Estrada, The Rest Of The Story

Squishy

When the law changes in a manner that benefits defendants, sometimes it affects all defendants, sometimes only those whose crimes were committed after its effective date, and sometimes those whose judgments were not final upon the change's effective date. The challenge is in figuring out who enjoys the benefit. The hard and fast rule is really only spongy and leisurely. So in the previous issue of *Forum* I regaled you with everything I ever thought I wanted to know about *Estrada* (*In re Estrada* (1965) 63 Cal.2d 740) but was too ashamed to admit. Of course, there was not enough room to discuss all 1,100+ instances where *Estrada* had been cited, so I limited my discussion to California Supreme Court decisions that had analyzed *Estrada* and became its progeny, *vel non*. In this issue, I hope to finish off the subject by discussing an array of Court of Appeal cases that analyzed how the presumption of retroactivity applied, if at all.

Recap Or Nightcap, Anyone?

For the two or three of you who did not actually memorize the previous article, let me say simply that *Estrada* was one of four cases issued by the California Supreme Court the same day, setting forth the general rule that a statutory change resulting in a reduction in penalty for a given act (i.e., amelioration) is presumed to be retroactive to those whose judgments are not final at the time the change took effect, unless the enacting body (usually the Legislature) expressed a contrary intent.

Instead of discussing the cases chronologically as I did in the previous article, I have tried to group them by themes. As always, if you find something of interest, read the actual case, because I could well have misinterpreted its holding or simply inserted or omitted an essential word, such as "not."

Finally, But Never On Sunday

One of the critical components of *Estrada*'s principles is that the presumption of retroactivity of an ameliorative statute will not be applied to those whose judgments are final. (Never say never, however.) Generally speaking, a judgment does not become final in this context "so long as the courts may provide a remedy on direct review. That includes the time within which to petition to the United States Supreme Court for writ of certiorari." (*In re Pine* (1977) 66 Cal.App.3d 593, 594, cited with approval in *In re Pedro T.* (1994) 8 Cal.4th 1041, 1046, and *People v. Vieira* (2005) 35 Cal.4th 264, 305.)

Sir, She What?

In *Pine*, the Court of Appeal retroactively applied to Pine the elimination of a minimum period before a defendant convicted of Health and Safety Code section 11352 could be paroled under the indeterminate sentence law in effect at the time. Though the effective date of the ameliorative amendment was later than the Supreme Court's denial of the defendant's application for hearing in that court (now known as a petition for review in the Supreme Court), it was earlier than the expiration of the time during which he could have filed a petition for writ of certiorari in the United States Supreme Court (90 days after entry of judgment of a state court of last resort). Thus, at least for *Estrada* purposes, the judgment was not final.

[For misdemeanor appeals, there are provisions for seeking transfer to the Court of Appeal from the Appellate Division of the Superior Court, but for the sake of sanity everywhere I'm not going to bore you with those details. I am going to assume they have an impact on the date of the finality of those judgments. Check out rule 8.1000 and any leads you can get from there.]

Appealing Digression

There is a bit of a moving target, up to a point, if an appeal has not been filed. In those instances, where a notice of appeal is required if a party wants to appeal, the judgment for purposes of *Estrada* is final after the time to appeal has expired. (By the way, if a death sentence is ordered, the appeal is automatic, and the defendant need not file a notice of appeal.)

A notice of appeal from a conviction whose appeal will be heard in the Court of Appeal must be filed within 60 days of the appealable order or judgment. That includes not only felonies in which a sentence of death has not been imposed, but also some misdemeanors if the original superior court charges contained a felony count component. See Penal Code section 1237 for the specifics on what can be appealed; see Rules of Court, rule 8.304 and its very informative Advisory Committee Comment, outlining which appeals are to be heard in the Court of Appeal; and see rule 8.308, for the 60-day deadline.

One cannot be relieved from default if the 60-day deadline has expired. If, however, the conditions are right--(a) an incarcerated defendant (b) requested counsel to file a notice of appeal prior to the expiration of the 60 days--the court may deem a notice of appeal "constructively" filed timely even if not physically received timely, under *In re Benoit* (1973) 10 Cal.3d 72. The court also considers a notice timely filed if from an inmate who, before the deadline expired, delivered it to custodial officials for mailing to the court, the so-called "prison delivery" rule. See the discussion in *Silverbrand v. County of*

Los Angeles (2009) 46 Cal.4th 106, which extended it even to civil appeals. It is now embodied in Rules of Court, rules 8.25(b)(5) and 8.817(b)(5).) Oh, and don't forget rule 8.66, where the Chief Justice can extend time in case of public emergencies.

Otherwise, no creek, and no paddle.

For those whose appeals must be heard in the appellate division of the superior court (i.e., infractions and misdemeanors that are not described by rule 8.304), the notice of appeal must be filed within 30 days, per rule 8.853. (It was not my intention to devote a lot of time to deadlines in this article, but *In re Hernandez* (1974) 40 Cal.App.3d 893 relieved the defendant from default in a misdemeanor appeal to the appellate division, even though he had not asked his attorney to appeal. The attorney intended to file a notice of appeal but miscalendared and missed the deadline by 5 days. The court granted relief based on constitutional grounds springing from the attorney's dereliction of duty. In the few cases that cited *Hernandez*, the defendants had timely asked their attorneys to file their notices of appeal. If it happens to you, check out *Hernandez*. It seems to fly in the face of other decisions interpreting the Rules of Court, but I could not find a case disapproving its holding, expressly or otherwise.)

If the opposing party files a notice of appeal timely (e.g., if the People appeal), there are provisions extending the time by 30 days (Court of Appeal-bound) or 15 days (Appellate Division-bound) if the otherwise nonappealing party decides to file a cross-appeal.

And Now We Return You To Our Regular Programming--Finally!

In *Bennett v. Procunier* (1968) 262 Cal.App.2d 799, the appellate court declined to apply *Estrada* to give the benefit of the amendments to section 1203.03 regarding credit for time served as part of the diagnostic study. At the time the defendant was sent to the Department of Corrections diagnostic center for an evaluation and recommendation prior to sentencing, there was no provision to allow credit for time served. The defendant returned and was sentenced to the term prescribed by law. He did not appeal. His judgment became final. Then the law changed to permit such credit. He then sought a writ of mandamus to compel the prison officials to grant him that credit against his sentence. The Court of Appeal declined to grant him the benefit, even though it concluded the statute was ameliorative. His problem was that his judgment was final, and *Estrada* applied only to nonfinal judgments.

In a case similar to *Pine*, *supra* (holding that the judgment is not final until the time for filing a petition for writ of certiorari expires), the Court of Appeal

declined to apply retroactively the amendment eliminating section 11352's minimum parole eligibility period to a defendant whose judgment was final. "However, as indicated by its clearly expressed limitation, the *Estrada* holding does not apply to cases where, as here, the judgment became final prior to enactment of the ameliorative law." (*In re Moreno* (1976) 58 Cal.App.3d 740, 742.) (Is it just I, or does anyone else marvel that this *Estrada*-analysis case begins on the same page number (740) as the *Estrada* decision?)

Probation Has Hidden Perks

On the other hand, a judgment is not final while the defendant is on probation, as in *In re May* (1976) 62 Cal.App.3d 165 (relying on *People v. Superior Court* (*Giron*) (1974) 11 Cal.3d 793, which in turn referred to *Stephens v. Toomey* (1959) 51 Cal.2d 864). In *May*, the defendant was convicted in 1971 of possession of marijuana, a felony. He then failed to appear for sentencing until late 1975, at which time he was placed on probation three days before a law went into effect reducing from felony to misdemeanor possession of less than an ounce of marijuana, and reducing the maximum penalty to fine only, not to exceed $100. He subsequently violated probation and was ordered to serve a term of custody in the county jail, with probation to terminate on completion of that term. The Court of Appeal agreed that he was entitled to the ameliorative benefit because his judgment was not final for purposes of *Estrada* consideration. It ordered the lower court to impose a fine not to exceed $100 and to correct its records to reflect that the conviction was a misdemeanor.

Crux Estrada

It is probably important to consider the context in which retroactivity and *Estrada*'s treatment of final judgments logically crop up in the same discussion. Keep in mind that *Estrada* clarified and declared a tool for determining legislative intent when determining how a new statute or amendment is to be applied. Penal Code section 3 provides that no part of the Penal Code is retroactive unless expressly so declared. (There is a corresponding section 3 in the Civil Code and in the Code of Civil Procedure.) *Estrada* construed section 3 as embodying the common law general rule of construction that new statutes are to be applied prospectively, unless it can be ascertained that the Legislature intended otherwise. Where the Legislature has reduced the punishment for a proscribed act, however, it must be presumed that the Legislature believed that the harsher punishment was uncalled for. *Estrada* eschewed the notion that the Legislature would be vindictive and vengeful by requiring those convicted previously to be subjected to the level of punishment that the Legislature has now decided is

too severe. Therefore the Supreme Court concluded that the Legislature must have intended the new provisions to apply retroactively, in the absence of a clear indication to the contrary. But this rule of construction can only apply to cases that the courts have jurisdiction over, and once judgments have become final, the courts have no jurisdiction.

When DSL (Not Fast And Furious)

I mention this only because one will immediately be reminded that in 1977, the Uniform Determinate Sentencing Act of 1976 took effect. In that Act, section 1170.2 required the setting of parole dates for inmates serving indeterminate terms, and those dates were to be the equivalent of when the inmates would have completed their sentences had they been sentenced under the DSL at the outset. More or less, anyway. When I started writing this part of the article, I discovered that I was getting way too pedantic for a general survey resource. So if you find yourself saying, "Wow, this stuff is SOOO invigorating," I suggest you (a) get help, and (b) read *Way v. Superior Court of San Diego County* (1977) 74 Cal.App.3d 165 in depth on your own. The short of it is that the DSL (a) did not impermissibly invade the Governor's exclusive power to commute sentences and (b) properly applied the provisions of an entirely new approach to sentencing across the board, retroactively. "The distinction is that in this case final judgments will be reduced only as an incident of a major and comprehensive reform of an entire penal system. In view of the legislative objective, the final judgment rule must yield." (*Way*, at p. 180.)

Although *Estrada* was mentioned in the majority's opinion, it was in the context of discounting *Estrada*'s limitation to judgments not yet final. Otherwise, *Estrada* was not relevant to the upholding the statute's retroactive effect. The concurring justice criticized the majority's efforts to sidestep *Estrada*. Justice Friedman concluded that the "finality of judgment" limitation was dicta and artificial, and would have applied *Estrada* regardless of finality of judgments. (But a concurring opinion is NOT the holding of the court--it is a statement by one or more justices agreeing with the end result, but with a different take on the rationale to get there. Lower courts are bound by holdings, not by concurring opinions.)

Fast Forward But Not Furious

Oh, and does that broad change in sentencing scheme also remind you of Penal Code section 1170.126, the petition for recall of sentencing available to certain Three Strikers, per Proposition 36, the Three Strikes Reform Act of 2012? Although there are aspects in litigation right now over whether *Estrada* applies to extend the direct benefits of sections 667 and 1170.12 to

those whose judgments are not final, or whether even those defendants must resort to section 1170.126 to seek relief, I am hopeful that any attack similar to that addressed in *Way* will be as futile as that in *Way*.

Markable, Part I

Finality also was addressed in *People v. Community Release Board* (*Phoenix*) (1979) 96 Cal.App.3d 792, and the opinion contains a remarkable statement, at page 800: "*Way* was recently cited with approval in a unanimous decision by our Supreme Court. (*Younger v. Superior Court*, [1978] 21 Cal.3d 102, 117-118 [145 Cal.Rptr. 674, 577 P.2d 1014].) **We therefore take it as settled that legislation reducing punishment for crime may constitutionally be applied to prisoners whose judgments have become final**." [Emphasis added.] (In *Phoenix*, the defendant's death judgment for kidnapping for ransom had earlier been converted to life without the possibility of parole when the California Supreme Court found the death penalty unconstitutional, and then the Court of Appeal concluded that the LWOP sentence was reduced to life WITH the possibility of parole when section 209 was amended to provide that as the maximum penalty for the statute he violated. Lucky guy, in some sense.)

Remarkable

A remarkable statement, as I said, given the time-after-time reiteration that *Estrada* principles apply only to those whose judgments are not final. But it was relied on in *In re Chavez* (2004) 114 Cal.App.4th 989. In *Chavez*, the defendants were sentenced in 1998 to seven years for the principal count plus four consecutive indeterminate terms of "not more than three years." The crimes involved embezzlement and filing false tax returns plus enhancements because the grand theft and receiving stolen property amounts exceeded $2.5 million (over $17 million, in fact). After the judgments became final, the false returns statute (Rev. & Tax. Code, sec. 19705) was amended, making the indeterminate terms ("not more than three years") determinate (16 months, 2 years, or 3 years). On habeas, the defendants persuaded the Court of Appeal to apply the amelioration to their cases. First, the Court of Appeal agreed that the change from the indeterminate "not more than three years" to the determinate sentencing scheme of 16 months, 2 years, or 3 years was ameliorative. Next, the appellate court applied the *Estrada* presumption and concluded that there was nothing to indicate that the Legislature intended the ameliorative amendment to apply prospectively.

The Court analyzed both *Estrada* and *Way*, and found them compatible. *Estrada* was simply a resurrection of the common law rule that ameliorative changes were to be applied retroactively to nonfinal judgments, in the

absence of a clear indication of contrary intent. (Though *Estrada* did not mention this particular rule as one of common law, the Supreme Court characterized it that way in *People v. Rossi* (1976) 18 Cal.3d 295, 298, which applied the *Estrada* presumption of retroactivity to decriminalization of conduct.) *Way* did deal with a major overhaul in the sentencing law, but its conclusion that the change could be applied retroactively was not narrowly limited to sea changes. Instead, *Chavez* held that there was no prohibition against applying revised sentencing provisions to persons whose sentences have become final if that is what the Legislature intended or what the Constitution requires.

Big Picture Economy Of Scale

I mentioned the challenge to the Uniform Determinate Sentencing Act (which we have all come to know and love as the DSL--I guess UDSA just sounded too much like an agency that grades eggs and beef). In contrast to those who urged that the new sentencing scheme would be applied prospectively only, if they had their *Way* (oh, one of the worst puns I've used in quite a while, and I have to admit, I've used some doozies), the defendant in *People v. Alcala* (1977) 74 Cal.App.3d 425 argued that he should be given the benefit of the new DSL directly, and that the trial court should have imposed a determinate term rather than the indeterminate term applicable at the time of his offense. I assume he wanted to bypass the process for the setting of a parole date that the new Community Release Board would determine to be the equivalent of a sentence that would have been imposed had Mr. Alcala's crime been committed under the DSL. The Court of Appeal concluded that *Estrada*'s presumption applies only when the legislative intent is not clear. Here, examination of the whole new scheme reflected the Legislature's plan for how ISL prison terms would be dealt with under the new DSL. Thus, the presumption of retroactivity was overcome.

Santa's Brother Saving Was A Big Player, Time To Time.

In *People v. Superior Court* (*Martin*) (1982) 132 Cal.App.3d 658, the defendant argued that his prior commitment to the state hospital as a Mentally Disordered Sex Offender could not be extended, because the MDSO provisions had been repealed. Not so fast, said the appellate court, because there was a saving clause. Section 3 of the act repealing MDSO provisions read, "Nothing in this act shall be construed to affect any person under commitment [as an MDSO] under Article I (commencing with Section 6300) of Chapter 2 of Part 2 of Division G of the Welfare and Institutions Code prior to the effective date of this act. It is the Legislature's intent that persons committed as mentally disordered sex offenders and persons whose terms of commitment are extended under the provisions of Section 6316 of the Welfare

and Institutions Code shall remain under these provisions until the commitments are terminated and the persons are returned to the court for resumption of the criminal proceedings." That's a pretty good example of how the Legislature knows how to express its intent regarding retroactive or prospective application of changes in the law. (And yes, in yet another amazing coincidence, 3 IS the section number in the Penal and Civil Codes and the Code of Civil Procedure regarding prospective application in the absence of an indication of a contrary intent.)

I Can See Clarity Now, The Rain Is Gone

In *People v. Holland* (1983) 141 Cal.App.3d 795, we see another prime example of clarity in wordsmithery. While the defendant's case was pending, the monetary threshold for theft to qualify as grand theft increased from $200 to $400. The defendant argued that his grand theft conviction should be reduced to a misdemeanor, relying on the principles of *Estrada*. Not so fast, said the appellate court, because there was a saving clause. (*Deja* what?) The court found that section 2 of chapter 935 addressed the retroactivity of the amendments to both section 487 and section 496 as follows: "The changes in monetary limits or amounts contained in this bill, Assembly Bill 1389 of the 1981-82 Regular Session of the Legislature, and Assembly Bill 629, which was enacted as Chapter 80 of the Statutes of 1982, shall apply only to offenses committed on or after January 1, 1983. It is the intent of the Legislature that the changes in these bills be given no retroactive effect."

Thank you, drafters. (Well, thanks offered in the context of when one has to divine legislative intent. I'm certain defendants were somewhat less grateful.) (More marveling: The opinion itself assiduously avoided the quandary of whether the change makes below-threshold thefts petit or petty. The Penal Code theft sections use "petty" rather than "petit." But the burglary statute refers to "petit larceny." In the past 80 years, published appellate court decisions seem to favor "petty theft" over "petit theft" 20 to 1. *Holland* dodged the issue. Got snoots?) (Tell me what OTHER column you're going to learn such interesting facts from!)

Express Delivery

Realignment stirred up the soup of retroactivity discussions as well. If the defendant was sentenced before its effective date of October 1, 2011, but his judgment was not final by then, does he or she get the benefit of commitment to county jail under section 1170, subdivision (h), under *Estrada*? Not according to *People v. Cruz* (2012) 207 Cal.App.4th 664. Section 1170, subdivision (h)(6) states, "The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or

after October 1, 2011." In other words, the act contains a saving clause, and resort to *Estrada*'s presumption in favor of retroactivity is defeated, because the Legislature clearly indicated its intent that the Act operate prospectively.

Relativity Of Time And Space?

In a footnote, the Court of Appeal also stated that it was not convinced that the changes were ameliorative in any event. (I assume it must have felt three years is three years, right? Whether it is served at Jamestown or Pelican Bay? So why would it make a difference if it is instead served in county jail or, presumably, under home confinement?) But the Court decided to assume for the purpose of the discussion before it that Realignment had some ameliorative effect (because of its impact on parole or postrelease community supervision), as it ultimately had no bearing on the outcome, given the saving clause expressly declaring the provisions to be prospective.

On the other hand, *In re Carl N.* (2008) 160 Cal.App.4th 423 and *In re N.D.* (2008) 167 Cal.App.4th 885 concluded that the changes in the law regarding who could be committed to the California Youth Authority were not ameliorative, as they affected only where a juvenile could be committed, not the length of the commitment itself.

So What Did 8,575,619 People Mean By That?

The big *Estrada*-related issue at the moment is whether eligible Third Strike life-sentenced defendants whose judgments were not final are automatically entitled to be resentenced to a doubled determinate term without having to pursue the discretionary recall process embodied in section 1170.126 of the Three Strikes Reform Act. (Proposition 36 of 2012, not to be confused with Proposition 36 of 2000, the Substance Abuse and Crime Prevention Act of 2000. See? Another coinkydink? I think not! I don't make this stuff up, you know.)

People v. Yearwood (2013) 213 Cal.App.4th 161 held that section 1170.126 was the functional equivalent of a saving clause, and thus was the only vehicle for relief, whether or not the judgment was final when the Act took effect. Review was denied in that case. There have been several Court of Appeal opinions since then, some agreeing with *Yearwood* and some concluding *Yearwood* was wrong. The matter is currently pending in the California Supreme Court in *People v. Conley* (S211275), in which the lower appellate court had aligned itself with *Yearwood*. From what I can tell, all of the previously-published cases addressing this subject have been depublished (except for *Yearwood*), either by an order of the Supreme Court denying review (some or all denied without prejudice, depending on the outcome in

Conley) or by an order granting review but holding without further briefing pending the outcome in *Conley*. Time should tell.

Not To Be Confused With The Periodic Table

The *Estrada* presumption of retroactivity applies (IF it applies) to amendments that affect the elements of the crime in a manner that would have benefited the defendant had the crime been committed under the new law. In *People v. Cloud* (1969) 1 Cal.App.3d 591, defendant's conviction for battery on a peace officer was reduced to simple battery because the class of individual protected was amended, removing the victim in that case from its provisions. (During the pendency of his case, "parole officers" were removed from the list of peace officers covered by section 243.) The appellate court applied the retroactivity presumption of *Estrada*.

In *People v. Ramirez* (1972) 27 Cal.App.3d 660, the defendant failed to return to the California Rehabilitation Center following a 72-hour temporary community release. He was convicted of escape, but before his judgment was final, the law was amended to provide a lower penalty for his misconduct, under a different section. The Court of Appeal applied *Estrada* and concluded that the defendant was entitled to the benefit of the lower penalty. (The case was procedurally more complex than that, but those who felt invigorated by *Way* can take the time to read *Ramirez* with equal enthusiasm. For those, I say get a life. For the rest, trust me, *Ramirez* applied *Estrada*, now get on with your life.)

Going Up--For Some!

I mentioned earlier that the threshold for elevating theft to grand theft was held to be prospective only (see *Holland*, *supra*). That was then (1983), and that was because the statute declared the intent of the Legislature. Fast forward to now (well, three years ago, anyway), and take a gander at *People v. Vinson* (2011) 193 Cal.App.4th 1190. Among the many reforms taken to reduce the prison population (by offsetting the cost for the anticipated increase in commitments that the same legislation was going to generate by harsher penalties for sex offenses against minors), the Legislature changed the law on petty theft with a prior conviction. Instead of exposing a defendant to felony treatment of a current petty theft where the defendant had served a period of time in custody for a single prior conviction of any of several particular theft-related offenses, section 666 was amended to require three prior convictions of specified offenses, with a period of incarceration, before the current petty theft could be dealt with as a felony. *Vinson* applied *Estrada* and concluded that the amendment applied retroactively.

Trash And Treasure Perspectives

Of course, for the presumption of retroactivity to apply, the change itself has to be ameliorative. Of the quartet handed down by the California Supreme Court, *In re Griffin* (1965) 63 Cal.2d 757 declined to grant relief to the defendant. Got to love that Indeterminate Sentence Law. When the defendant committed his crime, it carried a sentence of 10 years to life, but he would be eligible for parole consideration after serving a third of the minimum term. In fact, Griffin was released on parole after serving one-third of 10 years. While his case was pending, the law was changed to provide a sentence of five years to life, but the person would not be eligible for parole for a minimum of five years. The Supreme Court declined to give Griffin the benefit of the lower range (five years to life) because, as to Griffin himself, the law increased the punished (by making him ineligible for parole as early as he had been paroled).

Along the same lines, where the appellate court seemed to consider the actual impact on the individual, in *People v. McNeely* (1994) 28 Cal.App.4th 739, the court declined to give the defendant the retroactive benefit of the change in section 12022.6 (the excessive taking enhancement). At the time of his crime, an additional term of one year would be imposed if the value of the taken property exceeded $25,000. Before his judgment was final, the threshold was increased to $50,000 by amendment of section 12022.6. McNeely argued that he was entitled to the benefit of the change. It isn't quite clear from the opinion, so I am assuming that his argument was that the true finding should be stricken because the information alleged that the value exceeded $25,000. While not disagreeing with the principles announced in *Estrada*, the Court of Appeal declined to apply them to the defendant. The value of the property taken was $65,000, and the court concluded that, had the current law been in effect, the People would have charged him with taking over $50,000 and the result would have been the same.

The *McNeely* facts were sufficiently different to distinguish *People v. Roberts* (1994) 24 Cal.App.4th 1462, where the taken property was valued at only $29,000, and it was proper to apply the ameliorative benefit to the defendant whose judgment was not final. (Ah, the ironies. Eponymous Roberts prevailed on the argument, but in fact the trial court had neglected to impose the additional sentence in the first place. The trial court did impose the enhancement on the co-appellant Talley, whose name does not appear in the caption of the option except as "et al.," and the appellate court did strike that portion of Talley's sentence. Again I ask you, where else are you going to learn these behind-the-scenes tidbits?)

It Isn't Over Till It's Over

People v. Figueroa (1993) 20 Cal.App.4th 65 and *People v. Todd* (1994) 30 Cal.App.4th 1724 both found *Estrada* applicable to drug offenses near school property. In each case, the law at the time of the crime imposed enhancement for drug trafficking within 1,000 feet of a school. Before their judgments were final, the law was amended in several respects. Relevant to amelioration and retroactivity, the amendments added conditions that must exist before the enhancements could be invoked. In both cases, the Courts of Appeal granted the defendants the benefits of the ameliorative changes. In *Figueroa*, however, the appellate court remanded the case to the trial court to allow the district attorney an opportunity to prove that the misconduct ran afoul of even the new elements for the enhancement to apply. We don't know what happened in *Todd*--"The extent of relief to which defendant is entitled in this particular case is discussed in the unpublished portion of this opinion." (At page 1726.) And I don't plan to track it down.

Not Exactly The Life Of Riley

In *People v. Superior Court* (*Dillon*) (1981) 115 Cal.App.3d 687, complex rules were at play. When he committed his first-degree murder (without special circumstances), the punishment was a life sentence, and he would have been eligible for parole consideration after seven years. At that time, any person arrested before age 21 could be committed to the California Youth Authority, rather than state prison, unless his sentence was a life sentence. Under the Indeterminate Sentence Law, a life sentence was a life sentence only if it carried no stated minimum. Typically they were known as "straight" life sentences, when it was necessary to distinguish. So punishment by imprisonment in the state prison for life would be a "life sentence," even if the person were eligible for parole after seven years. Punishment by imprisonment in the state prison for a term of six months (or any other number of months or years) to life was not deemed to be a life sentence, for purposes of statutes that pertained to "life sentences." So for a person under the age of 21, a sentence of, say, five years to life would make that person technically eligible for a commitment to the CYA, but a straight life sentence would preclude that option.

Before Mr. Dillon's judgment became final, the sentence for murder changed to 25 years to life, which, under the standard usage at the time, did not constitute a "life sentence." (Note that the punishment was specifically set forth in the statute as "25 years to life," and was not couched in the Three Strikes language of "life" with various minimums of no less than 25 years.) The defendant argued that he was therefore entitled to consideration for commitment to the California Youth Authority. The Court of Appeal disagreed. By parity of reasoning with *In re Griffin*, the appellate court

concluded that the new sentencing scheme for murder, considered realistically and as a whole, increased the penalty for first degree murder where special circumstances are not found. Thus, it declined to apply the new provisions retroactively.

On the other hand, in *People v. Benefield* (1977) 67 Cal.App.3d 51, the minor was tried as an adult for murder. Before judgment was final, the law changed so that a minor could not be committed to state prison without first being sent to CYA for evaluation and report, followed by a determination by the trial court whether the minor would be suitable for a commitment to CYA. The appellate court found this change to be ameliorative and applied the presumption of retroactivity, in the absence of evidence the Legislature intended otherwise.

We Can Be Civil About This, Too

Estrada principles were found relevant in civil contexts as well. In *People v. American Contractors Indemnity Co*. (1999) 76 Cal.App.4th 1408, the bail bond company sought to have forfeiture of the bond set aside, because during the pendency of the action, the law was amended to require a further action on the part of the clerk before a bond could be declared forfeited. The Court of Appeal relied on *People v. Durbin* (1966) 64 Cal.2d 474, which was substantially based on *Estrada*, and concluded that amendments ameliorating forfeitures are to be applied retroactively to judgments not yet final.

And in *Weissbuch v. Board of Medical Examiners* (1974) 41 Cal.App.3d 924, the appellate court applied *Estrada* to conclude that the Board could not rely on the doctor's conviction for possession of marijuana, at the time classified as a narcotic, as per se unprofessional misconduct. While the disciplinary proceedings were pending, the statute was amended, declassifying marijuana as a narcotic or dangerous drug. That was the game changer.

With Apologies To Oscar Wilde, Punishment, Not Trial

Estrada's principle of retroactivity (in the absence of contrary intent) applies to ameliorative provisions. It does not apply to mere changes in, for example, trial procedure. In *People v. Gonzalez* (2012) 210 Cal.App.4th 724, the defendant argued for a new trial. After his conviction, section 1111.5 was enacted, under which a defendant could not be convicted on the uncorroborated testimony of an in-custody informant. The defendant argued on appeal that *Estrada* applied and that he should be given the benefit of the new section. The Court of Appeal held that section 1111.5 does not lessen or mitigate a punishment for a particular crime. It does not fall within the type

of amendments that qualify for *Estrada*'s presumption of retroactivity. Therefore, in the absence of clear indication of a contrary intent, the law is to be applied prospectively, in keeping with the general presumption.

Cash Or Credit?

Changes in the law on credit for time served were held to be retroactive after applying the *Estrada* presumption in *People v. Hunter* (1977) 68 Cal.App.3d 389.

By way of background, prior to 1972 the law did not provide for any credit for time served prior to a commitment to state prison. Since all prison sentences at that time were indeterminate, I assume the idea was that a person would be released when rehabilitated, and the concept of just how long that might take was not all that important. Hence, the theory goes, presentence detention was irrelevant.

In 1971, though, section 2900.5 was enacted, giving prison-bound defendants credit for time spent prior to imposition of judgment. It was not until a 1976 amendment that a prison-bound defendant received credit for any time spent in local custody as a condition of a grant of probation. Mr. Hunter came within that category.

Sometimes A Presumption Is Just A Presumption (Groucho's First Draft?)

Interestingly (well, to me, anyway), the Court of Appeal partly relied on *Estrada*, but did not have to. Remember, the presumption announced by *Estrada* applies when the court cannot tell what the intent of the Legislature was. For changes not related to mitigation of sentence (or decriminalization of conduct), Penal Code section 3 applies a presumption of prospectivity unless there is a contrary intent. *Estrada* merely moved the presumption over in favor of retroactivity (to nonfinal judgments) if the change is ameliorative.

But a presumption is just a presumption. When there are indications that the Legislature intended otherwise, there is no reason to apply a presumption (either way). And in construing the intent for the 1976 amendment, the *Hunter* court cited the following language of the legislative history of the amendment: "The bill would repeal a provision making credit for time served applicable prospectively only. This would codify a portion of *In re Kapperman* (1974) 11 Cal.3d 542 which invalidates this provision."

As it happens, *Kapperman* based its holding on equal protection grounds. The 1971 amendment contained language making the brand new section 2900.5 prospective only. *Kapperman* concluded there was no rational basis for that, and found the restriction to violate equal protection principles. To acknowledge that problem, the amendment's history shows that the Legislature did not intend prospective application. But perhaps the *Hunter* court felt a need to cover all bases against an argument that the quoted portion referred only to that part of the amendment of the language construed by *Kapperman*. Anyway, either way, a good result for the defense.

Easy Come, Easy Go

On the subject of credit for time served, I should mention *People v. Doganiere* (1978) 86 Cal.App.3d 237, which held that *Estrada* principles required retroactive application of an amendment broadening who was to be given credit against the state prison sentence for conduct credits earned while in local custody.

I am somewhat--okay, COMPLETELY--hesitant to conclude that *Doganiere* still stands as good authority for anything related to *Estrada*. *Doganiere* was severely criticized, and probably completely undermined, by the Supreme Court in *People v. Brown* (2012) 54 Cal.4th 314, at 326-327: "We find *Doganiere* unpersuasive because it offers no authority for its conclusion other than an irrelevant decision involving custody credits. (See *Hunter*, *supra*, 68 Cal.App.3d 389, cited in *Doganiere*, at p. 239; but see *Kapperman*, *supra*, 11 Cal.3d 542, 546; *ante*, at p. 10 & fn. 16.) A subsequent decision that merely accepted *Doganiere*'s holding without examination (*People v. Smith* (1979) 98 Cal.App.3d 793, 799) adds no force to defendant's position. [Para.] More persuasive is *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*), a case that, while ultimately decided under the equal protection clause, necessarily examined the legislative purpose underlying conduct credits and concluded that statutes authorizing such credits must logically apply prospectively."

Nonetheless, I mention *Doganiere* because it seems like section 4019 had to have been subject to some *Estrada* consideration prior to 2012, and I didn't want to leave you hanging. You're right, it was. But apparently with the wrong outcome.

First There Was A Crime, Then There Was No Crime, Then There Was

So what happens if a person is charged with a crime and the Legislature amends the law in a way that inadvertently decriminalizes that behavior, but then the Legislature sees the error and amends the law to restore the criminality? We find our answer in *Henry v. Municipal Court* (1985) 171

Cal.App.3d 721. Mr. Henry was arrested for being under the influence of PCP, unlawful under Health and Safety Code section 11550 at the time. But section 11550 does not specifically list the prohibited substances. Instead, it refers to another section that contains a list (section 11055). When that list was amended, the Legislature inadvertently dropped PCP. It discovered and rectified its mistake within 29 days. Henry argued that he could not be prosecuted because his act had been decriminalized within the meaning of *Estrada* and *People v. Rossi*, *supra*, 18 Cal.3d 295, and the new statute could not be applied to him without violating ex post facto principles.

Alas, nice try, but no cigar. For those readers with unquenchable thirsts (as well as anyone who actually needs to deal with the holding), read the case. The Court held that many California cases recognize that the rule barring prosecution under a repealed statute does not apply when the repealed statute is substantially reenacted, because in such cases "it will be presumed that the legislative body 'did not intend that there should be a remission of crimes not reduced to final judgment.'" (*Henry*, at p. 725.) It boils down to a conclusion that a "statute has an ex post facto effect when it alters the situation of an accused to his disadvantage by: (a) making criminal an action innocent when done; (b) making more serious an act already criminal when done; (c) inflicting greater punishment than that attending the act at the time it was committed; or (d) permitting a person to be convicted with less evidence than was required when the act was done." (*Ibid.*) The amended statute did not expose Mr. Henry to any prosecution or punishment that he was not already subject to at the time of his crime. Hence, no problem.

Nuff's Snuff!

Had enough? As I indicated at the outset, if this really matters to you or your client, be sure to consult the horse's mouth.