the enactment of Proposition 57, where a portion of the

charges relate to crimes committed while the defendant was under 18 years of age, and the remainder of the charges relate to crimes committed while the defendant was 18 years of age or older. Application of Proposition 57 to such a case would prove exceptionally complex, and would require the lower courts to take differing actions based on the procedural posture of the case. If the case were procedurally young, Proposition 57 would require certain charges being dropped from the adult case and initiated anew in juvenile court, while the remaining charges would continue to proceed in adult court. This would trigger the complexity of two independent prosecutions proceeding simultaneously—potentially with overlapping witnesses and evidence necessary for both cases—and many times would result in the juvenile case being transferred back to adult court where it started.[11]

Once such charges are returned to adult court, there would be multiple legal and common sense reasons requiring the charges be joined back together, but procedural actions that took place in the adult case in the interim would dictate how and whether such joinder would be possible. Conversely, if the case had a lengthy procedural history in adult court at the time Proposition 57 was enacted, application of the new procedural

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[11] Of course the juvenile court could deny a transfer request and determine that the charges before it should remain in the jurisdiction of the juvenile court. This could lead to a situation where true findings in juvenile court and convictions in adult court are in competition at the time of sentencing. Presumably an adult court prison sentence would render futile any rehabilitative measures that would have otherwise been available through the juvenile justice system. Yet the juvenile proceedings would have consumed considerable judicial and governmental resources to reach that futile end. And while prosecutors may often choose to file available adult crimes in lieu of juvenile allegations, that is a consideration made at the time of charging a case, and a consideration that was significantly altered under the requirements of Proposition 57.

requirements could result in an irreparable severance of the charges, with the adult court charges proceeding to trial before the juvenile court proceedings are complete. This would not only consume scarce governmental and judicial resources to conduct multiple trials—which would often involve cross-admissible evidence—but would also force crime victims to become involved in unnecessarily prolonged and repeated litigation, which would run afoul of their constitutional rights under Marsy's Law (California Victims' Bill of Rights Act of 2008). (See Cal. Const., art. I, § 28, subd. (b).)

Another example would be a prosecution that was lawfully initiated in adult court prior to the enactment of Proposition 57, where the charges relate to a course of conduct that spans a time period both before and after the defendant's 18th birthday. This is particularly common with sex offenses, as often a defendant's conduct can span several years before it is detected. In addition, because victims of sex crimes are often very young, it may be difficult to determine the precise date of specific criminal acts. This reality is accounted for in various locations in the law, such as statutes that specifically contemplate a course of conduct (i.e., Pen. Code, § 288.5 [engaging in three or more acts of substantial sexual conduct with a child under age 14]), and no unanimity being required for offenses involving a course of conduct (e.g., *People v. Stankewitz* (1990) 51 Cal.3d 72, 100). These are considerations prosecutors take into account in determining how to best charge a case. But applying Proposition 57 to a case after it has already been charged and is properly pending in adult court strips prosecutors of the ability to be fully aware of all applicable laws at the time a case is filed, and disregards the prosecution's previously lawful exercise of its discretion, which would in turn impinge upon the People's right to due process in the proceedings. (See Cal. Const., art I, § 29; *Miller v.*

Superior Court (1999) 21 Cal.4th 883, 896 [the People of the State of California have the right to due process in criminal trials].)

Another such example would be a prosecution against multiple codefendants that was lawfully initiated in adult court prior to the enactment of Proposition 57, where one or more of the codefendants was under 18 years of age when the crime was committed, and the remaining codefendants were 18 years of age or older when the crime was committed. Again, application of Proposition 57 to such a case could prove exceptionally complex depending on the status of the proceedings in adult court. In fact, applying Proposition 57 at a late stage in the proceedings could result in a forced severance, which would contravene the long-standing preference for joint trials. (See, e.g., Cal. Const., art. I, § 30; Pen. Code, § 1098; *Zafiro v. United States* (1993) 506 U.S. 534, 537; *People v. Boyde* (1988) 46 Cal.3d 212, 231.) As the United States Supreme Court has stated, joint trials are favored because they "promote economy and efficiency" and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." (*Zafiro v. United States, supra,* 506 U.S. at p. 537.)

The possibility for situations such as those listed above are too numerous and unpredictable to provide a complete list. It is for this reason that a simple, bright-line rule eliminating such uncertainty is of paramount importance. As stated above, applicable authority provides us with that rule: For any criminal prosecution initiated on or after November 9, 2016, or any fitness or transfer hearing conducted on or after November 9, 2016, the juvenile-law amendments enacted by Proposition 57 are fully applicable in a properly prospective manner. Those amendments cannot be retroactively applied, however, to cases that were lawfully pending in a court of criminal jurisdiction prior to November 9, 2016. Such a rule not

only avoids the complexity and uncertainty inherent with attempting to apply Proposition 57 in a retroactive manner, but also comports with a long history of legislation and jurisprudence regarding the application of newly enacted laws.

H. To The Extent The Issue Has Become Moot In The Present Case, This Court Should Exercise Its Discretion To Address It On The Merits Because It Is Capable Of Repetition Yet Evading Review

As stated above, the adult court in the present matter transferred real party's case to juvenile court over petitioner's objection. When the Court of Appeal did not rule on petitioner's request for a stay, the juvenile court was tasked with accepting the case as if it had been started anew after Proposition 57's effective date. Petitioner renewed its objection in juvenile court, again arguing that Proposition 57 did not apply retroactively and the case should be transferred back to adult court. The juvenile court denied the request and the proceedings continued in that court. Those proceedings included a transfer hearing that was conducted while the petition for writ of mandate remained pending in the Court of Appeal.

Initially, the adult court's ruling in this case was erroneous because, for the reasons stated above, it constituted an impermissible retroactive application of the new law. That erroneous ruling placed the juvenile court in a situation where it was forced to take action in a case for which it did not have statutory jurisdiction. And while petitioner does not fault either court for making its best efforts to interpret and apply a newly enacted law, it remains that the juvenile court acted in excess of its statutory jurisdiction when it conducted the transfer hearing. (See, e.g., *Hopkins v. Anderson* (1933) 218 Cal. 62, 64-67 [a court that was originally given jurisdiction to proceed in a particular manner has the authority to proceed with that case to

its conclusion even if a subsequent change in the law removes the original jurisdiction given]; *Walker, supra,* 12 Cal.App.5th at p. 719 [the adult court continued to have jurisdiction over cases lawfully pending there prior to the enactment of Proposition 57 notwithstanding the new law's amendment of section 602].) Accordingly, this Court should vacate the juvenile-court proceedings and order the matter reinstated in adult court in the same procedural posture it was in at the time those proceedings were suspended.

Finally, to the extent the adult court's order transferring real party's case to juvenile court, or the subsequent procedural actions that took place in juvenile court, has resulted in the underlying Proposition 57 issues becoming moot, this Court should exercise its discretion to address these issues of continuing public importance that are capable of repetition yet evading review. A case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief. (*People v. Gregerson* (2011) 202 Cal.App.4th 306, 321.) However, the court has discretion to address issues on the merits, despite their mootness, where issues are of continuing public importance and capable of repetition yet evading review. (*People v. Barrett* (2012) 54 Cal.4th 1081, 1092-1093, fn. 7.) The issues raised in the present case are ones that, even if moot, will be repeated and are likely to evade review.

CONCLUSION

For the reasons stated above, the juvenile-law amendments enacted by Proposition 57 cannot be retroactively applied to cases that were lawfully pending in a court of criminal jurisdiction prior to November 9, 2016. Accordingly, petitioner respectfully requests this Court vacate the actions of the lower courts and order the matter reinstated in adult court in the same procedural posture as when the proceedings were previously suspended.

Dated: July 12, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
Case No. S241231

The text of the **OPENING BRIEF ON THE MERITS** in the instant case consists of 18,198 words as counted by the Microsoft Word program used to generate the said **OPENING BRIEF ON THE MERITS.**

Executed on July 12, 2017.

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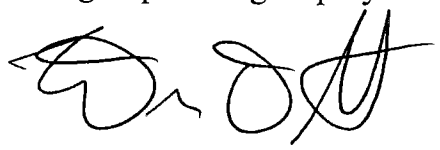

DONALD W. OSTERTAG
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DECLARATION OF SERVICE
Case No. S241231

I, the undersigned, declare:

I am a resident of or employed in the County of Riverside; I am over the age of 18 years and not a party to the within action.

My business address is 3960 Orange Street, Riverside, California.

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That on July 12, 2017, I served a copy of the within, **OPENING BRIEF ON THE MERITS**, by electronically serving the following parties:

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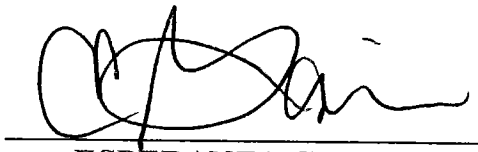
I declare the foregoing to be true and correct under penalty of perjury.

Executed on July 12, 2017, at Riverside, California.



ESPERANZA GARCIA