9 Cal.App.5th 753
Court of Appeal,
Fourth District, Division 2, California.

The PEOPLE, Petitioner,
v.
The SUPERIOR COURT of
Riverside County, Respondent;
Pablo Ullisses Lara, Jr., Real Party in Interest.

E067296
|
Filed 3/13/2017

Synopsis
Background: The People directly filed a criminal complaint against minor in adult court. After the enactment of the Public Safety and Rehabilitation Act, minor moved for a fitness hearing in juvenile court. The Superior Court, Riverside County, No. RIF1601012, Richard T. Fields, J., granted the motion. The People petitioned for writ of mandate or prohibition.

Holdings: The Court of Appeal, Ramirez, P.J., held that:

[1] denial of the People's petition for writ of mandate or prohibition created a "cause" and thus established law of the case, and

[2] the Act required a fitness hearing in a case filed in adult court before the effective date of the Act.

Petition denied.

****457** ORIGINAL PROCEEDINGS; petition for writ of mandate/prohibition. Richard T. Fields, Judge. Petition denied. (Super.Ct.No. RIF1601012)

Attorneys and Law Firms

Michael A. Hestrin, District Attorney, Donald W. Ostertag, Deputy District Attorney, for Petitioner.

No appearance for Respondent.

Steven S. Mitchell, Long Beach; Steven L. Harmon, Public Defender, Laura Arnold, Deputy Public Defender, for Real Party in Interest.

****458** OPINION

RAMIREZ, P.J.

***757** Having read and considered the petition, the informal response we requested, and additional briefing as described below, as well as the record provided by both parties, we conclude the petition lacks merit. Our order requesting an informal response notified the parties that "[t]he 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." All parties received "due notice" (Code Civ. Proc., § 1088), and "it appears that the petition and opposing papers on file adequately address the issues raised by the petition, that no factual dispute exists, and that the additional briefing that would follow issuance of an alternative writ is unnecessary to disposition of the petition." (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178, 203 Cal.Rptr. 626, 681 P.2d 893 (*Palma*).) In reliance on these rules, and because we agree that the issue posed by the petition is an important one warranting speedy resolution, we now resolve the petition by way of a formal written opinion denying relief.

At the outset, we pause to explain the procedure we have utilized on this petition. We emphasize that we do not take this approach lightly, nor do we ***758** mean to imply an intention on our part to adopt this procedure as our routine practice. (See, e.g., *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1223, 23 Cal.Rptr.2d 397, 859 P.2d 96 [urging courts not to allow the expedited *Palma* procedure to become routine], disapproved on other grounds as stated in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, 3 Cal.Rptr.3d 623, 74 P.3d 726; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 34-35, 13 Cal.Rptr.2d 856, 840 P.2d 961 (*Ng*) [same].) We acted as we did because this petition was particularly exigent, as explained *post*.

On November 8, 2016, the voters passed Proposition 57. [1] As relevant to this petition, Proposition 57 eliminated the People's ability to directly file charges against a

juvenile offender in adult court and instead authorized the People to file "a motion to transfer the minor from juvenile court to a court of criminal jurisdiction." (Welf. & Inst. Code, § 707, subd. (a)(1).) Upon receiving such a motion, the juvenile court is to decide whether the minor should be transferred to adult court [2] based on statutorily-prescribed criteria. (Welf. & Inst. Code, § 707, subd. (a)(2).)

Prior to the passage of Proposition 57, the People directly filed a complaint against real party in interest, a minor, in adult court under the authority of former section 707, subdivision (d)(2), of the Welfare and Institutions Code. A preliminary hearing occurred on May 26, 2016. On June 10, 2016, the People filed an information charging real party in interest with felony violations of ****459** Penal Code sections 209, subdivision (b)(1), 286, subdivision (c)(2)(B), and 288a, subdivision (c)(2)(B).

On November 16, 2016, real party in interest filed a motion requesting "a fitness hearing in juvenile court pursuant to recently enacted legislation via Proposition 57." After considering written opposition from the People, who argued Proposition 57 could not be applied to real party in interest's case retroactively, the trial court granted the motion on November 29, 2016. Noting that the issue was "novel," the trial court stayed its order until December 20, 2016, so the People could seek appellate intervention.

The People's petition in this case followed three days later on December 2, 2016. It sought an emergency stay and asserted there would be "widespread ***759** confusion and continued litigation" if the trial court's order in this case stood. In addition, the petition introduced evidence that there were 57 other direct-file cases pending, and that 10 motions to transfer to juvenile court had already been received. On December 16, 2016, we requested an informal response, which we received on December 20, 2016. Petitioner filed a reply on December 29, 2016.

On December 6, 2016, the People filed *People v. Superior Court* (*Sanchez*) (case No. E067311) in this court. They raised the same issue raised in this petition, and, as they did in the petition in this case, requested an emergency stay. The petition asserted there were "widespread confusion, continued litigation, and jurisdictional and procedural uncertainties attendant with the trial court's order." On December 9, 2016, the People filed a separate motion for stay in *Sanchez*. That same day, we issued an order denying the request for stay but indicating we would resolve the merits of the petition by separate order. On December 16, 2016, we issued another order, this time that the *Sanchez* petition would be considered with the petition in this case, since they both raised identical issues. We also requested an informal response from the real party in interest in *Sanchez*. That response was filed on December 20, 2016; a reply followed on December 29, 2016.

On December 7, 2016, the People filed *People v. Superior Court* (*Mayer*) (case No. E067326), which raised the same issues as this petition and *Sanchez*. The *Mayer* petition also requested an emergency stay, which we denied the following day. As we did in *Sanchez*, we indicated we would separately resolve the merits of the petition. On December 16, 2016, we ordered *Mayer* considered with this petition and requested an informal response. As in *Sanchez*, the response and reply were filed on December 20 and 29, 2016, respectively.

Next, the People filed *People v. Superior Court* (*Negrete*) (case No. E067345) on December 9, 2017. As in the three previous petitions, they requested an emergency stay, which, on December 12, 2016, we denied indicating we would separately resolve the merits. On December 16, 2016, we ordered *Negrete* considered with this petition and requested an informal response. We again received a response on December 20, 2016, and a reply on December 29, 2016. The four responses and replies filed on December 20 and 29, 2016, are substantially identical.

Each of these petitions raised the same issue as the petition in this case, and each relied on the same declaration attesting to the number of direct-file cases that were pending in the county at the time. In *Negrete*, the People first offered as an exhibit an email string, including a message from a sitting superior court judge, in support of their assertion that immediate appellate ***760** action was necessary to prevent further confusion in the trial courts. The judge's e-mail indicates "that the Prop 57 remands ****460** to juvenile court are causing some significant stress since there are no specific protocols that are in place," and that "there is going to be some confusion." The People's e-mail exhibit implies this state of confusion was expected to last until some kind of appellate intervention occurred.

Finally, the People filed *People v. Superior Court* (*E.P.*) (case No. E067384) on December 16, 2016. On December 28, 2016, we denied the petition's request for immediate stay, indicated we would separately resolve the petition on the merits, and requested an informal response. We received a response on January 4, 2017, and a reply on January 13, 2017.

As the foregoing illustrates, the People presented us with five rapid-fire, nearly identical petitions in a two-week span, each with a request for immediate stay on the ground that exigent relief was necessary because rampant confusion was occurring in the trial court. We were also aware that delaying the publication of an opinion resolving the issue the People's petitions presented could have drastic consequences for real parties in interest, or, for that matter, for any minor who was facing prosecution under a complaint that had been directly filed in adult court but had not been transferred to juvenile court; each of the petitions sought an emergency stay on the ground that otherwise a dangerous offender would be released after the transfer to juvenile court took effect. The issue the People's petitions presented was concrete and easily addressed in a single published opinion. Moreover, the issues were well framed, the record was complete, and our only task was to construe Proposition 57, which is a legal question that does not depend on the specific facts of this or any of the other four petitions we ordered considered with it. Finally, as we explain in the final section of this opinion, resolution of this petition required us to do no more than apply "well-settled principles of law [to] undisputed facts." (See, e.g., *Ng, supra*, 4 Cal.4th at p. 35, 13 Cal.Rptr.2d 856, 840 P.2d 961 [listing criteria justifying granting a mandamus petition using the accelerated *Palma* procedure].) For all of these reasons, we expedited the petitions as much as possible by ordering them considered together, and by foregoing a hearing we found would have been unnecessary.

We then published an opinion on the merits on January 19, 2017. [3] Therein, we cited ***761** *Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 414-417, 132 Cal.Rptr.3d 602 (*Frisk*), for the proposition that we had created a cause and law of the case by requesting an informal response, receiving and considering the response and reply, publishing an opinion on the merits, and explicitly informing the parties of our conclusion that this opinion created a cause and law of the case, indicating the opinion was therefore something more than a so-called "summary denial." (See *Kowis v. Howard* (1992) 3 Cal.4th 888, 893-894, 12 Cal.Rptr.2d 728, 838 P.2d 250 (*Kowis*) [a summary denial does not create a cause].)

[1] Upon further reflection, we realize this might be viewed as a significant departure from what has become something of a maxim in writs jurisprudence, namely, that a mandamus petition may be granted on a peremptory basis without the setting of an order to show cause, thereby creating a cause and constituting law of the ****461** case, but that a petition that is denied without the setting of an order to show cause fails to create a cause and cannot constitute law of the case. In 1990, we "point[ed] out the anomaly" in *Standon Co. v. Superior Court* (1990) 225 Cal.App.3d 898, 900, footnote 2, 275 Cal.Rptr. 833. As the anomaly still has not been resolved despite the passage of more than 25 years, we granted rehearing on our own initiative. (Cal. Rules of Court, rule 8.268(a)(1).) Our order specifically invited the parties to brief the merits of the petition and indicated that we might either grant the petition on a peremptory basis or deny it with an opinion after deeming ourselves to have created a cause. [4] We now publish our best attempt to explain why we conclude we had the authority to deny the petition as we have done. In other ***762** words, we explain why the logic of the authorities we discuss herein compels the conclusion that, when we follow the procedure we used here in an important and exigent case such as this one, we create a cause and law of the case by taking jurisdiction over the petition, filing an opinion on the merits, explicitly informing the parties of our view on the creation of a cause and law of the case, and, to the greatest extent possible, reserving full periods for rehearing and modification. (Cal. Const. art. VI, § 14.)

1. Creation of a cause

The cause language comes from Article 6 of the California Constitution. (See, e.g., Cal. Const., Art. VI, §§ 10 [rules regarding jurisdiction of causes and authorization for the court to comment on evidence, testimony, and credibility of witnesses as "necessary for the proper determination of the cause"]; 12 [rules for transfer and review of "causes" by the Supreme Court]; 14 [rules for appellate decisions on causes].) Particularly relevant here is section 14 of Article VI, which reads, in pertinent part: "Decisions of the Supreme Court and courts of appeal that determine ****462** causes shall be in writing with reasons stated."

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Despite its inclusion in California's Constitution, our search for a well-established definition of the term "cause" in this context seems to have produced as many questions as answers. As the California Supreme Court itself has noted, "the term 'cause' is not susceptible to precise definition." (*In re Rose* (2000) 22 Cal.4th 430, 449, 93 Cal.Rptr.2d 298, 993 P.2d 956 (*Rose*).) In fact, the *Rose* court found the term had one meaning in the context of transferring causes, and another in contexts such as "orders denying petitions for review in ordinary civil and criminal cases." (*Id.* at p. 451, 93 Cal.Rptr.2d 298, 993 P.2d 956.) Still, despite noting that "not every matter presented to the court for a ruling ... is a cause that requires a written decision" (*id.* at p. 452, 93 Cal.Rptr.2d 298, 993 P.2d 956), the court did not propose an affirmative definition of "cause."

Were we less inclined to truly get to the bottom of this issue, we might seize on *Funeral Dir. Assn. v. Bd. of Funeral Dirs.* (1943) 22 Cal.2d 104, 106, 136 P.2d 785, in which the California Supreme Court wrote: "It is only after an alternative writ has been issued that the matter becomes a 'cause,' the determination of which, i.e., the granting or denying of a peremptory writ, requires a written decision." (See also *Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 694, 32 Cal.Rptr. 288 [same].) Were this obviously still the law, our task would be complete. In light of later authorities, however, we fail to see how the issuance of an alternative writ is ***763** a precondition to the creation of a cause regardless of whether a petition is granted or denied, at least when a court follows a procedure such as the one we are following here.

The Supreme Court has said: "When an appellate court considers a petition for a writ of mandate or prohibition, it is authorized in limited circumstances to issue a peremptory writ in the first instance, without having issued an alternative writ or order to show cause. (Code Civ. Proc., §[§] 1088, 1105; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223 [23 Cal.Rptr.2d 397, 859 P.2d 96]; ... *Palma*).)" (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236, 82 Cal.Rptr.2d 85, 970 P.2d 872 (*Lewis*).) This statement cannot be true if the issuance of an alternative writ or order to show cause is necessary to a matter's being a "cause." In other words, once the *Palma* procedure became valid, and courts were allowed to grant peremptory petitions without issuing an alternative writ or order to show cause, engaging in either kind of issuance should only be a sufficient, not a necessary, condition for creating a cause.

The *Palma* court noted that "the decision to grant a peremptory writ, unlike the summary denial of a petition seeking a writ, is determinative of a 'cause' within the meaning of article VI, section 14." (*Palma, supra*, 36 Cal.3d at p. 178, fn. 6, 203 Cal.Rptr. 626, 681 P.2d 893.) Our *Palma* notice and this opinion have both notified the parties that we are resolving the issue presented on the merits, and that we consider our opinion to have created a cause for the reasons we discuss. What we publish today is therefore as "determinative" as an opinion granting a petition for writ of mandate on a peremptory basis under *Palma*.

Our search for an explanation as to why we did not therefore create a cause has been in vain, as no authority we have found has identified a right of which we have deprived the parties by not issuing an alternative writ or order to show cause before publishing an opinion denying the ****463** petition, just as we would have done had we granted the petition. We are again aware that we cannot use an expedited procedure such as this one except in extraordinary cases, but we are also confident this case was sufficiently exigent to qualify.

We have found several cases asserting that a Court of Appeal has three and only three options when it receives a petition for writ of mandate: "(1) deny the petition summarily, before or after receiving opposition; (2) issue an alternative writ or order to show cause; or (3) grant a peremptory writ in the first instance, after compliance with the procedure set forth in *Palma*." (*Lewis, supra*, 19 Cal.4th at p. 1239, 82 Cal.Rptr.2d 85, 970 P.2d 872; see, e.g., *Kowis, supra*, 3 Cal.4th at pp. 893-894, 12 Cal.Rptr.2d 728, 838 P.2d 250; *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1024, 269 Cal.Rptr. 720, 791 P.2d 290 (*Bay Development*).) Not one of these cases explains why a written opinion denying a mandamus petition on the ***764** merits after a *Palma* notice requesting a response cannot create a cause. Phrased differently, not one of these cases offers a reason for treating the granting of a petition for writ of mandate differently from the denial of a petition for writ of mandate on a peremptory basis when a Court of Appeal has followed the procedure we describe herein.

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We note the right to oral argument cannot fill this gap. As *Lewis* explained, "the statutes and rules governing peremptory writs of mandate and prohibition do not require an appellate court to afford the parties an opportunity for oral argument before the court issues such a writ in the first instance, and in the past this court and the Courts of Appeal have issued peremptory writs in the first instance without holding oral argument." (*Lewis, supra,* 19 Cal.4th at pp. 1236-1237, 82 Cal.Rptr.2d 85, 970 P.2d 872.) We see, and we have found in our research, no reason to treat the denial of a mandamus petition, after a *Palma* notice but without an alternative writ or order to show cause, in an opinion that tells the parties it is creating a cause, any differently from the granting of a mandamus petition on a peremptory basis, at least with respect to whether oral argument is required.

We are aware that the last sentence in the passage we quoted in the previous paragraph is: "Our holding in this regard applies only to those proceedings in which an appellate court *properly issues a peremptory writ of mandate or prohibition in the first instance*...." (*Lewis, supra,* 19 Cal.4th at p. 1237, 82 Cal.Rptr.2d 85, 970 P.2d 872, italics added.) Still, for the following reasons, this does not mean that oral argument is dispensable in an appropriate case only when the court grants, but not when it denies, a writ petition.

First, the *Lewis* court did not squarely consider any issues regarding the denial of a petition for writ of mandate; in that case, this court, acting as the intermediate appellate court, had granted a mandamus petition, and the writ petitioner argued, as relevant here, that the court lacked the authority to do so without holding oral argument. (*Lewis, supra,* 19 Cal.4th at pp. 1238-1239, 82 Cal.Rptr.2d 85, 970 P.2d 872.) " 'It is axiomatic that cases are not authority for propositions not considered.' " (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388, 53 Cal.Rptr.2d 81, 916 P.2d 476.)

Second, and more to the point, *Lewis* did not give a reason why the denial of a writ petition on a peremptory basis using the procedure at issue in this case should be treated any differently from the granting of one. It is noteworthy that the *Lewis* court explicitly said its holding "does not affect the right to oral argument on appeal ****464** or after the issuance of an alternative writ or order to show cause." (*Lewis, supra,* 19 Cal.4th at p. 1237, 82 Cal.Rptr.2d 85, 970 P.2d 872.) Choosing the right to oral argument on appeal and the right to oral argument when an alternative writ or order to show cause issues as the things to explicitly ***765** exclude from the reach of its opinion sheds no light on why oral argument would be required before a writ is denied after a *Palma* notice in an opinion on the merits that indicates it creates a cause, but not before that same petition could be granted.

For these reasons, our decision not to allow oral argument should not prevent us from finding that we created a cause, because, under *Lewis*, oral argument was not something we were obligated to provide. Moreover, "Denying an opportunity for oral argument before the issuance of a peremptory writ of mandate or prohibition in the first instance would be unfair to the parties only if the court's use of the accelerated *Palma* procedure were unwarranted. The remedy for such unfairness is not uniformly to require oral argument before a peremptory writ is issued in the first instance, but rather to restrict the use of that procedure to the narrow category of cases described above." (*Lewis, supra,* 19 Cal.4th at p. 1261, 82 Cal.Rptr.2d 85, 970 P.2d 872.) We have already described why we think the importance and exigency of this case would have authorized us to grant a peremptory writ of mandate without having issued an order to show cause or alternative writ.

Nor did we deprive the parties of notice and opportunity to be heard, as we followed the procedure described in *Palma*. (Code Civ. Proc., § 1088 [requiring notice before issuance of a peremptory writ in the first instance]; *Palma, supra,* 36 Cal.3d at pp. 179-180, 203 Cal.Rptr. 626, 681 P.2d 893.) In fact, petitioner in this case had more opportunity to be heard before receiving our decision than the real party in interest on a petition for writ of mandate would ordinarily have. Had we granted the petition on a peremptory basis, we most likely would have done so after receiving only one brief from the party that did not prevail. Here, the People had an opportunity to file two briefs, the petition and the reply. In addition, we considered the briefs and the record filed in conjunction with four other petitions raising the same issue, such that we actually read 10 briefs from the Petitioner. We then re-opened briefing after publishing and recalling an opinion that explained our views. The issues were especially well framed, and the record was as well developed as it could be, especially given that resolution of the issue posed is a question of law. (See, e.g., *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699, 170

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Cal.Rptr. 817, 621 P.2d 856 [the interpretation of a statute "is a question of law"].)

[2] Once again, then, we have searched for, but not found, a definition of "cause" that we could easily apply to this case. We know that issuing an alternative writ or an order to show cause will create a cause. (E.g. *Funeral Dir. Assn. v. Bd. of Funeral Dirs., supra*, 22 Cal.2d at p. 106, 136 P.2d 785.) We know that granting a peremptory writ under *Palma* will also determine a cause. (*Palma, supra*, 36 Cal.3d at p. 178, 203 Cal.Rptr. 626, 681 P.2d 893.) We know that a summary denial will not create a ***766** cause. (E.g. *Kowis, supra*, 3 Cal.4th at pp. 893-894, 12 Cal.Rptr.2d 728, 838 P.2d 250.) However, it appears we still do not know how these rules apply to an opinion that denies a petition for writ of mandate, but does so in a manner that is no less summary than the manner in which we would have issued a peremptory writ.

We are mindful of *Kowis*'s conclusion that the Court of Appeal there did not ****465** create a cause because "[i]t issued neither an alternative writ nor a peremptory writ in the first instance." (*Kowis, supra*, 3 Cal.4th at p. 894, 12 Cal.Rptr.2d 728, 838 P.2d 250.) This conclusion follows if it is true that a Court of Appeal lacks the ability to issue anything other than a "summary denial" when it denies a mandamus petition without issuing an alternative writ or order to show cause. But this assumption appears to have less validity when we consider that the authority the *Kowis* court cited in the above-quoted statement was the following quotation: "It is settled law that an appellate court's action denying *without opinion* a petition for a writ of mandate or prohibition is not the determination of a 'cause' requiring oral argument and a written opinion." (*People v. Medina* (1972) 6 Cal.3d 484, 490, 99 Cal.Rptr. 630, 492 P.2d 686, italics added; see, e.g., *Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 640, 88 Cal.Rptr.2d 197 [citing *Kowis* for proposition that, "The denial without opinion of a petition for a writ of mandate or prohibition is not res judicata"]; *People v. Carrington* (1974) 40 Cal.App.3d 647, 649, 115 Cal.Rptr. 294 [no law of the case effect attaches when a "petition for a writ has been denied by the Court of Appeal *without opinion*" (original italics)].)

As this case and the authorities we now discuss illustrate, the denial of a petition for writ of mandate without an order to show cause is not necessarily a denial without an opinion. These authorities show the better-reasoned rule is that: "Unless the court *summarily denies the petition* or the respondent performs the act specified in an alternative writ, the matter becomes a 'cause' that must be decided 'in writing with reasons stated.' " (*Lewis, supra*, 19 Cal.4th at p. 1241, 82 Cal.Rptr.2d 85, 970 P.2d 872, italics added.)

Our approach illustrates the extent to which the answer to this debate hinges on what is and is not a summary denial. The alleged maxim of jurisprudence that led us to share our thoughts on procedure in such detail appears to assume that any denial of a writ petition that was not preceded by the issuance of an alternative writ is a summary denial, and therefore not a cause. We acknowledge that this appears to be the view of the drafters of California Rules of Court, rule 8.490(b)(1), which ascribes immediate finality to only two types of "decisions regarding petitions for writs within the court's original jurisdiction: [¶] (A) An order denying or dismissing such a petition without issuance of an alternative writ, order to show cause, or writ of review; and [¶] (B) An order denying or dismissing such a petition as moot after issuance of an alternative writ, order to show cause, or writ of review." ***767** In contrast, "[a]ll other decision in a writ proceeding are [generally] final 30 days after the decision is filed." As we now explain, however, the logic of the authorities we discuss yields the conclusion that we have discretion, in rare and appropriate cases like this one, to create a cause by issuing a *Palma* notice and filing a written opinion that denies a mandamus petition on the merits and notifies the parties of our intention to create a cause. In other words, we conclude we have the authority, in some cases, to create a cause by filing a denial opinion that is something other than a summary denial.

What, then, is a summary denial? Of the authorities we located, *Lewis* comes closest to providing a definition of general application: "The summary denial of a petition for a prerogative writ properly is viewed as a refusal by the court to exercise original jurisdiction over the matter." (*Lewis, supra*, 19 Cal.4th at p. 1260, fn. 18, 82 Cal.Rptr.2d 85, 970 P.2d 872; see ****466** *Rose, supra*, 22 Cal.4th at p. 445, 93 Cal.Rptr.2d 298, 993 P.2d 956 ["An order summarily denying a petition for writ of mandate or prohibition generally reflects a discretionary refusal to exercise original jurisdiction over a matter that properly may be pursued in the lower courts."].) In this case, we did far more than decline jurisdiction. We ordered four similar petitions considered with this case, issued five *Palma* notices, read five responses and five replies

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that we would not have had to read had we immediately denied the petition, separately denied stay requests and an independent motion for stay with indications that we would resolve the petitions on the merits separately, published an opinion on the merits and told the parties we were creating a cause, granted rehearing on our own initiative to better explain our position regarding this case's procedural aspects, requested briefing, and then published this opinion, which also expressly tells the parties that we have accepted jurisdiction. If a summary denial is a refusal to take jurisdiction, this opinion is not a summary denial.

Kowis, though it does not purport to deny the phrase, “summary denial,” directly offers information about what is and is not sufficient in this regard, as it squarely considered whether the denial of a mandamus petition had created a cause. (*Kowis, supra*, 3 Cal.4th at p. 894, 12 Cal.Rptr.2d 728, 838 P.2d 250.) There, “the Court of Appeal ... after obtaining and considering opposition ... summarily denied the petition with a brief supporting statement. It issued neither an alternative writ nor a peremptory writ in the first instance.” (*Ibid.*) The entire opinion denying the petition read: “The petition for writ of mandate and request for stay and the opposition have been read and considered by Presiding Justice Kremer and Justices Wiener and Huffman. The petition is denied. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892 [187 Cal.Rptr. 592, 654 P.2d 775].)” (*Id.* at p. 892, 187 Cal.Rptr. 592, 654 P.2d 775.)

***768** We have no quarrel with [5] the *Kowis* court's statement that, “A short statement or citation explaining the basis for the summary denial does not transform the denial into a decision of a cause.” (*Kowis, supra*, 3 Cal.4th at p. 895, 12 Cal.Rptr.2d 728, 838 P.2d 250; see *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 230, 124 Cal.Rptr. 427 [“While it is true that the court accompanied the summary denial with an explanatory comment, we do not regard that comment as a formal opinion (Cal. Const., art. VI, § 14)....”].) At bottom, our response is that the opinion we publish today, like the one we initially published, is far more than a “brief supporting statement.” (*Kowis, supra*, 3 Cal.4th at p. 894, 12 Cal.Rptr.2d 728, 838 P.2d 250.)

Of course, an opinion's length cannot be the determining factor in whether the denial of a writ petition without the issuance of an order to show cause creates a cause. Otherwise, “unnecessary litigation” would result. (*Kowis, supra*, 3 Cal.4th at p. 898, 12 Cal.Rptr.2d 728, 838 P.2d 250.) As *Kowis* noted, “If each summary denial must be parsed to determine if it was necessarily on the merits, or if there was some other possible explanation, uncertainty results. The parties would often be uncertain whether a denial established law of the case until the appellate court decided the question during the later appeal. Such uncertainty ****467** could often be unfair as well as inefficient.” (*Ibid.*) For this reason, the *Kowis* court rejected the “sole possible ground” rule, which had previously allowed an exception to the default rule that the summary denial of a writ petition does not create law of the case if the only way the petition could have been denied was on the merits. (*Id.* at pp. 897-899, 12 Cal.Rptr.2d 728, 838 P.2d 250.) While rejecting this rule and disapproving several cases that followed it, the *Kowis* court concluded: “A summary denial of a writ petition does not establish law of the case whether or not that denial is intended to be on the merits or is based on some other reason.” (*Id.* at p. 899, 12 Cal.Rptr.2d 728, 838 P.2d 250.)

We agree that preventing unnecessary litigation is a noble goal. Still, it seems there is no need to fear additional litigation about whether an opinion does or does not create a cause if we take the time to expressly share our thoughts on that subject with the parties. When we do, there are no questions about what we intended. Instead, we have made clear what we have done; and this opinion explains why we find we have authority to act as we have. Respectfully, then, while we acknowledge *Kowis*'s holding and the framework the case establishes, we find them inapplicable here, because the opinion we file now is “something more than” a summary denial. (*Frisk, supra*, 200 Cal.App.4th at p. 417, 132 Cal.Rptr.3d 602 [“The ‘something more’ that distinguishes ***769** this matter is our discretionary determination to issue a formal opinion in the course of an accelerated writ proceeding where our denial by opinion is a decision on the merits.”].)

Bay Development also supports our conclusion that an opinion denying a writ petition is not always a summary denial, even if no alternative writ or order to show cause issues. (*Bay Development, supra*, 50 Cal.3d at pp. 1024-1025, 269 Cal.Rptr. 720, 791 P.2d 290.) In that case, the California Supreme Court considered whether a “37-page written opinion” issued by this court fell under the rule for timeliness after a petition is summarily denied even though no alternative writ ever issued. (*Id.* at p. 1023,

269 Cal.Rptr. 720, 791 P.2d 290.) The court held that the summary denial rule "was intended to apply only to summary denials of writ petitions by the Court of Appeal, and not to cases—such as this case—in which the Court of Appeal sets a writ matter for oral argument, hears oral argument and resolves the matter by full written opinion." (*Id.* at p. 1024, 269 Cal.Rptr. 720, 791 P.2d 290.) It is true that we had set the matter for oral argument in *Bay Development*, but we did not issue an alternative writ or an order to show cause. (*Ibid.*) Nonetheless, the court found the summary denial rule did not apply to our opinion, even though the opinion denied the writ petition. (*Id.* at pp. 1023-1024, 269 Cal.Rptr. 720, 791 P.2d 290.)

[3] In this case, we did not hold oral argument before filing an opinion denying the petition on the merits. However, *Lewis*, which postdates *Bay Development* by nine years, held that oral argument is not required. Therefore, this distinction is one without a difference, and we continue to read *Bay Development* to give us at least some authority to deny a mandamus petition, without an order to show cause or an alternative writ, and yet still issue a "decision" that amounts to an "opinion" that creates a cause. (Cal. Rules of Court, rule 8.490(b)(1), (2) [discussing orders denying writ petitions, and then "[a]ll other decision in a writ proceeding"]; cf. rule 8.490(b)(2)(B) ["If a Court of Appeal certifies its *opinion* for publication or partial publication after filing its *decision* ... ****468** (italics added)].).[6] In *Frisk*'s words: "It is true that the Supreme Court in *Bay Development* recommended that appellate courts in the future 'should follow the contemplated statutory procedure by issuing an alternative writ or order to show cause before setting a writ matter for oral argument.' (*Bay Development, supra,* 50 Cal.3d at p. 1025, fn. 8 [269 Cal.Rptr. 720, 791 P.2d 290]; see also *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 228, fn. 2 [45 Cal.Rptr.2d 207, 902 P.2d 225] (*Guardino*).) Neither *Bay Development* nor *Guardino*, however, contemplated the exigencies encompassed by the accelerated *Palma* process." (*Frisk, supra,* 200 Cal.App.4th at p. 416, 132 Cal.Rptr.3d 602.)

***770** Once again, we agree that the "summary denial" of a writ petition does not create a cause. (E.g. *Kowis, supra,* 3 Cal.4th at pp. 893-894, 12 Cal.Rptr.2d 728, 838 P.2d 250.) Rather, the point we make is that the authorities we just discussed confirm our conclusion that this opinion qualifies as more than a summary denial. We now describe the necessary elements of the rule we have discerned from the authorities discussed and show how, when we apply this rule to the facts of this case, we are confident in our conclusion that we have created a cause.

First, the court must take jurisdiction over the merits of the petition. (*Lewis, supra,* 19 Cal.4th at p. 1260, 82 Cal.Rptr.2d 85, 970 P.2d 872.) In this case, we issued several orders, including *Palma* notices, considered the briefs and record on five separate petitions, expedited our procedure because the issue presented was both urgent and easily resolved using settled principles of law, granted rehearing and requested more briefing, and published an opinion answering the interpretive question posed on the merits. In our view, we indisputably took jurisdiction.

Second, the court must issue an opinion on the merits. (*Frisk, supra,* 200 Cal.App.4th at p. 417, 132 Cal.Rptr.3d 602; *Bay Development, supra,* 50 Cal.3d at pp. 1024-1025, 269 Cal.Rptr. 720, 791 P.2d 290.) Here, we published two opinions after telling the parties we would resolve the petition later on the merits. Again, we undeniably satisfied this criterion.

Finally, the court should give some consideration to the parties' expectations, as this is another theme that seems to run through the cases discussing creation of a cause. As discussed *ante*, we find that explicitly telling the parties that we conclude we have created a cause, and why, answers *Kowis*'s concerns about endless litigation over these issues. The *Bay Development* court also considered the parties' expectations when finding that the rules regarding summary denials were not intended to apply to our 37-page opinion after oral argument. (*Bay Development, supra,* 50 Cal.3d at p. 1025, fn. 7, 269 Cal.Rptr. 720, 791 P.2d 290.) *Frisk* does the same by emphasizing the importance of allowing the parties an opportunity for rehearing. (*Frisk, supra,* 200 Cal.App.4th at pp. 416-417, 132 Cal.Rptr.3d 602.)

[4] Explicitly telling the parties that the court considers itself to have created a cause with an explanation as to why, seems to us to resolve the issues discussed in the cases we have analyzed. (*Kowis, supra,* 3 Cal.4th at p. 892, 12 Cal.Rptr.2d 728, 838 P.2d 250 [summary denial said only that decision was on the merits with a citation ****469** to a single case without explanation.].) In other words, if a Court of Appeal plans to deny a petition for mandamus without issuing an alternative writ or an order

to show cause while intending to create a cause, it should signal its conclusion that its opinion, while a denial, is nonetheless something other than a summary denial. It is also helpful, when possible, to preserve the right to rehearing, such that objections to a Court of Appeal's procedure are most likely to start in that court, while still preserving a meaningful right to ***771** certiorari to the California Supreme Court. We have again complied in full; we note we granted rehearing on our own initiative with the specific goal of reopening the period in which the parties may request rehearing, as well as the period of finality, we invited briefing on all issues presented, and we explicitly told the parties that we might do exactly what we conclude this opinion does. (Cal. Rules of Court, rule 8.268(d).)

Based on the foregoing, we conclude we have created a cause by proceeding as we did in this action. We next consider the related issue of whether the doctrine of law of the case applies.

2. Applicability of the law of the case doctrine

[5] **[6]** "The law of the case doctrine states that when, in deciding an appeal, an appellate court 'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal ..., and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular.' " (*Kowis, supra,* 3 Cal.4th at pp. 892-893, 12 Cal.Rptr.2d 728, 838 P.2d 250.) This doctrine also applies to pretrial writ proceedings in which a petition is granted on a peremptory basis under *Palma*. (*Id.* at p. 894, 12 Cal.Rptr.2d 728, 838 P.2d 250.)

With respect to the interaction between the creation of a cause and law of the case, the *Kowis* court explained: "If a writ petition is given full review by issuance of an alternative writ, the opportunity for oral argument, and a written opinion, the parties have received all the rights and consideration accorded a normal appeal. Granting the resulting opinion law of the case status as if it had been an appellate decision is appropriate. But if the denial followed a less rigorous procedure, it should not establish law of the case." (*Kowis, supra,* 3 Cal.4th at p. 899, 12 Cal.Rptr.2d 728, 838 P.2d 250.)

Here, our opinion denying the petition followed a procedure "less rigorous" than the one described by the *Kowis* court, as we did not issue an alternative writ or allow oral argument. First, though, *Kowis* was not faced with whether oral argument was necessary before law of the case could apply; it was only asked to decide whether an order denying a writ petition, which contained nothing but a citation to a single case with a statement that the decision was on the merits but without any indication as to whether it created a cause or why, created law of the case. (*Kowis, supra,* 3 Cal.4th at p. 892, 12 Cal.Rptr.2d 728, 838 P.2d 250 ["We granted review on the question whether the Court of Appeal erred in applying the law of the case doctrine based on a summary denial of an earlier petition for writ of mandate."].) In fact, *Lewis* noted *Kowis* ***772** indicated the issue of whether oral argument was required was undecided. (*Lewis, supra,* 19 Cal.4th at p. 1255, 82 Cal.Rptr.2d 85, 970 P.2d 872.)

Second, we again emphasize that, under *Palma* and *Lewis* as discussed *ante*, neither oral argument nor an alternative writ ****470** or order to show cause is a necessary condition to creating a cause. We therefore fail to see why the absence of either would bar application of the law of the case doctrine, when we satisfy the criteria discussed in the previous section. If an alternative writ, an order to show cause, and oral argument may all be bypassed in appropriate cases when we grant a peremptory writ, then we are unable to find a reason why "the issuance of a peremptory writ in the first instance by an appellate court is a final determination of a cause on the merits" (*Lewis, supra,* 19 Cal.4th at p. 1255, 82 Cal.Rptr.2d 85, 970 P.2d 872), but the denial of a writ petition after employing the same procedure is not. Consequently, we conclude that law of the case has been established in this matter.

In finishing our conclusions about the procedure we have used, we note one major distinction between this case and *Frisk*. The petition there concerned the trial court's failure to act on a peremptory challenge to a judge (Code Civ. Proc., § 170.6), and the fact that a petition for writ of mandate is the only means of appellate review of such a challenge (Code Civ. Proc., § 170.3, subd. (d)) helped support the court's conclusion that law of the case applied. (*Frisk, supra,* 200 Cal.App.4th at p. 415, 132 Cal.Rptr.3d 602.) The *Frisk* court explained: "Because writ relief is the only authorized mode of appellate review for peremptory challenges, our decision, in contrast to routine summary denials, is binding on the parties, and cannot be revisited

on a subsequent appeal. [Citation.] As such, we judge the petition on its procedural and substantive merits, and our determination whether to grant or deny the petition 'is necessarily on the merits.' " (*Ibid.*)

Here, we are unaware of any statute that prevents the People from seeking review of the trial court's order transferring real party in interest to juvenile court on appeal. Still, we do not see how this affects the applicability of the law of the case doctrine, which, as we have explained, applies when "an appellate court 'states in its opinion a principle or rule of law necessary to the decision.' " (*Kowis, supra,* 3 Cal.4th at p. 893, 12 Cal.Rptr.2d 728, 838 P.2d 250.) As we have already explained, we created a cause by taking jurisdiction, filing an opinion on the merits, and explaining to the parties our analyses and conclusions about the expedited procedure we used.

Based on the foregoing, we find, and explicitly tell the parties, that we deem this opinion to be law of the case. We do so with the knowledge that ***773** we have done our best to ensure that the periods for rehearing and finality that would apply to an opinion granting the petition will apply to this opinion.

[7] In closing our views on the procedural path we have chosen,[7] we again remind ****471** the parties that we in no way intend for this to become our standard operating procedure. As we have labored to explain, this case is uniquely important and exigent. We therefore gave the parties an answer to the issue the petition raised in the most expeditious way we concluded the law would allow.

For the foregoing reasons, we conclude that we have created a cause and law of the case by publishing this opinion after the procedural route we chose. We now turn to the merits of the petition.

DISCUSSION

[8] The People contend the trial court misapplied the law when it held that Proposition 57 could be applied to cases that were directly filed against juvenile offenders in adult court before the new law took effect. Because we disagree that applying Proposition 57 to require a juvenile court judge to assess whether real party in interest will go to trial in adult or juvenile court constitutes a retroactive application of the new law, we deny the petition.

[9] We agree with the People in part: changes in the law ordinarily apply prospectively but not retroactively. (See, e.g., Pen. Code, § 3.) "It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, ***774** or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287, 279 Cal.Rptr. 592, 807 P.2d 434 (*Tapia*).)

We also agree with the petition that *In re Estrada* (1965) 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948 (*Estrada*), the case that spawned a well-known exception to the default rule of prospectivity, does not apply here. After all, *Estrada* does no more than "inform[ ] the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments." (*People v. Brown* (2012) 54 Cal.4th 314, 324, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) Real party in interest does not argue that, and we therefore do not consider whether, Proposition 57 amounts to a legislative reduction in the punishment for a crime.

[10] Where we part ways with the People is in defining what sorts of applications of a new law will actually count as "retroactive" in the sense we have been discussing. After all, "[a] statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7-8, 255 Cal.Rptr. 412, 767 P.2d 679.)

The *Tapia* court, considering whether a voter initiative that changed who (the judge rather than counsel) and under what circumstances (only in conjunction with challenges for cause) jurors would be examined during voir dire, described how this understanding of retroactivity intersects with changes to the procedural rules governing criminal trials. Rejecting a contention that the rule changes required by ****472** the voter initiative could only apply to prosecutions for crimes committed after the effective date of the new law, the court explained: "Even though applied to the prosecution of a crime committed before the law's effective date, a law addressing the conduct of trials still addresses conduct in the future.

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This is a principle that courts in this state have consistently recognized. Such a statute ' "is not made retroactive merely because it draws upon facts existing prior to its enactment.... [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future." ' [Citations.] For this reason, we have said that 'it is a misnomer to designate [such statutes] as having retrospective effect.' " (*Tapia, supra*, 53 Cal.3d at p. 288, 279 Cal.Rptr. 592, 807 P.2d 434.) Thus, "a law governing the conduct of trials is being applied 'prospectively' when it is applied to a trial occurring after the law's effective date, regardless of when the underlying crime was committed." (*Id.* at p. 289, 279 Cal.Rptr. 592, 807 P.2d 434.)

The legislative changes at issue in this petition fit easily into this framework. 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." ***775** (*Tapia, supra*, 53 Cal.3d at p. 289, 279 Cal.Rptr. 592, 807 P.2d 434.) Because Proposition 57 can only apply to trials that have yet to occur, it can only be applied prospectively.

Arguing we should not apply this definition from *Tapia* to the facts of this case, the People seize on the following language from *People v. Grant* (1999) 20 Cal.4th 150, 157, 83 Cal.Rptr.2d 295, 973 P.2d 72 (*Grant*): "In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date." From this, the People reason that "Proposition 57's procedural changes can only be applied to 'new' and 'future' proceedings [citation] and cannot be applied to procedural aspects that have already taken place, such as the previous direct-filing of a case in the superior court or the conduct of a previously-held fitness hearing."

This position is unavailing. Although real party in interest is now under the jurisdiction of the juvenile court, the People may move to have him transferred to adult court if they think he meets the criteria for trial there. (Welf. & Inst., § 707, subd. (a).) Even assuming the decision to directly file a complaint against real party in interest in adult court is in fact the last act before Proposition 57 can be applied, the People's position fails because they have not identified how asking them to get the juvenile court's permission before proceeding to a final adjudication in adult court "attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date." (*Grant, supra*, 20 Cal.4th at p. 157, 83 Cal.Rptr.2d 295, 973 P.2d 72.)

For comparison, we look to *Strauch v. Superior Court* (1980) 107 Cal.App.3d 45, 49, 165 Cal.Rptr. 552 (*Strauch*), which the *Tapia* court cited with approval. (*Tapia, supra*, 53 Cal.3d at p. 289, 279 Cal.Rptr. 592, 807 P.2d 434.) The real party in interest there filed a medical malpractice complaint against the petitioner. (*Strauch*, at p. 47, 165 Cal.Rptr. 552.) The petitioner moved to strike the complaint because, when the complaint was filed, Code of Civil Procedure section 411.30 provided that "no ****473** complaint [for medical malpractice] shall be accepted for filing unless it is accompanied by" a certificate of merit, and no certificate had been filed. (*Strauch*, at pp. 47-48, 165 Cal.Rptr. 552.) The trial court denied the motion, granted the real party in interest relief under Code of Civil Procedure section 473, and allowed the late filing of a certificate of merit. (*Strauch*, at p. 47, 165 Cal.Rptr. 552.) After that ruling, the Legislature amended Code of Civil Procedure section 411.30 to specify that the certificate of merit did not need to be filed until the date of service of the complaint, and that the defect was only subject to demurrer. (*Strauch*, at p. 48, 165 Cal.Rptr. 552.) On writ review of the order denying the motion to strike, ***776** the court held it was appropriate to apply the amended statute in support of the trial court's order because the law was procedural, only, and applying it would "not create a new cause of action or deprive a malpractice defendant of any defense on the merits or affect vested rights." (*Id.* at p. 49, 165 Cal.Rptr. 552.)

In *Strauch*, as here, a statute created a right (the right to dismissal absent a certificate of merit in *Strauch*, and the right to directly prosecute a juvenile in adult court here) that was later abrogated by legislative amendment. The petitioner in *Strauch* fought to keep that right, just as the People here do. In each case, however, the petition fails to show how the legislative change affects "vested rights." (*Strauch, supra*, 107 Cal.App.3d at p. 49, 165 Cal.Rptr. 552; cf. *Aetna Casualty & Surety Co. v. Industrial Accident Com.* (1947) 30 Cal.2d 388, 182 P.2d 159 (*Aetna Casualty*) [new law allowing increased recovery from the Industrial Accident Commission could not be applied

to claimants whose injuries arose before the new law's effective date because the increased compensation due by the claimants' employers was a substantive rather than procedural change]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 246 Cal.Rptr. 629, 753 P.2d 585 [Proposition 51, which rejected traditional joint and several liability on tort claims in favor of liability that is proportionate to fault, could not be applied retroactively to causes of action that arose prior to the law's effective date because it decreased the amount of recovery a plaintiff could reasonably obtain].) Having to file a motion to get the juvenile court's permission to try a minor in adult court does not strike us as the sort of changed legal consequences the *Grant*, *Strauch*, and *Tapia* courts had in mind.

Moreover, we are unconvinced that the act of directly filing a case against a juvenile offender in adult court without the permission of the juvenile court is the last act prior to application of Proposition 57. For this portion of our analysis, we look to the materials in support of Proposition 57. (See, e.g., *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901, 135 Cal.Rptr.2d 30, 69 P.3d 951 [official ballot pamphlet useful in interpreting voter initiatives].)

As both parties have noted, the ballot pamphlet supporting Proposition 57 contains two express purposes related to juvenile offenders: "Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles"; and "Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 141, Public Safety and Rehabilitation Act of 2016, § 2.) In addition, the legislative analysis supporting Proposition 57 went so far as to state: "the only way a youth could be tried in adult court is ***777** if the juvenile court judge in the hearing [under Welfare and Institutions Code section 707, subdivision (a)]] decides to transfer the youth to adult court." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016), analysis by legislative analyst, p. 56.)

****474** A juvenile offender is not "tried in adult court" merely because the People have filed a complaint against him or her there. Rather, "past cases 'compel the holding that an accused is "brought to trial" ... when a case has been called for trial by a judge who is normally available and ready to try the case to conclusion. The court must have committed its resources to the trial, and the parties must be ready to proceed and a panel of prospective jurors must be summoned and sworn.[8]' " (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1196, 117 Cal.Rptr.3d 327, 241 P.3d 828 [analyzing when a case is brought to trial for purposes of Penal Code section 1382, which requires dismissal if certain speedy trial deadlines are not met].) The People have not shown, nor can they show, that real party in interest has participated in a proceeding in adult court that meets these criteria. They have therefore not shown that the harm Proposition 57's ballot pamphlet said the new law would prevent, namely, "trial" of a juvenile in adult court without the permission of a juvenile judge, has occurred. As we see it, this means the People have not shown that the last act precedent to application of Proposition 57 has already happened, such that requiring a juvenile judge to assess whether real party in interest will be brought to trial in adult court would be applying Proposition 57 retroactively.

Finally, the People argue some temporal qualifiers in the materials supporting Proposition 57, combined with the initiative's relative silence regarding retroactivity, evidence an intent on the part of the voters to only have the initiative's new rules applied to cases filed after its passage. "Specifically, [they contend,] 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.)" We are ***778** unconvinced that the italicized adverbs above imply anything about retroactivity. In fact, this phrasing seems more like an indication that the voters intended Proposition 57's provisions regarding juveniles to be applied immediately; otherwise, it would be untrue that minors are "no longer" automatically tried in adult court, and that a juvenile judge must grant a motion to transfer "before" a trial in adult court can occur.

Although portions of Proposition 57 that are not at issue here and some initiatives that are similar to Proposition 57 mention retroactivity while the portion of Proposition 57 that affect juvenile offenders do not, this does not change our analysis. The *Tapia* court was quite clear that the initiative under consideration there was "entirely silent on the question of retrospectivity," and yet it applied

the new law anyway. (*Tapia, supra*, 53 Cal.3d at p. 287, 279 Cal.Rptr. 592, 807 P.2d 434.) In cases like this, " 'the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction [i.e., the presumption of prospectivity], but because they are not in fact ****475** retroactive. There is then no problem as to whether the Legislature intended the changes to operate retroactively.' " (*Tapia*, at p. 290, 279 Cal.Rptr. 592, 807 P.2d 434, quoting *Aetna Casualty*, *supra*, 30 Cal.2d at p. 394, 182 P.2d 159.)

Moreover, "We must assume that [the] voters knew about and followed *Tapia*." (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 171, 14 Cal.Rptr.3d 261, 91 P.3d 205.) Because we do precisely this, and because we conclude that Proposition 57 is being applied prospectively in this case, it is of no moment that Proposition 57 does not explicitly address retroactivity.

We publish today's opinion because we recognize that trial courts may need guidance deciding whether and how to apply Proposition 57 to cases that were directly filed in adult court before its passage. We caution that we need not and therefore do not opine about anything other than the retroactivity of the portion of Proposition 57 that requires the juvenile court to permit trial of a minor in an adult criminal court. We do not address the equal protection argument real party in interest advanced in his informal response. (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 10, 18 Cal.Rptr.3d 492 [court must avoid reaching constitutional issues if case can be resolved on statutory ground].) In addition, although the People asked for advice about how courts should handle direct-filed cases that are transferred to juvenile court and then back to adult court after a successful motion under Welfare and Institutions Code section 707, subdivision (a), we do not purport to guide trial courts regarding other procedural aspects of cases against juveniles now that Proposition 57 has passed. Any such issues are best left for cases that squarely present them.

***779** DISPOSITION

The petition is denied.

We concur:

McKINSTER, J.

SLOUGH, J.

All Citations

9 Cal.App.5th 753, 215 Cal.Rptr.3d 456, 17 Cal. Daily Op. Serv. 2448, 2017 Daily Journal D.A.R. 2339

Footnotes

1 This enactment is also known as The Public Safety and Rehabilitation Act of 2016. For ease of reference, we shall refer to it as "Proposition 57" in this opinion. Moreover, when we use the term Proposition 57 in the course of this opinion, we refer, unless otherwise specified, only to those portions of the enactment that are relevant to this petition, namely, the portions of Proposition 57 that eliminated the People's ability to initiate criminal cases against juvenile offenders anywhere but in the juvenile court.

2 The statutory phrase is "a court of criminal jurisdiction." (See, e.g., Welf. & Inst. Code, § 707, subd. (a).) As do the People and as did the voter pamphlet supporting Proposition 57, we tend to use the vernacular, *adult court*. We do this for ease of reference and mean no disrespect.

3 In an abundance of caution, we note that, due to clerical error, the opinion failed to explicitly indicate that it would not become final for 30 days. (Cal. Rules of Court, rule 8.490(b)(1).) We saw no reason to modify the opinion based on clerical error (Code Civ. Proc., § 473, subd. (d)) only to grant rehearing and replace our previous published opinion with this one.

4 We use the vernacular and often refer to this order requesting a response as a *Palma* notice, even though we told the parties we were as likely to deny as to grant the petition. The order reads:

"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." Real party in interest filed an informal response on February 16, 2017, and the People filed a reply on February 23, 2017. Neither objected to any aspect of our procedure, and each argued the merits of the parties' positions in the same way they had argued their positions in the earlier briefs. The new briefing has not changed our view of the merits, such that, with the exception of some minor stylistic changes, the discussion section of this opinion remains unchanged from the opinion we filed on January 19, 2017. In addition, on March 10, 2017, real party in interest filed a letter bringing to our attention a recently published opinion, *People v. Cervantes* (March 9, 2017, A140464) 9 Cal.App.5th 569, 215 Cal.Rptr.3d 174, 2017 WL 933028 [2017 Cal.App.LEXIS 204], that also addresses Proposition 57's impact on juvenile offenders who had complaints directly filed against them in adult court prior to the enactment of the new law. We have read the case and concluded it does not change our analysis of either the procedural or the substantive issues discussed in this opinion.

5 Nor could we "quarrel with" an opinion from the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 20 Cal.Rptr. 321, 369 P.2d 937.) We emphasize that we are attempting no such thing in this opinion. Rather, we try to explain why, in our view, the patchwork of cases discussing the creation of a cause in the contexts of mandamus petitions leaves room for the procedural approach we have taken.

6 The finality rule that applies to writs further supports this conclusion, as it gives us discretion to order finality of even a summary denial as if the denial were not summary at all. (Cal. Rules of Court, rule 8.490(b)(1) [denials without issuance of alternative writ or order to show cause are immediately final "[e]xcept as otherwise ordered by the court"].)

7 We briefly reject two potential objections to our approach. One is that we could have accomplished the same task (i.e. the creation of a cause and law of the case) by issuing an order to show cause at a specially set hearing, with the return and traverse due on an expedited schedule. In response, we note the filing of a return and traverse is expected to be more laborious than the preparation and submission of an informal letter brief, such that requests for extensions of time are both expected and routinely granted. (Cf. Cal. Rules of Court, rule 8.487(a)(1) [preliminary response may be served within 10 days] with Cal. Rules of Court, rule 8.487(b)(2) [return usually due within 30 days]). In addition, the hearing takes time and judicial resources that we conserved by adopting the approach we have described. The foregoing analysis explains why this case was uniquely suited for expedition and demonstrates that we have endeavored to find a procedural path that preserves the same rights the parties would have had if we had granted the petition on a peremptory basis under *Palma*. A second argument against creating a cause out of a denial after issuance of a *Palma* notice is that a *Palma* notice traditionally implies that the court is leaning toward issuance of the peremptory writ, and not that it might instead deny the petition in a way that creates a cause. We can understand how a standard *Palma* notice, which simply implies the court might grant the petition, could affect the presentation of the reply. No such issue arises in this case, however, since our *Palma* notice explicitly told the parties we were considering denying the petition in an opinion we deemed to have created both a cause and law of the case.

8 We note the trial court and the parties, at the November 29, 2016 hearing at which the trial court granted real party in interest's motion for a fitness hearing, discussed whether the attachment of jeopardy is the last point at which a motion for transfer to adult court can be made, even in a case that was filed before the passage of Proposition 57. We express no view on this question, as it is not presently before us. Our reference to the rule for calculation of when a case has gone to trial for speedy trial purposes is intended only to emphasize that a "trial" has not yet occurred in this case.

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9 Cal.App.5th 569
Court of Appeal,
First District, Division 4, California.

The PEOPLE, Plaintiff and Respondent,
v.
Alexander CERVANTES, Defendant and Appellant.

A140464
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Filed 3/9/2017
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As Modified 4/10/2017
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Certified for Partial Publication. *

Synopsis

Background: Defendant was convicted in the Superior Court, Solano County, No. FCR281334, Harry S. Kinnicutt, J., of offenses committed when he was 14 years old, including two counts of attempted murder, first degree burglary, torture, aggravated mayhem, assault with a deadly weapon, assault with intent to commit rape, sodomy, or oral copulation on a person under 18 years, forcible rape of a child under 14 years, forcible sodomy of a child under 14 years, forcible oral copulation of a child under 14 years, and forcible lewd act on a child, as well as enhancements alleging defendant personally used a deadly and dangerous weapon and that defendant personally inflicted great bodily injury, for which defendant received prison sentence of 50 years to life under the one-strike law, consecutive 11-year determinate term for one attempted murder, plus a consecutive life term for the other attempted murder. He appealed.

Holdings: The Court of Appeal, Streeter, J., held that:

[1] trial counsel provided ineffective assistance as to all specific intent crimes other than burglary;

[2] Public Safety and Rehabilitation Act was not retroactive;

[3] applied prospectively, Act required fitness hearing before defendant was tried in adult court on remand;

[4] defendant would be eligible for fitness hearing even if he was merely resentenced, rather than retried, on remand;

[5] statute affording youthful offenders earlier parole hearings did not apply to defendant;

[6] defendant was only eligible for worktime credits in prison on his 11-year determinate sentence; and

[7] sentence was functional equivalent of life without possibility of parole (LWOP) in violation of Eighth Amendment.

Affirmed in part, reversed in part, and remanded with instructions.

****178** Solano County Superior Court, Hon. Harry S. Kinnicutt. (Solano County Super. Ct. No. FCR281334)

Attorneys and Law Firms

****179** Arnold & Porter, Peter Obstler, Ginamarie Caya, San Francisco, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, Eric D. Share, Supervising Deputy Attorney General, Rene A. Chacon, Supervising Deputy Attorney General, Joan Killeen, Deputy Attorney General for Plaintiff and Respondent.

Opinion

Streeter, J.

***579** Alexander Cervantes was 14 years old when he attacked a 13-year-old girl and her 20-month-old brother, who were the younger siblings of one of his friends. After breaking into their home in the middle of the night, he stabbed them repeatedly as they slept, raped and sodomized the girl, forced her to orally copulate him, and ultimately passed out during the attack. He had been drinking heavily that evening and his defense rested on voluntary intoxication to negate specific intent. He was convicted of 15 charges, including various sex offenses, first-degree burglary, and two counts each of attempted murder, torture, and aggravated mayhem. He received a prison sentence of 50 years to life under the one-strike law

(Pen. Code, [1] § 667.61), a consecutive 11-year determinate term for one attempted murder (§§ 187, 664), plus a consecutive life term for the other attempted murder.

We divide our discussion into three parts. Only an overview of the first part shall be published, but the remaining two parts are certified for publication in their entirety

First, Cervantes argues that the representation he received was so far below the minimum threshold of constitutionally effective assistance of counsel as to amount to no defense at all. Pointing to dozens of shortcomings—beginning with an incomplete investigation of his mental state, which he says guaranteed his counsel either had no basis for strategic choices she made or simply failed to recognize choices she should have made—he asks that we reverse outright, and remand for a new trial. While we reject that argument, we agree there were a number of serious deficiencies in counsel's performance, enough to leave us without confidence in the outcome of the trial on most of the specific intent crimes. We therefore reverse on eight specific intent counts, while affirming as to the remaining seven counts, including the convictions for burglary and all of the general intent crimes (four of the six sex offenses, and two counts of assault with a deadly weapon).

***580** Second, our conclusion that we must reverse and remand for retrial on eight of 15 counts presents some novel issues under recently-passed Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Prop 57). Cervantes argues Prop 57 requires that the case be remanded for a "fitness hearing" to the juvenile court, which he contends has "exclusive jurisdiction" over any trial of the offenses charged in this case until and unless it determines that the case should be transferred to adult criminal court, and further, that a remand for retrial on any of the counts of which he was convicted requires vacatur of all the convictions and retrial of all charges. He argues that Prop 57 is retroactive, but that this result is mandated even applying Prop 57 prospectively to any proceedings on remand after a partial reversal. We do not agree that Prop 57 is retroactive. Nor do we agree that a partial reversal requires that all convictions must ****180** be vacated. But we do agree that Prop 57 requires a remand to the juvenile court for a "fitness hearing," and that the outcome of that hearing will determine which department of the Superior Court—adult criminal court, or juvenile court—will handle any retrial on the reversed counts and sentencing.

Third, Cervantes argues that the sentence imposed on him is the functional equivalent of life without possibility of parole and therefore violates the Eighth Amendment under *Graham v. Florida* (2010) 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (*Graham*) and *People v. Caballero* (2012) 55 Cal.4th 262, 268, 145 Cal.Rptr.3d 286, 282 P.3d 291 (*Caballero*). Since the sentencing choices made on the convictions we affirm, even without conviction on the counts we reverse, could produce another indeterminate life sentence with a lengthy minimum term, this Eighth Amendment issue will be relevant to the proceedings on remand whether Cervantes's case is handled in adult criminal court or stays in juvenile court. Thus, we address it and conclude that a sentence requiring Cervantes to serve at least 66 years in prison before he would first become eligible for parole, is constitutionally infirm. Because that term exceeds his life expectancy, it is the functional equivalent of life without parole and violates the Eighth Amendment under *Graham*, at p. 74, 130 S.Ct. 2011 and *Caballero,* at p. 268, 145 Cal.Rptr.3d 286, 282 P.3d 291. Where, exactly, the constitutional line lies below the 66 years to life imposed in this case has yet to be addressed by our Supreme Court, although we note that some guidance on the issue will likely be forthcoming in a case now pending before it. In the meantime, the Prop 57 "fitness hearing" we order today will rectify any constitutional concerns about the length of whatever term of confinement is imposed on Cervantes for the convictions we affirm here, as well as for any other offenses that may be tried on remand.

*581 I. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts Disclosed at Trial

1. *Prosecution's Case*

On the evening of December 11, 2010, Cervantes attended a party, where witnesses saw him drinking from 6:00 p.m. to 9:00 p.m. One of the partygoers described him as "really drunk" at 10:20 p.m.

At approximately 1:30 or 2:00 a.m. on December 12, 2010, Cervantes entered the Vacaville home of his sometime

friend, Gabriel T. (Gabriel).[2] He carried a steak knife he had brought from home and had a condom with him. Gabriel was not at home because he was in juvenile hall. The only occupants were Gabriel's younger sister, 13-year-old A.P., and their 20-month-old brother, I.A. A.P. was babysitting I.A. while their mother and another sister were out of the house.

As the evening progressed, A.P. and I.A. fell asleep on their mother's bed. A.P. awoke to the sensation of a sharp pain in her back like someone was punching her, and she saw blood underneath her on the bed. Looking in the mirror, she saw someone else in the room. Turning, she recognized Cervantes as a friend of her older brother's. A.P. testified he was wearing ****181** black gloves and a black jacket.[3] She asked Cervantes why he was there. "He said that it was revenge for my brother, against Richard —something with an R," or "revenge for [her] brother for snitching on ... Richard...." A.P. did not know what he was talking about. As A.P. tried to unlock her cell phone to call 911, she fell off the bed. While she was on the floor, Cervantes stabbed her repeatedly in her head, back, and shoulders. A.P. suffered defensive wounds on her wrists and elbow when she tried to shield her head. She begged Cervantes to stop and eventually he did. After Cervantes stopped stabbing her, A.P. heard her baby brother "squeal," but she could not move to help him. Then the screaming stopped.

Cervantes came back over to A.P. and "started getting into [her] pants." He put his hand down the back of her pants and "was feeling on [her] butt." ***582** Cervantes told A.P. to get on the bed and she complied out of fear. Cervantes got on top of her and put his penis in her vagina. After a couple of minutes, he told A.P. to moan and call him "daddy." When A.P. did not comply, Cervantes threatened to kill her brother, by which A.P. thought he meant Gabriel. A.P. complied with Cervantes's demands. Cervantes "finally stopped" and told her to "turn around." A.P. rolled onto her stomach, and Cervantes sodomized her. Cervantes "finally stopped," then told A.P. she "was going to suck his dick." Cervantes "kind of put his penis up into [her] mouth" and "pulled [her] head down." When A.P. saw Cervantes starting to doze off, she tried to get away, but he grabbed her hair and "yanked [her] back down." Eventually, Cervantes fell asleep.

A.P. grabbed her phone and her little brother and quickly got out of the room. Entering the kitchen, she noticed the door to the garage was standing open, as was the door leading from the garage to the outside of the house. Both doors had been closed earlier and the external door was normally kept locked. Once outside, A.P. called 911 and went across the street to a neighbor's house.

Shortly after 4:00 a.m. a SWAT team responded to A.P.'s home, eventually entered, and arrested Cervantes in the master bedroom. He was naked and smeared with blood. A large bloodstain and what appeared to be urine were found on the sheets.

When the crime scene was processed three empty beer cans were found: one was on the couch, one by the sink in the kitchen, and the third on the driveway in front of the garage. Cervantes's DNA was found on two of the beer cans. The parties stipulated that both victims' blood was found on a knife retrieved from the bedroom where the children were attacked, and the investigation showed the knife matched another steak knife found at Cervantes's mother's house. The parties also stipulated that (1) DNA testing could not exclude Cervantes as the source of semen found on anal swabs taken from A.P., and (2) A.P.'s dried blood was found on Cervantes at the time of his arrest.

After the attack, the children were taken to the hospital. A.P. had been stabbed a total of 42 times, and I.A. had been stabbed 13 times. A.P. had a collapsed lung and a lacerated liver and spleen. I.A. had four fractured ribs and internal injuries. A.P. was hospitalized for three days, ****182** and both children were scarred by the knife wounds they suffered that night.

2. *The Charges, the Defense Case, and the Verdicts*

Cervantes was charged as an adult by information filed on March 29, 2011. (Welf. & Inst. Code, former §§ 602, subd. (b)(2), 707, subd. (d)(2)(A).) An ***583** amended information filed on September 17, 2012 charged Cervantes with two counts of attempted willful, deliberate, and premeditated murder (§§ 664, 187) (counts 1, 2), first degree burglary (§ 459) (count 3), two counts of torture (§ 206) (counts 4, 5), two counts of aggravated mayhem (§ 205) (counts 6, 7), two counts of assault with a deadly weapon (§ 245, subd. (a)(1)) (counts 8, 9), assault with intent to commit rape, sodomy, or oral copulation

on a person under 18 years (§ 220, subd. (a)(2)) (count 10), forcible rape of a child under 14 years (§§ 261, subd. (a)(2), 264, subd. (c)(1)) (count 11), forcible sodomy of a child under 14 years (§ 286, subd. (c)(2)(B)) (count 12), two counts of forcible oral copulation of a child under 14 years (§ 288a, subd. (c)(2)(B)) (counts 13, 14), and forcible lewd act on a child (§ 288, subd. (b)(1)) (count 15). The information further alleged as to counts 1 through 7 and 10 through 15 that Cervantes personally used a deadly and dangerous weapon, a knife (former § 12022, subd. (b)(1)); as to counts 1 through 3 and 6 through 15 that Cervantes personally inflicted great bodily injury (former § 12022.7, subd. (a)); and as to counts 10 through 15 that Cervantes inflicted great bodily injury (§ 12022.8). The information included allegations as to counts 11 through 15 under section 667.61, known as the "one-strike" law, which calls for life sentences, including mandatory minimums, for individuals convicted of certain sex offenses in particularly blameworthy circumstances. The one-strike allegations against Cervantes included that the sex crimes were committed during a first-degree burglary (§ 667.61, subds. (d)(4), (e)(2)), that Cervantes also committed aggravated mayhem against and tortured A.P. (§ 667.61, subd. (d)(3)), personally inflicted great bodily injury on her (§ 667.61, subd. (d)(6)), personally used a dangerous or deadly weapon (§ 667.61, subd. (e)(3)), and committed the crimes against a child under age 14 (§ 667.61, subds. (d)(7), (j)(1), (j)(2)).

Trial was held in mid-September 2012. Building on the testimony that Cervantes had been drinking during the evening before the attacks, defense counsel's strategy was to defend against all of the crimes requiring specific intent based on voluntary intoxication. The parties stipulated that Cervantes's blood alcohol level at 8:57 a.m. on December 12, 2010 was 0.12 percent. A forensic toxicologist, Jeffery Zehnder, testified for the defense that Cervantes's blood alcohol level could have been as high as .25 percent at the time of the crimes. Zehnder testified about increasing levels of impairment that occur with increasing levels of blood alcohol. At .12 percent, "ability to do certain things, like speak" would be impaired, and at .15 percent there would be not only "slurred speech," but also "impaired information processing in the brain." Zehnder also testified that alcohol reduces inhibitions and can cause an individual to behave and speak recklessly and inappropriately, and a .20 percent blood alcohol level could cause severe impairment, memory loss, and black-outs.

***584** Defense counsel argued to the jury that Cervantes was so intoxicated that he never formed the specific intent to kill and never premeditated or deliberated, and thus could not be convicted of attempted murder. She also argued, due to his inebriated state, Cervantes had not formed the intent ****183** required for burglary, torture or the other specific intent crimes.

On September 21, 2012, the jury found Cervantes guilty of all the substantive offenses, many of the enhancements, and found true some but not all of the one-strike allegations. [4] With respect to all the sex crimes, it found he personally used a deadly weapon and committed the five alleged as one-strike offenses against a child under 14 in the course of a first-degree burglary (§ 667.61, subds. (d)(4), (e)(2), (e)(3), (j)(1), (j)(2)), but found the infliction of great bodily injury, torture and aggravated mayhem one-strike allegations not true. [5] (§ 667.61, subds. (d)(3), (d)(6), (e)(3).) The true findings on the one-strike allegations subjected Cervantes to a sentence of 25 years to life on each of the five one-strike sex offenses. (§ 667.61, subds. (a), (e)(2), (e)(3), (j)(1), (j)(2).) The jury deliberated for approximately seven hours before reaching its verdicts.

On November 16, 2012, Cervantes's trial counsel filed a three-page motion for new trial, arguing the evidence was insufficient to prove he had the required specific intent to support the convictions on counts 1 through 4, 6, 7, ***585** 10 and 15. Counsel also filed a thick stack of letters from family, friends, mentors, and community members in support of Cervantes, to be used at sentencing.

B. Facts and Theories Developed by Pro Bono Counsel after Trial

After Cervantes was convicted, Peter Obstler, a partner in the San Francisco office of Bingham McCutchen (and later of Arnold & Porter), took an interest in the case and attended the hearing on the new trial motion. With Obstler in the lead, Bingham McCutchen substituted in as Cervantes's counsel on a pro bono basis, and Obstler and Arnold & Porter continue to represent him on appeal. A new date was set for the hearing of the motion for a new trial.

As he came up to speed on the case, Obstler learned that three different attorneys from the Conflict Defender's Office had represented Cervantes following his ****184**

arrest. First was William Pendergast, who represented Cervantes from December 2010 to March 2011, when he was appointed as a commissioner. Then Kathryn Barton took over Cervantes's defense until she resigned from the Conflict Defender's Office around the end of 2011 or January of 2012. Beginning in February 2012, Erin Kirkpatrick, who was new to the Conflict Defender's Office, took over the representation and continued in that role through trial. Kirkpatrick had more than ten years of experience as a criminal defense attorney and entered the Conflict Defender's employ at a high level of experience and responsibility.

After reviewing the transcripts and conducting his own investigation, aided by experts, Obstler came to advocate a different theory of the crime than Kirkpatrick had pursued at trial. He noted and built upon the fact that, early in the defense investigation of the case, Cervantes reported to Pendergast that, in addition to drinking, he had also smoked marijuana [6] and taken psilocybin mushrooms on the night of the crimes, which he had purchased from a "Northsider" at the party he had attended before the attacks. Cervantes specifically told Pendergast he did not get the mushrooms from Gabriel. Cervantes told Pendergast he had taken Ecstasy (MDMA), which he purchased from Gabriel, on numerous occasions but had not used MDMA on the night of the attacks. Another recent criminal case in town involved a defendant named Richard Calkins, who also took psilocybin mushrooms and then shot and killed two of his best friends and maimed a third while they were watching television, with no preceding argument or other provocation. Calkins's crime and the role of psilocybin mushrooms in it had been reported in the local newspapers.

***586** Even though Cervantes and Calkins apparently did not know each other, Obstler embraced the theory that the "Richard" mentioned by A.P. in her testimony was this very same Richard Calkins. He argued at the new trial motion and again on appeal that Cervantes never made the remark about "Richard," and A.P. probably misunderstood him or made it up from publicity about the *Calkins* case because her family had become suspicious that they were the targets of someone seeking revenge against Gabriel for having provided the mushrooms that resulted in such violent consequences.

Despite their lack of an actual acquaintance with one another, Obstler claims there was a connection between Cervantes and Calkins. It turned out that Gabriel had sold the psilocybin mushrooms to Calkins more than three weeks before Cervantes's crimes, and Gabriel admitted as much to the police shortly after Calkins was arrested. That is apparently why he was in juvenile hall. Based on the reactions by Calkins and Cervantes after eating the mushrooms, Dr. Alex Stalcup, a defense addiction expert, speculated that the mushrooms in both cases may have been adulterated with MDMA or "angel dust" (PCP); the expert admitted on cross-examination that he did not, in fact, know whether the mushrooms were tainted. According to expert testimony in the *Calkins* case, some of the mushrooms in his possession did test positive for MDMA. From these leads, Obstler and his team have developed the theory that Gabriel also sold psilocybin mushrooms to Cervantes at around the same time he sold them to ****185** Calkins and they, too, were tainted with MDMA. [7]

Obstler also pointed to additional information about Cervantes's developmental and mental health history that could have been used at trial to help explain his behavior that night. Cervantes's umbilical cord was wrapped around his neck at birth, resulting in oxygen deprivation. He was required to use oxygen machines to maintain breathing at times in his childhood. He had learning difficulties in school and had an individualized education program (IEP). He was in a car accident as a child and suffered some head injuries, at once characterized as "minor," but having led to "moderately severe brain damage." He was diagnosed with attention deficit hyperactivity disorder (ADHD) in elementary school and had been on medication for it since second grade.

***587** But the evidence of Cervantes's developmental and mental health history was not all helpful. In one IEP, it was noted that Cervantes had an atypical obsession with sex and violence, so much so that the evaluator wondered if he had been sexually abused. When he was in the fifth or sixth grade he was removed from school and taken to the hospital after he said he was going to "kill [his] mother and burn [down the] house."

To help interpret the mental health evidence, Obstler sought out an expert, Dr. Michael Shore, a neuropsychologist, who conducted a battery of

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neurological tests and examinations, which led him to conclude that Cervantes had a baseline mental status of a ten-year-old. Among the tests he ordered performed was a single photon emission computed tomography (SPECT) study, which is a nuclear imaging test that employs glucose injected with radioactive material to measure brain activity. The SPECT test itself was performed by Dr. Daniel Amen, and his report was attached as an exhibit to the motion for a new trial. Dr. Amen concluded: "The most significant finding is decreased activity in the orbitofrontal cortex ... consistent with an ADHD like process." He also found scalloping, "often indicative of some form of toxic exposure," and decreased activity in the prefrontal pole, which "may indicate a history of brain injury."

Based in part on Dr. Amen's report, Dr. Shore concluded that Cervantes's brain was "diffusely damaged" and found specific "compromise" of the prefrontal cortex. He opined that Cervantes was in a state of "acute organic psychosis" when he attacked the children. Cervantes was also suffering from "longstanding and quite significant" depression, "moderate brain damage," and learning disabilities. Dr. Shore believed Cervantes's drug use partly explained his behavior that night, and he was allowed to testify to Cervantes's drug and alcohol history. He opined that Cervantes's substance abuse may have contributed to his brain damage, along with lack of oxygen at birth and "multiple minor head injuries." Dr. Shore accepted as a fact that Cervantes had taken psilocybin mushrooms on the night of his crimes. His opinion was based on brain damage, psychedelic ****186** drug ingestion, and depression; no single factor could be considered the cause of the psychotic episode.

Dr. Stalcup, a physician specializing in addiction medicine, also conducted an examination of Cervantes, focusing on the effect of hallucinogenic drugs on someone with his specific cognitive impairments, as described by Dr. Shore. Assuming Cervantes consumed psilocybin mushrooms on the night of the crimes, Dr. Stalcup endorsed Dr. Shore's opinion and concluded that Cervantes's alcohol and drug use caused an organic psychosis and Cervantes attacked his victims in a dissociative state. His opinion relied on Dr. Shore's report and on Cervantes's report of having taken psilocybin mushrooms that night. He was not allowed to testify that Cervantes was, in fact, using ***588** psilocybin mushrooms that night. He also thought Cervantes was "possibly" under the influence of MDMA. Dr. Stalcup also opined, however, even without psilocybin mushrooms, Cervantes's alcohol and marijuana use alone, combined with the deficits revealed in the SPECT scan, would have led to organic psychosis.

C. The Motion for a New Trial

On April 16, 2013, Obstler filed a motion for a new trial. Evidentiary hearings were conducted over the next several months, and on October 18, 2013, the court denied the motion. In addition to expert psychological testimony from Drs. Shore and Stalcup,[8] summarized above, Obstler called his legal expert, Coffer, to testify as an expert witness on competency of criminal defense counsel. (See fn. 7, *ante*.) In a lengthy written report with multiple attachments, as well as in testimony on the new trial motion, Coffer catalogued the errors and omissions he saw in Kirkpatrick's preparation for trial and trial strategy, and ultimately opined that Kirkpatrick had provided ineffective assistance of counsel. Obstler also called as witnesses two mental health experts retained by the defense before trial, as well as Kirkpatrick, Pendergast and Barton, and two of Kirkpatrick's superiors in the Conflict Defender's Office. The testimony will be summarized below, in the unpublished section of the opinion.

The trial court denied Cervantes's motion for a new trial, finding Kirkpatrick credible and her decisions "competently made based upon the information she had at the time." The court further found that, had the defense presented at trial the evidence presented in the new trial motion, "there is no reasonable probability that a different result would occur." The mental health evidence had included an "[atypical] obsession with sex and violence and lack of control and behavioral problems" and, had it been presented to the jury along with "the actual horrific facts of the crime itself," it "would have been absolutely devastating to the defense." The court also opined that "more evidence of voluntary intoxication through marijuana and psychedelic mushrooms" would not have resulted in a more favorable verdict for Cervantes.

D. Sentencing

On October 28, 2013, the court sentenced Cervantes to 50 years to life for two of the sex crimes under the one-strike law (two consecutive terms of 25- ***589** to-life), plus 11 years imposed consecutively for ****187** the attempted

murder of I.A., plus an additional consecutive life term for the attempted murder of A.P. The remaining counts were either imposed concurrently or stayed under section 654. Thus, Cervantes's aggregate sentence was 61 years to life, plus a consecutive life term. Importantly, the longest terms were attributable to the sex offenses under the one-strike law, four of which were general intent crimes (rape, sodomy and two counts of oral copulation). Under section 667.61, Cervantes was not awarded any credits for good conduct before sentencing. (See section II.C.2.c., *post*.) The probation officer had calculated Cervantes's exposure at four life sentences without possibility of parole, plus an indeterminate term of 155 years to life and a determinate term of 15 years, 4 months. The judge stayed many of the potential sentences on various counts of conviction and enhancements in an effort to bring the sentence within the limits established by *Graham, supra,* 560 U.S. at page 74, 130 S.Ct. 2011 and *Caballero, supra,* 55 Cal.4th at page 268, 145 Cal.Rptr.3d 286, 282 P.3d 291. Through its comments at sentencing and the many sentencing choices it made, we believe the court fairly clearly expressed its intention to impose a life sentence with the highest minimum term it could, while avoiding an unconstitutional sentence under *Caballero*.

II. DISCUSSION

A. Ineffective Assistance of Counsel

1. Cervantes's Claims of Ineffective Assistance

Still represented by Obstler and his firm on appeal, Cervantes contends Kirkpatrick was constitutionally ineffective in representing him, pointing out numerous errors she allegedly made. He claims that, in combination, these errors amounted to a complete failure to subject the prosecution's case to meaningful adversarial testing.

First, Cervantes argues trial counsel failed to adequately investigate certain details of the case, specifically she (1) failed to consult with Cervantes's two prior attorneys, who could have informed her of their investigation to date and their theories of the case; (2) failed to follow up on crime scene photographs that showed a bicycle in the garage of the home where the attacks occurred, which defense counsel claims would have bolstered Cervantes's story that he entered Gabriel's house to retrieve his bike; (3) failed to follow up on crime scene photos that showed there was no forcible entry into the house; (4) failed to investigate the route Cervantes took in arriving at Gabriel's house; (5) failed to investigate other forensic evidence, specifically five cigarette butts, a beer can, and footprints outside the home that showed they were made before Cervantes entered the house, not afterwards, and ***590** therefore tended to undercut the prosecution's theory of the crime; (6) failed to subject the prosecution's revenge theory to adversarial scrutiny or investigation; (7) failed to investigate Gabriel's "exculpatory" statement to police about Cervantes's revenge motive; (8) failed to investigate or present evidence about who "Richard" was; and (9) abandoned an involuntary intoxication/drug psychosis defense based on consumption of psilocybin mushrooms laced with MDMA, based largely on a negative urine test conducted after Cervantes's arrest, which Cervantes claims was unreliable and an insubstantial basis for rejecting the mushroom defense.

Second, he claims Kirkpatrick failed to adequately communicate with or prepare her expert witnesses, which caused her to "abandon[ ] important mental health and cognitive brain evidence that was not only ****188** material but crucial to the jury's determination" of the specific intent required for many of the alleged offenses. Specifically, she cut off communication with Dr. Roderick Pettis, an expert psychiatrist hired by the defense, without even securing a copy of his detailed notes of an interview he had conducted with Cervantes. She also failed to obtain a recommended brain scan for Cervantes. And, when informed shortly before trial by a different defense expert, Dr. John Podboy, a clinical and forensic psychologist, that Cervantes may have been in a "dissociative state" at the time of the crimes, she decided not to call that expert as a witness and went to trial without investigating further.

And third, Cervantes contends the defense that Kirkpatrick did put on through Zehnder's testimony was not a legally viable voluntary intoxication defense, primarily because she did not choose an appropriate expert to explain why his state of intoxication would have negated Cervantes's formation of the specific intent required for the various crimes.[9] Zehnder testified primarily about the physical effects of alcohol intoxication, such as slurred speech and impairment of motor skills. We agree with Cervantes that he would have been better served if Kirkpatrick had called a neuroscience expert[10] who could have testified about the mental effects of alcohol intoxication and perhaps

psilocybin intoxication on a person with Cervantes's apparent cognitive deficits.

[1] Where, as here, the trial court has denied a motion for a new trial based on an ineffective assistance claim, we apply the standard of review applicable to mixed questions of law and fact, upholding the trial court's factual findings to ***591** the extent they are supported by substantial evidence, but reviewing de novo the ultimate question of whether the facts demonstrate a violation of the right to effective counsel. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724–725, 208 Cal.Rptr. 708.)

[2] We agree with Cervantes that trial counsel should have done more to investigate leads developed by Pendergast and Barton. Kirkpatrick's limited investigation of a psilocybin mushroom defense fell below the standard of objectively reasonable representation. Her minimal and ineffective communication with defense-retained experts caused her to make an uninformed decision in rejecting a theory of cognitive impairment as part of her voluntary intoxication defense. She chose as her only expert witness someone who was not qualified to opine on the mental impacts of extreme alcohol intoxication, much less on the combined effects of alcohol and psilocybin mushrooms on someone with Cervantes's brain impairment.

Because Kirkpatrick's performance leaves us without confidence in the outcome of the trial on the specific intent crimes other than burglary, we hold she was constitutionally ineffective. We therefore reverse the eight counts specified in the disposition. On the general intent sex offenses, assault with a deadly weapon, and burglary charges, however, we are satisfied Cervantes got a fair trial with a reliable result, and we affirm.

****189** 2.–7.e[**]

B. Proposition 57

1. *Overview of this Section*

Having concluded that we must reverse eight counts of conviction that required specific intent and will affirm ***594** seven counts, including the burglary conviction, we now turn to the impact on our disposition of Prop 57, which was passed by the voters on November 8, 2016.[28] Six weeks later, Cervantes sought and was granted permission to file a supplemental brief arguing that Prop 57 should be applied retroactively to all non-final cases under the rationale of *In re Estrada* (1965) 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948 (*Estrada*), where the Supreme Court held that a legislative reduction in the statutory penalty for a crime must be applied to all non-final cases. He contends Prop 57 requires us to vacate the judgment entered below and remand the case for a “fitness” or “transfer” hearing[29] in juvenile court, after which Cervantes would either be dealt with through the juvenile justice system, or else would be transferred by the juvenile court[30] to adult court under Welfare and Institutions Code, section 707[31] for a new trial. In fact, he contends this procedure is mandated for any counts reversed on appeal and remanded for a new trial, even if Prop 57 is *not* given retroactive effect. He then suggests that such a disposition would result in “split” jurisdiction between two courts, with reversed counts going to juvenile court and affirmed counts remaining in criminal court, which would violate the rule of *In re Dennis J.* (1977) 72 Cal.App.3d 755, 760–762, 140 Cal.Rptr. 463 (*Dennis J.*) that the same juvenile cannot have charges pending in both criminal court and juvenile court that might lead to conflicting orders from the two divisions. (But see Welf. & Inst. Code, § 707.01, subd. (a)(1) [allowing simultaneous jurisdiction].) Hence, he reasons, we may not reverse some counts and affirm others. A new trial of all counts is required.

***595** We reject the argument that Prop 57 gives Cervantes, in effect, a full “do over” ****190** on all counts despite the fact he has already been tried, convicted and sentenced, but we conclude that Prop 57, even if not given retroactive effect—which we conclude is not mandated—nonetheless requires a fitness hearing. That hearing will, in effect, determine which department of the superior court, the juvenile court or the adult criminal court, will try any remaining counts on remand (should the People elect retrial) and will decide the *consequences* Cervantes faces for the offenses of which he stands convicted or that are found to be true following remand.

In arriving at this conclusion, we specifically reject Cervantes's argument that he is entitled to a fitness hearing on retroactivity or equal protection grounds because (1) the juvenile division and criminal division of superior court both have subject matter jurisdiction

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over statutorily specified crimes committed by minors; (2) the statutory amendments under Prop 57 do not amount to a reduction of a penalty and are not subject to retroactive application under *Estrada*; and (3) failing to extend the new hearing procedure to Cervantes does not deprive him of equal protection because a prospective procedural change in the law that treats offenders differently depending upon when their crimes were committed does not violate equal protection. We ultimately agree, however, based on both the text of Prop 57 and the ameliorative purpose behind it, that Cervantes is entitled to a fitness hearing before he may be retried or resentenced in adult court. The initiative measure fundamentally favors rehabilitation over punishment [32] for juveniles and requires procedural changes to ensure that juveniles facing trial in adult criminal court will receive a judicially conducted fitness hearing first. Because Cervantes once again faces a trial or resentencing on remand, he is entitled under Prop 57 to a transfer to juvenile court for a fitness hearing, as described in Section 707, before retrial or resentencing.

2. *Procedure for Transferring a Minor to Adult Court under Prop 57*

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; ***596** *Juan G. v. Superior Court* (2012) 209 Cal.App.4th 1480, 1489, & fn. 4, 147 Cal.Rptr.3d 816 (*Juan G.*).) Beginning in March 2000 and continuing until the adoption of Prop 57, however, the district attorney was authorized, as a matter of executive discretion, to file a criminal action against a juvenile in certain defined circumstances, rather than filing the case in juvenile court, a practice known as "direct filing" or "discretionary direct filing." (Former § 707, subd. (d); 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 (Prop 21); see generally, *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 548–550, 117 Cal.Rptr.2d 168, 41 P.3d 3 (*Manduley*); *Juan G.*, at p. 1489 & fn. 4, 147 Cal.Rptr.3d 816.) Some crimes, like Cervantes's, were considered so serious by the voters that, if committed by a minor ****191** age 14 or older, juvenile court was not an option; filing in adult criminal court was mandated by statute ("mandatory direct filing"). [33] (Former § 602, subd. (b); see Prop 21, § 18, p. 125; *Juan G.*, at pp. 1488–1489, 147 Cal.Rptr.3d 816.)

Prop 57 was designed to undo Prop 21. After the passage of Prop 57, the charging instrument for all juvenile crimes must be filed in juvenile court. (See § 602.) While prosecuting attorneys may move to transfer certain categories of cases to criminal court (§ 707, subd. (a)(1)), they have no authority to directly and independently file a criminal complaint against someone who broke the law as a juvenile, even by committing the crimes that previously qualified for mandatory direct filing. In cases where transfer to adult court is authorized (§ 707, subd. (b)) (and not all cases qualify), [34] the juvenile court now has sole authority to determine whether the minor should ***597** be transferred. (§ 707, subd. (a)(2); see *Brown v. Superior Court* (2016) 63 Cal.4th 335, 340–341, 203 Cal.Rptr.3d 1, 371 P.3d 223 [describing history and general provisions of the initiative measure].) Thus, Prop 57 effectively guarantees a juvenile accused felon a right to a fitness hearing before he or she may be sent to the criminal division for prosecution as an adult.

3. *Prop 57 Is Not Retroactive.*

Cervantes relies on two provisions of Prop 57 in advancing his claim of retroactivity: (1) Section 602 was amended to provide that jurisdiction in the juvenile court is what Cervantes calls "exclusive"; and (2) Section 707 was amended to require a fitness hearing in juvenile court as a prerequisite for transfer of a juvenile to adult criminal court. (§ 707, subd. (a).) He relies on voter intent to invest greater efforts in rehabilitation—"especially for juveniles"—in order to stop the "revolving door" of crime. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 2, p. 141, (2016 Voter Guide).) Because a juvenile court has a time limit on jurisdiction over its wards (e.g., Welf. & Inst. Code, §§ 607, 607.1, 1769), and because its focus is on rehabilitation, [35] Cervantes argues ****192** the new transfer provisions effectively mandate more lenient treatment—or a reduction in punishment—such that Prop 57 must be applied retroactively under *Estrada*.

We reject Cervantes's position on retroactivity because (1) jurisdiction is concurrent in crimes that subject the juvenile offender to adult prosecution; (2) *Estrada*'s reasoning does not support a retroactive application; and

(3) subsequent Supreme Court cases interpreting *Estrada* have limited it to situations in which there is, strictly speaking, a " ' "legislative mitigation of the penalty *for a particular crime*." ' " (*People v. Brown* (2012) 54 Cal.4th 314, 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182 (*Brown*).)

a. Section 602 Does Not Deprive the Criminal Division of Concurrent Subject Matter Jurisdiction Over Statutorily Specified Crimes Committed by Juveniles.

[3] With the passage of Prop 57, Section 602 now reads: "Except as provided in Section 707, any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within ***598** the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court." Cervantes contends this gives the juvenile court "exclusive jurisdiction" over his case and the cases of all juvenile offenders [36] whose cases are not yet final on appeal—at least until a fitness hearing is conducted.

Yet, the statute does not use the term "exclusive," and it assigns jurisdiction over all juvenile criminal matters to the juvenile court explicitly subject to the exceptions in Section 707. Section 707 applies to "a minor ... alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age." Section 707, subdivision (b) lists 30 serious crimes that subject even the youngest juveniles eligible for criminal prosecution under section 707, ages 14 and 15, to adult prosecution.

[4] **[5]** We conclude, for crimes that qualify the juvenile offender for transfer to adult court, subject matter jurisdiction is concurrent between the criminal division and the juvenile division. "The juvenile court and the criminal court are divisions of the superior court, which has subject matter jurisdiction over criminal matters and civil matters, including juvenile proceedings. (See Cal. Const., art. VI, § 10.) When exercising the jurisdiction conferred by the juvenile court law, the superior court is designated as the juvenile court. (Welf. & Inst. Code, § 245.) Accordingly, when we refer herein to the jurisdiction of the juvenile court or the jurisdiction of the criminal court, we do not refer to subject matter jurisdiction, but rather to the statutory authority of the particular division of the superior court, in a given case, to proceed under the juvenile court law or the law generally applicable in criminal actions. (See *In re Harris* (1993) 5 Cal.4th 813, 837, 21 Cal.Rptr.2d 373, 855 P.2d 391.)" (****193** *Manduley, supra*, 27 Cal.4th at p. 548, fn. 3, 117 Cal.Rptr.2d 168, 41 P.3d 3.) To the extent Cervantes suggests Prop 57 deprives the criminal court of fundamental subject matter jurisdiction over a juvenile felon [37] upon remand after appeal, we disagree. [38]

***599** Prop 57's amendment to Section 602 does not govern where jurisdiction must be sited permanently, nor does it either prescribe or prohibit revisiting the jurisdictional issue when a case is remanded for a new trial. Being subject to Section 707, subdivision (b), which lists the crimes that may qualify a 14-year-old for transfer to criminal court, Cervantes is subject to concurrent jurisdiction in both criminal and juvenile divisions of superior court. Here, the criminal division lawfully assumed jurisdiction under pre-Prop 57 law and retained jurisdiction throughout the trial; Section 602 does not oust the criminal division of jurisdiction upon remand after an appeal.

b. *Estrada*'s Reasoning Does Not Support Retroactive Application of Prop 57.

[6] **[7]** New statutes or changes in statutes ordinarily are applied prospectively only, "absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287, 279 Cal.Rptr. 592, 807 P.2d 434 (*Tapia*); see also § 3; *Brown, supra*, 54 Cal.4th at pp. 319–323, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) Nevertheless, a well-recognized exception prevails when a criminal statute reduces the penalty for a given crime; in that circumstance, the new, less punitive statute applies to all defendants whose convictions are not yet final on appeal. (*Estrada, supra*, 63 Cal.2d at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948.)

Estrada involved an escape without force or violence from the California Rehabilitation ****194** Center at a time when that offense required a minimum one-year additional sentence and a two-year minimum after being returned to custody before parole consideration. (*Estrada,*

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supra, 63 Cal.2d at p. 743, 48 Cal.Rptr. 172, 408 P.2d 948.) Between the time of the escape and the time Estrada was convicted, however, ***600** the governing statutes were amended to reduce the minimum term to six months for nonviolent escape and to require no minimum period before parole consideration. (*Id.* at pp. 743–744, 48 Cal.Rptr. 172, 408 P.2d 948.) Estrada was being held in custody solely because of the minimum terms required by the former version of the statute and would have been entitled to release under the new version. (*Id.* at p. 744, 48 Cal.Rptr. 172, 408 P.2d 948.) Finding the reduction in penalty amounted to a legislative decision that the prior law had been too harsh, the Court held the amended statutes applied to the petitioner. "[L]egislative mitigation of the penalty for a particular crime" called for the retroactive application of the reduced penalty, effectively establishing a rule that any law reducing the penalty for a crime was intended to apply to all non-final judgments. (*Id.* at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948; see also, *People v. Conley* (2016) 63 Cal.4th 646, 656, 203 Cal.Rptr.3d 622, 373 P.3d 435 [*Estrada*'s holding "reflects a presumption about legislative intent, rather than a constitutional command"].)

c. The Supreme Court Has Limited *Estrada* to Statutory Changes That Mitigate the Penalty for a Particular Offense.

[8] Cervantes argues that Prop 57 amounts to a reduction in punishment, requiring us to find it retroactive under *Estrada*. But later Supreme Court cases have limited *Estrada's* retroactivity exception to statutory changes that mitigate the penalty for a particular crime, which is not true of Prop 57.

In 1991, in response to Proposition 115 (Prop 115), which, among other things, gave judges in criminal trials the power to conduct voir dire instead of attorneys (see Code Civ. Proc., § 223), *Tapia, supra*, 53 Cal.3d 282, 279 Cal.Rptr. 592, 807 P.2d 434 held most of the new procedures, including that relating to voir dire, were not retroactive under *Estrada*. (*Id.* at pp. 287, 279 Cal.Rptr. 592, 807 P.2d 434.) *Tapia* emphasized that the retroactivity exception turns on the type of legal change effectuated by the new or amended statute: changes in direct penal consequences like the one under consideration in *Estrada*, would call for retroactive application, while those like the one involved in *Tapia* that "address the conduct of trials which have yet to take place, rather than criminal behavior which has already taken place" are to be applied prospectively.[39] (*Id.* at pp. 288–289, 279 Cal.Rptr. 592, 807 P.2d 434.) Under that rubric, the transfer procedure dictated by Prop 57 is not one that ***601** addressed "criminal ****195** 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." (*Ibid.*) This suggests its application should be prospective only.

Brown, supra, 54 Cal.4th 314, 142 Cal.Rptr.3d 824, 278 P.3d 1182 even more strongly supports a prospective application. *Brown* dealt with a situation more closely linked to the length of punishment for an offense than Prop 57 is. Specifically, *Brown* addressed the legislative changes in presentence conduct credits in 2010–2011, which first gave pretrial detainees more generous conduct credits, then reverted to less generous credits, and finally switched back again to more generous credits. (*Brown*, at pp. 317–318, 320, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) The Supreme Court unanimously decided that a jail inmate awaiting trial and sentencing should earn credits at the rate in effect at the time he served the days in jail, not at the more generous rate available when he was sentenced. (*Id.* at pp. 319–330, 142 Cal.Rptr.3d 824, 278 P.3d 1182; see also, *In re Strick* (1983) 148 Cal.App.3d 906, 909–914, 196 Cal.Rptr. 293 [legislation to allow greater worktime credits in prison held not to apply retroactively and not to violate equal protection].)

Brown recognized that a change in credits-earning eligibility would affect the length of a prisoner's time in custody, and in that sense would have a direct effect on punishment (*Brown, supra*, 54 Cal.4th at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182), but nevertheless held *Estrada* did not apply. The *Brown* court called the *Estrada* rule a "contextually specific qualification to the ordinary presumption that statutes operate prospectively." (*Id.* at p. 323, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) It reasoned, "the rule and logic of *Estrada* is specifically directed to a statute that represents ' "a legislative mitigation of the *penalty for a particular crime*" ' (*Estrada*, at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948, italics added) because such a law supports the inference that the Legislature would prefer to impose the new, shorter penalty rather than to ' "satisfy a desire for vengeance" ' (*ibid.*). The same logic does not inform our understanding of a law that

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rewards good behavior in prison." (*Brown*, at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

We find the rationale underlying *Estrada* equally inapplicable to the procedural changes implemented by Prop 57. While Prop 57 will have a substantive impact on time in custody in some cases—sometimes a big impact—the transfer procedure required under Section 707 does not resemble the clear-cut reduction in penalty involved in *Estrada*. Although it is now the juvenile court, rather than the district attorney, that makes the decision whether a juvenile felon will be tried as an adult, we may presume that many cases filed in juvenile court will still ***602** end up in adult court (with adult penalties) under Prop 57, after the fitness hearing is held. Prop 57 mitigates the penalty for a particular crime even less directly than the jail credits at issue in *Brown*. More like the voir dire procedure in *Tapia,* which affected who performed a particular function in the judicial process, Prop 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*. (*Brown, supra*, 54 Cal.4th at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

4. *Applied Prospectively, Prop 57 Requires A Fitness Hearing Before a Juvenile Felon Is "Tried in Adult Court" Initially or on Remand.*

a. Textual Provisions of Prop 57 and Principles of Statutory Construction Bearing on this Issue

[9] Section 2 of Prop 57, titled "Purpose and Intent," "[r]equire[s] a judge, not ****196** a prosecutor, to decide whether juveniles should be tried in adult court." (2016 Voter Guide, *supra,* text of Prop. 57, § 2, p. 141.) The Legislative Analyst spoke even more strongly: "the only way a youth could be tried in adult court is if the juvenile court judge in the hearing [under Section 707, subdivision (a)(2)]] decides to transfer the youth to adult court." (2016 Voter Guide, *supra,* analysis of Prop. 57 by Legis. Analyst, p. 56.) Thus, the phrase, "tried in adult court"—or the prospect of being tried in adult court upon the filing of a transfer motion—appears to be the trigger for a juvenile's right to a fitness hearing. This case requires us to confront whether prospective application of Prop 57 requires a fitness hearing if a juvenile felon has had one trial in adult court but is about to be tried again because his case is being remanded for partial retrial or resentencing.

The key statutes amended to effectuate the juvenile provisions of Prop 57 were Section 602 and Section 707, the latter of which provides for the mechanics of the fitness hearing. (2016 Voter Guide, *supra*, text of Prop 57, §§ 4.1 & 4.2, pp. 141–142.) Section 707 describes the ordinary chronology of a fitness hearing when charges are filed after Prop 57's effective date. (See section II.B.2, *ante*, and section II.B.4.c., *post*.) It does not purport to explore the conduct of or entitlement to such a proceeding on remand. Section 707 describes its reach broadly, indicating it applies "[i]n *any case* in which a minor is alleged to be a person described in Section 602." (§ 707, subd. (a)(1), italics added.) We see nothing in Section 707 that requires the allegation to be pending in juvenile court at the time of the fitness hearing. One of the allegations included in each of the counts in the amended ***603** information in criminal court was that Cervantes was "14 years of age" at the time of his crimes, citing former Section 602, subdivision (b). Thus, in facing retrial on remand, Cervantes facially qualifies for a fitness hearing. Nothing in Prop 57 indicates the offense had to occur on or after the effective date of Prop 57 in order for the new procedures to apply. (Cf. *John L. v. Superior Court* (2004) 33 Cal.4th 158, 169, 14 Cal.Rptr.3d 261, 91 P.3d 205; *In re Chong K.* (2006) 145 Cal.App.4th 13, 18–19, 51 Cal.Rptr.3d 350.) The amendment to section 602 is also critically important to understanding the availability of a fitness hearing because it strikes out entirely former subdivision (b) and its reference to mandatory direct filing, thus raising the question whether a criminal prosecution may be reinitiated on retrial where the original filing was by authority of former subdivision (b). Together, these two sections provide a general framework for a transfer hearing in all post-Prop 57 initiated juvenile cases, but neither sheds much light on how Section 707 should be applied, if at all, in the case of a remand.

"In interpreting a voter initiative ..., we apply the same principles that govern the construction of a statute." (*People v. Canty* (2004) 32 Cal.4th 1266, 1276, 14 Cal.Rptr.3d 1, 90 P.3d 1168 (*Canty*).) Of course, when the intent of a statute is clear from the plain meaning of its text, we follow its mandates without looking elsewhere. (*Greb v. Diamond Internat. Corp.* (2013) 56 Cal.4th 243, 256, 153 Cal.Rptr.3d 198, 295 P.3d 353; *People v. Leal* (2004) 33 Cal.4th 999, 1008, 16 Cal.Rptr.3d 869, 94 P.3d 1071.) Clear intent, clearly expressed, is decisive. But Section 707, to the extent it provides clues to the

availability of a fitness hearing on remand, does not explicitly or by clear implication either authorize or preclude such a procedure. It does anticipate the fitness hearing will be conducted "prior to the attachment of jeopardy." (§ 707, subd. (a)(1).) As we shall discuss, that language naturally raises a question as to whether, on a retrial after remand, ****197** jeopardy attaches anew with the swearing of a new jury, or whether the reference to "attachment of jeopardy" should be construed as a reference to the attachment of jeopardy at the first trial. We find the language of Section 707 to be ambiguous on the issue before us, which requires that we consult additional interpretive aids in understanding its meaning.

[10] " '[T]he "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a measure comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute.' " (*Canty, supra,* 32 Cal.4th at p. 1276, 14 Cal.Rptr.3d 1, 90 P.3d 1168; accord, *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299.) "When construing a statute or an initiative measure, we are ***604** obliged to give effect to every phrase and paragraph of the law, leaving no part useless or deprived of meaning." (*People v. Nava* (1996) 47 Cal.App.4th 1732, 1737, 55 Cal.Rptr.2d 543.) "Because the most reasonable interpretation of a [statutory] provision [enacted as a voter initiative] may be reflected, in part, by evidence of the enacting body's intent beyond the statutory language itself, in its history and background [citation], [a court] also consider[s] the measure as presented to the voters with any uncodified findings and statements of intent. In considering the purpose of legislation, statements of the intent of the enacting body contained in a preamble, while not conclusive, are entitled to consideration. [Citations.] Although such statements in an uncodified section do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute." (*Canty, supra,* at p. 1280, 14 Cal.Rptr.3d 1, 90 P.3d 1168.) In determining voter intent, we may also look to the ballot arguments favoring the measure, the Legislative Analyst's interpretation, and the history of the initiative measure. (*Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1256, 48 Cal.Rptr.2d 12, 906 P.2d 1112.)

Applying those guidelines, additional uncodified provisions of Prop 57 inform our interpretation of its scope. Uncodified section 5 mandates that Prop 57 be "broadly construed to accomplish its purposes," and that section actually prohibits the Legislature from amending Section 602 and Section 707 unless "such amendments are consistent with and further the intent of this act." (2016 Voter Guide, *supra*, text of Prop. 57, § 5, p. 145.) Uncodified section 9 also advises us to "liberally construe[ ] [Prop 57] to effectuate its purposes." (2016 Voter Guide, text of Prop 57, § 9, p. 146.)

In reaching our conclusion about the availability of a fitness hearing on remand, we employ the usual rules of construction to ascertain the intent of the electorate, which of course is our ultimate objective in any endeavor to construe a voter initiative. (*Canty, supra,* 32 Cal.4th at p. 1276, 14 Cal.Rptr.3d 1, 90 P.3d 1168.) We find especially significant, indeed controlling, the tenet requiring us to read a statute in a manner to effectuate its underlying purpose. (*Id.* at pp. 1276–1277, 14 Cal.Rptr.3d 1, 90 P.3d 1168 ["The intent of the law prevails over the letter of the law, and ' "the letter will, if possible, be so read as to conform to the spirit of the act." [Citation.]' "]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245, 149 Cal.Rptr. 239, 583 P.2d 1281 ["The literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers."].) With these principles and provisions in mind, we turn to the task of determining Prop 57's impact on this case.

***605** ****198** b. The Ameliorative Intent Underlying Prop 57 Is Implemented Largely Through the Requirement of an Impartial Judicial Fitness Hearing to Inquire into the Juvenile Felon's "Behavioral Patterns and Social History" and to Determine His or Her Amenability to Rehabilitation Through Juvenile Court.

[11] Taking a broad view of the stated "Purpose and Intent" of Prop 57 in section 2 of the initiative measure, we must first acknowledge it as a dramatic change of course and a ringing endorsement of rehabilitation as opposed to pure punishment, especially for youthful offenders. Indeed, Prop 57 expressly aimed to "Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles." (2016 Voter Guide, *supra,* text of Prop. 57, § 2, p. 141.) The ballot argument in favor of Prop 57 noted that the measure "[r]equires judges instead of prosecutors to decide whether minors should be prosecuted as adults,

emphasizing rehabilitation for minors in the juvenile system. [¶] *We know what works*. Evidence shows that the more inmates are rehabilitated, the less likely they are to re-offend. Further evidence shows that minors who remain under juvenile court supervision are less likely to commit new crimes. Prop. 57 focuses on evidence-based rehabilitation and allows a juvenile court judge to decide whether or not a minor should be prosecuted as an adult." (2016 Voter Guide, *supra*, Argument in Favor of Proposition 57, p. 58.)

Prop 57 resulted in several important changes in the juvenile court law that, considered in light of its increased emphasis on rehabilitation, convince us Cervantes should be given a fitness hearing on remand. We are struck first with Prop 57's insistence that "a judge, not a prosecutor, [must] decide whether juveniles should be tried in adult court." (2016 Voter Guide, *supra,* text of Prop. 57, § 2, p. 141.) This suggests the electorate wanted an impartial decision-maker to weigh the juvenile felon's prospects for rehabilitation before allowing him or her to be "tried in adult court," with its attendant consequences. And judicial discretion was to be exercised in every individual case, regardless of the juvenile's crime.

Thus, Prop 57 eliminated the category of mandatory direct file crimes and offenders that under prior law had foreclosed any prospect of the rehabilitative juvenile model entirely to the most serious offenders, even as young as 14. (2016 Voter Guide, *supra,* text of Prop. 57, § 4.1, pp. 141–142.) This amendment represented a fundamental policy shift and a rejection of the concept of mandatory direct filing.

By excising subdivision (b) of Section 602, the voters determined that every juvenile facing trial in criminal court ***606** should first have his or her fitness for treatment under the juvenile court law considered. Under Prop 57, even those who have committed the most heinous crimes, and even if they are nearer to the age of majority, are entitled to a fitness hearing and the exercise of judicial discretion before transfer to adult court. This suggests an underlying popular conviction that no minor should be considered irredeemable or beyond rehabilitation without an individualized look at his or her background and characteristics. [40]

****199** Turning to the nature of the hearing provided, the probation department must first prepare and provide to the court a report on the juvenile's "behavioral patterns and social history" (§ 707, subd. (a)(1); 2016 Voter Guide, *supra,* text of Prop. 57, § 4.2, p. 142.) The report forms a partial basis for the court's ultimate decision, when considered in combination with any evidence the juvenile or the district attorney might present. (§ 707, subd. (a)(2).) In deciding whether to retain jurisdiction or transfer the minor to adult court, the court must consider specific statutorily defined factors, namely, the degree of criminal sophistication exhibited by the minor; whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction; the minor's previous delinquent history; the success of previous attempts by the juvenile court to rehabilitate the minor; and the circumstances and gravity of the offense alleged to have been committed by him or her. (§ 707, subd. (a)(2)(A)-(E).)

Though Cervantes claimed at the new trial motion that he had certain cognitive impairments and was drug-addled and in a dissociative mental state at the time of the crimes, he has never had such evidence presented on his behalf in a forum where his amenability to rehabilitation was an issue to be decided. Because he was subject to mandatory direct filing, no one ever exercised discretion to determine whether he was suitable for treatment in juvenile court. Yet, being 14 at the time of his crimes, Cervantes was in the youngest category of offenders subject to criminal prosecution under Section 707.

Thus, if we remand Cervantes for retrial without ordering a fitness hearing, he will fall into the subset of juveniles in which no discretion has ever been exercised, either by the district attorney or by the juvenile court, to determine whether the juvenile court law might have something to offer for his rehabilitation. This new opportunity, while not a "mitigation of penalty" in ***607** the *Estrada* sense, must be recognized as ameliorative in intent, and sometimes in substance, and not just a difference in identity of the person performing identical procedural tasks, such as that involved in *Tapia*.

c. The Requirement That the District Attorney Make the Transfer Motion "Prior to the Attachment of Jeopardy" Does Not Negate the Possibility That the Voters Intended Prop 57 to Apply on Remand.

[12] We must next determine whether the electorate intended to provide the same procedural protections to a

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juvenile felon returning to superior court for retrial after an appeal. Complicating the question is the fact that Prop 57 requires the district attorney's transfer motion to be brought "prior to the attachment of jeopardy." (§ 707, subd. (a)(1).) There was no occasion here for a transfer motion—which normally triggers a fitness hearing—because this case was prosecuted under the old "direct file" regime. The "prior to the attachment of jeopardy" language tends to suggest the electorate intended a Prop 57 fitness hearing to occur near the beginning of the case against a juvenile felon, before the jurisdictional hearing in juvenile court. (See fn. 41, *post*.) Literally and narrowly read, that language could be taken to mean that, if a case were transferred from criminal court to juvenile court for a fitness hearing after jeopardy had attached in criminal court, the case would be stuck in juvenile court, with no means for the district attorney to move it back to criminal court. We have no trouble concluding the voters would not have wanted a construction of Prop 57 that would leave the district attorney hamstrung by a claim the motion was untimely. Deciding the applicability ****200** of Prop 57 to Cervantes on remand forces us to grapple with the question of when jeopardy attaches in this context.

[13] **[14]** **[15]** Ordinarily, in criminal cases, jeopardy attaches when the jury, including alternates, is sworn.[41] (*People v. Hernandez* (2003) 30 Cal.4th 1, 5, 131 Cal.Rptr.2d 514, 64 P.3d 800.) Our task is to determine whether Cervantes may be tried on remand without a fitness hearing four years after his first jury was sworn, but before the trial court will embark on empaneling a new jury and conducting a new trial or resentencing on remand.

[16] **[17]** **[18]** **[19]** **[20]** Of course, the question of the attachment of jeopardy usually arises in the context of the double jeopardy prohibition of the Fifth Amendment. ***608** (U.S. Const., 5th Amend.) "The double jeopardy rules are well known. The protection against double jeopardy generally precludes retrial for the same offense after a conviction or an acquittal. [Citation.] An exception to this rule applies if the judgment of conviction is reversed as a result of a defendant's appeal, motion for new trial, or other challenge by a defendant to his or her conviction. [Citation.] Like other constitutional guarantees, double jeopardy protections are not absolute, and may be waived by a defendant. A defendant who files a motion for a new trial, like a defendant who moves for a mistrial, waives state and federal double jeopardy protections. [Citations.] By seeking reversal of a judgment of conviction on appeal, ' "[i]n effect [a defendant] assents to all the consequences legitimately following such reversal, and consents to be tried anew...." ' (*People v. Sachau* (1926) 78 Cal.App. 702, 706 [248 P. 960].)" (*People v. Eroshevich* (2014) 60 Cal.4th 583, 590-591, 179 Cal.Rptr.3d 356, 336 P.3d 678.) Under a waiver theory, jeopardy apparently does reattach with the swearing of a second jury on remand, but because the defendant initiated the appeal, he is deemed to have waived any double jeopardy objection to a retrial. Because *Eroshevich* appears to be the most recent statement on the subject from our state Supreme Court,[42] we follow the waiver theory adopted in that case.

Under that theory, we gather, Cervantes was no longer in jeopardy after he was convicted and sentenced in the trial below. Nevertheless, when his jury is sworn to retry the reversed counts in any upcoming trial upon remand, he will once again be "put in jeopardy of life or limb." (U.S. Const., 5th Amend.) His retrial is constitutionally permissible only because he implicitly waived his right to challenge it on double jeopardy grounds.

But does the waiver of a double jeopardy challenge by appeal necessarily encompass a waiver of new and more protective pretrial procedures enacted since Cervantes's last trial? We think not. If Prop 57 was intended to give every juvenile felon a right to a fitness hearing before being "tried in adult court," as we have held, then we think that right pertains to a ****201** second trial upon remand, as well. In context, the "prior to attachment of jeopardy" provision governs only *timing* of the prosecutor's transfer motion, not the more fundamental question of the defendant's *entitlement* to such a hearing. In the absence of express guidance in the text of Prop 57 on this particular point, we decline to adopt a reading of the "attachment of jeopardy" language that treats those two questions as one and the same. We find it unlikely the voters read the jeopardy phrase as disentitling a defendant to a fitness hearing on remand. (See also, 2016 Voter Guide, *supra,* text of ***609** Prop. 57, § 9, p. 146.) By our understanding of jeopardy principles, if we instruct the trial court to transfer the case to juvenile court for a fitness hearing before commencing any retrial, the district attorney will have an opportunity to request a transfer to adult court "prior to the attachment of jeopardy" within the meaning of Section 707, subdivision (a)(1). And by obtaining the benefit of Section 707 in that circumstance, the defendant

implicitly waives any right to object to a transfer motion. At oral argument, Cervantes' counsel explicitly waived any such objection, but we make clear that, having requested a fitness hearing at a point following the initial attachment of jeopardy, the waiver is deemed made by his acceptance of the benefit of section 707.

5. *Cervantes Is Eligible for A Fitness Hearing on Remand, Even If the Reversed Counts Are Dismissed and He Is Only Resentenced on the Affirmed Counts.*

[21] Because we realize the district attorney may opt not to retry Cervantes, we must also decide whether Cervantes will be entitled to a fitness hearing on remand if the district attorney decides not to retry him and the trial court then proceeds straight to resentencing. In other words, when Prop 57 mandates a fitness hearing before a juvenile felon is "tried in adult court" does it also mandate such a hearing before a defendant remanded after appeal is simply resentenced, rather than being retried?

We have already discussed the voters' strong support for providing a fitness hearing for every juvenile facing the prospect of being "tried in adult court." We now explain our conclusion that the voters were equally committed to providing such a hearing before a juvenile convicted of a felony could be *sentenced* in adult court.

[22] The Supreme Court has found the word "trial" to be "ambiguous" in terms of whether a "trial" encompasses the sentencing. "[W]hile the word 'trial' has long been interpreted to refer to the process culminating in the determination of guilt, particularly in bail cases [citations], the word has also been interpreted to include the sentence or judgment in other cases [citations]. Accordingly, we recognize that the word is ambiguous as to whether it includes proceedings following the determination of guilt...." (*People v. Overstreet* (1986) 42 Cal.3d 891, 896, 231 Cal.Rptr. 213, 726 P.2d 1288 [plur. opn.]; accord, *In re Martin* (1987) 44 Cal.3d 1, 49–50, 241 Cal.Rptr. 263, 744 P.2d 374 [opn. of Mosk, J., for a unanimous court].) For some purposes, the word "trial" does not encompass the sentencing. (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1253, 135 Cal.Rptr.2d 639, 70 P.3d 1054 [remand for retrial treated differently from remand for resentencing for motion under Code Civ. Proc., § 170.6]; ***610** *People v. Stuckey* (2009) 175 Cal.App.4th 898, 910–913, 96 Cal.Rptr.3d 477 (*Stuckey*) ["trial" does not include sentencing for purposes of Evid. Code, § 730, but acknowledging the word is "ambiguous"]; ****202** *People v. Domenzain* (1984) 161 Cal.App.3d 619, 621–623, & fn. 4, 207 Cal.Rptr. 724 [for purposes of time limits under section 1382, "brought to trial" on remand does not include delay in resentencing].)

That it is "ambiguous" means the word "tried" or "trial" may have different meanings in different contexts and different statutes. For instance, it has been recognized that the right to a speedy trial, guaranteed by the Sixth Amendment as well as by the state constitution (Cal. Const., art. I, § 15) and state statute (§§ 1191, 1202, 1381.5, 1382), includes the right to a speedy sentencing. (See *Pollard v. United States* (1957) 352 U.S. 354, 361, 77 S.Ct. 481, 1 L.Ed.2d 393 [assuming arguendo the "sentence is part of the [criminal] trial for purposes of the Sixth Amendment"]; *People v. Mahan* (1980) 111 Cal.App.3d 28, 32, 168 Cal.Rptr. 428 [state and federal constitutional rights to "speedy trial" include prompt sentencing]; *People v. Brown* (1968) 260 Cal.App.2d 745, 750–751, 67 Cal.Rptr. 288 ["Although in certain contexts the expression 'brought to trial' might possibly encompass only that portion of the criminal proceeding which results in a determination of the accused's guilt or innocence, it is clear that as used in section 1381.5 it includes the entry of a judgment or other final, appealable order. The imposition of sentence is an essential part of the speedy trial guaranteed to all accused."]; see also, *People v. Hsu* (2008) 168 Cal.App.4th 397, 404, 85 Cal.Rptr.3d 566 [declining to decide whether defendant had a right to speedy sentencing, but citing authorities acknowledging such a right]; cf. *People ex rel. Dorris v. McKamy* (1914) 168 Cal. 531, 535–536, 143 P. 752 ["the word 'trial,' as commonly understood in our practice, includes nothing beyond proceedings in the court in which the case originated"; appeal was not part of trial].) Similarly, a penalty trial in a capital case is regarded as part of a "single, unitary criminal proceeding" that includes a "retrial, be it of the entire proceedings or the penalty phase only." (*People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1233–1234, 23 Cal.Rptr.2d 403, 859 P.2d 102 [discovery allowed "at trial" under § 1054.3, subd. (a)(1) encompassed the penalty phase of a capital trial].) Sentencing is also recognized as a "critical stage" in the "criminal prosecution[ ]" for purposes of the Sixth Amendment right to counsel. (U.S. Const., 6th Amend; *Mempa v. Rhay* (1967) 389 U.S. 128, 133, 88 S.Ct. 254, 19 L.Ed.2d 336 [" 'the right to counsel is not a right

confined to representation during the trial on the merits' "]; cf. *People v. Arbee* (1983) 143 Cal.App.3d 351, 356, 192 Cal.Rptr. 13 [right to "fair trial" entitles defendant to be present at sentencing because it "constitutes an essential and material phase of the criminal proceeding"].)

Our task is to determine the meaning of "tried in adult court" in section 2 of Prop 57. Considering the material in the ballot pamphlet, we believe when the voters approved Prop 57, they most likely understood being ***611** "tried in adult court" to encompass all the proceedings in a criminal trial court, including sentencing. As demonstrated above, this is not an unheard of construction.

In reaching this conclusion we are cognizant that, although juvenile court jurisdiction would normally require Cervantes's release from custody at age 23 [43] (Welf. & Inst. Code, § 1769, subd. (c)), there are ****203** provisions allowing appropriate authorities to petition to keep a youthful inmate committed under Section 602 in custody longer—up to "the maximum term prescribed by law for the offense of which he or she was convicted"—based on concerns about public safety and dangerousness. (Welf. & Inst. Code, §§ 1780, 1782.) Upon petition by the Department of Youth Authority (now called the Division of Juvenile Facilities (DJF)), a minor committed under Section 602, who is about to reach the maximum age he can be held at DJF and who has not yet been confined for the maximum term attributable to his offenses, may be held for the remainder of the term applicable to the crimes of which he or she was convicted if the petitioner can show "that unrestrained freedom for that person would be dangerous to the public." (Welf. & Inst. Code, § 1780; see generally, *Chaparro v. Superior Court* (1990) 218 Cal.App.3d 560, 562–568, 267 Cal.Rptr. 181 (*Chaparro*).) In that situation, the inmate is entitled to a judicial hearing in which he or she has rights to presence, appointed counsel, compulsory process, and the right to produce evidence. (Welf. & Inst. Code, § 1781.)

Similarly, the prosecuting attorney may petition for extended detention if the inmate "would be physically dangerous to the public because of the person's mental or physical deficiency, disorder, or abnormality that causes the person to have serious difficulty controlling his or her dangerous behavior...." (Welf. & Inst. Code, § 1800; see *Chaparro, supra,* 218 Cal.App.3d at pp. 565, 568, 267 Cal.Rptr. 181.) The inmate is entitled to a jury trial on whether he or she represents a physical danger to the public. (Welf. & Inst. Code, § 1801.5.) In such circumstances, a juvenile offender over age 21 may be transferred to the Department of Corrections and Rehabilitation for appropriate placement in order to protect other wards in the DJF. (Welf. & Inst. Code, § 1802.) Renewed petitions may be filed every two years to keep the inmate in custody for two-year intervals. (*Ibid.*)

Thus, if the juvenile court were to retain jurisdiction after the fitness hearing, it would not necessarily result in an early release from custody for ***612** Cervantes, but it would give him a far greater opportunity for periodic inquiries into the necessity of his continued incarceration. As a result, a juvenile disposition must realistically be considered a more advantageous disposition than a criminal sentence for the same offense. And giving Cervantes a fitness hearing upon remand, while not required under *Estrada*, removes one obstacle to his obtaining an earlier discharge from custody.

We conclude the voters who approved Prop 57 intended a juvenile felon to have a fitness hearing before being sentenced in adult criminal court. We arrive at that conclusion based on the purposes underlying Prop 57, discussed above, and on the fact that, for many juvenile felons, including many whose crimes were less serious than Cervantes's, the time in custody they face in criminal court is far longer than their likely term of confinement in juvenile court. Indeed, it is the vastly more serious *consequences* of trial in criminal court that makes the choice of tribunal so important.

[23] [24] [25] That choice remains equally significant in the case of a retrial or resentencing. Cervantes has already been tried in adult court under direct filing and has been sentenced to literally a lifetime in prison. Though we shall reverse Cervantes's sentence on constitutional grounds, he faces almost equally severe consequences over again on remand, even without a retrial. It is not primarily the prospect of enduring another guilt determination that adversely affects Cervantes, however. Indeed, in some ways a trial in ****204** adult court offers the juvenile felon procedural advantages not available in juvenile court. [44] Instead, it is the severe sentencing options available in adult court that stand to seriously limit Cervantes's access to freedom at some meaningful point in his lifetime.

Acknowledging the practical reality that adult criminal sentencing is the biggest disadvantage to being "tried in

adult court," we find it hard to imagine the electorate wanted juveniles to receive a fitness hearing before being "tried" in adult court without also intending that juveniles receive such a hearing before being "sentenced" in adult court. We therefore hold that, beginning with the effective date of Prop 57, a juvenile felon may not be "sentenced in adult court" without a prior transfer hearing under Section 707, subdivision (a), if he or she so requests. ***613** We further hold that when a juvenile felon requests a fitness hearing after guilt determination but before sentencing, he waives any objection to the timeliness of the district attorney's motion to transfer the case back to adult court. For purposes of our case, that means, upon remand, even if the district attorney elects not to retry Cervantes on the reversed counts, Cervantes must nevertheless be granted a fitness hearing upon request before he may be resentenced on the affirmed counts.[45] We note that, even if Cervantes is ultimately transferred back to criminal court, the fitness hearing will also serve the purpose of making a record of any mitigating factors that may apply when he is resentenced and eventually comes up for parole. (See *People v. Franklin* (2016) 63 Cal.4th 261, 284–287, 202 Cal.Rptr.3d 496, 370 P.3d 1053 (*Franklin*).)

6. *Proceedings After Remand*

Upon remand, should Cervantes seek a fitness hearing, we shall order the trial court to suspend proceedings and transfer Cervantes to the juvenile court, where the court shall proceed as described in Section 707. If that occurs, the trial court shall hold the criminal proceedings in abeyance until completion of the fitness hearing. The juvenile court shall order the probation department to prepare a study of Cervantes's "behavioral patterns and social history," and the juvenile court shall consider that report in making a determination of fitness. (§ 707, subd. (a)(1).) The district attorney may present additional evidence of unfitness, and Cervantes shall have an opportunity to present evidence on his own behalf. (§ 707, subd. (a)(2).)

After the transfer hearing, if the juvenile court were to decide to retransfer Cervantes to the criminal division, the criminal court would then order the case back on calendar and proceed with the new trial or resentencing, at the People's election. (See Welf. & Inst. Code, § 707.1, subd. (a).) If the juvenile division were to determine that jurisdiction should be retained for further adjudication and disposition, ****205** then the trial court would transfer the matter to juvenile court for all purposes.

There are at least two statutes already in place that provide a procedural framework for a transfer to juvenile court while proceedings remain suspended in criminal court, from which the trial court may take direction on remand. Either statute may serve as a model for the procedure to be employed. First, Welfare and Institutions Code section 604 provides for suspension of proceedings in criminal court and certification to juvenile court ***614** when it is discovered that the defendant was a minor when the crime was committed. Rule 4.116 of the California Rules of Court establishes the procedure for such a transfer and spells out the information that must be provided to the juvenile court. A second analogue is section 1170.17, which allows for transfer from criminal court to juvenile court before sentencing for the express purpose of a fitness hearing. Section 1170.17 provides for a judicial assessment of fitness before sentencing whenever a juvenile felon has been "prosecuted" under the criminal law "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." (§ 1170.17, subd. (a).) In such a case, upon conviction, the defendant may bring a motion for a fitness hearing. (*Ibid.*; *id.* at subd. (b).) Under the Rules of Court, however, Cervantes himself and other juvenile felons tried in criminal court under the direct filing procedure are not eligible to bring a motion under section 1170.17.[46] The procedure described in that section may nevertheless be used on remand for the fitness hearing we order under Prop 57.

C. Eighth Amendment

1. *Cervantes's Eighth Amendment Claims*

Cervantes also claims he must be granted relief from an unconstitutional sentence, which he alleges is unconstitutional because it was imposed for reasons of retribution (*Miller*, *supra*, 132 S.Ct. at p. 2469) and because it is a de facto sentence of life without possibility of parole (LWOP). (*Graham*, *supra*, 560 U.S. at p. 74, 130 S.Ct. 2011; *Caballero*, *supra*, 55 Cal.4th at p. 268, 145 Cal.Rptr.3d 286, 282 P.3d 291.) Given our remand for a fitness hearing in juvenile court, this case may not return to adult criminal court for resentencing. But in the event

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it does, and since, in any event, the maximum term of confinement that may be imposed on Cervantes in adult court or in juvenile court (see Welf. & Inst. Code, § 726, subd. (d)) is subject to the same constitutional limitation, we turn to Cervantes' Eighth Amendment claims so that any sentence imposed—wherever that may occur—may be selected with our view of the constitutional limits in mind. As we explain below, because we deal with nonhomicide offenses and find the sentence to be the functional equivalent of LWOP, we find *Graham* and *Caballero* controlling and do not reach the issue raised under *Miller.*

***615** 2. *The Sentence Is the Functional Equivalent of LWOP and Therefore Violates the Eighth Amendment under* Graham *and* Caballero.

a. The Reasoning of *Graham* and *Caballero*

The Eighth Amendment of the United States Constitution forbids "cruel and unusual ****206** punishments." (U.S. Const., 8th Amend; see also, Cal. Const., art. I, § 17 ["cruel or unusual"].) In *Graham*, *supra*, 560 U.S. 48, 130 S.Ct. 2011 the Supreme Court held the states may not sentence a juvenile nonhomicide offender to LWOP. [47] (*Id*. at p. 74, 130 S.Ct. 2011.) The court specifically noted that youth are different from adults, not just younger. The Court cited research showing that a minor's brain is not fully developed. (*Id.* at p. 68, 130 S.Ct. 2011.) "As compared to adults, juveniles have a ' "lack of maturity and an underdeveloped sense of responsibility" '; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.' [Citation.] ... Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.' [Citation.] A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.' " (*Ibid*., quoting *Roper v. Simmons* (2005) 543 U.S. 551, 561–570, 125 S.Ct. 1183, 161 L.Ed.2d 1 [unconstitutional to execute someone for crimes committed under age 18].)

[26] "[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments." (*Graham*, *supra*, 560 U.S. at p. 68, 130 S.Ct. 2011.) Finding young people to be qualitatively different from adults, *Graham* concluded the Eighth Amendment demands qualitatively different treatment at sentencing. *Graham* explained that a sentence of life without parole for one so young "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, [and] no [reason for] hope." (*Id.* at p. 79, 130 S.Ct. 2011.) The sentence " 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the juvenile convict], he will remain in prison for the rest of his days.' " (*Id.* at p. 70, 130 S.Ct. 2011.)

[27] But it was not ultimately the severity of the eventual punishment that inspired the Supreme Court to declare LWOP sentences unconstitutional for juvenile nonhomicide offenders; it was the lack of opportunity for parole release. (***616** *Graham, supra,* 560 U.S. at p. 74, 130 S.Ct. 2011.) "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the state must do, however, is give [juvenile offenders] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id.* at p. 75, 130 S.Ct. 2011.)

[28] **[29]** In *Caballero*, the California Supreme Court held *Graham*'s reasoning also applies to a "term-of-years sentence that amounts to the functional equivalent of a life without parole sentence." (*Caballero, supra,* 55 Cal.4th at p. 268, 145 Cal.Rptr.3d 286, 282 P.3d 291.) "[S]entencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation ****207** and fitness to reenter society in the future." (*Ibid.*) In *Caballero* the sentence was 110 years to life, which obviously exceeded the defendant's life expectancy. (*Id.* at p. 265, 145 Cal.Rptr.3d 286, 282 P.3d 291.) *Caballero* defined the life expectancy of a juvenile sentenced to prison for life as "the normal life expectancy of a healthy person of defendant's age and gender living in the United States." (*Id.* at p. 267, fn. 3, 145 Cal.Rptr.3d 286, 282 P.3d 291.) Its holding seems to require sentencing and reviewing courts to consult

mortality tables to determine the constitutionality of a proposed or actual sentence.

In the years since *Caballero*, the published cases in California have defined a sentence of 43 years to life, with parole eligibility at age 55, as constitutional (*People v. Bell* (2016) 3 Cal.App.5th 865, 872–880, 208 Cal.Rptr.3d 102; see also *People v. Perez* (2013) 214 Cal.App.4th 49, 51–52, 154 Cal.Rptr.3d 114 [30-to-life sentence, with parole eligibility at age 47, not de facto LWOP]) and a sentence of 75-to-life, with parole eligibility at age 84, as unconstitutional (*People v. Lewis* (2013) 222 Cal.App.4th 108, 119, 165 Cal.Rptr.3d 624 (*Lewis*).) Between those poles, each court is on its own in determining where the constitutional boundaries lie. Although no published California case has declared a sentence unconstitutional that did not exceed the defendant's predicted life expectancy, there is out-of-state authority to suggest that a sentence allowing only "geriatric release" would be equally unconstitutional. [48]

***617** The California Supreme Court currently has pending before it a case that is expected to address whether a "total sentence of 50 years to life or 58 years to life [is] the functional equivalent of life without the possibility of parole for juvenile offenders[.]" (*People v. Contreras* (Jan. 15, 2015, D063428) [nonpub. opn.] review granted Apr. 15, 2015, S224564.) In the meantime, we must decide this case, applying *Caballero*. Ours is an easy decision because it falls clearly within *Caballero*'s prohibition. The more difficult decisions occur when the minimum eligible parole date falls shortly before the expiration of the defendant's life expectancy.

b. Section 3051 Does Not Apply to Cervantes.

[30] In response to *Graham*, *Miller* and *Caballero*, in 2013 the California Legislature enacted section 3051 affording ****208** youthful offenders earlier parole hearings, making most eligible for parole after 15 or 25 years in prison. (§ 3051, added by Stats. 2013, ch. 312, §§ 1, 4, pp. 2658–2662; *Franklin, supra*, 63 Cal.4th at pp. 276–278, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) Section 3051, however, specifically carves out an exception for juveniles sentenced under the one-strike law, as Cervantes was. (§§ 667.61, subd. (a), 3051, subd. (h).) In so doing, our Legislature has decided that juveniles convicted of certain serious sex crimes under aggravated circumstances may be kept in prison more than 25 years before being given a chance for parole. How much longer remains a matter for individual trial judges to determine on a case-by-case basis. *Franklin* and section 3051 have no application here. [49]

***618** c. Cervantes Must Serve More Than 66 Years in Prison Before He Will Be Eligible for Parole.

[31] **[32]** *Caballero* mandates that we compare the date upon which Cervantes will first become eligible for parole release and the date upon which he is expected to die, using actuarial tables. (*Caballero, supra*, 55 Cal.4th at pp. 267, fn. 3, 268, 145 Cal.Rptr.3d 286, 282 P.3d 291.) If his life expectancy expires before he becomes eligible for a parole hearing, his sentence is unconstitutional. (*Id.* at p. 268, 145 Cal.Rptr.3d 286, 282 P.3d 291.) As we shall explain, the 66 years that Cervantes must serve before becoming eligible for parole exceeds his life expectancy and the sentence is unconstitutional.

At the outset, we are confronted with the question of when Cervantes will be eligible for a parole hearing at which he would have an opportunity to "obtain release based on demonstrated maturity and rehabilitation." (*Graham, supra*, 560 U.S. at p. 75, 130 S.Ct. 2011.) Because the parties' briefs did not seem to agree on his parole eligibility date, we requested supplemental briefing. The parties have now informed us his minimum eligible parole date is September 23, 2077, as calculated by the California Department of Corrections and Rehabilitation (CDCR). [50] This means he will be 80 years old when he first becomes eligible for parole. [51]

Calculating his first parole eligibility date requires us to resolve a potential ambiguity between the one-strike law (§ 667.61) and worktime credits under section 2933 et seq. As enacted in 1994, section 667.61, subdivision (j) provided limited conduct credits of 15 percent to one-strike offenders (Stats. 1994, 1st Ex. Sess. 1993–1994, ch. 14, § 1, pp. 8570, 8572), [52] but even those credits were eliminated in 2006. The Sex Offender Punishment, Control, and Containment Act of 2006 (SOPCC) ****209** (Sen. Bill 1128 (2005–2006 Reg. Sess.)), amended section 667.61 to eliminate subdivision (j) and any reference to presentence conduct credits for one-strike offenders. (Stats. 2006, ch. ***619** 337, § 33, pp. 2639–2641.) Proposition 83, passed by the voters in November 2006, made similar changes.

(Voter Information Guide, Gen. Elec. (Nov. 7, 2006) text of Prop. 83, pp. 127–131.) The legislative history of the SOPCC, as well as the ballot pamphlet, reveal that the removal of former subdivision (j) was intended to eliminate conduct credits for defendants sentenced under section 667.61. As the Legislative Counsel's Digest of Senate Bill 1128 explains: "Existing law requires the person to receive credits for time served or for work, to reduce his or her sentence. [¶] This bill ... would eliminate the possibility of the person receiving credit to reduce his or her sentence." (See also, Sen. Com. on Public Safety, analysis of Sen. Bill No. 1128 (2005–2006); Voter Information Guide, Gen. Elec. (Nov. 7, 2006), analysis by Legis. Analyst and text of Prop. 83, pp. 42, 131 at < http://vig.cdn.sos.ca.gov/2006/general/pdf/english.pdf> [as of March 9, 2017].)

The trial judge apparently was aware of the 2006 amendments because he awarded Cervantes no conduct credits for presentence custody and told Cervantes he also would receive no conduct credits in prison. The legislative history leaves no doubt the judge was correct.

Thus, under our reading of the statutes, which is consistent with CDCR's calculation, Cervantes is not entitled to worktime credits in prison, except on his 11-year determinate sentence. Ordinarily, a defendant sentenced to a life term is eligible for parole after serving seven years or other minimum term established by law, whichever is greater. (§ 3046, subd. (a).) In this case, a 50-year minimum term was imposed under section 667.61 (two consecutive 25-to-life terms on counts 11 and 13). Thus, Cervantes will be required to serve at least 50 years with no worktime or conduct credits before reaching his minimum eligible parole date. (§§ 2933.1, subd. (a), 3046, subd. (a)(2).) Although CDCR is awarding him 15 percent worktime credit on his determinate term for attempted murder of I.A., he must still serve more than nine years of his 11-year sentence before becoming eligible for parole. [53] Cervantes's additional consecutive life term for the attempted murder of A.P. adds seven more years in computing Cervantes's minimum eligible parole date (§ 3046, subds. (a)(1) & (b)), making him ineligible for parole release until he serves more than 66 years of his sentence.

***620** d. Cervantes's Sentence Is Unconstitutional under *Graham* and *Caballero.*

[33] The aggregate sentence imposed on Cervantes is unconstitutional under ****210** *Caballero* because it exceeds his life expectancy. The California Center for Health Statistics records the life expectancy for a Hispanic male born in California between 1995 and 1997 as 79 years (Cal. Center for Health Statistics, California Life Expectancy: Abridged Life Tables by Race/Ethnicity for California 1995-97, p. 2 at < http://www.cdph.ca.gov/pubsforms/Pubs/OHIRLifetables1995-1997.pdf> [as of March 9, 2017]), whereas he will not be eligible for parole until age 80. Although the impact of growing up, and growing old, in prison may well reduce Cervantes's actual life expectancy significantly, we need not attempt to quantify that impact in this case. [54] Even assuming the life expectancy for Hispanic men outside of prison would apply equally to Cervantes, his minimum eligible parole date is still beyond the likely end of his life. [55] The sentence therefore constitutes the functional equivalent of LWOP.

Granted, with our reversal of the attempted murder convictions, the remaining sentence would be 50 years to life. Even that long a minimum term before parole eligibility is now under scrutiny by our Supreme Court. ***621** Assuming a 50-year to life sentence ultimately passes constitutional muster, and although the parole authorities or the juvenile court may decide to keep Cervantes in prison for the remainder of his life without offending the Constitution, it would be error of constitutional dimension under *Graham* and *Caballero* for a sentencing judge to write him off as irredeemable at the time of initial sentencing. (*Graham, supra,* 560 U.S. at pp. 68, 75, 130 S.Ct. 2011; *People v. Caballero, supra,* 55 Cal.4th at pp. 268–269, 145 Cal.Rptr.3d 286, 282 P.3d 291.) Giving Cervantes a fitness hearing will give him the same opportunity to present a case for his rehabilitative potential, in much same way that Section 3051 does, where it applies.

III. DISPOSITION

The judgment is affirmed as to counts 3, 8, 9, 11, 12, 13 and 14 and their accompanying enhancements and findings. The ****211** 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

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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 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 in accordance with the views expressed in section II.C. of this opinion, allowing him a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," as required by *Graham*, *supra*, 560 U.S. at pages 74–75, 130 S.Ct. 2011, and *Caballero*, *supra*, 55 Cal.4th at page 268, 145 Cal.Rptr.3d 286, 282 P.3d 291.

***622** Due to our resolution of the ineffective assistance of counsel claim, a copy of this opinion shall be sent to the State Bar of California and trial counsel shall be notified of the referral. (Bus. & Prof. Code, § 6086.7.)

We concur:

Ruvolo, P.J.

Rivera, J.

All Citations

9 Cal.App.5th 569, 215 Cal.Rptr.3d 174, 17 Cal. Daily Op. Serv. 2243, 2017 Daily Journal D.A.R. 2226

Footnotes

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II.A.2 through II.A.7.e.

1 Statutory references, unless otherwise indicated, are to the Penal Code.

2 The true nature of the relationship between Cervantes and Gabriel was ambiguous. There was evidence that they had a "very strong relationship," Cervantes "worship[ped]" Gabriel, and Gabriel taught Cervantes about taking drugs. But Cervantes, who was younger, was also described as "sort of the lackey," and Gabriel told the police he did not like Cervantes very much and called him "hella stupid," "retarded," and a "pussy."

3 Defense counsel elicited testimony on cross-examination of a police witness that Cervantes was not wearing gloves at the time of his arrest, and that the officer did not know of any gloves found on the premises. An investigating detective did not recall A.P. saying the suspect wore gloves when she spoke to police near the time of the crime. The implication was that A.P. may have embellished her story and was not trustworthy.

4 As to count 1 (attempted murder of A.P.) the jury found there was premeditation and deliberation, but as to count 2 (attempted murder of I.A.) it did not find premeditation or deliberation (attempted second-degree murder). (§§ 187, 664.) As to both attempted murders it found personal use of a deadly weapon and personal infliction of great bodily injury. (§§ 12022, subd. (b)(1), 12022.7.) It also found Cervantes guilty of the following crimes and enhancements: first-degree burglary with use of a deadly weapon and personal infliction of great bodily injury on both children as well as burglary in the commission of the sex crimes. (§§ 459, 460, 667.61, subds. (d)(4), (e)(2), 12022, subd. (b)(1)); torture of both children and aggravated mayhem with respect to both, with great bodily injury and personal deadly weapon use on those four counts (§§ 205, 206, 12022, subd. (b)(1), 12022.7); personal infliction of great bodily injury in the commission of two counts of assault with a deadly weapon (§ 245, subd. (a)(1); 12022.7); assault with intent to commit rape, forcible rape on a person under age 14, sodomy by force on a person under age 14, two counts of forcible oral copulation on a person under age 14, and forcible lewd act on a child (§§ 220, subd. (a)(2), 261, subd. (a), 264, subd. (c)(1), 286, subd. (c)(2)(B), 288, subd. (b)(1), 288a, subd. (c)(2)(B)).

5 The jury's findings were not sufficient to support a one-strike sentence under section 667.61, subdivision (d)(4), which requires not only that the sex crimes occurred during a first degree burglary, but that the burglary was committed "with

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intent to commit" one of the sex crimes specified in subdivision (c). (§ 667.61, subd. (d)(4).) The jury's findings do not include the intent element. But the findings do support a 25-to-life sentence on each of the qualifying sex offenses based on burglary coupled with personal use of a deadly weapon, and because the victim was under age 14. (§ 667.61, subds. (a), (e)(2), (e)(3), (j)(1), (j)(2).)

6 A test of Cervantes's blood or urine was positive for THC (the active ingredient in marijuana). This was not brought out at trial.

7 Among the expert advice Obstler received was legal advice on competency of counsel in criminal defense from John Coffer, an attorney with 34 years of experience in both the prosecution and defense of criminal cases. Coffer prepared a lengthy written report that was admitted into evidence at the hearing on the new trial motion. The report is not signed under oath and is replete with hearsay, speculation and opinions well beyond his expertise. For instance, at the time he filed his report, Coffer's theory was that the mushrooms had been adulterated with PCP based on speculation by Dr. Alex Stalcup, an addiction expert hired by Obstler after trial. Despite this earlier theory, Obstler has now focused his suspicion on MDMA because of the similarities with the *Calkins* case.

8 Drs. Shore and Stalcup wrote reports summarizing their findings and opinions, but the trial court would not admit either report into evidence because they both contained hearsay. The judge's hearsay rulings in connection with expert testimony in these reports and in the hearing itself were, for the most part, consistent with *People v. Sanchez* (2016) 63 Cal.4th 665, 674–686, 204 Cal.Rptr.3d 102, 374 P.3d 320.

9 Cervantes also argues there were evidentiary errors at the hearing on his motion for a new trial that compromised the outcome of the motion. In light of our disposition on his claims of ineffective assistance of counsel, we do not separately address those claims, but we do address some of the claims of evidentiary error in our discussion of ineffective assistance of counsel.

10 When we use the term "neuroscience expert" we include any professional who has specialized knowledge of brain function and impairment.

** See footnote *, *ante*.

28 Prop 57 also included provisions relating to prison inmates, prison credits, and eased access to parole consideration. We deal in this opinion solely with the changes implemented with respect to juveniles.

29 Under Welfare and Institutions Code former section 707, subdivision (a)(1) and (c), the determination to be made was whether the minor was a "fit and proper subject to be dealt with under the juvenile court law." (See Stats. 2015, ch. 234, § 2, p. 2138.) The current section, as amended by Prop 57, eliminates the phrase beginning "fit and proper subject"; instead, the juvenile court is simply empowered to "decide whether the minor should be transferred to a court of criminal jurisdiction." (Welf. & Inst. Code, § 707, subd. (a)(2).) Given this change, it is perhaps more correct to refer to the hearing as a "transfer" hearing. The criteria to be used, however, correspond closely to the criteria used to determine fitness. (Compare Welf. & Inst. Code, § 707, subd. (a)(2)(A)–(E) with Welf. & Inst. Code, former § 707, subds. (a)(1)(A)-(E), (a)(2)(B)(i)–(v), (c)(1)–(5) (Stats. 2015, ch. 234, § 2, pp. 2138–2139).) We use the terms "fitness hearing" and "transfer hearing" interchangeably.

30 We refer to "juvenile courts" and "criminal courts" throughout this section of the opinion, rather than the more unwieldy "court of criminal jurisdiction" (Welf. & Inst. Code, § 707, subd. (a)) or "superior court sitting as a juvenile court" (see Welf. & Inst. Code, § 245.) We use "adult court" and "criminal court" (or a combination of the two) interchangeably.

31 In this section of our opinion we shall refer to both former and current Welfare and Institutions Code section 707 as "Section 707" and to both former and current Welfare and Institutions Code section 602 as "Section 602." The former sections will be designated as such.

32 This change of focus corresponds to a legislative change in section 1170, subdivision (a)(1), which recently adopted the language "the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice." (§ 1170, subd. (a)(1), as amended by Stats. 2016, ch. 696, § 1, effective January 1, 2017.) Beginning in 1977 and for nearly 40 years thereafter, the same statute reflected a pure punishment model: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." (Former § 1170, subd. (a)(1), added by Stats. 1976, ch. 1139, § 273, operative July 1, 1977.)

33 Mandatory direct filing existed before Prop 21 was passed, but it was authorized only for youths age 16 or older. (Stats. 1999, ch. 996, § 12.2, p. 7560; *Manduley*, *supra*, 27 Cal.4th at pp. 549–550, 117 Cal.Rptr.2d 168, 41 P.3d 3; *Juan G.*, *supra*, 209 Cal.App.4th at pp. 1488–1490, 147 Cal.Rptr.3d 816.)

34 Under former Section 707, for minors age 16 and over, transfer was authorized for any felony listed in former Section 707, subdivision (b) (former § 707, subd. (d)(1)), or any other felony if committed in the circumstances described in former section 707, subdivision (d)(3). (Former § 707, subd. (a)(1).) Fourteen and 15-year-old minors could be transferred to

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adult court only if they were charged with one of 30 crimes listed in former section 707, subdivision (b), which, as relevant to this case, included attempted murder, forcible rape, sodomy, oral copulation, forcible lewd act with a child under age 14, torture and aggravated mayhem. (Former § 707, subd. (b)(4)–(7), (12), (23) & (24).) Cervantes would continue to be eligible for transfer to adult court under the new law, but he would be entitled to a fitness hearing before transfer. (§ 707, subds. (a)(2), (b)(4)–(7), (12), (23) & (24).) Under prior law he was not entitled to adjudication in juvenile court under any circumstances and was not entitled to a fitness hearing because at age 14 he was alleged to have committed the above-specified sex crimes in circumstances warranting one-strike treatment. (Former § 602, subd. (b)(2)(A), (D) & (F).)

35 E.g., Welf. & Inst. Code, §§ 202, 1700; *Manduley*, *supra*, 27 Cal.4th at p. 593, 117 Cal.Rptr.2d 168, 41 P.3d 3; *In re Greg F.* (2012) 55 Cal.4th 393, 416–417, 146 Cal.Rptr.3d 272, 283 P.3d 1160; *In re Kasaundra D.* (2004) 121 Cal.App.4th 533, 539, 16 Cal.Rptr.3d 920.

36 We use the term “juvenile offender” to refer to “any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age.” (§ 602.)

37 We use the term “juvenile felon” to denote “a minor ... alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, or of an offense listed in subdivision (b) [of Section 707] when he or she was 14 or 15 years of age.” (§ 707, subd. (a)(1).)

38 *Manduley* decided implementation of the direct file system under Prop 21 did not violate the Equal Protection Clause. (*Manduley, supra,* 27 Cal.4th at pp. 567–573, 117 Cal.Rptr.2d 168, 41 P.3d 3.) Cervantes, too, contends denial of a fitness hearing in his case would deprive him of equal protection. But Cervantes is not similarly situated with a juvenile felon who committed his crimes after Prop 57 was enacted. (See *Brown*, *supra*, 54 Cal.4th at pp. 328–330, 142 Cal.Rptr.3d 824, 278 P.3d 1182 [rejecting equal protection argument based on legislative changes in the rates at which defendants earn presentence conduct credits].)

Moreover, we conclude if there was no equal protection problem in adopting the direct file procedure, there can be no equal protection problem in abandoning it. Both systems are merely different approaches or experiments in how best to deal with juvenile delinquents, and a state may change course without creating equal protection problems. (*People v. Spears* (1995) 40 Cal.App.4th 1683, 1688, 48 Cal.Rptr.2d 634 [“ ‘It is perfectly proper for the Legislature to create a new sentencing procedure which operates prospectively only. Despite the disparity created by rendering different sentences after an admittedly arbitrarily chosen date, prospective application of such a statute does not violate equal protection principles, because of the legitimate public purpose’ ” motivating the change of law.].) “ ‘[T]he 14th 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.’ ” (*People v. Floyd* (2003) 31 Cal.4th 179, 191, 1 Cal.Rptr.3d 885, 72 P.3d 820, quoting *Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505, 31 S.Ct. 490, 55 L.Ed. 561 [*Floyd* refused to apply drug treatment alternative sentencing retroactively].)

39 In applying these rules, *Tapia* identified four categories of legal changes introduced by Prop 115, including those that “change the legal consequences of criminal behavior to the detriment of defendants” and others described as “provisions which clearly benefit defendants” or “benefit only defendants.” (*Tapia*, *supra*, 53 Cal.3d at pp. 297, 300, 279 Cal.Rptr. 592, 807 P.2d 434.) The first category of changes could not be applied retroactively, but *Tapia* saw no impediment to applying the latter category of rules in trials involving crimes that had occurred before the effective date of Prop 115. (*Id.* at pp. 300–301, 279 Cal.Rptr. 592, 807 P.2d 434.) *Tapia* suggests such laws “may be applied to pending cases” if they “ ‘lessen the punishment’ ” for crime. (*Id.* at p. 301, 279 Cal.Rptr. 592, 807 P.2d 434.) We believe *Brown* has narrowed *Estrada* further, requiring that a statute “ ‘mitigat[e] ... the penalty for a particular crime’ ” before it is accorded retroactive effect. (*Brown, supra,* 54 Cal.4th at p. 326, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

40 We note that this expressed policy is broadly consistent with the rationale adopted by the United States Supreme Court in of *Graham, supra*, 560 U.S. 48, 130 S.Ct. 2011, and *Miller v. Alabama* (2012) 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (*Miller*), discussed below in connection with Cervantes's Eighth Amendment contentions (see *post*, section II.C), that a juvenile's immaturity and potential for rehabilitation must be taken into account before any sentence amounting to life imprisonment is imposed.

41 “In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. [Citations.] In a nonjury trial, jeopardy attaches when the court begins to hear evidence.” (*Serfass v. United States* (1975) 420 U.S. 377, 388, 95 S.Ct. 1055, 43 L.Ed.2d 265.) In juvenile proceedings, jeopardy attaches when the court “ ‘ “enters upon” ’ ” jurisdictional proceedings, or when the first witness is sworn. (*People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1439, 59 Cal.Rptr.2d 371.)

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42 We recognize there is some older authority to the contrary. (See *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 606, 119 Cal.Rptr. 302, 531 P.2d 1086 ["jeopardy as to an offense of which a defendant has been convicted continues during appellate proceedings and retrial following reversal of the judgment"].)

43 The juvenile court maintains jurisdiction over minors committed to the Division of Juvenile Facilities until age 25 at the oldest, or age 23 for more recent commitments. If the minor had not yet served a period of two years in custody, the commitment may be extended until he or she has completed a "two-year period of control." (Welf. & Inst. Code, §§ 1769, subds. (b) & (c), 1771, subd. (b).)

44 For instance, minors whose cases are adjudicated in juvenile court have no right to a jury trial. (*People v. Superior Court of Santa Clara County* (1975) 15 Cal.3d 271, 274, 124 Cal.Rptr. 47, 539 P.2d 807.) As another example, the rule requiring corroboration of accomplice testimony does not apply in juvenile delinquency proceedings. (*In re Mitchell P.* (1978) 22 Cal.3d 946, 948–953, 151 Cal.Rptr. 330, 587 P.2d 1144.) And at disposition, *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 does not apply in juvenile court. (*In re Christian G.* (2007) 153 Cal.App.4th 708, 712–715, 63 Cal.Rptr.3d 215; *In re Alex U.* (2007) 158 Cal.App.4th 259, 265–266, 69 Cal.Rptr.3d 695.)

45 We emphasize, however, that this right to a fitness hearing on remand—whether for retrial on the merits, or just for sentencing—applies only to defendants who, like Cervantes, have not had a fitness hearing previously, and it is a right that may be exercised only once, even if a remand is granted more than once in subsequent appeals.

46 "If the prosecuting attorney lawfully initiated the prosecution as a criminal case under Welfare and Institutions Code section 602(b) or 707(d), and the minor is convicted of a criminal offense listed in those sections, the minor must be sentenced as an adult." (Cal. Rules of Court, rule 4.510(a); see also § 1170.17, subds. (b) & (c) [juvenile felons are eligible for pre-sentence fitness hearing if they were transferred to criminal court under subdivisions and subject to presumptions not applicable to Cervantes].)

47 *Miller*, *supra*, 132 S.Ct. at page 2469 extended *Graham* by holding it is unconstitutional to sentence a juvenile *homicide* offender to a *mandatory* sentence of life without possibility of parole; rather, sentencing authorities must use their discretion in considering mitigating circumstances, especially factors relating to the youthfulness of the offender. (*Miller*, at pp. 2467–2469.)

48 In some states a sentence of 60 years to life, or even less, has been held to be the equivalent of life without parole, even though first parole eligibility may not technically extend beyond the youthful defendant's life expectancy. (*State v. Ragland* (Iowa 2013) 836 N.W.2d 107, 109–110, 120–122 [60 years unconstitutional]; *Peterson v. State* (Fla. App. 2016) 193 So.3d 1034, 1038–1039 & fn. 8 [56-year sentence with opportunity for release at age 74 was unconstitutional]; *Bear Cloud v. State* (Wyo. 2014) 334 P.3d 132, 142 [" '[t]he prospect of [only] geriatric release' " is the functional equivalent of life without parole]; *State v. Null* (Iowa 2013) 836 N.W.2d 41, 71 (*Null*) [52.5 years is de facto life sentence even though evidence "does not clearly establish that [the defendant's] prison term is beyond his life expectancy," but rather may "come within two years of his life expectancy"]; see also, *Casiano v. Comm'r of Corr.* (2015) 317 Conn. 52, 115 A.3d 1031, 1035, 1044–1045 & fn. 15 [50 years without possibility of parole was a de facto LWOP for purposes of applying *Miller*'s sentencing requirements]; but see, *Williams v. State* (Fla. App. 2016) 197 So.3d 569, 572 [50-year sentence not de facto LWOP]; *State v. Zuber* (App.Div.2015) 442 N.J.Super. 611, 126 A.3d 335, 348–349 [110-to-life sentence with parole after 55 years was not de facto LWOP], revd. by *State v. Zuber* (2017) 227 N.J. 422, 152 A.3d 197 [defendant entitled to resentencing applying *Miller* factors]; *State v. Cardeilhac* (2016) 293 Neb. 200, 876 N.W.2d 876, 888–889 [60-to-life, with parole eligibility after 30 years, is not de facto LWOP]; *Hayden v. Keller* (E.D.N.C. 2015) 134 F.Supp.3d 1000, 1008–1009 [collecting cases on both sides of issue].)

49 In *Franklin*, the state Supreme Court was nominally confronted with the question whether the 16-year-old defendant's life sentence with the possibility of parole after 50 years was unconstitutional. Because under section 3051 Franklin would be eligible for a parole hearing in his 25th year of incarceration (*Franklin*, *supra*, 63 Cal.4th at p. 268, 202 Cal.Rptr.3d 496, 370 P.3d 1053), the Court held the issue had become moot and therefore declined to decide whether the sentence was the functional equivalent of LWOP. (*Id.* at pp. 268, 276–280, 202 Cal.Rptr.3d 496, 370 P.3d 1053.) It remanded to allow Franklin to provide mitigating evidence relevant to his eventual youthful offender parole hearing. (*Id.* at pp. 269, 284, 286–287, 202 Cal.Rptr.3d 496, 370 P.3d 1053.)

50 We hereby deny Cervantes's amended request for judicial notice filed November 30, 2016.

51 The parties have also informed us that Cervantes will first be eligible for a parole hearing in 2051, but the Attorney General calls it a "consultation hearing." Cervantes will not be eligible for release until 2077.

52 Section 667.61, former subdivision (j), provided: "Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 [credit on term of imprisonment] shall apply to reduce the minimum term of 25 years in the state prison imposed pursuant to subdivision (a) or 15 years in the state prison imposed pursuant to subdivision (b). However, in no case shall

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the minimum term of 25 or 15 years be reduced by more than 15 percent for credits granted pursuant to Section 2933 [prison conduct credit], 4019 [presentence conduct credit], or any other law providing for conduct credit reduction. In no case shall any person who is punished under this section be released on parole prior to serving at least 85 percent of the minimum term of 25 or 15 years in the state prison."

53 Attempted murder is a violent felony (§ 667.5, subd. (c)(12)) and thus subject to limited credits under section 2933.1. CDCR appears to have calculated Cervantes's minimum eligible parole date based on the assumption that Cervantes is entitled to 15 percent credit on his 11-year determinate sentence for attempted murder of I.A. We have no occasion to agree or disagree with that statutory interpretation.

54 Poor prison conditions in California and the lack of adequate medical care have been well-documented. (*See Brown v. Plata* (2011) 563 U.S. 493,507–509, 131 S.Ct. 1910, 179 L.Ed.2d 969 [noting poor health care and overcrowding in California's prisons results in a rise of prison violence and spread of infectious diseases].) A study drawing on data from New York prisons found that for each additional year spent in prison, an inmate's life expectancy declines by two years. (Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003* (March 2013) Am. J. of Pub. Health, Vol. 103, No. 3.) Another study used data from Michigan to estimate that the average life expectancy for Michigan inmates incarcerated for natural life sentences from the time they were juveniles is 50.6 years, whereas the life expectancy for adults subject to the same sentence is 58.1 years. (*Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, Campaign for the Fair Sentencing of Youth, ACLU of Mich. (April 2013) p. 2, at < http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf> [as of March 9, 2017].)

55 The use of life expectancy tables has been criticized in the context of determining cruel and unusual punishment under *Graham*. (*Zuber*, *supra*, 126 A.3d at pp. 347–348 [discussing problems with use of life expectancy tables]; *Null*, *supra*, 836 N.W.2d at p. 71 ["we do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates"]; Cummings & Colling, *There is No Meaningful Opportunity in Meaningless Data: Why it is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences* (2014) 18 UC Davis J. Juv. L. Policy 267, 288–294 [suggesting that any sentence that withholds a juvenile offender's first parole hearing for more than 35 years should be deemed unconstitutional].)

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11 Cal.App.5th 816
Court of Appeal,
Fifth District, California.

The PEOPLE, Plaintiff and Respondent,
v.
Victor Alexander MARQUEZ,
Defendant and Appellant.

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Filed 5/16/2017
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Certified for Partial Publication. *

Synopsis
Background: Juvenile defendant was convicted in the Superior Court, Tulare County, No. VCF222534, Gerald F. Sevier, J., of special circumstance murder and sentenced to life without the possibility of parole (LWOP). He appealed. The Court of Appeal, Cornell, Acting P.J., 2013 WL 3209482, reversed and remanded. Following resentencing hearing on remand, the Superior Court, Gary L. Paden, J., again imposed an LWOP sentence for special circumstance murder. Defendant appealed.

Holdings: The Court of Appeal, Peña, J., held that:

[1] juvenile provisions of Public Safety and Rehabilitation Act did not retroactively apply to defendant;

[2] default rule providing that statute is not retroactive unless expressly so declared applied to determination of whether juvenile provisions of Act were retroactive;

[3] judicially-created exception to default rule did not apply to support retroactive application of juvenile provisions of Act;

[4] juvenile provisions of Act did not create affirmative defense that was unavailable to defendant at trial; and

[5] defendant was not entitled to remand for a transfer hearing under due process clause or the Sixth Amendment.

Affirmed.

****816** APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge. (Super. Ct. No. VCF222534)

Attorneys and Law Firms

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein, Peter H. Smith, and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

PEÑA, J.

*819 INTRODUCTION

Defendant Victor Alexander Marquez was just four months shy of his 18th birthday when he brutally murdered Maria Juarez by stabbing and slashing her 19 times during an attempted robbery. Judge Gerald F. Sevier presided over defendant's trial and sentenced him to life without the possibility of parole (LWOP) for special circumstance murder. While defendant's original appeal was pending, the United States Supreme Court decided *Miller v. Alabama* (2012) 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (*Miller*). *Miller* held that mandatory LWOP sentences for juvenile homicide offenders violated the federal Constitution's Eighth Amendment prohibition against cruel and unusual punishment. In defendant's first appeal, we recognized ***820** California does not provide for mandatory LWOP sentences for minors convicted of murder, and the sentencing ****817** court understood this aspect of its statutory sentencing discretion. Nevertheless, we reversed the judgment and remanded the matter to the trial court to reconsider defendant's LWOP sentence after applying the individualized sentencing criteria set forth in *Miller*. (*People v. Marquez* (June 25, 2013, F063837, 2013 WL 3209482) [nonpub. opn.].)

Judge Gary L. Paden conducted the resentencing hearing. After considering the *Miller* criteria, Judge Paden again imposed an LWOP sentence. Defendant contends the trial court misapplied the *Miller* criteria and argues his sentence constitutes cruel and unusual punishment under the Eighth Amendment. In supplemental briefing, defendant contends Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Proposition 57) passed by the voters on November 8, 2016, applies retroactively to his case. Defendant argues the initiative ended the practice employed here of allowing the prosecutor to directly file a case involving a juvenile offender in adult criminal court rather than first conducting a suitability hearing as now required by the amended provisions of the Welfare and Institutions Code. As we explain in the unpublished portion of this opinion, the trial court properly evaluated the *Miller* criteria. In the published portion, we conclude the suitability hearing provisions of Proposition 57 are not retroactive.

FACTS AND PROCEEDINGS [**]

DISCUSSION

1. Application of *Miller* Criteria on Resentencing [***]

2. Retroactivity of Proposition 57

[1] Approximately three months after Maria Juarez was murdered, the district attorney's office directly charged defendant in criminal court with first degree murder, pursuant to Welfare and Institutions Code section 707, subdivision (b). [2] Proposition 57, passed by the voters on November 8, 2016, no longer permits a prosecutor to direct file serious felony cases involving ***821** juveniles in adult criminal court. The parties have filed supplemental briefing on the issue of whether Proposition 57 applies retroactively to compel a juvenile court to conduct a fitness hearing to determine if a juvenile can be tried in adult criminal court. Defendant argues the initiative effectively reduces his punishment and provides an affirmative defense to the direct filing procedure and should therefore be applied to him retroactively. The People contend the law is prospective, it changes only juvenile court procedure, and it does not affect the penalty imposed. We agree with the People and the recent decision from the First District Court of Appeal in *People v. Cervantes* (2017) 9 Cal.App.5th 569, 215 Cal.Rptr.3d 174 (*Cervantes*) and the Sixth District Court of Appeal in *People v. Mendoza* (2017) 10 Cal.App.5th 327, 216 Cal.Rptr.3d 361 (*Mendoza*).

Juvenile Provisions of Proposition 57

[2] Before a minor could be tried in adult court, California historically required a finding of unfitness for juvenile court. (*Cervantes, supra,* 9 Cal.App.5th at p. 595, 215 Cal.Rptr.3d 174; *Juan G. v. Superior Court* (2012) 209 Cal.App.4th 1480, 1489, 147 Cal.Rptr.3d 816.) Beginning with the passage of Proposition 21 in March 2000, the district attorney was authorized as a matter of executive discretion to file an ****818** action against a juvenile directly in adult criminal court under certain defined circumstances. This practice is known as "direct filing" or "discretionary direct filing." (*Cervantes, supra,* at p. 596, 215 Cal.Rptr.3d 174.) The procedural change in how cases were formerly filed initially in juvenile court withstood constitutional challenges that it violated the separation of powers between the executive and judicial branches of government and due process of law under the federal and state constitutions. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 551–573, 117 Cal.Rptr.2d 168, 41 P.3d 3 (*Manduley*).) Our Supreme Court further rejected challenges to the statutory scheme as violating equal protection. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 835–841, 16 Cal.Rptr.3d 420, 94 P.3d 551.)

[3] The purpose of Proposition 57 with regard to juvenile offenders is to undo Proposition 21. The charging instrument for all juveniles must now be filed in juvenile court. Prosecutors may still move the court to transfer certain categories of cases to criminal court, but the juvenile court is vested with the sole authority to determine whether a juvenile should be transferred. Juveniles accused of felonies are guaranteed a right to a fitness hearing before being sent to the criminal division of superior court to be tried as an adult. (*Cervantes, supra,* 9 Cal.App.5th at pp. 596–597, 215 Cal.Rptr.3d 174.)

822** ***Proposition 57's Silence on Retroactivity

Defendant contends section 602 was amended to provide exclusive jurisdiction in juvenile court, and section 707 was amended to require a fitness hearing in juvenile court as a prerequisite to transferring a case to adult court.

The People point out that in contrast to the amendments to sections 602 and 707, which are silent on the issue of

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retroactive application, the constitutional amendment to article I, section 32 of the California Constitution, set forth in section 3 of Proposition 57, expressly changes adult sentencing to make nonviolent adult offenders eligible for parole consideration after completing the term of his or her primary offense. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) p. 141.) The People analyze various statements in the voter guide to show the juvenile provisions are meant to be prospective. The voter pamphlet refers to transfers from juvenile court to adult court that "should" occur. (*Id*., at pp. 54, 56, 58, 141–146.) This ballot pamphlet may indicate intent for prospective application of juvenile transfer procedures but, at best, it is ambiguous. The statutory changes to sections 602 and 707 and the sections implementing them are silent on the issue of retroactivity.

[4] [5] [6] We therefore begin our analysis with Penal Code section 3, which provides that "[n]o part of it is retroactive, unless expressly so declared." "Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear," this section provides the default rule. (*People v. Brown* (2012) 54 Cal.4th 314, 319, 142 Cal.Rptr.3d 824, 278 P.3d 1182 (*Brown*).) Defendant concedes Proposition 57 is silent on the question of whether it applies retroactively to proceedings under the act. The analysis of Proposition 57 by the legislative analyst and the arguments for and against Proposition 57 are also silent on this question. (Voter Information Guide, *supra*, at pp. 54–57, 141–146; see *People v. Buford* (2016) 4 Cal.App.5th 886, 918–920, 209 Cal.Rptr.3d 593 (conc. opn. of Peña, J.) [analyzing silence of Prop. 47 on question of retroactivity], review granted Jan. 11, 2017, S238790.) Because the statute contains no ****819** express declaration that sections 602 and 707 apply retroactively to proceedings under the act, and there is no clearly implied intent of retroactivity in the legislative history, the default rule under Penal Code section 3 applies.

Procedural Function of Superior Court Under Proposition 57

Section 602 now reads: "Except as provided in Section 707, any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state ***823** defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

As noted in *Cervantes*, revised section 602 does not use the term "exclusive" and assigns jurisdiction over all juvenile criminal matters to the juvenile court, explicitly subject to the exceptions in section 707. Subdivision (b) of section 707 lists 30 serious crimes that subject even the youngest juveniles for criminal prosecution under section 707, ages 14 and 15, to adult prosecution. The court in *Cervantes* concluded for crimes that qualify a juvenile offender for transfer to adult court, "subject matter jurisdiction is concurrent between the criminal division and the juvenile division." (*Cervantes, supra*, 9 Cal.App.5th at p. 598, 215 Cal.Rptr.3d 174.) *Cervantes* explained under the California Constitution the juvenile and criminal court are divisions of the superior court, which has subject matter jurisdiction over all criminal, civil, and juvenile matters. (*Cervantes*, at p. 598, 215 Cal.Rptr.3d 174, citing Cal. Const., art. VI, § 10.)

[7] Thus, when reference is made to the jurisdiction of the juvenile or criminal court, the reference does not refer to subject matter jurisdiction, but to the statutory authority of the particular division of the superior court in a given case to proceed under juvenile court law or generally applicable criminal law. (*Cervantes, supra*, 9 Cal.App.5th at p. 598, 215 Cal.Rptr.3d 174.) Prior to the passage of Proposition 21 in March 2000, a procedure similar to the one enacted by Proposition 57 was used to transfer juveniles from juvenile to criminal court. In *Manduley*, our Supreme Court held this procedural change did not violate any constitutional principle. The transfer procedure changed with the passage of Proposition 21 and again with the passage of Proposition 57. The superior court retained fundamental subject matter jurisdiction under either procedure.

Punishment and the Estrada *Rule*

Defendant cites *In re Estrada* (1965) 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948 to argue retroactive application.

In *Estrada*, the court stated:

> "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the

> commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. 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 ***824** the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." ****820** (*In re Estrada, supra*, 63 Cal.2d at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948.)

Cervantes analyzed *Estrada* and noted Estrada had escaped from the California Rehabilitation Center without force or violence when the offense required a minimum one-year additional sentence and a two-year minimum after being returned to custody before parole consideration. (*In re Estrada, supra*, 63 Cal.2d at p. 743, 48 Cal.Rptr. 172, 408 P.2d 948; *Cervantes, supra*, 9 Cal.App.5th at p. 599, 215 Cal.Rptr.3d 174.) Between the time of the escape and the time Estrada was convicted, however, the governing statutes were amended to reduce the minimum term to six months for nonviolent escape and to require no minimum period before parole consideration. (*Estrada, supra*, at pp. 743–744, 48 Cal.Rptr. 172, 408 P.2d 948; *Cervantes, supra*, at p. 600, 215 Cal.Rptr.3d 174.) Estrada was being held in custody solely because of the minimum terms required by the former version of the statute and would have been entitled to release under the new version. (*Ibid.*)

Finding the reduction in penalty amounted to a legislative decision the prior law had been too harsh, the court held the amended statutes applied to the petitioner. " '[L]egislative mitigation of the penalty for a particular crime' called for the retroactive application of the reduced penalty, effectively establishing a rule that any law reducing the penalty for a crime was intended to apply to all nonfinal judgments. ([*In re Estrada, supra*, 63 Cal.2d] at p. 745 [48 Cal.Rptr. 172, 408 P.2d 948]; see also *People v. Conley* (2016) 63 Cal.4th 646, 656 [203 Cal.Rptr.3d 622, 373 P.3d 435] [*Estrada*'s holding 'reflects a presumption about legislative intent, rather than a constitutional command'].)" (*Cervantes, supra*, 9 Cal.App.5th at p. 600, 215 Cal.Rptr.3d 174.)

Defendant argues Proposition 57 amounts to a reduction in punishment, requiring us to find the law retroactive pursuant to *Estrada*. As *Cervantes* explained, however, the change in the law is procedural in nature and does not affect punishment. As noted in *Cervantes*, the passage of Proposition 115 in 1991 gave judges in criminal trials the power to conduct voir dire instead of attorneys. (*Cervantes, supra*, 9 Cal.App.5th at p. 600, 215 Cal.Rptr.3d 174.) In *Tapia v. People* (1991) 53 Cal.3d 282, 287, 288–289, 279 Cal.Rptr. 592, 807 P.2d 434, the Supreme Court held most of the new procedures, including those relating to voir dire and reciprocal discovery, were not retroactive under *In re Estrada*. (*Cervantes, supra*, at pp. 600–601, 215 Cal.Rptr.3d 174.) *Tapia* noted Proposition 115 changed the law, and these changes fell into four categories: (1) provisions changing the legal consequences of criminal behavior to the detriment of defendants; (2) provisions addressing the conduct of trials; (3) provisions clearly benefiting defendants; and (4) a single provision codifying existing law. (*Tapia v. People, supra*, at p. 297, 279 Cal.Rptr. 592, 807 P.2d 434.) *Tapia* found categories 1 and 3 were subject to ***825** retroactivity analysis, but the procedural change to the law affecting the conduct of trials in category 2 was not retroactively applicable but prospective in nature. (*Id.* at pp. 297–301, 279 Cal.Rptr. 592, 807 P.2d 434.)

Cervantes analyzed *Tapia* as follows:

> "*Tapia* emphasized that the retroactivity exception turns on the type of legal change effectuated by the new or amended statute: changes in direct penal consequences like the one under consideration in *Estrada*, would call for retroactive application, while those like the one involved in *Tapia* that 'address the conduct of trials which have yet to take place, rather than criminal behavior which has already taken place' are to be ****821** applied prospectively. (*Tapia, supra*, at pp. 288–289 [279 Cal.Rptr. 592, 807 P.2d 434].) Under that rubric, the 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 [279 Cal.Rptr. 592, 807 P.2d 434].) This suggests its application should be prospective only." (*Cervantes, supra*, 9 Cal.App.5th at pp. 600–601, 215 Cal.Rptr.3d 174, fn. omitted.)

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The *Estrada* case was recently revisited by our Supreme Court in *Brown, supra*, 54 Cal.4th 314, 142 Cal.Rptr.3d 824, 278 P.3d 1182. *Cervantes* analyzed the holding in *Brown* and found the legislative change in *Brown* strongly supported prospective application. The legislative change addressed presentence conduct credits, a situation more closely linked to the length of punishment for an offense than Proposition 57. In *Brown*, the Supreme Court unanimously determined a jail inmate awaiting trial and sentencing should earn credits at the rate in effect when sentenced. (*Brown, supra*, 54 Cal.4th at pp. 317–330, 142 Cal.Rptr.3d 824, 278 P.3d 1182; *Cervantes, supra*, 9 Cal.App.5th at p. 601, 215 Cal.Rptr.3d 174.) *Cervantes* noted *Brown* recognized a change in credit-earning ability would affect the length of a prisoner's time in custody and, in that sense, would have a direct effect on punishment, but nevertheless found *Estrada* was inapplicable. (*Brown, supra*, at pp. 323, 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182; *Cervantes, supra*, at p. 601, 215 Cal.Rptr.3d 174.)

Brown held: "*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, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) "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." ' " (*Id.* at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) In *Brown*, the court did not apply the *Estrada* rule because "a statute increasing the rate at which prisoners may earn credits for good behavior does not represent a judgment about the needs ***826** of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent." (*Brown, supra*, at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182; see *Cervantes, supra*, 9 Cal.App.5th at pp. 601–602, 215 Cal.Rptr.3d 174.)

[8] Similarly here, *Estrada* does not control because Proposition 57's transfer of the fitness hearing procedure to juvenile court does not reduce punishment for a particular crime. *Cervantes* recognized that while Proposition 57 may have a substantive impact on time in custody in some cases, and sometimes a big impact, the transfer procedure required under the Welfare and Institutions Code "does not resemble the clear-cut reduction involved in *Estrada*." (*Cervantes, supra*, 9 Cal.App.5th at p. 601, 215 Cal.Rptr.3d 174.) *Cervantes* found that although the juvenile court rather than the district attorney makes the decision to try a juvenile offender as an adult, we may presume many cases filed in juvenile court will still end up in adult court with adult penalties under Proposition 57 after the fitness hearing is held. *Cervantes* further found that Proposition ****822** 57 "mitigates the penalty for a particular crime even less directly than the jail credits at issue in *Brown*" and found the change in the law to be more analogous to the voir dire procedure in *Tapia*, "which affected who performed a particular function in the judicial process." (*Cervantes, supra*, at pp. 601–602, 215 Cal.Rptr.3d 174.) *Cervantes* concluded 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*." (*Cervantes*, at p. 602, 215 Cal.Rptr.3d 174, citing *Brown, supra*, 54 Cal.4th at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

Cervantes was followed by *Mendoza, supra*, 10 Cal.App.5th 327, 216 Cal.Rptr.3d 361, which also held the *Estrada* rule does not apply to make Proposition 57 retroactive. Like *Cervantes*, *Mendoza* found Proposition 57 is distinguishable from the laws at issue applying the *Estrada* rule first because "Proposition 57 does not expressly mitigate the penalty for any particular crime." (*Mendoza, supra*, at p. 348, 216 Cal.Rptr.3d 361.) Instead, it changes the procedural mechanism for transferring juvenile offenders to adult court. Citing to *Brown*, *Mendoza* reasoned the *Estrada* retroactivity rule is not applicable to any amendment that may reduce a punishment, but is directed to statutes representing legislative mitigation of the penalty for a specific crime. (*Mendoza*, at p. 348, 216 Cal.Rptr.3d 361; *Brown, supra*, 54 Cal.4th at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

Mendoza also found that "Proposition 57 provides no certainty that a minor will actually receive a mitigated penalty because juvenile courts have discretion under Proposition 57 to transfer juvenile cases to adult court." The penalty for all cases transferred to adult court "will be the same as they were before Proposition 57." (*Mendoza, supra*, 10 Cal.App.5th at p. 348, 216 Cal.Rptr.3d 361.)

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Mendoza analyzed the Supreme Court's decision in *People v. Francis* (1969) 71 Cal.2d 66, 75 Cal.Rptr. 199, 450 P.2d 591 where the defendant ***827** committed a drug offense that was later amended by the Legislature from being punished only as a felony to being punished as a wobbler. *Francis* applied the *Estrada* rule, reasoning that although the amendment did not guarantee Francis a lower sentence, making the specific crime a misdemeanor demonstrated a legislative intent that punishing the offense as a felony might be too severe in certain cases. (*People v. Francis, supra,* at p. 76, 75 Cal.Rptr. 199, 450 P.2d 591; *Mendoza, supra,* 10 Cal.App.5th at p. 348, 216 Cal.Rptr.3d 361.) *Mendoza* found the legislative change in *Francis* distinguishable from Proposition 57, "because it involved a legislative mitigation of the potential punishment for a specific crime. Where, as under Proposition 57, the potential benefit inures to a class of offenders based on their age rather than on the offenses they commit, the inference that voters deemed the entire Penal Code unduly severe when applied to minors is too attenuated to support application of the *Estrada* rule." (*Mendoza, supra,* 10 Cal.App.5th at pp. 348–349, 216 Cal.Rptr.3d 361.)

Contrary to *Cervantes* and *Mendoza*, *People v. Vela* (2017) 11 Cal.App.5th 68, 218 Cal.Rptr.3d 1 (*Vela*) held that Proposition 57 has retroactive application because the intent of the voters was to broaden the number of minors who could potentially stay in the juvenile justice system where the primary emphasis is on rehabilitation rather than punishment. (*Vela, supra,* at p. ––––, 218 Cal.Rptr.3d 1.) *Vela* found the potential for reduction in punishment of a crime in *Francis* was analogous to the potential ameliorating ****823** benefit to minors after amendments to the Welfare and Institutions Code, and it held the *Estrada* rule applied to Proposition 57. (*Vela,* at p. ––––, 218 Cal.Rptr.3d 1.)

We disagree with the *Vela* court's analysis of *Francis*, *Estrada*, and the retroactivity of Proposition 57. *Vela* expands the *Estrada* rule by finding a potential benefit inuring to a class of offender based on age rather than the offenses committed. We find persuasive the reasoning in *Mendoza* that "applying the *Estrada* rule to Proposition 57 would expand that rule in such a manner as to risk swallowing the general [Penal Code] section 3 presumption that legislation is intended to apply prospectively." (*Mendoza, supra,* 10 Cal.App.5th at p. 348, 216 Cal.Rptr.3d 361, citing *Brown, supra,* 54 Cal.4th at pp. 324–325, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

We agree with the findings in *Cervantes* and *Mendoza* that no provision in the Welfare and Institutions Code enacted by Proposition 57 reduces any form of punishment under the Penal Code. The expressly retroactive constitutional revision in Proposition 57 applies only to adult offenders. The absence of express language making application of the Welfare and Institutions Code retroactive where the constitutional amendment is expressly retroactive demonstrates an intent by the voters to direct "the scope and manner of the Act's retroactive application." (See *People v. Conley, supra,* 63 Cal.4th at p. 658, 203 Cal.Rptr.3d 622, 373 P.3d 435.) The Welfare and Institutions Code changes in the proposition effect a procedural change similar to procedures—such as voir dire being conducted by the trial court—noted in *Tapia*.

[9] ***828** Defendant further argues Proposition 57 creates an affirmative defense that was unavailable during his trial, and the criminal division of superior court acted in excess of its jurisdiction because it did not afford him a proper transfer hearing upon a motion by the prosecutor as now required by amendments to the Welfare and Institutions Code. This argument assumes Proposition 57 is retroactive. We have determined it is not. Defendant's affirmative defense argument further inaccurately assumes the criminal court lacks subject matter jurisdiction over juvenile cases. As *Cervantes* explained, the juvenile and criminal courts are both divisions within the same superior court, which maintains fundamental subject matter jurisdiction over juvenile cases. Proposition 57 does not create an affirmative defense for juveniles who have already been tried in criminal court; it prospectively changes the procedural process for transferring a case to criminal court.

Due to numerous errors in Cervantes's trial, eight of 15 counts were reversed on appeal, including all counts with specific intent as an element of the offense. This included Cervantes's convictions for attempted murder, torture, aggravated mayhem, and two sex offenses. (*Cervantes, supra,* 9 Cal.App.5th at p. 579, 215 Cal.Rptr.3d 174.) Because the court held the People could retry Cervantes on the reversed counts, placing him again in jeopardy, and given that Cervantes had to be resentenced even if the People elected not to retry him, the court found Cervantes was entitled on remand to a fitness hearing in juvenile

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court should he elect to have one. (*Id.* at p. 609, 215 Cal.Rptr.3d 174.)

The court's remand of *Cervantes* for further proceedings, thereby entitling him to a fitness hearing, turned the revised procedure into the prospective application of Proposition 57 for that defendant. This case is procedurally distinguishable from *Cervantes*. Defendant's convictions were affirmed in his first appeal to this court. ****824** After remand for resentencing in light of *Miller*, defendant has appealed the trial court's reimposition of an LWOP sentence. We have found no error in defendant's resentencing hearing and, thus, no basis for a remand. We conclude that application of Proposition 57 to defendant is not retroactive, and he is not entitled to remand solely for a fitness hearing before the juvenile court.

Constitutional Contentions

[10] Defendant contends he is entitled to remand for a transfer hearing under federal due process and the Sixth Amendment. Our Supreme Court rejected these contentions in *Manduley*. (*Manduley*, *supra*, 27 Cal.4th at pp. 551–573, 117 Cal.Rptr.2d 168, 41 P.3d 3.)

In *Kent v. United States* (1966) 383 U.S. 541, 556, 86 S.Ct. 1045, 16 L.Ed.2d 84 (*Kent*), the high court considered a statutory scheme conferring original and exclusive jurisdiction on a juvenile court over minors accused of various ***829** crimes. The law authorized the juvenile court to waive its jurisdiction and transfer the matter to criminal court after conducting an investigation, but no statutory criteria or procedures governed the juvenile court's determination to waive jurisdiction. (*Id.* at p. 547, 86 S.Ct. 1045; *Manduley*, *supra*, 27 Cal.4th at p. 565, 117 Cal.Rptr.2d 168, 41 P.3d 3, 27 Cal.4th 887A at p. 565.) *Manduley* found the decision in *Kent* held that a juvenile court violated the minor's due process of law in transferring the matter to criminal court without conducting a hearing or providing a statement of reasons for doing so. In conducting such a hearing, the minor possessed the right to effective assistance of counsel, access to the records considered by the juvenile court, and a statement of reasons for the juvenile court's decision. (*Kent*, *supra*, at pp. 553–563, 86 S.Ct. 1045; *Manduley*, *supra*, 27 Cal.4th at p. 565, 117 Cal.Rptr.2d 168, 41 P.3d 3.)

In distinguishing the statute at issue in *Kent*, our Supreme Court in *Manduley* explained that California's juvenile law does not confer upon the juvenile court original and exclusive jurisdiction over minors accused of crimes under the circumstances set forth in section 707. Under this statute, "neither the juvenile court nor the criminal court renders a decision whether the minor is fit for a juvenile court disposition." (*Manduley*, *supra*, 27 Cal.4th at p. 565, 117 Cal.Rptr.2d 168, 41 P.3d 3.) "Rather, as we have explained, the prosecutor's charging decision determines which court shall hear the matter." (*Ibid.*) *Manduley* rejected the petitioners' argument the procedural protections applicable to juvenile fitness hearings are mandated by *Kent* to apply also to the prosecutor's exercise of discretion to directly file charges in criminal court. *Manduley* distinguished prosecutorial discretion from judicial determinations. (*Manduley*, *supra*, 27 Cal.4th at pp. 565–566, 117 Cal.Rptr.2d 168, 41 P.3d 3.)

> "*Kent*, *supra*, 383 U.S. 541 [86 S.Ct. 1045], held only that where a statute confers a right to a *judicial* determination of fitness for a juvenile court disposition, the due process clause requires that the determination be made in compliance with the basic procedural protections afforded to similar judicial determinations. A statute that authorizes discretionary direct filing in criminal court by the prosecutor, on the other hand, does not require similar procedural protections, because it does not involve a judicial determination but rather constitutes an executive charging function, which does not implicate the right to procedural due process and a hearing." (*Manduley*, *supra*, 27 Cal.4th at p. 566, 117 Cal.Rptr.2d 168, 41 P.3d 3.)

****825** *Manduley* concluded the petitioners did not possess any right to be subject to the jurisdiction of the juvenile court, and the legislative branch could properly delegate to the prosecutor the discretion to determine where to filed charges against a minor, including directly with the criminal court.[3] (*Manduley*, *supra*, 27 Cal.4th at p. 567, 117 Cal.Rptr.2d 168, 41 P.3d 3.) The decisions of our Supreme Court ***830** are binding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.) We therefore reject defendant's constitutional arguments.

DISPOSITION

The judgment is affirmed.

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POOCHIGIAN, J.

WE CONCUR:

GOMES, Acting P.J.

All Citations

11 Cal.App.5th 816, 217 Cal.Rptr.3d 814, 17 Cal. Daily Op. Serv. 4516, 2017 Daily Journal D.A.R. 4504

Footnotes

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, only the Introduction, part 2 of the Discussion, and the Disposition are certified for publication.

** See footnote *, *ante*.

*** See footnote *, *ante*.

2 Further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

3 *Manduley* further rejected the petitioners' challenge to direct filing on equal protection grounds. (*Manduley*, *supra*, 27 Cal.4th at pp. 567–572, 117 Cal.Rptr.2d 168, 41 P.3d 3.)

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10 Cal.App.5th 327
Court of Appeal,
Sixth District, California.

The PEOPLE, Plaintiff and Respondent,
v.
Marcos MENDOZA et al.,
Defendants and Appellants.

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Filed 3/30/2017
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Certified for Partial Publication. *

Synopsis

Background: Following joint trial, defendant and co-defendant were convicted in the Superior Court, Santa Clara County, Nos. 212506, C1114503, Andrea Y. Bryan, J., of second degree murder with gang enhancements. Defendant and co-defendant appealed. The Court of Appeal, Grover, J., 2016 WL 6996261, affirmed judgments as modified. Defendant and co-defendant petitioned for rehearing, which was granted.

Holdings: Following rehearing, the Court of Appeal, Grover, J., held that:

[1] stated purposes of Public Safety and Rehabilitation Act voter initiative did not support retroactive application of initiative to defendant;

[2] ballot materials related to initiative did not suggest voters intended retroactive application of initiative;

[3] judicially-created exception to general presumption that new statutes apply prospectively did not apply to initiative;

[4] defendant was similarly situated with class of juveniles benefiting from initiative, as required to support equal protection challenge;

[5] rational basis review applied to defendant's equal protection challenge;

[6] rational basis existed for prospective-only application of initiative; and

[7] defendant's due process rights were not violated by failure to apply initiative retroactively.

Affirmed as modified with directions.

Opinion, 2016 WL 6996261, vacated.

****366** Santa Clara County Superior Court, Case Nos.: 212506, C1114503, Hon. Andrea Y. Bryan, Santa Clara County Super. Ct. Nos. 212506, C1114503)

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Opinion

Grover, J.

***330** Maurillo Garcia died in August 2011 after receiving multiple stab wounds. Defendants Marcos Mendoza, David Martell, and Juan Javier Ramirez (collectively, defendants) appeal their convictions, following a joint trial, for second degree murder (Pen. Code, §§ 187, 189) [1] with gang enhancements (§ 186.22, subd. (b)) for killing Garcia.

On appeal, defendants briefed the case separately but many of their arguments overlap. All defendants argue the trial court erred by: (1) excluding statements of Javier Barragan, a co-perpetrator; (2) allowing the prosecutor to commit misconduct during the opening statement; (3) admitting unduly prejudicial evidence of gang-related intimidation; and (4) failing to properly instruct the jury regarding (a) voluntary intoxication, (b) the required mental state for guilt as an aider and abettor, and (c) the evidence necessary to prove the gang enhancement. All defendants argue that the prosecution presented insufficient evidence to support their gang enhancements.

Mendoza and Ramirez argue that the trial court erred by: (1) allowing the prosecution to commit misconduct during its examination of John Deleone, a ***331** witness for the prosecution; (2) admitting unduly prejudicial out-of-court statements by Mendoza and Ramirez; (3) admitting unduly prejudicial evidence of prior convictions to prove a " 'pattern of criminal gang activity' " (§ 186.22, subd. (e)); and (4) allowing the gang expert to show unduly prejudicial slides in the slideshow that accompanied his expert testimony.

Mendoza argues that the prosecution provided insufficient evidence to corroborate accomplice Tommy Gonzalez's testimony about Mendoza's involvement in the homicide.

Martell argues that the prosecution presented insufficient evidence to support his guilt and contends that his trial counsel provided ineffective assistance by failing to present a plausible theory of Martell's innocence and by failing to properly cross-examine a witness.

All defendants argue the foregoing errors were cumulatively prejudicial.

In our original unpublished opinion, we found no prejudicial error, modified the ****367** judgments to specify a 15-year minimum parole eligibility (§ 186.22, subd. (b)(5)), and affirmed the judgments as modified. [2]

All defendants petitioned for rehearing. Ramirez argues, among other things, that Proposition 57, the Public Safety and Rehabilitation Act of 2016, should be applied retroactively to his case because he was 16 years old at the time of the offense and his judgment was not final when voters approved Proposition 57 at the November 2016 general election. We granted rehearing to determine whether Ramirez was entitled to relief under Proposition 57.

In the published portion of this opinion, we conclude that Proposition 57 does not apply retroactively to Ramirez's case. In the unpublished portion (part II), we adhere to our original analysis and again find no prejudicial error, however we will direct that a new abstract of judgment be prepared for each defendant to note a 15-year minimum parole eligibility date based on Penal Code section 186.22, subdivision (b)(5).

I. TRIAL COURT PROCEEDINGS

A. THE HOMICIDE

The jury heard two accounts of Maurillo Garcia's death. Tommy Gonzalez, an accomplice, provided one account. Tommy testified that he was drinking ***332** with fellow Norteño gang members in the front yard of his house when a suspected Sureño gang member started spray-painting on the street by the house, leading Tommy and several others to chase down and assault the Sureño. [3] Salvador Rivas, an eyewitness, provided a second account. He testified that he was at a party at his father's house when he saw a group of five to seven men run toward and assault a man who was spray-painting in the street.

1. Co-Perpetrator Tommy Gonzalez's Account

Tommy Gonzalez testified for the prosecution as part of a plea agreement whereby the prosecutor agreed to reduce his murder charge related to Maurillo Garcia's death to voluntary manslaughter in return for his truthful testimony at defendants' trial. Tommy lived at 436 Ezie St. with his mother, his brother Raymond Gonzalez, Jr. (Raymond Jr.), his nephew Raymond Gonzalez III (Raymond III), and others. Tommy had been a Norteño gang member since he was nine years old. His nickname was Beast because he fought frequently when he was incarcerated for a juvenile offense.

Tommy's friend Javier Barragan called him in the afternoon on August 27, 2011 and asked if he could come "kick back" at Tommy's house. Barragan arrived around 6:00 or 7:00 p.m. with defendants Mendoza and Ramirez. Tommy knew Mendoza by the nickname

Travieso and Ramirez by the nickname Smiley. Tommy testified that Barragan, Mendoza, and Ramirez were all part of a Norteño subset called San Jose Unidos. They all drank beers in the front yard and were eventually joined around 8:00 p.m. by defendant Martell, known to Tommy as Guerro. Tommy had not met Martell before, but Barragan assured him that Martell was " 'good people.' " At trial, Tommy identified all three defendants as the people who came to his house on August 27.

****368** Around 10:00 p.m., Tommy saw a person (later identified as Maurillo Garcia) who looked like a Sureño gang member walk past the house twice within two minutes. Garcia walked to a stop sign where Richdale Avenue dead-ends into Ezie Street and spray-painted something on the ground while saying "Sur Trece Putos Calle." Tommy perceived Garcia's actions as a challenge. Tommy ran toward Garcia, followed closely by Martell and then more distantly by Mendoza, Ramirez, and Barragan. Tommy swung at Garcia but missed; Garcia cut Tommy's stomach with a screwdriver. Tommy backed up and "everybody jump[ed] on" Garcia. Mendoza and Ramirez were punching Garcia. Tommy did not see Martell or Barragan do any punching or ***333** kicking. Tommy and the others ran back to his mother's Cadillac that was parked in front of 436 Ezie St. and drove away.

2. Witness Salvador Rivas's Account

Salvador Rivas testified that on the night of the homicide he was attending a party at his father's house on Ezie Street, which faces the intersection of Richdale Avenue and Ezie Street. Rivas was in the garage and the garage door facing the street was open. Jose Garcia (Maurillo Garcia's brother, whom we refer to as Jose for clarity) walked by the house and Rivas's father invited Jose to have a beer. Rivas noticed Maurillo Garcia spray-painting on the street near a stop sign. Five to seven men came from the direction of 436 Ezie St. and chased Garcia.[4] Rivas heard someone yell " 'Get him' " and " 'Norte.' "

Rivas testified that Garcia ran but was tripped and fell, at which point all of the men who chased him started beating him. Rivas stated that everyone participated in the assault. Garcia managed to get up for a moment but the men knocked him down again and continued to beat him. Rivas testified that the men mostly kicked Garcia but some punches were also thrown. He could not clearly see any weapons. He saw something shiny but acknowledged it could have been a belt buckle. Rivas also could not see any of the attackers well enough to identify them in court. The attack lasted about 30 seconds. The men went back toward 436 Ezie St. and left in a Cadillac. One of the men might have left separately in a van.

Rivas described the assailants as Hispanic males between 20 and 30 years old. He acknowledged that it was not very light outside the night of the homicide, that there were no streetlights in the area of Richdale where the homicide took place, and that there were some cars and trucks parked in the driveway of his father's house. He estimated his vantage point in the garage was 60 yards from the victim.

B. DEFENDANTS CHARGED WITH MURDER

Defendants were each charged in a single felony information with murder (§ 187), with a special allegation that each committed the murder for the benefit of, at the direction of, or in association with a criminal street gang ***334** (§ 186.22, subd. (b)(1)(C)).[5] Ramirez, who was 16 on August 27, 2011, was charged as an adult. (Former ****369** Welf. & Inst. Code, § 707, subds. (b), (d)(1); Stats. 2008, ch. 179, § 236, pp. 653–656.) The information alleged that Martell had a prior juvenile adjudication that qualified as a strike. (§ 667, subds. (b)–(i); Former Welf. & Inst. Code, § 707, subd. (b); Stats. 2008, ch. 179, § 236, pp. 653–656.)

C. TRIAL

Trial commenced in February 2013. Defendants moved for a mistrial after the prosecutor's opening statement, alleging that he argued facts that would not be introduced into evidence, vouched for prosecution witnesses, denigrated defendants, and committed *Griffin* error through improper reference to Ramirez's silence when interrogated after his arrest. (*Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (*Griffin*).) The court denied the motion.

1. Additional Testimony About the Homicide

Raymond Gonzalez, Jr. testified that Barragan, Martell, and Ramirez were drinking with Tommy in the front yard of 436 Ezie St. on the evening of the homicide. When

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the prosecutor pointed to Mendoza in the courtroom and asked if he was also there, Raymond Jr. responded, “I think so.” Tommy dropped Raymond Jr. off at a clubhouse in San Jose around 7:00 or 8:00 p.m. on August 27 and Raymond Jr. did not return home until after 2:00 a.m. On cross-examination, Raymond Jr. acknowledged that he was a Norteño when he was younger but said he “grew up out of it.” He also acknowledged that the district attorney's office had paid to relocate his family in return for his cooperation and that he had never told the police that Tommy was at the house on the night of the homicide.

Raymond Jr.'s son, Raymond III, also testified. Raymond III testified that he stayed inside the house at 436 Ezie St. the whole night on August 27. Raymond III was on juvenile probation when the homicide occurred. He did not want to testify. He denied that any of the defendants were at 436 Ezie St. the night of the homicide. He claimed that he lied to the police over the course of several interviews, telling them multiple versions of what happened that night and providing fictitious descriptions of suspects. He acknowledged testifying at Martell and Ramirez's preliminary hearing that five men came over to the house the night of the homicide, that he had seen those men before, and that they eventually left in his grandmother's Cadillac. ***335** He denied that his uncle Tommy was at the house the night of the homicide, and said his father Raymond Jr. had been there but had left at some point.

San Jose Police Detective Merlin Newton testified about Raymond III's statements to him in the early morning the night of the homicide and during subsequent interviews. The night of the homicide, Raymond III described three suspects to Newton: a man with the nickname Big Tone; a man with “S.J.” tattooed on his chest; and a 16-year-old. Newton testified that Raymond III made different statements at different interviews but that at some point he told Newton that he had been in the front yard of the house the night of the homicide and saw five Norteño men run after a person who was spray-painting on Richdale Avenue. Raymond III reportedly told Newton that the men ran out of Raymond III's view and eventually returned to the house before driving away in his grandmother's Cadillac.

Newton testified that, over the course of four interviews, Newton showed Raymond III pictures of individuals (including the defendants) and asked Raymond III if any of them were at the house the night of the homicide. Raymond III was inconsistent ****370** regarding whether Martell had been there the night of the homicide but at some point he identified a picture of Martell as a suspect during one of the interviews. Raymond III identified a picture of Ramirez as the 16-year-old he had described as being present the night of the homicide. He also identified pictures of three people who were never charged. Raymond III never identified pictures of Tommy or Mendoza.

2. Defendants' Flight the Night of the Homicide

a. Tommy's Testimony

Tommy testified that he drove the Cadillac away from 436 Ezie St. with Mendoza, Ramirez, Martell, and Barragan. While they were driving, Mendoza reportedly stated, “ ‘I got that nigga,’ ” and also stated that he “ ‘booked him’ ” 14 or 15 times. Ramirez said “I was carving that fool's face,” and then complained to Mendoza that “you fucking cut me, bitch.” Mendoza responded that Ramirez “shouldn't be getting in my way when I'm handling my business.” Ramirez had a deep cut on his hand.

Tommy testified that Barragan told him to drive to Peckerwood's (later identified as John Deleone's) apartment in the Thornbridge Apartments, which were near Ezie Street. Barragan asked for the weapons and Tommy reportedly saw a kitchen knife that had been used by Mendoza as well as a ***336** screwdriver.[6] At some point, Martell said that he had dropped his phone somewhere. Tommy parked, they wiped down the car, and he and Barragan went upstairs to Deleone's apartment. Tommy or Barragan handed the weapons to Deleone, Deleone's girlfriend took them into the bathroom, and then “you hear the water running.”

Tommy testified that Barragan's brother Junior picked the group up from Deleone's apartment about ten minutes after they arrived and drove them to Barragan's mother's house near the Oakridge Mall. The group stayed at Barragan's mother's house for a short time. Martell left separately before the others. Tommy, Barragan, Mendoza, and Ramirez were picked up by someone with the nickname Creeper and driven to Milpitas. When they

arrived in Milpitas, a "cop car pulled in right behind us, and we got off and took off running."

b. John Deleone's Testimony

John Deleone testified in return for use immunity and an agreement that the prosecutor would resolve pending drug charges against Deleone with drug rehabilitation and a county jail sentence. Deleone testified that in August 2011 he was a heavy methamphetamine user, using up to one-eighth ounce per day. His girlfriend was also a heavy methamphetamine user. He acknowledged at trial that he had a poor memory due to his prior drug use. He knew Barragan and also knew Mendoza, but only by the nickname Travi. He knew Ramirez by the nickname Smiley and claimed to be like a big brother to him. Based on refreshed recollection from Deleone's testimony at Mendoza's grand jury proceedings, Deleone testified that Barragan was a Norteño who was affiliated with San Jose Unidos. Deleone acknowledged that he identified Ramirez at the grand jury hearing as a member of San Jose Unidos but testified at trial that "I might have misspoke when you asked me that question."

Deleone testified that Barragan and Smiley came to his apartment on August ****371** 27 around 11:00 p.m. with a third person whose identity Deleone could not remember. The prosecutor purported to refresh Deleone's recollection by reading the following out loud from the grand jury transcript: " 'What happens on this occasion? Who came over on this occasion?' [¶] Your answer was: [¶] 'I remember Javi, Javier, Juan, and somebody else. I don't remember who the other person—I think it was Travi, but I couldn't be certain.' " [7] Deleone acknowledged at trial that he had also told investigating officers that the third person could have been Beast (Tommy's nickname). Deleone did not see Martell that night.

***337** Deleone testified that the people who came to his apartment that night were agitated. Ramirez reportedly told Deleone that he hit a guy with a Phillips-head screwdriver five to ten times and demonstrated by making stabbing motions on a couch or a pillow. When asked whether the people who came to his house brought weapons, Deleone stated that they brought a knife, a box cutter, and a Phillips-head screwdriver. The court later struck that testimony when Deleone clarified that he never saw weapons that night and instead only saw a black sweatshirt wrapped around certain items that Barragan brought to the apartment. Deleone's girlfriend took the black sweatshirt to a sink and turned on the water, at which point Deleone "could hear all the stuff rattling around in the sink." [8] Deleone testified that it seemed like the others were trying to shift the blame for the stabbing to Ramirez.

3. Tommy Flees, Is Arrested in Texas, and Cooperates with Police

Tommy testified that he moved to Texas after the homicide, where he was arrested in March 2012 for resisting arrest. San Jose police detectives came to Texas and interrogated Tommy regarding the Garcia homicide. Tommy testified that the officers played a short portion of a videotaped interview between Barragan and the police, during which Barragan appeared to be trying to blame everything on Tommy. [9] Faced with that interview, Tommy decided to cooperate with the police and tell them his version of the homicide.

On cross-examination, Tommy acknowledged that he had an extensive criminal history and that he cooperated with the police to avoid a possible life sentence. He also acknowledged that he might not have positively identified Martell during the initial Texas interview and might have stated more generally that a picture of Martell looked familiar. [10]

4. Cell Phone, DNA, and Fingerprint Evidence

A San Jose police officer testified that police found a cellular phone on Richdale Avenue near the intersection of Richdale and Ezie Street the night of the homicide. The phone was registered to Martell's mother and contained a photograph of ****372** Martell that looked like it was taken by Martell "holding out ***338** his cell phone and taking a photo of himself." The clip on the phone's case that would secure it to a pocket was loose.

The prosecution introduced information about the general locations of various cellular phones based on call activity on the night of the killing. San Jose Police Detective Juan Vallejo testified that cellular phone calls generally connect through the nearest cellular tower to

the phone's location. The San Jose Police Department employee who created a trial exhibit mapping cellular phone activity testified that a phone's location cannot be precisely identified based on its connection with a cellular tower and that if a tower is busy a phone can connect through a different tower.

Detective Vallejo testified that on August 27, calls from Martell's phone connected through a cellular tower in the San Francisco area before 8:00 p.m. and through towers in San Jose between 8:20 p.m. and 8:23 p.m. No further calls were made from that phone after 8:23 p.m. that night. Data for a phone number associated with Tommy showed that the phone connected with a tower near the crime scene from 6:22 p.m. until 10:02 p.m., through a tower south of the crime scene and closer to Deleone's apartment at 10:41 p.m., through a tower southwest of the crime scene near Barragan's mother's house at 10:58 p.m., and through a tower in Milpitas between 2:51 and 4:03 a.m. on August 28. Data for a phone number associated with Mendoza were generally consistent with Tommy's in both time and location on August 27 and the early morning of August 28. A phone number associated with Ramirez showed phone calls made through a tower in Milpitas around the same time as some of Tommy's calls.

The jury also heard testimony regarding fingerprint and DNA evidence. A fingerprint on a beer can found in the back yard at 436 Ezie St. matched Martell. Martell's DNA was found on a cigarette located in the front yard of 436 Ezie St. A fingerprint on a different beer can found in the back yard of 436 Ezie St. matched Mendoza. One of Mendoza's fingerprints matched a fingerprint found on a beer can in the front driveway of 436 Ezie St. Mendoza's DNA was found on a swab collected from that same beer can. Ramirez's DNA was present in dried blood taken from the exterior rear passenger side door of a gray Cadillac the police found on August 31 at the Thornbridge Apartments.

5. Victim Information and Autopsy Results

A crime scene investigator testified that Garcia had "S.U.R." tattooed in capital letters on his left arm as well as a tattoo of a man's head wearing a bandana with "V.S.T." and "13" written on it. He also had a star to the left of his left eye and three dots to the right of his right eye.

***339** Dr. Joseph O'Hara testified as an expert in pathology and cause of death about the autopsy he performed in the case. Garcia suffered 15 stab wounds to his face, chest, abdomen, thighs, arms, right foot, and lower back. Among the most severe stab wounds were a four- and one-half-inch deep wound to the chest; a four-inch deep wound to the abdomen that perforated his liver; a three-inch deep wound to the chest that collapsed a lung; and a five-inch deep wound to the armpit. Each of those four stab wounds could have been independently fatal without medical treatment. Though he could not be certain, Dr. O'Hara testified that the structure of the stab wounds indicated the possibility that two weapons were used: one with a single-edged blade and another with a double-edged blade. There were no round puncture wounds, as would be expected if a Phillips-head screwdriver ****373** was used as a weapon. Garcia suffered three incised wounds (wounds that are longer than they are deep) and multiple blunt-force injuries, including contusions, abrasions, and lacerations. Dr. O'Hara opined that the cause of death was multiple stab wounds of the head, trunk, and extremities.

6. Statements by Defendants

Detective Vallejo testified about interrogating Martell on August 31 with Detective Newton. [11] Martell was read his *Miranda* [12] rights and asked about the night of the homicide. Martell claimed he had been in San Francisco watching a football game that day and returned to the San Jose area around 7:30 or 8:00 p.m. Martell claimed he was dropped off at a grocery store near Ezie Street, walked to the house of his cousin (who was not home), and then walked to his aunt's house where he stayed the rest of the night. Martell said he lost his phone that day and thought he dropped it while walking from the grocery store to his cousin's house. The prosecutor asked Vallejo whether Martell admitted being a Norteño when he was younger, and Vallejo testified that Martell "said back when he was a juvenile, he was involved with gangs." Martell repeatedly denied being on Ezie Street on August 27 and told the police he did not know anything about the homicide. Detective Vallejo testified that at the time of the interview Martell had scratches and abrasions on his hands and a large "S.J." tattooed on his stomach.

Detective Newton testified about interrogating Ramirez in September 2011 after arresting him and reading him

his *Miranda* rights. Ramirez had what Newton described as a healing wound on his right ring finger. Ramirez said he was familiar with Ezie Street and had been there on one afternoon about two months earlier. He identified a picture of Barragan as a friend but claimed not to know his name. Ramirez denied being a Norteño, stating "No, ***340** I just hang out with," before trailing off. He steadfastly denied being on Ezie Street on August 27 and also denied participating in any sort of assault that might have occurred there.

The jury heard statements made by Mendoza from three sources: a non-custodial interview; a booking interview; and text messages from Mendoza's cellular phone. Detective Newton conducted a non-custodial interview with Mendoza at Mendoza's workplace in March 2012. [13] At the non-custodial interview, Mendoza stated that he had heard of Ezie Street but had never been there. He denied being in a gang. When asked if he "claimed Northern," Mendoza responded "[j]ust Northern, yeah." Newton showed Mendoza pictures of Martell, Barragan, and possibly other suspects; Mendoza denied knowing any of them. Mendoza had a large "U" tattoo that extended from the top of his chest down to his belly button. He also had "Unidos" tattooed across his stomach. Newton testified that Mendoza told him those tattoos were in support of a college team he liked, the Utah Utes.

When Mendoza was booked into the county jail after his arrest, correctional officer Gilbert Rios conducted a classification ****374** interview with Mendoza. Rios testified that all inmates are asked if they associate with a gang when they are booked into the county jail. Inmates were told that the gang association question was for their safety and that their response would remain confidential. Rios testified that if an individual indicated they would rather be housed with members of a certain gang, that would be treated as an admission. Rios's notes indicated that Mendoza "admitted Northerner."

The trial court also admitted text messages from Mendoza's phone relating to drug sales.

7. Gang Expert

San Jose Police Detective Chris Gridley testified as an expert regarding gang crimes. Gridley testified about Norteños generally, described prior convictions offered to prove a pattern of criminal gang activity, offered opinions about defendants' gang affiliations, and opined that the murder was gang-related. As Gridley's testimony is relevant to several issues on appeal, we will discuss it in greater detail in Part II.D.1.

8. Evidence of Intimidation

Evidence suggesting intimidation of witnesses was admitted over defendants' objections. Deleone testified that he was punched in the mouth by an ***341** inmate while in custody in the Santa Clara County Jail in May 2012. Deleone was told that the attack had been ordered by "the Norteños" because Deleone had made statements to the police related to defendants' case. [14] He was "[s]omewhat" fearful for his life afterward and was moved into protective custody. Deleone asked the district attorney's office to relocate him and also asked for an escort to and from testifying at defendants' trial because he feared for his life.

Tommy testified that at some point between the homicide and his arrest in Texas, Barragan's brother Junior told Tommy that his nephew and his brother (presumably meaning Raymond Jr. and Raymond III) "are snitching on me and on everybody" and asked Tommy if he knew where they were. [15] Tommy withheld the information because he feared for both his and his family's safety.

Salvador Rivas testified that his home was vandalized in October 2011 when someone spray-painted graffiti on his garage and his car. Among the graffiti was "XIV." Rivas feared for his family's safety and believed the graffiti was related to him talking to the police because the graffiti occurred within two hours after he received a subpoena to testify in defendants' case. He remained fearful at trial.

9. Defense Case

Though technically called by the prosecution, Martell's attorney sought favorable testimony from Randy Carrasco, whose grandmother was Martell's grandmother's partner. Carrasco worked with Martell as a furniture mover and testified that it was common for employees to get scratches while at work.

Defense investigator James O'Keefe testified based on a site visit that the approximate distance between where Garcia was stabbed and the garage at 452 Ezie Street was 198 feet, or 66 yards. He also testified, based on an Internet search, that there would have been almost no light from the moon on the night of the homicide.

**375 D. JURY INSTRUCTIONS, VERDICT, AND SENTENCING

Among other instructions, the court read versions of CALCRIM Nos. 252 (general v. specific intent), 400 (aiding/abetting generally), 401 ***342** (aiding/abetting intent), 403 (natural and probable consequences), 520 (murder), 875 (assault with a deadly weapon), 915 (simple assault), 1401 (gang enhancement) and 3426 (voluntary intoxication).

The jury deliberated for several days, and ultimately found all defendants guilty of the lesser included offense of second degree murder and found the gang allegations true. Martell waived jury on the strike allegation, which the court found true after a hearing.

The trial court sentenced each defendant to an indeterminate term of 15 years to life for murder. The court purported to stay the sentence for the gang enhancements. (See § 186.22, subd. (b)(1)(C).) [16] The court granted Martell's *Romero* [17] motion to strike the true finding on the strike allegation.

II. ISSUES RAISED IN THE ORIGINAL APPEALS [**]

III. NO RETROACTIVE APPLICATION OF PROPOSITION 57

We granted rehearing and asked the parties to submit supplemental briefing regarding whether Proposition 57 had any effect on Ramirez's appeal. Ramirez argues that he is entitled to relief under Proposition 57 because: (1) the voters intended to apply Proposition 57 to non-final cases; (2) *In re Estrada* (1965) 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948 (*Estrada*) compels retroactive application of Proposition 57; and (3) the failure to apply Proposition 57 retroactively would violate his California and federal constitutional rights to equal protection and due process.

*343 A. PROCEDURAL BACKGROUND AND PROPOSITION 57

Ramirez, who was 16 years old when the homicide occurred, was charged by direct filing in adult court. [26] At that time, former Welfare and Institutions Code section 707, subdivision (d)(1) allowed a prosecutor to bypass the juvenile court and directly file certain charges against a minor in adult court. (Stats. 2008, ch. 179, § 236, pp. 656–657.) Specifically, a prosecutor could file an accusatory pleading directly in adult court against a minor, like Ramirez, who was both 16 years of age or older and accused of committing certain specified offenses (including murder). (Former Welf. & Inst. Code, § 707, subds. (d)(1), (b)(1); Stats. 2008, ch. 179, § 236, pp. 654–657.)

The voters approved Proposition 57 at the November 8, 2016 general election; it took effect the next day. (****376** Cal. Const., art. II, § 10, subd. (a).) Proposition 57 amended the Welfare and Institutions Code to mandate that any allegation of criminal conduct against any person under 18 years of age be commenced in juvenile court, regardless of the age of the juvenile or the severity of the offense. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) Text of Proposed Laws, pp. 141–145.) As amended by Proposition 57, Welfare and Institutions Code section 707, subdivision (a)(1) now specifies that the sole mechanism by which a minor can be prosecuted in adult court is through a motion by a prosecutor to transfer the case from juvenile court to adult court. [27] In response to a motion to transfer, "the juvenile court shall decide whether the minor should be transferred to a court of criminal jurisdiction," considering: the "degree of criminal sophistication exhibited by the minor"; whether "the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction"; the "minor's previous delinquent history"; the success "of previous attempts by the juvenile court to rehabilitate the minor"; and the "circumstances and gravity of the offense alleged in the petition to have been committed by the minor." [28] (§ 707, subd. (a)(2)(A)–(a)(2)(E).)

Proposition 57 also changed parole eligibility for both adults *and* juveniles tried in adult court. It added section 32 to article I of the California Constitution, which provides:

"Any person convicted of a nonviolent felony ***344** offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." (Cal. Const., art. I, § 32, subd. (a)(1).)

Proposition 57 contains uncodified sections, some of which are relevant to Ramirez's contentions. Section 2 states that the purpose and intent of the proposition was, among other things, to "[s]ave money by reducing wasteful spending on prisons"; "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles"; and "[r]equire a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) Text of Proposed Laws, p. 141.) Section 5 states that the act "shall be broadly construed to accomplish its purposes." (*Id.* at p. 145.) Section 9 states that the act "shall be liberally construed to effectuate its purposes." (*Id.* at p. 146.)

B. TEXT AND HISTORY OF PROPOSITION 57 DO NOT SUPPORT RETROACTIVITY

[1] Whether the voters intended Proposition 57 to apply retroactively is a question of law to which we apply our independent judgment. (*People v. Arroyo* (2016) 62 Cal.4th 589, 593, 197 Cal.Rptr.3d 122, 364 P.3d 168 (*Arroyo*).) When interpreting a voter initiative, we apply the same rules that govern statutory construction. We first look to the language of the enactment, giving the words their ordinary meaning. If the law is ambiguous, we refer to other sources of voter intent, including the arguments and analyses contained in the official ballot pamphlet. (*Ibid.*)

[2] **[3]** **[4]** ****377** "Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear with respect to a particular statute, the Legislature's generally applicable declaration in section 3 provides the default rule: 'No part of [the Penal Code] is retroactive, unless expressly so declared.' " (*People v. Brown* (2012) 54 Cal.4th 314, 319, 142 Cal.Rptr.3d 824, 278 P.3d 1182 (*Brown*).) We are "cautious not to infer retroactive intent from vague phrases and broad, general language in statutes." (*Ibid.*)

[5] The text of Proposition 57 contains no express statement of intent regarding prospective or retroactive application. Ramirez argues that retroactive intent can be inferred from broadly and liberally construing the initiative's stated purposes of saving money by reducing spending on prisons and requiring judges rather than prosecutors to decide whether juveniles should be tried in adult court. (Citing Voter Information Guide, Gen. Elec. (Nov. 8, 2016) Text of Proposed Laws, p. 141.) But even broadly construed, none of the stated purposes provide a reference to timing from which retroactive intent can be inferred. In fact, there is arguably textual support for an inference of ***345** *prospective* intent. One stated purpose is to require judges rather than prosecutors to decide "whether juveniles *should be* tried in adult court." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) Text of Proposed Laws, p. 141, italics added.) That statement suggests an intent that Proposition 57 apply only to cases that have not already been tried. At most, the text of Proposition 57 is ambiguous.

[6] **[7]** **[8]** Because the text of the initiative is arguably ambiguous, we look to the ballot materials to determine whether they shed light on the voters' intent. (*Arroyo, supra*, 62 Cal.4th at p. 593, 197 Cal.Rptr.3d 122, 364 P.3d 168.) Ramirez points to several statements from the argument in favor of Proposition 57 that he argues suggest the voters intended to apply Proposition 57 retroactively: "Prop. 57 focuses resources on keeping dangerous criminals behind bars, while rehabilitating juvenile and adult inmates and saving tens of millions of taxpayer dollars"; "Prop. 57 focuses our system on evidence-based rehabilitation for juveniles and adults because it is better for public safety than our current system"; "Prop. 57 saves tens of millions of taxpayer dollars by reducing wasteful prison spending, breaks the cycle of crime by rehabilitating deserving juvenile and adult inmates, and keeps dangerous criminals behind bars"; "Requires judges instead of prosecutors to decide whether minors should be prosecuted as adults, emphasizing rehabilitation for minors in the juvenile system"; and "Evidence shows that the more inmates are rehabilitated, the less likely they are to re-offend. Further evidence shows that minors who remain under juvenile court supervision are less likely to commit new crimes. Prop. 57 focuses on evidence-based rehabilitation and allows a juvenile court judge to decide whether or not a minor should be prosecuted as an adult." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) argument in favor of Proposition 57 and rebuttal to argument against Proposition 57, pp. 58–59.)

Though the foregoing passages express voter intent to focus on rehabilitation, they are silent as to intent regarding retroactivity. And, like the statement of intent from Proposition 57 we have already discussed, the last two of those passages are susceptible of the same inference of *prospective* intent. Both state that judges should decide whether minors "should be prosecuted," suggesting an intent that the law apply only to future prosecutions.

****378** In sum, we find that 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 ballot pamphlet, meaning that we must follow section 3 and apply Proposition 57 prospectively unless the *Estrada* rule applies. (*Brown, supra,* 54 Cal.4th at p. 319, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

*346 C. THE *ESTRADA* RULE DOES NOT APPLY

Ramirez argues that retroactive application of Proposition 57 is compelled by the *Estrada* rule, which is a judicially-created exception to the general section 3 presumption that new statutes apply prospectively.

1. The *Estrada* Rule

[9] [10] Even in the absence of voter intent to apply a proposition retroactively, the *Estrada* rule provides a "contextually specific qualification to the ordinary presumption" of prospective application. (*Brown, supra,* 54 Cal.4th at p. 323, 142 Cal.Rptr.3d 824, 278 P.3d 1182, citing *Estrada, supra,* 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948.) When the electorate (or Legislature) amends "a statute to reduce the punishment for a particular criminal offense," the *Estrada* rule provides an inference that the voters "intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*Brown,* at p. 323, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) That conclusion is based 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.' " (*Ibid.* quoting *Estrada,* at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948, italics in *Brown*.)

Brown is instructive regarding application of the *Estrada* rule. *Brown* involved a legislative amendment to section 4019 that temporarily increased the rate at which presentence custody credits were calculated. (*Brown, supra,* 54 Cal.4th at pp. 317–319, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) Brown was sentenced to prison before the amendment but argued, based on the *Estrada* rule, that the amendment should apply retroactively to him because his judgment was not yet final when the amendment became effective. (*Id.* at pp. 318–319, 323, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) The *Brown* court decided the *Estrada* rule did not apply. It reasoned that unlike a legislative mitigation of the penalty for a particular crime, "a statute increasing the rate at which prisoners may earn credits for good behavior does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent." (*Id.* at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) The court noted that section 4019 did not alter the penalty for a crime at all, it merely "addresses *future conduct* in a custodial setting by providing increased incentives for good behavior." (*Brown,* at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182, italics in original.)

The *Brown* court rejected an argument that the *Estrada* rule should "apply more broadly to any statute that reduces punishment in any manner." (*Brown, supra,* 54 Cal.4th at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) The court reasoned that such a broad application would expand the *Estrada* rule to such an extent as to swallow the general section 3 presumption of prospective application. (*Ibid.*) That ***347** expansion would run counter to the court's interpretation of the *Estrada* rule "not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application ****379** 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,* at p. 324, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) The court also explained that broadening the *Estrada* rule to apply to the section 4019 amendments would not "represent a logical extension of *Estrada's* reasoning." (*Brown,* at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) While acknowledging that "a convicted prisoner who is released a day early is punished a day less," the court noted that "the rule and logic of *Estrada* is specifically directed to a statute that represents ' "a

legislative mitigation of the *penalty for a particular crime*" ' [citation] because such a law supports the inference that the Legislature would prefer to impose the new, shorter penalty rather than to ' "satisfy a desire for vengeance." ' " (*Ibid.* italics in *Brown*.)

2. Analysis

[11] Ramirez argues that the *Estrada* rule applies because Proposition 57 "specified that 'different treatment' as a juvenile was sufficient to meet ... 'the legitimate ends of the criminal law.' " (Quoting *Brown, supra*, 54 Cal.4th at p. 323, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) The fundamental problem with Ramirez's argument is that—unlike every case he cites where a court found that the *Estrada* rule applied [29] —Proposition 57 does not mitigate the penalty for a particular crime. As the court emphasized in *Brown*: "We based this conclusion [that the *Estrada* rule requires retroactive application of statutes that reduce punishment for a particular offense] 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 ***348** the criminal law.' " (*Brown*, at p. 323, 142 Cal.Rptr.3d 824, 278 P.3d 1182, quoting *Estrada, supra*, 63 Cal.2d at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948, italics in *Brown*.)

Proposition 57 is distinguishable in two respects from the laws at issue in cases applying the *Estrada* rule. First, Proposition 57 does not expressly mitigate the penalty for any particular crime. Instead, it amends the Welfare and Institutions Code to create a presumption that all individuals under the age of 18 come within the jurisdiction of the juvenile court (Welf. & Inst. Code, § 602), and provides a procedural method for prosecutors to move to transfer a juvenile case to adult court (Welf. & Inst. Code, § 707, subd. (a)(1)). ****380** We acknowledge that the amendments may have the effect of reducing the punishment in some cases because, unlike adult court sentences, the longest that juvenile court jurisdiction generally extends is until the juvenile offender is 25 years old. (§ 607, subd. (b).) But, as the *Brown* court reasoned when reviewing the amendments to section 4019, the *Estrada* rule is not applicable to any amendment that *may* reduce a punishment. Instead, the *Estrada* rule is "specifically directed to a statute that represents ' "a legislative mitigation of the *penalty for a particular crime*." ' " (*Brown, supra*, 54 Cal.4th at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182, italics in *Brown*.)

Second, Proposition 57 provides no certainty that a minor will actually receive a mitigated penalty because juvenile courts have discretion under Proposition 57 to transfer juvenile cases to adult court. (Welf. & Inst. Code, § 707, subd. (a)(2).) If a case is transferred to adult court, the penalty for all offenses will be the same as they were before Proposition 57.

Given these distinctions, we find that applying the *Estrada* rule to Proposition 57 would expand that rule in such a manner as to risk swallowing the general section 3 presumption that legislation is intended to apply prospectively. (*Brown, supra*, 54 Cal.4th at pp. 324–325, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

People v. Francis (1969) 71 Cal.2d 66, 75 Cal.Rptr. 199, 450 P.2d 591 (*Francis*), relied on by Ramirez, is distinguishable. Francis was convicted of committing a felony drug offense. While his case was pending on appeal, the statute prohibiting that drug offense was amended to change it from a straight felony to a wobbler that could be charged as a felony or a misdemeanor. The *Francis* court determined that the *Estrada* rule applied. (*Id.* at pp. 75–78, 75 Cal.Rptr. 199, 450 P.2d 591.) The court reasoned that while the amendment did not guarantee Francis a lower sentence, making the crime punishable as a misdemeanor showed a legislative intent that punishing the offense as a felony might be too severe in certain cases. (*Id.* at p. 76, 75 Cal.Rptr. 199, 450 P.2d 591.)

Francis is distinguishable because it involved a legislative mitigation of the potential punishment for a specific crime. Where, as under Proposition 57, the ***349** potential benefit inures to a class of offenders based on their age rather than on the offenses they commit, the inference that voters deemed the entire Penal Code unduly severe when applied to minors is too attenuated to support application of the *Estrada* rule. [30]

Our conclusion that the *Estrada* rule does not apply is consistent with a recent decision interpreting Proposition 57. (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 215 Cal.Rptr.3d 174 (*Cervantes*).) Cervantes (who was 14 years old) was charged as an adult before Proposition 57 and convicted of several charges, including attempted murder and torture. (*Cervantes*, at pp. 366, 369–70,

215 Cal.Rptr.3d 174.) Proposition 57 passed while his case was pending on appeal. The Court of Appeal rejected Cervantes's argument that Proposition **381 57 should apply retroactively to him under the *Estrada* rule, reasoning that while Proposition 57 "will have a substantive impact on time in custody in some cases—sometimes a big impact—the transfer procedure required under [Welfare and Institutions Code] Section 707 does not resemble the clear-cut reduction in penalty involved in *Estrada*." (*Id.* at p. 601, 215 Cal.Rptr.3d 174.) The court observed that 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*." (*Ibid.*)

D. NO EQUAL PROTECTION VIOLATION

Ramirez argues that not applying Proposition 57 retroactively to his case would violate his state and federal constitutional rights to equal protection. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).)

1. Standard of Review

[12] [13] [14] The concept of equal protection recognizes that individuals who are similarly situated should be treated equally, unless there is a justification for the differential treatment. (*Brown, supra,* 54 Cal.4th at p. 328, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) The first step in an equal protection challenge is demonstrating that the state adopted a classification that affects two or more similarly situated groups in an unequal way. (*Ibid.*) That "initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253, 127 Cal.Rptr.2d 177, 57 P.3d 654.)

[15] [16] [17] [18] [19] ***350** The second step is determining whether there is a sufficient justification for the unequal treatment. The level of justification needed is based on the right implicated. When the disparity implicates a suspect class or a fundamental right, strict scrutiny applies. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836, 16 Cal.Rptr.3d 420, 94 P.3d 551 (*Wilkinson*).) When no suspect class or fundamental right is involved, the challenger must demonstrate that the law is not rationally related to any legitimate government purpose. (*People v. Turnage* (2012) 55 Cal.4th 62, 74, 144 Cal.Rptr.3d 489, 281 P.3d 464 (*Turnage*).) "In other words, the legislation survives constitutional scrutiny as long as there is ' "any reasonably conceivable state of facts that could provide a rational basis for the classification." ' " (*Ibid.*)

2. Ramirez is Similarly Situated with Juveniles Benefiting from Proposition 57

[20] Ramirez is similarly situated with another class for purposes of his challenge to Proposition 57. The two classes are distinguished by whether trial had commenced before Proposition 57's effective date.[31] Ramirez falls within the class of individuals whose trials had already commenced. He is similarly situated with a class of hypothetical individuals who are 16 or 17 years old and accused of crimes that could result in transfer to adult court, but **382 whose trials had not commenced before Proposition 57 became effective.

3. There is a Rational Basis for Ramirez's Differential Treatment

Having determined that Ramirez is similarly situated with another class of individuals, we must decide whether there is a justification for the differential treatment caused by prospective application of Proposition 57. But first we must decide which standard of review applies: strict scrutiny or rational basis.

[21] Ramirez argues both that strict scrutiny applies because Proposition 57 implicates Ramirez's fundamental liberty interest (citing *People v. Olivas* (1976) 17 Cal.3d 236, 251, 131 Cal.Rptr. 55, 551 P.2d 375 (*Olivas*)), and that the distinction cannot even survive rational basis review.

Olivas involved a challenge to a law that allowed adult misdemeanants who were under 21 years old to be tried in adult court and then remanded to ***351** the California Youth Authority. (*Olivas, supra,* 17 Cal.3d at p. 239, 131 Cal.Rptr. 55, 551 P.2d 375.) The California Youth Authority could retain an individual until he or she turned 23 years old. (*Id.* at p. 241, 131 Cal.Rptr. 55, 551 P.2d 375.) Olivas (who was 19 years old when he was arrested) was convicted of a misdemeanor that had a maximum sentence of six months, meaning that under the challenged

law he faced a "potential period of confinement several times longer than the longest jail term which might have been imposed." (*Id.* at pp. 239–242, 131 Cal.Rptr. 55, 551 P.2d 375.) Because his challenge implicated a fundamental liberty interest, the Supreme Court concluded that strict scrutiny applied. (*Id.* at pp. 247–251, 131 Cal.Rptr. 55, 551 P.2d 375.)

Ramirez essentially argues that strict scrutiny applies here because he is potentially subject to a longer period of incarceration than those to whom Proposition 57 applies. Though *Olivas* could be interpreted to require strict scrutiny in any case involving penal statutes authorizing different sentences, "*Olivas* properly has not been read so broadly." (*Wilkinson, supra,* 33 Cal.4th at p. 837–838, 16 Cal.Rptr.3d 420, 94 P.3d 551 [applying rational basis to equal protection challenge to two statutes prohibiting battery against custodial officers where it was possible that statute prohibiting battery without injury could be punished more severely than statute prohibiting battery with an injury]; accord *People v. Owens* (1997) 59 Cal.App.4th 798, 802, 69 Cal.Rptr.2d 428 ["California courts have never accepted the general proposition that 'all criminal laws, because they may result in a defendant's incarceration, are perforce subject to strict judicial scrutiny.' "].) In a similar context, the Ninth Circuit concluded that the rational basis standard applied to a challenge brought by a defendant sentenced under Washington's indeterminate sentencing scheme who argued that he had been denied equal protection by not having that state's later-enacted determinate sentencing scheme applied to his case. (*Foster v. Washington State Bd. of Prison Terms and Parole* (9th Cir. 1989) 878 F.2d 1233, 1235.)

Ramirez's prosecution, conviction, and sentencing in adult court were all proper under the laws in place at the time of those events. Proposition 57 differentiates between people based on the timing of their prosecution rather than on any suspect classification. And Ramirez had no vested liberty interest " ' "in a specific term of imprisonment or in the designation a particular crime receives." ' " (*Turnage, supra,* 55 Cal.4th at p. 74, 144 Cal.Rptr.3d 489, 281 P.3d 464.) We find that the rational basis standard applies.

[22] [23] **383 Ramirez argues that the differential treatment he receives "bears no rational relationship to [Proposition] 57's 'objective.' " But the rational basis standard does not focus solely on a law's stated objective. It allows for " ' "any reasonably conceivable state of facts that could provide a rational basis for the classification." ' " (*Turnage, supra,* 55 Cal.4th at p. 74, 144 Cal.Rptr.3d 489, 281 P.3d 464, italics added.) The voters could rationally conclude that applying Proposition 57 prospectively would serve the legitimate purpose of not overwhelming the juvenile courts ***352** with requests for fitness hearings by those who had already been convicted in adult court for crimes committed as juveniles. (E.g., *Talley v. Municipal Court* (1978) 87 Cal.App.3d 109, 114–116, 150 Cal.Rptr. 743 [finding no equal protection violation in prospective-only application of alcohol treatment program that bypassed license suspension because differential treatment rationally related to law's purpose of " 'prevent[ing] the courts and programs in each county from being overburdened at the commencement of the implementation of this article' "].)

[24] The voters could also rationally conclude that applying Proposition 57 prospectively was rationally related to the legitimate government purpose of assuring that " 'penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written' " when the defendant committed the crime and was tried for that offense. (*People v. Floyd* (2003) 31 Cal.4th 179, 188, 190–191, 1 Cal.Rptr.3d 885, 72 P.3d 820 [rejecting equal protection challenge to prospective-only application of Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, which guaranteed probation for individuals convicted of nonviolent possession offenses, subject to certain disqualifying circumstances].) We acknowledge that the penal laws will not maintain their desired deterrent effect in *all* cases because Proposition 57 likely applies to juveniles who committed crimes before Proposition 57 but who were not prosecuted until after its effective date. But a " 'classification is not arbitrary or irrational simply because there is an "imperfect fit between means and ends' " [citations], or 'because it may be "to some extent both underinclusive and overinclusive." ' " (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 887, 183 Cal.Rptr.3d 96, 341 P.3d 1075.)

[25] More fundamentally, the federal Constitution " 'does not forbid ... statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time.' " (*Califano v. Webster* (1977) 430 U.S. 313, 314–316, 321, 97 S.Ct. 1192, 51 L.Ed.2d 360 [rejecting equal protection challenge to an amendment to the

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Social Security Act that improved a retirement benefit calculation but applied only prospectively; plaintiff had argued retroactive application was required to prevent discrimination based on date of birth].)

Because there is a rational basis for prospective-only application of Proposition 57, Ramirez's equal protection challenge fails. [32]

****384 *353 E. NO DUE PROCESS VIOLATION**

[26] Ramirez argues that not applying Proposition 57 retroactively to his case would violate his federal constitutional right to due process. He cites a single case to support that proposition, *Kent v. United States* (1966) 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (*Kent*).

Kent involved what the Supreme Court characterized as "a number of disturbing questions concerning the administration ... of the District of Columbia laws relating to juveniles." (*Kent, supra,* 383 U.S. at pp. 542–543, 86 S.Ct. 1045.) When Kent was 16 years old, he was apprehended after his fingerprints were found in the apartment of a woman who had been raped. Police interrogated Kent for several hours, delivered him to a "Receiving Home for Children" for the night, and then interrogated him for several more hours the next day. (*Id.* at pp. 543–544, 86 S.Ct. 1045.) Kent's mother retained counsel for Kent. His counsel filed motions requesting a hearing on the juvenile court's apparent intention to transfer Kent to adult court and seeking access to Kent's juvenile court file. The juvenile court file contained a report that discussed the possibility of Kent having a mental illness. (*Id.* at pp. 544–546, 86 S.Ct. 1045.) Without holding a hearing, the juvenile court summarily ordered Kent's case transferred to adult court, finding that "after 'full investigation, I do hereby waive' " the juvenile court's jurisdiction. (*Id.* at p. 546, 86 S.Ct. 1045.) Kent was charged in adult court with residential burglary, robbery, and rape. He was found not guilty by reason of insanity of rape, but was found guilty of the remaining charges. (*Id.* at pp. 548, 550, 86 S.Ct. 1045.)

The Supreme Court found that the juvenile court violated Kent's rights to due process and the effective assistance of counsel when it summarily transferred his case to adult court. (*Kent, supra,* 383 U.S. at pp. 557, 561–562, 86 S.Ct. 1045.) The statute at issue stated that the juvenile judge "may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult." (*Id.* at pp. 547–548, 86 S.Ct. 1045.) The court found that "the statute read in the context of constitutional principles relating to due process and the assistance of counsel" required the juvenile court to provide a hearing, assistance of counsel (including providing the attorney access to juvenile court files), and a statement of reasons to support its decision. (*Id.* at pp. 557, 561–562, 86 S.Ct. 1045.)

We find *Kent* readily distinguishable. *Kent* did not involve review of whether a law that had taken effect after a conviction should be applied ***354** retroactively. And the Supreme Court was careful to note that it was deciding the case based on its interpretation of the statute at issue there, read in the context of constitutional principles. (*Kent, supra,* 383 U.S. at pp. 557, 86 S.Ct. 1045.) Ramirez does not argue that the trial court here violated any procedural statute in effect when he was prosecuted.

[27] Over a century ago, the United States Supreme Court concluded that for purposes of due process, "the 14th 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, 31 S.Ct. 490, 55 L.Ed. 561 [denying due process challenge to new law prohibiting ****385** use of person's picture in advertising without consent].) Ramirez has failed to demonstrate any due process violation. [33]

IV. DISPOSITION

The superior court is directed to prepare a new abstract of judgment for each defendant to note a 15-year minimum parole eligibility date based on Penal Code section 186.22, subdivision (b)(5), and to forward those abstracts to the Department of Corrections and Rehabilitation. As so modified, the judgments are affirmed.

WE CONCUR:

Manoukian, Acting P.J.

Mihara, J.

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All Citations

10 Cal.App.5th 327, 216 Cal.Rptr.3d 361, 17 Cal. Daily Op. Serv. 3112, 2017 Daily Journal D.A.R. 3104

Footnotes

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II.

1 Unspecified statutory references are to the Penal Code.

2 The same day we filed the original opinion, we denied a petition for writ of habeas corpus filed by Martell's appellate counsel that alleged ineffective assistance of trial counsel. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

3 Meaning no disrespect, we refer to members of the Gonzalez family by their first names because multiple members of the Gonzalez family were involved in this case.

4 As relevant to one of Martell's appellate arguments, Rivas's testimony at trial regarding the chase was somewhat inconsistent. On direct examination, Rivas testified that one male led the chase and was followed by the remaining people. On cross-examination, Rivas testified that two men led the chase but that one of them was slightly in front of the second, with the rest further behind the second man.

5 Ramirez and Martell were held to answer following a joint preliminary hearing. Mendoza was indicted by a grand jury. Defendants' cases were eventually consolidated.

6 Tommy acknowledged on cross-examination that he had told the police during previous interviews that he never saw the weapons.

7 The court overruled defense objections to the prosecutor's method of refreshing Deleone's recollection.

8 After the court struck the testimony about weapons, the prosecutor referred to the items in the sweatshirt as weapons two more times and the trial court sustained defense objections each time. The court later denied a defense mistrial motion based on the prosecutor's conduct.

9 The court denied a defense motion to admit statements from the Barragan interview.

10 Merlin Newton, one of the San Jose detectives who interviewed Tommy in Texas, testified at trial that Tommy identified Martell during the Texas interrogation as the person who lost his phone the night of the homicide.

11 The video recording of the interrogation and a transcript were admitted into evidence at trial after certain information was redacted.

12 *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (*Miranda*).

13 After minor redactions, the audio recording of Mendoza's non-custodial interview was admitted into evidence over his relevance objection.

14 The hearsay statement was admitted for the limited purpose of showing Deleone's state of mind.

15 The hearsay statement was admitted for the limited purpose of showing the effect on the listener (Tommy).

16 The minute order states the stay was "purs. to Johnson case," presumably meaning *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1237, 1239, 135 Cal.Rptr.2d 848 (*Johnson*) [finding § 186.22, subd. (b)(1)(C) inapplicable to second-degree murder indeterminate sentence because § 186.22, subd. (b)(5) applies to " 'a felony punishable by imprisonment in the state prison for life' " and "requires that the defendant serve a minimum of 15 calendar years before being considered for parole"].

17 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628.

** See footnote *, *ante*.

26 As we will be differentiating between courts of criminal jurisdiction and juvenile courts, we will refer to courts of criminal jurisdiction as adult courts.

27 Specifically, Welfare and Institutions Code section 707, subdivision (a)(1) now provides: "In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age, the district attorney ... may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction."

28 Proposition 57 also amended Welfare and Institutions Code section 602, but those amendments are not relevant to this appeal. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) Text of Proposed Laws, pp. 141–142.)

29 Other than *Estrada* and *Brown*, Ramirez cites: *People v. Francis* (1969) 71 Cal.2d 66, 75–78, 75 Cal.Rptr. 199, 450 P.2d 591 [defendant entitled to resentencing on controlled substances conviction where amendment made offense a wobbler instead of a straight felony]; *People v. Rossi* (1976) 18 Cal.3d 295, 298, 134 Cal.Rptr. 64, 555 P.2d 1313 [reversing oral copulation conviction after legislative amendment rendered the defendant's conduct non-criminal]; *People v. Babylon* (1985) 39 Cal.3d 719, 721–722, 216 Cal.Rptr. 123, 702 P.2d 205 [reversing television piracy convictions where conduct no longer illegal under amendment enacted while appeal pending]; *People v. Nasalga* (1996) 12 Cal.4th 784, 787, 50 Cal.Rptr.2d 88, 910 P.2d 1380 [defendant entitled to shorter sentencing enhancement under legislative amendment increasing the minimum value of stolen property required for longer enhancement to apply]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1536, 1548–1549, 66 Cal.Rptr.2d 559 [reversing for limited retrial as to whether medicinal marijuana initiative provided valid defense to the defendant's marijuana possession conviction]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 783–786, 33 Cal.Rptr.3d 859 [reversing for new trial to allow the defendant to argue that legislative amendments related to medicinal marijuana provided a valid defense to conspiracy to possess marijuana for sale charge].

30 In concluding that the *Estrada* rule does not apply to Ramirez's case, we express no opinion on the possible applicability of Proposition 57 to cases where trial had not commenced before the initiative took effect. (See *People v. Superior Court (Lara)* (2017) 9 Cal.App.5th 753, 776–78, 215 Cal.Rptr.3d 456 [finding juveniles charged in adult court by direct filing before Proposition 57 are entitled to fitness hearings before trials commence]; *Cervantes, supra*, 9 Cal.App.5th at pp. 603–16, 215 Cal.Rptr.3d 174 [finding juvenile convicted in adult court after direct filing was entitled to a fitness hearing on remand before retrial of counts the Court of Appeal reversed].)

31 We acknowledge that when remanding the case for possible retrial or resentencing, the *Cervantes* court found that the distinguishing event for application of Proposition 57 was sentencing rather than commencement of trial. (*Cervantes, supra*, 9 Cal.App.5th pp. 608–13, 215 Cal.Rptr.3d 174 ["[B]eginning with the effective date of Prop [.] 57, a juvenile felon may not be 'sentenced in adult court' without a prior transfer hearing under Section 707, subdivision (a), if he or she so requests."].) We explain in footnote 7, *post*, why defining the two classes based on sentencing rather than the commencement of trial would not change our equal protection analysis here.

32 Even assuming, consistent with *Cervantes*, that the two classes are distinguished by whether sentencing had occurred before Proposition 57's effective date (see *Cervantes, supra*, 9 Cal.App.5th at pp. 614–13, 215 Cal.Rptr.3d 174), our equal protection analysis would not change. Applying Proposition 57 to juveniles who had been found guilty in adult court before Proposition 57 but who were not *sentenced* until after the initiative became effective would slightly increase the class of people who benefit from Proposition 57. But the voters could still rationally conclude that applying Proposition 57 only to that slightly larger class of juveniles would serve the legitimate government interest of preventing juvenile courts from being overwhelmed with requests for fitness hearings by those who had already been convicted *and sentenced* in adult court for crimes they committed as juveniles.

33 Ramirez also argues that, even if his constitutional arguments fail, Proposition 57 should be construed as retroactive to avoid serious and doubtful constitutional questions. "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers." (*Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828, 142 P.2d 297.) This rule of statutory construction is inapplicable here. Construing Proposition 57 as prospective-only does not raise "serious and doubtful" constitutional issues, as our analysis of those constitutional issues demonstrates. Hence, no presumption arises that the voters intended to avoid these issues.

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14 Cal.App.5th 469
Court of Appeal,
Second District, Division 5, California.

The PEOPLE, Plaintiff and Respondent,
v.
Armando PINEDA, Jr., Defendant and Appellant.

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Filed 8/14/2017
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Certified for Partial Publication. *

Synopsis

Background: After district attorney directly filed charge against juvenile defendant in a court of criminal jurisdiction, rather than a juvenile court, defendant was convicted in the Superior Court, Los Angeles County, No. TA133930, Eleanor J. Hunter, J., of second degree murder. He appealed.

Holdings: The Court of Appeal, Baker, J., held that:

[1] Proposition 57, which repealed direct file procedures, applied to juvenile defendant, and

[2] conditional reversal of defendant's conviction to afford him a juvenile fitness hearing was appropriate remedy.

Conditionally reversed and remanded with directions.

Kriegler, Acting P.J., filed opinion concurring in part and dissenting in part.

****270** APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Conditionally reversed, with directions. (Los Angeles County Super. Ct. No. TA133930)

Attorneys and Law Firms

Jeralyn Keller, Pasadena, under appointment by the Court of Appeal, for Defendant and Appellant.

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Opinion

BAKER, J.

***471** A jury found defendant Armando Pineda, Jr. (defendant) guilty of second degree murder for shooting the patriarch of a neighboring family, ***472** Rogelio Islas (Rogelio).[1] Defendant was 17 years old at the time of the crime, and the Los Angeles ****271** County District Attorney directly filed the charge against him in a court of criminal jurisdiction, rather than a juvenile court. Owing to that filing decision and the subsequent repeal of "direct file" procedures effected by Section 4 of the Public Safety and Rehabilitation Act of 2016 (Proposition 57), we must decide an issue pending on our Supreme Court's docket: whether the changes worked by Section 4 apply to defendant because his conviction is not yet final. In the unpublished portion of our opinion, we also consider defendant's additional assignments of error: the trial court abused its discretion by denying his motion to continue the trial, the court should have instructed the jury on third party flight as consciousness of guilt (both defendant and his father fled the scene of the crime, and the defense at trial was that the father was the shooter), and the court should have given defendant's proposed pinpoint instruction on provocation as relevant to voluntary manslaughter.

I. BACKGROUND

A. The Offense Conduct

On several occasions during the two years that preceded Rogelio's killing, members of the Pineda family (i.e., defendant's family) and the Islas family (i.e., Rogelio's family) argued and, at times, engaged in fisticuffs. Both families lived on the same street in Compton (one house apart), and naturally, each family believed it was in the right and the other family was responsible for the ongoing trouble.

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On the day defendant shot Rogelio in June 2014,[2] trouble began around 2:30 in the afternoon. Defendant, his girlfriend Katherine Bautista (Bautista), and his sister Connie had plans to visit another of defendant's sisters. They were preparing to leave for the visit in an SUV parked between the Pineda and Islas family homes. Defendant's father, Armando Pineda, Senior (Senior), had arrived home at about the same time, and he drove past Rogelio standing outside his home without incident.

According to Connie and others in the Pineda family, defendant was in the process of putting his child into a car seat in the SUV when Rogelio insulted defendant and both men then began arguing. Connie and Bautista attempted ***473** to convince defendant to stop arguing and get in the SUV—physically holding defendant back at one point. While defendant and Rogelio were arguing, Senior came outside.

The only eyewitnesses to what happened next were defendant and members of his family; they would later claim Senior pulled a gun on Rogelio and shot him multiple times. But there were several witnesses not associated with either family who heard what happened.

Oscar Ibarra (Ibarra) lived in the house between the Pineda and Islas homes, and he heard a woman say in a scared voice, "No, Junior. Don't do it," followed by multiple gunshots two or three seconds later. (Because defendant and his father shared the same name, defendant was often called "Junior." Defendant's mother also referred to defendant as "Papa.") Maria Soto, an off-duty police officer who was visiting the home next to the Islas family's house, heard a woman scream "no, poppy, no" in Spanish and then the sound of shots fired.

Another neighbor who lived two houses down from the Islas family home, Gustavo Silva (Silva), heard the gunshots and ****272** looked out his window. Seconds later, Silva heard Connie frantically say, "No, Junior. No. You don't do that. Why did you do that?" Silva then saw someone (he could not see who) pushed into a waiting SUV, which then "burned rubber" driving away from the scene. In the meantime, the other neighbor, Ibarra, had seen defendant run toward the SUV. Although Ibarra could not see defendant enter the vehicle, defendant was no longer in the area after the SUV drove off at high speed.

When the SUV raced away, defendant, Senior, and Bautista (and defendant's infant daughter) were inside; Connie was left behind. Silva saw Connie get on her cell phone and heard her say: "Mom, he killed him. He killed him. What do I do?"; and then, "Junior. Junior. Junior. Junior killed him. What do I do?"[3] This, however, was not Connie's own account of the phone call. She said she called her mother a minute or two after the shooting and said, "Mom, my dad just shot the neighbor." Connie's mother remembered the phone call in the same way, i.e., with Connie identifying her father, not defendant, as the killer.

Connie also sent text messages after the shooting, including a 3:02 p.m. message to her then-boyfriend. (The content of that text message was not offered into evidence at trial—a topic we will return to momentarily.) ***474** Connie's boyfriend called her back after receiving the text message and she told him "her dad just shot the neighbor."[4]

Law enforcement investigation following the shooting determined Rogelio had been shot five times, including two shots that were fatal (one to the back of the head and another to the lower back). Initially, Connie, Bautista, and defendant's mother did not tell the police that Senior was the culprit in Rogelio's murder. They advised the police that Senior was the shooter only later, during interviews approximately seven months after the killing.

B. The District Attorney Charges Defendant With Murder, and the Trial Court Denies a Defense Motion to Continue the Trial

At the time of Rogelio's murder, California law allowed prosecutors to file murder charges against a defendant over 16 years old directly in a court of criminal jurisdiction, meaning a court assigned responsibility for adjudicating charges against adult offenders rather than a juvenile court. (Former Welf. & Inst. Code, § 707, subds. (b)(1), (d)(1), added by Stats. 1975, ch. 1266, § 4, as amended by Prop. 21, § 26, approved March 7, 2000.) Using this "direct file" procedure, the Los Angeles County District Attorney in October 2014 charged defendant with Rogelio's murder in a court of criminal jurisdiction.

During the proceedings that ensued, defendant was initially represented by retained counsel. At a court appearance in December 2014, the trial court relieved

retained counsel at defendant's request and appointed the public defender to represent defendant. The court advised defendant that his new attorney would need time to get up to speed on the case, and defendant agreed to continue the trial date to allow counsel to do so.

****273** At a pretrial conference in March 2015, the trial court set May 5, 2015, as the trial date. The court also scheduled a discovery compliance hearing on April 2, 2015, and a pretrial conference on April 17, 2015. At the pretrial conference on April 17, 2015, the trial court denied an oral motion by the defense to continue the trial.

Twelve days later, and less than a week before trial, the defense filed a written motion seeking a 14-day continuance of the trial date. The declaration from defense counsel asserted a continuance was warranted for a variety of reasons. Specifically, defense counsel contended (1) he expected to be in trial ***475** on another case on the existing trial date, (2) his investigator was attempting to subpoena a "newly found witness" (Connie's former boyfriend who received her text message following the shooting), (3) the defense ballistics and crime reconstruction expert had not yet completed her final report, (4) the defense was attempting to recover the content of the text message Connie sent her boyfriend after Rogelio's shooting, (5) he received "hours more of recorded phone calls ... from the prosecution, and ... [was] still listening to CDs (with recorded witness statements) received from the prosecution during the past month," and (6) he had inherited a felony caseload including multiple " 'life cases,' " which affected his ability to prepare for trial even though he had "committed a great deal of time in attempting to become ready to handle this matter expeditiously."

Regarding the asserted need for more time to try to recover the text message, defense counsel's declaration stated "the defense investigators [ ]who have done extensive work on this case [ ]since the Public Defender's Office was appointed approximately four months ago" had sent Connie and her boyfriend's damaged cell phones to the Computer Crime Institute at Dixie State University (the Dixie State Institute). The declaration explained the phones had been previously sent to another laboratory that had no success in recovering "crucial text messages" and the Dixie State Institute was one of the only labs that could attempt "chip extractions" that might recover the message. Defense counsel declared he left a message with the Dixie State Institute the day before filing the continuance motion to determine when their work would be completed but had not "heard back yet."

The prosecution opposed the defense request to continue the trial date. The prosecution's opposition brief responded to each of the reasons defense counsel raised as grounds for a continuance, including the effort to recover the content of the text message Connie sent after the shooting. The prosecutor explained she had spoken with a Dixie State Institute representative on the same day the defense attorney contacted the institute. The representative told the prosecutor there were no guarantees the chip extraction would be successful but the institute should have an answer by May 1, 2015. As to the asserted defense need for more time to review recordings of jail calls and visits, the prosecution's opposition stated: "As the court is aware[,] on April 2, 2015, the People turned over CDs consisting of jail calls and jail visits. The Court informed the Defendant that the People were monitoring his calls and visits. If the Defendant continues to make calls and receive visits and those are monitored, the prosecution has a continuing obligation to turn over such evidence. As such, this is an ongoing issue that does not serve as a basis for a continuance."

On the morning of trial, the court heard argument on the defense's motion for a 14-day continuance. Defense counsel acknowledged several of the ***476** issues he asserted as grounds for a continuance had been resolved and he was "very close to be[ing] ****274** ready." But counsel maintained the requested continuance remained necessary because the Dixie State Institute was still working on recovering the text message from Connie to her boyfriend and because "there are hours worth of CD's and calls that I have been trying to get through and there is more to be done on that." As to the text message issue in particular, defense counsel asserted he had learned that morning that Dixie State Institute personnel were not able to extract information from the chip on one of the damaged phones but they were working on the second phone and he expected they would be done with their work 14 days later, on May 19, 2015.

The prosecution persisted in its opposition to the requested continuance, explaining it was not clear why Dixie State Institute personnel needed until May 19 when they previously said they would have an answer by May 1. The prosecution also noted that if a continuance were

granted to review the jail calls, the case would never go to trial because defendant continued to make calls and receive visitors, which generated additional recordings that had to be produced.

Having heard from both sides and considered the defense declaration and the prosecution's written opposition, the trial court denied the motion for a continuance and sent the case out for trial.

C. Jury Instructions and the Verdict

Trial proceeded over the course of six days. Defendant put on a substantial defense case, testifying himself and calling his mother, Bautista, Connie, and Connie's former boyfriend (among others) as witnesses.

The defense at trial was not simply that the prosecution had the wrong guy, i.e., that Senior, not defendant, shot Rogelio. Rather, defendant also relied on the testimony at trial to contend he was not guilty of murder even if the jury believed he was the shooter because he shot Rogelio in an objectively reasonable response to long-term provocation (the family feuding), which would make the crime voluntary manslaughter rather than murder.

In aid of this alternative defense, defendant proposed the court give an instruction he formulated concerning "long-term provocation." The instruction stated: "Provocation may be established even though there was not a single incident qualifying as sufficient provocation. Provocation may be established by a long period of minor events culminating in sufficient ***477** provocation." The trial court declined to give this proposed pinpoint instruction, reasoning the provocation concept was adequately covered in the instructions the court intended to give. [5]

For its part, the prosecution asked the trial court to instruct the jury that defendant's flight from the scene of the crime was a fact it could use to infer consciousness of guilt. The court agreed, stating it would give CALCRIM No. 372. [6] Defense ****275** counsel made no request to modify the flight instruction, nor did he propose the trial court instruct the jury that it could consider Senior's flight from the scene of the crime in the same manner. [7] During closing argument, however, defense counsel argued without objection that Senior's flight from the scene of the murder was evidence of his guilt: "[W]hat father would allow his son to be taken into custody, or at least, not come back? And what—in a situation where [Senior's] just gone, unless he was the killer. It's just common sense."

During its summation, the prosecution urged the jury to convict defendant of first degree murder, i.e., murder that is willful, deliberate, and premeditated. The jury, however, found defendant guilty of second degree murder. The jury also found true personal use of a firearm enhancements that had been alleged in connection with the murder charge. At sentencing, the trial court considered on the record the factors for sentencing a juvenile described in *Miller v. Alabama* (2012) 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 and its progeny. The court sentenced defendant to an aggregate term of 40 years to life, consisting of 15 years to life for the second degree murder conviction, and a consecutive 25 years to life pursuant to Penal Code section 12022.53, subdivision (d) based on defendant's personal use of a firearm causing Rogelio's death.

Defendant noticed a timely appeal from the judgment of conviction on October 28, 2015. Just over a year later voters approved the Public Safety and ***478** Rehabilitation Act of 2016, denominated Proposition 57 (hereinafter, "the Act"), at the November 2016 general election. The Act took effect the next day, November 9, 2016.

II. DISCUSSION

Section 4 of the Act (hereinafter, "Section 4") amended Welfare and Institutions Code section 707 to eliminate former subdivision (d), which gave prosecutors discretion to directly file charges against certain juvenile defendants in a court of criminal jurisdiction. This direct file authority avoided the need to file a petition in juvenile court and then seek judicial approval to transfer the case to a court of criminal jurisdiction. (See generally *People v. Vela* (2017) 11 Cal.App.5th 68, 73-75, 218 Cal.Rptr.3d 1, review granted July 12, 2017, S242298 (*Vela*).) Had defendant been charged after enactment of Section 4, there is no question he would have been entitled to a fitness hearing in juvenile court, at which a judicial officer would determine whether to transfer his case to a court of criminal jurisdiction in light of five specified statutory criteria, and after reviewing a report prepared by a probation officer. (Welf. & Inst. Code, § 707, subd. (a) [listing

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criteria, including the minor's previous delinquent history, whether the minor can be rehabilitated before expiration of juvenile court jurisdiction, and the circumstances and gravity of the offense].) Of course, defendant was charged well before California voters enacted Section 4, so the question for us is whether he is entitled to the benefit of the changes worked by the Act.

Recognizing our Supreme Court will soon have the final word, we hold Section 4 applies to every minor to whom it can ****276** constitutionally apply, which includes defendant because his conviction is not yet final. We further hold defendant's remaining arguments for reversal —the denial of his motion to continue the trial and the asserted instructional errors—are meritless. In light of these twin holdings, we conclude the same remedy ordered in *Vela* is appropriate here: conditional reversal of the judgment with directions to afford defendant the hearing required by Welfare and Institutions Code section 707 (as amended by the Act), if requested by the prosecution.

A. Section 4's Statutory Changes Apply to Defendant and Require a Conditional Reversal of the Judgment

[1] Six published Court of Appeal opinions have endeavored to discern the voters' intent in enacting Section 4, although only five have found it necessary to decide the precise question we confront here: whether Section 4's amendments to the Welfare and Institutions Code apply to juveniles charged or convicted before the section's effective date. (*People v. Superior Court (Walker)* (2017) 12 Cal.App.5th 687, 220 Cal.Rptr.3d 1 (*Walker*); ***479** *People v. Marquez* (2017) 11 Cal.App.5th 816, 217 Cal.Rptr.3d 814 (*Marquez*), review granted July 26, 2017, S242660; *Vela, supra,* 11 Cal.App.5th 68, 218 Cal.Rptr.3d 1, rev. gr.; *People v. Mendoza* (2017) 10 Cal.App.5th 327, 216 Cal.Rptr.3d 361, review granted July 12, 2017, S241647 (*Mendoza*); *People v. Cervantes* (2017) 9 Cal.App.5th 569, 215 Cal.Rptr.3d 174, review granted May 17, 2017, S241323 (*Cervantes*); see also *People v. Superior Court (Lara)* (2017) 9 Cal.App.5th 753, 774, 215 Cal.Rptr.3d 456, review granted May 17, 2017, S241231 [finding it unnecessary to consider whether the changes worked by Section 4 amount to a legislative reduction in the punishment for a crime].) Having granted review (so far) of all but one of these cases, our Supreme Court will ultimately resolve the question we must decide. Our discussion of the ramifications of Section 4 for this case will therefore get right to the point.

The weight of published authority concludes Section 4's elimination of direct filing authority does not require reversal for a juvenile convicted before Section 4 took effect—regardless of whether the conviction in question is final. (*Marquez, supra,* 11 Cal.App.5th at pp. 820-821, 217 Cal.Rptr.3d 814, rev. gr.; *Mendoza, supra,* 10 Cal.App.5th at pp. 345, 348, 216 Cal.Rptr.3d 361, rev. gr.; *Cervantes, supra,* 9 Cal.App.5th at pp. 580, 601-602, 215 Cal.Rptr.3d 174, rev. gr.; see *Walker, supra,* 12 Cal.App.5th at pp. 697-699, 220 Cal.Rptr.3d 1; see also *People v. Vieira* (2005) 35 Cal.4th 264, 306, 25 Cal.Rptr.3d 337, 106 P.3d 990 ["[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed"].) But we exercise judgment not by counting the number of published opinions on either side of an issue but rather by assessing the persuasiveness of the reasons offered for reaching one outcome or another. Without doubt, the question of Section 4's application to convictions that preceded its effective date has spawned reasonable disagreement, but we find the analysis in *Vela* to be generally the better reasoned approach.

[2] We acknowledge at the outset that the general rule is that legislative changes ordinarily apply only prospectively, " 'absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise.' (****277** *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 [279 Cal.Rptr. 592, 807 P.2d 434] [ ] (*Tapia*) ...)" (*Cervantes, supra,* 9 Cal.App.5th at p. 599, 215 Cal.Rptr.3d 174, rev. gr.) It is also true that the text of the Act itself is silent on whether Section 4 should apply to convictions sustained, or charging decisions made, prior to its enactment. [8] (See, e.g., *Marquez, supra,* 11 Cal.App.5th at p. 822, 217 Cal.Rptr.3d 814, rev. gr.) But the ultimate question we answer in this case (as in every case ***480** concerning the proper effect to be given to an initiative) is what did the voters who approved the Act intend. The answer to that question turns, in our view, on a proper application of *In re Estrada* (1965) 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948 (*Estrada*); an appreciation of the Act's purposes, which the Act itself lays bare in its uncodified provisions; and an understanding of the differences between juvenile and criminal adjudication. On each of these points, we believe *Vela* arrives at the correct conclusion.

Estrada stands as an exception to the general rule that legislative changes ordinarily operate prospectively. (*Cervantes, supra,* 9 Cal.App.5th at p. 599, 215 Cal.Rptr.3d 174, rev. gr.) As recounted in *Vela*, *Estrada* holds that " '[w]hen 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.' " (*Vela, supra,* 11 Cal.App.5th at p. 77, 218 Cal.Rptr.3d 1, rev. gr., quoting *Estrada, supra*, 63 Cal.2d at pp. 744-745, 48 Cal.Rptr. 172, 408 P.2d 948.)

We agree with *Vela* *'s* conclusion that the changes in law worked by Section 4 are, for *Estrada* purposes, amendments that lessen the punishment for crimes committed by juvenile defendants. (*Vela, supra,* 11 Cal.App.5th at pp. 77-78, 218 Cal.Rptr.3d 1, rev. gr.) Thus, under the interpretive rule announced in *Estrada*, we presume the voters who approved the Act intended defendant to benefit from the repeal of the direct filing procedure and the corresponding requirement for a juvenile court fitness hearing because he is among the people to whom those changes may still constitutionally apply. (*Id.* at p. 78, 218 Cal.Rptr.3d 1 ["[W]e find an 'inevitable inference' that the electorate 'must have intended' that the potential 'ameliorating benefits' of rehabilitation (rather than punishment), which now extend to every eligible minor, must now also 'apply ****278** to every case to which it constitutionally could apply' "].)

The conclusion that Section 4 is properly seen as a measure reducing the punishment for crimes makes sense in light of the markedly reduced emphasis on punishment in juvenile courts, as compared to courts of criminal ***481** jurisdiction. *Vela* details the differences between the two court systems at length. (*Vela, supra,* 11 Cal.App.5th at pp. 73-74, 218 Cal.Rptr.3d 1, rev. gr. [quoting the observation in *In re Julian R.* (2009) 47 Cal.4th 487, 496, 97 Cal.Rptr.3d 790, 213 P.3d 125 that the " '[s]ignificant differences between the juvenile and adult offender laws underscore their different goals: The former seeks to rehabilitate, while the latter seeks to punish' "]; see also Welf. & Inst. Code, § 607 [juvenile court jurisdiction over a juvenile offender extends, at most, to the time at which the offender turns 25 years of age]; Cal. Code Regs., tit. 15, §§ 4951-4957 [parole consideration dates for juvenile offenders range from a year or less up to a maximum of seven years, depending on the severity of the offense].)

In addition, the upshot of the *Estrada* rule—that courts will presume a measure reducing the punishment for an offense applies to all cases in which the punishment may be constitutionally reduced—is consistent with the voters' declared purposes in approving the Act. Those purposes include "[s]top[ping] the revolving door of crime by emphasizing rehabilitation, especially for juveniles"; "[r]equir[ing] a judge, not a prosecutor, to decide whether juveniles should be tried in adult court"; and "[s]av[ing] money by reducing wasteful spending on prisons." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 141 [§ 2].) Section 5 of the Act directs that it should be construed broadly to accomplish these purposes, and we agree with *Vela* that the statements of purpose in the Act further demonstrate that "the intent of the electorate in approving [the Act] was to broaden the number of minors who could potentially stay within the juvenile justice system, with its primary emphasis on rehabilitation rather than punishment." (*Vela, supra,* 11 Cal.App.5th at p. 76, 218 Cal.Rptr.3d 1, rev. gr.)

The *Vela* opinion also rebuts—persuasively so, in our view—the central rationale on which the *Cervantes* line of cases relies to hold Section 4 does not affect a defendant charged and convicted before the Act took effect. Those cases read our Supreme Court's decision in *People v. Brown* (2012) 54 Cal.4th 314, 142 Cal.Rptr.3d 824, 278 P.3d 1182 (*Brown*) as having limited the *Estrada* interpretive rule to applying only where a legislative change reduces the punishment for a *particular criminal offense*. (See, e.g., *Mendoza, supra,* 10 Cal.App.5th at p. 348, 216 Cal.Rptr.3d 361, rev. gr.; *Cervantes, supra*, 9 Cal.App.5th at p. 600, 215 Cal.Rptr.3d 174, rev. gr. ["[L]ater Supreme Court cases have limited *Estrada* *'s* retroactivity exception to statutory changes that mitigate the penalty for a particular crime ..."].) They then reason Section 4 does not reduce the penalty for a particular crime, even though juvenile courts cannot order offenders to be held in custody as long as courts of criminal jurisdiction can, because Section 4's amendments provide only an uncertain benefit, namely, a fitness hearing that might or might not result in the transfer of a juvenile offender to a court of criminal jurisdiction. (See, e.g., ***482** *Marquez, supra,* 11 Cal.App.5th at pp.

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826-827, 217 Cal.Rptr.3d 814, rev. gr.; *Mendoza*, at p. 348, 216 Cal.Rptr.3d 361 ["We acknowledge that the amendments [made by Section 4] may have the effect of reducing the punishment in some cases because, unlike adult court sentences, the longest that juvenile court jurisdiction generally ****279** extends is until the juvenile offender is 25 years old. [Citation.] But, as the *Brown* court reasoned ..., the *Estrada* rule is not applicable to any amendment that *may* reduce a punishment"]; *Cervantes*, at pp. 601-602, 215 Cal.Rptr.3d 174.)

Vela, however, cites authority—including *People v. Francis* (1969) 71 Cal.2d 66, 75 Cal.Rptr. 199, 450 P.2d 591 (*Francis*) and *Estrada* itself—that holds a contingent reduction in penalty (meaning a reduction that may or may not actually take place, depending on the exercise of discretion) still warrants invocation of the presumption that the change in law was intended to apply as broadly as constitutional principles permit. (*Vela*, *supra*, 11 Cal.App.5th at pp. 78-80, 218 Cal.Rptr.3d 1, rev. gr.) *Francis*, in particular, is key. In that case, the Legislature changed the statutorily authorized penalty for Francis's marijuana possession crime while his case was on appeal, making the crime a "wobbler" rather than a straight felony. (*Francis*, at p. 75, 75 Cal.Rptr. 199, 450 P.2d 591.) Our Supreme Court acknowledged Francis's case was somewhat unlike *Estrada* because the change did not "revoke one penalty and provide for a lesser one but rather vest[ed] in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty." (*Id.* at p. 76, 75 Cal.Rptr. 199, 450 P.2d 591.) But our Supreme Court held the " 'inevitable inference' " drawn in *Estrada*, i.e., that the Legislature intended the amendment to apply to every case to which it could constitutionally apply, applied equally in Francis's case because the legislative change was a determination "that the former penalty provisions may have been too severe *in some cases* and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*Ibid.* (emphasis added); see also *Vela*, at pp. 79-80, 218 Cal.Rptr.3d 1.)

[3] The same analysis obtains with respect to Section 4: the voters who approved the Act determined criminal punishment for juvenile offenders may be too severe in some cases, namely, those where a judge declines to order the transfer of an offender to a court of criminal jurisdiction—an adjudicatory forum in which there is a greater focus on punishment instead of rehabilitation and greater latitude to impose substantially longer custodial sentences. In other words, the holding in *Francis*, especially when combined with what *Vela* describes as the "sea change in penology regarding the relative culpability and rehabilitation possibilities for juvenile offenders" (*Vela*, *supra*, 11 Cal.App.5th at p. 75, 218 Cal.Rptr.3d 1, rev. gr.), convinces us California voters intended Section 4's amendments to then-existing law to apply to all juveniles possible, ***483** including defendant, because punishing those juveniles with criminal court sentences might in some cases be too severe.[9]

[4] **[5]** ****280** Having held defendant is entitled to the benefit of Section 4's amendments to section 707 of the Welfare and Institutions Code, reversal of the judgment is required because defendant has not had the fitness hearing that section requires, if requested. The question remains, however, what form the reversal should take. We agree with *Vela* that a conditional reversal of the judgment is the remedy that best gives effect to the voters' intentions in passing the Act.[10] (*Vela*, *supra*, 11 Cal.App.5th at pp. 81-82, 218 Cal.Rptr.3d 1, rev. gr.) But a *conditional* reversal is only appropriate in this case if the reversal is necessary solely to give effect to our holding with respect to the ramifications of the Act's passage. We therefore proceed to discuss defendant's other assertions of error and conclude a conditional reversal is indeed the appropriate remedy because all of defendant's remaining arguments for outright reversal lack merit.

B.–D.[**]

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the juvenile court with directions to conduct a fitness hearing under ***484** Welfare and Institutions Code section 707, if the prosecution moves for such a hearing, no later than 90 days from the date the remittitur issues. If, after a fitness hearing, the juvenile court determines that it would have transferred defendant to a court of criminal jurisdiction, the judgment of conviction shall be reinstated as of the date of that determination. If no motion for a fitness hearing is filed, or if a fitness hearing is held and the juvenile court determines that it would not have transferred defendant to a court of criminal jurisdiction, defendant's criminal conviction, including the true findings on the alleged enhancements,

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will be deemed to be juvenile adjudications as of the date of the juvenile court's determination. In the event the conviction is deemed a juvenile adjudication, the juvenile court shall then conduct a dispositional hearing and impose an appropriate disposition within the court's discretion.

I concur:

DUNNING, J. [*]

KRIEGLER, Acting P.J., concurring in part and dissenting in part

I concur in the majority opinion to the extent it affirms defendant's conviction of second degree murder with personal use of a firearm. I respectfully dissent from that portion of the opinion conditionally reversing the judgment with directions to hold a fitness hearing pursuant to Proposition 57. Because the issue has divided the Courts of Appeal, and the dispute will eventually be resolved by our Supreme Court, I add **281 just a few observations on the issue of retroactivity of Proposition 57.

In recent years, Propositions 36 and 47 made significant changes in criminal law and procedure. Both initiatives contained express retroactivity provisions, putting the electorate on notice that the proposed changes would affect final and non-final judgments. Proposition 57, on the other hand, is completely silent in its text and the voters' guide on the issue of retroactivity. The electorate had no reason to believe that a person in defendant's position—duly charged under existing law, convicted by jury, and sentenced—would retroactively be entitled to a fitness hearing. If the proponents of Proposition 57 intended retroactive application of its terms, they should not have kept that intent hidden from the electorate. Perhaps voters would have been amenable to retroactive application of Proposition 57. “But voters can make that choice only if the question is presented in the initiative on which they have been asked to vote. The question was not presented” in Proposition 57, “and so it is not a choice we can say the voters have already made.” (*People v. Valencia* (2017) 3 Cal.5th 347, 386, 220 Cal.Rptr.3d 230, 397 P.3d 936 (conc. opn. of Kruger, J.).)

***485** Not only is there no express retroactivity provision, there is no reason to conclude the voters impliedly intended Proposition 57 to apply to someone in defendant's situation under the reasoning of *In re Estrada* (1965) 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948 (*Estrada*). I doubt that the reasoning of *Estrada* applies here, as the statutory punishment for second degree murder and use of a firearm (or any other offense) was not mitigated by Proposition 57. But beyond that, the suggestion that the voters must have intended retroactive application of any ameliorative provisions of Proposition 57 under *Estrada* is a fiction with which I cannot agree. It is not a stretch to conclude that the electorate as a whole has no knowledge or understanding of the principle of *Estrada*, particularly since the justices of the Courts of Appeal are divided on both the scope of the *Estrada* holding and its application to the issue presented here.

This brings me to my final point. There is no way to comply with Proposition 57 as to defendant. As amended by Proposition 57, Welfare and Institutions Code section 707, subdivision (a)(1), requires the prosecutor to make a motion to transfer the minor from juvenile court to a court of general jurisdiction “prior to the attachment of jeopardy.” Jeopardy attached long ago in this case. There is nothing in the language of Proposition 57 authorizing a fitness hearing after a conviction by jury and sentencing by the trial court. Proposition 57's requirement that a transfer motion be made “prior to the attachment of jeopardy” is an indication of the intent of the initiative. Liberal construction of Proposition 57 is required, but application of it to a circumstance never disclosed to the electorate and temporally impossible, in my view, goes beyond what may reasonably be read into the initiative by way of liberal construction. (See *People v. Estrada* (2017) 3 Cal.5th 661, 220 Cal.Rptr.3d 801, 399 P.3d 27 [noting that Proposition 36 did not explicitly address the issue presented but intent is found in other factors].)

I would affirm the judgment in its entirety.

All Citations

14 Cal.App.5th 469, 222 Cal.Rptr.3d 269, 17 Cal. Daily Op. Serv. 7887, 2017 Daily Journal D.A.R. 7834

Footnotes

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of Parts II.B–II.D; Justice Kriegler's concurring and dissenting opinion is certified for publication in full.

1 Many of the individuals involved in this case share the same last name. We use first names where warranted for clarity.

2 Defendant does not challenge the sufficiency of the evidence to support the jury's verdict, and we state the facts in the light most favorable to the People. (*People v. Perez* (2010) 50 Cal.4th 222, 229, 112 Cal.Rptr.3d 310, 234 P.3d 557; *People v. Cooper* (1979) 94 Cal.App.3d 672, 676, fn. 2, 156 Cal.Rptr. 646.)

3 Ibarra also saw Connie talking on her cell phone, but he could not hear what she was saying. Ibarra later asked Connie what happened and she said, while crying, “He shot” and “He had a gun.”

4 According to defendant's mother, Senior picked her up in the SUV after fleeing the scene of the crime (by then, no one else was in the vehicle) and he admitted shooting Rogelio. When asked later during trial, the Pineda family witnesses testified they had not seen or heard from Senior after the day of the shooting.

5 The court instructed the jury with CALCRIM Nos. 522 and 570. CALCRIM No. 522 advised the jury that provocation may reduce a murder from first degree to second degree, or to manslaughter, and that the “weight and significance of the provocation, if any, are for you to decide.” CALCRIM No. 570 informed the jury that it could find defendant guilty of voluntary manslaughter if he killed in response to provocation that would cause an average person to act rashly from passion rather than judgment. As relevant here, the instruction stated “[s]ufficient provocation may occur over a short or long period of time.”

6 As given, CALCRIM No. 372 stated: “If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself.”

7 Defendant's attorney objected to the CALCRIM No. 372 instruction, but only on the ground that defendant turned himself in to the police four days after Rogelio's murder. In defendant's view, this meant he had not fled.

8 Because the Act includes no express provision declaring whether it applies prospectively or retrospectively, the question of the voters' intent must be resolved by reference to background legal principles. Put more concretely, voters were not told Section 4 would apply retrospectively, but neither were they told it would apply only prospectively; the choice between the two modes of application necessarily turns on the correct application of settled, judicially developed interpretive principles. (See, e.g., *People v. Burton* (1989) 48 Cal.3d 843, 861, 258 Cal.Rptr. 184, 771 P.2d 1270; *People v. Weidert* (1985) 39 Cal.3d 836, 844, 218 Cal.Rptr. 57, 705 P.2d 380 [“The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted”]; see also *People v. Valencia* (2017) 3 Cal.5th 347, 379, 220 Cal.Rptr.3d 230, 397 P.3d 936 (conc. opn. of Kruger, J.) [“California cases have established a set of standard rules for the construction of voter initiatives. ‘We interpret voter initiatives using the same principles that govern construction of legislative enactments.’ [Citation.]”].) In this vein, we further note there is no support for the proposition that the intentions or expectations of voters who passed an earlier, unrelated initiative measure should control the interpretation of an initiative measure enacted by a differently composed electorate years later.

9 To the extent the *Cervantes* line of cases can be read to suggest the *Estrada*/*Francis* rule applies only where the legislative change enumerates a specific penal statute (as with Health and Safety Code section 11530 that was at issue in *Francis*), we think the suggestion unjustifiably elevates form over substance. If California voters approved an amendment to Penal Code section 190 that stated any person guilty of murder in the first or second degree, who was 17 years old at the time of the crime, could be sentenced to a maximum of eight years in prison, we (and presumably other courts) would have no difficulty concluding the amendment would apply to all convictions not yet final. Nor would we have any difficulty reaching the same conclusion if California voters made similar amendments to multiple penal statutes all in the same initiative measure. Section 4, in substance, is no different—it provides for analogous, albeit contingent, reductions in punishment for a host of penal statutes without need of going to the trouble of enumerating them all.

10 Because we reverse the judgment, albeit conditionally, there is no concern that it is impossible to comply with the terms of Section 4. For one thing, the prosecution theoretically could opt not to file a motion for a fitness hearing, in which case there would obviously be no concern that such a motion was not “made prior to the attachment of jeopardy.” (Welf. & Inst. Code, § 707, subd. (a)(1).) But even understanding a fitness hearing motion is likely a foregone conclusion here, there is still no reason to believe complying with the terms of Section 4 is impossible. Reversal of the judgment effectively operates to vitiate the prior attachment of jeopardy—as even *Cervantes* appears to recognize. (*People v. Eroshevich* (2014) 60 Cal.4th 583, 590-591, 179 Cal.Rptr.3d 356, 336 P.3d 678; *Cervantes, supra*, 9 Cal.App.5th at p. 608, 215

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Cal.Rptr.3d 174, rev. gr. [“Under a waiver theory, jeopardy apparently does *reattach* with the swearing of a second jury on remand ...”], emphasis added.)

** See footnote *, *ante*.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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11 Cal.App.5th 68
Court of Appeal,
Fourth District, Division 3, California.

The PEOPLE, Plaintiff and Respondent,
v.
Adrian Raphael VELA, Defendant and Appellant.

G052282
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Filed 4/24/2017
|
Certified for Partial Publication. *

Synopsis

Background: Juvenile defendant was convicted in the Superior Court, Orange County, No. 10CF0100, John Conley, J., of murder, attempted murder, and related firearm and gang allegations, and was sentenced to 72 years to life. He appealed.

Holdings: On rehearing, the Court of Appeal, Moore, J., held that:

[1] intent in approving voter proposition requiring juvenile transfer hearing before minor could be tried in criminal court retroactively extended to defendant;

[2] retroactivity rule providing that any law reducing penalty was intended to apply to all non-final judgments applied to support retroactive application of proposition; and

[3] reversal of convictions was not required due to retroactivity determination, but rather remand for juvenile transfer hearing was appropriate remedy.

Judgment conditionally reversed and remanded with directions.

Opinion, 2017 WL 193061, vacated.

**3 Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Judgment conditionally reversed; remanded with directions. (Super. Ct. No. 10CF0100)

Attorneys and Law Firms

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OPINION

MOORE, J.

***70** I

INTRODUCTION

Sixteen-year-old defendant Adrian Raphael Vela and one of his fellow gang members "hit up" (confronted) two suspected rival gang members. Vela's ***71** accomplice pulled out a gun and shot the two victims, killing one of them. The prosecutor directly filed charges against Vela in "adult" criminal court. The jury found Vela guilty of murder, attempted murder, and found true the related firearm and gang allegations.

Vela makes several interrelated claims of instructional error concerning accomplice liability. Vela also raises two constitutional challenges to his 72 years to life sentence. In the unpublished parts of this opinion, we will find that the trial court committed no instructional errors. Further, Vela's sentence does not violate either the equal protection clause or the Eighth Amendment.

In the published portion of this opinion, we conditionally reverse the judgment. Due to the electorate's recent approval of Proposition 57, which emphasized juvenile rehabilitation, prosecutors can no longer directly file charges against a minor in an "adult" criminal court. Only a juvenile court judge can determine whether a minor can be prosecuted and sentenced as an adult, after conducting a transfer hearing, taking into account various factors such as the minor's age, maturity, criminal sophistication, and his or her likelihood of rehabilitation.

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We find that Vela is retroactively entitled to a transfer hearing because his case is not yet final on appeal. If, after conducting the hearing, the juvenile court judge determines that Vela's case should be transferred to a court of criminal jurisdiction, then his convictions and sentence will be reinstated. But if the juvenile court determines that Vela is amenable to rehabilitation, and should remain within the juvenile justice system, then his convictions will be deemed juvenile adjudications. The juvenile court is then to impose an appropriate disposition within its discretion under juvenile court law.

****4** II [**]

III

DISCUSSION

A.-C. [***]

***72** *D. The Effect of Proposition 57*

Although Vela was 16 years old when he committed these offenses, the Orange County District Attorney chose to file the charges directly in "adult" or criminal court. At that time, the district attorney was permitted to do so.

While this appeal was pending, Proposition 57, also known as "The Public Safety and Rehabilitation Act of 2016," became effective. Among other provisions, Proposition 57 amended the Welfare and Institutions Code so as to eliminate direct filing by prosecutors. Certain categories of minors—which would include Vela—can still be tried in criminal court, but only after a juvenile court judge conducts a transfer hearing to consider various factors such as the minor's maturity, degree of criminal sophistication, prior delinquent history, and whether the minor can be rehabilitated. (Welf. & Inst. Code, § 707, subd. (a)(1).) [1]

[1] After we filed an unpublished opinion affirming the judgment, Vela filed a petition for rehearing contending that Proposition 57 applies retroactively to his case. (*In re Estrada* (1965) 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948 (*Estrada*).) Ordinarily, this court will not address an issue that has been raised for the first time in a petition for rehearing. (*People v. Holford* (2012) 202 Cal.App.4th 758, 759, 136 Cal.Rptr.3d 713.) However, for good cause we may do so. (*Alameda County Management Employees Assn. v. Superior Court* (2011) 195 Cal.App.4th 325, 338, fn. 10, 125 Cal.Rptr.3d 556.) This court granted the petition.

We hold that: 1) the amendments to the Welfare and Institutions Code that require a juvenile transfer hearing before a minor may be prosecuted and sentenced in a criminal court apply retroactively; and 2) the appropriate resolution is a conditional reversal dependent on the outcome of a juvenile transfer hearing on remand.

1. *Proposition 57 applies retroactively.*

[2] **[3]** **[4]** The Legislature ordinarily makes laws that will apply to events that will occur in the future. Accordingly, there is a presumption that laws apply prospectively rather than retroactively. But this presumption against retroactivity is a canon of statutory interpretation rather than a constitutional mandate. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1224, 246 Cal.Rptr. 629, 753 P.2d 585.) Therefore, the Legislature can ordinarily enact laws that apply retroactively, either explicitly or by implication. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 311, 279 Cal.Rptr. 592, 807 P.2d 434 ***73** (dis. opn. of Mosk, J.).) In order to determine if a law is meant to apply retroactively, the role of a court is to determine the intent of the Legislature, or in the case of a ballot measure, the intent of the electorate. (*People v. Conley* (2016) 63 Cal.4th 646, 659, 203 Cal.Rptr.3d 622, 373 P.3d 435.)

a. The purpose of the juvenile justice system is to rehabilitate minors.

[5] Before we consider the intent of Proposition 57, a brief discussion of some of the distinctions between the juvenile justice system and the criminal justice system ****5** is in order. Generally, all of the laws regarding juvenile delinquency proceedings are included within the Welfare and Institutions Code, while other code sections—primarily the Penal Code—define the offenses. [2] "Significant differences between the juvenile and adult offender laws underscore their different goals: The former seeks to rehabilitate, while the latter seeks to punish." (*In re Julian R.* (2009) 47 Cal.4th 487, 496, 97 Cal.Rptr.3d 790, 213 P.3d 125.)

Generally, any person under the age of 18 who is charged with violating a law is considered a "minor." (§ 602.) A "juvenile court" is a separate, civil division of the superior court. (§ 246.) A prosecutor charges a minor with an offense by filing a juvenile petition, rather than a criminal complaint. (See §§ 653.7, 655.) Minors "admit" or "deny" an offense, rather than plead "guilty" or "not guilty." (§ 702.3.) There are no "trials," per se, in juvenile court, rather there is a "jurisdictional hearing" presided over by a juvenile court judge. (§ 602.) The jurisdictional hearing is equivalent to a "bench trial" in a criminal court. (See Cal. Rules of Court, rule 5.780.) Although a juvenile court judge adjudicates alleged law violations, there are no "convictions" in juvenile court. (§ 203.) Rather, the juvenile court determines—under the familiar beyond the reasonable doubt standard and under the ordinary rules of evidence—whether the allegations are "true" and if the minor comes within its jurisdiction. (See § 602 et seq.)

[6] There is no "sentence," per se, in juvenile court. Rather, a judge can impose a wide variety of rehabilitation alternatives after conducting a "dispositional hearing," which is equivalent to a sentencing hearing in a criminal court. (§ 725.5; *In re Devin J.* (1984) 155 Cal.App.3d 1096, 1100, 202 Cal.Rptr. 543.) In the more serious cases, a juvenile court can "commit" a minor to juvenile hall or to the Division of Juvenile Justice (DJJ), formerly known as the California Youth Authority (CYA). In order to commit a minor to the DJJ, the record must show that less restrictive alternatives would be ineffective or inappropriate. (***74** *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576, 258 Cal.Rptr. 540.) The DJJ, rather than the court, sets a parole consideration date. DJJ commitments can range from one year or less for nonserious offenses, and up to seven years for the most serious offenses, including murder. (See Cal. Code Regs, tit. 15, § 4951-4957.) A minor committed to DJJ must generally be discharged no later than 23 years of age. (§ 607, subd. (f).)

b. Discretionary direct filing by prosecutors began with Proposition 21.

Prior to Proposition 57, rather than filing a juvenile petition, a prosecutor could, for certain offenses, choose to directly file a criminal complaint against a minor 14 years of age or older in criminal court. (Former § 707, subd. (d), repealed by Initiative Measure (Prop 57, § 4.2, approved Nov. 8, 2016, eff. Nov. 9, 2016.) Discretionary direct filing was the result of a previous ballot measure, Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 549, 574, 117 Cal.Rptr.2d 168, 41 P.3d 3 (*Manduley*).) Among other provisions, "Proposition 21 revised the juvenile court law to *broaden the circumstances* in which minors 14 years of age and older can be prosecuted in the criminal division of the superior court, rather than in juvenile court. [The ****6** initiative], authorize[d] specified charges against certain minors to be filed directly in a court of criminal jurisdiction, without a judicial determination of unfitness under the juvenile court law." (*Ibid.*, italics added.) In *Manduley*, the Supreme Court upheld Proposition 21 against a variety of challenges to the prosecutor's discretionary authority to directly file charges: "The decision to file charges in criminal court [against a minor] is analogous to a prosecutor's decision to pursue capital charges against a defendant." (*Id.* at p. 570, 117 Cal.Rptr.2d 168, 41 P.3d 3.)

Proposition 21 included various findings and declarations, among them: "While overall crime is declining, juvenile crime has become a larger and more ominous threat"; "The rehabilitative/treatment juvenile court philosophy was adopted at a time when most juvenile crime consisted of petty offenses. The juvenile justice system is not well-equipped to adequately protect the public from violent and repeat serious juvenile offenders"; "Juvenile court resources are spent disproportionately on violent offenders with little chance to be rehabilitated"; "Dramatic changes are needed in the way we treat juvenile criminals ... if we are to avoid the predicted, unprecedented surge in juvenile and gang violence." (Text of Proposition 21 < http://vigarchive.sos.ca.gov/2000/primary/propositions/21text.htm>.)

***75** *c. The express intent of Proposition 57 was to emphasize juvenile rehabilitation.*

Sixteen years after Proposition 21, the electorate approved Proposition 57, which repealed both discretionary and mandatory direct filing by prosecutors and emphasized juvenile rehabilitation. During that time there had been a sea change in penology regarding the relative culpability and rehabilitation possibilities for juvenile offenders, as reflected in several judicial opinions. (See, e.g., *Graham v. Florida* (2010) 560 U.S. 48, 67, 130 S.Ct. 2011, 176 L.Ed.2d 825 [a juvenile cannot be sentenced to life without the possibility of parole (LWOP) for a nonhomicide offense]; see also *Miller v. Alabama* (2012) 567 U.S. 460, 132 S.Ct. 2455, 2463-2464, 183 L.Ed.2d 407 (*Miller*) [no

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more mandatory LWOP sentences for juveniles even a homicide offense; there must be a consideration of youth-related factors in sentencing].) In *Miller*, the United States Supreme Court took note of the practice of prosecutors directly filing charges against minors: "The States next argue that courts and prosecutors sufficiently consider a juvenile defendant's age, as well as his background and the circumstances of his crime, when deciding whether to try him as an adult. But this argument ignores that many States use mandatory transfer systems. In addition, some lodge the decision in the hands of the prosecutors, rather than courts." (*Id.* at p. 2460.)

[7] In order to determine the intent of Proposition 57, we not only look to its provisions, but we may also look to the ballot materials in support of its passage. (See, e.g., *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901, 135 Cal.Rptr.2d 30, 69 P.3d 951 [official ballot pamphlet useful in interpreting voter initiatives].) Here, the ballot pamphlet "supporting Proposition 57 contains two express purposes related to juvenile offenders: 'Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles'; and 'Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court.' (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, Public Safety and Rehabilitation Act of 2016, § 2, p. 141.) In addition, the legislative analysis supporting Proposition 57 went so far as to state: 'the only way a ****7** youth could be tried in adult court is if the juvenile court judge in the hearing [under Welfare and Institutions Code section 707, subdivision (a)] decides to transfer the youth to adult court.' " (*People v. Superior Court* (*Lara*) (2017) 9 Cal.App.5th 753, 776-777, 215 Cal.Rptr.3d 456, quoting Ballot Pamp., Gen. Elec. (Nov. 8, 2016) analysis of Prop. 57 by Legis. Analyst, p. 56.) Proposition 57 also provided that: "This act shall be liberally construed to effectuate its purposes." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, Public Safety and Rehabilitation Act of 2016, § 9, p. 146.)

[8] ***76** Thus, while the intent of the electorate in approving Proposition 21 was to broaden the number of minors subject to adult criminal prosecution, the intent of the electorate in approving Proposition 57 was precisely the opposite. That is, the intent of the electorate in approving Proposition 57 was to broaden the number of minors who could potentially stay within the juvenile justice system, with its primary emphasis on rehabilitation rather than punishment.

d. The implied intent of Proposition 57 was to retroactively extend its emphasis on juvenile rehabilitation to every minor to whom it could constitutionally apply.

[9] Although Proposition 57 plainly applies to minors whose charges are filed after its effective date, we must now determine whether it also applies retroactively. That is, does the electorate's express intent to emphasize juvenile rehabilitation extend to minors—such as Vela—who have been directly filed upon in criminal court by a prosecutor, but who were not given the benefit of a juvenile transfer hearing, and whose cases are not yet final on appeal?

When analyzing questions regarding retroactivity, we look primarily to our Supreme Court's opinion in *Estrada*, *supra*, 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948, for guidance. In *Estrada*, the defendant was initially convicted of a drug offense and was committed to a rehabilitation center. (*Id.* at pp. 742-743, 48 Cal.Rptr. 172, 408 P.2d 948.) Estrada left the center at some point and was later captured and pleaded guilty to escape without force or violence. (*Id.* at p. 744, 48 Cal.Rptr. 172, 408 P.2d 948.) At the time of his escape, the punishment for an escape was at least one consecutive year in prison. Further, there was also a statutory delay in an inmate's parole eligibility. But in Estrada's case, after his escape, but before his conviction, the Legislature amended the applicable statutes. An escape without force or violence was now punishable by imprisonment in the state prison for a term of not less than six months, nor more than five years, with no delay in parole eligibility. (*Id.* at pp. 743-744, 48 Cal.Rptr. 172, 408 P.2d 948.)

The Supreme Court reasoned that Estrada was "entitled to the ameliorating benefits of the statutes" as they had been amended. (*Estrada*, *supra*, 63 Cal.2d at p. 744, 48 Cal.Rptr. 172, 408 P.2d 948.) The Supreme Court recognized "the general rule of construction, coming to us from the common law, that when there is nothing to indicate a contrary intent in a statute it will be presumed that the Legislature intended the statute to operate prospectively and not retroactively. That rule of construction, however, is not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction should not be followed blindly in complete disregard of factors that may give a

clue to the legislative intent." (*Id.* at p. 746, 48 Cal.Rptr. 172, 408 P.2d 948.)

****8 *77** In determining the lawmakers' intent, the Supreme Court found "one consideration of paramount importance. It leads inevitably to the conclusion that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail. 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 pp. 744-745, 48 Cal.Rptr. 172, 408 P.2d 948.)

The Supreme Court further explained 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. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance. As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts.' " (*Estrada, supra*, 63 Cal.2d at pp. 745-746, 48 Cal.Rptr. 172, 408 P.2d 948.)

Here, for a minor accused of a crime, it is a potential "ameliorating benefit" to have a neutral judge, rather than a district attorney, determine that he or she is unfit for rehabilitation within the juvenile justice system. While a district attorney has an obligation to be objective and impartial, the duty of that position is also to act as a zealous advocate. (*People v. Eubanks* (1996) 14 Cal.4th 580, 590, 59 Cal.Rptr.2d 200, 927 P.2d 310.) And the impact of the decision to prosecute a minor in criminal court rather than juvenile court can spell the difference between a 16-year-old minor such as Vela being sentenced to prison for 72 years to life, or a discharge from the DJJ's custody at a maximum of 23 years of age. After the passage of Proposition 57, a juvenile court judge can only make that irrevocable decision after receiving a probation report and after conducting a full hearing considering the minor's prior history, the circumstances of the offense, and several other factors relating to his or her youth and immaturity. (§ 707, subd. (a).)

***78** Applying the reasoning of *Estrada*, we find that by its approval of Proposition 57, and its rejection of Proposition 21, the electorate has "expressly determined" that the former system of direct filing was "too severe." Further, we find an "inevitable inference" that the electorate "must have intended" that the potential "ameliorating benefits" of rehabilitation (rather than punishment), which now extend to every eligible minor, must now also "apply to every case to which it constitutionally could apply." (*Estrada, supra*, 63 Cal.2d at pp. 744-746, 48 Cal.Rptr. 172, 408 P.2d 948.) As in *Estrada*, "to hold otherwise" we would have to conclude that the electorate was motivated "by a desire for vengeance" against Vela and similarly situated minors. That conclusion would be directly at odds ****9** with the intent of the electorate in its approval of Proposition 57.

e. *The possibility for a minor's rehabilitation within the juvenile justice system is analogous to the possible reduction of a criminal defendant's sentence.*

[10] The Attorney General argues that "*Estrada*'s retroactivity rule only applies in the specific situation where the law unambiguously reduces a sentence or liability for a particular crime." The Attorney General contends that since Proposition 57 does not "unambiguously" reduce a sentence for a particular crime, the reasoning of *Estrada* does not apply. We disagree.

[11] We recognize, of course, that we are bound by the opinions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.) However, we do not interpret the holding, or ratio decidendi, of *Estrada* to be limited to its particular facts. "The fundamental rule for determining the precedential force and applicability of a case is to ascertain its true holding or *ratio decidendi*. The rule has been summarized as follows: 'The *ratio decidendi*

is the principle or rule which constitutes the ground of the decision, and it is this principle or rule which has the effect of a precedent.' " (*Santa Monica Hospital Medical Center v. Superior Court* (1988) 203 Cal.App.3d 1026, 1033, 250 Cal.Rptr. 384.) But a close reading of *Estrada* reveals that the Legislature did not unambiguously reduce the sentence for Estrada's particular crime: an escape without force or violence. (*Estrada, supra,* 63 Cal.2d at p. 743, 48 Cal.Rptr. 172, 408 P.2d 948.)

Again, in *Estrada*, the defendant had been convicted of an escape without force or violence under the then existing version of the escape statute. (*Estrada, supra,* 63 Cal.2d at p. 743, 48 Cal.Rptr. 172, 408 P.2d 948.) On the day of Estrada's escape, the statute made no distinction between escapes with force or violence and escapes without force or violence. Every defendant was required to be sentenced to a term of not less than one year in state prison consecutive to his ***79** or her commitment offense and a two-year minimum period for parole consideration after being returned to custody following an escape. (*Ibid.*) But prior to Estrada's case becoming final, the Legislature amended the escape and parole statutes. The sentence for an escape with force or violence remained the same. But a sentence for an escape without force or violence was now " 'imprisonment in the state prison for a term of not less than six months *nor more than five years*.' " (*Ibid.*, italics added.) The Legislature also amended the parole statute to no longer require a minimum period before parole consideration following an escape. In Estrada's case, he was being held in custody because his parole eligibility had been delayed. (*Ibid.*)

However, the sentence for Estrada's particular crime —an escape without force or violence—was not "unambiguously reduced" by the amendment. That is, after the Legislature amended the escape statute, a court could still sentence a particular defendant to a one-year or greater consecutive sentence for a nonviolent escape and still have remained within the five-year sentencing range. Thus, the actual effect of the amendment was to create *the possibility* for a reduction in a defendant's sentence based on the discretion of the court and a defendant's particular circumstances.

[12] When a change in the law allows a court to exercise its sentencing discretion more favorably for a particular defendant, the reasoning of *Estrada* applies. (****10** *People v. Francis* (1969) 71 Cal.2d 66, 75-76, 75 Cal.Rptr. 199, 450 P.2d 591 (*Francis*).) In *Francis*, the defendant had no prior record of narcotic offenses, but was convicted of possessing "four 'sandwich bag packages' " of marijuana. (*Id.* at pp. 70-71, 75 Cal.Rptr. 199, 450 P.2d 591.) The court denied probation and sentenced the defendant to state prison for one to 10 years. (*Id.* at p. 75, 75 Cal.Rptr. 199, 450 P.2d 591.) "While the instant case was pending on appeal, [the Health and Safety Code section] was amended to provide for alternative sentences of imprisonment in the county jail for not more than one year or in the state prison for one to ten years where no prior narcotics offenses are shown [citation]." (*Ibid.*) The Supreme Court applied the reasoning of *Estrada, supra,* 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948, and remanded the defendant's case "to the trial court to reconsider the matter of probation and sentence." (*Francis, supra,* 71 Cal.2d at p. 75, 75 Cal.Rptr. 199, 450 P.2d 591.)

In *Francis*, the Attorney General argued that *Estrada* was distinguishable because the Legislature had not unambiguously reduced the defendant's sentence; rather, it had changed the crime from a straight felony to a "wobbler." (*Francis, supra,* 71 Cal.2d at p. 76, 75 Cal.Rptr. 199, 450 P.2d 591.) The Supreme Court disagreed. "Here, unlike *Estrada*, the amendment does not revoke one penalty and provide for a lesser one but rather *vests in the trial court discretion* to impose either the same penalty as under the former law or a lesser penalty." (*Ibid.*, italics added.) The Supreme Court was persuaded that "the mere fact that the Legislature changed the offense from a felony to a felony-misdemeanor *conceivably might* cause a trial court to impose a county jail ***80** term or grant probation in a case where before the amendment the court denied probation ... and sentenced the defendant to prison." (*Id.* at p. 77, 75 Cal.Rptr. 199, 450 P.2d 591.) Thus, just as it had reasoned four years earlier in *Estrada*, the Supreme Court found that there was an "inference" that the Legislature intended the amendment to "apply to every case" to which it *might* constitutionally apply "because the Legislature has determined that the former penalty provisions *may have been too severe in some cases* and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*Id.* at p. 76, 75 Cal.Rptr. 199, 450 P.2d 591, italics added.)

Here, the electorate has taken away from prosecutors the discretion to directly file cases against minors in criminal courts. As a result—similar to the discretion of a judge

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to reduce a crime from a felony to a misdemeanor *in some cases*—a juvenile court judge can now exercise his or her discretion *in some cases* and determine that a minor should remain in the juvenile justice system rather than face prosecution and sentencing in the criminal courts. For those minors who remain in the juvenile court, with its primary emphasis on rehabilitation rather than punishment, the potential effect of that "ameliorating benefit" is analogous to the potential reduction in a criminal defendant's sentence as in *Estrada* and *Francis*.

Our colleagues in the First District Court of Appeal, Division Four, recently addressed Proposition 57 under similar circumstances. (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 215 Cal.Rptr.3d 174 (*Cervantes*).) In *Cervantes*, a 14-year-old defendant had been tried and convicted in an "adult" criminal court, prior to the passage of Proposition 57, without a "transfer" or "fitness" hearing. The court reversed eight of the defendant's 15 convictions. (*Cervantes, supra,* 9 Cal.App.5th at p. 570, 215 Cal.Rptr.3d 174.) The court held that Proposition 57 affords the defendant an opportunity for a fitness hearing on remand as to any counts to be retried, but ****11** *Cervantes* did not find that Proposition 57 applies retroactively under *Estrada, supra,* 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948. *Cervantes* held that "the Supreme Court has limited *Estrada* to statutory changes that mitigate the penalty for a particular offense." (*Cervantes, supra,* 9 Cal.App.5th at p. 600, 215 Cal.Rptr.3d 174, original capitalization omitted.) We respectfully disagree. Again, in *Francis, supra,* 71 Cal.2d at page 76, 75 Cal.Rptr. 199, 450 P.2d 591, the Supreme Court applied the reasoning of *Estrada* in a situation where a statutory change converted a crime from a straight felony into a wobbler. That is, in *Francis*, the Supreme Court applied the statutory change retroactively, even though did not necessarily mitigate the penalty for that particular crime for that particular defendant.

In *Cervantes*, the court also relied on *People v. Brown* (2012) 54 Cal.4th 314, 142 Cal.Rptr.3d 824, 278 P.3d 1182 (*Brown*), for the proposition that the reasoning of *Estrada, supra,* 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948, cannot be extended to any situation other than the reduction of a defendant's sentence for a particular ***81** offense. (*Cervantes, supra,* 9 Cal.App.5th at pp. 601-602.) In *Brown*, the court held that a statutory change that temporarily increased conduct credits for prisoners did not apply retroactively. (*Brown, supra,* 54 Cal.4th at pp. 323-324, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) In *Brown*, the Supreme Court distinguished *Estrada* and held that the conduct credits law did "not alter the penalty for any crime; a prisoner who earns no conduct credits serves the full sentence originally imposed. Instead of addressing punishment for past criminal conduct, the statute addresses *future conduct* in a custodial setting by providing increased incentives for good behavior." (*Id.* at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

But under Proposition 57, a transfer hearing conducted by a juvenile court judge does not address future conduct or provide incentives for good behavior as in *Brown*. Rather, the potential benefit of a juvenile transfer hearing is that it may, in fact, dramatically alter a minor's effective sentence or "juvenile disposition" for past criminal conduct. Thus, just as the Supreme Court reasoned in *Estrada* and *Francis*, we infer that the electorate intended the possible ameliorating benefits of Proposition 57 to apply to every minor to whom it may constitutionally apply, including Vela.

2. *Vela is entitled to a juvenile transfer hearing.*

[13] Having found that the statutory amendments under Proposition 57 apply retroactively, we must now address what should happen with Vela's judgment. Not surprisingly, Vela urges that his convictions should be reversed. We disagree. The jury's convictions, as well as its true findings as to the sentencing enhancements, will remain in place. Nothing is to be gained by having a "dispositional hearing," or effectively a second trial, in the juvenile court.

[14] On the other hand, the Attorney General argues that the failure to provide Vela with a juvenile transfer hearing constitutes only "harmless error" given the nature of the charges and the underlying facts of this case. We disagree. This court is not in a position to evaluate the various factors to be considered at a juvenile transfer hearing such as Vela's "physical, mental, and emotional health at the time of the alleged offenses." (§ 707, subd. (a)(1)(A)(ii).)

We will seek to strike a middle ground. An appellate court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." ****12** (Pen. Code, § 1260.) "A limited remand is appropriate under section 1260 to allow the trial court to resolve one or more factual issues affecting the validity of the judgment but distinct from the ***82**

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issues submitted to the jury....” (*People v. Braxton* (2004) 34 Cal.4th 798, 818-819, 22 Cal.Rptr.3d 46, 101 P.3d 994.) Indeed, a remand with instructions for the lower court to conduct a limited hearing is not a particularly unusual disposition. (See, e.g., *People v. Lightsey* (2012) 54 Cal.4th 668, 674, 143 Cal.Rptr.3d 589, 279 P.3d 1072 [remand for hearing concerning defendant's competency]; *People v. Johnson* (2006) 38 Cal.4th 1096, 1097, 45 Cal.Rptr.3d 1, 136 P.3d 804 [remand for hearing regarding prosecutor's use of peremptory challenges]; *People v. Wycoff* (2008) 164 Cal.App.4th 410, 412, 78 Cal.Rptr.3d 907 [conditional reversal and remand for review of police personnel records].)

Here, under these circumstances, Vela's conviction and sentence are conditionally reversed and we order the juvenile court to conduct a juvenile transfer hearing. (§ 707.) When conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer Vela's cause to a court of criminal jurisdiction. (§ 707, subd. (a)(1).) If, after conducting the juvenile transfer hearing, the court determines that it would have transferred Vela to a court of criminal jurisdiction because he is “not a fit and proper subject to be dealt with under the juvenile court law,” then Vela's convictions and sentence are to be reinstated. (§ 707.1, subd. (a).) On the other hand, if the juvenile court finds that it would not have transferred Vela to a court of criminal jurisdiction, then it shall treat Vela's convictions as juvenile adjudications and impose an appropriate “disposition” within its discretion.

IV

DISPOSITION

The judgment of the criminal court is conditionally reversed. The cause is remanded to the juvenile court with directions to conduct a transfer hearing as discussed within this opinion, no later than 90 days from the filing of the remittitur. If, at the transfer hearing, the juvenile court determines that it would have transferred Vela to a court of criminal jurisdiction, then the judgment shall be reinstated as of that date. The criminal court is then to conduct a limited “[*People v.*]*Franklin* [(2016) 63 Cal.4th 261, 202 Cal.Rptr.3d 496, 370 P.3d 1053] hearing” within 30 days as discussed within the unpublished portion of this opinion.

If, at the transfer hearing, the juvenile court determines that it would not have transferred Vela to a court of criminal jurisdiction, then Vela's criminal ***83** convictions and enhancements will be deemed to be juvenile adjudications as of that date. The juvenile court is then to conduct a dispositional hearing within its usual time frame.

WE CONCUR:

BEDSWORTH, ACTING P.J.

THOMPSON, J.

All Citations

11 Cal.App.5th 68, 218 Cal.Rptr.3d 1, 17 Cal. Daily Op. Serv. 3967, 2017 Daily Journal D.A.R. 3958

Footnotes

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of all of part II and subparts A., B., and C. of part III.

** See footnote *, *ante*.

*** See footnote *, *ante*.

1 Further undesignated statutory references will be to the Welfare and Institutions Code.

2 Notably, the presumption against retroactivity is incorporated within the preliminary provisions of the Penal Code and other code sections, but not within the Welfare and Institutions Code. (See Pen. Code, § 3; Civil Code, § 3; Code Civ. Proc. § 3.)

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12 Cal.App.5th 687
Court of Appeal,
Fourth District, Division 1, California.

The PEOPLE, Petitioner,
v.
The SUPERIOR COURT of
Riverside County, Respondent;
Jeremy Walker, Real Party In Interest.

D071461
|
12/22/2016
|
Filed 6/8/2017

Synopsis
Background: Prior to re-trial, juvenile murder defendant filed motion to transfer his case from Adult Court to Juvenile Court pursuant to Proposition 57, The Public Safety and Rehabilitation Act of 2016, which eliminated the People's ability to directly file criminal charges against a juvenile defendant in a court of criminal jurisdiction. The Superior Court, Riverside County, No. RIF1201399, Becky L. Dugan, J., granted the motion, and the People petitioned for writ relief.

Holdings: The Court of Appeal, Aaron, J., held that:

[1] electorate did not intend for Proposition 57 to be applied retroactively;

[2] inference that legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments did not apply;

[3] application of Proposition 57 o defendant's case constituted an improper retroactive application; and

[4] failure to apply Proposition 57 did not violate equal protection.

Petition granted.

**3 PETITION for writ of mandate from the Superior Court of Riverside County, Becky L. Dugan, Judge. Petition granted. (Super. Ct. No. RIF1201399)

Attorneys and Law Firms

**4 Michael A. Hestrin, District Attorney, and Donald W. Ostertag, Deputy District Attorney for Petitioner.

Bonnie M. Dumanis, District Attorney, Peter J. Cross, Deputy District Attorney, as Amicus Curiae on behalf of Petitioner.

No appearance for Respondent.

Robert J. Booher, under appointment by the Court of Appeal, for Real Party in Interest.

California Public Defenders Association, Law Offices of the Public Defender and Laura B. Arnold, as Amicus Curiae on behalf of Real Party in Interest.

AARON, J.

***690** I.

INTRODUCTION

On November 8, 2016, the voters passed Proposition 57, [1] and the new law became effective the following day. As relevant to this writ proceeding, Proposition 57 eliminated the People's ability to directly file criminal charges against a juvenile defendant [2] in a court of criminal jurisdiction (Adult Court). We must determine whether Proposition 57 applies to a pending case that the People directly filed in Adult Court against real party in interest, Jeremy Walker, several years *prior* to the effective date of the new law. We conclude that Proposition 57 does not apply to Walker's case and that the trial court's transfer of Walker's case from Adult Court to the juvenile court (Juvenile Court) pursuant to the new law was erroneous. [3] Accordingly, we grant the People's writ petition and direct the trial court to vacate its order transferring Walker's case from Adult Court to Juvenile Court.

***691** II.

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PROCEDURAL BACKGROUND

In February 2012, the People filed a complaint against Walker in Adult Court, alleging two counts of attempted premeditated murder (Pen. Code, §§ 664, 187, subd. (a)) and one count of active participation in a gang (Pen. Code, § 186.22, subd. (a)). With respect to the attempted murder counts, the People alleged two firearm enhancements (Pen. Code, § 12022.53, subds. (d), (e)) and a gang enhancement (Pen. Code, § 186.22, subd. (b)). The record indicates that Walker was 17 years old at the time of the events giving rise to the charges.

The People filed the complaint pursuant to former section 707, subdivision (d) of the Welfare and Institutions Code.[4] That statute permitted the direct filing of criminal charges in Adult Court against a person who was under 18 years of age at the time the crime was allegedly committed, under certain specified circumstances.

A jury found Walker guilty as charged. The jury also found the firearm and gang ****5** enhancements true. The trial court sentenced Walker to 80 years to life in prison.

In May 2015, this court ruled that the trial court erred in admitting certain evidence at Walker's trial and reversed his convictions. In September 2015, the remittitur issued in Walker's appeal. Since the issuance of the remittitur, Walker has been awaiting retrial.

On November 8, 2016, the voters passed Proposition 57, which became effective the following day.

In late November 2016, Walker filed a motion to transfer his case from Adult Court to Juvenile Court, in light of Proposition 57. In his motion, Walker argued that Proposition 57 "applies retroactively to direct file cases which are not yet final." (Formatting omitted.)

The People filed an opposition to the motion in which they argued that Proposition 57 did not apply retroactively to cases filed in Adult Court prior to the effective date of the new law.

***692** The trial court held a hearing on Walker's motion on December 12, 2016. At the conclusion of the hearing, the court granted the motion, ruling in relevant part:

> "One side is, it goes to [J]uvenile [C]ourt, because Prop 57 is to be broadly construed. It doesn't speak to retroactivity at all, which of course is the People's argument, if it doesn't speak to it, that means it's prospective.
>
> "So these cases are going to have to be adjudicated again by eventually the Supreme Court, I'm sure, but my order right now is I'm going to grant the motion and order it —put it in [J]uvenile [C]ourt, because I think that's what the intent of the proposition is."

The trial court stayed its order to permit the People to seek appellate review.

That same day, the People filed a petition for writ of mandate/prohibition in the Court of Appeal, Fourth Appellate District, Division 2. In their petition, the People requested that the Court of Appeal order the trial court to vacate its order granting Walker's motion. Three days later, the Administrative Presiding Justice of the Court of Appeal, Fourth Appellate District, transferred the matter to this court.[5]

On December 22, this court issued an order to show cause, directed Walker to file a return, permitted the People to file a traverse, and stayed all further proceedings in the trial court. Thereafter, Walker filed a return, the People filed a traverse, and this court heard argument in the matter.[6]

***693** III.

DISCUSSION

The trial court's order granting Walker's motion to transfer the case from Adult Court to Juvenile Court is premised on an improper retroactive application of Proposition 57

In their petition, the People argue that this court should order the trial court to ****6** vacate its order granting Walker's motion. In support of this contention, the People argue that Proposition 57 does not apply retroactively to cases properly filed in Adult Court prior to the effective date of the proposition, and that the trial court's order

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transferring Walker's case to Juvenile Court is premised on an improper retroactive application of the law.

Walker contends that Proposition 57 applies retroactively to cases filed in Adult Court prior to the effective date of the proposition. In the alternative, Walker contends that the trial court's order constitutes a prospective application of the new law. Walker also argues that the Adult Court lacks jurisdiction over his case pursuant to a section of the Welfare and Institutions Code (§ 602) as amended by Proposition 57. Finally, Walker maintains that to fail to apply Proposition 57 to his case would constitute a denial of equal protection of the law.

We first provide a summary of Proposition 57, before considering whether the proposition may be applied retroactively to cases properly filed in Adult Court before the effective date of the statute. After concluding that Proposition 57 may not be applied retroactively, we next consider whether the trial court's order is premised on a prospective application of the new law. We conclude that the trial court's application of Proposition 57 to Walker's case constitutes an improper retroactive application of the law. We further conclude that the Adult Court does not lack jurisdiction over Walker's case under section 602 and that failing to apply Proposition 57 to Walker's case would not deny him equal protection of the law.

A. *Proposition 57*

1. *Summary of Proposition 57*

In *People v. Cervantes* (2017) 9 Cal.App.5th 569, 215 Cal.Rptr.3d 174 (*Cervantes*), review granted May 17, 2017, S241323, the Court of Appeal summarized the state of the law governing the filing of criminal charges against juveniles *prior* to the enactment of Proposition 57.

> "Historically, California required a judicial determination of unfitness for juvenile court ***694** before a minor could be prosecuted in adult court. [Citations.] Beginning in March 2000 [with the passage of Proposition 21 [7]] and continuing until the adoption of Proposition 57, however, the district attorney was authorized, as a matter of executive discretion, to file a criminal action against a juvenile in certain defined circumstances, rather than filing the case in juvenile court, a practice known as 'direct filing' or 'discretionary direct filing.' [Citations.] Some crimes ... were considered so serious by the voters that, if committed by a minor age 14 or older, juvenile court was not an option; filing in adult criminal court was mandated by statute ('mandatory direct filing')." (*Cervantes*, at pp. 595–596, 215 Cal.Rptr.3d 174, fn.omitted.)

As noted previously, the electorate adopted Proposition 57 on November 8, 2016, and it became effective the following day. The proposition eliminated the People's ability to directly file charges against a juvenile defendant in Adult Court. [8] (See ****7** *Cervantes, supra,* 9 Cal.App.5th at p. 596, 215 Cal.Rptr.3d 174; *People v. Superior Court* (*Lara*) (2017) 9 Cal.App.5th 753, 758, 215 Cal.Rptr.3d 456 (*Lara*), review granted May 17, 2017, S241231.) The *Cervantes* court summarized Proposition 57 as follows:

> "Proposition 57 was designed to undo Proposition 21. After the passage of Proposition 57, the charging instrument for all juvenile crimes must be filed in juvenile court. (See Welf. & Inst. Code, § 602.) While prosecuting attorneys may move to transfer certain categories of cases to criminal court (Welf. & Inst. Code, § 707, subd. (a)(1)), they have no authority to directly and independently file a criminal complaint against someone who broke the law as a juvenile, even by committing the crimes that previously qualified for mandatory direct filing. In cases where transfer to adult court is authorized (§ 707, subd. (b)) (and not all cases qualify), the juvenile court now has sole authority to determine whether the minor should be transferred. (Welf. & Inst. Code, § 707, subd. (a)(2); see *Brown v. Superior Court* (2016) 63 Cal.4th 335, 340–341 [203 Cal.Rptr.3d 1, 371 P.3d 223] ... [describing history and general provisions of the initiative measure].) Thus, Proposition 57 effectively guarantees a juvenile accused felon a right to a fitness hearing before he or she may be sent to the criminal division for prosecution as an adult." (*Cervantes*, at pp. 596–597, 215 Cal.Rptr.3d 174, fn.omitted.)

***695** 2. *Proposition 57's amendments of sections 602 and 707*

As suggested by the *Cervantes* court's summary, Proposition 57 amended sections 602 and 707. As amended by Proposition 57, section 602 provides:

> "Except as provided in Section 707, any person who is under 18 years of age when he or she violates any law of

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this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."[9]

As amended by Proposition 57, section 707, subdivision (a)(1) provides:

> "(a)(1) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction. The motion must be made prior to the attachment ****8** of jeopardy. Upon such motion, the juvenile court shall order the probation officer to submit a report on the behavioral patterns and social history of the minor. The report shall include any written or oral statement offered by the victim pursuant to Section 656.2. [10]"

Proposition 57 also added section 707, subdivision (a)(2), which specifies certain criteria that the Juvenile Court shall consider in "decid[ing] whether the minor should be transferred to a court of criminal jurisdiction [(i.e., Adult Court)]." (§ 707, subd. (a)(2).)[11] The criteria include the degree of criminal ***696** sophistication exhibited by the minor (§ 707, subd. (a)(2)(A)(i)), the minor's prospects for timely rehabilitation (§ 707, subd. (a)(2)(B)(i)), the minor's history of delinquency (§ 707, subd. (a)(2)(C)(i)), the success of prior attempts by the Juvenile Court to rehabilitate the minor (§ 707, subd. (a)(2)(D)(i)), and the circumstances and gravity of the commitment offense (§ 707, subd. (a)(2)(E)(i)).

Proposition 57 also amended section 707, subdivision (b) to state as follows:

> "Subdivision (a) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation of one of the following offenses when he or she was 14 or 15 years of age: [list of numerous offenses including attempted murder]."

Finally, and importantly for this case, Proposition 57 repealed former section 707, subdivision (d), which permitted the People to directly file criminal charges against minors in Adult Court under certain specified circumstances. As applicable to this case, former section 707, subdivision (d)(1) provided in relevant part:

> "[T]he district attorney or other appropriate prosecuting officer may file an accusatory pleading in a court of criminal jurisdiction against any minor 16 years of age or older who is accused of committing an offense enumerated in subdivision (b). [12]"

Proposition 57 also eliminated various presumptions to be applied by the Juvenile Court in determining whether a minor is "a fit and proper subject to be dealt with under the juvenile court law," (former § 707, subd. (c)) by amending section 707, subdivision (a)(2) and repealing former section 707, subdivision (c).

3. *Proposition 57's uncodified sections*

Proposition 57 contains a number of uncodified sections, three of which Walker cites in his brief. Section 2 of Proposition 57 provides in relevant part:

> "Purpose and Intent.
>
> ****9** "In enacting this act, it is the purpose and intent of the people of the State of California to:
>
> "[¶] … [¶]
>
> "4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.
>
> ***697** "5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court."

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Section 5 of Proposition 57 provides, "Amendment. This act shall be broadly construed to accomplish its purposes. The provisions of Sections 4.1 and 4.2 of this act [13] may be amended so long as such amendments are consistent with and further the intent of this act by a statute that is passed by a majority vote of the members of each house of the Legislature and signed by the Governor."

Finally, section 9 provides, "Liberal Construction. This act shall be liberally construed to effectuate its purposes."

4. *The distinctions between the prosecution of offenses in Adult Court and in Juvenile Court*

"Significant differences between the juvenile and adult offender laws underscore their different goals: The former seeks to rehabilitate, while the latter seeks to punish." (*In re Julian R.* (2009) 47 Cal.4th 487, 496, 97 Cal.Rptr.3d 790, 213 P.3d 125.) The court in *People v. Vela* (2017) 11 Cal.App.5th 68, 218 Cal.Rptr.3d 1 (*Vela*) outlined some of these differences:

> "A prosecutor charges a minor with an offense by filing a juvenile petition, rather than a criminal complaint. [Citations.] Minors 'admit' or 'deny' an offense, rather than plead 'guilty' or 'not guilty.' [Citation.] There are no 'trials,' per se, in juvenile court, rather there is a 'jurisdictional hearing' presided over by a juvenile court judge. [Citation.] The jurisdictional hearing is equivalent to a 'bench trial' in a criminal court. [Citation.] Although a juvenile court judge adjudicates alleged law violations, there are no 'conviction[s]' in juvenile court. [Citation.] Rather, the juvenile court determines—under the familiar beyond the reasonable doubt standard and under the ordinary rules of evidence —whether the allegations are 'true' and if the minor comes within its jurisdiction. [Citation.]
>
> "There is no 'sentence,' per se, in juvenile court. Rather, a judge can impose a wide variety of rehabilitation alternatives after conducting a 'dispositional hearing,' which is equivalent to a sentencing hearing in a criminal court. [Citations.] In the more serious cases, a juvenile court can 'commit' a minor to juvenile hall or to the Division of Juvenile Justice (DJJ), formerly known as the California Youth Authority (CYA). In order to commit a minor ***698** to the DJJ, the record must show that less restrictive alternatives would be ineffective or inappropriate. [Citation.] The DJJ, rather than the court, sets a parole consideration date. DJJ commitments can range from one year or less for nonserious offenses, and up to seven years for the most serious offenses, including murder. [Citation.] A minor committed to DJJ must generally be discharged no later than 23 years of age." (*Id.* at pp. 73–74, 218 Cal.Rptr.3d 1.)

B. *The electorate did not intend for Proposition 57 to apply retroactively*

[1] The People contend that the electorate did not intend for Proposition 57 ****10** to apply retroactively. "Whether the voters intended Proposition 57 to apply retroactively is a question of law to which we apply our independent judgment." (*People v. Mendoza* (2017) 10 Cal.App.5th 327, 344, 216 Cal.Rptr.3d 361 (*Mendoza*).)

1. *Principles governing the interpretation of a voter initiative*

[2] **[3]** "When interpreting a voter initiative, we apply the same rules that govern statutory construction. We first look to the language of the enactment, giving the words their ordinary meaning. If the law is ambiguous, we refer to other sources of voter intent, including the arguments and analyses contained in the official voter information guide." (*Mendoza, supra*, 10 Cal.App.5th at p. 344, 216 Cal.Rptr.3d 361.)

2. *The presumption in favor of the prospective application of statutes*

[4] **[5]** "It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287, 279 Cal.Rptr. 592, 807 P.2d 434 (*Tapia*).) [14] "The presumption of prospectivity assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1214, 246 Cal.Rptr. 629, 753 P.2d 585 (*Evangelatos*).)

[6] The Supreme Court reaffirmed this principle in *People v. Brown* (2012) 54 Cal.4th 314, 319–320, 142 Cal.Rptr.3d 824, 278 P.3d 1182 (*Brown*) by referring ***699** to " '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 [enacting body] ... must have intended a retroactive application.' " The *Brown* court explained further that, "[i]n applying this principle, [the California Supreme Court has] been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes." (*Id.* at p. 319, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) In short, " ' "a statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective." ' " (*Id.* at p. 320, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

3. *Neither the text nor the ballot materials establish that the electorate intended for Proposition 57 to be applied retroactively*

[7] The People argue that "there is nothing in either the text of Proposition 57, or the ballot materials submitted to the voters, that demonstrates an intent for the juvenile portions of the law to apply retroactively to cases that have already been filed." We agree.

The *Mendoza* court reviewed the text of Proposition 57 and concluded, "The text of Proposition 57 contains no express statement of intent regarding prospective or retroactive application." (****11** *Mendoza, supra,* 10 Cal.App.5th at p. 344, 216 Cal.Rptr.3d 361.) Our review of the text of the proposition leads us to the same conclusion.

Walker contends that we may infer the electorate's intent to apply Proposition 57 retroactively given the enumeration in section 2 of the stated purposes for the law (i.e., to "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles," and to "[r]equire a judge, not a prosecutor, to decide whether juveniles should be tried in adult court") (Prop. 57, § 2) as well as the statement in section 5 that the act "shall be broadly construed to accomplish its purposes." (Prop. 57, § 5.) We disagree. Both statements fall *far short* of the clear indication of retroactivity required under California law. (See *Brown, supra,* 54 Cal.4th at p. 319, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) [15] To apply Proposition 57 retroactively based on these statements would amount to improperly inferring "retroactive intent from vague phrases and broad, general language ...." (*Brown,* at p. 319, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

***700** Walker also contends that the following statement in the Legislative Analyst's analysis of Proposition 57 supports the conclusion that the electorate intended for the proposition to apply retroactively:

> "The measure changes state law to require that, *before* youths can be transferred to adult court, they must have a hearing in juvenile court to determine whether they should be transferred. *As a result, the only way a youth could be tried in adult court is if the juvenile court judge in the hearing decides to transfer the youth to adult court*." (Voter Guide, *supra*, analysis of Prop. 57 by Legis. Analyst, p. 56, italics added in Walker's brief.)

This statement merely describes the effect of changes in the law wrought by Proposition 57, and says nothing about whether those changes are to apply retroactively. For the same reason, we are unpersuaded by Walker's contention that the electorate's intent to apply the law retroactively is demonstrated by the Legislative Analyst's reference to potential costs savings premised on youths spending less time in prison and on parole as a result of the proposition. (See Voter Guide, *supra*, at p. 57.) This analysis reflects the Legislative Analyst's prediction with respect to the cost savings related to the implementation of the law generally. Nothing in the analysis suggests that the savings predicted—which was estimated to be "a few million dollars annually" (Voter Guide, *supra*, at p. 57)—was in any way based on the proposition being applied retroactively. [16]

We also are unpersuaded by Walker's contention that Proposition 57 may be applied retroactively because "[n]othing in the language of the measure or the Legislative Analyst's treatment of the measure ****12** suggested an intention to limit the applicability to those whose cases have been filed or who were at any specific stage of the proceedings." In light of the well-established presumption in *favor* of the *prospective* application of statutes (e.g., *Tapia, supra,* 53 Cal.3d at p. 287, 279 Cal.Rptr. 592, 807 P.2d 434), the *absence* of language in Proposition 57 reflecting an intent to apply the proposition prospectively does not demonstrate that the voters intended for the law to be applied *retroactively*.

In sum, "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." (*Mendoza, supra,* 10 Cal.App.5th at p. 345, 216 Cal.Rptr.3d 361.) Accordingly, we must apply Proposition 57 prospectively, unless an ***701** exception

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to the presumption in favor or prospective application applies. (*Mendoza*, at p. 345, 216 Cal.Rptr.3d 361; see *People v. Marquez* (2017) 11 Cal.App.5th 816, 821–23, 217 Cal.Rptr.3d 814 [concluding Proposition 57 is silent on retroactivity] (*Marquez*).) We consider that issue below.

4. *The* Estrada *qualification to the presumption of prospective application does not apply*

a. Estrada *and its progeny*

In *Mendoza, supra*, 10 Cal.App.5th 327, 216 Cal.Rptr.3d 361, the Court of Appeal summarized a qualification to the ordinary presumption of prospective application of statutes that the Supreme Court first developed in *In re Estrada* (1965) 63 Cal.2d 740, 745, 48 Cal.Rptr. 172, 408 P.2d 948 (*Estrada*):

> "Even in the absence of voter intent to apply a proposition retroactively, the *Estrada* rule provides a 'contextually specific qualification to the ordinary presumption' of prospective application. (*Brown, supra*, 54 Cal.4th at p. 323 [142 Cal.Rptr.3d 824, 278 P.3d 1182], citing *Estrada, supra*, 63 Cal.2d 740 [48 Cal.Rptr. 172, 408 P.2d 948].) When the electorate (or Legislature) amends *'a statute to reduce the punishment for a particular criminal offense*,' the *Estrada* rule provides an inference that the voters 'intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date.' (*Brown*, at p. 323 [142 Cal.Rptr.3d 824, 278 P.3d 1182].) That conclusion is based 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.' " ' (*Ibid.*, quoting *Estrada*, at p. 745 [48 Cal.Rptr. 172, 408 P.2d 948], italics added by *Brown*.)" (*Mendoza*, at p. 346, 216 Cal.Rptr.3d 361, italics added.) [17]

The Supreme Court has subsequently emphasized that *Estrada* "is today properly understood, not as weakening or modifying the default rule of prospective operation ... but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment ****13** for a particular criminal offense is intended to apply to all nonfinal judgments." (*Brown, supra*, 54 Cal.4th at p. 324, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) The *Brown* court explained that "the rule and logic of *Estrada*" (*id.* at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182) is that a retroactive application of a statute mitigating the penalty for a ***702** particular crime is supported by the "inference that the Legislature would prefer to impose the new, shorter penalty rather than to ' "satisfy a desire for vengeance." ' " (*Ibid.*, quoting *Estrada, supra*, 63 Cal.2d at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948.) As the *Brown* court explained:

> " ' "Nothing is to be gained," ' we reasoned [in *Estrada*], ' "by imposing the more severe penalty after such a pronouncement ... other than to satisfy a desire for vengeance" ' [*Estrada, supra*, at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948]—a motive we were unwilling to attribute to the Legislature. On this basis we concluded the inference was 'inevitable ... 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.' (*Ibid.*)" (*Brown*, at p. 323, 142 Cal.Rptr.3d 824, 278 P.3d 1182.)

However, the Supreme Court has concluded that for statutes for which it can be said that the enacting body may have had a legitimate motive for applying the statute prospectively, the "inevitable" inference of retroactive intent referred to in *Estrada* (*Estrada, supra*, 63 Cal.2d at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948) does not apply, *even where the statute has a clear ameliorative effect*. For example, in *Brown*, the Supreme Court concluded that a statute that temporarily increased the rate at which inmates could earn presentence conduct credits did not apply retroactively. (*Brown, supra*, 54 Cal.4th at pp. 317–318, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) While acknowledging that a "prisoner who is released a day early is punished a day less" (*id.* at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182), the *Brown* court reasoned that the Legislature may have reasonably believed that "a law that rewards good behavior in prison," (*ibid.*) should only be applied prospectively because "it is impossible to influence behavior after it has occurred." (*Id.* at p. 327, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) Thus, the *Brown* court concluded that the "logic of *Estrada*" (*id.* at p. 325, 142 Cal.Rptr.3d 824, 278 P.3d 1182) did not support a retroactive application.

Similarly, in *People v. Conley* (2016) 63 Cal.4th 646, 203 Cal.Rptr.3d 622, 373 P.3d 435 (*Conley*), the Supreme

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Court concluded that the Three Strikes Reform Act (Reform Act) could not be applied retroactively pursuant to *Estrada* so as to mandate "automatic resentencing for third strike defendants serving nonfinal sentences imposed under the former version of the Three Strikes law." (*Conley*, at p. 657, 203 Cal.Rptr.3d 622, 373 P.3d 435.) The Supreme Court explained that, notwithstanding that there could "be no doubt that the Reform Act was motivated in large measure by a determination that sentences under the prior version of the Three Strikes law were excessive," (*id.* at p. 658, 203 Cal.Rptr.3d 622, 373 P.3d 435) the "presumption about legislative intent," (*id.* at p. 656, 203 Cal.Rptr.3d 622, 373 P.3d 435) reflected in *Estrada* did not apply. In support of this conclusion, the *Conley* court noted that the Reform Act did not merely reduce penalties, as in *Estrada*. (*Conley*, at p. 659, 203 Cal.Rptr.3d 622, 373 P.3d 435.) Rather, the Reform Act also contained a "new set of disqualifying factors that preclude a third strike defendant from receiving a second strike sentence" (****14** *Conley*, at p. 659, 203 Cal.Rptr.3d 622, 373 P.3d 435); thus, as the *Conley* court explained, an "application of the Reform Act's revised sentencing scheme would not be so simple as mechanically substituting a second strike sentence for a previously ***703** imposed indeterminate life term." (*Id.* at p. 660, 203 Cal.Rptr.3d 622, 373 P.3d 435.) Under these circumstances, the *Conley* court refused to apply *Estrada* because it could not say with "confidence, as [it] did in *Estrada*, that the enacting body lacked any discernible reason to limit application of the law with respect to cases pending on direct review." (*Id.* at pp. 658–659, 203 Cal.Rptr.3d 622, 373 P.3d 435.)

b. Estrada *does not support a retroactive application of Proposition 57*

[8] Five decisions of the Courts of Appeal have considered whether *Estrada* applies with respect to Proposition 57. (*Mendoza*, *supra*, 10 Cal.App.5th at pp. 345–349, 216 Cal.Rptr.3d 361; *Lara*, *supra*, 9 Cal.App.5th at p. 774, 215 Cal.Rptr.3d 456; *Cervantes*, *supra*, 9 Cal.App.5th at pp. 600–602, 215 Cal.Rptr.3d 174; *Vela*, *supra*, 11 Cal.App.5th at pp. 76–81, 218 Cal.Rptr.3d 1; *Marquez*, *supra*, 11 Cal.App.5th at pp. 823–27, 217 Cal.Rptr.3d 814.) In four of these cases, the courts have concluded that *Estrada* does not apply. (*Mendoza*, at pp. 346–349, 216 Cal.Rptr.3d 361; *Lara*, at p. 774, 215 Cal.Rptr.3d 456;[18] *Cervantes*, at p. 601, 215 Cal.Rptr.3d 174; *Marquez*, at p. 822–23, 217 Cal.Rptr.3d 814; but see *Vela*, at p. 78, 218 Cal.Rptr.3d 1 [stating "we find an 'inevitable inference' that the electorate 'must have intended' that the potential 'ameliorating benefits' of rehabilitation (rather than punishment), which now extend to every eligible minor, must now also 'apply to every case to which it constitutionally could apply,' " quoting *Estrada*, *supra*, 63 Cal.2d at pp. 744–745, 48 Cal.Rptr. 172, 408 P.2d 948].) We agree with the conclusions of the courts in *Mendoza*, *Lara*, and *Cervantes*. Most fundamentally, *Estrada* does not apply because "Proposition 57 does not mitigate the penalty for a particular crime." (*Mendoza*, at p. 347, 216 Cal.Rptr.3d 361; *Cervantes*, at p. 600, 215 Cal.Rptr.3d 174; see *Brown*, *supra*, 54 Cal.4th at p. 324, 142 Cal.Rptr.3d 824, 278 P.3d 1182 [*Estrada* applies to changes in the law "*mitigating the punishment for a particular criminal offense*" (italics added)].)[19]

Further, the logic of *Estrada* does not support a retroactive application of Proposition 57. (See *Cervantes*, *supra*, 9 Cal.App.5th at p. 601, 215 Cal.Rptr.3d 174.) As the *Cervantes* court explained, "We find the rationale underlying *Estrada* ... inapplicable to the procedural changes implemented ****15** by ***704** Proposition 57. While Proposition 57 will have a substantive impact on time in custody in some cases—sometimes a big impact—the transfer procedure required under ... section 707 does not resemble the clear-cut reduction in penalty involved in *Estrada*." (*Ibid.*)

To the *Cervantes* court's observations, we would add that, much like the statutes at issue and *Brown* and *Conley*, we cannot say with any confidence that the voters clearly would have intended the "fundamental policy shift," (*Cervantes*, *supra*, 9 Cal.App.5th at p. 605, 215 Cal.Rptr.3d 174) brought about by the enactment of Proposition 57 to be applied to cases filed in Adult Court prior to the proposition's effective date. That is because, as with the statutory scheme at issue in *Conley*, applying Proposition 57 to such cases would require much more than simply substituting in a more lenient sentence upon a defendant's conviction. (See *Conley*, *supra*, 63 Cal.4th at p. 660, 203 Cal.Rptr.3d 622, 373 P.3d 435.)

For example, in *Vela*, *supra*, 11 Cal.App.5th 68, 218 Cal.Rptr.3d 1, prior to the effective date of Proposition 57, the People charged a juvenile defendant in Adult Court and a jury found the defendant guilty of several

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crimes, including murder. (*Vela*, at p. 71, 218 Cal.Rptr.3d 1.) While the defendant's case was pending on appeal, Proposition 57 became effective. (*Vela*, at p. 72, 218 Cal.Rptr.3d 1.) The *Vela* court concluded that *Estrada* applied and that Proposition 57 applied retroactively to defendant's case. (*Vela*, at p. 72, 218 Cal.Rptr.3d 1.) Accordingly, the *Vela* court was tasked with determining "what should happen with [defendant's] judgment." (*Id.* at p. 81, 218 Cal.Rptr.3d 1.) The defendant argued that his convictions should be reversed. (*Ibid.*) The *Vela* court disagreed, reasoning: "The jury's convictions, as well as its true findings as to the sentencing enhancements, will remain in place. Nothing is to be gained by having a 'dispositional hearing,' or effectively a second trial, in the juvenile court." (*Ibid.*) After rejecting the People's argument that the failure to provide a transfer hearing constituted harmless error, the *Vela* court stated that it would "seek to strike a middle ground." (*Ibid.*) Accordingly, the *Vela* court conditionally reversed the judgment of the Adult Court and remanded the matter to the Juvenile Court with directions to hold a transfer hearing. (*Id.* at p. 82, 218 Cal.Rptr.3d 1.)

The *Vela* court explained that "[w]hen conducting the transfer hearing, the [J]uvenile [C]ourt shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in [J]uvenile [C]ourt and had then moved to transfer Vela's cause to [Adult Court]." (*Vela, supra*, 11 Cal.App.5th at p. 82, 218 Cal.Rptr.3d 1.) The court further directed that the Adult Court judgment would be reinstated if "the [J]uvenile [C]ourt determines that it would have transferred [defendant] to [Adult Court]." (*Ibid.*) On the other hand, the *Vela* court concluded that "[if] the [J]uvenile [C]ourt determines that it would not have transferred [defendant] to [Adult Court], then [defendant's] criminal convictions and enhancements will be deemed to be ***705** juvenile adjudications as of that date." (*Id.* at pp. 82–83, 218 Cal.Rptr.3d 1.) The competing arguments at play in *Vela* and that court's selection of the "middle ground" (*id.* at p. 81, 218 Cal.Rptr.3d 1) demonstrate that, contrary to the straightforward sentence reduction that may be implemented where *Estrada* properly may be applied (*Conley, supra*, 63 Cal.4th at p. 660, 203 Cal.Rptr.3d 622, 373 P.3d 435), applying Proposition 57 to cases pending in Adult Court or on appeal would, in many cases, be procedurally ****16** complex.[20]

Thus, we are unpersuaded by the *Vela* court's contention that in order not to provide retroactive effect to Proposition 57 "we would have to conclude that the electorate was motivated 'by a desire for vengeance' against [the defendant] and similarly situated minors." (*Vela, supra*, 11 Cal.App.5th at p. 78, 218 Cal.Rptr.3d 1.) On the contrary, clearly a voter who *agreed* with Proposition 57's policy changes could also reasonably intend, for any number of reasons other than "vengeance" (*Estrada, supra*, 63 Cal.2d at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948), that the change in the law *not* apply to such defendants. For example, as the *Mendoza* court observed, such a voter might reasonably believe that judicial economy would not be best served by transferring a case from Adult Court to Juvenile Court after proceedings in Adult Court have already commenced. (See *Mendoza, supra*, 10 Cal.App.5th at pp. 351–352, 216 Cal.Rptr.3d 361 ["The voters could rationally conclude that applying Proposition 57 prospectively would serve the legitimate purpose of not overwhelming the juvenile courts with requests for fitness hearings by those who had already been convicted in adult court for crimes committed as juveniles"].) Thus, a voter might reasonably intend for the new law not to be applied to cases filed in Adult Court prior to the effective date of the proposition in order to avoid the procedural difficulties created by such an application. Plainly, such a voter would not be acting out of "vengeance." (*Estrada*, at p. 745, 48 Cal.Rptr. 172, 408 P.2d 948.) In short, both 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 apply only prospectively, support our conclusion that *Estrada* does not require a retroactive application of the new law. (See *Conley, supra*, 63 Cal.4th at pp. 658–660, 203 Cal.Rptr.3d 622, 373 P.3d 435.)

Accordingly, we conclude that *Estrada* and its progeny do not support the conclusion that Proposition 57 should be applied retroactively to Walker's case.

C. *Applying Proposition 57 to Walker's case constitutes an improper retroactive application of the law*

Having concluded that Proposition 57 may not be applied *retroactively* (see pt. III.B, *ante*), we must consider whether the trial court's order is ***706** proper on the ground that it is premised on a *prospective* application of Proposition 57.[21] Walker contends that the trial court properly

applied Proposition 57 to his case because applying the proposition to a juvenile defendant who has not yet been *tried* in Adult Court constitutes a prospective application of the law. [22]

1. *The test for determining whether a law is being applied retroactively or prospectively*

In *Tapia*, *supra*, 53 Cal.3d 282, 279 Cal.Rptr. 592, 807 P.2d 434, the Supreme ****17** Court considered whether various changes in the criminal law made by Proposition 115 could be applied to crimes committed before the proposition's effective date. (*Tapia*, at p. 286, 279 Cal.Rptr. 592, 807 P.2d 434.) After determining that the law could be applied only prospectively (*id.* at p. 287, 279 Cal.Rptr. 592, 807 P.2d 434), the Supreme Court considered "what the terms 'prospective' and 'retrospective' mean." (*Id.* at p. 288, 279 Cal.Rptr. 592, 807 P.2d 434.) The defendant in *Tapia* argued that a law is applied retroactively "if it is applied to the prosecution of a crime committed before the law's effective date." (*Ibid.*) The *Tapia* court agreed that "[f]or some types of laws, the test which [defendant] proposes is clearly appropriate." (*Ibid.*) Specifically, the *Tapia* court stated that "a law is retrospective if it defines past conduct as a crime, increases the punishment for such conduct, or eliminates a defense to a criminal charge based on such conduct." (*Ibid.*)

However, the *Tapia* court reasoned that the defendant's "proposed test is not appropriate ... for *laws which address the conduct of trials which have yet to take place*, rather than criminal behavior which has already taken place." (*Tapia*, *supra*, 53 Cal.3d at p. 288, 279 Cal.Rptr. 592, 807 P.2d 434, italics added.) Laws that address the conduct of trials may be applied irrespective of the date on which criminal conduct occurred. (*Ibid.*) Further, laws that address the conduct of trials, *may* be applied prospectively to the extent that "*they relate to the procedure to be followed in the future*." (*Ibid.*, italics added.) The *Tapia* court explained, "[I]t is evident that a law governing the conduct of trials is being applied 'prospectively' *when it is applied to a trial* occurring after the law's effective date, regardless of when the underlying crime was committed or the underlying cause of action arose." (*Id.* at p. 289, 279 Cal.Rptr. 592, 807 P.2d 434, italics added.)

***707** In explaining the distinction between prospective and retroactive statutes, the *Tapia* court distinguished *People v. Hayes* (1989) 49 Cal.3d 1260, 265 Cal.Rptr. 132, 783 P.2d 719 (*Hayes*), in which the court concluded that a statute that required the exclusion of certain prehypnotic evidence, [23] could *not* be applied to a defendant where the hypnosis occurred *prior* to the effective date of the statute:

> "[Defendant] also interprets our opinion in ... *Hayes*, *supra*, 49 Cal.3d 1260 [265 Cal.Rptr. 132, 783 P.2d 719], as supporting his position. It does not. In *Hayes*[,] we considered the effect of Evidence Code section 795, which requires the exclusion of prehypnotic testimony unless certain statutory procedures were followed at the time of hypnosis. As in our previous cases, we began by reaffirming the presumption that new statutes operate prospectively and proceeded to determine what 'prospective' operation meant in the case before us. We did not hold that the statute would apply, or not, based upon the date the alleged crime was committed. *Instead, we looked to the date of the conduct regulated by the statute*. Because the prehypnotic evidence in question predated the statute, we held that '[t]o invoke section 795 to exclude such evidence ... would be tantamount ****18** to giving the statute retroactive effect.' (... *Hayes*, *supra*, 49 Cal.3d at p. 1274 [265 Cal.Rptr. 132, 783 P.2d 719].) The past conduct to which the statute attached legal consequences was the use of hypnosis; the date of the offense was irrelevant." (*Tapia*, *supra*, 53 Cal.3d at p. 291, 279 Cal.Rptr. 592, 807 P.2d 434, italics added.)

The *Tapia* court then applied its definition of the terms "prospective" and "retrospective" in "determin[ing] which of Proposition 115's provisions may and may not be applied to the prosecution of crimes committed before the measure's effective date." (*Tapia*, *supra*, 53 Cal.3d at p. 297, 279 Cal.Rptr. 592, 807 P.2d 434.) The *Tapia* court noted that the provisions in Proposition 115 fell into four categories: "(A) provisions which change the legal consequences of criminal behavior to the detriment of defendants; (B) provisions which address the conduct of trials; (C) provisions which clearly benefit defendants; and (D) a single provision which codifies existing law." (*Tapia*, at p. 297, 279 Cal.Rptr. 592, 807 P.2d 434.)

After stating that laws that change the legal consequences of behavior to a defendant's detriment *may not* be applied to crimes committed before the proposition's effective date (category A) (*Tapia*, *supra*, 53 Cal.3d at pp. 298–299, 279 Cal.Rptr. 592, 807 P.2d 434), the *Tapia* court stated the following:

> "Other provisions of Proposition 115 address the conduct of trials rather than the definition of, punishment for, or defenses to crimes. These provisions include section 2 ... which eliminates postindictment preliminary hearings; section 4 ... which ***708** gives the People the right to due process and a speedy trial; section 5 ... which provides that the Constitution shall not be construed to prohibit joinder, makes hearsay evidence admissible at preliminary hearings, and makes discovery reciprocal; sections 6, 7, and 7.5 ... which reform voir dire; sections 8, 15, 16, 17, and 18 ... which reform preliminary hearing procedures; section 19 ... which provides that the absence of cross-admissibility is not a ground for severance; section 20 ... which requires appointment of counsel who is ready to proceed; section 21 ... which provides that felony trials shall take place within 60 days of arraignment; section 22 ... which authorizes continuances to maintain joinder; sections 23, 24, 25, and 27 ... which reform discovery procedures and provide for reciprocal discovery; and section 28 ... which provides for appellate review of trial dates and continuances." (*Id.* at p. 299, 279 Cal.Rptr. 592, 807 P.2d 434.)

As the quotation indicates, the *Tapia* court defined as provisions "*address*[*ing*] the conduct of trials" (*Tapia, supra,* 53 Cal.3d at p. 299, 279 Cal.Rptr. 592, 807 P.2d 434, italics added), numerous changes in the law governing *pretrial* proceedings (e.g., the elimination of postindictment preliminary hearings, proceedings governing the admission of hearsay at preliminary hearings, and reciprocal discovery procedures). (*Ibid.*) The *Tapia* court concluded that "*certain* [of these] provisions addressing the conduct of trials," (*id.* at p. 286, 279 Cal.Rptr. 592, 807 P.2d 434, italics added) could be applied in the prosecutions of crimes committed prior to Proposition 115's effective date. (*Tapia,* at p. 286, 279 Cal.Rptr. 592, 807 P.2d 434.)

In addressing *which* of the provisions addressing the conduct of trials could be applied to the defendant, the *Tapia* court noted that the defendant had "advanced several arguments in an effort to show that application of such provisions in his case, even though addressed on their face ****19** to the *conduct of future trials* and not to past criminal behavior, will nevertheless be 'retrospective' as applied to him." (*Tapia, supra,* 53 Cal.3d at p. 299, 279 Cal.Rptr. 592, 807 P.2d 434.) The *Tapia* court rejected the defendant's argument that changes to procedures governing voir dire could not be applied to him, [24] *since voir dire had yet to commence in his trial.* [25] (*Tapia,* at pp. 299–300, 279 Cal.Rptr. 592, 807 P.2d 434.)

However, and critical for this case, the *Tapia* court concluded that Proposition 115's reciprocal discovery provisions *could not properly be applied prospectively to compel the production of evidence obtained by defense counsel before the effective date of the proposition*. The *Tapia* court ***709** reasoned that use of the new law in this context would in fact constitute an impermissible retroactive application of Proposition 115:

> "Application of the discovery provisions to compel production of evidence obtained by defense counsel before Proposition 115's effective date would be retroactive under the principles we have already discussed. This is because counsel can only be guided, while conducting an investigation, by the discovery rules then in force." (*Tapia, supra,* 53 Cal.3d at p. 300, 279 Cal.Rptr. 592, 807 P.2d 434.) [26]

[9] In the wake of *Tapia*, the Supreme Court has made clear that "a change in procedural law is *not* retroactive when applied *to proceedings that take place after its enactment.*" (*People v. Sandoval* (2007) 41 Cal.4th 825, 845, 62 Cal.Rptr.3d 588, 161 P.3d 1146, italics added (*Sandoval*).)

For example, in *People v. Ledesma* (2006) 39 Cal.4th 641, 47 Cal.Rptr.3d 326, 140 P.3d 657 (*Ledesma*), the Supreme Court considered whether a change in the law reducing the number of peremptory challenges that each side could employ in a capital trial could be applied lawfully to the defendant. (*Id.* at p. 663, 47 Cal.Rptr.3d 326, 140 P.3d 657.) The amendment to the law became effective while the defendant was awaiting retrial. (*Ibid.*) Specifically, the law became effective after "pretrial proceedings—including motions and discovery— [had begun] in his retrial," but *prior* to the selection of the jury in the retrial. (*Ibid.*) The *Ledesma* court held that reducing the number of peremptory challenges that the parties could exercise was not an improper retroactive application of the statute because the conduct regulated by the statute—the selection of jurors—had yet to occur:

> ****20** "We reject defendant's argument that application of [the new law] to his case is retroactive because the pretrial portions of his trial began before that statute

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went into effect. The operative date for determining prospective application of a statute is the 'date of the conduct regulated by the statute.' (*Tapia ..., supra*, 53 Cal.3d at p. 291 [279 Cal.Rptr. 592, 807 P.2d 434]; *see* [*Hayes, supra*,] 49 Cal.3d [at p. 1274, 265 Cal.Rptr. 132, 783 P.2d 719] [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].) [The new law] governs the conduct of the jury selection portion of the trial. Therefore, application of the statute that was in effect at the time defendant's jury was selected is a proper, prospective application of the statute." (*Id.* at p. 664, 47 Cal.Rptr.3d 326, 140 P.3d 657.)

***710** 2. *Applying Proposition 57 to Walker's case constitutes an impermissible retroactive application of Proposition 57*

[10] It is undisputed that, prior to the effective date of Proposition 57, the People properly filed charges against Walker in Adult Court pursuant to former section 707, subdivision (d).[27] As outlined in part III.A.1, *ante*, "Proposition 57 eliminated the People's ability to directly *file* charges against a juvenile [defendant] in adult court ...." (*Lara, supra*, 9 Cal.App.5th at p. 758, 215 Cal.Rptr.3d 456, italics added; *see Cervantes, supra*, 9 Cal.App.5th at p. 596, 215 Cal.Rptr.3d 174 ["After the passage of Proposition 57, the charging instrument for all juvenile crimes must be *filed* in juvenile court" (italics added)].) Thus, to 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, 279 Cal.Rptr. 592, 807 P.2d 434 ["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, 279 Cal.Rptr. 592, 807 P.2d 434, 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, 47 Cal.Rptr.3d 326, 140 P.3d 657, discussing *Hayes*, italics added.)

Conversely, because the amendments to sections 602 and 707 brought about by Proposition 57 pertain to the *filing* of criminal charges, as applied to Walker, they do not " 'relate to the procedure to be followed *in the future*' " (*Tapia, supra*, 53 Cal.3d at p. 288, 279 Cal.Rptr. 592, 807 P.2d 434, italics added) and do not "appl[y] to proceedings that [will] take place *after* its enactment." (*Sandoval, supra*, 41 Cal.4th at p. 845, 62 Cal.Rptr.3d 588, 161 P.3d 1146, italics added.) Criminal charges were filed against Walker well before the enactment of Proposition 57. (Compare with *Tapia*, at pp. 286, 299, 279 Cal.Rptr. 592, 807 P.2d 434 [changes to law governing voir dire may be applied prospectively ****21** where voir dire has *not* occurred]; and *Ledesma, supra*, 39 Cal.4th at p. 664, 47 Cal.Rptr.3d 326, 140 P.3d 657 [changes to law governing jury selection may be applied prospectively where jury selection has *not* occurred].)

While Walker suggests that *Tapia* provides that the application of a law is necessarily prospectively so long as the *trial* has not begun, *Tapia* is clear that applying a change in the law to a *pretrial* procedure that has already occurred constitutes an impermissible *retroactive* application of the law. (*Tapia, supra*, 53 Cal.3d at p. 300, 279 Cal.Rptr. 592, 807 P.2d 434 [applying change in law mandating reciprocal discovery to discovery obtained prior to the change in the law ***711** constitutes a retroactive application of the law].) Further, all of the cases cited in Walker's brief in support of his contention that Proposition 57 may be applied in his case are distinguishable because they involve the *prospective* application of a statute to a procedure that will occur in the *future*. For example, in *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 68 Cal.Rptr.3d 142 (*Bourquez*), the Court of Appeal concluded that a change in the law occasioned by Proposition 83 to provide for the indeterminate commitment of persons committed under the Sexual Violent Predator Act (§ 6600) could *prospectively* be applied to individuals whose commitment proceedings were pending at the time of the effective date of the change in the law. (*Bourquez*, at p. 1289, 68 Cal.Rptr.3d 142.) The *Bourquez* court explained that " 'the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date.' " (*Id.* at p. 1288, 68 Cal.Rptr.3d

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142.) The *Bourquez* court concluded that the last event necessary to trigger the application of the statute at issue in that case would occur *at the time of the commitment*, and thus, after the passage of Proposition 83:

> "In determining whether someone is [a sexually violent predator under the law], the last event necessary is the person's mental state at the time of the commitment. For pending petitions, the person's mental state will be determined after the passage of Proposition 83, at the time of commitment." (*Bourquez*, at p. 1289, 68 Cal.Rptr.3d 142.)

Similarly, in *John L. v. Superior Court* (2004) 33 Cal.4th 158, 14 Cal.Rptr.3d 261, 91 P.3d 205 (*John L.*), the Supreme Court concluded that certain changes in the law brought about by Proposition 21 pertaining to the standard of proof and the admissibility of evidence in juvenile probation proceedings conducted pursuant to section 777 could lawfully be applied to *future proceedings*. (*John L.*, at p. 171, 14 Cal.Rptr.3d 261, 91 P.3d 205.) The *John L.* court reasoned, "Proposition 21's standard of proof and evidentiary provisions concern the conduct and *procedure to be followed in future* section 777 proceedings, i.e., juvenile probation violation hearings held after [the effective date of Proposition 21]." (*Ibid.*, italics added; see also *In re Chong K.* (2006) 145 Cal.App.4th 13, 18–19, 51 Cal.Rptr.3d 350 (*Chong*) [relying on *John L.* and concluding that "Proposition 21's amendment to section 781 [governing requests to seal juvenile records] applies to all petitions to seal juvenile records brought under that statute *on or after* [the effective date of Proposition 21], regardless of when the underlying offenses occurred" (italics added)].) [28]

***712** *Strauch v. Superior Court* (1980) 107 Cal.App.3d 45, 165 Cal.Rptr. 552 ****22** (*Strauch*), [29] is not to the contrary. In *Strauch*, a plaintiff who filed a medical malpractice complaint failed to attach to the complaint a certificate of merit, as had been mandated under the law at the time of the filing of the complaint. (*Strauch*, at p. 47, 165 Cal.Rptr. 552.) The defendants moved to strike the complaint, and the trial court granted plaintiff's motion for relief from the late filing for mistake of law pursuant to Code of Civil Procedure section 473. (*Strauch*, at p. 47, 165 Cal.Rptr. 552.) After the trial court's ruling, *but while the defendant's petition for writ of mandate challenging the trial court's ruling remained pending*, the law requiring the filing of the certificate of merit at the time of the filing of the complaint was amended in such a way so as to "validate" the timing of the plaintiff's filing of the complaint. (*Id.* at p. 48, 165 Cal.Rptr. 552.) The Court of Appeal concluded that a prospective application of the new statute cured the plaintiff's filing and the court was not required to consider the propriety of the trial court's ruling under Code of Civil Procedure section 473. (*Strauch*, at p 49, 165 Cal.Rptr. 552.) Thus, in *Strauch*, the validity of the procedural action at issue *remained pending* at the time of the effective date of the new law. In this case, in contrast, the filing of the accusatory pleading against Walker pursuant to former section 707, subdivision (d) occurred more than four years prior to Proposition 57's repeal of that provision.

In sum, as outlined above, Proposition 57 changes the law governing a procedural event that had already been fully completed in this case as of the effective date of Proposition 57—the filing of charges against Walker. Applying Proposition 57 to Walker's case would thus constitute an improper retroactive application of the law because it would "attach[ ] new legal consequences to ... an event ... that was *completed* before the law's effective date." (*Bourquez*, *supra*, 156 Cal.App.4th at p. 1288, 68 Cal.Rptr.3d 142.) Such an application is improper under *Tapia* and its progeny because, in filing charges against Walker, the People could "only be guided ... by the [law] then in force." (*Tapia*, *supra*, 53 Cal.3d at p. 300, 279 Cal.Rptr. 592, 807 P.2d 434.)

Accordingly, we conclude that the trial court's application of Proposition 57 to Walker's case constitutes an improper retroactive application of the proposition.

***713** 3. *We respectfully disagree with the conclusions of the Courts of Appeal in* Cervantes *and* Lara *that a prospective application of Proposition 57 requires that a fitness hearing be held in cases directly filed in Adult Court prior to the effective date of Proposition 57*

We have carefully considered the decisions of the Courts of Appeal in *Cervantes* ****23** and *Lara* concluding that Proposition 57 properly applies prospectively to cases directly filed in Adult Court before the effective date of Proposition 57. (See *Cervantes*, *supra*, 9 Cal.App.5th at p. 602, 215 Cal.Rptr.3d 174; *Lara*, *supra*, 9 Cal.App.5th at p. 774–775, 215 Cal.Rptr.3d 456.) We respectfully disagree with the reasoning and conclusions in both cases.

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In *Cervantes*, the Court of Appeal concluded that "applied prospectively, Proposition 57 requires a fitness hearing before a juvenile felon is 'tried in Adult Court' initially or on remand." (*Cervantes, supra,* 9 Cal.App.5th at p. 602, 215 Cal.Rptr.3d 174, capitalization & italics omitted, quoting Prop. 57, § 2.) In support of this conclusion, the *Cervantes* court noted that both the uncodified statement of purpose and intent in section 2 of Proposition 57 as well as the Legislative Analyst's summary of the proposition refer to the law as changing whether a juvenile could be "tried in adult court." (Prop. 57, § 2 ["In enacting this act, it is the purpose and intent of the people of the State of California to ... [r]equire a judge, not a prosecutor, to decide whether juveniles should be *tried in adult court*"] (italics added), (Voter Guide, *supra*, analysis of Prop. 57 by Legis. Analyst, p. 56 ["the only way a youth could be *tried in adult court* is if the juvenile court judge in the hearing decides to transfer the youth to adult court" (italics added)].)) From such statements, the *Cervantes* court concluded, "the phrase, 'tried in adult court'—or the prospect of being tried in adult court upon the filing of a transfer motion—appears to be the trigger for a juvenile's right to a fitness hearing." (*Cervantes,* at p. 602, 215 Cal.Rptr.3d 174; see also *Lara, supra,* 9 Cal.App.5th at pp. 776–777, 215 Cal.Rptr.3d 456 [employing similar reasoning].)

The difficulty with this reasoning is that it is unmoored to any of the operative text of Proposition 57. As the *Cervantes* court acknowledged, while statements of intent or purpose "in an uncodified section do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute." (*Cervantes, supra,* 9 Cal.App.5th at p. 604, 215 Cal.Rptr.3d 174.) However, such provisions are "*not* intended to be a substantive part of the code section or general law that the bill enacts ...." (*People v. Allen* (1999) 21 Cal.4th 846, 858, fn. 13, 89 Cal.Rptr.2d 279, 984 P.2d 486; accord 1A Sutherland, Statutory Construction (7th ed.) § 20:3.) In addition, while we have no quarrel with the *Cervantes* court's statement that "the ***714** Legislative Analyst's interpretation" of a statute may be useful in determining "voter intent" (*Cervantes,* at p. 604, 215 Cal.Rptr.3d 174), the plain text of a statute must prevail over unenacted language in legislative history. (See *In re Cervera* (2001) 24 Cal.4th 1073, 1079–1080, 103 Cal.Rptr.2d 762, 16 P.3d 176 [declining to give effect to statements in legislative history concerning effect of Three Strikes law because "it was the Three Strikes law that was enacted, not any of the documents within its legislative or initiative history. A statute, of course, must prevail over any summary [in the legislative history]".)

Neither the *Lara* court nor the *Cervantes* court cites to *any* language in the *operative text of Proposition 57* stating that a juvenile may no longer be *tried* in Adult Court without a transfer hearing. That is because there is no such language. As discussed above, Proposition 57 eliminated the People's ability to directly *file* charges against a juvenile defendant in Adult Court. (See pt. III.A.1, *ante*.) If the text of Proposition 57 provided that a juvenile may no longer be *tried* in Adult Court, then we might agree with the *Lara* and *Cervantes* courts that, under *Tapia*, the change in the law would apply to cases not ****24** yet tried. (See *Tapia, supra,* 53 Cal.3d at p. 289, 279 Cal.Rptr. 592, 807 P.2d 434 ["a law governing the conduct of trials is being applied 'prospectively' *when it is applied to a trial* occurring after the law's effective date" (italics added)].) However, absent such text, we cannot agree with the courts in *Lara* and *Cervantes* that Proposition 57 may properly be applied prospectively to cases filed in Adult Court prior to the effective date of the proposition.

The remainder of the arguments offered by the *Cervantes* and *Lara* courts are also unpersuasive. The *Cervantes* court suggested that Proposition 57 may be applied to cases pending in Adult Court at the time the proposition became effective for the following reason:

> "Section 707 describes its reach broadly, indicating it applies '[i]n *any case* in which a minor is alleged to be a person described in Section 602.' (Welf. & Inst. Code, § 707, subd. (a)(1), italics added.) *We see nothing in Welfare and Institutions Code section 707 that requires the allegation to be pending in [J]uvenile [C]ourt at the time of the fitness hearing.*" (*Cervantes, supra,* 9 Cal.App.5th at p. 602, 215 Cal.Rptr.3d 174, second italics added.)

However, section 707, subdivision (a)(1) further provides:

> "In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age, *the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from*

juvenile court to a court of criminal jurisdiction." (Italics added.)

The italicized text above makes clear that a motion to transfer under section 707 applies where the matter is "pending in [J]uvenile [C]ourt" (***715** *Cervantes, supra,* 9 Cal.App.5th at p. 602, 215 Cal.Rptr.3d 174). Otherwise, there would be no need for the prosecuting attorney to make a motion to transfer the minor from Juvenile Court to Adult Court.

The *Cervantes* court also stated that the uncodified provisions of Proposition 57 such as section 5 (mandating that Prop. 57 be "broadly construed to accomplish its purposes") and section 9 (stating that Prop. 57 shall be "liberally construed to effectuate its purposes") support the conclusion that Proposition 57 is to be applied to cases filed in Adult Court before the effective date of the proposition. (*Cervantes, supra,* 9 Cal.App.5th at p. 604, 215 Cal.Rptr.3d 174). As discussed above, to rely on such broad principles of interpretation, in the absence of *any* statutory text supporting a retroactive application of the statute, is contrary to the Supreme Court's admonishment not to "infer retroactive intent from vague phrases and broad, general language." (*Brown, supra,* 54 Cal.4th at p. 319, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) Indeed, the Supreme Court has specifically rejected such reasoning. (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 173, 18 Cal.Rptr. 369, 367 P.2d 865 ["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"].)

Similarly, the *Cervantes* court stated that the tenet of statutory interpretation that courts must "read a statute in a manner to effectuate its underlying purpose," (*Cervantes, supra,* 9 Cal.App.5th at p. 604, 215 Cal.Rptr.3d 174) is "significant, [and] indeed controlling." (*Ibid.*) The Supreme Court has rejected similar reasoning:

> ****25** "[D]efendants' claim that the 'remedial' purpose of the measure necessarily demonstrates that the electorate must have intended that the proposition apply retroactively cannot be sustained. Although the 'findings and declaration of purpose' included in the proposition clearly indicate that the measure was proposed to remedy ... perceived inequities ..., such a remedial purpose does not necessarily indicate an intent to apply the statute retroactively. Most statutory changes are, of course, intended to improve a preexisting situation and to bring about a fairer state of affairs, and if such an objective were itself sufficient to demonstrate a clear legislative intent to apply a statute retroactively, almost all statutory provisions and initiative measures would apply retroactively rather than prospectively." (*Evangelatos, supra,* 44 Cal.3d at p. 1213 [246 Cal.Rptr. 629, 753 P.2d 585].)

We are also unpersuaded by the *Cervantes* court's related reasoning that Proposition 57 must be applied to cases filed in Adult Court prior to its effective date in order to effectuate the "fundamental policy shift" of the proposition's "rejection of the concept of mandatory direct filing" (*Cervantes, supra,* 9 Cal.App.5th at p. 605, 215 Cal.Rptr.3d 174), and to further the electorate's ***716** "[a]meliorative [i]ntent" (*id.* at p. 605, 215 Cal.Rptr.3d 174, italics omitted). With respect to the first rationale, the *Cervantes* court cited no authority, and we are aware of none, that supports the conclusion that the magnitude of the public policy change caused by a new law is relevant in determining whether a change in the law may be applied to a procedure that has already occurred in the case. In our view, the second rationale ("ameliorative intent") echoes *Estrada*, which, as the *Cervantes* court concluded, is improper. (Compare *Cervantes*, at p. 595, 215 Cal.Rptr.3d 174 ["the statutory amendments under Proposition 57 do not amount to a reduction of a penalty and are not subject to retroactive application under *Estrada*"] with *id.* at pp. 606–607, 215 Cal.Rptr.3d 174 [stating that the opportunity for a transfer hearing "while not a 'mitigation of penalty' in the *Estrada* sense, must be recognized as ameliorative in intent, and sometimes in substance"].)

We also do not find the reasoning of the *Lara* court to be convincing. After discussing the Supreme Court's decision in *Tapia*, the *Lara* court reasoned:

> "The legislative changes at issue in this petition fit easily into this framework. 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.' (*Tapia, supra,* 53 Cal.3d at p. 289, 279 Cal.Rptr. 592, 807 P.2d 434.) Because Proposition 57 can only apply to trials that have yet to occur, it can only be applied prospectively." (*Lara, supra,* 9 Cal.App.5th at pp. 774–775, 215 Cal.Rptr.3d 456.)

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To begin with, the *Lara* court's analysis appears to assume that all laws governing the "conduct of trials," are laws pertaining to "trials that have yet to occur." (*Lara, supra*, 9 Cal.App.5th at pp. 774–775, 215 Cal.Rptr.3d 456.) However, as discussed above (see pt. III.C.1, *ante*), *Tapia* makes clear that the category of laws governing "the conduct of trials" includes many *pretrial* procedures, such as reciprocal discovery procedures. (*Tapia, supra*, 53 Cal.3d at p. 299, 279 Cal.Rptr. 592, 807 P.2d 434.) *Tapia* also makes clear that the application of a change in the law to an event that has already occurred in a case, is a *retroactive* application of the law. (*Tapia*, at p. 300, 279 Cal.Rptr. 592, 807 P.2d 434 [to apply change in the law governing reciprocal discovery provisions to discovery obtained *prior* to the effective date of the changed ****26** law "would be retroactive under the principles we have already discussed"].) Thus, as discussed above (see pt. III.C.2, *ante*), to apply Proposition 57's change in the law governing the *filing* of charges against juveniles to filings that had occurred prior to the effective date of the changed law is a retroactive application of the proposition. (See *Tapia*, at p. 300, 279 Cal.Rptr. 592, 807 P.2d 434.)

We are similarly unconvinced by the *Lara* court's dismissal of the People's contention in that case, which we find persuasive, that Proposition 57 may not be applied prospectively to the procedural aspects of a case that have already occurred, such as the direct filing of the case in Adult Court, because such an application is, in fact, a retroactive application of the law. In rejecting this contention, the *Lara* court reasoned as follows:

> "[T]he People reason that ***717** 'Proposition 57's procedural changes can only be applied to "new" and "future" proceedings [citation] and cannot be applied to procedural aspects that have already taken place, such as the previous direct-filing of a case ....' [¶] This position is unavailing. Although real party in interest is now under the jurisdiction of the [J]uvenile [C]ourt, the People may move to have him transferred to [A]dult [C]ourt if they think he meets the criteria for trial there. (... § 707, subd. (a).) Even assuming the decision to directly file a complaint against real party in interest in [A]dult [C]ourt is in fact the last act before Proposition 57 can be applied, the People's position fails because they have not identified how asking them to get the [J]uvenile [C]ourt's permission before proceeding to a final adjudication in adult court 'attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date.' " (*Lara, supra*, 9 Cal.App.5th at p. 775, 215 Cal.Rptr.3d 456.)

To begin with, the *Lara* court's unexplained assertion that the real party was "now under the jurisdiction of the [J]uvenile [C]ourt" is conclusory, (*Lara, supra*, 9 Cal.App.5th at p. 775, 215 Cal.Rptr.3d 456) [30] and we are not persuaded by the *Lara* court's suggestion that Proposition 57 requires the People to get "permission" from the Juvenile Court before proceeding to a "final adjudication" in a case that was properly filed in Adult Court prior to the effective date of the proposition. (*Lara*, at p. 775, 215 Cal.Rptr.3d 456.) On the contrary, as we have explained, Proposition 57 changes the court in which the People may *file* criminal charges, and in that way alters where the People may commence a proceeding, rather than barring the People from proceeding to a "*final* adjudication" (*Lara*, at p. 775, 215 Cal.Rptr.3d 456, italics added) in Adult Court. Finally, contrary to the *Lara* court, we conclude that applying Proposition 57 to cases properly filed in Adult Court under prior law *does* attach a new legal consequence to an event completed prior to the change in the law. (*Lara*, at p. 775, 215 Cal.Rptr.3d 456.) Specifically, such application attaches a new legal consequence to the prior proper *filing* of charges in Adult Court, an event completed prior to the change in the law, by invalidating the filing and transferring the matter back to Juvenile Court.

Finally, neither the *Cervantes* court nor the *Lara* court identified any procedural mechanism in *Proposition 57* by which an ****27** Adult Court may transfer to the Juvenile Court a case that was pending in Adult Court as of the effective date of the proposition. As discussed above, the *Lara* court merely asserted that the real party was now under the jurisdiction of the Juvenile Court (*Lara, supra*, 9 Cal.App.5th at p. 775, 215 Cal.Rptr.3d 456), and the *Cervantes* ***718** court looked to two statutes, section 604 and Penal Code section 1170.17, [31] as "analogue[s]," that could "provide a procedural framework for a transfer to juvenile court." (*Cervantes, supra*, 9 Cal.App.5th at pp. 613–614, 215 Cal.Rptr.3d 174.) In our view, 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.

[11] In short, the 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 the combination of an impermissible *retroactive* application of Proposition 57 to invalidate a properly direct filed case under the former law and the borrowed "procedural framework" (*Cervantes, supra,* 9 Cal.App.5th at p. 613, 215 Cal.Rptr.3d 174) of a law *outside* of Proposition 57 to transfer the case from the Adult Court to the Juvenile Court. Because we see nothing in either Proposition 57 or California law that would justify or require such transfers, we decline to follow the *Cervantes* and *Lara* courts. (See *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 772, 274 Cal.Rptr. 787, 799 P.2d 1220 [refusing to "usurp the legislative role, creating, in the worst scenario, a Frankenstein's monster whose existence the voters never contemplated"].) [32]

****28 *719** D. *The Adult Court continues to have jurisdiction over Walker, notwithstanding Proposition 57's amendment of section 602*

[12] Walker argues in the alternative, in an undeveloped argument, that "[u]nder the language of [§ 602], the moment Proposition 57 became effective, all juvenile [defendants] prosecuted in [Adult Court] without a transfer hearing fell under the jurisdiction [33] of the [J]uvenile [C]ourt." Walker's claim raises an issue of statutory interpretation, which we review de novo, applying the principles outlined in part III.B.1, *ante*.

As noted previously (see part III.A.1, *ante*), as amended by Proposition 57, section 602 provides:

> "Except as provided in Section 707, any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the [J]uvenile [C]ourt, which may adjudge such person to be a ward of the court." (Italics added.)

To begin with, while section 602 describes those persons who are within the jurisdiction of the Juvenile Court, section 602 does not state that such persons are *exclusively* within the jurisdiction of the Juvenile Court. (See *Cervantes, supra,* 9 Cal.App.5th at p. 598, 215 Cal.Rptr.3d 174 [stating that section 602 ***720** "does not use the term 'exclusive' "].) Nor does section 602 contain *any* express restrictions on the jurisdiction of the *Adult Court*. (See *Cervantes,* at p. 598, 215 Cal.Rptr.3d 174 [rejecting juvenile defendant's contention that section 602 "gives the [J]uvenile [C]ourt 'exclusive jurisdiction' over his case and the cases of all juvenile [defendants] whose cases are not yet final on appeal—at least until a fitness hearing is conducted" (fn. omitted)].)

****29** Further, in light of the reference to section 707 in section 602, section 602 is best interpreted as providing that "[a]fter the passage of Proposition 57, the *charging instrument* for all juvenile crimes must be filed in juvenile court," (*Cervantes, supra,* 9 Cal.App.5th at p. 596, 215 Cal.Rptr.3d 174, citing § 602, italics added) and that a prosecutor may file a "motion to transfer," (§ 707, subd. (a)(1)) the case from Juvenile Court to Adult Court. We are unpersuaded by Walker's contentions that interpreting section 602 as providing that the Adult Court lacks jurisdiction over his case is necessary in order to further the voters' intent "that more juveniles be rehabilitated," [34] for all of the reasons discussed in part III.C, *ante*, in connection with our discussion of whether the application of Proposition 57 to Walker's case to require that the case be transferred from Adult Court to Juvenile Court would constitute a prospective application of the provisions enacted under the proposition. In short, we agree with the *Cervantes* court that section 602 does not "oust the [Adult Court] of jurisdiction," (*Cervantes,* at p. 599, 215 Cal.Rptr.3d 174) in a case already pending in Adult Court under former law. (See *ibid.* ["Here, [Adult Court] lawfully assumed jurisdiction under pre-Proposition 57 law and retained jurisdiction throughout the trial; section 602 does not oust the criminal division of jurisdiction upon remand after an appeal"].)

Accordingly, we conclude that the Adult Court continues to have jurisdiction over Walker, notwithstanding Proposition 57's amendment of section 602.

E. *Failing to apply Proposition 57 to Walker's case does not constitute a denial of equal protection of the law*

[13] Walker contends that to fail to apply Proposition 57 to him and other "minors like him," would violate his right to equal protection under the state and federal

constitutions. We apply the de novo standard of review to this claim. (See *Yohner v. California Dept. of Justice* (2015) 237 Cal.App.4th 1, 11–12, 187 Cal.Rptr.3d 550 [applying de novo standard of review to claim that law violated " 'equal protection principles' " (*id.* at p. 11, 187 Cal.Rptr.3d 550)].)

***721** 1. *Governing law*

Both the United States Constitution and the California Constitution guarantee the equal protection of the laws. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7; see *In re Evans* (1996) 49 Cal.App.4th 1263, 1270, 57 Cal.Rptr.2d 314 [noting that "(t)he scope and effect of the two clauses is the same"].)

[14] [15] [16] [17] "The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, ' "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." ' [Citation.] 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' " (*Brown, supra,* 54 Cal.4th at 328, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) "The second step is determining whether there is a ****30** sufficient justification for the unequal treatment. The level of justification needed is based on the right implicated. When the disparity implicates a suspect class or a fundamental right, strict scrutiny applies. [Citation.] When no suspect class or fundamental right is involved, the challenger must demonstrate that the law is not rationally related to any legitimate government purpose." (*Mendoza, supra,* 10 Cal.App.5th at p. 350, 216 Cal.Rptr.3d 361.)

2. *Application*

Walker contends that it would violate equal protection principles to treat him differently "from those minors who are alleged to have committed analogous crimes, but whose alleged offenses occurred after November 8, 2016." In addition to comparing himself to the class of defendants who *committed offenses* after the adoption of Proposition 57, Walker also appears to contend that it violates equal protection principles to treat juvenile defendants differently "based solely on the date on which a *felony complaint against them was filed* in superior court." (Italics added.)

We assume, strictly for purposes of this decision, that Walker is similarly situated to those juveniles who committed offenses and/or had felony complaints filed against them *after* the effective date of Proposition 57. (Compare *Cervantes, supra,* 9 Cal.App.5th at p. 598, fn. 38, 215 Cal.Rptr.3d 174 [defendant who committed crimes and who had been convicted of crimes in Adult Court prior to enactment of Proposition 57 "*is not similarly situated* with a juvenile felon who committed his crimes after Proposition 57 was enacted" (italics added)]; with *Mendoza, supra,* 10 Cal.App.5th at p. 350, 216 Cal.Rptr.3d 361 [concluding defendant challenging Proposition 57 on equal protection grounds who had previously suffered a conviction in Adult Court "*is similarly situated* with a class of hypothetical ***722** individuals who are 16 or 17 years old and accused of crimes that could result in transfer to adult court, but whose trials had not commenced before Proposition 57 became effective" (italics added)].)

[18] With respect to the second prong of our equal protection analysis, we reject Walker's undeveloped assertion that "[g]iven that children have fundamental rights ... any disparate treatment of real party and those minors whose alleged offenses came after the passage of Proposition 57 must be justified under strict scrutiny." The classification that Walker contends violates equal protection is not one based on *age*, but rather, is one based on when a *crime was committed* or a *complaint was filed.* Further, while we agree with Walker that "children have fundamental rights," Walker fails to establish that Proposition 57 impinges on any of those fundamental rights.

[19] Accordingly, we consider whether there is any rational basis justifying a prospective application of the law. Clearly, there is. As stated previously (see pt. III.B.4.b, *ante*), a rational voter could have concluded that a prospective application of the law would serve the legitimate goal of judicial economy by avoiding the invalidation of proceedings already conducted in Adult Court for those juvenile defendants against whom the People legally and properly directly filed accusatory pleadings in Adult Court prior to the effective date of Proposition 57. (See *Cervantes, supra,* 9 Cal.App.5th at p. 570, 215 Cal.Rptr.3d 174 [rejecting equal protection

challenge to Proposition 57 "because a prospective procedural change in the law that treats defendants differently depending upon when their crimes were committed does not violate equal protection"]; cf. ****31** *Mendoza*, *supra*, 10 Cal.App.5th at pp. 351–352, 216 Cal.Rptr.3d 361 [rejecting equal protection challenge to Proposition 57 and stating, "The voters could rationally conclude that applying Proposition 57 prospectively would serve the legitimate purpose of not overwhelming the juvenile courts with requests for fitness hearings by those who had already been convicted in adult court for crimes committed as juveniles"].)[35]

Accordingly, we conclude that refusing to apply Proposition 57 to Walker's case does not constitute a denial of equal protection of the law.

IV.

CONCLUSION

This court is not hostile to the policy changes effectuated by Proposition 57. However, as laudatory as the motivation behind the enactment of ***723** Proposition 57 may be, we conclude that the changes in the law that it enacted may not lawfully be applied to Walker's case given the lack of any discernable intent on the part of the electorate to apply Proposition 57 to require transfer hearings in the Juvenile Court for those minors against whom charges were properly filed in Adult Court prior to the effective date of the proposition.

V.

DISPOSITION

Let a writ of mandate issue directing the trial court to (1) vacate its December 12, 2016 order granting Walker's motion to transfer the case to Juvenile Court and (2) to conduct further proceedings in a manner consistent with this opinion. The stay issued on December 22, 2016 is vacated.

I CONCUR:

O'ROURKE, J.

I CONCUR IN THE RESULT:

NARES, Acting P.J.

All Citations

12 Cal.App.5th 687, 220 Cal.Rptr.3d 1, 17 Cal. Daily Op. Serv. 5456, 2017 Daily Journal D.A.R. 5459

Footnotes

1 Proposition 57 is officially titled, "The Public Safety and Rehabilitation Act of 2016." (Prop. 57, § 1.)

2 Unless otherwise specified, in referring to a "juvenile defendant," "juvenile," or "minor," we intend to refer to a person who allegedly committed a crime while under 18 years of age.

3 Juvenile Court and Adult Court are both divisions of the superior court, and thus, a transfer from one of these courts to the other does not implicate the subject matter jurisdiction of either court, but rather, "the statutory authority of the particular division of the superior court, in a given case, to proceed under the juvenile court law or the law generally applicable in criminal actions." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 548, fn. 3, 117 Cal.Rptr.2d 168, 41 P.3d 3 (*Manduley*).)

4 Unless otherwise specified, all subsequent statutory references are to the Welfare and Institutions Code.

5 The matter was transferred to this court in light of our prior decision in Walker's appeal. (See Cal. Rules of Court, rule 10.1000(B)(1)(A) ["If multiple appeals or writ petitions arise from the same trial court action or proceeding, the presiding justice may transfer the later appeals or petitions to the division assigned the first appeal or petition"].)

6 While this writ proceeding was pending, we granted the San Diego County District Attorney's application to file an amicus brief on behalf of the People. We also granted an application to file an amicus brief on behalf of Walker filed by the California Public Defenders Association and the Law Offices of the Public Defender, County of Riverside. We have considered these amicus briefs, as well as Walker's answer brief to the San Diego County District Attorney's amicus brief.

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7 "Proposition 21, titled the Gang Violence and Juvenile Crime Prevention Act of 1998 and approved by the voters at the March 7, 2000, Primary Election (Proposition 21), made a number of changes to laws applicable to minors accused of committing criminal offenses." (*Manduley, supra,* 27 Cal.4th at pp. 544–545, 117 Cal.Rptr.2d 168, 41 P.3d 3.)

8 In addition to the juvenile defendant provisions and several uncodified sections, Proposition 57 also amended Article 1, section 32 of the California Constitution governing the consideration of parole and the earning of behavior credits in state prison. Unless otherwise specified, in referring to Proposition 57, we refer to the juvenile defendant provisions and the uncodified sections of the proposition.

9 Prior to the adoption of Proposition 57, former section 602 provided:

"(a) Except as provided in subdivision (b), any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

"(b) Any person who is alleged, when he or she was 14 years of age or older, to have committed one of the following offenses shall be prosecuted under the general law in a court of criminal jurisdiction: [certain special circumstances murders and various specified sex offenses]."

10 Section 656.2 specifies certain rights of the victims of crimes allegedly committed by juvenile defendants.

11 Section 707, subdivision (a)(2) provides in relevant part:

> "Following submission and consideration of the report, and of any other relevant evidence that the petitioner or the minor may wish to submit, the juvenile court shall decide whether the minor should be transferred to a court of criminal jurisdiction. In making its decision, the court shall consider the criteria specified in subparagraphs (A) to (E). If the court orders a transfer of jurisdiction, the court shall recite the basis for its decision in an order entered upon the minutes. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the transfer hearing, and no plea that may have been entered already shall constitute evidence at the hearing."

12 As does section 707, subdivision (b), as amended by Proposition 57, former section 707, subdivision (b) included attempted murder as among the listed offenses.

13 The amendments to sections 602 and 707 are contained in Section 4.1 and 4.2 of Proposition 57.

14 While certain codes statutorily codify this principle (see, e.g., Pen. Code, § 3, Code Civ. Proc., § 3), the Supreme Court has made clear that language in these codes merely "codif[ies] a general rule of construction" (*Stenger v. Anderson* (1967) 66 Cal.2d 970, 977, fn. 13, 59 Cal.Rptr. 844, 429 P.2d 164), and thus, the presumption in favor of prospective application applies with respect to the interpretation of statutes generally. (See *ibid.* [applying rule of prospective application to provision in Welfare and Institutions Code].)

15 California voters are familiar with text that expresses an intent to have a law apply retroactively. At the same election at which voters adopted Proposition 57, they also voted on Proposition 62, the text of which states: "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) (hereafter "Voter Guide") text of Prop. 62, p. 163.)

16 Even assuming that there was evidence that the Legislative Analyst's prediction *was* based on a retroactive application of Proposition 57, this would not demonstrate a clear intent of the *electorate* to have the proposition apply retroactively. (See *California Comp. & Fire Co. v. State Bd. of Equalization* (1982) 132 Cal.App.3d 25, 29, 182 Cal.Rptr. 745 [rejecting as "totally unpersuasive" the argument that a law should be applied retroactively because the Legislative Analyst's revenue projection *was* based on retroactive application of the law].)

17 Courts have relied on *Estrada* in concluding that a change in the law that entirely decriminalizes conduct or provides a defendant with a new defense to an offense applies retroactively to cases that are not yet final, absent indicia of a contrary intent in the law. (See e.g., *People v. Rossi* (1976) 18 Cal.3d 295, 299–302, 134 Cal.Rptr. 64, 555 P.2d 1313 (*Rossi*) ["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, 51 Cal.Rptr.3d 80, 146 P.3d 531 (*Wright*) [discussing *Rossi* and cases following *Rossi*].)

18 The *Lara* court's conclusion on this issue is not entirely clear. The *Lara* court stated, "We also agree with the petition that [*Estrada, supra,* 63 Cal.2d 740, 48 Cal.Rptr. 172, 408 P.2d 948], the case that spawned a well-known exception to the default rule of prospectivity, *does not apply* here." (*Lara, supra,* 9 Cal.App.5th at p. 774, 215 Cal.Rptr.3d 456, italics

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added.) However, the *Lara* court then stated, "Real party in interest does not argue that, and we therefore *do not consider*, whether Proposition 57 amounts to a legislative reduction in the punishment for a crime." (*Ibid.*, italics added.)

19 Nor can it be said that Proposition 57 is "akin to a defense to criminal charges," as Walker argues in his brief. (Boldface & capitalization omitted.) The statutory changes to sections 602 and 707 summarized in part III.A.2, *ante*, pertain to in which division of the superior court criminal charges against a juvenile may be filed and which law will be applied upon such filings. These amendments bear no resemblance to statutory changes that provide a complete *defense* to previously criminal conduct, which *Estrada*'s progeny have ruled are presumptively retroactive. (See, e.g., *Wright*, *supra*, 40 Cal.4th at pp. 94–95, 51 Cal.Rptr.3d 80, 146 P.3d 531.)

20 One need only read the disposition in *Cervantes*, see footnote 32, *post*, to appreciate the complexity of attempting to apply Proposition 57 to cases that were filed in Adult Court prior to its enactment.

21 In the trial court, Walker's motion to transfer the case to the Juvenile Court was based exclusively on the contention that Proposition 57 applied *retroactively*. In this court, Walker contends that the trial court's order constitutes a proper *prospective* application of Proposition 57. The People contend that the trial court's order is premised on an improper retroactive application of Proposition 57.

22 While Walker has been tried in Adult Court, he contends that, in light of this court's reversal of the judgment based on that trial, he stands in the same position as any other juvenile awaiting trial in Adult Court.

23 "Prehypnotic evidence" refers to evidence obtained from a witness prior to the witness undergoing hypnosis. (*Hayes*, *supra*, 49 Cal.3d at p. 1274, 265 Cal.Rptr. 132, 783 P.2d 719.) In *Hayes*, the court explained that while prior case law established that *post*hypnotic evidence is generally inadmissible (*id.* at p. 1268, 265 Cal.Rptr. 132, 783 P.2d 719, italics added), "a witness who has undergone hypnosis is not barred from testifying to events which the court finds were recalled and related *prior* to the hypnotic session." (*Id.* at p. 1270, 265 Cal.Rptr. 132, 783 P.2d 719, italics added.)

24 According to the defendant, the changes in the voir dire statute could not be applied to him because his counsel "might have sought an earlier ruling on a motion to change venue rather than waiting for the results of voir dire." (*Tapia*, *supra*, 53 Cal.3d at p. 299, 279 Cal.Rptr. 592, 807 P.2d 434.)

25 In describing the procedural history of the case, the *Tapia* court expressly stated that voir dire had yet to commence in the defendant's trial at the time Proposition 115 became effective. (*Tapia*, *supra*, 53 Cal.3d at p. 286, 279 Cal.Rptr. 592, 807 P.2d 434.)

26 Although not of relevance to this issue, the *Tapia* court stated that provisions in Category C could be applied to the defendant under case law extending *Estrada* to provisions "redefin[ing], to the benefit of defendants, conduct subject to criminal sanctions." (*Tapia*, *supra*, 53 Cal.3d at p. 301, 279 Cal.Rptr. 592, 807 P.2d 434 [citing *Rossi*, *supra*, 18 Cal.3d 295, 134 Cal.Rptr. 64, 555 P.2d 1313].) We explained in pt. III.B.4, *ante*, why *Estrada* and its progeny, such as *Rossi*, do not apply in this case. In addition, although not of relevance to this appeal, the *Tapia* court stated that a provision that codified existing law *may* be applied to crimes committed before the codification (Category D). (*Tapia*, at pp. 301–302, 279 Cal.Rptr. 592, 807 P.2d 434.)

27 As noted previously (see pt. II, *ante*), the People filed the initial complaint against Walker more than four years prior to Proposition 57's effective date.

28 Although the *Chong* court described its application of the statutory changes at issue in that case as a "retrospective" application of the law (*Chong*, *supra*, 145 Cal.App.4th at p. 19, 51 Cal.Rptr.3d 350), it is clear that the *Chong* court meant only that the law could be applied to *offenses* committed before the effective date of the statute. This is made clear by the fact that the *Chong* court relied on *John L.* in concluding that the change in the law could be applied to petitions to seal brought *on or after* the effective date of statute, regardless of when the underlying offenses occurred. (*Ibid.*) Thus, properly understood, *Chong* stands for the proposition that the changes to Proposition 21 pertaining to petitions to seal juvenile records may be applied *prospectively* to petitions filed on or after the effective date of the statute. We disagree with the *Chong* court to the extent that it described this application of Proposition 21 as being "retrospective" (*Chong*, at p. 19, 51 Cal.Rptr.3d 350), as that term is used in *Tapia* and *John L.*

29 The *Lara* court heavily relied on *Strauch*. (*Lara*, *supra*, 9 Cal.App.5th at pp. 775–776, 215 Cal.Rptr.3d 456.) Walker cited *Strauch* both in a supplemental brief discussing *Lara* and *Cervantes* and in his answer brief to the San Diego County District Attorney's amicus brief.

30 Elsewhere in its opinion, the *Lara* court explained that "[p]rior to the passage of Proposition 57, the People directly filed a complaint against real party in interest, a minor, in [A]dult [C]ourt under the authority of former section 707, subdivision (d)(2) ...." (*Lara*, *supra*, 9 Cal.App.5th at p. 758, 215 Cal.Rptr.3d 456.)

31 The *Cervantes* court explained that section 604 "provides for suspension of proceedings in criminal court and certification to juvenile court when it is discovered that the defendant was a minor when the crime was committed." (*Cervantes, supra,* 9 Cal.App.5th at pp. 613–614, 215 Cal.Rptr.3d 174.)

The *Cervantes* court stated that Penal Code section 1170.17 "provides for a judicial assessment of fitness before sentencing whenever a juvenile felon has been 'prosecuted' under the criminal law '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.' " (*Cervantes,* at pp. 614, 215 Cal.Rptr.3d 174.) However, the *Cervantes* court noted that "[u]nder the California Rules of Court ... [the defendant] and other juvenile felons tried in criminal court under the direct filing procedure are not eligible to bring a motion under [Penal Code] section 1170.17. The procedure described in that section may nevertheless be used on remand for the fitness hearing we order under Proposition 57." (*Ibid.*)

While this appeal was pending, we asked the parties for supplemental briefing concerning what effect, if any, Penal Code section 1170.17 has on the issue in this case. The People argued that the electorate's failure to abrogate Penal Code section 1170.17 "indicates an intent for [Proposition 57] to apply prospectively." We need not address the People's argument in light of our conclusion that Proposition 57 does not apply to cases filed in Adult Court prior to the effective date of the proposition, for the reasons stated in the text.

32 For the reasons stated in the text, the absence of any procedural mechanism within Proposition 57 with respect to the manner in which it should be applied to cases filed in Adult Court prior to the effective date of the statute demonstrates that the electorate did not intend for it to be applied to such cases as a matter of *statutory interpretation.* Further, the absence of any such statutory procedural mechanisms would likely pose great challenges for trial courts as they attempt to uniformly *implement* Proposition 57 in such cases. Consider the complexity of the disposition in *Cervantes*, in which the Court of Appeal explained how Proposition 57 should be applied on remand in an appeal in which the judgment was affirmed in part and reversed in part:

> "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 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 ... 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. ... [¶] 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 ...."

33 As alluded to in part I, *ante*, the Supreme Court has explained that the term "jurisdiction" in section 602 does not refer to "subject matter jurisdiction," but rather, to "the statutory authority of the particular division of the superior court, in a given case, to proceed under the juvenile court law or the law generally applicable in criminal actions." (*Manduley, supra,* 27 Cal.4th at p. 548, fn. 3, 117 Cal.Rptr.2d 168, 41 P.3d 3 [discussing former section 602, subdivision (a)].) Thus, we interpret Walker's argument as a contention that section 602 provides that the juvenile court law applies to all juvenile defendants whose cases were pending in Adult Court, without having been subject to a transfer hearing, upon the effective date of the statute.

34 In support of this argument, Walker cites to the uncodified portions of Proposition 57 discussing the rehabilitative purpose of the proposition (Prop. 57, § 2) and the voter's intent that the proposition be construed "broadly" (*id.*, § 5) and "liberally" (*id.*, § 9) that we address in part III.B.3 and III.C.3, *ante*.

35 The *Lara* court did not reach the equal protection question in light of its resolution of the petition on other grounds. (See *Lara, supra*, 9 Cal.App.5th at p. 778, 215 Cal.Rptr.3d 456.)

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