IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DOUGLAS EDWARD MCKENZIE,

Defendant and Appellant.

S251333

Court of Appeal, Fifth Appellate District, No F073942
Madera County Superior Court
Nos. MCR047554, MCR047692, MCR047982

Hon. Ernest LiCalsi, Judge

# APPELLANT'S ANSWER BRIEF ON THE MERITS

ELIZABETH CAMPBELL
Attorney at Law
State Bar No. 166960

PMB 334
3104 O Street
Sacramento, CA 95816
(530) 786-4108
campbell166960@gmail.com
Attorney for Appellant

## TABLE OF CONTENTS

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DOUGLAS EDWARD MCKENZIE,<br><br>Defendant and Appellant. | S251333<br><br>F073942<br><br>Madera County Superior Court Nos. MCR047554 MCR047692 MCR047982 |

**APPELLANT'S ANSWER BRIEF ON THE MERITS**

INTRODUCTION

This court has granted review on the following issue:

*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?*

In the proceedings underlying this appeal, appellant Douglas McKenzie was placed on probation; the court did not impose sentence at that time. At a later date, appellant violated probation, probation was revoked, and the court imposed a state prison sentence. Appellant appealed, and during the pendency of his appeal, legislation was enacted which, if applied to his case, would significantly reduce his prison sentence. The question before this court is whether that ameliorative legislation should apply under these circumstances.

The Court of Appeal agreed with appellant that Senate Bill No. 180, which became effective on January 1, 2018, applies retroactively to this case. The Attorney General urges this court to find that although Senate Bill No. 180 applies retroactively to non-final judgments, appellant was not entitled to relief because the judgment against him was final before the new legislation took effect.

The Attorney General is incorrect, because the order granting probation was not a final order for purposes of determining whether an ameliorative statute applies to this case. A probation order is considered to be a final judgment only for the "limited purpose of taking an appeal therefrom." (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796; *People v. Howard* (1997) 16 Cal.4th 1081, 1087.)

Generally, where an amendatory statute mitigates punishment and there is no saving clause, the amendment will operate retroactively so that the lighter punishment is imposed if the amended statute takes effect before the judgment of conviction becomes final. (*In re Estrada* (1965) 63 Cal.2d 740, 744-748.) This rule arises from an inference that when the Legislature has reduced the punishment for an offense, it has done so based on a determination that the former penalty was too severe. Courts will thus presume that the Legislature must have intended that the new statute imposing the lesser penalty should apply to every case to which it constitutionally could apply. (*People v. DeHoyos* (2018) 4 Cal.5th 594, 600.)

The Court of Appeal in this case, like other courts to consider the issue, concluded that nothing in Senate Bill 180 indicates that the Legislature intended it to apply only prospectively. (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1213, rev. gr. 11/20/18 [S251333], citing Stats. 2017, ch. 677, § 1.) The court thus found that Senate Bill 180 applies retroactively to cases in which the judgment was not yet final on January 1, 2018. (*People v. McKenzie, supra,* 25 Cal.App.5th at p. 1213.) The Court of Appeal determined that the language of Penal Code section 1237 did not confer finality upon the original grant of probation for purposes of *Estrada*, and relying in part on this court's recent holding in *People v. Chavez* (2018) 4 Cal.5th 771, 786, concluded that the judgment in the instant case "is not final, *Estrada* applies, and defendant is entitled to the benefit of Senate Bill No. 180." (*People v. McKenzie, supra*, 25 Cal.App.5th at p. 1218.)

In addition to the instant case, two other recent Court of Appeal decisions have grappled with the specific question of when a case is "final" for purposes of retroactive application of ameliorative statutory amendments. The People rely heavily on the first of these cases, *People v. Superior Court* (*Rodas*) (2017) 10 Cal.App.5th 1316, in which the court held that an ameliorative amendment to Health and Safety Code section 11352 did not apply to a probationer who absconded for many years before filing a motion to withdraw her plea under Penal Code section 1018. The court in *Rodas* held that, because the six-month time limitation in Penal Code section 1018 is jurisdictional, the court had no

authority to grant the motion to withdraw the plea. (*People v. Superior Court, supra*, 10 Cal.App.5th at p. 1324.) The court went on to hold that because the original grant of probation was an appealable order under Penal Code section 1237, and the defendant had not appealed, the judgment of conviction had become final for retroactivity purposes seven years prior to the amendment to Health and Safety Code section 11352. (*People v. Superior Court, supra*, 10 Cal.App.5th at p. 1326.)

The final case to address a parallel issue to the issue presented in the instant case is *People v. Grzymski* (2018) 28 Cal.App.5th 799, rev. gr. 2/13/19 [S252911].) That case did not involve a grant of probation; rather, it involved a split sentence under Penal Code section 1170, subdivision (h), under which the defendant was ordered to serve a portion of his sentence in county jail prior to being released on mandatory supervision. (*People v. Grzymski, supra*, 28 Cal.App.5th at p. 803.) The defendant was ultimately committed to prison in a total of three cases. (*Id.* at p. 804.) When the defendant sought to avail himself of relief under Senate Bill 180, the court confronted the question of when a split sentence imposed under Penal Code section 1170, subdivision (h)(5) becomes a final judgment for retroactivity purposes. (*People v. Grzymski, supra*, 28 Cal.App.5th at p. 804.) The court rejected the defendant's argument that once the trial court "modified" the previously imposed terms to eliminate a provision for a term of mandatory supervision, they were no longer final judgments under *Estrada*. (*Ibid.*) Relying on language from the instant case

distinguishing between suspended *execution* of a sentence and suspended *imposition* of a sentence, the court in *Grzymski* held that an unappealed split sentence becomes final sixty days after it is imposed, because "a split sentence involves suspending execution of part of the sentence." (*People v. Grzymski, supra*, 28 Cal.App.5th at p. 806.)

While these cases arguably all reach the correct conclusion based on their respective procedural histories, *Rodas* in particular does so via a problematic analysis that conflates finality for purposes of Penal Code section 1237 with finality for purposes of *Estrada*. (*People v. Superior Court, supra*, 10 Cal.App.5th at p. 1325.) This analysis, if not the the result, is inconsistent with this court's prior holdings in this area, with analogous areas of law, and with the legislative history of Penal Code section 1237.

In fact, this court has long recognized separate and non-contradictory notions of finality: finality for purposes of filing an appeal, and finality for purposes of retroactive application of an ameliorative statutory amendment. (See, e.g., *People v. Scott* (2014) 58 Cal.4th 1415, 1426.) As to the former, Penal Code section 1237 confers this type of finality to an order of probation where no sentence is imposed, solely for purposes of permitting a direct appeal. (See, e.g., *People v. Howard, supra*, 16 Cal.4th at p. 1087.) As to the latter, the type of finality that bars relief under an ameliorative statutory amendment occurs only after the time for filing a petition for certiorari has elapsed. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.)

Thus, the Court of Appeal properly held that SB 180 applies to the instant case because the judgment was not yet final at the time the statutory amendments went into effect. Appellant respectfully requests that this court affirm the holding of the Court of Appeal and remand the matter to the trial court.

## STATEMENT OF THE CASE

On October 25, 2013, Madera County complaint number MCR047554 charged appellant with felony transportation of methamphetamine. (Health & Saf. Code, § 11379, subd. (a).) (CT 8.) The complaint further alleged that appellant had been convicted of four prior felonies within the meaning of Health and Safety Code, section 11370.2, subdivision (c), and that he had served three prior prison terms within the meaning of Penal Code, section 667.5, subdivision (b). (CT 9.) Count two of this complaint charged appellant with misdemeanor possession of paraphernalia. (Health & Saf. Code, § 11364.1.) (CT 10.)

On November 19, 2013, complaint number MCR47692 charged appellant with possession of methamphetamine for sale (Health & Saf. Code, § 11378) and unlawful transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)). (CT 11-12.) The complaint also alleged that appellant committed the offense while out on bail or own recognizance in case No. MCR047554 within the meaning of Penal Code, section 12022.1. (CT 11-12.)

On January 10, 2014, complaint number MCR047982 charged appellant with possession of methamphetamine for sale. (Health & Saf. Code, § 11378.) This complaint also alleged the four prior felonies under Health and Safety Code, section 11370.2, subdivision (c), and three prior prison terms under Penal Code, section 667.5, subdivision (b). (CT 14-15.)

On November 4, 2014, appellant pleaded guilty to the charges in all three complaints in exchange for promises of probation. (CT 17, 21, 25.) He was placed on probation in all three cases. (CT 17, 21, 25.)[1]

On March 3, 2016, a petition was filed in all three cases alleging violations of probation. (CT 35-36, 41-43.) On April 1, 2016, appellant admitted the alleged violations. (CT 47-49.)

On June 1, 2016, the court revoked probation in all three cases and declined appellant's request to reinstate probation. (CT 83.) In case number MCR047554, the court imposed the aggravated term of four years in county jail for count one, and a time-served sentence of 118 days for count two. (CT 83.) In case number MCR047692, the court imposed a term of three years in county jail for count one, stayed pursuant to Penal Code section 654, and an unstayed consecutive term of one year in county jail for count two. (CT 83.) In case number MCR047982, the court imposed an unstayed consecutive term of eight months, deemed time served. (CT 83.)

The court then imposed three years for each of the Health and Safety Code section 11370.2, subdivision (c), enhancements as to case number MCR047554, for a total of twelve years, and one year for each of the prior prison terms, for a total of three years.

---

[1]The reporter's transcript for this hearing is not part of the record on appeal. Respondent has indicated that imposition of sentence was suspended (Opening Brief on the Merits, p. 13), as did the court below. (Slip opn., p. 2.) The record does not indicate that any sentence was imposed prior to June 1, 2016.

(CT 83.) The court struck these enhancements under Penal Code section 1385 as to case number MCR047982. (CT 83.) Finally, the court imposed a two-year term pursuant to Penal Code section 12022.1 in case number MCR047692. (CT 83.) The resulting total term was 22 years. (CT 83.)

Appellant filed notice of appeal in each case on June 16, 2016. (CT 92-94.) On September 13, 2017, the Court of Appeal, Fifth Appellate District, issued an opinion modifying the sentence to award additional credits in case number MCR047554, and to strike the prior prison term enhancements in case number MCR047982. Appellant petitioned for review; on December 21, 2017, this court granted review and transferred the matter back to the Court of Appeal, with directions to vacate the original decision and reconsider the cause in light of S.B. 180 (Stats. 2017, ch. 677).

On August 10, 2018, the Court of Appeal issued a new opinion, in which it concluded that all of the Health and Safety Code section 11370.2 enhancements must be stricken. (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1218, rev. gr. 11/20/18 [S251333].)

This court granted the People's petition for review on November 20, 2018.

## STATEMENT OF FACTS

Because the underlying matters were resolved by guilty plea, the statement of facts is summarized from the probation report.

MCR047982

On January 8, 2014, two Madera police officers went to the home of Douglas McKenzie, whom they knew to have active felony warrants. (Conf. CT 7.) Another resident granted them entry, and the found McKenzie behind a closed interior door in the home. McKenzie was arrested and asked if he had anything illegal in his possession. (Conf. CT 7.) McKenzie looked at his left front pocket and said, "Just what's in there." (Conf. CT 7.) An officer found a black film container in McKenzie's pocket, containing three small and one larger plastic bags containing a white crystal substance that the officer believed to be methamphetamine. (Conf. CT 7.)

MCR047692

On October 25, 2013, a search of McKenzie's car revealed a grey cloth bag hidden below the cup holders in the center console. The sock contained four small plastic bags containing a crystal substance, which an officer believed to be crystal methamphetamine. (Conf. CT 7.) McKenzie had $313 in cash on his person, and text messages on his phone included messages asking for $40 a bag. (Conf. CT 7.) Other messages on the phone discussed larger narcotic transactions. (Conf. CT 7.) McKenzie later admitted that the crystal substance was crystal methamphetamine and that he had been selling it. (Conf. CT 7.)

MCR047554

During a traffic stop on September 29, 2013, an officer noticed a chemical odor emitting from McKenzie's mouth. (Conf. CT 8.) McKenzie admitted smoking methamphetamine and consented to a search of his person and truck. In the left cargo pocket of the defendant's pants, an officer found a black plastic digital scale, which McKenzie said he used to insure that he got what he paid for when he bought methamphetamine. (Conf. CT 8.) The right cargo pants pocket contained a mint box with a clear plastic bag containing methamphetamine. (Conf. CT 8.) Another pants pocket contained a used glass smoking pipe. (Conf. CT 8.)

## ARGUMENT

### APPELLANT IS ENTITLED TO THE BENEFIT OF THE AMENDMENTS TO HEALTH AND SAFETY CODE SECTION 11370.2 BECAUSE THE JUDGMENT OF CONVICTION WAS NOT YET FINAL AT THE TIME THE AMENDMENTS WENT INTO EFFECT

The Court of Appeal correctly found that, because appellant was placed on probation with imposition of sentence suspended, and because his current appeal is from sentence as imposed and executed, the judgment of conviction is not yet final, and he is entitled to the ameliorative affects of legislation adopted during the pendency of this appeal. (See *People v. Scott* (2014) 58 Cal.4th 1415, 1423; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306; *People v. Eagle* (2016) 246 Cal.App.4th 275, 279–280; *In re May* (1976) 62 Cal.App.3d 165, 169.) The Court of Appeal properly struck the Health and Safety Code section 11370.2 enhancements, and appellant respectfully asks this court to affirm that order.

The question of when a sentence becomes a final judgment under *Estrada* is a question of law that this court reviews de novo. (See *People v. Arroyo* (2016) 62 Cal.4th 589, 593.)

A. Procedural History

Appellant was originally charged with various drug-related offenses, including four enhancement allegations under Health and Safety Code section 11370.2, in three separate complaints filed between October 25, 2013, and January 10, 2014. (CT 8-15.) On November 4, 2014, he pleaded guilty to the charges in all three complaints in exchange for promises of probation. (CT 17, 21, 25.)

He was placed on probation in all three cases, with imposition of sentence suspended. (CT 17, 21, 25.)

On June 1, 2016, the court revoked probation in all three cases and declined appellant's request to reinstate probation. (CT 83.) The court sentenced appellant to a term of imprisonment in county jail under Penal Code section 1170, subdivision (h), and imposed terms of three years for each of the Health and Safety Code section 11370.2, subdivision (c), enhancements as to case number MCR047554, for a total of twelve years. (CT 83.) The resulting total term was 22 years, all to be served in county jail. (CT 83.)

Appellant filed notice of appeal in each case on June 16, 2016. (CT 92-94.) While the matter was pending on appeal, the Legislature amended Health and Safety Code section 11370.2 to drastically limit the application of those enhancements. (Stats. 2017, ch. 677, § 1.)

B. The 2017 Amendment to Health and Safety Code Section 11370.2 Applies to All Cases Not Yet Final on Appeal on its Effective Date.

Prior to January 1, 2018, Health and Safety Code section 11370.2, subdivision (c), provided that persons convicted of certain narcotics offenses would receive a consecutive term of three years for each prior conviction of certain narcotics offenses, including convictions for violations of Health and Safety Code sections 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383. (See *People v. Milan* (2018) 20

Cal.App.5th 450, 454.) Senate Bill 180 amended section 11370.2 to greatly reduce the number of prior convictions that qualify for the enhancement. (*People v. Milan, supra*, 20 Cal.App.5th at p. 454.) For persons convicted of sections 11378 or 11379, the law now provides a three-year enhancement only for prior felony convictions of Health and Safety Code section 11380 involving a minor. (*Id.* at pp. 454-455; Stats. 2017, ch. 677 (S.B. 180) § 1, eff. Jan 1, 2018.)

None of appellant's prior felony convictions were for violations of Health and Safety Code section 11380 involving a minor; rather, they were for violations of Health and Safety Code section 11379.6, subdivision (a), and section 11378. (CT 8-15.)

The Court of Appeal held, and the Attorney General does not dispute, that Senate Bill 180 was intended to apply retroactively, and that it does in fact apply retroactively to cases not yet final on appeal. (*People v. McKenzie, supra,* 25 Cal.App.5th at p. 1213.) Courts presume that the Legislature intended ameliorative amendments to criminal laws to apply retroactively, absent some indication to the contrary in the amending statute. (See *People v. Brown* (2012) 54 Cal.4th 314, 323–324; see *In re Estrada* (1965) 63 Cal.2d 740.) The lower court here noted that "[n]othing in Senate Bill No. 180 indicates the Legislature intended prospective application only." (*People v. McKenzie, supra,* 25 Cal.App.5th at p. 1213, citing Stats. 2017, ch. 677, § 1.)

Senate Bill 180 states, in its entirety:

> Existing law imposes on a person convicted of a violation of, or of conspiracy to violate, specified crimes relating to controlled substances a sentence enhancement to include a full, separate, and consecutive 3-year term for each prior conviction of, or for each prior conviction of conspiracy to violate, specified controlled substances crimes, including possession for sale and purchase for sale of opiates, opium derivatives, and hallucinogenic substances.
>
> This bill would instead limit the above sentence enhancement to only be based on each prior conviction of, or on each prior conviction of conspiracy to violate, the crime of using a minor in the commission of offenses involving specified controlled substances.

(Stats. 2017, ch. 677.)

The legislative history and analysis of Senate Bill 180 clearly indicate an intent to undo the damage inflicted by the "failed War on Drugs." (2017-2018 SB 180, Assembly Committee on Public Safety Analysis, p. 4, quoting Californians for Safety and Justice.)[2] The bill's author noted the existing population of inmates serving lengthy sentences in county jails throughout the state, and observed that the recently enacted Proposition 57, designed to reduce the state's prison population by making those serving prison terms for non-violent convictions eligible for parole after completing their base terms, prior to serving time on any

---

[2]This item is the subject of the accompanying Motion for Judicial Notice.

sentence enhancements, would have no effect on the population serving felony sentences in county jail. (2017-2018 SB 180, Assembly Floor Analysis, p. 2.)[3] The legislative history is replete with discussions of cost savings, equity, restabilizing families profoundly affected by the war on drugs, and the need to address the drug crisis as a public health issue by focusing on treatment and prevention. (See 2017-2018 SB 180, Assembly Committee on Public Safety Analysis, pp. 2-5 ; 2017-2018 SB 180, Assembly Floor Analysis, pp. 2-3; 2017-2018 SB 180, Senate Floor Analysis, p. 7; 2017-2018 SB 180, Senate Committee on Public Safety Analysis, pp. 3-6.)[4]

As noted, there is no dispute between the parties as to whether SB 180 applies to a judgment that is not final on appeal. (Opening Brief on Merits, p. 25.) Where an amendment to a penal statute mitigates punishment and becomes effective before the judgment of conviction in a particular case becomes final, the amendment applies to the case, unless there is a clear legislative intent to the contrary. (*In re Estrada, supra*, 63 Cal.2d at pp. 744, 748; *People v. Floyd* (2003) 31 Cal.4th 179, 184.) "[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.)

---

[3]See footnote 2, supra.

[4]See footnote 2, supra.

### C. "Finality" for Purposes of *Estrada* Is Not the Same as "Finality" for Purposes of Taking an Appeal.

This court in *Estrada* chose the date of "finality" as the crucial date for determining when an ameliorative statute applies to a particular defendant. The court had previously decided in *People v. Harmon* (1960) 54 Cal.2d 9 that where a criminal statute is amended to mitigate punishment after the prohibited act is committed, but before final judgment, the punishment in effect when the act was committed should prevail. (*People v. Harmon, supra,* 54 Cal.2d at p. 21.) The *Estrada* decision overturned *Harmon*, and held that "in such situations the punishment provided by the amendatory act should be imposed." (*In re Estrada, supra*, 63 Cal.2d at p. 742.) This court observed that the facts in *Estrada* presented "a stronger case for relief than did the *Harmon* case," because in *Harmon* the amendatory act lessening the punishment did not become effective until the defendant's case was pending on appeal, whereas in *Estrada*, the amendatory act became effective after the commission of the offense but before trial, conviction or sentence. (*In re Estrada, supra*, 63 Cal.2d at p. 744.) The court concluded that the result was the same in either scenario, however: "The key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies." (*In re Estrada, supra*, 63 Cal.2d at p. 744.)

In selecting "the date of final judgment" as the determinative date, this court looked to the common law: "It is the rule at common law and in this state that when the old law in effect when the act is committed is repealed, and there is no saving clause, all prosecutions not reduced to final judgment are barred." (*In re Estrada, supra*, 63 Cal.2d at pp. 746-747, citing *Spears v. County of Modoc* (1894) 101 Cal. 303.) The court also observed that "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*In re Estrada, supra,* 63 Cal.2d at p. 748.) "This is the rule followed by a majority of the states, and by the United States Supreme Court." (*Ibid.*, citing *Calder v. Bull* (1798) 3 U.S. (3 Dall.) 386, 390 [1 L.Ed. 648].)[5]

---

[5]The selection of "finality" as the determinative date for applying an ameliorative statute was not without controversy at the time that *Estrada* was decided. A dissenting justice observed:

> But what of the defendant who pleads guilty to an offense? His conviction promptly becomes final, thereby effectively shutting the door to his ever receiving any benefit under the majority decision in this case. Unless the Legislature in any subsequent amendment of the law prescribing his punishment expressly states that it is its intention to ameliorate punishments theretofore meted out to previous violators of the law, there is no way in which he may benefit from the reduced penalty. As often as not, when compared with the person who pleads not guilty, the one pleading guilty may be the more deserving of the two.

While this court in *Estrada* elaborated at some length as to why a presumption of retroactivity applied, beyond an observation that the rule regarding finality was followed at common law, the court did not delve into the reason why "finality" was selected as the determining date. As this court observed as early as 1894, however:

> If the judgment is appealed from, and its enforcement is suspended until the determination of the appeal, the power to enforce the judgment falls with the repeal of the statute, and the appellate court will

---

> Thus the majority opinion creates a situation which will result in what will certainly appear to those in prison, whose judgments have become final, as a gross inequity and as an unequal treatment under the law. It has the effect of encouraging appeals and delays not related to guilt or innocence but employed solely to keep open the possibility of subsequent windfalls effected by the combination of an ameliorating legislative act and the application of the opinion of the majority in this case.

(*In re Estrada, supra*, 63 Cal.2d at p. 753, diss. opn. by J. Burke.)

It is true that the *Estrada* rule results in courts distinguishing between defendants who promptly enter guilty pleas or who are promptly tried versus those whose cases do not resolve quickly, between those who file notices of appeal versus those who do not, between appellants whose cases are decided expeditiously versus those whose cases linger in the appellate courts. Most of these distinctions have no bearing on whether a particular prisoner is "deserving" of more lenient treatment, but when finality of judgment is the determining factor, any or all of these factors can determine who receives the benefit of an amended statute. This, however, is true of any application of *Estrada* and is not unique to probationers.

> direct a dismissal of the proceedings. Until the determination of the appeal, the proceeding is pending in court, and the judgment does not become final until affirmed by the appellate court.

(*Spears v. Cty. of Modoc, supra*, 101 Cal. at pp. 305-06.) The common law upon which this court relied in *Estrada* was rooted in laws governing the outright repeal of statutes. The court in *Spears* cited British authorities holding that "the effect of repealing a statute is 'to obliterate it as completely from the records of the parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law.'" (*Spears v. Cty. of Modoc, supra,* 101 Cal. at p.305, citation omitted.) The court noted that in its application to the penal laws, the effect of this rule was that "the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter." (*Ibid.*)

Thus, while the court in *Estrada* focused on legislative intent, the roots of the doctrine underlying that decision lie in fundamental notions of a court's jurisdiction and authority to decide a case that is still pending before it. (See, e.g., *Spears v. County of Modoc*, 101 Cal. at p. 306, cited at *In re Estrada, supra*, 53 Cal.2d at pp. 746-747.)

Moreover, it is clear from the *Estrada* holding that the "finality" being discussed in that case is not "finality" for purposes of taking an appeal. In fact, case law both before and after the

*Estrada* decision makes it clear that there are multiple definitions of "finality." Broadly, a judgment becomes final for purposes of *Estrada* when the judgment of conviction is rendered, the availability of appeal is exhausted, and the time for petition for certiorari has elapsed. (*People v. Kemp* (1974) 10 Cal.3d 611, 614; see also *People v. Vieira, supra*, 35 Cal.4th at p. 306.) But this cannot be the same definition of "final" that appears in the text of Penal Code section 1237, because the latter type of "finality" confers the right to appeal in the first place.

In fact, the courts of this state have comfortably applied these separate concepts of finality for many years, and similar dual definitions exist in the federal courts and in non-criminal contexts. In a civil context, it has been observed that "the term 'final judgment' is susceptible of more than one reasonable interpretation." (*Principal Life Ins. Co. v. Peterson* (2007) 156 Cal.App.4th 676, 688.) While pending on appeal, "a judgment is both 'final' in the sense that it is appealable and not 'final' in the sense that the appeal remains unresolved." (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304; see also *Principal Life Ins. Co. v. Peterson, supra,* 156 Cal.App.4th at p. 688.)

The United States Supreme Court has observed that "[f]inality is variously defined; like many legal terms, its precise meaning depends on context." (*Clay v. United States* (2003) 537 U.S. 522, 527 [123 S.Ct. 1072; 155 L.Ed.2d 88.) The court identified multiple points when a case may be considered "final," depending on context. For purposes of appellate review and claim

preclusion, a federal judgment becomes final "when the district court disassociates itself from the case, leaving nothing to be done at the court of first instance save execution of the judgment." (*Ibid.*, citing *Quackenbush v. Allstate Ins. Co.* (1996) 517 U.S. 706, 712 [116 S.Ct. 1712; 135 L.Ed.2d 1].) On the other hand, "finality" for purposes of postconviction relief "attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." (*Clay v. United States, supra,* 537 U.S. at p. 527.)

D. A Grant of Probation Is Not a Final Judgment for Purposes of *Estrada*.

In line with this legal legacy of acknowledging multiple definitions of when a case is "final," this court has long recognized that a grant of probation is not a final judgment except for limited purposes such as appealability under Penal Code section 1237. (See, e.g., *People v. Chavez* (2018) 4 Cal.5th 771, 781; *Stephens v. Toomey* (1959) 51 Cal.2d 864, 870-872.) When a trial court grants probation, it either suspends the imposition of a sentence or imposes a sentence and suspends execution of that sentence. (*People v. Segura* (2008) 44 Cal.4th 921, 932; *People v. Howard* (1997) 16 Cal.4th 1081, 1092-1093.) Neither scenario – where imposition of sentence is suspended, or where sentence is imposed with execution suspended – results in a final judgment. (*People v. Chavez, supra,* 4 Cal.5th at p. 781.) So long as the defendant remains on probation, the court may revoke, modify, or change its

order suspending imposition or execution of the sentence, as warranted by the defendant's conduct. (*People v. Segura, supra*, 44 Cal.4th at p. 932; Pen. Code, §§ 1203.2, 1203.3.)

When a court suspends imposition of sentence, it pronounces no judgment at all, and a defendant is placed on probation with no judgment pending. (*People v. Chavez, supra,* 4 Cal.5th at p. 781, citing *Stephens v. Toomey, supra,* 51 Cal.2d at pp. 871–872.) When the court suspends execution of sentence, the sentence constitutes "a judgment provisional or conditional in nature." (*Stephens v. Toomey, supra,* 51 Cal.2d at pp. 870–871; see also *People v. Chavez, supra*, 4 Cal.5th at p. 781.) "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." (*People v. Chavez, supra*, 4 Cal.5th at p. 781, quoting *Stephens v. Toomey, supra,* 51 Cal.2d at p. 871.) "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." (*People v. Chavez, supra*, 4 Cal.5th at p. 781.)

In *Chavez,* this court was confronted with the question of when, given that a grant of probation is not a final judgment, probation nonetheless becomes a "final judgment" precluding relief under Penal Code section 1385. This court concluded that a trial court lacked the power to dismiss a defendant's criminal convictions under Penal Code section 1385 after he had successfully completed his probation. (*People v. Chavez, supra,* 4 Cal.5th at p. 777.) A court may exercise its dismissal power under

section 1385 at any time before judgment is pronounced, but loses that authority after judgment is final. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 524, fn. 11.) "Yet in the case of a successful probationer, final judgment is never pronounced, and after the expiration of probation, may never be pronounced." (*People v. Chavez, supra,* 4 Cal.5th at p. 777.) A sentencing court may exercise its power under Penal Code section 1385 "until judgment is pronounced or when the power to pronounce judgment runs out." (*People v. Chavez, supra,* 4 Cal.5th at p. 777.) "Because the trial court's authority to render judgment ends with the expiration of probation, the court has no power to dismiss under section 1385 once probation is complete." (*People v. Chavez, supra,* 4 Cal.5th at p. 777.)

This court's decision rested on the "fundamentally revocable nature of probation." (*People v. Chavez, supra*, 4 Cal.5th at p. 782, citing Pen. Code, §§ 1203.2, 1203.3.) The court emphasized the fact that during the period of probation, the sentencing retains the power to revoke probation and sentence the defendant to imprisonment. (*People v. Chavez, supra*, 4 Cal.5th at p. 782.) This power is defined by statute. Section 1203.3, subdivision (a), provides a court with "authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." (Pen. Code, § 1203.3, subd. (a).) Section 1203.2, subdivision (c), permits the court to terminate probation and order that the person be delivered to custody. (Pen. Code, § 1203.2, subd. (c).) Thus, this court concluded in *Chavez*,

the sentencing court's "power to punish the defendant, including by imposing imprisonment, continues during the period of probation." (*People v. Chavez, supra,* 4 Cal.5th at p. 782, citations omitted.)

This court explicitly rejected the People's argument in *Chavez* that the Legislature expected that, once probation was granted, there would be no future proceeding by which a defendant would be punished. (*People v. Chavez, supra*, 4 Cal.5th at p. 786.) The court observed that, on the contrary, the provisions in Penal Code section 1203.3 permitting a trial court to revoke, modify, or change its order at any time during the period of probation, indicate that the Legislature expects that a court will sometimes "punish" a defendant "despite its original clemency in granting probation." (*People v. Chavez, supra*, 4 Cal.5th at p. 786, citing *People v. Howard*, *supra*, 16 Cal.4th at p. 1092.)

The reasoning in *Chavez* proceeded along well-trodden ground. This court has previously observed that a grant of probation is "qualitatively different from such traditional forms of punishment as fines or imprisonment." (*People v. Howard, supra*, 16 Cal.4th at p. 1092.) "Probation is neither 'punishment' (see § 15) nor a criminal 'judgment' (see § 1445)." (*People v. Howard, supra,* 16 Cal.4th at p. 1092.) Rather, courts deem probation an act of clemency in lieu of punishment. (*People v. Howard, supra,* 16 Cal.4th at p. 1092, citing *In re Tyrell J.* (1994) 8 Cal.4th 68, 81.)

Further, this court has long distinguished between cases in which sentence has been imposed but suspended, and those in

which the court has suspended imposition. The former type of suspension has a greater degree of finality than the latter: Once the trial court has imposed sentence and the defendant has begun a probation term, the trial court has no authority on revoking probation to impose a lesser sentence. (*People v. Howard, supra,* 16 Cal.4th 1081.) This court in *Howard* stressed "the important distinction, in probation cases, between orders suspending imposition of sentence and orders suspending execution of previously imposed sentences." (*People v. Howard, supra,* 16 Cal.4th at p. 1087.) If the trial court had originally suspended imposition of sentence before placing the defendant on probation, the court "unquestionably would have had full sentencing discretion on revoking probation." (*People v. Howard, supra,* 16 Cal.4th at p. 1087.)

"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." (*People v. Howard, supra,* 16 Cal.4th at p. 1087, citing *People v. Banks* (1959) 53 Cal.2d 370, 386, and *Stephens v. Toomey, supra,* 51 Cal.2d at p. 871.) "The probation order is considered to be a final judgment only for the 'limited purpose of taking an appeal therefrom.'" (*People v. Howard, supra,* 16 Cal.4th at p. 1087, citing *People v. Superior Court* (*Giron*) (1974) 11 Cal.3d 793, 796.)

This distinction between previously imposed but suspended sentences, and those cases where no sentence has been imposed, is crucial in the context of retroactive application of ameliorative

sentences. In *People v. Scott, supra,* 58 Cal.4th 1415, this court held that the Realignment Act did not apply to probationers who had had a state prison sentence imposed and suspended prior to the effective date of that statute. (*People v. Scott, supra*, 58 Cal.4th at p. 1426.) This was because the trial court, upon revocation and termination of such a defendant's probation, was required to order the sentence to be served in state prison according to the terms of the original sentence, even if the defendant otherwise qualified for incarceration in county jail under the terms of the Realignment Act. (*Id.* at p. 1423.) "[A] defendant is 'sentenced' when a judgment imposing punishment is pronounced even if execution of the sentence is then suspended. 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.*)

In *Scott*, this court relied both on its prior holding in *Howard* and on the language of Penal Code section 1203.2, subdivision (c), and former rule 435(b)(2) of the California Rules of Court, which "by their terms, limit the court's power in situations in which the court chose to impose sentence but suspended its execution pending a term of probation." (See *People v. Scott, supra*, 58 Cal.4th at p. 1424, citing *People v. Howard, supra*, 16 Cal.4th at p. 1088.) Notably, the court in *Scott* focused on the very distinction that the People dismiss in the instant case: that sentence had already been imposed in that case, albeit suspended. In fact, the court specifically emphasized that the situation would

have been different had no sentence been imposed, because a probation order absent a suspended sentence is "considered to be a final judgment only for the 'limited purpose of taking an appeal therefrom.'" (*People v. Scott, supra,* 58 Cal.4th at p. 1423, citation omitted.)

This principle – that where a court suspends imposition of sentence, no judgment exists – is firmly established under California law. "When the trial court suspends imposition of sentence and grants probation, no judgment is entered until such time as the probation is revoked and the defendant is sentenced." (*In re White* (1969) 1 Cal.3d 207, 212, citing *People v. Arguello* (1963) 59 Cal.2d 475, 476; *In re Phillips* (1941) 17 Cal.2d 55, 58.) "In granting probation after a conviction, the trial court may suspend the imposition of sentence, in which case no judgment of conviction is rendered, or it may impose sentence and order the execution thereof stayed. In the latter case a judgment of conviction has been rendered." (*People v. Arguello, supra*, 59 Cal.2dat p. 476, citing *In re Phillips, supra*, 17 Cal.2d at p. 58.)

Indeed, until 1951, a grant of probation was not even a "judgment" for purposes of appeal. Penal Code section 1237 now explicitly states that an order granting probation is deemed to be a final judgment for purposes of that section. (Pen. Code, § 1237, subd. (a).) The history of that amendment as well as this court's subsequent holdings make clear, however, that an order of probation is only a "final judgment" for the limited purpose of filing an appeal.

Shortly after the phrase concerning grants of probation was added to Penal Code section 1237 in 1951, this court examined the effect of that amendment. (See *People v. Robinson* (1954) 43 Cal.2d 143, 145.) The 1951 amendment permitted a defendant to appeal not only from "a final judgment of conviction," but also from a grant of probation, since by the terms of the amended statute, "an order granting probation shall be deemed to be a final judgment within the meaning of this section." (Pen. Code, § 1237, subd. (a), amended Stats 1951 ch 1674 § 133.) This court observed that prior to the 1951 amendment, "an order granting probation did not constitute a 'final judgment of conviction' from which an appeal might be taken." (*People v. Robinson, supra,* 43 Cal.2d at p. 145, citing *In re Phillips*, *supra*, 17 Cal.2d at pp. 63-64; *People v. Leach* (1949) 90 Cal.App.2d 667, 671 [where court suspended imposition of sentence and granted probation, there was no final judgment of conviction from which an appeal could be taken].)

Under the 1951 amendment, however, "an order granting probation is expressly designated a 'final judgment' for the purpose of appeal." (*People v. Robinson, supra,* 43 Cal.2d at p. 145, citing *People v. Haeussler* (1953) 41 Cal.2d 252, 254; *People v. Brown* (1952) 114 Cal.App.2d 52, 53; *People v. Sumner* (1953) 117 Cal.App.2d 40 [noting that under 1951 amendment, order suspending imposition of sentence was now appealable under Penal Code section 1237].)

It is clear from this history and effect that the inclusion of a grant of probation in Penal Code section 1237 was intended simply

to confer appealability upon such an order. The statutory language specifically states that a grant of probation constitutes a final judgment of conviction "within the meaning of" that statute, and does not mention other purposes of finality. Indeed, this court has clarified that, while under section 1237 an order granting probation is deemed a "final judgment" for the purpose of taking an appeal, "such an order 'does not have the effect of a judgment for other purposes.'" (*People v. Chavez, supra*, 4 Cal.5th at p. 786, quoting *People v. Superior Court, supra*, 11 Cal.3d at p. 796; see also *People v. Howard, supra*, 16 Cal.4th at p. 1087; accord, *People v. Johnson* (1955) 134 Cal.App.2d 140, 142–143.) Indeed, it would be nonsensical to conflate the finality of a judgment *for purposes of appeal* with finality of a judgment *on appeal*, since the latter can never occur if it is subsumed by the former.

This court in *Chavez* pointed to *Stephens v. Toomey, supra*, 51 Cal.2d 864, as the authority for the proposition that neither form of probation – either probation with a suspended sentence, or probation with suspended imposition of sentence – results in a final judgment. (*People v. Chavez, supra,* 4 Cal.5th at p. 781.) In *Stephens*, this court examined at length the differing considerations of when a judgment becomes "final" when a criminal defendant is placed on probation. Stephens had sought to be registered as an elector, and after he was found ineligible due to a criminal conviction, sought mandamus relief to compel the registrar of voters to register him as an elector. (*Stephens v. Toomey, supra*, 51 Cal.2d at pp. 868-869.) He had been placed on

probation for the offense in question, with a suspended sentence. (*Id.* at p. 869.) This court dismissed the mandamus petition because no final judgment existed in regard to the underlying conviction; because Stephens was on probation, the judgment might or might not become final, depending upon the outcome of his probationary term. (*Id.* at p. 875.)

At the outset, the court clarified that the word conviction, as used in regard to ineligibility to register as an elector, must mean a final judgment of conviction. (*Stephens v. Toomey, supra*, 51 Cal.2d at p. 869.) The court observed that a judgment is not final if there still remains some legal means of setting it aside, and that a judgment in an ordinary criminal case therefore becomes final when all available means to avoid its effect have been exhausted. (*Ibid.*) "Certain means to that end have been made available to an accused. The traditional method was by appeal. The probation laws then intervened." (*Ibid.*)

In looking at the effect of probation laws on what constitutes a "final judgment of conviction," the court identified three classes of offenders who were eligible for probation, and explained in detail how each class stood in relation to finality of judgment. (*Stephens v. Toomey, supra*, 51 Cal.2d at pp. 870-871.) First, the court identified a group of probationers who were eligible but not placed on probation, but instead were immediately sentenced as provided by law. "This is the judgment. It is appealable ( Pen. Code, § 1237) and its finality must await the results of any appeal." (*Stephens v. Toomey, supra*, 51 Cal.2d at p. 870.)

The second distinct class were those as to whom the court pronounces judgment, sentences the defendant, suspends the execution of the sentence, and places the defendant on probation. (*Stephens v. Toomey, supra,* 51 Cal.2d at p. 870.) "If no appeal is taken the judgment becomes final and is effective for all purposes during probation except that incarceration is prevented by reason of the stay order and that compliance with the conditions of the order of probation be observed under the supervision of the probation officer as provided by section 1203.1 of the Penal Code." (*Stephens v. Toomey, supra*, 51 Cal.2d at p. 870.) The court noted that the judgment as to this class of defendants is not a final judgment for all purposes, but rather "is a judgment provisional or conditional in nature." (*Id.* at p. 871.) "It is in the process of becoming final in that its finality depends on the outcome of the probationary proceeding." (*Ibid.*)

The final class are those defendants as to whom the court withholds the imposition of judgment, suspends further proceedings on the plea or verdict, and places the defendant on probation. (*Stephens v. Toomey, supra*, 51 Cal.2d at p. 871.) "In this class of cases there is no judgment pending against the probationer." (*Ibid.*) "He may go about his usual activities, uninhibited by any court order, except the terms and conditions of the order of probation." (*Ibid.*, citing *Pearson v. County of Los Angeles*, 49 Cal.2d 523). "But from the time that the order of probation is made until the case is dismissed the probationer is not a free man. Although there is no judgment pending against

him, he is still subject to the restraints of the order of probation and for the duration thereof." (*Stephens v. Toomey, supra*, 51 Cal.2d at p. 871.) If the probationer violates the conditions of probation, he is subject to a revocation of probation, with judgment and sentence to follow. (Pen. Code, § 1203.2.) That judgment upon revocation is appealable under section 1237 of the Penal Code, and for finality must await the result of any appeal. (*Stephens v. Toomey, supra*, 51 Cal.2d at p. 871.)

Thus, there is a long history in this state of declining to treat a grant of probation as a final judgment of conviction. Penal Code section 1237, subdivision (a), is a limited exception to that rule, but it does not supercede this court's consistent holdings affirming that a grant of probation is not a final judgment, and it does not confer finality for purposes of *Estrada*.

E. The Opinion in *Rodas* Is Procedurally Distinguishable.

The People's argument relies heavily on the Third District Court of Appeal's decision in *Rodas*, but *Rodas* is procedurally distinguishable. As already discussed, the court in *Rodas* was faced with a scenario in which a probationer who had absconded from probation years earlier moved to withdraw her plea under Penal Code section 1018, seeking relief under the newly revised Health and Safety Code section 11352. (*People v. Superior Court (Rodas), supra*, 10 Cal.App.5th at pp. 1318-1319.) As the lower court here pointed out, the *Rodas* decision rested primarily on the jurisdictional limits of Penal Code section 1018, which is not at

issue in the instant case. (See *People v. McKenzie, supra,* 25 Cal.App.5th at pp. 1217-1218.)

In fact, the court in *Rodas* had to distinguish its own prior holding in *People v. Eagle, supra,* 246 Cal.App.4th 275, in which it had held that the defendant was entitled to retroactive application of changes to Health and Safety Code section 11379, excluding personal use from the acts criminalized as transportation. The court there had specifically found that the defendant's sentence had not been final at the time of the amendments because the trial court had suspended imposition of sentence and placed him on probation. (*People v. Eagle, supra,* 246 Cal.App.4th at p. 279.) The court in *Rodas* noted that *Eagle* had not involved the jurisdictional limitation of Penal Code section 1018. (*People v. Superior Court, supra,* 10 Cal.App.5th at pp. 1322-1323.) This case, of course, also does not involve a motion to withdraw the plea under Penal Code section 1018.

Moreover, to the extent that the court in *Rodas* relied on the language in Penal Code section 1237 deeming a grant of probation "a final judgment of conviction" for purposes of that section, the court's reading of that section is far too broad and is directly at odds with this court's reaffirmation in *People v. Chavez* that an order granting probation does not have the effect of a judgment for purposes other than taking an appeal. (*People v. Chavez, supra,* 4 Cal.5th at p. 786.) The *Rodas* opinion does not address either the history of the 1951 amendment to section 1237, or the long history

in this state of recognizing that a grant of probation is not a final judgment.

F. Appellant Is Entitled to Application of Senate Bill 180 Because His Conviction Was Not Yet Final When the Amendment Went into Effect.

As this court noted in *Scott*, under rules of statutory construction the Legislature is presumed to have been aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light of that preexisting law. (*People v. Scott, supra,* 58 Cal.4th at p. 1424, citing *People v. Yartz* (2005) 37 Cal.4th 529, 538.) "Courts may assume, under such circumstances, that the Legislature intended to maintain a consistent body of rules and to adopt the meaning of statutory terms already construed." (*People v. Scott, supra,* 58 Cal.4th at p. 1424, citing *People v. Harrison* (1989) 48 Cal.3d 321, 329; *People v. Wood* (1998) 62 Cal.App.4th 1262, 1270.) The *Scott* court applied this principle to conclude that the Legislature must have intended the term "sentenced" in the provisions of the Realignment Act to be consistent with *Howard* and with existing law. (*People v. Scott, supra,* 58 Cal.4th at p. 1424.)

Similarly, this court should presume that in amending Health and Safety Code section 11370.2, the Legislature was aware of longstanding authority holding that an order granting probation was only a final judgment for purposes of filing an appeal. (See Pen. Code, § 1237, subd. (a); *People v. Superior Court (Giron), supra*, 11 Cal.3d at p. 796; see *People v. Howard*, supra,

16 Cal.4th at p. 1087; accord, *People v. Johnson, supra*, 134 Cal.App.2d at pp. 142–143.)

As discussed at length above, the question of whether *Estrada* applies in a given case – that is, the question of whether the case is not yet "final" for purposes of *Estrada* – is rooted in considerations of jurisdiction and authority to decide a case that is still pending. (See *Spears v. Cty. of Modoc, supra*, 101 Cal. at pp. 305-306.) This is not a case like *Chavez*, in which the court had lost authority to act because probation had terminated. (See *People v. Chavez, supra,* 4 Cal.5th at p. 777.) It is also not a case like *Howard* or *Scott*, in which the court had previously imposed but suspended execution of a sentence. (See *People v. Scott, supra,* 58 Cal.4th at p. 1424; *People v. Howard, supra,* 16 Cal.4th at p. 1081.)

Instead, this case is the very type of case which this court, in those precedents, identified as a situation in which the court would retain "full sentencing discretion." (*People v. Howard, supra,* 16 Cal.4th at p. 1087; see also *People v. Scott, supra,* 58 Cal.4th at p. 1423; see also Pen. Code, § 1203.3, subd. (a).)

Had the trial court initially imposed sentence in 2014 and suspended its execution, appellant might have been precluded under *Scott* and related authorities from obtaining the benefit of a change in law. But instead, the trial court suspended imposition of sentence when it granted probation. This appeal arises from the trial court's 2016 sentence, which constitutes the judgment of conviction, and which is not yet final because this appeal is still

pending. (See *People v. Vieira, supra*, 35 Cal.4th at pp. 305–306.) Thus, the judgment is not final, *Estrada* applies, and appellant is entitled to the benefit of Senate Bill No. 180. (See *People v. Eagle, supra*, 246 Cal.App.4th at pp. 279–280; *In re May, supra*, 62 Cal.App.3d at p. 169.) The Court of Appeal properly struck the Health and Safety Code section 11370.2 enhancements, and appellant respectfully asks this court to affirm that order.

## CONCLUSION

For the foregoing reasons, appellant requests that this court affirm the holding of the Court of Appeal, and remand the matter back to the trial court for further proceedings.

Dated: June 12, 2019

Respectfully submitted,

ELIZABETH CAMPBELL
Attorney at Law
State Bar No. 166960

PMB 334
3104 O Street
Sacramento, CA 95816
(530) 786-4108
campbell166960@gmail.com
Attorney for Appellant

## CERTIFICATE OF WORD COUNT

As required by California Rules of Court, Rule 8.520(c), I certify that this brief contains 10,036 words, as determined by the word processing program used to create it.

Elizabeth Campbell
Attorney at Law

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a member of the State Bar of California and a citizen of the United States. I am over the age of 18 years and not a party to the within-entitled cause; my business address is PMB 334, 3104 O Street, Sacramento, California, 95816.

On June 14, 2019, I served the attached

APPELLANT'S ANSWER BRIEF ON THE MERITS

**(by mail)** - by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

| | |
|---|---|
| Douglas Edward McKenzie<br>2294 Emerson Avenue<br>Merced, CA 95341 | Madera County Superior Court<br>209 W. Yosemite Avenue<br>Madera, CA 93637<br><br>Madera County District Attorney<br>209 W. Yosemite Avenue<br>Madera, CA 93637 |

**(by electronic transmission)** - I am personally and readily familiar with the preparation of and process of documents in portable document format (PDF) for e-mailing, and I caused said document(s) to be prepared in PDF and then served by electronic mail to the party listed below, by close of business on the date listed above:

| | |
|---|---|
| Central California Appellate Program<br>2407 J Street, Suite 301<br>Sacramento, CA 95816<br>eservice@capcentral.org | Office of the Attorney General<br>P.O. Box 944255<br>Sacramento, CA 94244-2550<br>SacAWTTrueFiling@doj.ca.gov<br><br>California Court of Appeal<br>Fifth Appellate District<br>2424 Ventura Street<br>Fresno, CA 93721<br>served via Truefiling.com |

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 14, 2019, in Sacramento, California.

_____

DECLARANT