

When Punishment No Longer Fits The Crime

The Game's Afoot (Not To Be Confused With A Rabbit's Foot)

As this is being written, the California Supreme Court is once again considering the subject of retroactivity of a change in the sentencing law, this time in the context of 2012's Proposition 36, the Three Strikes Reform Act. The specific issue is whether the new statute operates retroactively to all defendants whose judgments were not final on the 3X Reform Act's effective date, November 7, 2012. The defense urges that it is retroactive, based on the presumption of retroactivity (for statutes ameliorating punishment or decriminalizing behavior) announced 48 years ago in *In re Estrada* (1965) 63 Cal.2d 740. In a nutshell, *Estrada* held that a statute ameliorating punitive provisions will be applied retroactively to all whose judgments were not final on the statute's effective date, unless it can be determined that the legislative body intended the provisions to operate prospectively only.

In *People v. Conley* [(2013) 215 Cal.App.4th 1482, review granted Aug. 14, 2013, S211275], the Supreme Court is going to consider whether the legislative body (in this instance, the electorate) expressed its intent to limit retroactivity by providing a specific section setting forth the mechanism for reconsideration of the sentence. As succinctly summarized in *People v. Contreras* (2013) __Cal.App.4th __ (decided 11/18/13, G047603, and holding that it is retroactive), "Courts of Appeal are split on the issue, and the California Supreme Court has taken it up. (*People v. Lewis* (2013) 216 Cal.App.4th 468, review granted Aug. 14, 2013, S211494 [holding the Reform Act applies retroactively]; *People v. Conley* (2013) 215 Cal.App.4th 1482, review granted Aug. 14, 2013, S211275 [holding the Reform Act is not retroactive]; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167 (*Yearwood*) [not retroactive]; *People v. Lester* (2013) 220 Cal.App.4th 291, 304 (*Lester*) [same, but with a dissent].)"

In Retrospect, Ad Nauseam

"*Estrada*" issues arise again and again. In this article, I am going to trace the development of *Estrada* in the California Supreme Court from the beginning through its most recent consideration (*People v. Brown* (2012) 54 Cal.4th 314.)

It's good to start with *Estrada*, of course, which was one of four cases decided that day, each involving a question of retroactivity. I think it is important to go into *Estrada* in a bit of detail, as it is the cornerstone against which all of the subsequent "retroactive/prospective" questions were measured.

When Mr. Estrada escaped from the California Rehabilitation Center, his crime (escape without force or violence, which at the time carried the same penalty provisions as escape with force or violence) required that he not be paroled for at least two years after his return to prison following the conviction for escape. Prior

to sentencing, the statutes were amended, separating escape into two categories, with and without force or violence. "With" force or violence was punishable by not less than one year in prison (hence, a life top); "without" was punishable by not less than six months and not more than five years. Further, the parole statute pertaining to a minimum of two years after return to prison was applicable to only those escapes with force or violence. Mr. Estrada's crime would have carried no such minimum had the new statute applied. The Supreme Court was called on to decide whether the new law or the old applied to Mr. Estrada.

For All Intentions And Purposes

The bottom line is that the Supreme Court concluded that the Legislature must have intended the ameliorative provisions to apply to defendants whose judgments were not final when the law changed. But a KEY phrase is "must have intended." Because there are two sections (four, if you include the Code of Civil Procedure section 3, and Civil Code section 3, which are identical to Penal Code section 3, except applicable to their own codes) that would seem, on their face, to require prospective application.

It had to interpret the significance of Penal Code section 3 ("No part of it [the Penal Code] is retroactive unless expressly so declared") and Government Code section 9608. ("The termination or suspension (by whatsoever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law.")

It's A Common Law Thing

In short, the Supreme Court determined that both sections have their uses, but they allow wiggle room when a statute does not expressly indicate how it is to be applied. "First as to section 3 of the Penal Code. That section simply embodies 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. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." (*Estrada*, at p. 746.)

And it applied the same reasoning to Government Code section 9608, whose primary purpose was to prevent the barring of prosecutions when a statute is amended. "It is the rule at common law and in this state that when the old law in effect when the act is committed is repealed, and there is no saving clause, all

prosecutions not reduced to final judgment are barred. [Citation omitted, new par.] It is equally well settled that if the old statute in existence when the crime is committed is thereafter amended so as to increase the punishment, and there is no saving clause, all prosecutions not reduced to final judgment are also barred. This is so because the accused cannot be punished under the new law since to do so would be *ex post facto*, and he cannot be punished under the old law because it has been repealed without a saving clause." (*Id.*, at pp. 746-747.) But those rules do not apply where there is a saving clause, such as section 9608.

I Can See Clearly Now

Looking at the statute finely, though, the Supreme Court concluded that "A reading of that section demonstrates that the Legislature, while it positively expressed its intent that an offender of a law that has been repealed or amended should be punished, did not directly or indirectly indicate whether he should be punished under the old law or the new one. As has already been pointed out, where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed. Neither a saving clause such as section 9608 of the Government Code nor a construction statute such as section 3 of the Penal Code changes that rule. This is the rule followed by a majority of the states [footnote omitted], and by the United States Supreme Court. (*Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 [1 L.Ed. 648].)" (*Id.*, at pp. 747-748.)

At Least I'm Not Writing Word Problems

I apologize for being so pedantic. But I think it is important to understand what *Estrada* had to contend with and how it dealt with it. Penal Code section 3 and Government Code section 9608 exist today, unchanged. From a prosecution perspective, they seem to dictate that amendments to statutes are to be applied prospectively only, unless the new law expressly states otherwise. But by *Estrada's* explanation of their true function (overcoming problems encountered because of certain common law principles) and interpreting them as simply requiring the Court to ascertain the intent of the Legislature when the new sections were enacted, the judicial branch must examine the changes more deeply. By lessening the punishment, the Legislature must have concluded that the former scheme was too punitive. *Estrada* concluded that the Court would NOT presume that the Legislature was motivated by a desire for vengeance. Thus, in the absence of a clear expression of intent that the new provisions were to operate prospectively only, any defendant whose judgment was not final was entitled to the benefit of the act.

If It Ain't Broke, Don't Fix It?

That sections 3 and 9608 have not changed bring to mind the old joke regarding whether one looks at a glass as half full or half empty--either way there's not enough

wine in it. Well, it brought it to MY mind, anyway. It is true that we still have to contend with both sections (the half empty view), BUT I think it is significant that the Legislature has not changed them in the 48 years since the *Estrada* decision. It has had plenty of opportunity, because the issue has come up many times in both the Supreme Court and the Courts of Appeal, and in many instances the reviewing court found retroactivity even though the intent was not expressed. If the Legislature were unhappy with the *Estrada* analysis, one would think it would have reacted, as it has been known to do on other occasions. (For example, Penal Code section 1385 was amended by the Legislature to disallow a court from dismissing a prior serious felony conviction alleged under section 667, subdivision (a), in response to *People v. Fritz* (1985) 40 Cal.3d 227, which was decided only six months earlier.)

Part Of The In Crowd

The second case was *In re Daup* (1965) 63 Cal.2d 754. The facts were almost identical to those in *Estrada*. Mr. Daup escaped from prison at a time when the penalty for escaped without force or violence was a term in prison for of term of not less than one year (meaning the maximum was life). Prior to his trial, the statute was amended and the penalty for that crime was six months to five years in prison. His term was fixed as "for the term prescribed by law," which was the manner in which courts sentenced prison-bound defendants under the indeterminate sentence law, with the Adult Authority applying what it concluded was the "term prescribed by law" according to the appropriate statute. The facts being the same for all intents and purposes, so was the resolution: "Thus the problem is identical with the one discussed in *In re Estrada, supra*, and is controlled by that decision."

[Talk About Simple Sentencing Laws]

[History lesson digression: You will notice that these opinions arose out of habeas corpus petitions rather than from appeals. When a court sentenced a person "for the term prescribed by law," it was pretty hard to argue that the court got it wrong. Hence, the habeas corpus proceedings challenged the Adult Authority's interpretation of what that term was. Lesson over, wake up now.]

A Mixed Bag

The third case, *In re Griffin* (1965) 63 Cal.2d 757, reiterated the holding in *Estrada*, but found that the statute in question was not ameliorative as to the defendant. The defendant had been sentenced to prison for 10 years to life on the current drug offense (Health & Saf. Code, sec. 11351) because he had a prior conviction of a type that triggered that sentence. Before judgment was final, however, the Legislature lowered the term to five years to life, but increased the minimum time that must be served before the inmate could be paroled. Thus, it ameliorated the punishment in some respects, and increased it in others.

Mr. Griffin claimed that he was entitled to the ameliorating benefit without being subject to the increased minimum before eligibility for parole. But he had already been granted parole earlier than the new minimum before the Supreme Court decided the matter. Thus, were the new law to be applied in its entirety, he would actually have to be returned to prison for another 20 months before he would be eligible for parole under it.

The Court concluded that the overall effect of the change in the law was harsher, and declined to apply it to the defendant.

Remember When Magazines Cost 20 Cents (Hi, Gabriel & The Angels!)?

The fourth case decided at the same time was *In re Kirk* (1965) 63 Cal.2d 761. Again, the *Estrada* rationale was upheld. At the time Mr. Kirk violated Penal Code section 476a (insufficient funds checks), had the aggregate amount totaled less than \$50, the maximum penalty would be a year in the county jail. Mr. Kirk's total was \$75 and thus was convicted of a wobbler felony, carrying a penalty of up to one year in the county jail or up to fourteen years in state prison. Prior to his judgment becoming final, the law increased the threshold for felony treatment to \$100. The Supreme Court characterized the problem as "precisely the same as the one involved in the *Estrada* case." And the court reached the same result, concluding that Mr. Kirk was entitled to the benefit of the ameliorative change, and that the record of conviction should show that it was a misdemeanor, not subject to a prison sentence. (The Court did not actually use the term misdemeanor, but that was the effect. Of course, Mr. Kirk still had to finish serving his time under two other judgments arising out of separate first-degree robbery cases.)

And with those four cases (disapproving a number of contrary Court of Appeal as well as some of its own), the rule was established that, in the context of ameliorative changes in the law, the courts must examine carefully the intent of the enacting body (Legislature or electorate) to determine whether defendants whose judgments were not final when the new laws went into effect were entitled to their benefit. Penal Code section 3 and Government Code section 9806 are to be relied on as a last resort when it is impossible to determine the legislative intent.

Personal Musings, AKA Pure Guesswork

Of course I am not privy to why the Supreme Court decided to release four separate opinions on the same day. I do have a rationale that might explain it. Although the principle announced in *Estrada* was applied in all four cases (i.e., not blindly adhering to Penal Code section 3 or Government Code section 9608), the facts in each case were subtly different. In one case (*Estrada*), the law eliminated a minimum period of incarceration before parole. In another (*Daup*), the law reduced the length of the available prison term as punishment. In the third (*Griffin*), the

Court simply concluded that a defendant was not entitled to the benefit of a portion of the statute because overall the changes increased, rather than decreased, the punishment. And in the fourth (*Kirk*), the law increased the minimum elements of a crime for it to be considered a felony.

This should broadcast to any follower that the Supreme Court wanted to make it clear that the rule applies in a variety of situations. I am exaggerating, but sometimes it feels like a court distinguishes my (in my opinion excellent and controlling) authority because the wall was cream-colored rather than off-white, as though that makes all the difference in the world. The Supreme Court having applied the rule to slightly different scenarios, it would be difficult for a court to attempt to distinguish the *Estrada* principle because the facts before the court do not precisely mirror those in *Estrada*. But that is just my guess.

Pedants Go Marching Two By Two, Hurrah, Hurrah!

Okay, ye have sloggethed enough. Enjoy the trip down the slide. Here is what the Supreme Court has done since The Big Four.

In re Corcoran (1966) 64 Cal.2d 447: The facts were similar to those in *Estrada*, as was the result. The matter was remanded for the trial court to determine whether the previously mandated order that the sentence for escape run consecutively was reasonable, or whether the sentence should be modified to run concurrently, as permitted by the amended law.

People v. Durbin (1966) 64 Cal.2d 474: This case actually related to whether the trial court was required to set aside a forfeiture of bail when the defendant appeared in court and so moved. While the case was still proceeding, the law changed to require the granting of the motion if certain conditions were present, as they were. After discussing the *Estrada* decision, the Supreme Court stated at page 479, "What was there said with regard to an amendatory statute lessening criminal punishment equally applies to the reduction or elimination of civil penalties or forfeitures. [Par.] It follows that whether the forfeiture of bail is considered a civil penalty or as akin to criminal punishment, the amendment taking from the trial court the discretion to declare forfeitures in cases as the present where the defendant is physically unable to appear must be applied to all cases not final at the time the amendment became effective."

People v. Pennington (1967) 66 Cal.2d 508: *Estrada* was not really a big issue in this death penalty appeal. In the first footnote, the court stated, "The indictment, returned March 23, 1965, in one of its charges, accused defendant of furnishing unlawfully to a minor hypnotic dangerous drugs in violation of section 4234 of the Business and Professions Code. Amendments to that section effective in September 1965 make it inapplicable to the particular allegations. That section was superseded by a new section of the Health & Saf. Code, § 11913, which proscribes the same

offense formerly covered by section 4234 of the Bus. & Prof. Code. The new enactment does not reduce the penalty for violation (compare Pen. Code, § 18, with Health & Saf. Code, § 11913) so that the principle of *In re Estrada*, 63 Cal.2d 740 [48 Cal.Rptr. 172, 408 P.2d 948], does not apply."

People v. Rivers (1967) 66 Cal.2d 1000: *Only the dissenting justice relied on Estrada.* The question was whether a change in case law setting forth rules of admissibility of evidence under specific circumstances should be applied retroactively. The majority opinion said no. Only the dissent said yes, relying on *Estrada*.

People v. Francis (1969) 71 Cal.2d 66: While the case was pending on appeal, the punishment for defendant's crime changed from straight felony to wobbler status, and the court relied on *Estrada's* principles to find that the defendant was entitled to the benefit of the new law.

People v. Floyd (1970) 1 Cal.3d 694: Retroactivity was not an issue in the case, but *Estrada* was cited several times for the proposition that vengeance or retribution has no place as a penal objective.

People v. Hunter (1971) 4 Cal.3d 432: I may be cheating with this one. Before the defendant's judgment became final, decisional law required that movement be more than incidental to support kidnapping for the purpose of robbery. The majority opinion concluded that the defendant was entitled to the benefit of the new standard, relying on *People v. Mutch* (1971) 4 Cal.3d 389, decided the same day. *Mutch* did not cite *Estrada*. *Estrada* was mentioned only in the dissenting opinion in *Hunter* and the dissent would have denied relief.

In re Kapperman (1974) 11 Cal.3d 542: Although the Supreme Court found that the defendant was entitled to the benefit of the amendments to Penal Code section 2900.5, which for the first time recognized credit for time served in the county jail prior to commitment to state prison (but expressly stating that the law is to be applied prospectively), it did so on equal protection grounds. The Court specifically found that *Estrada* was inapplicable. At page 546: "Initially, we point out that this case is not governed by cases (e.g., *In re Estrada*, 63 Cal.2d 740, 744 [48 Cal.Rptr. 172, 408 P.2d 948]) involving the application to previously convicted offenders of statutes lessening the punishment for a particular offense. The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written. (Cf. *People v. Harmon*, 54 Cal.2d 9, 26 [4 Cal.Rptr. 161, 351 P.2d 329]; overruled in *In re Estrada, supra*, on other grounds.)"

In re Marriage of Bouquet (1976) 16 Cal.3d 583: (Huh? A marriage case?) This case involved the definition of community and separate property. Prior to the change, the wife's earnings and accumulations during separation were her separate property, but the husband's were community property. The change made the

earnings and accumulations of BOTH spouses during separation separate property. The issue was whether the change in the law should be applied to the dissolution proceedings that were pending at the time the law was amended. The Court relied on *Estrada* in discerning legislative intent. In looking at sources other than the statute's silence on retroactivity, it concluded that the Legislature intended the law to be applied retroactively.

People v. Rossi (1976) 18 Cal.3d 295: Before the defendant's judgment was final, the conduct of which she had been convicted (oral copulation, which, at the time, was criminal even between consenting adults) was decriminalized by statutory amendments. Eleven years after *Estrada*, the Supreme Court reaffirmed its rationale and treatment of Penal Code section 3 and Government Code section 9806, and held that the defendant was entitled to the benefit of the change in the law.

People v. Chapman (1978) 21 Cal.3d 124: Before defendant's judgment became final, the punishment for Health and Safety Code section 11357, possession of marijuana, was amended by statute so that the crime was punishable only as a misdemeanor, not as a felony. As such, Health and Safety Code section 11590 (a registration requirement) was not applicable. The Court applied *Estrada* principles without any analysis. The condition of probation requiring registration was stricken.

People v. Collins (1978) 21 Cal.3d 208: The facts were a little similar to those in *Rossi*, except that the conviction of oral copulation arose out of a plea bargain. The defendant had been facing allegations of attempted and completed burglaries, rapes, assaults with intent to commit rape, and counts of forcible oral copulation. He pleaded guilty to a single count of oral copulation without force. All of the other allegations were dismissed as part of the plea bargain. As that particular conduct had been decriminalized (as in *Rossi*), Mr. Collins argued that the conviction should be reversed. The Supreme Court agreed (in keeping with *Rossi*). But there was a rub. Since reversal affected the People's side of the plea bargain, the 14 dismissed counts could be restored. On the other hand, because the defendant had entered his plea bargain in good faith, any new sentence must be limited to no more than what he had received originally (one to fifteen years state prison), as he was entitled to that benefit of his bargain.

People v. Teron (1979) 23 Cal.3d 103: The Court was not grappling with retroactivity of an ameliorative statute. It had to determine whether the new death penalty law enacted after the defendant's crime could be applied to him, even though the previous death penalty in effect at the time of his crime had been found to be unconstitutional. It held that the new law could not be applied, as it constituted an increase in punishment. At pages 116-117, the Court stated, "For more than a century, section 3 of the Penal Code has specifically provided that no provision of the code 'is retroactive, unless expressly so declared.' Although past decisions have held that this provision does not bar the retroactive application of amendatory legislation which mitigates or reduces the punishment for a crime (see,

e.g., *In re Estrada* (1965) 63 Cal.2d 740, 746 [48 Cal.Rptr. 172, 408 P.2d 908]; *People v. Rossi* (1976) 18 Cal.3d 295 [134 Cal.Rptr. 64, 555 P.2d 1313]), our courts have pronounced that the canon of construction embodied in section 3 fully applies to penal measures which increase the punishment for particular crimes. (See, e.g., *Sekt v. Justice's Court* (1945) 26 Cal.2d 297, 308-309 [159 P.2d 17, 167 A.L.R. 833]; *In re Estrada, supra*, 63 Cal.2d 740, 747-748; *People v. Daniels* (1963) 222 Cal.App.2d 99, 101 [34 Cal.Rptr. 844]; see also *White v. Brown* (9th Cir. 1972) 468 F.2d 301, 303.)"

Evangelatos v. Superior Court (1988) 44 Cal.3d 1188: This was a civil case where the issue was the retroactivity of Proposition 51 (which limited the joint and several liability of each tortfeasor to that tortfeasor's proportionate share of the blame). The Supreme Court concluded it was prospective only. Though a civil case, it figures prominently in many subsequent *Estrada*-issue cases. Because of language like this (at pages 1208-1209): "In the years since *Estrada, supra*, 63 Cal.2d 740, *Mannheim, supra* [1970], 3 Cal.3d 678, and *Marriage of Bouquet, supra*, 16 Cal.3d 583, both this court and the Courts of Appeal have generally commenced analysis of the question of whether a statute applies retroactively with a restatement of the fundamental principle that 'legislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention.' (See, e.g., *Fox v. Alexis* (1985) 38 Cal.3d 621, 637 [214 Cal.Rptr. 132, 699 P.2d 309]; *White v. Western Title Co., supra* [1985], 40 Cal.3d 870, 884; *Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590, 593 [229 Cal.Rptr. 825, 724 P.2d 511]; *Baker v. Sudo* (1987) 194 Cal.App.3d 936, 943 [240 Cal.Rptr. 38]; *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1156 [221 Cal.Rptr. 675]; *Glavinich v. Commonwealth Land Title Ins. Co., supra* [1984], 163 Cal.App.3d 263, 272.) These numerous precedents demonstrate that California continues to adhere to the time-honored principle, codified by the Legislature in Civil Code section 3 and similar provisions, that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application. The language in *Estrada*, *Mannheim*, and *Marriage of Bouquet* should not be interpreted as modifying this well-established, legislatively-mandated principle." As Charlie Brown might say, "Aaugh!"

Tapia v. Superior Court (1991) 53 Cal.3d 282: There were some provisions of Proposition 115 (the "Crime Victims Justice Reform Act" of 1990) that were of some benefit to defendants, by adding additional elements for certain conduct to qualify as special circumstances. Given the bent of sentiment expressed in *Evangelatos*, I consider the following language from *Tapia* to be indispensable to the success of any *Estrada* argument, because it is a declaration by the Supreme Court (i.e., controlling under *Auto Equity Sales, Inc. v. Superior Court (Heseflow)* (1962) 57 Cal.2d 450) written AFTER the discouraging (to the criminal defense bar) analysis it set forth in *Evangelatos*. At page 301: "Application of these provisions to trials of crimes committed before Proposition 115's operative date may change the legal consequences of a defendant's criminal conduct. Such application is permissible,

however, because the provisions favor defendants. Although we usually presume that new statutes are intended to operate prospectively, that presumption 'is not a straitjacket.' (*In re Estrada, supra*, 63 Cal.2d at p. 746.) In past cases we have not applied the presumption to statutes changing the law to the benefit of defendants. Instead, we have assumed 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' and "'sufficient to meet the legitimate ends of the criminal law.'" (*Id.*, at p. 745, quoting *People v. Oliver* (1956) 1 N.Y.2d 152 [151 N.Y.S.2d 367, 134 N.E.2d 197, 201-202].) We have applied the same reasoning to statutes which redefine, to the benefit of defendants, conduct subject to criminal sanctions. (*People v. Rossi* (1976) 18 Cal.3d 295 [134 Cal.Rptr. 64, 555 P.2d 1313].) [Footnote omitted.] *These authorities compel the conclusion that the provisions listed above may be applied to pending cases.* [Emphasis in last sentence added.] (Which makes me want to break out and sing with Satchmo as he ends "What a Wonderful World"--"Oh Yeah!" Hey, I'm easily amused. Get used to it.)

In re Pedro T. (1994) 8 Cal.4th 1041: Vehicle Code section 10851 was amended in 1989 to increase the range of punishment. The amendment contained a sunset clause, reverting the penalty in three years unless the Legislature extended the new provisions. The Legislature took no action, and the range reverted when the sun set. The defense argued that he should have received the benefit of the lower range of punishment, even though he committed his crime during the time of the higher range. The Supreme Court held that the defendant was not entitled to the benefit. This is where it is important to remember that *Estrada* stands for the proposition that the court must examine broadly to ascertain legislative intent. It does not say that every statute reducing penalty is automatically to be applied retroactively. Because the Legislature will not be presumed to be motivated by vengeance, *Estrada* looks for a clear indication that the Legislature did not intend the amelioration to be retroactive, and found none. Thus, it concluded that the Legislature must have intended the benefit to be applied to those whose judgments were not yet final. This is not inconsistent with the refusal of the Court to agree that the expiration of the increased range entitled Pedro to the benefit of the restored lower range. There was no indication in the Legislation regarding retroactivity, and the Supreme Court analyzed the increased range as an experiment by the Legislature to see whether it would have an impact on the level of criminal misconduct. It is unlikely that the Legislature would "cripple" the experiment by intended that anyone sentenced under the new range would be forgiven somewhat and have their sentence lowered when the sun set. The Supreme Court simply concluded that the intent of the Legislature was that the expiration of the increased range was to have no effect on the sentences of those convicted during that time period. And though it did NOT rule in favor of the minor, it reiterated, at page 1045, "The basis of our decision in *Estrada* was our quest for legislative intent. Ordinarily when an amendment lessens the punishment for a crime, one may reasonably infer the Legislature has

determined imposition of a lesser punishment on offenders thereafter will sufficiently serve the public interest." Oh Yeah! *Evangelatos*, eat your heart out!

People v. Nasalga (1996) 12 Cal.4th 784: I can't say it any better than the Court, at page 787: "In 1992 the Legislature amended Penal Code [footnote omitted] section 12022.6, subdivisions (a) and (b), ... to increase the amount of the property loss required for a one-year enhancement from \$25,000 to \$50,000 and to increase the loss required for a two-year enhancement from \$100,000 to \$150,000. ... In this case we address the question of whether a person who stole \$124,000 ... before the 1992 amendment of section 12022.6, but whose conviction was not final at the time the amendment became operative, is entitled to the benefit of the 1992 amendment and is, therefore, eligible only for the one-year enhancement. Pursuant to *In re Estrada* [citation] and *In re Kirk* (1965) [citation], we answer this question in the affirmative." Did you notice the year? Thirty-one years later, *Estrada* is still alive and well!

People v. Floyd (2003) 31 Cal.4th 179: The question was whether the Substance Abuse and Crime Prevention Act of 2000 (the OTHER Proposition 36) was retroactive. The answer was rather simple. No. The Act contained a saving clause that expressly declared its provisions to be applied prospectively from its effective date, July 1, 2001. (There were SOME folks who would receive its benefit though convicted earlier, because it applied to probation and parole violators who were on probation or parole on its effective date, but it was not retroactive to those not yet or not still on probation or parole.) One nice sentence, though dicta, in response to a defense argument that the Court rebuffed (at page 186): "That is, in the absence of the saving clause, we would have applied the *Estrada* rule and extended the benefits of Proposition 36 to all those whose convictions were not yet final as well as to those whose convictions postdated the act's effective date." So *Estrada* is ruling the roost, though not relevant in that case, 38 years later!

People v. Alford (2007) 42 Cal.4th 749: The issue was whether Penal Code section 1465.8, imposing a court security fee, could be applied retroactively. Alas, the *Estrada* analysis of Penal Code 3 is not always a GOOD thing. At page 753-754: "As its own language makes clear, section 3 is not intended to be 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. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent.' (*In re Estrada* (1965) 63 Cal.2d 740, 746.) Even without an express declaration, a statute may apply retroactively if there is "'a clear and compelling implication'" that the Legislature intended such a result. (*People v. Grant* (1999) 20 Cal.4th 150, 157 (*Grant*) quoting *People v. Hayes, supra* [1989], 49 Cal.3d [1260] at p. 1274.)" Well, we lost the battle (who knew that a security fee was nonpunitive, eh?), but we again got confirmation that Penal Code section 3 is not a "straitjacket." Still ticking and kicking, 42 years later.

People v. Brown (2012) 54 Cal.4th 314: Effective January 25, 2010, Penal Code 4019 was amended to provide more conduct credits for time spent in the county jail than were previously allowed. The question was whether it was retroactive. The Supreme Court said no. *Evangelatos* and Penal Code section 3 played big roles in the outcome. Whereas *Estrada* seemed to approach the issue of retroactivity from a perspective of, "Well, if it benefits the defendant, we will assume it applies unless we see a different intent," *Brown* started with the principle that laws apply prospectively unless there is a clear indication otherwise, citing Penal Code 3 and *Evangelatos*. Take, for example, the sentence on page 320: "These principles require us to reject defendant's argument that former section 4019 applies retroactively as a matter of statutory construction. The statute contains no express declaration that increased conduct credits are to be awarded retroactively, and no clear and unavoidable implication to that effect arises from the relevant extrinsic sources, i.e., the legislative history." Am I alone in thinking that the two Supreme Court opinions approach the problem from opposite viewpoints? *Brown* is very important to read (that is, if one is grappling with *Estrada* considerations). It seems to reinvigorate Penal Code section 3 (as did *Evangelatos*), but whether it diminishes the importance of *Estrada* is questionable. The opinion contains no discussion of its own language in *Alford* or *Tapia*, both decided subsequent to *Evangelatos*, and both of which rely on the "Penal Code section 3 is not a straitjacket" characterization by *Estrada*, yet criticizes that characterization as abandoned by *Evangelatos*. In any event, the Supreme Court concluded that statutes describing conduct credit (distinguished from credit for time in actual custody) are not the equivalent of statutes lessening punishment for past conduct, but instead are rewards to encourage future good conduct. Thus, *Estrada* principles do not come into play.

Game Over, Man?

So there you have it, a play-by-play of the development of the *Estrada* rule in Supreme Court decisions. Oh, wait, one final tidbit. When is a judgment final? According to *Pedro T.*, at page 1046, "[A] judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed," citing *In re Pine* (1977) 66 Cal.App.3d 593, 594.

No Bets, Please

As I always try to remember to disclaim, read the cases yourselves. I am fully capable of misunderstanding what the cases said. My opinions are mine, and I may be the only person in the world harboring them. Keep in mind that I have only reported the Supreme Court decisions. I believe there are over 130 Court of Appeal published decisions out there where *Estrada* came into play (or not). And I could have missed a Supreme Court case here and there as well. Mistakes are personal. Don't rely on the mistakes of others, just make your own.