In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DOUGLAS EDWARD McKENZIE,** **Defendant and Appellant.**	Case No. S251333

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The Honorable Ernest J. LiCalsi, Judge

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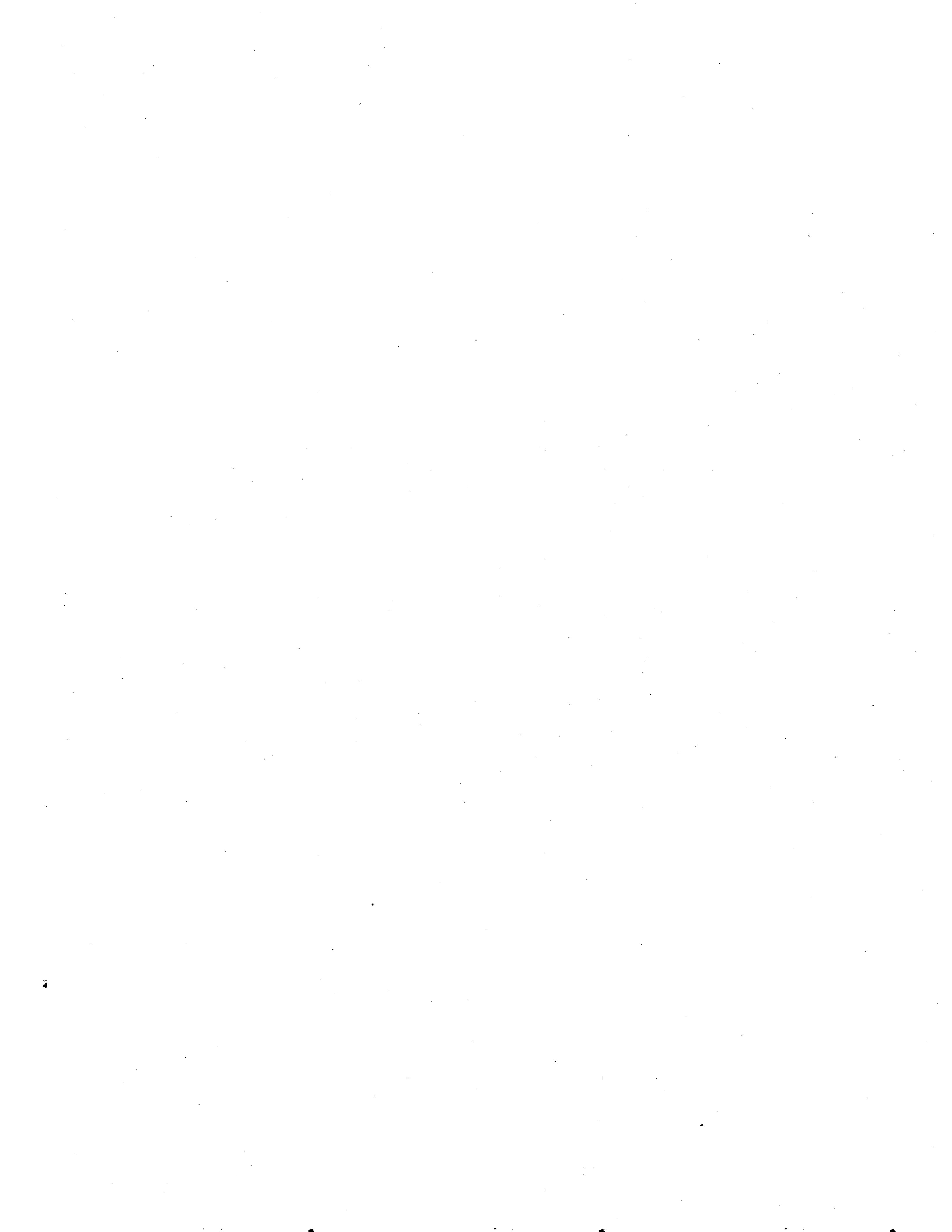

ISSUE PRESENTED

After the time to appeal the underlying conviction in a probation case has expired, may the probationer still claim the benefit of a change in the law on appeal from the revocation of probation and imposition of a sentence that had been suspended?

INTRODUCTION

McKenzie pleaded guilty and admitted that sentencing enhancement allegations were true in 2014. Among other things, McKenzie admitted that he had four prior felony convictions for controlled substances violations, which would add three years each to his sentence according to the version of Health and Safety Code section 11370.2, subdivision (c), then in effect. The trial court granted probation and suspended imposition of sentence. McKenzie did not appeal.

Probation did not go well. In 2016, the trial court revoked probation and imposed sentence. As part of that sentence, the trial court imposed three-year terms for each of four prior controlled-substance convictions that McKenzie had admitted in 2014. McKenzie did appeal from the revocation of probation and sentencing. And while that appeal was pending, the Legislature abolished the Health and Safety Code section 11370.2 enhancements that are part of McKenzie's conviction.

In California, we infer that the Legislature intends that new laws that lessen punishment apply retroactively, so long as the defendant's judgment of conviction is not final. (*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) For this purpose, a judgment is final when direct review concludes. (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306 (*Vieira*).)

Here, McKenzie would have to go back to the adjudication of his sentencing enhancements in 2014 to obtain relief. But under Penal Code section 1237, he could have appealed then. He did not, and so the probation

order and the matters that led up to it were final for purposes of appellate review well before the law changed. A later appeal from the revocation of probation cannot reach back months or years to reopen them. And because his convictions and enhancements are final for purposes of direct review, they are final for *Estrada* too.

The People ask this Court to hold that an order granting probation is the relevant appealable judgment when determining whether a judgment of conviction is final for purposes of the *Estrada* rule.

STATEMENT OF THE CASE

A. McKenzie Pleads Guilty and Admits Sentencing Enhancements, Is Granted Probation with Imposition of Sentence Suspended, and Forgoes Appeal

On November 4, 2014, McKenzie resolved the charges in three cases by pleading guilty in Madera County Superior Court to two felony counts of transportation or sale of methamphetamine (Health & Saf. Code, § 11379, subd. (a)), two felony counts of possession for sale of methamphetamine (Health & Saf. Code, § 11378), and a misdemeanor. (Clerk's Transcript [CT] 17, 21, 25.) McKenzie also admitted that he had suffered four prior felony convictions for controlled substances violations, subjecting him to enhanced punishment pursuant to the version of Health and Safety Code section 11370.2, subdivision (c), in effect at that time. (CT 17, 21, 25.) And McKenzie admitted that he had suffered three prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). (CT 17, 21, 25.)

The superior court suspended imposition of sentence, granted McKenzie probation for five years on all three cases and ordered him to attend drug court. (CT 18, 22, 26.) McKenzie's time to appeal the judgment expired on January 3, 2015 (Cal. Rules of Court, rule 8.308) without any appeal having been filed.

B. McKenzie Violates Probation and Is Sentenced

About a year and a half later, McKenzie was back in court, admitting probation violations in all three cases. (CT 47-49.) On June 1, 2016, the superior court revoked probation and sentenced McKenzie to a split aggregate term of 22 years—10 years in county jail and 12 years of mandatory supervision, pursuant to Penal Code section 1170, subdivision (h)(5)(A). (CT 83, 86, 89; 2 Reporter's Transcript [RT] 316-321.)[1] As part of that sentence, the superior court imposed sentences for the enhancements now at issue in this case: consecutive three-year terms for each of the four prior controlled-substance convictions pursuant to the version of Health and Safety Code section 11370.2, subdivision (c) still in effect at that time. (CT 83; 2 RT 318-321.) The superior court imposed sentences for these enhancements, among others, in two of McKenzie's three cases, but then stated that they were stayed in one of the two cases. (2RT 319-321.)

C. McKenzie Appeals the Sentence, Then Petitions for Review Regarding New Legislation

McKenzie appealed this sentence, claiming, inter alia, that his sentencing enhancements should have been imposed only once. (See *People v. McKenzie* (Sept. 13, 2017, F073942) 2017 WL 4022359 [nonpub. opn].) The Court of Appeal agreed with McKenzie that, as status enhancements, they should have been imposed only once on the aggregate term. (*Id.* at p. *2.)[2] The Court of Appeal therefore struck the "second set"

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[1] The court had revoked but reinstated probation based on earlier violations. (See RT 316.)

[2] A "status" enhancement is one that is based on the nature of the offender, as opposed to the nature of the offense. (*People v. Coronado* (1995) 12 Cal.4th 145, 156.) A status enhancement — typically based on recidivism — is imposed once on the aggregate term, while enhancements based on the nature of offense are appended to the sentence for that particular crime. (*Ibid.*)

of stayed enhancement terms as requested. (*Ibid.*) As modified, the judgment was affirmed on September 14, 2017. (*Ibid.*)

McKenzie filed a petition for review, raising a single new issue: "does newly enacted Senate Bill 180, amending Health and Safety Code, section 11370.2 to abolish all previous qualifying prior convictions except for those involving a minor, apply retroactively to appellant's case which is not yet final on appeal?" (Petition for review in case no. S244929 at 5, some capitalization omitted.) This Court granted review and transferred the matter back to the Court of Appeal, with directions to "vacate its decision and reconsider the cause in light of S.B. 180 (Stats. 2017, ch. 677)." (Case no. S244929.)[3]

D. The Court of Appeal Decides That McKenzie Is Entitled to Benefit from the New Statutory Amendment

The Court of Appeal concluded that the amendment to Health and Safety Code section 11370.2 applied in McKenzie's case. (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1218 (*McKenzie*)). The court below first agreed with the parties that the amendment applies retroactively to all cases that were not final on the effective date, January 1, 2018. (*Id.* at p. 1213.) It then considered *when* the judgment in McKenzie's case was final for this purpose. (*Ibid.*) The court disagreed with the People's argument that the order granting probation was the relevant judgment for this purpose under Penal Code section 1237. (*Id.* at pp. 1214-1215.) Rather, the opinion below reasoned that "the *sentence* is the judgment" for probation cases in which imposition of sentence was suspended. (*Id.* at p. 1213.) That meant that McKenzie's case was not final when Health and

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[3] The People mention the unpublished opinion in Fifth Appellate District case number F073942 and the unpublished documents in this Court's case no. S244929 because they explain decisions affecting McKenzie in this case. (Cal. Rules of Court, rule 8.1115(b)(2).)

Safety Code section 11370.2 was amended, and the Court of Appeal ordered McKenzie's enhancements for his four prior controlled-substance convictions stricken. (*Id.* at p. 1218.)

E. The People Successfully Petition for Review

That brings us back to this Court. The People asked this Court to decide when the judgment in a probationer's case is final for the purpose of the retroactive application of new legislation in cases like McKenzie's.[4] That is, where a probationer's guilt has been adjudicated, he or she is placed on probation with imposition of sentence suspended, and then sentence is imposed at some later date, is the judgment final when the time for appealing the verdict or admission of guilt and the true finding or admission of enhancement allegations has expired? Or, is the judgment not final until some time later, after the probationer has violated probation, the trial court imposes sentence, and the probationer appeals that judgment? The People noted that the Third and Fifth Districts of the Court of Appeal have come to different conclusions on this issue.

This Court granted the People's petition for review on November 20, 2018. (Case no. S251333.)

SUMMARY OF THE ARGUMENT

Along with his guilty plea in 2014, McKenzie admitted that he had four prior felony convictions for controlled substances violations. Under Health and Safety Code section 11370.2, subdivision (c), as it provided at that time, those admissions meant additional three-year terms would be added to his sentence. McKenzie apparently had no quarrel with the adjudication of his guilt and enhancement allegations and did not appeal the judgment. Only after he violated probation, and sentence was actually

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[4] The People did not file a petition for rehearing.

imposed, did McKenzie appeal. And while that appeal was pending, the Legislature abolished the enhancements based on his prior drug offenses.

Under *In re Estrada*, *supra*, 63 Cal.2d 740, defendants are entitled to the benefit of legislation that ameliorates punishment *if* their convictions are not final. Thus, the question becomes, when, for retroactivity, does a determination of guilt that results in an order granting probation and suspending imposition of sentence become final?

The answer is: when the time to file a direct appeal challenging the probation order has expired. Finality, for *Estrada* retroactivity, occurs when the time for direct appeal has ended. After that time, a defendant can no longer raise a challenge to the order or the underlying convictions. The reasoning behind this answer will unfold in four steps, as introduced below.

First, *Estrada* retroactivity applies until a judgment of conviction becomes final. *Estrada* itself said that "The key date is the date of final judgment." (*Estrada*, *supra*, 63 Cal.2d at p. 744.)

Second, a judgment of conviction becomes final for *Estrada* retroactivity when the time for direct appeal has passed. "[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*People v. Covarrubias* (2016) 1 Cal.5th 838, 935, internal quotation marks and citation omitted.) Put another way, "[f]or purposes of determining retroactivity, a judgment becomes final 'at that point at which the courts can no longer provide a remedy on direct review.'" (*In re Richardson* (2011) 196 Cal.App.4th 647, 664, citation omitted; accord, *In re Pine* (1977) 66 Cal.App.3d 593, 595.)

Third, orders granting probation are considered a final judgment for purposes of filing an appeal. Penal Code section 1237, subdivision (a), allows a defendant to appeal from "a final judgment of conviction" and

defines that term to include "an order granting probation." For purposes of a defendant appealing a determination of his guilt, the Penal Code treats a prison sentence and order granting probation the same. (Pen. Code, § 1237, subd. (a).)

Fourth, a probationer can appeal an order granting probation and the underlying determination of guilt *only* by appealing that order. In that appeal, a defendant can challenge the order and "all matters necessarily adjudicated in the proceedings culminating in the order" such as "factual findings of criminal conduct as well as legal determinations . . . ." (*People v. Flores* (1974) 12 Cal.3d 85, 94 (*Flores*).) In other words, an appeal of an order granting probation allows a challenge to "the merits of [the] conviction." (*People v. Howard* (1965) 239 Cal.App.2d 75, 77.) But if a defendant does not appeal the order granting probation, he cannot challenge the order or the underlying determination of guilt through a later appeal. (See *ibid.*)

In sum, finality depends on when the time for direct appeal has ended (steps 1 and 2). To appeal the underlying determination of guilt in a probation case, a probationer must appeal from the order granting probation (steps 3 and 4). When the time to file that appeal passes, the time for direct appeal has ended and the determination of guilt becomes final for *Estrada* purposes. And in this case, McKenzie's conviction, including his admissions to prior convictions that qualified for enhanced sentencing, became final when the time to appeal from the resulting probation order passed, well before the Legislature amended the enhancement statute, and retroactive application does not extend to him.

ARGUMENT

I. WHEN DEFENDANTS ARE GRANTED PROBATION AFTER THEIR GUILT IS ADJUDICATED, THE JUDGMENT OF CONVICTION IS FINAL FOR THE PURPOSE OF THE *ESTRADA* RULE WHEN THE TIME FOR DIRECT APPEAL FROM THE ORDER GRANTING PROBATION HAS ENDED, AND AT THAT POINT DEFENDANTS ARE NO LONGER ENTITLED TO BENEFIT FROM NEW LAWS

A. Additional Background Regarding Probation and Sentencing

This case is about the retroactive application of new legislation to defendants who have been placed on probation. Under *Estrada*, *supra*, 63 Cal.2d 740, defendants are entitled to the benefit of legislation that ameliorates punishment *if* their convictions are not final. Unlike defendants remanded to prison, probationers are not necessarily sentenced at the time their guilt is adjudicated and they are granted probation. That has caused some inconsistency and disagreement in the case law regarding when probationers' convictions are final for the purpose of determining whether new legislation applies. The People therefore briefly review the relevant law governing probation and sentencing.

After a verdict or plea of guilty, a trial court may retain jurisdiction over the defendant by granting probation. (*People v. Banks* (1959) 53 Cal.2d 370, 384.) The trial court does this in one of two ways: by pronouncing sentence and suspending its execution or by suspending imposition of sentence. (*Ibid.*; Pen. Code, §§ 1203, subd. (a); 1203.1, subd. (a).)

The two types of probation are very similar in most respects. Both types of probation are "act[s] of clemency in lieu of punishment" with the goal of rehabilitation. (*People v. Howard* (1997) 16 Cal.4th 1081, 1092 (*Howard*).) And either way, defendants are not committed to the prison

authority, but "remain[] in the actual or constructive custody of the court." (*People v. Banks*, *supra*, 53 Cal.2d at p. 384.) Defendants then have the "opportunity to avoid serving their time in prison by completing a period of conditional release in the community in lieu of the prison terms prescribed by law for their underlying convictions." (*People v. Guzman* (2005) 35 Cal.4th 577, 593.) The trial court has broad discretion to impose terms and conditions of probation, and to modify those terms and conditions during probation. (*People v. Olguin* (2008) 45 Cal.4th 375, 379; Pen. Code, § 1203.1, subds. (a), (j).) The trial court may modify its order suspending execution or imposition of sentence. (*Howard*, *supra*, 16 Cal.4th at p. 1092; Pen. Code, §1203.3, subd. (a).) If the defendant complies with the terms and conditions throughout the period of probation, or is discharged by the trial court, the underlying conviction may be dismissed. (*People v. Chatman* (2018) 4 Cal.5th 277, 286.) But unless and until that happens, the defendant stands convicted. (*People v. Banks*, *supra*, 53 Cal.2d at p. 387.)

Defendants do not always succeed on probation. If a defendant violates the terms and conditions of probation, the court may reinstate, modify, or revoke and terminate probation. (Pen. Code, § 1203.2; *People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420.) For revocation, defendants are entitled to notice, a hearing, and the assistance of counsel. (Pen. Code, § 1203.2; *People v. Vickers* (1972) 8 Cal.3d 451, 458-462.) Again, the foregoing is the same for all probationers, whether or not imposition of sentence was suspended.

The distinction between suspended imposition of sentence and suspended execution of sentence "come[s] into play" if and when the unsuccessful probationer is committed to prison after revocation and termination of probation. (*People v. Bolian*, *supra*, 231 Cal.App.4th at p. 1422; see also *Howard*, *supra*, 16 Cal.4th at p. 1094; Pen. Code, § 1203.3, subd. (c).) If execution of sentence was suspended, the already-announced

sentence "shall be in full force and effect" upon termination of probation. (Pen. Code, § 1203.3, subd. (c)); see also Cal. Rules of Court, rule 4.435(b)(2).) In other words, the court "must order that exact sentence into effect." (*Howard, supra*, 16 Cal.4th at p. 1088.)

If imposition of sentence was suspended, the trial court "may . . . pronounce judgment for any time within the longest period for which the person might have been sentenced" upon termination of probation. (Pen. Code, § 1203.3, subd. (c); see *Howard, supra*, 16 Cal.4th at p. 1088.) But the court's discretion is directed back to the circumstances existing at the time probation was granted. The trial court must consider "any findings previously made," the "length of the sentence must be based on circumstances existing at the time," and "subsequent events may not be considered in selecting the base term or in deciding whether to strike the additional punishment for enhancements charged and found." (Cal. Rules of Court, rule 4.435(b)(1); *Howard, supra*, 16 Cal.4th at p. 1088.)[5]

This difference in sentencing options is the "distinction" between the two types of probation. (*Howard, supra*, 16 Cal.4th at p. 1094.) The option of pronouncing sentence and suspending execution permits the trial courts to "convey" a "message," where appropriate for certain probationers, that they are "on the verge of a particular prison commitment." (*People v. Medina* (2001) 89 Cal.App.4th 318, 323.)

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[5] If probation has previously been revoked and reinstated, "'a later sentence upon revocation of the reinstated probation may take into account events occurring between the original grant and the reinstatement.'" (*People v. Black* (2009) 176 Cal.App.4th 145, 151, quoting *People v. Harris* (1990) 226 Cal.App.3d 141, 147.)

B. The Law Changed After McKenzie Violated Probation and Was Sentenced

In McKenzie's case, the court suspended imposition of sentence when it placed him on probation. Over three years later, after probation had been revoked and sentence imposed, the law changed in a way favorable to McKennzie.

At the time of McKenzie's conviction, Health and Safety Code section 11370.2, subdivisions (a) through (c), included a series of sentencing enhancements for convictions for prior drug crimes. Defendants convicted of certain drug offenses received an additional three-year sentence for each prior qualifying conviction. (*Ibid.*) Those qualifying convictions, listed in former section 11370.2, consist of eleven different drug offenses and conspiracy to commit them. (*Ibid.*) McKenzie admitted that he had been convicted of four such prior drug crimes before he was granted probation. (CT 17, 21, 25.)

Senate Bill 180 amended the section and abolished most of these enhancements. (Stats. 2017, ch. 677, § 1.) It removed ten of the eleven qualifying prior convictions. (*Ibid.*) The only remaining qualifying conviction is the use of a minor as an agent in the commission of a drug offense (Health & Saf. Code § 11380, subd. (a)). (Stats. 2017, ch. 677, § 1.) Section 11370.2 now provides for a sentencing enhancement only if the defendant has a prior conviction under section 11380.

Senate Bill 180 did not contain an urgency clause. (Stats. 2017, ch. 677, § 1.) It went into effect on January 1, 2018. (See *People v. Camba* (1996) 50 Cal.App.4th 857, 865-866 [operative date is "January 1 of the year following" enactment].)

C. Under The *Estrada* Rule, Legislation That Ameliorates Punishment Applies Retroactively to Criminal Cases in Which the Judgment Is Not Final

Although new statutes and amendments generally operate prospectively, the amendment to Health and Safety Code section 11370.2 applies retroactively to all criminal cases that are not yet final.

Penal Code section 3 provides that no statutes are "retroactive, unless expressly so declared." This statute and its civil counterparts "codif[y] 'the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.'" (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*), quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209.) Accordingly, "[i]t is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287.)

There is an exception to this general rule for certain criminal laws. California courts presume that the Legislature intended to apply a law that has the effect of reducing punishment to "all defendants whose judgments are not yet final on the statute's operative date." (*Brown*, *supra*, 54 Cal.4th at p. 323.) This inference of retroactive application is called the *Estrada* rule after this Court's decision in *Estrada*, *supra*, 63 Cal.2d 740. The *Estrada* rule applies both to laws that govern substantive offenses and to laws that, like Health and Safety Code section 11370.2, govern penalty enhancements. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.)[6]

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[6] In this particular case, new legislation relates to penalty enhancements, not a substantive offense. Conventionally, we do not describe a defendant as "guilty" of a sentencing enhancement. Instead, we (continued...)

Senate Bill 180 abolished numerous sentencing enhancements when it amended Health and Safety Code section 11370.2. Nothing in Senate Bill 180 indicates that the Legislature intended prospective-only application. (Stats. 2017, ch. 677, § 1.) Thus, current section 11370.2, effective January 1, 2018, applies retroactively to judgments that are not yet final for the purpose of review.

D. A Judgment Becomes Final for Purposes of *Estrada* Retroactivity When the Time for Appealing the Judgment of Conviction Has Expired

The recent amendment to Health and Safety Code section 11370.2 does not apply to McKenzie. Under Penal Code section 1237, McKenzie's time to appeal his conviction and enhancements ran from the date of the 2014 probation order, and expired without any appeal having been filed. He could not challenge his conviction and enhancements in his later appeal from probation revocation and sentencing. His conviction (and enhancements) were final well before Health and Safety Code Section 11370.2 was amended.

"The key date is the date of final judgment." (*Estrada*, *supra*, 63 Cal.2d at p. 744.) Since its inception, this Court has only applied the *Estrada* rule "provided the judgment convicting the defendant of the act is not final." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) Indeed, for over 50 years, this Court has continued to remark on the key role of finality in its retroactivity decisions. (See, e.g., *People v. Superior Court* (*Lara*) (2018)

(...continued)
speak of a factfinder's "true finding" as to the enhancement, or a defendant's "admission" that he is subject to a penalty enhancement and that the underlying facts supporting it are true. It comes to the same thing. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) For convenience and readability, the People's use of the terms "guilty," "guilt," and "conviction" should be understood to include the adjudication of penalty enhancements.

4 Cal.5th 299, 308, 311; *People v. Conley* (2016) 63 Cal.4th 646, 657; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1195-1196; *Brown, supra*, 54 Cal.4th at pp. 323-324; *In re Pedro T.* (1994) 8 Cal.4th 1041, 1045.)

This Court defines finality for the purpose of retroactivity in terms of appellate reviewability. A judgment becomes final for *Estrada* retroactivity when the time for direct appeal has passed. (*Vieira, supra*, 35 Cal.4th at p. 305.) And the time for direct appeal ends when a defendant can no longer petition the United States Supreme Court for a writ of certiorari. (*People v. Covarrubias, supra*, 1 Cal.5th at p. 935; *Vieira*, at p. 305.) Put another way, "[f]or purposes of determining retroactivity, a judgment becomes final 'at that point at which the courts can no longer provide a remedy on direct review.'" (*In re Richardson, supra*, 196 Cal.App.4th at p. 664, quoting *In re Pine, supra*, 66 Cal.App.3d at p. 595.)[7]

In the context of the retroactive application of ameliorative changes in criminal law, the United States Supreme Court has recognized that defining finality in terms of the conclusion of direct appeal is "universal" among the states. (*Bell v. Maryland* (1964) 378 U.S. 226, 230.) And for cases before the United States Supreme Court, "[s]tate convictions are final 'for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.'" (*Beard v. Banks* (2004) 542 U.S. 406, 411, quoting *Caspari v. Bohlen* (1994) 510 U.S. 383, 390.)

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[7] A notice of appeal must be filed within 60 days of the trial court's judgment or order. (Cal. Rules of Court, rule 8.308.) After a Court of Appeal decision is final, a defendant has 10 days to petition for review in this Court. (Rule 8.500(e)(1).) A defendant has 90 days to file a petition for certiorari after the state's highest court has denied or concluded review. (U.S. Supreme Ct. Rules, rule 13.1.)

E. Orders Granting Probation Are the Relevant Judgments of Conviction When Determining Finality for the Purpose of *Estrada* Retroactivity

The law governing direct appeals therefore determines finality for purposes of the *Estrada* rule. Penal Code section 1237 defines the types of appealable orders under California law and specifically states that a defendant may appeal from a "final judgment of conviction." (Pen. Code, § 1237, subd. (a).)[8] That subdivision further specifies that "an order granting probation . . . shall be deemed to be a final judgment within the meaning of this section." (Pen. Code, § 1237, subd. (a).) For purposes of a defendant appealing a determination of his guilt, then, the Penal Code treats a prison sentence and order granting probation the same.

Because the probation order is appealable under Penal Code section 1237, subdivision (a), probationers have the opportunity to challenge not only the grant of probation, but "all matters necessarily adjudicated in the proceedings culminating in the order granting probation . . . includ[ing] all factual findings of criminal conduct as well as legal determinations made

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[8] Penal Code section 1237 provides:

An appeal may be taken by the defendant from both of the following:

(a) Except as provided in Sections 1237.1, 1237.2, and 1237.5, from a final judgment of conviction. A sentence, an order granting probation, or the commitment of a defendant for insanity, the indeterminate commitment of a defendant as a mentally disordered sex offender, or the commitment of a defendant for controlled substance addiction shall be deemed to be a final judgment within the meaning of this section. Upon appeal from a final judgment the court may review any order denying a motion for a new trial.

(b) From any order made after judgment, affecting the substantial rights of the party.

by the trial court." (*Flores, supra*, 12 Cal.3d at p. 94.) And so California courts have long recognized that an appeal from "'an order granting probation' gives rise to a review of all the antecedent proceedings," without limitation to "mere examination of the propriety of the order itself." (*People v. Glaser* (1965) 238 Cal.App.2d 819, 824 [collecting cases], disapproved on another ground in *People v. Barnum* (2003) 29 Cal.4th 1210, 1219-1222.) Importantly for our purposes, this includes any appellate challenges to the conviction underlying the probation order. (*People v. Howard, supra*, 239 Cal.App.2d at p. 77; *People v. Glaser*, at pp. 821-824; see *People v. Mower* (2002) 28 Cal.4th 457, 466, fn. 3 [reviewing for instructional error on appeal from an order suspending imposition of sentence and placing defendant on probation]; *People v. Cook* (1975) 13 Cal.3d 663, 666-667, fn. 1 [permitting attack on conviction based on defense counsel's conflict of interest on appeal from order suspending imposition of sentence and granting probation], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)[9] *Estrada* itself says that its rule applies "provided the judgment *convicting* the defendant of the act is not final." (*Estrada, supra*, 63 Cal.2d at p. 745, italics added.) When a probation order issues, the defendant has of course been convicted.

Penal Code section 1237 also makes appealable "any order made after judgment, affecting the substantial rights of the party." (Pen. Code, § 1237, subd. (b).) Orders *revoking* a defendant's probation are appealable under this part of the statute. (*People v. Coleman* (1975) 13 Cal.3d 867, 871, fn.

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[9] These are all cases, like this one, in which imposition of sentence was suspended when probation was granted. (*People v. Mower, supra*, 28 Cal.4th at p. 466; *People v. Cook, supra*, 13 Cal.3d at p. 667, fn. 1; *Flores, supra*, 12 Cal.3d at p. 93; *People v. Howard, supra*, 239 Cal.App.2d at pp. 75-76; *People v. Glaser, supra*, 238 Cal.App.2d at p. 820.)

1; *People v. Vickers*, *supra*, 8 Cal.3d at p. 453, fn. 2.) That includes matters that do not and cannot arise until then. For example, the trial court's error in imposing status enhancements more than once was properly appealed after the revocation of probation in this case. (See *McKenzie*, *supra*, 25 Cal.App.5th at pp. 1218-1219.)

In sum, the Legislature, in enacting Penal Code section 1237, established a dichotomy of appealable orders in cases where probation is granted and later revoked. A defendant may appeal his probation order and any antecedent issues associated with that order when probation is granted. (Pen. Code, § 1237, subd. (a).) Separately, if probation is ultimately revoked, a defendant may appeal that revocation and any new associated consequences. (Pen. Code, § 1237, subd. (b).)

F. A Probationer Can Appeal the Underlying Determination of Guilt Only by Appealing from the Order Granting Probation

A defendant appealing probation revocation as an "order made after judgment" under Penal Code section 1237, subdivision (b), cannot raise issues adjudicated in the proceedings that resulted in the original probation order. "[A]n appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment. Thus, a defendant who elects not to appeal an order granting or modifying probation cannot raise claims of error with respect to the grant or modification of probation in a later appeal from a judgment following revocation of probation." (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421, citations omitted.)

California courts have consistently held that a defendant may not challenge the conviction underlying his probation order on appeal from a subsequent probation revocation. (See, e.g., *People v. Howard*, *supra*, 239 Cal.App.2d at p. 77 [precluding conviction review where no initial appeal

from order suspending imposition of sentence and granting probation]; *People v. Glaser*, *supra*, 238 Cal.App.2d at pp. 821-824 [same]; see also *People v. Ramirez*, *supra*, 159 Cal.App.4th at p. 1421 [same preclusion where no initial appeal from probation order imposing sentence but suspending execution]; *People v. Harty* (1985) 173 Cal.App.3d 493, 500-501 [same]; *People v. Munoz* (1975) 51 Cal.App.3d 559, 563 [same].)

Where a defendant allows the time for appeal to lapse during the probationary period, any appealable issues antecedent to that probation order become final and unappealable. (*People v. Ramirez*, *supra*, 159 Cal.App.4th at p. 1421; see *People v. Succop* (1966) 65 Cal.2d 483, 489, fn. 4 [recognizing that defendant must appeal conviction and judgment, even when judgment suspended for a Welfare and Institutions Code section 5501 commitment, and that a "separate appeal" may be taken when original sentence is executed at conclusion of commitment proceedings, provided that appeal is directed only to matters in post-judgment commitment proceeds and does not raise issues that could have been reviewed in initial appeal]; *People v. Howerton* (1953) 40 Cal.2d 217, 219-220 [refusing to consider challenges to defendant's finalized conviction on appeal from collateral sexual-psychopath proceedings]; see also *People v. Montgomery* (1942) 51 Cal.App.2d 777, 777-778 [barring successive appeal where challenged conviction final].) Where a defendant does not appeal from the order granting probation, the defendant is then "precluded from going behind the order granting probation." (*People v. Howard*, *supra*, 239 Cal.App.2d at p. 77.)

In conclusion, finality for the purpose of applying *Estrada* depends on when the time for direct appeal from the judgment of conviction has ended. (*Vieira*, *supra*, 35 Cal.4th at p. 305.) To appeal the underlying determination of guilt in a probation case, a probationer must appeal from the order granting probation. (Pen. Code, § 1237, subd. (a).) When the

time to appeal the order granting probation and the factual and legal determinations that led up to the order has ended, the determination of guilt becomes final for *Estrada* purposes.

G. Treating All Orders Granting Probation As the Relevant Appealable Judgments for Purposes of *Estrada* Retroactivity Comports with Legislative Intent, Furthers the Public's Interest in Finality, Advances the Goal of Rehabilitation, and Avoids Absurd Results

1. Treating all orders granting probation as the relevant appealable judgments for purposes of *Estrada* retroactivity comports with legislative intent

Ultimately, *Estrada* retroactivity rests on a presumption about the Legislature's intent when it changes the law. (*Brown, supra*, 54 Cal.4th at p. 324; *People v. Floyd* (2003) 31 Cal.4th 179, 189.) *Estrada* did not contemplate that the availability of the retroactive application of new laws would be indefinitely prolonged. This is why *Estrada* said that "The key date is the date of final judgment." (*Estrada, supra*, 63 Cal.2d at p. 744.) And the Legislature certainly did not intend that the failure to comply with the terms and conditions of probation would result in vacating convictions through the retroactive application of new laws. But that is what will happen if this Court decides, like the lower court, that sentencing is the relevant appealable judgment in probation cases where imposition of sentence is suspended.

Included in the trial court's authority to modify its orders is the authority to "extend the probationary term." (*People v. Leiva* (2013) 56 Cal.4th 498, 504.) So, if the trial court reinstates probation after one or more violations, probation may extend well beyond the original grant of probation. (See, e.g., *People v. Superior Court* (*Rodas*) (2017) 10 Cal.App.5th 1316, 1318-1320 (*Rodas*).) The Legislature did not intend that probationers should have their convictions undone in that manner.

Quite the opposite. The Legislature intended that, to have the determination of guilt vacated, the probationer would "fulfill the conditions of probation . . . ." (Pen. Code, § 1203.4, subd. (a)(1).) After all, the "primary purpose" of probation is the successful rehabilitation of the defendant. (*Howard*, *supra*, 16 Cal.4th at p. 1092.) The possibility of a favorable change in the law after conviction is *no* part of the purpose of probation.

This Court has cautioned that *Estrada* should not be applied so broadly that it "weaken[s]" the "strong presumption" that new laws apply prospectively. (*Brown*, *supra*, 54 Cal.4th at p. 324.) *Estrada* is based on an inference that the Legislature would want legislation lessening punishment "for a particular *offense*" to apply to "nonfinal judgments." (*Brown*, at p. 324.) Acts and events in a particular *case* such as a defendant's probation violations and a trial court's (perhaps unrewarded) efforts to rehabilitate a defendant by reinstating and extending probation are unrelated to the premise of the *Estrada* rule. The Legislature cannot intend that such events in individual cases at the trial court level should affect and extend the retroactivity of new laws. Extending the *Estrada* rule case-by-case like this would "endanger the default rule of prospective operation . . . ." (*Brown*, at p. 324) at the cost of other policy considerations. For all but nonfinal judgments or where the Legislature has expressly provided for retroactive application, statutes must apply prospectively "to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written." (*People v. Floyd*, *supra*, 31 Cal.4th at p. 190; see also *id.* at p. 191.)

2. Treating all orders granting probation as the relevant appealable judgments for purposes of *Estrada* retroactivity furthers the public's interest in finality and advances the goal of rehabilitation

As this Court has explained more than once, there is an important public "interest in the finality of criminal proceedings." (*In re Reno* (2012) 55 Cal.4th 428, 451; see, e.g., *In re Robbins* (1998) 18 Cal.4th 770, 778; *In re Martinez* (2017) 3 Cal.5th 1216, 1222; *Rodas*, *supra*, 10 Cal.App.5th at p. 1326; accord, *Beard v. Banks*, *supra*, 542 U.S. at p. 413.)

The People's position is consistent with the public's interest in finality, an interest that the Legislature would not intend to implicitly undercut by reducing a penalty. Three benefits of finality prove this point.

First, finality prevents criminals from escaping prosecution. Without finality, probationers could use a change in the law to vacate the determination of their guilt years after the plea or trial. The intervening years would degrade the People's case. Evidence would be destroyed. Witnesses would move. Memories would fade. As a result, the People would present either a weaker case or none at all. Some probationers, therefore, would escape any determination of guilt. Again, the Legislature does not intend for a statutory amendment to become a practical acquittal through such unintended consequences.

Second, finality conserves public resources. Allowing probationers to vacate determinations of their guilt after years had passed would impose two financial burdens. Police would have to preserve evidence during the period of probation. That would mean storing methamphetamine, heroin, or marijuana for years. (See *Beard v. Banks*, *supra*, 542 U.S. at p. 413 [recognizing the burden on the states "to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." (Internal quotation marks and citations omitted)].) If a probationer absconded, the preservation period would

extend indefinitely. And prosecutors would have to prosecute the case for a second time. If the Legislature intended to impose these costs, it would not do so indirectly by amending a crime.

Third, finality benefits probationers as well, by encouraging them to accept responsibility and focus on rehabilitation. If *Estrada* retroactivity is extended to a probationer who does not have a pending direct appeal, the probationer will know that compliance with the terms and conditions of probation is not the only way to vacate a conviction. If he absconded, for example, the Legislature might change the law. With that change, he could move to vacate the nonfinal determination of his guilt. But if the determination of his guilt is final, and compliance is the remaining path to having a conviction vacated, that incentive to abscond disappears. As the *Rodas* court observed, allowing defendants to set aside judgments of conviction (or enhancement adjudications) years later "would also have the absurd effect of encouraging defendants to violate the terms of their probation in the hopes of extending the probation term to take advantage of any beneficial changes in the law during the probationary period." (*Rodas*, *supra*, 10 Cal.App.5th at p. 1326; cf. *In re Pedro T.*, *supra*, 8 Cal.4th at pp. 1046-1047 ["a rule that retroactively lessened the sentence imposed on an offender pursuant to a sunset clause would provide a motive for delay and manipulation in criminal proceedings"]; and see *In re Reno*, *supra*, 55 Cal.4th at p. 451 ["'Without finality, the criminal law is deprived of much of its deterrent effect'[Citation]"].)) In fact, trial courts may become reluctant to extend probation and give defendants additional opportunities to achieve rehabilitation, if that might mean defendants could have their convictions vacated through a change in the law without ever having fully complied with the terms and conditions of probation.

3. Treating all orders granting probation as the relevant appealable judgments for purposes of *Estrada* retroactivity avoids absurd results

Finally, treating all orders granting probation as the relevant judgments for purposes of *Estrada* retroactivity also avoids absurd results. Suppose this Court adopts the holding of the lower court. That would mean that a probationer who does not initially challenge her underlying conviction, and then successfully completes the term of probation cannot benefit from a subsequent amendment to the pertinent statute, while a similarly situated probationer who violates his terms, has his probation revoked, and appeals from that revocation, may retroactively apply the amendment to invalidate his conviction entirely.[10]

As an example of absurd results, consider Margarita Rodas. She pleaded no contest and was granted probation in 2007. (*Rodas*, 10 Cal.App.5th at pp. 1319.) She violated probation four times. (*Id.* at pp. 1319-1320.) The court generously reinstated probation three times, and then she absconded. (*Ibid.*) Only after the law changed in her favor nearly seven years after her guilt had been adjudicated did she show up in court, seeking the benefit of the new law. (*Ibid.*) Under the holding below, she would have been entitled to it. (See *McKenzie*, 25 Cal.App.5th at p. 1218.)

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[10] The People note that although a successful probationer may petition the court to set aside the conviction and expunge his record, certain negative consequences of a felony conviction may remain. (See Pen. Code, § 1203.4, subd. (a); see, e.g., *Chavez, supra*, 4 Cal.5th at pp. 777-778.)

H. Courts Have Disagreed on the Question of When the Determination of Guilt Underlying an Order Granting Probation Becomes Final in a Probation Case

1. A judgment is final for *Estrada* retroactivity when direct appeal from the probation order concludes, whether execution or imposition of sentence is suspended

It appears to be fairly settled that a probation order is the relevant appealable judgment for determining whether a judgment is final for *Estrada* retroactivity as to probation orders that follow a suspended execution of sentence. (See, e.g., *People v. Grzymski* (2018) 28 Cal.App.5th 799, 805-806; *McKenzie*, *supra*, 28 Cal.App.5th at p. 214; *People v. Amons* (2005) 125 Cal.App.5th 855, 868-869.) It should be no different when the probation order follows a suspended imposition of sentence. In probation cases, the distinction between the two types of probation is an "important" one that implicates the scope of a judge's sentencing discretion. (*Howard*, *supra*, 16 Cal.4th at p. 1087.) But the distinction has no bearing on determining finality for retroactivity, because in either situation a defendant may appeal from the order granting probation. (See Pen. Code, § 1237, subd. (a).) And in either situation, failing to take that appeal, or the conclusion of that appeal, ends the time for a direct appeal challenging the underlying determination of guilt. (Compare *People v. Howard*, *supra*, 239 Cal.App.2d at p. 77 [imposition suspended] with *People v. Ramirez*, *supra*, 159 Cal.App.4th at p. 1421 [sentence imposed but execution suspended].) In both types of cases, guilt has been adjudicated and the relevant factual findings and legal rulings can and must be appealed within 60 days under Penal Code section 1237, subdivision (a), and rule 8.308 of the California Rules of Court. *Estrada* itself did not tie finality to sentencing, but to "the judgment convicting the defendant of the act . . . ." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) Using

similar language, Penal Code section 1237, subdivision (a) includes all probation orders as "judgment[s] of conviction."

Recently, however, a conflict on this topic has arisen among the Courts of Appeal. The Third District has held that, under Penal Code section 1237, the order granting probation is the relevant appealable judgment for *Estrada* purposes in probation cases, whether the trial court suspended imposition or execution of sentence. (*Rodas*, 10 Cal.App.5th at p. 1325.) In contrast, the Fifth District drew a distinction between probation cases in which sentence is imposed with execution suspended and cases in which imposition of sentence is suspended in the opinion below. (*McKenzie*, *supra*, 25 Cal.App.5th at pp. 1213-1214.) The opinion reasoned that no judgment is pending against a probationer until sentence is imposed. (*Id.* at p. 1214.)

2. *Rodas* properly held that, under section 1237, a probation order is a "final judgment" for the purpose of appeal and is the relevant appealable judgment for *Estrada* retroactivity, even if imposition of sentence is suspended

The Third District has the better view. The order granting probation is the relevant appealable judgment for *Estrada* purposes in both types of probation cases. (*Rodas, supra*, 10 Cal.App.5th at p. 1322.) If the time for direct review of a probation order has concluded, then the judgment of conviction is final as to that order adjudicating the charged offenses and placing the defendant on probation, and *Estrada* retroactivity does not apply.

In 2007, Rodas pleaded no contest to transportation of heroin for personal use (Health & Saf. Code, § 11352). (*Id.* at p. 1319.) Imposition of sentence was suspended and she was placed on probation for three years. (*Ibid.*) She then violated probation four times. The court reinstated probation three times, and then she absconded. (*Ibid.*) In 2014, some six

and a half years after Rodas's no-contest plea, the Legislature limited section 11352 to transportation for sale. A year after that, Rodas reappeared and successfully asked the superior court to allow her to withdraw her plea because of the change in the law. The People filed a petition for writ of mandate, and the Third District reversed.

The Third District held that Rodas was not entitled to retroactive application of the statutory amendment or to withdraw her plea. (*Rodas, supra*, 10 Cal.App.5th at p. 1319.) The court decided that, because Rodas did not appeal the superior court's order granting probation, her conviction for transporting heroin became final for *Estrada* retroactivity purposes in 2007. (*Id.* at p. 1326.) The court reasoned that "'[s]tate convictions are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." [Citations.]'" (*Id.* at p. 1325, quoting *Beard v. Banks, supra*, 542 U.S. at p. 411.) An order granting probation is considered a final judgment for purposes of filing an appeal — as to that order and to all that led up to it. (*Rodas*, at p. 1325.) This is because Penal Code section 1237, subdivision (a), allows a defendant to appeal from "a final judgment of conviction" and defines that term to include "an order granting probation." (*Ibid.*)

Because Rodas could have challenged her underlying convictions and admissions on appeal from the probation order, the Third District decided that Rodas could not challenge the matters adjudicated by her plea and admissions years later by appealing from the revocation of probation and imposition of sentence. "If the time to appeal the probation order lapses without an appeal having been taken . . . the defendant may not thereafter challenge the underlying conviction when appealing a subsequent order revoking probation and imposing a suspended sentence. [Citations.]"

(*Rodas*, *supra*, 10 Cal.App.5th at p. 1325.) This is as true when imposition of sentence is suspended (*id.* at p. 1326) as it is when execution of sentence is suspended. "'Since no appeal was taken within the allowable time from this [probation] order, appellant is now precluded from going behind the order granting probation' to challenge the merits of his conviction." (*Rodas*, *supra*, 10 Cal.App.5th at p. 1325, quoting *People v. Howard*, *supra*, 239 Cal.App.2d at p. 77.) The Third District also relied on *People v. Glaser*, which held that "following revocation of probation after imposition of sentence had been suspended, the defendant was precluded from challenging any matters giving rise to his conviction and the ensuing order granting him probation because he failed to timely perfect an appeal under Penal Code section 1237 from the probation order." (*Rodas*, at p. 1325, citing *People v. Glaser*, *supra*, 238 Cal.App.2d at p. 821.)

In short, according to *Rodas*, finality depends on when the time for direct appeal has ended. To appeal the underlying determination of guilt in a probation case, a probationer must appeal from the order granting probation. When the time to file that appeal passes, the time for direct appeal has ended and the determination of guilt becomes final for *Estrada* purposes. This is true whether imposition or execution of sentence was suspended.

The *Rodas* decision is well-reasoned. As the Third District pointed out, the Penal Code provides the answer: "An order granting probation is identified in Penal Code section 1237 as a 'final judgment' for purposes of taking an appeal. (*Ibid.*)" (*Rodas*, *supra*, 10 Cal.App.5th at p. 1322.) "The key date" for retroactivity "is the date of final judgment." (*Estrada*, 63 Cal.2d at p. 744.) As this Court has explained, section 1237 means that a defendant must challenge on appeal from a probation order "all matters necessarily adjudicated in the proceedings culminating in the order" such as "all factual findings of criminal conduct as well as legal determinations

made by the trial court." (*Flores*, *supra*, 12 Cal.3d at p. 94.) In other words, it is the appeal of an order granting probation that allows a challenge to "the merits of [the] conviction." (*People v. Howard*, *supra*, 239 Cal.App.2d at p. 77.)

So, as the Third District concluded in *Rodas*, when a defendant receives probation, the underlying convictions (and any enhancements) become final "for retroactivity purposes" once the time to appeal the order granting probation has passed. (*Rodas*, *supra*, 10 Cal.App.5th at pp. 1325-1326.) And this is so where, as here, imposition of sentence was suspended. (*Id.* at p. 1326.)

3. Despite Penal Code section 1237 and this Court's definition of finality in the context of *Estrada*, the opinion below held that when probation is granted and imposition of sentence has been suspended, there is no judgment at that point for the purpose of the *Estrada* rule

The opinion below, on the other hand, held that the sentence is the judgment, and when probation is granted and imposition of sentence has been suspended, there is no judgment at that point for purposes of *Estrada* retroactivity.

Again, when McKenzie pleaded guilty in three cases, he admitted that he had suffered four prior felony convictions for controlled substances violations, subjecting him to enhanced punishment pursuant to the version of Health and Safety Code section 11370.2, subdivision (c), in effect at that time. (*McKenzie*, *supra*, 25 Cal.App.5th at pp. 1210-1211.) As McKenzie knew (see CT 17, 21, 25), those admissions potentially meant sentences of three years each. (Former Health & Saf. Code § 11370.2, subds. (a)-(c).) As in *Rodas*, imposition of sentence was suspended, and like Rodas, McKenzie was granted probation. Neither Rodas nor McKenzie appealed.

Like Rodas, McKenzie violated probation and then sought to improve his position based on a change in the law that occurred well after the time for appealing the probation order (and all antecedent proceedings) had expired. (*McKenzie, supra*, 25 Cal.App.5th at pp. 1211-1212.)

In contrast with *Rodas*, the decision below extended the benefit of the changed law to McKenzie. The opinion drew a distinction between probation cases in which sentence is imposed with execution suspended and cases in which imposition of sentence is suspended. (*McKenzie, supra*, 25 Cal.App.5th at pp. 1213-1214.) This distinction was important to the court's decision, because the court below reasoned that "[i]n a criminal case, the *sentence* is the judgment." (*Id.* at p. 1213.) In the court's view, no judgment was pending against McKenzie until sentence was imposed. (*Id.* at p. 1214.)

The opinion below acknowledged that Penal Code section 1237 states that an order granting probation is a "final judgment" for the purpose of appeal. (*McKenzie, supra*, 25 Cal.App.5th at p. 1215 & fn. 6.) But the opinion relied on a decision by this Court for the proposition that a probation order "'does not have the effect of a judgment for other purposes.'" (*Id.* at p. 1215, quoting *People v. Chavez* (2018) 4 Cal.5th 771, 786 (*Chavez*).) So, the opinion below continued, McKenzie's appeal from the later 2016 probation revocation proceeding was an "appeal from a judgment of conviction" (*McKenzie, supra*, 25 Cal.App.5th at p. 1217), and that judgment was therefore not yet final (*id.* at p. 1218). The court below stuck the four three-year enhancements for McKenzie's prior drug-related convictions. (*Id.* at pp. 1218-1219.)

I. The Holding Below That the Sentence, and Not the Judgment of Conviction, Is the Relevant Appealable Judgment for the Purpose of the *Estrada* Rule Departs from Important Principles

The reasoning of the opinion below turns on two flawed premises: its reliance on this Court's statement to the effect that, while an order granting probation does have the effect of a final judgment for the purpose of appeal, it "'does not have the effect of a judgment for other purposes'" (*McKenzie, supra*, 25 Cal.App.5th at p. 1215, quoting *Chavez, supra*, 4 Cal.5th at p. 786) and its categorical statement that "the *sentence* is the judgment" (*McKenzie*, at p. 1213).

1. For *Estrada* and retroactivity, the finality of a judgment has been defined as finality on appeal

It is for the very reason that an order granting probation has the "effect of a final judgment for the purpose of appeal" that it is also the relevant appealable judgment for the purpose of the *Estrada* rule. Sometimes "judgment" refers to a sentence, but the terms "judgment" and "final judgment" have multiple meanings. (*In re Pine, supra*, 66 Cal.App.3d at p. 596, fn. 2.)[11] Indeed, "[t]he confusion as to what constitutes a 'final judgment' within the meaning of the principles announced in *In re Estrada, supra*, 63 Cal.2d 740, 744-745, results from the multiple use of that term. [Citations.]" (*In re Pine, supra*, 66 Cal.App.3d at p. 596, fn. 2.) For *Estrada* and retroactivity, "[t]he finality of

[11] For that matter, the frequently used terms "conviction," "sentence," "judgment," and "final judgment" *all* have different meanings in different contexts. (*People v. Santa Ana* (2016) 247 Cal.App.4th 1123, 1139-1143; *People v. Davis* (2016) 246 Cal.App.4th 127, 139-141, review granted and then dismissed; *People v. Moon* (2011) 193 Cal.App.4th 1246, 1252; *In re Pine, supra*, 66 Cal.App.3d at p. 596, fn. 2.) "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court . . . ." (*People v. Santa Ana*, at p. 1143.)

a judgment has been *defined* as that point at which the courts can no longer provide a remedy on direct review." (*In re Pine*, *supra*, at p. 595, italics added; see also *id.* at p. 594, cited with approval in *Vieira, supra,* 35 Cal.4th at p. 306.) So it is finality on appeal that is the linchpin for purposes of the *Estrada* rule.

In fact, this Court has been perfectly clear on this point: "'[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.'" (*Vieira, supra*, 35 Cal.4th at p. 306, quoting *People v. Nasalga*, *supra*, 12 Cal.4th at 789, fn. 5; accord, *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 935; *People v. Kemp* (1974) 10 Cal.3d 611, 614.) And as this Court has pointed out (*Vieira,* at p. 306), the United States Supreme Court also defines finality for the purpose of determining the retroactive application of an ameliorative criminal law as the point at which a case has "reached final disposition in the highest court authorized to review it." (*Bell v. Maryland*, *supra*, 378 U.S. at p. 230.)

In other words, an order granting probation is final for the purpose of retroactivity precisely because the probationer can "tak[e] an appeal therefrom. . . ." (*People v. Superior Court* (*Giron*) (1974) 11 Cal.3d 793, 796 (*Giron*).) That the order is not yet final for "other purposes" does not affect the definition of finality for retroactivity. (See *In re Pine*, *supra*, 66 Cal.App.3d at p. 595, fn. 2).

For these reasons, it cannot be said as a generally applicable rule in criminal cases that "the *sentence* is the judgment." (*McKenzie*, *supra*, 25 Cal.App.5th at p. 1213.) That is not always true, and as discussed above, it is not the standard for the *Estrada* rule. Again, "judgment" has multiple meanings. (*In re Pine*, *supra*, 66 Cal.App.3d at p. 596, fn. 2.) In particular, there is a distinction between a judgment that is final for purposes of

retroactivity and finality in the context of retaining jurisdiction. (*Ibid.*) So, a superior court may retain jurisdiction over a probationer for certain purposes defined by statute, while at the same time the probationer's underlying conviction is final and no longer vulnerable to attack. For example, in *Chavez*, this Court considered when a probationer's judgment is final for the purpose of a trial court's jurisdiction to dismiss an action under Penal Code section 1385. (*Chavez, supra*, 4 Cal.5th 771, 777, cited in *McKenzie, supra*, 25 Cal.App.5th at p. 1215.) The relevant "judgment" that terminates a trial court's jurisdiction under section 1385 is sentencing. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 524, fn. 11; see *Chavez*, at p. 781.)[12] But a successful probationer is never sentenced within the meaning of section 1385, because probation simply expires. (*Chavez*, at p. 783.) This Court decided that jurisdiction under section 1385 continued in such a case until the trial court's authority to "render judgment" by pronouncing sentence ended with the expiration of probation. (*Id.* at p. 777.) This Court did not consider in *Chavez* the definition of a final judgment for purposes of retroactivity, nor did it make any mention of *Estrada*. But it did acknowledge that an order granting probation is a final judgment for the purpose of appeal. (*Chavez*, at p. 786.) The extent of a trial court's jurisdiction to dismiss an action under section 1385 where a probationer is not sentenced is, unlike retroactivity, an example of the "*other* purposes" (*Chavez*, at p. 786, italics added) for which an order of probation is not the relevant final judgment.

[12] As an example of the multiple meanings of "judgment," the term "pronouncing judgment" is often used to mean "pronouncing sentence." (*Flores, supra*, 12 Cal.3d at p. 93, fn. 6.)

2. An order granting probation and suspending imposition of sentence is the relevant appealable judgment for *Estrada*, even if it does not have the effect of a judgment for all purposes

According to the opinion below, though, the nature of a probation order as a final judgment is strictly limited to the purpose of appealing from that order. (*McKenzie*, *supra*, 25 Cal.App.5th at p. 1215.) Indeed, this Court has said that an order granting probation and suspending the imposition of a sentence "'is deemed to be a final judgment'" in Penal Code section 1237 "for the *limited purpose* of taking an appeal therefrom" but "it does not have the effect of a judgment for other purposes." (*Giron*, *supra*, 11 Cal.3d at p. 796, italics added.) Subsequent decisions have repeated this language. (See *Howard*, *supra*, 16 Cal.4th at p. 1087; *People v. Orabuena* (2004) 116 Cal.App.4th 84, 97-98; *McKenzie*, at p. 1215.)

Giron had nothing to do with retroactivity, and did not mention *Estrada*. It dealt with the withdrawal of a guilty plea due to ignorance of immigration consequences. (*Giron*, *supra*, 11 Cal.3d at p. 795.) It therefore does not define finality for retroactivity. In *Flores*, this Court acknowledged *Giron* and clarified that Penal Code section 1237 should *not* be read as limiting an appeal from a probation order solely to the propriety of that order. (*Flores*, *supra*, 12 Cal.3d 85, 94.) Construing Penal Code section 1237's designation of probation orders as "final judgment[s]" for purposes of appeal, this Court found legislative intent to allow probationers to challenge *all matters adjudicated* in association with the probation order *including factual findings of criminal conduct.* (*Ibid.*)

The language from *Giron* is consistent with the People's position. Penal Code section 1237 provides at least that an order granting probation is a final order for the purpose of appeal. As explained, an order granting probation is final for *Estrada* retroactivity precisely *because* the

probationer can "tak[e] an appeal therefrom . . . ." (*Giron, supra*, 11 Cal.3d at p. 796.)

This Court's statement in *Howard* that "when the trial court suspends imposition of sentence, no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation" (*Howard, supra*, 16 Cal.4th at p. 1087), does not undermine the People's position. Read in context, it is clear that *Howard* is simply another example of a probation order not being a final judgment for all purposes. As in *Chavez* and *Giron*, *Howard* does not mention *Estrada* or retroactivity. Rather, this Court decided that, where the trial court has imposed and then suspended sentence when granting probation, it cannot later reduce that sentence after revoking probation. (*Howard, supra*, 16 Cal.4th at p. 1084.) "Judgment," as used in *Howard*, means the actual prison sentence, either imposed for the first time after probation is revoked or imposed and stayed at the time probation is granted. (*Id.* at pp. 1087-1088, citing *People v. Banks, supra*, 53 Cal.2d at pp. 385-387.)

The three cases just discussed — *Chavez*, *Giron*, and *Howard* — are not contrary to the People's position because those cases do not purport to define a final judgment for the purpose of *Estrada* retroactivity. (See, e.g., *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1278 ["an opinion is not authority for a proposition not therein considered"].) The People's position is consistent with all three.

3. Two cases that hold that an order granting probation and suspending the imposition of sentence is not the relevant appealable judgment for *Estrada* retroactivity are wrongly decided

The two cases that differ from the People's position were wrongly decided.

In *People v. Eagle*, the People conceded the question of finality, and this Court accepted that concession without further analysis. (*People v.*

Eagle (2016) 246 Cal.App.4th 275, 279.) That concession relied upon the language in *Giron* discussed above. With the benefit of further deliberation, and for the reasons set forth in this brief, the People have concluded that our concession was wrong and led the *Eagle* court astray. The People seek to "gracefully and good naturedly surrender[] former views to a better considered position" (*McGrath v. Kristensen* (1950) 340 U.S. 162, 178 (conc. opn. of Jackson, J.)), and ask this Court to disapprove that part of *People v. Eagle*.

The other flawed decision is *In re May* (1976) 62 Cal.App.3d 165 (*May*). *May* held that "no final judgment was issued" for purposes of *Estrada* retroactivity because proceedings in May's case were suspended and he was granted probation. (*May*, at p. 169.) The court concluded that May was entitled to benefit when the law changed some four years after he was placed on probation, and granted his habeas corpus petition.

The *Rodas* court questioned whether *May*'s conclusion — that May's conviction was not final for retroactivity purposes under *Estrada* — remained viable under subsequent authority. (*Rodas*, 10 Cal.App.5th at pp. 1324.) The *Rodas* court pointed out that "'[s]tate convictions are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." [Citations.]' (*Beard v. Banks* (2004) 542 U.S. 406, 411.)" (*Rodas*, at p. 1325.)

The People agree that *May* should be disapproved. The opinion contains little reasoning to support its holding. The court simply quoted *Giron* to say that an order granting probation and suspending the imposition of a sentence "'is deemed to be a final judgment' for the limited purpose of taking an appeal therefrom" but "it does not have the effect of a judgment for other purposes." (*May, supra*, 62 Cal.App.3d at p. 169, quoting *Giron*,

supra, 11 Cal.3d at p. 796.) The court assumed without discussion that finality for appeal was not finality for retroactivity. (*May*, at p. 169.) This assumption fails because, as discussed, the end of the time to appeal triggers finality for retroactivity. (*People v. Covarrubias*, *supra*, 1 Cal.5th at p. 935; *Vieira*, *supra*, 35 Cal.4th at pp. 305-306.) Beyond quoting *Giron*, the court in *May* relied on the legislative-intent rationale underlying *Estrada* retroactivity. (*May*, at p. 169.) Yet, as discussed earlier, the People's position actually furthers legislative intent.

J. The Recent Amendment to Health and Safety Code Section 11370.2 Does Not Apply to McKenzie Because His Convictions and Enhancements Were Final Once the Time for Appealing the 2014 Order Granting Probation Expired

After McKenzie pleaded guilty and admitted enhancement allegations, the trial court placed McKenzie on probation and suspended the imposition of sentence on November 4, 2014. (CT 18, 22, 26.) McKenzie had sixty days to appeal from the order of probation from the 2014 convictions and to file a statement of reasons for a certificate of probable cause. (Cal. Rules of Court, rule 8.308(a); see *Rodas*, *supra*, 10 Cal.App.5th at p. 1325.) He did not do so. When the time for appealing the probation order lapsed on January 5, 2015, that order and McKenzie's underlying conviction and enhancements were no longer open to question. (*People v. Howard*, *supra*, 239 Cal.App.2d at p. 77; *People v. Glaser*, *supra*, 238 Cal.App.2d at pp. 821-824.)

By the time McKenzie filed a notice of appeal after the probation revocation hearing, on June 16, 2016 (CT 92-94), sixty days had long since run. The 2014 convictions and enhancements are final "for retroactivity purposes," and he is not entitled to the benefit of the amendment to Health and Safety Code section 11370.2, which became effective on January 1,

2018, nearly three years after his case was final. (*Rodas*, *supra*, 10 Cal.App.5th at p. 1326.)

CONCLUSION

The People respectfully request that the judgment be reversed.

Dated: February 12, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 10,872 words.

Dated: February 12, 2019

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. McKenzie** No.: **S251333**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 12, 2019, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 12, 2019, at Sacramento, California.

Declarant

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