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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

The People,

Plaintiff,

v.

MICHAEL TIRPAK,

Defendant.

Case No. **BA097152**

Opposition to Resentencing; Pen. Code, § 1170.95 is Unconstitutional Under the Separation of Powers

OPPOSITION

The People oppose this petition for resentencing filed under Penal Code[1] section 1170.95 on the ground that the statute violates the separation of powers (Cal. Const., art. III, § 3) insofar as it affects final judgements. First, the Legislature infringes upon the judicial power by commanding that different law apply to judgments that are already final. Second, and similarly, the Legislature infringes upon the Governor's pardon and commutation power by commanding the courts to vacate lawful criminal convictions.

ARGUMENT

"The California Constitution establishes a system of state government in which power is divided among three coequal branches (Cal. Const., art. IV, § 1 [legislative power]; Cal. Const., art. V, § 1 [executive power]; Cal. Const., art. VI, § 1 [judicial power]), and further states that those charged with the exercise of one power may not exercise any other (Cal. Const., art. III, § 3)." (*People v. Bunn* (2002) 27 Cal.4th 1, 14.) Although the branches are interdependent and no "sharp line" between them exists, "the

[1] Further statutory references are to the Penal Code unless otherwise indicated.

Constitution does vest each branch with certain 'core' or 'essential' functions that may not be usurped by another branch." (*Ibid.*, citations omitted.) Relevant here, "the separation of powers doctrine prohibits the Legislature 'from arrogating to itself core functions of the executive or judicial branch.' [Citation.]" (*Id.* at p. 16.)

Here, section 1170.95 violates the separation of powers because the Legislature has usurped the judiciary's power to pronounce rulings according to law, as well as the Governor's power to pardon offenders and commute lawful sentences.

1. Section 1170.95 unconstitutionally commands courts to reopen final judgments to decide cases under new law.

"The Legislature is charged, among other things, with 'mak[ing] law . . . by statute.' (Cal. Const., art. IV, § 8, subd. (b).) This essential function embraces the far-reaching power to weigh competing interests and determine social policy." (*People v. Bunn*, *supra*, 27 Cal.4th at pp. 14–15.) "Quite distinct from the broad power to pass laws is the essential power of the judiciary to resolve 'specific controversies' between parties. [Citation.] (*Id.* at p. 15.) "In general, the 'power to dispose' of criminal charges belongs to the judiciary." (*Id.* at p. 16.)

Under these principles, "direct legislative influence over the outcome of judicial proceedings is constitutionally constrained." (*People v. Bunn*, *supra*, 27 Cal.4th at p. 17.) The key point in this analysis is when a case becomes final for judicial purposes. "Separation of powers principles do not preclude the Legislature from amending a statute and applying the change to both pending and future cases, though any such law cannot 'readjudicat[e]' or otherwise 'disregard' judgments that are already 'final.' " (*Ibid.*) "A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari with the United States Supreme Court have expired." (*People v. Buycks* (2018) 5 Cal.5th 857, 876, fn. 5.)

This constitutional limit on the Legislature's power was recognized in the seminal case of *In re Estrada* (1965) 63 Cal.2d 740, 745. The main holding of *Estrada* was that courts would presumptively apply new legislation reducing criminal punishments retroactively to all nonfinal judgments. (*Id.* at p. 748.) But the Court also noted that this was the constitutional limit of the Legislature's power to declare new punishments retroactive:

> 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.

(*Id.* at p. 745, italics added.)

Two key cases have addressed legislative attempts to revive final cases: *Plaut v. Spendthrift Farm* (1995) 514 U.S. 211 [115 S.Ct. 1447, 131 L.Ed.2d 328] and *People v. Bunn*, *supra*, 27 Cal.4th 1. Though both involved changes to the statute of limitations, the key point is that they were decided on separation of powers grounds, rather than ex post facto, double jeopardy, or any other constitutional protection peculiar to criminal defendants.

In *Plaut*, Congress enacted section 27A(b) of the Securities Exchange Act of 1934, which tried to revive certain civil causes of action that had previously been dismissed on statute of limitations grounds. (*Plaut v. Spendthrift Farm*, *supra*, at pp. 214–215.) The Court held that this resurrection of final cases violated the separation of powers:

> Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is' in particular cases and controversies. *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy -- with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments." Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990). By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.

(*Id.* at pp. 218–219.) It made no difference to the Court's analysis whether Congress directed a result in a particular case or rather reopened a class of cases:

> To be sure, § 27A(b) reopens (or directs the reopening of) final judgments in a whole class of cases rather than in a particular suit. We do not see how that makes any difference. The separation-of-powers violation here, if there is any, consists of depriving judicial judgments of the conclusive effect that they had when they were announced, not of acting in a manner -- viz., with particular rather than general effect -- that is unusual (though, we must note, not impossible) for a legislature.

(*Id.* at pp. 227–228.) The Court concluded:

> We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so. Section 27A(b) is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment.

(*Id.* at p. 240.)

The high court's holding and reasoning in *Plaut* would heavily influence the California Supreme Court's decision in *Bunn*, where it found that *Plaut* was "both consistent with California law and persuasive for state separation of powers purposes." (*People v. Bunn*, *supra*, 27 Cal.4th at p. 5.) As background, in 1994 the Legislature created and amended section 803, subdivision (g), which allowed prosecution of certain sex crimes against minors even if the statute of limitations had already expired.[2] (*Id.* at p. 4.) In 1996 and 1997, the Legislature further amended section 803(g) to allow refiling of cases that had previously been dismissed on statute-of-limitations grounds. (*Id.* at p. 5.) The question in *Bunn* was whether the 1996 and 1997 amendments violated California's separation of powers clause. (*Ibid.*) The Court held that it did if the judgment of dismissal had already become final before the new law took effect: "for separation of powers purposes, such prior judgments are sacrosanct." (*Ibid.*) But this rule came with an important caveat—any final judgment was still subject to any limits on finality that existed at the time the judgment became final. (*Ibid.*) Thus, in *Bunn* the defendant was actually subject to one of the new refiling laws that came into effect when his prior dismissal was upheld. (*Ibid.*) The Court reached a different result in a companion case, *People v. King* (2002) 27 Cal.4th 29, 36, where the dismissal was final before the new legislation took effect.

In light of this authority, section 1170.95 violates the separation of powers by re-opening final judgments. SB 1437 has significantly changed accomplice liability for murder, in particular by limiting the first degree felony-murder rule. Section 1170.95, in turn, commands courts to reopen final convictions for murder, and to essentially decide them anew again under the new laws of accomplice liability. The fact that it uses a

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[2] The California Supreme Court had previously found that these retroactive features did not violate either ex post facto or due process principles. (*People v. Frazer* (1999) 21 Cal.4th 737, 742–743.) When it decided *Bunn* this was still the law, but the United States Supreme Court would eventually hold otherwise in *Stogner v. California* (2003) 539 U.S. 607, 632–633 [123 S.Ct. 2446, 156 L.Ed.2d 544].

"resentencing" procedure, rather than a whole new trial, does not alter its effect: the court, depending on the facts, may vacate a final judgment, not because of any legal error, but rather because the Legislature has enacted a new policy. But the Legislature's power to dictate which law applied to these cases ended when they became final.

We are mindful that the Legislature and the electorate have passed resentencing laws similar to section 1170.95 in recent years, beginning with Proposition 36 in 2012. But we are not aware of any challenge to these laws on separation of powers grounds. The fact that we may have been violating separation of powers principles for several years in other contexts is not a valid legal ground to uphold section 1170.95 here.

Nor does the unconstitutionality of section 1170.95 mean that defendants who would not be guilty of murder under today's law have no relief. It simply recognizes that the Legislature does not have carte blanche to undo final convictions. The power to do so in our system lies elsewhere.

2. Section 1170.95 unconstitutionally infringes upon the Governor's pardon and commutation power.

Section 1170.95 is unconstitutional for another reason: The Legislature's decree to vacate certain convictions usurps the Governor's exclusive power to issue pardons and commute sentences.

Under the California Constitution, only the Governor has the power to issue reprieves, pardons, and commutations. (Cal. Const., art. V, § 8.) "Definitionally, a reprieve is a temporary stay or deferment of execution of a sentence [citation]; a commutation is a permanent reduction in degree or amount of punishment [citation], and a pardon is a permanent and complete termination of penalty and remission of guilt [citations]." (*Way v. Superior Court* (1977) 74 Cal.App.3d 165, 176.) No other branch of California government may exercise the power: "[T]he Governor's pardon power is exclusive." (*Id.* at p. 175.)

Two significant California cases have addressed legislative enactments that were alleged to have infringed upon the Governor's pardon and commutation power: *Way v. Superior Court*, *supra*, 74 Cal.App.3d 165, and *Younger v. Superior Court* (1978) 21 Cal.3d 102. Both concluded that the legislation at issue did not violate the separation of powers, but as will be shown, section 1170.95 is a much more direct usurpation of the pardon power than either *Way* or *Younger*.

Way addressed the 1976 conversion from the Indeterminate Sentencing Law (ISL) to the Determinate Sentencing Law (DSL), which was a fundamental change in the philosophy behind California criminal sentencing. Under the former ISL, the court

sentenced the defendant to the term prescribed by law (usually a range of years or some minimum term to life), but the executive branch—the Adult Authority—set the length of time within that sentence that the defendant would actually serve. (See *In re Sandel* (1966) 64 Cal.2d 412, 415.) The DSL returned the sentencing power to the court, which would now usually select one of three possible terms of imprisonment for a crime depending on aggravating or mitigating factors. (*Way v. Superior Court*, *supra*, at p. 170.) The DSL applied retroactively to existing sentences via new section 1170.2. This section directed the Board of Prison Terms (formerly the "Community Release Board") to set a new length of imprisonment for all prisoners under the terms of the DSL, subject to some discretion. (§ 1170.2, subd. (a); *Way v. Superior Court*, *supra*, at pp. 171–174.) Because of the Board's duties and discretion, it was inevitable that some prisoners would receive earlier parole dates under the DSL than they would have under the ISL, but it was impossible to determine which prisoners would receive such a reduction. (*Way v. Superior Court*, *supra*, at p. 173.)

Plaintiffs sought an injunction against the retroactive portion of the DSL, arguing that it unconstitutionally infringed upon the Governor's power to commute sentences. (*Way v. Superior Court*, *supra*, 74 Cal.App.3d at p. 169.) The Court of Appeal first determined that the Governor's pardon and commutation power was indeed exclusive, that section 1170.2 had the effect of commutation in certain cases, and that it made no difference whether it did so as a general "amnesty" rather than in individual cases. (*Id.* at pp. 176–177.) But it then went on to hold that this effect was merely incidental to a valid legislative purpose:

> We note that the motivation behind section 1170.2 is not consistent with commutation. The Legislature's objective, admittedly one within its power, is to restructure punishments for criminal conduct and to make them uniform to the extent reasonably possible. Having accomplished this as to future offenders, it then sought to avoid a condition which it deemed both undesirable and inconsistent with the concept of uniformity, that felons concurrently serving sentences for identical offenses be subject to disparate terms solely because of the time when they committed their crimes. It undertook no act of mercy, grace, or forgiveness toward past offenders, such as characterizes true commutations.

(*Id.* at p. 177.) The court then commented that it could not find section 1170.2 unconstitutional "unless its unconstitutionality clearly, positively and unmistakably appear[ed]" from the Legislature exercising the "complete" power of another branch. (*Id.*

at p. 178.) It did not find this to be: "There is no clear, positive and unmistakable unconstitutionality to be found in Penal Code section 1170.2; we hold it valid as incidental to a comprehensive reformation of California's penal system." (*Ibid.*)

Here, even more clearly than section 1170.2 in *Way*, section 1170.95 effects a commutation or pardon. The entire purpose of the statute is to vacate final convictions for murder, sometimes replacing them with a lesser target offense, but always resulting in "a permanent reduction in degree or amount of punishment" or "a permanent and complete termination of penalty and remission of guilt." (*Way v. Superior Court*, *supra*, 74 Cal.App.3d at p. 176.) The fact that it conditions this pardon on the lack of additional evidence of scienter is irrelevant; this just makes it a general or conditional "amnesty," which *Way* held was just a commutation or pardon under a different name. (*Id.* at p. 177.) The question is whether this is merely incidental to a valid legislative purpose, as in *Way*, or instead a usurpation of the Governor's exclusive power.

We believe it is the latter. First, unlike in *Way*, the Legislature here did not stray into the pardon power as a mere incident to some other valid legislative purpose; the whole purpose of section 1170.95 is to vacate otherwise lawful convictions. Second, this is fundamentally an act of "mercy, grace, or forgiveness" consistent with the commutation and pardon power. It is well settled that there is no constitutional duty to apply any new, more-lenient law retroactively to nonfinal cases. (See *People v. Floyd* (2003) 31 Cal.4th 179, 188–189 [quoting *Estrada*, *supra*].) To do so thus lessens a defendant's punishment even though he or she is not entitled to it—the very definition of mercy. Third, in this instance the Legislature is exercising substantially the "whole" power of another branch. In *Way*, section 1170.2 did not vacate any convictions, nor was it intended to reduce sentences across the board; indeed, it was impossible to tell in advance which prisoners might receive earlier discharges (even though some inevitably would). (*Way v. Superior Court*, *supra*, 74 Cal.App.3d at p. 173.) Section 1170.95, by contrast, institutes a targeted general amnesty for a class of criminal, subject only to identifying those included in the class. This is a pardon or commutation in all but name.

Nor does the Legislature's desire for "uniformity" give it carte blanche to exercise its own version of the pardon or commutation power. Most importantly, *Way* did not recognize "uniformity" between past and present cases, standing alone, as a valid reason for the legislature to exercise the commutation power. Rather, when it mentioned uniformity the court was referring to the new penal philosophy of the DSL to make the punishment fit the crime rather than the offender: "When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense *with provision for uniformity in the sentences of offenders*

committing the same offense under similar circumstances." (§ 1170, subd. (a)(1), italics added; *Way v. Superior Court, supra*, 74 Cal.App.3d at p. 169.) It was precisely this "comprehensive reformation" to a new penal philosophy that was the key to the *Way* court finding section 1170.2 constitutional. (*Id.* at p. 178.) Here, in contrast, the purpose of SB 1437 is not a "comprehensive reformation" approaching the scale of the DSL; rather, it lessens criminal liability for a specific crime. It is hardly unusual for the Legislature to add elements to a crime or change its punishment. After all, this is the entire reason for the *Estrada* rule. But this also means that section 1170.95 is no "incidental" pardon in furtherance of a larger goal. As such, since section 1170.95 is indeed a pardon or commutation, it is further an unconstitutional direct exercise of the Governor's power, unlike the situation in *Way*.

The second important case dealing with the pardon and commutation power—*Younger v. Superior Court, supra*, 21 Cal.3d 102—is not as significant as *Way*, but deals with a situation more in line with the one here. *Younger* dealt with the 1976 enactment of Health and Safety Code section 11361.5, which authorized the destruction of all records of arrests and convictions for the possession of marijuana occurring before January 1, 1976. (*Younger v. Superior Court, supra*, at pp. 107–108.) The Attorney General argued, inter alia, that this infringed upon the executive's pardon and commutation power. (*Id.* at p. 116.) The Court disagreed, first noting that this did not apply to any defendant whose case was not final, or who was still serving a sentence, on probation, or on parole, and thus posed no possible conflict with the executive's power. (*Ibid.*) Like in *Way*, this was not an act of grace, and any infringement of the pardon power was merely incidental to a valid Legislative purpose: "reducing the adverse social and personal effects of that conviction which linger long after the prescribed punishment has been completed." (*Id.* at p. 118.)

Here, again, section 1170.95 goes well beyond the statute at issue in *Younger*. There is no merely incidental infringement of the pardon power; its end goal is to vacate convictions. Nor does section 1170.95 merely reduce the collateral consequences of the conviction; it legally erases it. Though it applies to anyone convicted of murder, it is primarily intended to benefit prisoners still serving a sentence, facilitating their release. Thus, by contrasting this situation to the one in *Younger*, the unconstitutionality of section 1170.95 becomes apparent.

In sum, in our system of government the judiciary determines guilt and imposes judgments. The Legislature determines what the law is, and it may dictate what law applies to a case up through its finality. After finality, the executive has the exclusive means to commute the sentence or pardon the defendant. There might be other ways that

the Legislature could facilitate the Governor's pardon and commutation power. For example, it might create a commission to identify inmates suitable for release because they would not be guilty under the new laws. But it may not ultimately direct the Governor to pardon any prisoner in a particular case or class of cases, nor may it direct the judiciary to vacate its prior judgements, no matter how laudable its goal.

CONCLUSION

Based on the foregoing, the People respectfully request that the Court deny the petition for resentencing on the ground that section 1170.95 is unconstitutional.

Respectfully submitted,

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By 

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DECLARATION OF SERVICE BY MAIL

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause, and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the attached document entitled **Opposition to Resentencing; Pen. Code, § 1170.95 is Unconstitutional Under the Separation of Powers** by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail in the County and City of Los Angeles, California, addressed as follows:

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Executed on January 2, 2019, at Los Angeles, California.