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Supreme Court of California
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**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RANDOLPH STEVEN ESQUIVEL,

Defendant and Appellant.

No. S262551

Second District Court of Appeal, Division Five, Case No. B294024
Los Angeles County Superior Court No. NA102362
Honorable Jesus I. Rodriguez, Presiding Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

MARK R. FEESER
ATTORNEY AT LAW
State Bar No. 252968
3940-7174 Broad Street
San Luis Obispo, CA 93401
805-542-0189
Mark.R.Feeser@gmail.com

Attorney for Defendant and
Appellant Randolph Steven Esquivel

By Appointment of The
Supreme Court of California

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RANDOLPH STEVEN ESQUIVEL, Defendant and Appellant.	)	No. S262551

APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

This Court has granted review for the following issue: "Is the judgment in a criminal case considered final for purposes of applying a later ameliorative change in the law when probation is granted and execution of sentence is suspended, or only upon revocation of probation when the suspended sentence is ordered into effect? (See also *People v. Shelton*, S262972.)"[1]

INTRODUCTION

In September 2015, appellant, Randolph Steven Esquivel, pleaded guilty to one felony count pursuant to a plea agreement. The trial court imposed a prison sentence of five years, which included two, one-year prior prison term enhancements pursuant

[1] Appointed counsel here has also been appointed to represent Randall Alexander Shelton in Case No. S262972, for which this Court granted review on the same question but deferred briefing pending consideration and disposition of the instant case.

to Penal Code section 667.5, subdivision (b).[2] The trial court suspended the execution of the sentence and placed appellant on formal probation for five years. In 2018, probation was revoked, and the trial court imposed the five-year prison term.

Appellant appealed from the revocation of probation and while his appeal was pending, legislation was enacted to amend section 667.5, subdivision (b). (Sen. Bill No. 136 (2019-2020 Reg. Sess.) § 1, effective Jan. 1, 2020) ("SB 136").) Specifically, SB 136 amended section 667.5, subdivision (b), so that the prior prison term enhancement now applies only if the prior conviction was for a sexually violent offense, thus greatly narrowing the scope of its application. (§ 667.5, subd. (b).) Neither of appellant's prior prison terms was based on a conviction for a sexually violent offense. Appellant thus sought the benefit of SB 136 in the context of his appeal from the revocation of probation.

The Court of Appeal assumed that SB 136 applies retroactively to all non-final cases at the time of its enactment. (See *People v. Esquivel* (Mar. 26, 2020, B294024) [nonpub. opn.] at Slip Op. pp. 12-13.)[3] The court, nevertheless, reasoned that SB 136 did not apply to appellant because it found his case became final when the sentence was imposed but suspended, probation was ordered, and he thereafter failed to appeal the judgment. (Slip Op. pp. 13-17.) The issue, therefore, is: whether

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[2] All further statutory references are to the Penal Code unless otherwise indicated.
[3] All further references to the Court of Appeal's opinion in this case are designated as "Slip Op."

appellant's case remained a non-final judgment until probation was revoked and the suspended sentence executed?

This Court recently addressed a closely related question in *People v. McKenzie* (2020) 9 Cal.5th 40. There, the defendant pleaded guilty, admitted certain sentence enhancements, and was placed on probation. (*Id.* at p. 43.) Unlike the instant case, however, the trial court suspended both the imposition and execution of the sentence. (*Ibid.*) Probation was later revoked, and while the appeal from the revocation of probation was pending, ameliorative legislation was enacted that, if applicable, eliminated the defendant's sentence enhancements. (*Id.* at pp. 43-44.) In that context, this Court held that the ameliorative legislation applied retroactively because the judgment was not final under *In re Estrada* (1965) 63 Cal.2d 740 ("*Estrada*") until the sentence was imposed and executed. (*Id.* at pp. 45-52.)

The reasoning of *McKenzie* applies with equal force to cases where probation is granted, the sentence is imposed, and only its execution is suspended. This is because "neither forms of probation—suspension of the imposition of sentence or suspension of the execution of sentence—results in a final judgment." (*People v. Chavez* (2018) 4 Cal.5th 771, 781 ["In the case where the court suspends [only the] execution of sentence, the sentence constitutes 'a judgment provisional or conditional in nature.' [Citation.]"].) Accordingly, appellant respectfully requests that this Court reverse the Court of Appeal and remand this case to the trial court to strike the section 667.5, subdivision (b) enhancements and modify appellant's sentence.

STATEMENT OF THE CASE

On September 8, 2015, appellant was charged with one count of attempting to burn a structure (§ 455) and one count of possession of flammable materials (§ 453, subd. (a)). (CT 34-37) The Information further alleged that appellant served two prior prison terms (§ 667.5, subd. (b)) and that he had one prior strike conviction (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) and one prior serious felony conviction (§ 667, subd. (a)(1)). (CT 35-36) Appellant's prior prison terms were based on convictions for assault with a firearm (§ 245, subd. (a)(2)) in 2006, and unlawful firearm possession (§ 12021, subd. (a)(1)) in 2010. (CT 35-36)

On September 11, 2015, pursuant to a plea agreement, appellant pleaded no contest to one count of attempting to burn a structure (§ 455) and admitted the related sentence enhancements. (CT 42-45; RT A-1 to A14) The remaining count was dismissed. (CT 43; RT A-21) The prosecution also moved to dismiss the strike and section 667, subdivision (a) enhancements. (CT 45; RT A-20) Appellant was sentenced to a prison term of five years, the execution of which was suspended, and he was placed on five years of formal probation. (CT 43) The suspended sentence was based on the upper term of three years for attempting to burn a structure, plus one year for each of the two prior prison terms. (CT 43; RT A-14) Appellant did not appeal.

On August 13, 2018, a probation report alleged that appellant failed to comply with the terms of his probation and recommended that probation be revoked. (CT 54-55) On August 17, 2018, probation was revoked, and a bench warrant was

issued. (CT 56; RT B-1) On September 24, 2018, the matter was continued pending receipt of a supplemental probation report. (CT 60) A supplemental probation report was filed on October 10, 2018, recommending probation be reinstated. (CT 61, 62-66) On October 30, 2018, the prosecution moved to revoke probation. (CT 67-98)

On November 15, 2018, the trial found that appellant had violated probation, revoked probation, and ordered that he serve the previously suspended sentence of five years in state prison. (CT 100-101, 102) Appellant was awarded 95 days of actual presentence credit and 94 days of conduct credit. (CT 101, 102) Appellant filed a timely notice of appeal. (CT 103)

While appellant's appeal was pending, the Legislature amended section 667.5, subdivision (b), significantly reducing the scope of its application. Appellant thus sought the benefit of SB 136 in the context of his appeal from the revocation of probation. (Slip Op. pp. 12-13.) On March 26, 2020, the Court of Appeal affirmed the sentence. (Slip Op. pp. 12-18.)

This Court granted review on August 12, 2020.

STATEMENT OF FACTS

As the facts surrounding appellant's conviction and probation violation are not relevant to the issue for which this Court has granted review, they are only briefly summarized.

UNDERLYING OFFENSE AND ENHANCEMENTS.

On August 7, 2015, appellant poured lighter fluid on the front door of an apartment and on a truck belonging to two victims who had no prior relationship with appellant. Appellant was arrested at the scene and appeared to be intoxicated. (CT 1-25 [transcript of preliminary hearing].)

PROBATION VIOLATION.

While on probation, appellant was arrested for providing false information to a police officer, driving without a license, and theft. (CT 62-63) He was also convicted of domestic violence (§ 243, subd. (e)) (CT 68) and had multiple arrests for violating post-release community supervision in another case. (CT 62-63)

ARGUMENT

I. FOR PURPOSES OF RETROACTIVELY APPLYING AMELIORATIVE LEGISLATION, A PROBATION CASE IS NOT FINAL UNTIL PROBATION ENDS OR THE SENTENCE IS ORDERED TO BE SERVED.

The Court of Appeal here correctly assumed that SB 136 applies retroactively to all cases that are not final on the date the legislation was enacted. The court, however, erred in finding that SB 136 did not apply to appellant's case upon revocation of

probation. The court erred, because petitioner's case was not final until probation was revoked, and the sentence executed.

A. **Standard Of Review.**

Whether a sentence is final under *Estrada* is subject to *de novo* review. (See *People v. Arroyo* (2016) 62 Cal.4th 589, 593.)

B. **SB 136 Applies Retroactively To All Cases Not Yet Final On Its Effective Date.**

At the time of appellant's 2015 plea, and where a new felony prison sentence is imposed, former section 667.5, subdivision (b), required the trial court to impose a:

> [O]ne-year term for each prior separate prison term, provided that no additional term shall be imposed under this subdivision for any prison term prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody or the imposition of a term of jail custody imposed under subdivision (h) of Section 1170 or any felony sentence that is not suspended.

On October 8, 2019, however, SB 136 was signed into law, amending section 667.5, subdivision (b). (Sen. Bill No. 136 (2019-2020 Reg. Sess.) § 1, effective Jan. 1, 2020).) The sentence enhancement now applies only if the prior prison term was served for a "sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." (§ 667.5, subd. (b).) For defendants with prior prison terms that were not served for a "sexually violent" offense, the one-year enhancement no longer applies.

None of appellant's prior prison terms were served for the violation of a "sexually violent offense." His prior prison terms were based, instead, on violations of section 245, subdivision (a)(2) (assault with a firearm), and section 12021, subdivision (a)(1) (unlawful firearm possession). (See CT 36; compare Welf. & Inst. Code, § 6600, sub. (b) [listing sexually violent offenses].)

Under *Estrada*, a court must assume, absent clear evidence to the contrary, that the Legislature intended sentence ameliorating legislation to apply to all defendants whose judgments are not yet final at the time of its passage. (*In re Estrada*, *supra*, 63 Cal.2d 740, 742; *People v. McKenzie*, *supra*, 9 Cal.5th 40, 44-45.) "[A]bsent a saving clause, a criminal defendant is entitled to the benefit of a change in the law during the pendency of his appeal." *(People v. Babylon* (1985) 39 Cal.3d 719, 722.) The *Estrada* rule applies regardless of whether a statutory amendment reduces or completely eliminates a penal sanction. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 45; *People v. Rossi* (1976) 18 Cal.3d 295, 301.)

There is no savings clause or other indication that SB 136 was not intended to apply to all non-final cases under *Estrada.* The Court of Appeal here thus assumed, and appellant and Respondent agreed, that SB 136 applies retroactively to all cases not yet final on appeal. (Slip Op. at p. 13.) Numerous lower courts have reached the same conclusion. (*People v. Winn* (2020) 44 Cal.App.5th 859, 871-873; *People v. Bermudez* (2020) 45 Cal.App.5th 358, 378; *People v. Matthews* (2020) 47 Cal.App.5th 857, 864-865; *People v. Lopez* (2019) 42 Cal.App.5th 337.)

Accordingly, this Court should similarly hold that SB 136 applies retroactively to all cases not reduced to a final judgment at the time of its enactment.

C. This Court's Recent Decision In *People v. McKenzie* Demonstrates That An Order Granting Probation Is Not A Final Judgment For Purposes Of *Estrada* Retroactivity.

The key date for purposes of applying ameliorative legislation under *Estrada* is the date of "'final judgment.'" (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 44 ["'If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then .... it, and not the old statute in effect when the prohibited act was committed, applies.'"]; *People v. Rossi*, *supra*, 18 Cal.3d 295, 304 [the *Estrada* rule "'applies to any such proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it.'"].) A judgment generally becomes final under *Estrada* once the availability of an appeal is exhausted and the time for the filing of a petition for certiorari has expired. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 45; *People v. Vieira* (2005) 35 Cal.4th 264, 306; *People v. Kemp* (1974) 10 Cal.3d 611, 614.)

This Court recently held, in *People v. McKenzie*, *supra*, 9 Cal.5th 40, that where the trial court suspends *both* the imposition and execution of sentence ("imposition of sentence suspended" or "ISS" probation), the defendant can take advantage of ameliorative legislation during the pendency of an appeal from the subsequent revocation of probation. Here, in

contrast, the trial court imposed but suspended the execution of the sentence and placed appellant on probation ("execution of sentence suspended" or "ESS" probation). The reasoning of *McKenzie*, however, and the precedents on which it relied, demonstrate that an order granting probation is not a final judgment under *Estrada*, regardless of whether ISS or ESS probation is ordered.

In *McKenzie*, the defendant pleaded guilty to various offenses and enhancements, and the trial court placed him on ISS probation. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 43.) The trial court later revoked probation and imposed a sentence that included "four three-year prior drug conviction enhancements under former [Health and Safety Code] section 11370.2, subdivision (c)." (*Ibid.*) The defendant appealed, and while his appeal was pending, the governor signed Senate Bill No. 180 (2017-2018 Reg. Sess.) ("SB 180"). (*Ibid.*) SB 180 amended section 11370.2, such that the defendant's prior convictions no longer qualified for the sentence enhancement. (*Ibid.*) Analyzing finality in the context of ISS probation, this Court held that a case is not final under *Estrada* until the ability to appeal the order revoking probation has expired. (*Id.* at pp. 44-52.) This Court thus affirmed the order of the Court of Appeal, remanding to the trial court to strike the sentence enhancements. (*Ibid.*)

Reaching this conclusion, this Court rejected the Attorney General's reliance on section 1237, subdivision (a), which provides that an "'an order granting probation … shall be deemed to be a final judgment.'" (*People v. McKenzie*, *supra*, 9 Cal.5th 40,

46-47.) Based on this language, the Attorney General argued that section 1237 was dispositive of finality under *Estrada*. (*Id.* at p. 46.) This Court concluded, however, that finality under *Estrada* should not be conflated with finality under section 1237, subdivision (a). (*Ibid.*; see *People v. Superior Court* (*Giron*) (1974) 11 Cal.3d 793, 796 [under section 1237, an order granting probation "is 'deemed to be a final judgment' for the limited purpose of taking an appeal therefrom" and "does not have the effect of a judgment for other purposes."]; *People v. Flores* (1974) 12 Cal.3d 85, 94-95 [accord].)

Instead, the "relevant cut-off point under *Estrada* for applying ameliorative amendments is the date the 'judgment of conviction becomes final.'" (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 46.) The "phrase 'judgment of conviction'" does not refer "only to 'underlying' convictions and enhancement findings, exclusive of sentence." (*Ibid.*) "In criminal actions, the terms 'judgment' and ' "sentence" ' are generally considered 'synonymous' [Citation], and there is no 'judgment of conviction' without a sentence." (*Ibid.*) *Estrada* thus referred to "the cut-off point for application of ameliorative amendments as the date when the 'case[ ],' [Citation] or 'prosecution[ ]' is 'reduced to a final judgment.'" (*Ibid.*) Accordingly, if legislation is enacted while an appeal from the revocation of probation is pending, it "cannot be said that [the] criminal prosecution or proceeding concluded before the ameliorative legislation took effect." (*Ibid.*)

Even more importantly in the context of the instant case, however, this Court observed that the above conclusion was

consistent with the reasoning of *People v. Chavez*, *supra*, 4 Cal.5th 771. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 46-47.) In *Chavez*, the defendant completed probation and then, four years later, sought to have the action dismissed under section 1385. (*People v. Chavez*, *supra*, 4 Cal.5th 771, 777.) This Court held that the trial court lacked "the power to dismiss" after the defendant "completed his probation," because there was no longer an action to dismiss. (*Ibid.*)

Chavez, however, and as relevant here, "expressly rejected the argument" that a "'criminal action terminates' when 'the court orders a grant of probation.'" (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 47.) Instead, the "'criminal action' — and thus the trial court's jurisdiction to impose a final judgment — 'continues into and throughout the period of probation' and expires only 'when th[e] [probation] period ends.' [Citation.]" (*Ibid.* [Modifications in Original.].)

Reaching this conclusion, this Court observed that "neither forms of probation – suspension of the imposition of sentence [ISS probation] or suspension of the execution of sentence [ESS probation] – results in a final judgment." (*People v. Chavez*, *supra*, 4 Cal.5th 771, 781.) When ISS probation is ordered, the court "pronounces no judgment at all, and a defendant is placed on probation with 'no judgment pending against [him].'" (*Ibid.*) When ESS probation is ordered, "the sentence constitutes 'a judgment provisional or conditional in nature.'" (*Ibid.*) Therefore, for *both* ISS and ESS probation, the "finality of the sentence 'depends on the outcome of the probationary proceeding'

and ‘is not a final judgment’ at the imposition of sentence and order to probation.” (*Ibid.*) “Instead of a final judgment, the grant of probation opens the door to two separate phases for the probationer: the period of probation and the time thereafter.” (*Ibid.*)

As this Court explained, ISS and ESS probation orders are not final judgments because “[d]uring the probation period,” the trial court “retains the power to revoke probation and sentence the defendant to imprisonment.” (*People v. Chavez*, *supra*, 4 Cal.5th 771, 782.) The trial court also has the discretion to modify the terms of probation. (*Ibid.*) Specifically, pursuant to section 1203.3, subdivision (a), “[t]he court shall have authority *at any time during the term of probation* to revoke, modify, or change its order of suspension of imposition or execution of sentence.” (Emphasis Added.) Further, pursuant to section 1203.2, subdivision (c), “the court may decide to revoke release, terminate probation, and order that the person be delivered to custody.” (*People v. Chavez*, *supra*, 4 Cal.5th 771, 782.) Thus, “the court’s power to punish the defendant, including by imposing imprisonment, continues during the period of probation.” (*Ibid.*)

“Once probation ends, however, a court’s power is significantly attenuated. Its power to impose a sentence over the defendant ceases entirely—a result embodying the ideal that a court may not dangle the threat of punishment over a former probationer indefinitely.” (*People v. Chavez*, *supra*, 4 Cal.5th 771, 782.) “What is more, the court at that point may no longer revoke or modify its order granting probation.” (*Ibid.*) “In particular,

the court cannot extend the term of probation, change its conditions, or otherwise subject the defendant to punishment in lieu of the successfully completed probation." (*Id.* at p. 783.)

Chavez thus "confirm[ed] that a criminal proceeding ends only once probation ends if no judgment has issued in the case." (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 47.) *Chavez* is thus consistent with prior decisions distinguishing section 1237 finality from finality for other purposes, including *Estrada*. (*Id.* at pp. 47-48; see *People v. Superior Court (Giron)*, *supra*, 11 Cal.3d 793, 796; *People v. Flores*, *supra*, 12 Cal.3d 85, 94.)

This Court thus rejected the argument that, "because defendant failed to appeal from the order granting probation he may not benefit from ameliorative amendments that took effect long after the time for taking an appeal from that order lapsed." (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 48.)

> This reading of *Estrada* is consistent with the "consideration of paramount importance" we identified in that decision: the "inevitable inference" that the Legislature, having "determined that its former penalty was too severe," "must have intended" that the ameliorative statutory change "should apply to every case to which it constitutionally could apply." [Citation.] A contrary conclusion, we explained, would " 'serve no purpose other than to satisfy a desire for vengeance,' " and would have to rest on the impermissible view "that the Legislature was motivated by [such] a desire." [Citation.]

(*Ibid.*, citing *In re Estrada*, *supra*, 63 Cal.2d 740, 744-745.)

As this Court's discussion of and reliance on *Chavez* demonstrates, the outcome in the *McKenzie* case did not turn on the fact that the trial court ordered ISS probation versus ESS

probation.[4] Instead, the result in *McKenzie* is based on a far more straightforward proposition: that a grant of probation is not a final order under *Estrada* because the trial court retains the discretion to modify the terms of probation and/or to order the defendant to serve the sentence during the probationary term. By parity of reasoning, where the trial court imposes ESS probation, the case is not final "simply because [the defendant] can no longer appeal from the original order granting probation." (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 51.)

Following *McKenzie*, several lower courts have interpreted its reasoning to apply where the sentence is *imposed but its execution was suspended* pending probation or mandatory supervision. (*People v. Lopez* (Nov. 13, 2020, No. H046618) __ Cal.App.5th [2020 WL 6704165] [where execution of sentence is suspended and defendant is placed on mandatory supervision, the judgment is not final under *Estrada* until time to appeal revocation of supervision has expired]; *People v. Contreraz* (2020) 53 Cal.App.5th 965, 971, review granted November 10, 2020, S264638 [defendant could seek the retroactive benefit of ameliorative legislation on appeal from the revocation of ESS probation.]; *People v. Diaz Martinez* (2020) 54 Cal.App.5th 59, review granted November 10, 2020, S262551 [a "split sentence" under section 1170, subd. (h)(5) was not a final judgment for

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[4] Notably, the Court of Appeal in *McKenzie* suggested that the result would have been different if the trial court had initially imposed ESS probation, rather than ISS. (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1218.) This Court, however, did not adopt the lower court's reasoning on that point.

purposes of retroactively applying SB 136, where the court imposed but suspended portion of sentence pending completion of mandatory supervision]; *People v. Conatser* (2020) 53 Cal.App.5th 1223, review granted November 10, 2020, S264721 [a "split sentence" was not a final judgment for purposes of retroactively applying SB 180].)[5]

The reasoning of the Court of Appeal here is directly counter to *McKenzie* and *Chavez*. First, the Court of Appeal appears to have incorrectly conflated finality under section 1237, subdivision (a), with finality under *Estrada*. (Slip Op. pp. 13-14.) This Court rejected the same contention in *McKenzie*. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 46; see also *People v. Lopez* (Oct. 29, 2020, A158840) __ Cal.App.5th __ [2020 WL 6336140, at *6] ["*McKenzie* indicates that finality is not a binary concept and judgments can be final for some purposes but not others."].)

Second, the Court of Appeal erroneously distinguished *McKenzie*, finding it dispositive that the trial court there ordered ISS probation rather than ESS. (Slip Op. pp. 15-16.) As discussed, *supra*, *McKenzie*'*s* reliance on *Chavez* demonstrates that, for purposes of the *Estrada* rule, "neither forms of probation—suspension of the imposition of sentence [ISS] or suspension of the execution of sentence [ESS] —results in a final judgment." (*People v. Chavez*, *supra*, 4 Cal.5th 771, 781.)

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[5] This Court granted review in *Contreraz*, *Diaz Martinez*, and *Conatser*, but deferred further action pending consideration and disposition of the related issue in the instant case.

Accordingly, appellant's case was not final and he is entitled to the retroactive benefit of SB 136 in the context of his appeal from the revocation of ESS probation.

D. **Public Policy Supports The Retroactive Application Of SB 136 In The Context Of An Appeal From The Revocation Of ESS Probation.**

Also relevant to the resolution of the issue presented here, this Court in *McKenzie* rejected several policy arguments advanced by the Attorney General to argue that a probation case should be deemed final under *Estrada* once the ability to appeal the order granting probation has expired. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 48-49.) This Court's reasoning in *McKenzie* is equally applicable in the context of the SB 136.

Specifically, in *McKenzie*, the Attorney General argued that "precluding probationers like defendant from taking advantage of ameliorative statutory revisions that become effective after expiration of the time for direct appeal from an order granting probation would be 'consistent with the public's interest in finality, an interest that the Legislature would not intend to implicitly undercut by reducing a penalty.'" (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 48.) The Attorney General further argued that applying ameliorative legislation upon revocation of probation would produce "'absurd results,'" in that probationers who do not violate probation would be worse off. (*Ibid.*) Defendants, therefore, might violate probation to take advantage of new legislation, which would "make trial courts 'reluctant to

extend probation and give defendants additional opportunities to achieve rehabilitation.'" (*Ibid.*)

This Court, however, noted that it had "rejected similar arguments in *Estrada*" when it "adopted the existing rule and disapproved a previous decision holding that 'the punishment in effect when the act was committed' applies notwithstanding a subsequently enacted ameliorative revision." (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 49.) "These policy arguments did not persuade us in *Estrada* not to apply ameliorative revisions to defendants who have already committed criminal acts *if* the revisions take effect *before* their 'cases' are 'reduced to final judgment.'" (*Ibid.* [Emphasis in Original.].) "The People's similar arguments are no more persuasive today, more than 50 years later, in the context of determining whether *Estrada*'s rule includes defendants who are, when ameliorative statutory revisions take effect, appealing from a judgment entered upon revocation of probation." (*Ibid.*) "Indeed, we find it highly doubtful that a probationer would, as the People suggest, violate probation — and face probation revocation and imprisonment — simply in the hope that (1) the court would extend probation notwithstanding the violation, *and* (2) the Legislature would enact some ameliorative statute during the extended probationary term." (*Ibid.* [Emphasis in Original.].) Moreover, the People's concerns about the difficulties of a retrial were not implicated because the "trial court may simply strike the affected enhancements and modify defendant's sentence accordingly." (*Id.* at p. 49, fn. 2.)

This Court also rejected the argument that "probationers who do not file a timely appeal from an order granting probation 'cannot challenge the order or the underlying determination of guilt through a later appeal.'" (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 50.) As this Court explained:

> The legal principle associated with this argument provides that when a court suspends imposition of sentence and grants probation, the defendant's failure to appeal from the order granting probation generally "estops" the defendant "from claiming error *with respect to matters occurring before that order*," but not as to "proceedings in connection with the revocation of probation and sentencing." [Citation.] In other words, it 'merely forecloses action based on errors committed at the trial. [Citation.]

(*Ibid.* [Emphasis in Original.].)

Asserting the benefit of newly enacted ameliorative legislation, in contrast, does not require the defendant to claim an error that occurred prior to the trial court ordering probation. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 50.) Instead, the defendant raises an issue based on events that "occurred long after the court ordered probation *and* the time for direct appeal lapsed." (*Ibid.* [Emphasis in Original.].) The defendant, therefore, "*could not* have raised [the] issue during a direct appeal from the probation order." (*Ibid.* [Emphasis in Original.].) "Under these circumstances," the "failure to file such a direct appeal does not preclude him from taking advantage of ameliorative amendments that took effect while he was appealing from the subsequent revocation of his probation and imposition of sentence." (*Ibid.*)

This Court also found "no basis to conclude that the Legislature intended the old statute imposing punishment [SB 180] to apply to those on probation simply because they may no longer appeal from orders granting probation as to which there was no ground for appeal." (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 51.) In contrast, an "amendment eliminating criminal sanctions is [itself] a sufficient declaration of the Legislature's intent to bar all punishment for the conduct so decriminalized.' [Citation.]" (*Ibid.* [Modifications in Original.].)

Finally, this Court considered whether the legislative history behind SB 180 revealed "additional 'factors that indicate the Legislature must have intended that the amendatory statute should operate in' cases like this one." (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 51.) SB 180 was enacted to correct for the "'extreme punishment'" resulting from the sentence enhancement for prior drug convictions. (*Ibid.*) The legislative history further revealed that the enhancement for prior drug convictions not only failed to protect communities from drugs, it also had several negative effects, including 1) overcrowding of jails and prisons; 2) diverting money from community-based programs and services while harming state and local budgets, and 3) disproportionately harming low-income communities, and communities of color. (*Ibid.*) "In view of these stated concerns and goals," this Court found "no basis to conclude the Legislature intended to exclude those on probation simply because they can no longer appeal from the original order granting probation." (*Ibid.*)

Like the legislation in *McKenzie* (SB 180), SB 136 was enacted to alleviate the harm caused by an "ineffective" sentence enhancement and to "reduce prison and jail populations." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 136 (2019-2020 Reg. Sess.) pp. 2-3.)[6] The author of SB 136 noted that the "costly and ineffective" sentence enhancement "re-punishes people for previous jail or prison time served instead of the actual crime when convicted of a non-violent felony." (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business of Sen. Bill No. 136 (2019-2020 Reg. Sess.) p. 2.) "By ignoring the actual offense committed, this enhancement exacerbates existing racial and socio-economic disparities in our criminal justice system." (*Ibid.*) "Additionally, wide-spread research refutes the underlying premise that arbitrary enhancements increase public safety or deter future crime." (*Id.* at p. 3.) SB 136 was also expected to "save California tax payers tens of millions dollars each year," "keep families together, redirect funds to evidence-based rehabilitation and reintegration programs, and move California away from our failed mass incarceration policies." (*Ibid.*)

The legislative intent behind SB 136 is nearly identical to the ameliorative legislation in *McKenzie*. (See *People v. McKenzie*, *supra*, 9 Cal.5th 40, 51.) Accordingly, there is similarly "no basis to conclude the Legislature intended to

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[6] The legislative history documents cited herein are the subject of the accompanying Motion for Judicial Notice.

exclude those on probation simply because they can no longer appeal from the original order granting probation." (*Ibid.*)

E. The Inability To Modify A Suspended Sentence Upon Revocation of ESS Probation Does Not Render A Case Final For Purposes Of *Estrada*.

In *People v. Howard* (1997) 16 Cal.4th 1081, this Court held that a trial court lacks jurisdiction to modify a previously imposed but suspended sentence once probation is revoked. Reaching this conclusion, this Court distinguished ISS and ESS probation cases. (*Id.* at p. 1084.) Specifically, in the ESS probation context, if the defendant does not appeal the initial probationary sentence, "but instead commences a probation period reflecting acceptance of that sentence, then the court lacks the power, at the precommitment stage (see § 1170, subd. (d)), to reduce the imposed sentence once it revokes probation." (*Ibid.*)

Howard's holding is inapposite to the issue here because, like section 1237, it does not address finality under *Estrada*. (See *People v. McKenzie*, *supra*, 9 Cal.5th 40, 46-47 [finality under section 1237, subd. (a) should not be conflated with finality under *Estrada*]; *People v. Lopez*, *supra*, __ Cal.App.5th __ [2020 WL 6336140, at *6] [*"McKenzie* indicates that finality is not a binary concept and judgments can be final for some purposes but not others."].) Instead, *Howard* analyzed the trial court's ability to modify a previously imposed but suspended sentence based solely on its statutory authority. (See *People v. Howard*, *supra*, 16 Cal.4th 1081, 1086-1095; see §§ 1203, subd. (a), 1203.1, subd. (a), 1203.2, subd. (c), 1203.3, subd. (a).) The distinction drawn

between ISS and ESS probation in *Howard*, therefore, was unrelated to finality under *Estrada*. And as discussed, *supra*, *McKenzie* demonstrates, through its reliance on *Chavez*, that neither ISS nor ESS sentences are final under *Estrada*.

Accordingly, *Howard's* holding regarding the inability to modify an ESS sentence upon revocation of probation should not be conflated with finality under *Estrada*.

F. The Court of Appeal's Reliance On *Scott* And *Ramirez* Is Misplaced.

In addition to erroneously relying on the concept of finality in section 1237, subdivision (a), and ignoring the reasoning of *McKenzie* and *Chavez* regarding *Estrada* finality, the Court of Appeal found that appellant's case was already final based on *People v. Scott* (2014) 58 Cal.4th 1415 and *People v. Ramirez* (2008) 159 Cal.App.4th 1412. (Slip Op. pp. 14-15.) The Court of Appeal's reliance on *Scott* and *Ramirez* is misplaced.

The defendant in *Scott* was charged in 2009 with drug offenses and a prior conviction enhancement. (*People v. Scott*, *supra*, 58 Cal.4th 1415, 1420.) He pleaded guilty to one count and admitted the prior conviction. (*Ibid.*) The trial court imposed a seven-year prison sentence, suspended its execution, and ordered the defendant to serve three years of ESS probation. (*Ibid.*) In December 2011, the court revoked probation and executed the previously suspended sentence. (*Ibid.*)

In 2011, however, "the Legislature enacted and amended the Criminal Justice Realignment Act of 2011 addressing public safety (Stats.2011, ch. 15, § 1; Stats.2011, 1st Ex.Sess. 2011–

2012, ch. 12, § 1 (the Realignment Act or the Act)).” (*People v. Scott*, *supra*, 58 Cal.4th 1415, 1418.) The Realignment Act provides that defendants convicted of certain felonies, and “sentenced” after October 1, 2011, can “serve their sentences either entirely in county jail or partly in county jail and partly under the mandatory supervision of the county probation officer.” (*Id.* at pp. 1418-1419.) The trial court in *Scott* reasoned that the decision whether to reinstate probation was “‘essentially a sentencing proceeding’” occurring after the effective date of the Realignment Act, and thus ordered the defendant to serve his sentence in county jail. (*Id.* at p. 1420.)

After the appellate court affirmed, this Court granted review. (*People v. Scott*, *supra*, 58 Cal.4th 1415, 1418, 1421.) The issue before this Court, therefore, was:

> [T]he applicability of the Realignment Act to the category of defendants who, prior to October 1, 2011, have had a state prison sentence imposed with execution of the sentence suspended pending successful completion of a term of probation, and who, after October 1, 2011, have their probation revoked and are ordered to serve their previously imposed term of incarceration.

(*Id.* at p. 1419.) In that context, this Court held that “the Realignment Act is not applicable to defendants whose state prison sentences were imposed and suspended prior to October 1, 2011.” (*Ibid.*)

The Court of Appeal here reasoned that *Scott* thus stands for the proposition that, where ESS probation is granted, the order granting probation is final under *Estrada*. (Slip Op. at pp. 14-16.) The result in *Scott*, however, was not based on the

concept of finality under *Estrada*. Instead, this Court relied on the word "sentenced" in section 1170, subdivision (h)(6). (*People v. Scott*, *supra*, 58 Cal.4th 1415, 1421.) Interpreting that specific statutory term, this Court held that "the statutory provisions and case law existing at the time of the Legislature's enactment of section 1170(h)(6) in 2011 established that a defendant is 'sentenced' when a judgment imposing punishment is pronounced even if execution of the sentence is then suspended." (*Id.* at p. 1423.) "A defendant is not sentenced again when the trial court lifts the suspension of the sentence and orders the previously imposed sentence to be executed." (*Ibid.*)

"It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.) This Court in *Scott* did not mention *Estrada.* Accordingly, because *Scott* only addressed whether a defendant has been "sentenced," and not finality under *Estrada*, it is inapposite to this case. (See *People v. Diaz Martinez*, *supra*, 54 Cal.App.5th 59, review granted November 10, 2020, S262551 [rejecting the reliance on *Scott* in determining whether a split sentence under the Realignment Act was final under *Estrada*, where a portion of the imposed sentence was suspended while the defendant was released under mandatory supervision.].)

Moreover, finality under *Estrada* was not relevant in *Scott* because the Realignment Act included a savings clause that expressly provided that it would only apply "'prospectively'" to cases in which the defendant was "sentenced" after the effective date. (*People v. Scott*, *supra*, 58 Cal.4th 1415, 1421.) This Court

thus concluded that the term "sentenced" does not encompass proceedings occurring after the sentence was imposed, regardless of whether the sentence was suspended. (*Id.* at p. 1426.) The reason for the savings clause, and the corresponding intent that the Realignment Act only apply prospectively, thus distinguishes it from SB 136.

Specifically, a realignment sentence has multiple components, including split sentences, mandatory supervision, and possibly home detention. (See § 1170, subd. (h); *People v. Scott*, *supra*, 58 Cal.4th 1415, 1418-1419.) It thus makes sense for the Legislature to have intended to limit the applicability of the Realignment Act to defendants who had not yet been "sentenced" on the effective date, regardless of whether their case was otherwise "final."

SB 136, in contrast, is relatively straightforward to apply retroactively: If the enhancement under section 667.5, subdivision (b), no longer applies because the prison term was not served for a sexually violent offense, the court must strike the enhancement. Thus, as this Court observed in the context of similar ameliorative legislation in *McKenzie*, and unlike in *Scott,* there is "no basis to conclude the Legislature intended to exclude those on probation [from the benefit of SB 136] simply because they can no longer appeal from the original order granting probation." (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 51.) Accordingly, the Court of Appeal's reliance on *Scott* is misplaced.

The Court of Appeal's reliance on *People v. Ramirez*, *supra*, 159 Cal.App.4th 1412, is similarly misplaced. There, the trial

court placed the defendant on ESS probation. (*Id.* at p. 1418.) The defendant later violated probation and the parties agreed to a negotiated disposition to continue probation while also increasing the suspended sentence by one year. (*Id.* at pp. 1418-1419.) The defendant did not appeal. Probation was later revoked, and the defendant appealed at that time, challenging the increase to the previously suspended sentence. (*Id.* at pp. 1419-1420.) The Court of Appeal held the defendant could not challenge the sentence because he did not appeal the increased sentence when it was first imposed. (*Id.* at pp. 1427-1429.)

Ramirez is inapposite to this case because appellant is not claiming error related to the imposition of the sentence at the time probation was ordered or reinstated. "Instead, he raises an issue relating to the [2018] 'revocation of probation and sentencing' [citation], based on an event—the [enactment of SB 136]—that occurred long after the court ordered probation *and* the time for direct appeal lapsed." (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 50 [Emphasis in Original.].) As in *McKenzie*, appellant "*could not* have raised this issue during a direct appeal from the probation order." (*Ibid.* [Emphasis in Original.].) Thus, appellant's "failure to file such a direct appeal does not preclude him from taking advantage of ameliorative amendments that took effect while he was appealing from the subsequent revocation of his probation and [execution] of sentence." (*Ibid.*; see *People v. Diaz Martinez*, *supra*, 54 Cal.App.5th 59, review granted November 10, 2020, S262551 [defendant could take advantage of SB 136 upon revocation of supervision under

Realignment Act]; see also *People v. Lopez*, *supra*, __ Cal.App.5th __ [2020 WL 6336140, at *6] ["*McKenzie* shows" this Court's "willingness to allow defendants to take advantage of ameliorative legislation that occurs after their first opportunity for post-conviction review."].)

Accordingly, neither *Scott* nor *Ramirez* have any application to the instant case. This Court should instead apply the reasoning of *McKenzie* and *Chavez*, discussed *supra*, to hold that an order of probation is not a final judgment under *Estrada*, even if the sentence is imposed but suspended.

G. **Remedy.**[7]

The remedy in *McKenzie* was to simply strike the invalidated sentence enhancements. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 43-44, 52.) However, while the defendant in *McKenzie* pleaded guilty and admitted the relevant sentence enhancements, his plea was apparently not conditioned on a specific sentence, as the trial court suspended imposition of sentence. (See *People v. McKenzie*, *supra*, 9 Cal.5th 40, 43.) Here, in contrast, appellant's guilty plea, and his admission of the now invalidated sentence enhancements, was premised on a specific suspended sentence of five years. (RT A-1 to A-21)

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[7] To the extent this Court holds that SB 136 applies retroactively to this case, appellant submits that the determination of the appropriate remedy on remand, and its impact on the plea agreement in this case, is an issue that is "fairly included" in the issue for which this Court granted review. (Cal. Rules of Court, rules 8.516 and 8.520(b)(3).)

This Court recently observed, in *People v. Stamps* (2020) 9 Cal.5th 685, 700-709, that "[t]he *Estrada* rule only answers the question of *whether* an amended statute should be applied retroactively. It does not answer the question of *how* that statute should be applied." (*Id.* at p. 700 [Emphasis in Original.].) This Court thus addressed the proper remedy where a defendant, whose sentence was based on a plea agreement, seeks retroactive application of *discretionary* ameliorative legislation. Specifically, the defendant in *Stamps* sought the benefit of Senate Bill No. 1393 (2017-2018 Reg. Sess.) ("SB 1393"), which grants *discretion* to dismiss a serious felony enhancement (§ 667, subd. (a)) in the furtherance of justice. (*Id.* at p. 693.)

In that context, this Court observed that if the trial court exercises its *discretion* to modify the sentence, "such a determination would have consequences to the plea agreement." (*People v. Stamps*, *supra*, 9 Cal.5th 685, 707.) This is because "the court is not authorized to unilaterally modify the plea agreement by striking the serious felony enhancement but otherwise keeping the remainder of the bargain." (*Ibid.*) Therefore, if the trial court exercised its discretion to dismiss the enhancement on remand, two possibilities existed. First, the parties could "modify the bargain to reflect the downward departure in the sentence." (*Ibid.*) Second, the trial court could "withdraw its prior approval of the plea agreement." (*Id.* at p. 708.) Considering these possible outcomes, it was "ultimately defendant's choice whether he wishes to seek relief..." (*Ibid.*)

Stamps is inapposite to the remedy in this case because SB 136 does not involve an exercise of discretion by the trial court, it simply invalidates a portion of appellant's sentence. Therefore, while the previously suspended sentence was part of the plea agreement, the remedy here should be, as in *McKenzie*, to simply strike the now unauthorized enhancements. Alternatively, if the non-discretionary application of SB 136 fatally undermines the plea agreement, the appropriate remedy is to remand so that the trial court can strike the enhancements, *and* either 1) modify the plea agreement to reflect the modified sentence, 2) permit the prosecution to reinstate previously dismissed charges or enhancements, while limiting appellant's sentencing exposure to what was contemplated in the original agreement (five years).

1. This Court Should Remand To The Trial Court To Simply Strike The Prison Term Enhancements.

Stamps does not address the remedial question in this case. The legislation at issue in *Stamps*, SB 1393, did not narrow the scope of a sentence enhancement so as to render the defendant's sentence unauthorized. Instead, SB 1393 merely provided the trial court with discretion to dismiss the relevant enhancement. This is an incredibly important distinction because the reasoning in *Stamps* centered on the trial court's inability, under "long-standing law," to "unilaterally" modify an agreed-upon sentence by exercising its *discretion* to strike sentencing enhancements. (See *People v. Stamps*, *supra*, 9 Cal.5th 685, 701-708.)

No similar concern is presented by the retroactive application of SB 136 because the trial court is not required to exercise any discretion, and thus cannot "unilaterally" modify the agreed upon sentence. Instead, if SB 136 applies to appellant's case, his sentence includes a now voided enhancement and is unauthorized. The trial court must, therefore, strike the enhancements because they are no longer supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 313-324, 99 S.Ct. 2781; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) Put another way, it is the Legislature, not the trial court that dictates the modification of the sentence. The holding of *Stamps*, therefore, is inapposite.

This Court's decision in *Harris v. Superior Court* (2016) 1 Cal.5th 984, however, is instructive. There, the defendant pleaded guilty to felony grand theft and admitted certain enhancements in exchange for the dismissal of a robbery count and a six-year prison term. (*Id.* at pp. 987-988.) The electorate subsequently approved Proposition 47, which "reduced certain nonviolent crimes, including the grand theft from the person conviction in this case, from felonies to misdemeanors." (*Id.* at p. 988.) The defendant petitioned to have his theft conviction reduced to a misdemeanor, and the prosecution argued that they should be permitted to withdraw from the plea. (*Ibid.*)

Rejecting the People's argument, this Court observed that the intent of Proposition 47 was critical to the determination of the proper remedy, because "entering into a plea agreement does not insulate the parties 'from changes in the law that *the*

Legislature has intended to apply to them.' [Citation.]" (*Harris v. Superior Court*, *supra*, 1 Cal.5th 984, 991 [Emphasis in Original.].) Allowing the prosecution to withdraw and reinstate the original charges would make resentencing under Proposition 47 meaningless. (*Id.* at p. 992.) It would also frustrate a primary purpose of Proposition 47, which was to "reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative." (*Ibid.*) This Court further observed that "'the Legislature [or here, the electorate], for the public good and in furtherance of public policy, and subject to the limitations imposed by the federal and state Constitutions, has the authority to modify or invalidate the terms of an agreement.'" (*Ibid.*, citing *Doe v. Harris* (2013) 57 Cal.4th 64, 70.) Accordingly, the prosecution was not entitled to set aside the plea agreement once the defendant's sentence was recalled under Proposition 47. (*Harris v. Superior Court*, *supra*, 1 Cal.5th 984, 993.)

The same reasoning applies to SB 136. As discussed, *supra*, SB 136 was intended to eliminate an ineffective sentence enhancement, to reduce the prison population and save taxpayers' money, and to redirect funds to rehabilitative programming. It is true that SB 136 does not expressly indicate that it applies to all cases, whether resolved by trial or plea. SB 136, however, does not require the trial court to unilaterally modify a plea agreement, as did the legislation in *Stamps*.

More importantly, where SB 136 is applied retroactively to a case that was resolved by plea bargain, the result in most cases

will be, as here, to otherwise require a reduction in the sentence previously agreed upon as part of the plea. If the remedy in *Stamps* applies in this context, the retroactive application of SB 136 will inevitably result in the undoing of plea agreements because neither the defendant nor the trial court have any say in whether the enhancement can still be applied.

For example, in *People v. Hernandez* (2020) 55 Cal.App.5th 942 [2020 WL 6052581], the court found that the remedy in *Stamps* applied in the context of the retroactive application of SB 136. The court, therefore, held that because the trial court "must dismiss the prior prison term enhancements," the parties could either modify the bargain to "reflect the downward departure in the sentence," or the prosecutor and/or trial court could withdraw the plea agreement and restore the original charges. (*Id.* at p. [2020 WL 6052581 *12].) Accordingly, unless the prosecution and court were willing to modify the plea agreement, the defendant would be exposed to a longer sentence.

Unwinding plea agreements in this manner would directly frustrate the intent of SB 136 by exposing defendants to reinstatement of dismissed charges and enhancements, and thus longer sentences. Simply put, the benefits of SB 136 "would not be fully realized if the trial courts and the People could abandon a plea agreement whenever a defendant seeks retroactively to obtain elimination of an enhancement." (*People v. Matthews*, *supra*, 47 Cal.App.5th 857, 869; but see *People v. Hernandez*, *supra*, 55 Cal.App.5th 942 [2020 WL 6052581] [In context of SB 136, the court disagreed with *Matthews*, finding it was counter to

the reasoning of *Stamps*.]; *People v. Barton* (2020) 52 Cal.App.5th 1145, 1150, 1154-1160 [concluding that the reasoning of *Stamps* applies in the context of SB 180.].)

In sum, there is no basis to infer that the Legislature envisioned that the retroactive application of SB 136 to non-final cases would result in the undoing of plea agreements and the exposure of defendants to additional convictions and longer sentences. Accordingly, this Court should order this case to be remanded to the trial court to strike the now unauthorized section 667.5, subdivision (b), enhancements, and preclude the trial court from reconsidering any other aspects of the sentence.

2. If The Application Of SB 136 Fatally Undermines The Plea Agreement, This Court Should Limit The Sentencing Exposure To That Contemplated By The Plea Agreement.

As discussed, *supra*, the appropriate remedy here is to remand to the trial court to strike the sentence enhancements without otherwise disturbing the plea agreement. If, however, this Court finds that striking the sentence enhancements fatally undermines the plea agreement, this Court should order the trial court to strike the enhancements, permit the prosecution to restore any previously dismissed charges or enhancements, and limit appellant's total sentencing exposure to the five year prison term he previously agreed to.

People v. Collins (1978) 21 Cal.3d 208, 216-217, is instructive. There, the defendant pleaded guilty to one count of oral copulation in violation of section 288a. (*Id*. at p. 211.) In return, the prosecution agreed to strike an allegation that he

committed the offense by force, an enhancement for a prior felony conviction, and fourteen additional charges. (*Ibid*.) Following his plea but prior to sentencing, the Legislature amended section 288a to exclude the conduct for which he was alleged to have violated the statute. (*Ibid*.) At sentencing, he objected based on this change in the law, but the court overruled his objection and sentenced him to state prison. (*Ibid*.) The defendant appealed, and this Court reversed his conviction. (*Id.* at pp. 211-212.)

Addressing the remedy, the defendant argued that he should not be required to withdraw or modify the plea bargain, and that this Court should instead "'correct'" the sentence to "'no penalty.'" (*People v. Collins, supra*, 21 Cal.3d 208, 214.) The defendant proposed this remedy to avoid reinstatement of the charges dismissed under the plea agreement. (*Ibid*.) This Court disagreed, however, and directed the trial court to dismiss the conviction because "[a] conviction cannot stand on appeal when it rests upon conduct that is no longer sanctioned." (*Ibid*.)

Turning to the implications of the dismissal on the plea agreement, this Court parsed the roles and expectations of the parties to a plea agreement. (*People v. Collins, supra*, 21 Cal.3d 208, 214.) "When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made." (*Id*. at p. 214.) Thus, the trial court could not impose a judgment contrary to a plea agreement without giving a defendant the opportunity to withdraw from the plea. (*Id*. at pp. 214-215.) When a defendant

withdraws from or succeeds in challenging a guilty plea, the prosecution may also restore dismissed counts. (*Id*. at p. 215.)

Nevertheless, this Court found that the defendant was still entitled to the benefit of his plea bargain. (*People v. Collins, supra*, 21 Cal.3d 208, 216.) "This is not a case in which the defendant has repudiated the bargain by attacking his guilty plea; he attacks only the judgment, and does so on the basis of external events the repeal and reenactment of section 288a that have rendered the judgment insupportable." (*Ibid.* [Footnote Omitted.]) "This court has long recognized that the state has no interest in preserving erroneous judgments [Citation] and that convictions should not rest on noncriminal conduct. Here external events and not defendant's repudiation undermined this plea bargaining agreement." (*Ibid.*)

Accordingly, this Court sought to fashion a remedy that "restores to the state the benefits for which it bargained without depriving defendant of the bargain to which he remains entitled." (*People v. Collins, supra*, 21 Cal.3d 208, 216.) Doing so also avoided the concerns associated with penalizing a defendant for a successful appeal. (*Id*. at pp. 216-217.) Accordingly, this Court ordered that the prosecution could "revive one or more of the dismissed counts," but the defendant's sentence on remand was limited "to not more than three years in state prison, the term of punishment set by the Community Release Board pursuant to the determinate sentencing act." (*Id*. at p. 216.) This disposition "substantially restores the agreement previously negotiated" and "permits the defendant to realize the benefits he derived from the

plea bargaining agreement, while the People also receive approximately that for which they bargained." (*Id.* at p. 217.)

Applying the remedy in *Collins* to this case is consistent with *Stamps*. In *Stamps*, the defendant was faced with a choice of whether to ask the trial court to exercise its discretion to strike a sentence enhancement. (*People v. Stamps*, *supra*, 9 Cal.5th 685, 708.) Here, appellant has no decision to make; he has no benefits or risks to weigh. Because his prior prison term was not served for "a sexually violent offense," the trial court has no discretion to impose the enhancement. (See § 667.5, subd. (b).) SB 136 simply renders the current sentence unauthorized.

Since *Stamps* was decided, however, at least two courts have found that its reasoning governs the remedy even where a non-discretionary change in the law affects a plea bargain. (*People v. Hernandez*, *supra*, 55 Cal.App.5th 942 [2020 WL 6052581] [*Stamps* applies in the context of striking prison-prior enhancements invalidated by SB 136]; *People v. Barton*, *supra*, 52 Cal.App.5th 1145 [*Stamps* applies in the context of striking drug-related prior conviction enhancements invalidated by SB 180].) Both courts concluded that the remedy in *Stamps*, allowing the defendant to seek relief under the new law while also permitting the prosecution or trial court to rescind the plea agreement and reinstate any dismissed charges or enhancements, was appropriate. (*People v. Stamps, supra*, 9 Cal.5th 685, 707; *People v. Hernandez*, *supra*, 55 Cal.App.5th 942 [2020 WL 6052581]; *People v. Barton, supra*, 52 Cal.App.5th 1145, 1159-1160.)

Hernandez, *Barton*, and the instant case, however, are materially different from *Stamps*. The defendants in *Hernandez* and *Barton*, and appellant here, have no choice as to the application of SB 136 or SB 180, because the benefit of the ameliorative legislation is not discretionary. In contrast, the defendant in *Stamps* had a choice to seek the benefit of SB 1393 because the court's authority to strike the enhancement was discretionary. (See *People v. Stamps, supra*, 9 Cal.5th 685, 706-707.) SB 1393 thus did not render the defendant in *Stamps*' sentence unauthorized, whereas the nondiscretionary legislation at issue in *Hernandez*, *Barton*, and in this case does. For this reason, the remedy in *Stamps* simply does not fit. The remedy of *People v. Collins, supra*, 21 Cal.3d 208, 214, 216-217, however, does: strike the enhancement and remand to allow reinstatement of dismissed charges with an exposure limit consistent with what was agreed to in the original plea.

Moreover, in *Hernandez*, the court of appeal found that limiting a defendant's exposure to the time specified in the original plea agreement was a unilateral change to a material term of a plea agreement unauthorized under *Stamps*. (*People v. Hernandez*, *supra*, 55 Cal.App.5th 942 [2020 WL 6052581 at *9.) Similarly in *Barton*, the court found that the parties' plea agreement was unenforceable because SB 180 retroactively rendered unauthorized the sentence upon which the plea was conditioned. (*People v. Barton, supra*, 52 Cal.App.5th 1145, 1159.) It thus found that on remand the trial court must restore the parties to the *status quo ante*: "The parties may then enter

into a new plea agreement, which will be subject to the trial court's approval, or they may proceed to trial on the reinstated charges." (*Ibid*.)

Barton and *Hernandez* thus depart from the reasoning in *People v. Mancheno* (1982) 32 Cal.3d 855, where this Court emphasized the need for flexibility in providing a remedy when there is nonperformance under a plea agreement.

> The goal in providing a remedy for breach of the bargain is to redress the harm caused by the violation without prejudicing either party or curtailing the normal sentencing discretion of the trial judge. The remedy chosen will vary depending on the circumstances of each case. Factors to be considered include who broke the bargain and whether the violation was deliberate or inadvertent, whether circumstances have changed between entry of the plea and the time of sentencing, and whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate. Due process does not compel that a particular remedy be applied in all cases.

(*Id*. at p. 860.)

Finally, Respondent should be estopped from withdrawing from the plea bargain as it relates to the sentencing exposure, because appellant detrimentally relied on the plea bargain. (See *People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1353-1354.) A defendant may show detrimental reliance if he or she performed some part of the agreement. (*Id*. at p. 1355.) In *In re Kenneth H.* (2000) 80 Cal.App.4th 143, 149, for example, the detrimental reliance was found where a minor waived his right to remain

silent and paid $350 to take a polygraph examination in exchange for a plea agreement.

Here, appellant's agreed-upon sentence was executed on November 15, 2018, and he has served the entire time since then in state prison. (CT 100-101, 102) The required application of an amended statute intended to ameliorate appellant's punishment – and over which he has no control – would compel him, under the rationale of *Hernandez* and *Barton*, to face substantially greater punishment than he bargained for in his original plea agreement. (See *People v. Hernandez*, *supra*, 55 Cal.App.5th 942 [2020 WL 6052581 at *9]; *People v. Barton, supra*, 52 Cal.App.5th 1145, 1159.) Vacating the plea and starting anew, therefore, does not put appellant back to the *status quo ante*.

Mancheno establishes the principle of remedial flexibility when there is nonperformance of a plea agreement. (*People v. Mancheno, supra*, 32 Cal.2d 855, 860.) The remedy outlined in *Collins* applies that principle. (*People v. Collins, supra*, 21 Cal.3d 208, 216-217.) Allowing the prosecution to reinstate any dismissed charges or enhancements, while limiting appellant's exposure to the five years he already bargained for, "redress[es] the harm caused by the violation without prejudicing either party or curtailing the normal sentencing discretion of the trial judge." (*People v. Mancheno, supra*, 32 Cal.2d 855, 860.) This remedy is also consistent with appellant's reliance on his plea bargain. (*People v. Rhoden, supra*, 75 Cal.App.4th 1346, 1353-1355.)

Accordingly, if the non-discretionary retroactive application of SB 136 fatally undermines the plea agreement in this case,

this Court should direct the trial court to strike the section 667.5, subdivision (b) enhancements, and either: 1) modify the plea agreement to reflect the reduced sentence; or 2) allow the prosecution to reinstate any dismissed charges and enhancements, but limit appellant's exposure upon resentencing to the five years he bargained for.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Court reverse the holding of the Court of Appeal and remand this case to the trial court to strike the sentence enhancements imposed pursuant to section 667.5, subdivision (b).

DATED: November 23, 2020 Respectfully submitted,

Mark R. Feeser
MARK R. FEESER
Attorney for Appellant

CERTIFICATE OF LENGTH

I, Mark R. Feeser, counsel for Randolph Steven Esquivel, certify pursuant to California Rules of Court, rule 8.520(c), that the word count for this document is 9,962 words. This document was prepared in Microsoft Word, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Luis Obispo, California, on November 23, 2020.

Mark R. Feeser
MARK R. FEESER
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE

People v. Randolph Steven Esquivel
Supreme Court Case No.: S262551

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, employed in the County of San Luis Obispo, and not a party to the within action; my business address is 3940-7174 Broad Street, San Luis Obispo, CA 93401. My electronic service address is mark.r.feeser@gmail.com.

On **November 23, 2020**, I served the following:

APPELLANT'S OPENING BRIEF ON THE MERITS
by placing a true copy in an envelope addressed to each addressee, respectively as follows:

Clerk of the Los Angeles Sup. Court,
The Honorable Jessie I. Rodriguez
Governor George Dukmejian Courthouse
275 Magnolia Avenue
Long Beach, CA 90802

Randolph Steven Esquivel
CDC# BH9729
California Correctional Institute
24900 Highway 202
Tehachapi, CA 93561

Second District Court of Appeal
Division Five
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Each said envelope was sealed and the postage thereon fully prepaid, and then placed for deposit in the United States Postal Service this same day following ordinary business practices.

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On **November 23, 2020**, I transmitted a PDF version of this document by electronic mail to each of the following using the email addresses indicated:

Office of the Attorney General
Los Angeles Office
Los Angeles, CA 90013-1230
docketingLAawt@doj.ca.gov

California Appellate Project
Los Angeles Office
Los Angeles, CA 90071
CAPdocs@lacap.com

Los Angeles District Attorney
Los Angeles, CA 90012
truefiling@da.lacounty.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed **November 23, 2020**, at San Luis Obispo, California.

Mark R. Feeser
MARK R. FEESER