No. S262551

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.

Second Appellate District, Division Five, Case No. B294024
Los Angeles County Superior Court, Case No. NA102362
The Honorable Jesus "Jesse" I. Rodriguez, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

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?

INTRODUCTION

New criminal laws generally apply prospectively. (Pen. Code, § 3.) Under the rule of *In re Estrada* (1965) 63 Cal.2d 740, however, if new legislation is sufficiently ameliorative courts will presume, absent evidence to the contrary, that the Legislature intends the legislation to apply to all judgments that are not yet final at the time it takes effect. (*Id.* at pp. 744-745, 748; see also *People v. McKenzie* (2020) 9 Cal.5th 40, 44-45; *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308.)

This case concerns whether Esquivel's judgment was final for purposes of the *Estrada* rule when a new ameliorative law took effect. Esquivel was sentenced and placed on probation, with the execution of his sentence suspended. The new law came into effect after his sentence was no longer appealable, but before his probation was revoked and the sentence ordered to be executed.

As Esquivel concedes, a judgment "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." (OBM 15.) In criminal cases, the terms "judgment" and "sentence" are synonymous. Accordingly, when the sentence has been imposed, so too has the judgment. If the defendant *does not* appeal, the

sentence becomes final after 60 days under the ordinary rules of court—like any other judgment. If the defendant *does* appeal, the sentence becomes final at the end of the appellate process—again, like any other judgment. Esquivel's judgment was therefore already final at the new law came into effect.

In *McKenzie*, this Court recently held that an order suspending the imposition of a sentence and granting probation does not become a final judgment when the time to appeal the probation order expires (or when that appeal itself concludes). (*McKenzie*, *supra*, 9 Cal.5th at pp. 45-48.) The decision in *McKenzie* is fully consistent with the outcome in this case and is itself premised on the principle that a final sentence is a final judgment. When a superior court decides to suspend imposition of a sentence during a probationary term, it has deliberately not imposed the sentence itself. Accordingly, it has not imposed a judgment, and there is no judgment to become final, as *McKenzie* holds. But when a superior court actually imposes a sentence and suspends only its execution, it necessarily follows from the rationale of *McKenzie* that the superior court has imposed a judgment.

These well-established rules are also consistent with the historical treatment of criminal judgments in probation cases, as well as the treatment of "suspended-execution" judgments in related contexts. And treating imposed-sentence cases differently from cases where sentenc*ing* itself is suspended, for purposes of the *Estrada* rule, is consistent with the goals of the two forms of probation. Imposed-sentence probation is intended to send a

clear signal about the consequences of violation and revocation, a goal that would be undermined by subjecting the judgment to alteration. In contrast, a probation case like *McKenzie* with no sentence until after revocation, and therefore no judgment, sends no such signal.

If the Court disagrees, though, and holds that Esquivel's judgment was not final for purposes of the *Estrada* rule when the new law came into effect, that would raise the question of the appropriate remedy in this case. Esquivel argues that two prison-prior enhancements must simply be stricken from his sentence. But this Court's recent decision in *People v. Stamps* (2020) 9 Cal.5th 685 precludes such an outcome. The enhancements were a negotiated condition of Esquivel's plea bargain. Moreover, there is no evidence that the Legislature intended the new law invalidating such enhancements to unilaterally alter existing plea agreements. Accordingly, if the enhancements cannot stand, the case must be returned to where it was before the bargain was made. The prosecutor must be given the opportunity to either agree to a reduction of the sentence or to revive any dismissed counts or allegations.

Further, a return to the status quo ante would necessarily allow for the possibility of a sentence that is higher than the one imposed as a result of the original bargain. This follows as a matter of both principle and practicality. As a result of the defendant's invocation of the new law, the parties upon return to the status quo ante must reach a new agreement based on the new legal landscape, or must proceed to trial if a new agreement

cannot be reached. While a defendant will often be in a better bargaining position in light of the new law, it will not always be possible to reach a mutually satisfactory disposition based on the remaining charges. And an artificial cap may in some cases result in an extraordinary windfall to defendants. Since a plea bargain is fundamentally a voluntary contractual arrangement, there is nothing unjust in setting the parties back to the status quo ante in full when a defendant chooses to invoke a new law that invalidates an existing agreement.

STATEMENT OF THE CASE AND FACTS

Around 1:00 a.m. on August 7, 2015, Randolph Esquivel tried to shatter the window of Iker Garcia's apartment. Garcia yelled at him, and Esquivel fled. (1CT 4-5, 9.)[1] But he came back 20 minutes later, when Garcia's wife saw a shadow move past the living room. (1CT 5-6, 9-10.)

Garcia got up to investigate, looked through the peephole of the front door, and saw Esquivel pouring lighter fluid on the door itself. (1CT 5, 10-11.) The couple called the police and again Esquivel ran off. (1CT 6, 10.)

Officers caught Esquivel in front of the apartment building a short while later. (1CT 10, 21.) His eyes were bloodshot, and his speech was slurred, but Esquivel told the police that he had had only two beers. (1CT 19-20.) In the meantime, Garcia noticed that his truck had been doused in lighter fluid too, and a bottle of

[1] Because Esquivel pleaded no contest, the facts of the offense are taken from evidence presented at the preliminary hearing.

lighter fluid had been discarded in the driveway. (1CT 14-16.) Garcia also realized that he had seen Esquivel around the apartment complex before: Esquivel sometimes visited the upstairs neighbor, and Garcia would say hello to him in passing. However, they had not previously had any disagreements. (1CT 14-15.)

The District Attorney charged Esquivel, who was on post-release community supervision at the time (1CT 26), with maliciously attempting to burn property (§ 455; count 1) and maliciously possessing flammable material (§ 453, subd. (a); count 2). The information also included allegations stemming from Esquivel's 2006 conviction for assault with a deadly weapon in 2006 (§ 245, subd. (a)(2)) and 2010 conviction for illegally possessing a firearm (§ 12021, subd. (a)(1)). Specifically, the District Attorney alleged that Esquivel had served two separate prison terms (§ 667.5, subd. (b)) and that the 2006 offense was both a serious felony (§ 667, subd. (a)) and a prior strike (§§ 667, subds. (b)-(j), 1170.12). (1CT 34-37.)

On September 11, 2015, Esquivel accepted a plea agreement. He pleaded no contest to count 1, and admitted the prior strike and prior prison terms. (1CT 42-45; 1RT A12.) In exchange, the prosecutor moved to dismiss count 2 and the prior serious felony enhancement. (1RT A20-A21.) The court imposed an aggregate sentence of five years in prison, and suspended execution of that sentence while Esquivel was on probation. (1CT 42-45; 1RT A14.) In order to reach that aggregate sentence, the court imposed three years for count 1, plus one year for each of the

prior prison terms, and struck the prior strike conviction for purposes of sentencing. (1CT 42-45; 1RT A14, A20.)

In October 2018, the District Attorney asked the court to revoke Esquivel's probation. (1CT 67.)[2] Esquivel had deserted, failing to report to his probation officer any time after March 2018. (1CT 54-56.) It was also alleged that he had committed several new offenses while on probation. (1CT 68.) Esquivel had been convicted of domestic violence in March 2018 (§ 243, subd. (e)). (1CT 68; see 1RT C1-C2.) And he had been arrested in another county for false identification, giving false information, and driving without a license in June 2018 (§ 148.9, Veh. Code, §§ 31 & 12500, subd. (a)), as well as petty theft and false personation in August 2018 (§§ 488 & 529, subd. (a)). (1CT 68; see 1CT 69-75, 94-96.)

On November 15, 2018, the trial court revoked probation and lifted the stay of execution on Esquivel's five-year prison sentence. (1CT 100-102.) Esquivel then filed a notice of appeal, purportedly "from the judgment rendered on November 15, 2018." (1CT 103.)

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[2] Esquivel appeared in court for another possible violation in June 2016. (1CT 47.) The record does not include a probation report for that appearance; it only includes a minute order indicating that the appearance occurred. (See 1CT 47.) However, a subsequent report suggests that the June 2016 appearance stemmed from a failure to pay victim restitution: Esquivel made a restitution payment one day before the June 2016 appearance. (See 1CT 47, 54, 64.)

While the appeal was pending, the Legislature enacted Senate Bill 136, which modified section 667.5 to prohibit the imposition of prior prison term enhancements in most cases. (See § 667.5, subd. (b); Sen. Bill No. 136 (2019-2020 Reg. Sess.) ch. 590, § 1, eff. Jan. 1, 2020.) Esquivel had already filed his opening brief. However, he filed a supplemental letter brief in December 2019, arguing that Senate Bill 136 prohibited the enforcement of his two prison prior enhancements.[3]

In an unpublished opinion, the Second Appellate District, Division Five, affirmed the enhancements. (*People v. Esquivel* (Mar. 26, 2020, No. B294024) 2020 WL 1465895.) The Court of Appeal reasoned that, for the purposes of determining finality under the *Estrada* rule, "there is no judgment of conviction without a sentence." (*Id.* at *7, citing *McKenzie*, *supra*, 9 Cal.5th 40 [2020 WL 939371, at *3].) And where a defendant "[does] not timely appeal" from an imposed sentence, "that sentence [becomes] final" after 60 days, which necessarily makes the judgment final. (*Ibid.*) Accordingly, the fact "[t]hat [Esquivel] had the advantage of a grant of probation and an opportunity to avoid prison does not provide an opportunity to take advantage of a subsequent statutory amendment enacted long after his sentence became final." (*Ibid.*)

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[3] Esquivel actually filed two supplemental letter briefs in December 2019. The first addressed only Senate Bill 136. The second, a "Substitute Supplemental Letter Brief," also argued that Assembly Bill 1618 authorized the Court of Appeal to strike his prison prior enhancements without remanding the matter. This issue will be addressed in section II, below.

ARGUMENT

I. A JUDGMENT IS FINAL FOR PURPOSES OF THE *ESTRADA* RULE WHEN A SENTENCE IS IMPOSED AND THE SENTENCE ITSELF BECOMES FINAL

Relying on the *Estrada* rule, Esquivel seeks to benefit from a statutory amendment that became operative more than five years after he was sentenced. (See OBM 9, citing *McKenzie*, *supra*, 9 Cal.5th 40 and *Estrada*, *supra*, 63 Cal.2d 740.) But Esquivel's sentence, like any other unappealed sentence, became final shortly after it was imposed, and therefore so too did his judgment for *Estrada* purposes. Accordingly, the new statutory amendment does not apply in his case.

A. Senate Bill 136 is an ameliorative law within the meaning of *Estrada* that applies to nonfinal judgments as of its effective date

At the time of Esquivel's sentencing in 2015, section 667.5 authorized a one-year enhancement for each prison term served by a criminal defendant prior to conviction.[4] Senate Bill 136 later changed this rule so that the enhancement 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).)[5]

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[4] Section 667.5 "contain[ed] a 'washout' exception" for defendants who remained free of conviction or incarceration for a number of years. (*People v. Buycks* (2018) 5 Cal.5th 857, 889.) Esquivel did not remain free of conviction or incarceration for the necessary time, so that exception is inapplicable here. (See 1RT A12.)

[5] Neither of Esquivel's prior prison terms falls within this carve-out. (See 1CT 36; 1RT A12.)

The effective date of non-urgency legislation such as Senate Bill 136, passed in 2019 during the regular legislative session, was January 1, 2020. (Cal. Const., art. IV, § 8; Gov. Code, § 9600, subd. (a); *People v. Camba* (1996) 50 Cal.App.4th 857, 865 ["a statute enacted at a regular session of the Legislature generally becomes effective on January 1 of the year following its enactment except where the statute is passed as an urgency measure and becomes effective sooner"], internal quotation marks omitted.) And in enacting Senate Bill 136, the Legislature did not expressly declare or indicate that it did not intend the bill to apply retroactively. (Sen. Bill No. 136 (2019-2020 Reg. Sess.) ch. 590, § 1; see OBM 14-15.)

The People agree with Esquivel, and with every appellate court to have considered the issue, that Senate Bill 136 is an ameliorative change in the law within the meaning of *Estrada* and that it therefore applies to all non-final judgments when the bill took effect on January 1, 2020. (See OBM 13-15; accord, *People v. France* (2020) 58 Cal.App.5th 714, 719, review granted Feb 24, 2021, S266711; *People v. Joaquin* (2020) 58 Cal.App.5th 173, 176; *People v. Griffin* (2020) 57 Cal.App.5th 1088, 1091; *People v. Shaw* (2020) 56 Cal.App.5th 582, 588; *People v. Hernandez* (2020) 55 Cal.App.5th 942, 947, review granted Jan. 27, 2021, S265739; *People v. Reneaux* (2020) 50 Cal.App.5th 852, 876; *People v. Cruz* (2020) 46 Cal.App.5th 715, 739.; *People v. Smith* (2020) 46 Cal.App.5th 375, 396; *People v. Gastelum* (2020) 45 Cal.App.5th 757, 772; *People v. Jennings* (2019) 42

Cal.App.5th 664, 682; *People v. Lopez* (2019) 42 Cal.App.5th 337, 339.)

B. However, Senate Bill 136 does not apply here because Esquivel's judgment became final when the time to appeal his sentence expired

While Senate Bill 136 applies to non-final judgments under the *Estrada* rule, that does not mean it applies here. Esquivel was sentenced in September 2015 and did not appeal. His sentence, and therefore his judgment, became final in November 2015, long before Senate Bill 136 went into effect.

1. When an imposed but suspended sentence like Esquivel's becomes final, so too does the judgment for purposes of *Estrada*

To determine whether ameliorative legislation applies in a particular case, "'[t]he 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 . . . it, and not the old statute in effect when the prohibited act was committed, applies.'" (*McKenzie*, *supra*, 9 Cal.5th at p. 44, quoting *Estrada*, *supra*, 63 Cal.2d at p. 744; see *Lara*, *supra*, 4 Cal.5th at pp. 306-308 [discussing *Estrada*]; *People v. Brown* (2012) 54 Cal.4th 314, 323 [same].) The issue of when a judgment becomes final presents a purely legal question. (*People v. Monk* (2018) 21 Cal.App.5th Supp. 1, 4.) It is therefore reviewed de novo. (See *People v. Arroyo* (2016) 62 Cal.4th 589, 593.)

A judgment becomes final "when all available means to avoid its effect have been exhausted." (*Stephens v. Toomey* (1959) 51 Cal.2d 864, 869; see *People v. Chavez* (2018) 4 Cal.5th 771,

779-784.) It has not become final "if there still remains some legal means of setting it aside" on direct review. (*Stephens v. Toomey*, *supra*, 51 Cal.2d at p. 869; see *People v. Barboza* (2018) 21 Cal.App.5th 1315, 1319; OBM 15.) That is, for *Estrada* purposes, "'a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.'" (*People v. Vieira* (2005) 35 Cal.4th 264, 306, quoting *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5, and citing *Bell v. Maryland* (1964) 378 U.S. 226, 230, *In re Pedro T.* (1994) 8 Cal. 4th 1041, 1046, and *In re Pine* (1977) 66 Cal.App.3d 593, 594; see U.S. Supreme Ct. Rules, rule 13; Cal. Rules of Court, rules 8.308(a) & 8.500(e); cf. *People v. Kemp* (1974) 10 Cal.3d 611, 614 ["'By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed . . . .'"].)

In criminal cases, the term "judgment is synonymous with the imposition of sentence . . . ." (*People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 2, citing *People v. Warner* (1978) 20 Cal.3d 678, 682, fn. 1, *Stephens v. Toomey*, *supra*, 51 Cal.2d at pp. 870-871, *People v. Mendevil* (1978) 81 Cal.App.3d 84, 87-88, and *People v. Holly* (1976) 62 Cal.App.3d 797, 801-802; see § 1202 [equating judgment with sentence].) This principle is reflected in the rules governing direct review: "[t]he appeal from the 'sentence' is the same as the appeal from the judgment." (*People v. Spencer* (1969) 71 Cal.2d 933, 934, fn. 1.) And the rules governing appealability ultimately inform applicability of the *Estrada* rule, since a

judgment becomes final once the options for direct review have been exhausted. (*Vieira*, *supra*, 35 Cal.4th at p. 305; OBM 15.)

In the probation context, the timing of judgment finality depends on whether the trial court chooses to impose or suspend the sentence. "Section 1203, subdivision (a) defines 'probation' as . . . suspension of the *imposition* of sentence or suspension of the *execution* of sentence." (*Chavez*, *supra*, 4 Cal.5th at p. 781, italics added.) That is, "[w]hen the trial court in a criminal case decides at time of sentencing to grant the defendant probation, the court may either suspend imposition of sentence or actually impose sentence but suspend its execution." (*People v. Howard* (1997) 16 Cal.4th 1081, 1084, citing § 1203.1, subd. (a).) If the 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." (*Id.* at p. 1087.) Thus, when the trial court suspends *imposition* of a sentence—i.e., when it defers imposing a judgment—no judgment exists to become final for the purposes of *Estrada* retroactivity. (See *McKenzie*, *supra*, 9 Cal.5th at p. 45 [finding the matter to be non-final where "review of the judgment imposing a prison sentence" had not been completed].)

By contrast, "when a court elects to impose a sentence, a judgment has been entered and the terms of the sentence have been set even though its execution is suspended pending a term of probation." (*People v. Scott* (2014) 58 Cal.4th 1415, 1424, citing *Howard*, *supra*, 16 Cal.4th 1081.) That judgment—i.e., the sentence—subsequently "becomes final and nonappealable"

under the ordinary rules of court. (*Howard*, *supra*, 16 Cal.4th at p. 1084; see *Scott*, *supra*, 58 Cal.4th at p. 1423 ["a defendant is 'sentenced' when a judgment imposing punishment is pronounced even if execution of the sentence is then suspended"]; Cal. Rules of Court, rule 8.308(a).) If the judgment is not appealed within 60 days, or if the direct appeal from that sentence has been resolved, an appellate court reviewing a subsequent probation violation may *not* alter the originally imposed sentence. (*People v. Amons* (2005) 125 Cal.App.4th 855, 870, citing *Howard*, *supra*, 16 Cal.4th at p. 1087.) The sentence may *not* be set aside. (See *Stephens v. Toomey*, *supra*, 51 Cal.2d at p. 869.)

This Court in *Scott* addressed the issue in a slightly different context. It held that an ameliorative statute did not apply to a probationer when a sentence had been imposed and execution suspended prior to the enactment of the statute. (*Scott*, *supra*, 58 Cal.4th at pp. 1418-1419.) However, the statute at issue was expressly prospective, and expressly excluded any case where "sentencing" occurred prior to the effective date. (*Ibid.*) Accordingly, the Court was not required to consider whether a "sentence" constituted a "judgment" for the purposes of *Estrada* retroactivity.

Howard, though, is more directly on point. Like *Scott*, it did not expressly address the question of *Estrada* retroactivity. (See OBM 28-29.) But it did turn on the proposition that a sentence whose execution has been suspended becomes final under the normal rules of court. The Court considered, "[i]f . . . the [trial] court actually imposes sentence but suspends its execution on

granting probation, *and the sentence becomes final and nonappealable*," whether the trial court "retain[s] . . . authority to impose a new sentence different from the one previously imposed?" (*Howard*, *supra*, 16 Cal.4th at p. 1084.)

In determining that a trial court lacked authority to impose anything other than the original sentence, the Court reasoned that the "former judgment" (i.e., the original sentence) (*Howard*, *supra*, 16 Cal.4th at p. 1087) was "long ago final in terms of appealability" (*id.* at p. 1090). The sentence therefore could not be modified. (*Id.* at pp. 1086-1088.) Instead, a trial court has only two choices once the original sentence becomes final: allow the suspension order to continue, or revoke the suspension order and thereby allow the former judgment to come into effect. (See *id.* at p. 1090 ["we are concerned with the court's power to modify an imposed sentence, long ago final in terms of appealability"].)

In fact, the Court has followed this rationale for several decades, acknowledging that a sentence becomes a final judgment even when its execution has been suspended. In *In re Phillips* (1941) 17 Cal.2d 55, the Court considered the finality of the two different types of probation cases for the purposes of filing an appeal. It observed that a trial court "may suspend the imposition of the sentence, in which case no judgment of conviction is rendered, or it may impose the sentence and thereafter suspend its execution." (*Id.* at p. 58, citations omitted.) "In the latter case a judgment of conviction has been rendered from which an appeal can be taken, and upon affirmance, *it becomes a final judgment*." (*Ibid.*, italics added.)

Phillips is especially relevant because, at the time it was decided, only true "judgments" could be appealed. Under the law as it exists today, when sentenc*ing* is suspended during probation, "'an order granting probation . . . shall be deemed to be a final judgment . . . '" for the purposes of taking an appeal. (*McKenzie*, *supra*, 9 Cal.5th at p. 46, citing § 1237, subd. (a).) Indeed, the fact that an order granting probation is merely "deemed" to be a judgment for the limited context of filing an appeal—rather than constituting a true judgment—was critical to this Court's decision in *McKenzie* that suspended imposition did not lead to a final judgment. (*McKenzie*, *supra*, 9 Cal.5th at pp. 47-48.) However, this language was not a part of the Penal Code when *Philips* was decided in 1941. (See *In re Bine* (1957) 47 Cal.2d 814, 817 [language "deem[ing]" probation order to be a final judgment was added in 1951].)

Instead, at the time *Philips* was decided, appeals were governed by a prior version of section 1237, which provided: "An appeal may be taken by the defendant: [¶] (1) From a final judgment of conviction; [¶] (2) From an order denying a motion for a new trial; [¶] (3) From any order made after judgment, affecting the substantial rights of the party. (Former § 1237, enacted Stats. 1872.) As the *Philips* authorities made clear, where sentenc*ing* was suspended, "no 'final judgment of conviction' was rendered" so "an appeal from it does not lie." (*People v. Noone* (1933) 132 Cal.App. 89, 92, cited in *Philips*, *supra*, 17 Cal.2d at p. 58.) By contrast, where only the execution was suspended, a judgment *had* been rendered, permitting an

appeal. (*Philips*, *supra*, 17 Cal.2d at p. 58.) When the ordinary appellate process has been completed—i.e., when no further direct review is available—such a sentence "becomes a final judgment." (*Phillips*, *supra*, 17 Cal.2d at p. 58; accord, *Oster v. Municipal Court* (1955) 45 Cal.2d 134, 141 ["when the judgment . . . was affirmed and became final, the order suspending 30 days of the sentence likewise became final and, even if assumed to have been erroneous when made, may not now be attacked"].)

The Court of Appeal in *McKenzie*, in an opinion that was subsequently affirmed by this Court, relied upon this principle too. When probation is granted "the timing of the judgment can vary because a trial court may grant probation by either suspending *imposition* of the sentence, or by imposing the sentence and suspending its *execution*." (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1214, review granted and aff'd in *McKenzie*, *supra*, 9 Cal.5th 40, citing *People v. Segura* (2008) 44 Cal.4th 921, 932.) "These two situations affect when the judgment becomes final, which in turn affects whether a defendant is eligible to seek the retroactive benefit of a change in law." (*Ibid.*)

> [W]hen the trial court initially imposes sentence, but suspends execution of that sentence and grants probation, a judgment has been rendered. (*People v. Mora* (2013) 214 Cal.App.4th 1477, 1482 [imposition of a sentence is equated with entry of a final judgment, even if its execution is suspended and the defendant is placed on probation].) That judgment will become final if the defendant does not appeal within 60 days. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1420-1421; see [Cal. Rules of Court,] rule 8.308(a).)

(*Ibid.*)

The only thing subject to change once an imposed sentence becomes final is the order suspending that sentence. (*Howard*, *supra*, 16 Cal.4th at pp. 1087-1088.) This makes sense because, as the Court has separately recognized, the order suspending execution of a sentence is "an order made after judgment." (*Perez*, *supra*, 23 Cal.3d at p. 549, fn. 2.) And while a trial court has jurisdiction to change post-judgment orders—for instance, by revoking probation and lifting the post-judgment suspension of execution (§ 1203.2)—jurisdiction to alter the judgment itself expires after 60 days. (*Howard*, *supra*, 16 Cal.4th at pp. 1087-1088.)[6]

"[T]he filing of a timely notice of appeal is a jurisdictional prerequisite. 'Unless the notice is actually or constructively filed

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[6] A narrow exception to this rule allows a trial court to resentence a defendant up to 120 days after the initial sentencing. (§ 1170, subd. (d).) As this Court has held, finality occurs after 60 days. (*Buycks*, *supra*, 5 Cal.5th at p. 873.) The question of whether resentencing under section 1170 "reopens" a final judgment for *Estrada* purposes is currently pending before this Court. (*People v. Federico*, review granted Aug. 26, 2020, S263082 ["Did defendant's resentencing pursuant to Penal Code section 1170, subdivision (d)(1) 'reopen' the finality of his sentence . . . ?"]; see also *People v. Padilla*, review granted Aug. 26, 2020, S263375 ["When a judgment becomes final, but is later vacated, altered, or amended and a new sentence imposed, is the case no longer final . . . ?"].) Regardless, that rule is not implicated here. Esquivel's probation revocation occurred well after the 120-day period set forth in section 1170 had expired. And his contention is only that his judgment was not initially final for purposes of *Estrada* when Senate Bill 136 came into effect.

within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.'" (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113, quoting *In re Jordan* (1992) 4 Cal.4th 116, 121.) In other words, if a notice of appeal is not filed within 60 days of the date a sentence is imposed, an appellate court may *only* review the post-judgment orders affecting the suspension of that sentence. (*Ibid.*; see Cal. Rules of Court, rule 8.308(a); accord, *Howard*, *supra*, 16 Cal.4th at pp. 1087-1088.)

While the suspension order may be changed under this type of appellate review, there is no "legal means of setting . . . aside" the sentence itself. (*Stephens v. Toomey*, *supra*, 51 Cal.2d at p. 869; see *Howard*, *supra*, 16 Cal.4th at pp. 1087-1088; accord, *Perez*, *supra*, 23 Cal.3d at p. 549, fn. 2 [an order suspending execution is "an order made after judgment"]; *People v. Wood* (1998) 62 Cal.App.4th 1262, 1270 [following the same rule, "a trial court may not reduce a sentence previously imposed and suspended"], citing *Howard*, *supra*, 16 Cal.4th at p. 1087.) And if there is no legal means of setting aside the sentence, it is final for the purposes of applying the *Estrada* rule. (*Vieira*, *supra*, 35 Cal.4th at p. 305; OBM 15.)

Accordingly, where the trial court in a probation case imposes a sentence but suspends execution, the judgment becomes final for *Estrada* retroactivity purposes according to the ordinary operation of the rules of court. Under those rules, Senate Bill 136 does not apply in this case. The trial court imposed a five-year sentence and merely stayed execution of that

prison term. (See 1RT A14 ["The five years have been imposed and stayed."].) The sentence was therefore imposed, and judgment rendered, on September 11, 2015. Esquivel did not appeal from that judgment within 60 days, so the five-year sentence became final on November 10, 2015, well before the new ameliorative law went into effect. (See *People v. Preyer* (1985) 164 Cal.App.3d 568, 576 ["[A]ppellant could have appealed at that time. He did not do so then, and cannot do so now. That judgment is now final"]); *People v. Chagolla* (1984) 151 Cal.App.3d 1045, 1048 ["[S]tate prison sentence would have been appealable at that time. That judgment is now final."].)

2. Legislative history confirms that an imposed but suspended sentence becomes a final judgment by operation of ordinary procedural rules

The finality of a suspended sentence is confirmed by the development of the statutory framework authorizing trial courts to suspend execution of a sentence. This framework dates to the 1903 amendments to the Penal Code. (See *In re Collins* (1908) 8 Cal.App. 367, 369.)[7] Like the modern iteration, those amendments authorized courts to either suspend sentencing itself (former § 1203, subd. (1), as amended Stats. 1903, ch. 34 § 1) or to impose a sentence and suspend its execution (*id.*, subd.

[7] The origins of this power go back even further. "[I]n some jurisdictions" the common law authorized "a court having the authority to imprison as a penalty for crime to make an order staying execution, and the power to do this [was] held to be inherent in the court." (*Collins*, *supra*, 8 Cal.App. at p. 369.)

(2).) However, the circumstances under which execution could be suspended were more limited than they are now:

> [T]he court shall have power in its discretion to place the defendant upon probation in the manner following:
>
> (1) The court, judge or justice thereof may suspend the imposing of sentence . . . and shall place such person on probation . . .
>
> (2) *If the judgment is to pay a fine*, and that the defendant be imprisoned until it be paid, *the court*, judge, or justice, upon imposing sentence, *may direct that the execution of the sentence of imprisonment be suspended* for such period of time . . . and on such terms, as it shall determine, and shall place the defendant on probation . . . during such suspension to the end that he may be given the opportunity to pay the fine; provided, however, that upon payment of the fine being made, judgment shall be satisfied and the probation cease.

(Former § 1203, as amended Stats. 1903, ch. 34 § 1.) In this initial form, "[t]he *time at which* a judgment or sentence shall be carried into execution form[ed] no part of the judgment of the court." (*Collins*, *supra*, 8 Cal.App. at p. 370, italics added, superseded by statute as recognized in *In re Application of Giannini* (1912) 18 Cal.App. 166, 170.) "The judgment is the penalty of the law as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution." (*Ibid.*)

This principle made sense in the circumstances addressed by the 1903 code. Under that code, a court could suspend execution of the sentence only if it was *either* a fine *or* incarceration. (Former § 1203, subd. (2), as amended Stats. 1903, ch. 34 § 1.) In

such cases, the suspension provided a temporary grace period for the defendant to collect the necessary money. While the sentence came with two choices, it was quite definite: if the fine was not paid, the sentence would go into effect. If the defendant wished to challenge that fine, a prompt and timely appeal (before the judgment became final, and before probation was revoked) was necessary.

The power to suspend execution of a sentence was expanded in 1911 and 1935, with substantial revisions to section 1203 and the creation of section 1203.1:

> The court, judge or justice thereof, may suspend the imposing, *or the execution* of sentence . . . and in case of such suspension of imposition or execution of sentence, the court shall place such person on probation . . . .

(Former § 1203, subd. (1), as amended Stats. 1911, ch. 381 § 1, italics added; see *People v. Mendosa* (1918) 178 Cal. 509, 511.)

> [I]n cases where discretion is conferred on the court . . . as to the extent of the punishment the court, upon application of the defendant, or of the people or on its own motion, may summarily deny probation, or at a time fixed may hear and determine in the presence of the defendant the matter of probation of the defendant and the conditions of such probation, if granted.

(Former § 1203, as amended Stats. 1935, ch. 604 § 1.)

> The court, judge or justice thereof, in the order granting probation, may suspend the imposing, *or the execution* of the sentence and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence . . . and upon such terms and conditions as it shall determine.

(Former § 1203.1, added Stats. 1935, ch. 604 § 2, italics added.)

Under these new rules, the power to suspend execution was untethered from the fine-or-prison requirement of the 1903 version. But the principle remained the same. A sentence that was imposed prior to the grant of probation was a final judgment:

> the court may suspend the imposition of the sentence, in which case no judgment of conviction is rendered, or it may impose the sentence and thereafter suspend its execution. (Pen. Code, secs. 1203.1, 1203.2.) In the latter case a judgment of conviction has been rendered from which an appeal can be taken, and upon affirmance, *it becomes a final judgment*.

(*Phillips*, *supra*, 17 Cal.2d at p. 58, italics added; accord, *People v. Witt* (1915) 170 Cal. 104, 110 ["the fixing of the time for the execution of the judgment is no part of the judgment"].) Again, this made sense in the context of the statutory framework as it existed under the 1911 and 1935 amendments.

At that time, only true judgments could be appealed; there was no provision deeming a probation order to be an appealable judgment for such purposes. (§ 1237, subd. (a); see *Bine*, *supra*, 47 Cal.2d at p. 817 [language "deem[ing]" probation order to be a final judgment was added in 1951].) If the suspended sentence were not a proper judgment, the defendant could not have challenged it at the time of conviction. (See *Phillips*, *supra*, 17 Cal.2d at p. 58.) The sentence had to be a judgment in order for defendants to take advantage of the appellate review process—an apparent defect in suspended-imposition cases, which were not immediately appealable until the defect was fixed by legislation "deeming" probation orders to be appealable judgments. (See *Bine*, *supra*, 47 Cal.2d at p. 817.)

The relevant provisions governing suspended execution cases have remained largely unchanged since 1935. (Compare former § 1203.1, added Stats. 1935, ch. 604 § 2, with former § 1203.1, as amended Stats. 2010, ch. 178 § 75.)[8] The original principle therefore continues: criminal defendants may take advantage of their appellate rights in suspended execution cases immediately after the sentence is imposed, because the sentence

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[8] The two versions of section 1203.1—striking the subsequent deletions from the 1935 version, and italicizing the intervening additions in the 2010 version—provide that:

> The court, judge ~~or justice~~ thereof, in the order granting probation, may suspend the imposing~~,~~ or the execution of the sentence and may direct that ~~such~~ suspension may continue for ~~such~~ period of time not exceeding the maximum possible term of ~~such~~ sentence, except as hereinafter set forth, and upon ~~such~~ terms and conditions as it shall determine.

(Former § 1203.1, added Stats. 1935, ch. 604 § 2.)

> The court, *or* judge thereof, in the order granting probation, may suspend the imposing or the execution of the sentence and may direct that *the* suspension may continue for *a* period of time not exceeding the maximum possible term of *the* sentence, except as hereinafter set forth, and upon *those* terms and conditions as it shall determine.

(Former § 1203.1, subd. (a), as amended Stats. 2010, ch. 178 § 75.)

Additional changes to section 1237.1 were also made in 2020, and came into effect while Esquivel's case has been pending before this Court. (See Assem. Bill No. 1950, Stats. 2020, ch. 328 § 2.) Those changes limited the duration of probation. They did not alter the rules for suspended imposition or execution of sentence. (See § 1203.1, subd. (a).)

itself is the judgment. (See *Howard*, *supra*, 16 Cal.4th at p. 1084; *Phillips*, *supra*, 17 Cal.2d at p. 58; *Collins*, *supra*, 8 Cal.App. at p. 370.) Like any other judgment, that sentence becomes final under the ordinary rules of court.

In other words, the finality of a suspended-execution sentence is the ordinary and long-established rule. Such finality gives defendants in these cases direct access to the appellate process, just like all defendants with similar judgments. And, just like in any other case, if a defendant fails to appeal the imposed sentence, he or she may *not* challenge it once probation has been revoked. (See *Howard*, *supra*, 16 Cal.4th at p. 1084; *Phillips*, *supra*, 17 Cal.2d at p. 58; *Collins*, *supra*, 8 Cal.App. at p. 370.) This differs from probation cases like *McKenzie*, where the imposition of a sentence itself has been suspended, and which represent a conspicuous exception to the ordinary rule of finality.

3. Closely related sentencing scenarios also confirm this understanding of finality

An examination of other types of suspended execution sentences likewise reaffirms the finality principles described above. Execution of a sentence can be suspended, for example, to allow for a later surrender date, or during the pendency of an appeal. (See *People v. Graves* (2001) 93 Cal.App.4th 1171, 1177 [surrender date postponed for two months after sentencing due to defendant's poor health]; § 1273 [authorizing bail pending appeal].) In both situations, finality is rooted in the imposition of the sentence.

A non-probationary defendant who is not immediately placed into custody after sentencing must still file the appeal

within 60 days after it is imposed. A "judgment is rendered when the trial court orally pronounces sentence." (*People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9.) But *execution* of the judgment does not begin until a certified "commitment document" is delivered to the warden of the state prison (*id.* at pp. 344-345; § 1213 et seq.), and "[t]he term of imprisonment commences to run when the defendant is delivered into the custody of the Director of Corrections" (*In re Black* (1967) 66 Cal.2d 881, 889-890). Nevertheless, the appeal must be filed "within 60 days after rendition of judgment" (*People v. Mendez* (1999) 19 Cal.4th 1084, 1088)—not within 60 days of execution or commitment to prison.[9]

Likewise, the execution of a sentence is suspended for defendants who are released on bail pending appeal. (§ 1273; see *People v. Ranger Ins. Co.* (2006) 143 Cal.App.4th 1304, 1309 ["in an appeal bond the surety contracts to produce the defendant in execution of the judgment"] quoting *People v. Allen* (1994) 28 Cal.App.4th 575, 582.) But suspending execution of a sentence pending appeal has no effect on the process by which it becomes final. "The court need not make a specific order for the defendant's return after issuance of the remittitur, as the affirmance of a judgment is self-executing—as soon as the affirmance is final, the defendant must surrender himself to

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[9] Similarly, in the civil context, the trigger date for the purposes of a jurisdictionally timely appeal is the date an appealable order is entered, not the date on which a party is required to comply with that order. (See, e.g., *Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 996.)

serve the sentence." (*Ranger Ins. Co.*, *supra*, 143 Cal.App.4th at p. 1309.)

No published authority has addressed the timing of *Estrada* finality in a case with a deferred surrender date. However, the case law governing appellate jurisdiction and *Estrada* retroactivity speaks exclusively in terms of sentencing; no case has turned on the date incarceration actually began. And, under the ordinary rules of court, such defendants still must file their notices of appeal prior to the expiration of the 60-day period, as counted from the date of sentencing. (Cal. Rules of Court, rule 8.308; see also *Witt*, *supra*, 170 Cal. At p. 110 ["the fixing of the time for the execution of the judgment is no part of the judgment"].) If they do not do so, an appeal would be untimely because the judgment would already have become final.

4. Treating an imposed but suspended sentence as the source of a final judgment for *Estrada* purposes is consistent with the goals of the different forms of probation

The different approaches of the two forms of probation also support the conclusion that suspended sentences are final. The reason for imposing and suspending a sentence is to emphasize the definite and concrete consequences of violating probation. The Judicial Council, explaining the significance of suspending execution of a sentence during probation in the California Judges Benchbook, drives this point home:

> JUDICIAL TIP: When the court imposes sentence and suspends its execution, it should inform the defendant that if he or she violates the terms and conditions of probation and formal revocation of probation results, the court will have no discretion to incarcerate the

> defendant for any term less than the term just imposed. This statement will *underscore the importance of the defendant's compliance* with the terms of probation *and the irreversible consequences of noncompliance*.

(Cal. Judges Benchbook: Misdemeanor Sentencing (CJER 2012) § 75.53, italics added; see *People v. Martin* (1943) 58 Cal.App.2d 677, 678-679 [when suspending execution of sentence, trial court told defendant, "you have a suspended sentence to Tehachapi hanging over your head. If you violate any of the terms of your probation, that is where you are going to go. Now, do you understand that distinctly?"]; cf. 1RT A14 [trial court telling Esquivel here, "Even if I'm not around, there is no other judge that has the option or discretion to strike it and simply give you a better sentence. The five years have been imposed and stayed."].)

In other words, by imposing and suspending a sentence, the trial court tells a defendant that violating probation will result in "irreversible consequences." Telling defendants that these "irreversible consequences" can actually be reversed if the Legislature passes a new law—allowing them to escape from a sentence that is supposed to be "hanging over" their heads—would tend to undermine this message.

In short, a probationer with a suspended sentence (like Esquivel) is in a substantially different position from a probationer with no sentence whatsoever (like *McKenzie*). By imposing a sentence, the judge has decided to send a message about the importance of complying with the terms of probation. Indeed, even the victims in suspended execution cases—who have a right to appear at sentencing—have already been given a

certain degree of closure. Reopening such a case would therefore work a harm on them that is unlike the issues faced by victims in suspended imposition cases, who know that the matter is still ongoing. (See *People v. Green* (2004) 125 Cal.App.4th 360, 378, quoting § 1191.1 [victims "'have the right to appear . . . at the sentencing proceeding and to reasonably express . . . their views concerning the crime, the person responsible, and the need for restitution.'"]; Cal. Const., art. I, § 28, subd. (a)(6) [addressing victims' rights].)

5. This Court's recent decisions in *Chavez* and *McKenzie* do not compel a contrary conclusion

Until very recently, the lower courts have also agreed that judgment finality occurs in probation cases once the sentence has been imposed and becomes final, even if its execution is suspended. (*See Barboza*, *supra*, 21 Cal.App.5th at pp. 1318-1319 [otherwise retroactive Proposition 57 relief not available because trial court imposed judgment and suspended execution when granting probation]; *People v. Superior Court* (*Rodas*) (2017) 10 Cal.App.5th 1316, 1326 [rejecting 2015 relief request where defendant "did not appeal the court's order granting probation [in 2007]," so "the judgment of conviction . . .became final for retroactivity purposes in 2007"]; *Amons*, *supra*, 125 Cal.App.4th at p. 868 [new sentencing rules announced in *Blakely v. Washington* (2004) 542 U.S. 296 did not apply retroactively to defendant whose sentence was imposed but execution suspended during probation].)

Following this Court's decisions in *McKenzie*, *supra*, 9 Cal.5th 40 and *Chavez*, *supra*, 4 Cal.5th 771, however, several Courts of Appeal have held that imposed-but-suspended sentences do not become final for *Estrada* purposes under the ordinary rules of court. (E.g., *France*, *supra*, 58 Cal.App.5th at p. 730 [relying on *McKenzie*, *supra*, 9 Cal.5th 40, in holding that an imposed-but-suspended sentence does not become final]; *People v. Martinez* (2020) 54 Cal.App.5th 885 [same], review granted Nov. 10, 2020, S264848; *People v. Conatser* (2020) 53 Cal.App.5th 1223, 1225 [same], review granted Nov. 10, 2020, S264848; *People v. Contreraz* (2020) 53 Cal.App.5th 965, 967 [same], review granted Nov. 10, 2020, S264721.) Neither *McKenzie* nor *Chavez* compels this conclusion.

In *McKenzie*, the trial court suspended imposition of sentencing and placed the defendant on probation. (*McKenzie*, *supra*, 9 Cal.5th at p. 43.) No sentence was imposed until he violated probation almost two years later. (*Ibid.*) The defendant then filed an appeal two weeks after the sentence was imposed. (*Ibid.*)

This Court ultimately held that the original order granting probation was not a final judgment, and the appeal two weeks after sentencing was therefore timely. (*McKenzie*, *supra*, 9 Cal.5th at p. 45.) In doing so, the Court followed the rationale described above: "In criminal actions, the terms 'judgment' and 'sentence' are generally considered 'synonymous'" [citation], and there is no 'judgment of conviction' without a sentence [citation]." (*Id.* at p. 47.) Since no sentence had been imposed until after the

defendant violated probation, this meant that there was no judgment to become final.

Here, of course, more than "an order granting probation" was entered. While orders granting probation are "deemed to be a final judgment," they are only considered such "for the limited purpose of taking an appeal therefrom." (*McKenzie*, *supra*, 9 Cal.5th at p. 47, quotation marks omitted.) By contrast, an imposed sentence is not merely "deemed" a judgment. It *is* a judgment by its nature, and must therefore be considered a judgment for *all* purposes. (See *Phillips*, *supra*, 17 Cal.2d at p. 58.) Nothing about *McKenzie* is inconsistent with the principle that an imposed-but-suspended sentence is a final judgment.[10]

Chavez presents a different issue, because it involved a different factual background. In that case, the defendant asked the trial court to dismiss a count in the furtherance of justice under section 1385 four years after completing probation, and nearly nine years after the original conviction. (*Chavez*, *supra*, 4 Cal.5th at p. 777.) In other words, he sought dismissal long after all aspects of the case had been completed.

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[10] Esquivel cites two other, similar opinions issued by this Court. (See OBM 17, 20, citing *People v. Superior Court* (*Giron*) (1974) 11 Cal.3d 793, 796 and *People v. Flores* (1974) 12 Cal.3d 85, 94-95.) Both *Giron* and *Flores* considered defendants who had not been sentenced. That is, they were similar to *McKenzie*: sentencing was suspended, so no sentence had been imposed, and there was no judgment to become final. (*Giron*, *supra*, 11 Cal.3d at p. 796; *Flores*, *supra*, 12 Cal.3d at pp. 94-95.)

The Court never addressed ameliorative sentencing statutes in *Chavez*.[11] However, in the course of explaining that the case could not be dismissed under section 1385 because the judiciary lacked fundamental jurisdiction once all aspects of a case had been completed (*Chavez*, *supra*, 4 Cal.5th at pp. 779-784), the Court briefly discussed the two types of probation cases:

> Going as far back as *Stephens v. Toomey* (1959) 51 Cal.2d 864, we have explained that neither forms of probation—suspension of the imposition of sentence or suspension of the execution of sentence—results in a final judgment.

(*Id.* at p. 781.) As described above, though, *Stephens v. Toomey* does not go quite so far.

Stephens v. Toomey says that a judgment has not become final "if there still remains some legal means of setting it aside." (*Stephens v. Toomey*, *supra*, 51 Cal.2d at p. 869.) But other subsequent cases have specified that "final" means "the availability of appeal [has been] exhausted," (*Kemp*, *supra*, 10 Cal.3d at p. 614), and that an imposed-but-suspended sentence cannot be altered once the time for appeal has expired (*Howard*,

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[11] Esquivel objects that various cases relied upon throughout this brief are irrelevant because they did not consider *Estrada* retroactivity, and "'cases are not authority for propositions not considered.'" (OBM 31, quoting *People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10; see OBM 28-29 [dismissing *Howard*, *supra*, 16 Cal.4th 1081, as "unrelated to finality under *Estrada*"] OBM 29-32 [arguing that "finality under *Estrada* was not relevant in *Scott*," *supra*, 58 Cal.4th 1415, so "reliance on *Scott* is misplaced"].) However, while Esquivel relies heavily upon *Chavez* in the opening brief (see OBM 18-23), *Chavez* also does not concern *Estrada* retroactivity.

supra, 16 Cal.4th at p. 1087). In other words, once the sentence can no longer be altered under *Howard*, there is no "legal means of setting it aside" under *Stephens v. Toomey*.

Chavez also observed that, "[i]n the case where the court suspends execution of sentence, the sentence constitutes 'a judgment provisional or conditional in nature.'" (*Chavez*, *supra*, 4 Cal.5th at p. 781, quoting *Stephens v. Toomey*, *supra*, 51 Cal.2d at pp. 870-871.) But the type of conditionality that a suspended-execution case involves should not affect finality of the judgment. The conditionality—either revocation or successful completion of probation—only affects the "order made after judgment" to suspend execution. (*Perez*, *supra*, 23 Cal.3d at p. 549, fn. 2.) Either that suspension will continue or it will be lifted. But the "conditional" aspect of the case does not affect the sentence: that judgment can*not* be modified. (*Howard*, *supra*, 16 Cal.4th at p. 1087.)[12]

Indeed, a closer reading of *Stephens v. Toomey* shows it to be even more indicative of finality. It held that, "[i]f 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 . . . ." (*Stephens v. Toomey*, *supra*, 51 Cal.2d at p. 870, italics added.) Such a broad rule would answer the issue

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[12] Relying upon "conditionality" also proves too much. Even when a case is reduced to final judgment, it is still "conditional" in some sense because a defendant may often obtain some form of postconviction resentencing or other relief, resulting in the "reopening" of a judgment. (See *People v. Padilla* (2020) 50 Cal.App.5th 244, 253, review granted Aug. 26, 2020, S263375.)

presented in the current case: a suspended sentence "becomes final."

The Court did not stop there, though, because it was not concerned with criminal sentencing, or ameliorative statutes, or *Estrada* retroactivity. Rather, it was concerned with the constitutional rules governing felon disenfranchisement. (*Stephens v. Toomey*, *supra*, 51 Cal.2d at p. 869 ["petitioner seeks to enforce his right to vote while confronted with . . . the Constitution of the State of California which reads in part: '(N)o person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this State."].) And, because section 1203.4 permitted the court to "expunge" the conviction and dismiss the case—treating the conviction as though it never occurred—a suspended sentence was "not a final judgment *such as to render the prohibitive measure of the Constitution effective*." (*Id.* at p. 870, italics added.)

At the time *Stephens v. Toomey* was decided, expungement under section 1203.4 expressly "released [a defendant] from all penalties and disabilities resulting from the offense or crime of which he has been convicted." (*Meyer v. Board of Medical Examiners* (1949) 34 Cal.2d 62, 64; accord, *Stephens v. Toomey*, *supra*, 51 Cal.2d at p. 870.) In other words, the judgment was "final and . . . effective for all purposes during probation" (*Stephens v. Toomey*, *supra*, 51 Cal.2d at p. 870), and was only non-final for the purposes of evaluating "penalties and disabilities" like disenfranchisement (*ibid.*). So the broad language in *Stephens v. Toomey*, as cited by *Chavez*, does not

make a judgment non-final for the purposes of evaluating whether a court has the power to alter some component of the sentence itself. I.e., it does not make a judgment non-final for the purposes of *Estrada* retroactivity. As *Howard* made clear, no power to modify an imposed sentence exists once the time for appeal has passed. (*Howard*, *supra*, 16 Cal.4th at pp. 1087-1088.)

In short, it is certainly true that "a grant of probation is not a final order under *Estrada*." (OBM 21.) But where the trial court imposes a sentence, it does more than merely grant probation. It imposes a judgment. Neither *Chavez* nor *McKenzie* nor *Stephens v. Toomey* supports Esquivel's argument that such a judgment does not become final by operation of the ordinary procedural rules.

II. EVEN IF SENATE BILL 136 APPLIED TO ESQUIVEL, THE PROPER REMEDY WOULD BE TO RETURN THE PARTIES TO THE STATUS QUO ANTE

Even if Esquivel's judgment did not become final for purposes of *Estrada* when the time to appeal his sentence expired, he still would not be entitled to automatic reduction of his sentence as he contends.

"The *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." (*Stamps*, *supra*, 9 Cal.5th at p. 700; see also *id*. at p. 705 [section 1016.8, providing that "a plea agreement does not have the effect of insulating [the parties] from changes in the law that the Legislature has intended to apply to them," confirms only that a

new law may affect a plea bargain, but does not speak to remedy].) As the Court recently made clear in *Stamps*, the remedy is not to unilaterally "whittle down" Esquivel's punishment, which was the result of a negotiated disposition. Instead, the remedy should be to remand the case and allow the prosecutor to either accept such a reduction or to withdraw from the plea agreement. (See OBM 34-40 [arguing that the Court should remand for the trial court to simply strike the enhancements].)

A. Plea bargains are governed by the basic principles of contract law

"Because a 'negotiated plea agreement is a form of contract,' it is interpreted according to general contract principles." (*Segura*, *supra*, 44 Cal.4th at p. 930.) "Acceptance of the agreement binds the court and the parties to the agreement." (*Ibid.*, citing *People v. Armendariz* (1993) 16 Cal.App.4th 906, 910-911; *People v. Woodard* (1982) 131 Cal.App.3d 107, 110.) "'When a guilty or nolo contendere plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, *both* parties . . . must abide by the terms of the agreement.'" (*Segura*, *supra*, 44 Cal.4th at pp. 930-931, brackets omitted, quoting *People v. Panizzon* (1996) 13 Cal.4th 68, 80.) In other words, "the concept of *reciprocal benefits*" is "critical to plea bargaining." (*People v. Collins* (1978) 21 Cal.3d 208, 214, italics added.) "When either the prosecution or the defendant is deprived of benefits for which it has bargained," it will be entitled to some form of relief. (*Ibid.*)

The court must also adhere to the agreement: once a plea is accepted by the parties and approved by the court, the court may not proceed other than as specified in the plea. (§ 1192.5; *Stamps*, *supra*, 9 Cal.5th at p. 700.)

> "A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound. Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly. Once the court has accepted the terms of the negotiated plea, it lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree."

(*Id.* at p. 701, citations and alterations omitted.) In other words, a court is prohibited from "'unilaterally modifying the terms of the bargain without affording an opportunity to the aggrieved party to rescind the plea agreement and resume proceedings where they left off.'" (*Ibid.*, citations and alterations omitted.)

B. If the bargain is invalidated, the prosecution must have an opportunity to return to the status quo ante

As this Court recently held, when a new ameliorative law invalidates an element of a negotiated plea bargain, the general remedy is to permit the prosecution to withdraw from the agreement (or to agree to the alteration), not to unilaterally alter the terms of the bargain in the defendant's favor. (See *Stamps*, *supra*, 9 Cal.5th at pp. 703-705 [discussing *Collins*, *supra*, 21 Cal.3d 208, where crime to which defendant pleaded guilty was subsequently abolished].) There is an exception to that general rule, implicated where the Legislature makes clear its intent "to overturn long-standing law that a court cannot unilaterally

modify an agreed-upon term." (*Stamps*, *supra*, 9 Cal.5th at p. 701.) But, as in *Stamps*, the exception does not apply here; the Legislature did not address retroactivity at all in enacting Senate Bill 136. (See *France*, *supra*, 58 Cal.App.5th at p. 727; section I.A., above.)

Stamps is especially informative. That case considered Senate Bill 1393, which repealed a prohibition against courts striking certain five-year prior-conviction enhancements. (See Sen. Bill No. 1393 (2017-2018 Reg. Sess.) Stats. 2018, ch. 1013, §§ 1, 2.) That law became effective after the defendant's plea and sentencing but applied to the defendant's nonfinal case under *Estrada*. (*Stamps*, *supra*, 9 Cal.5th at p. 699.) In addressing the question of remedy, the Court determined that the ameliorative law "was intended to bring a court's discretion to strike a five-year serious felony enhancement in line with the court's general discretion to strike other enhancements." (*Id.* at p. 702.) But "the legislative history [did] *not* demonstrate any intent to overturn existing law regarding a court's lack of authority to unilaterally modify a plea agreement. Indeed, none of the legislative history materials mention plea agreements *at all*." (*Ibid.*)

Stamps contrasted Senate Bill 1393, and the legislative intent that motivated it, with Proposition 47, a law that the Court had previously decided was intended to unilaterally alter plea agreements. (See *Harris v. Superior Court* (2016) 1 Cal.5th 984, 991-992; *Doe v. Harris* (2013) 57 Cal.4th 64, 70; Prop. 47, adopted by voters effective November 5, 2014.) Proposition 47,

which reduced a category of nonviolent felony crimes to misdemeanors, expressly applied to those convicted of the enumerated offenses "whether by trial or plea." (*Stamps*, *supra*, 9 Cal.5th at p. 704.) And its broad policy goal of reclassifying certain low-level crimes to misdemeanors would be thwarted if, in response to resentencing petitions, prosecutors were permitted to withdraw from plea agreements and recharge offenders with formerly dismissed felonies. (*Ibid*.) The Court concluded that the type of intent manifest as to Proposition 47 was absent as to Senate Bill 1393, and therefore there could be no unilateral alteration of the bargain if a plea included an enhancement subject to Senate Bill 1393. (*Stamps*, *supra*, 9 Cal.5th at pp. 704-705.)[13]

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[13] *Harris* and *Doe* also presupposed that prosecutors could protect plea bargains against changes in the law. If they "want[ed] to insulate the agreement from future changes in the law they [could] specify that the consequences of the plea will remain fixed despite amendments to the relevant law." (*People v. Wright* (2019) 31 Cal.App.5th 749, 756; see *Doe*, *supra*, 57 Cal.4th at p. 71 ["plea agreements . . . incorporate the reserve power of the state to amend the law"]; *Harris*, *supra*, 1 Cal.5th at p. 993 ["plea agreement does not insulate the parties 'from changes . . . that *the Legislature has intended to apply to them*'"].)

But this supposition of *Harris* and *Doe* is no longer applicable. With the 2019 enactment of Assembly Bill 1618, prosecutors are now forbidden from insulating their plea bargains against changes in the law. (See Stats. 2019, ch. 586, § 1.) "A provision of a plea bargain that requires a defendant to generally waive future benefits of legislative enactments . . . that may retroactively apply after the date of the plea is void as against public policy." (§ 1016.8, subd. (b).)

Senate Bill 136, like Senate Bill 1393, was intended to ameliorate punishment for a particular enhancement provision, and neither its text nor its legislative history addresses plea bargaining. And unlike Proposition 47's broad policy goal of reclassifying a category of offenses, the goal of Senate Bill 136 to narrow the applicability of a discrete enhancement provision would not be thwarted in plea cases by the usual remedy of permitting the prosecutor to withdraw from the plea agreement. (See *Stamps*, *supra*, 9 Cal.5th at p. 704.)

Here, Esquivel pleaded no contest to count 1 and admitted both a prior strike conviction and two prior prison terms. (1CT 42-45; 1RT A12.) In return, the prosecutor moved to dismiss count 2 (1RT A21) and stipulated that the court would disregard the prior strike conviction "for purposes of sentencing" (1RT A20).

So long as a prosecutor had the option of insulating the plea agreement, any failure to do so might have been construed as "accepting" subsequent legislation. (See *Doe*, *supra*, 57 Cal.4th at p. 71.) Since plea bargains sound in contract law, this tacit "acceptance" could form the basis for enforcing a bargain even when subsequently modified by a court. (See *Segura*, *supra*, 44 Cal.4th at p. 930 ["acceptance" binds the parties in a plea bargain].)

However, now that prosecutors have no control over whether the plea agreement will incorporate a future change in law (§ 1016.8, subd. (b)), they can hardly be deemed to "accept" such a change. (See *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 706 ["an agreement is illusory if it leaves one party 'free to perform or to withdraw from the agreement at his own unrestricted pleasure'"], quoting *Mattei v. Hopper* (1958) 51 Cal.2d 119, 122.)

The record also indicates that the plea was conditional, as opposed to "open." Count 2 was dismissed "[p]ursuant to the plea to count 1." (1RT A21; see *People v. Cuevas* (2008) 44 Cal.4th 374, 381, fn. 4 [open plea is one in which defendant admits all charges unconditionally without any promises in return]; *Panizzon*, *supra*, 13 Cal.4th at p. 80 [negotiated plea agreement that must be treated as contract typically involves guilty plea "in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment"].)[14]

If the Court concludes that Esquivel's 2015 sentence never became a final judgment, Senate Bill 136 would invalidate part of the negotiated disposition—Esquivel's admission of the prior prison terms under Penal Code section 667.5, subdivision (b)—and he would be entitled to that benefit insofar as the

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[14] Even in the "open plea" context, a sentence may not simply be "whittled down" when part of it is invalidated by subsequent legislation. When a court sentences a defendant after an open plea, there is no agreed-upon limit to the court's sentencing power; rather, it exercises that power just as it would after a trial. (*People v. Clancey* (2013) 56 Cal.4th 562, 579-580; *Cuevas*, *supra*, 44 Cal.4th at p. 381, fn. 4.) In such a circumstance, "when part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.'" (*People v. Buycks* (2018) 5 Cal.5th 857, 893.) This further undermines Esquivel's argument for simply striking the enhancements. It would be incongruous to hold that a defendant who pleaded guilty in exchange for definite benefits (in the form of dismissed charges, for example) is entitled to a further, unilateral reduction of punishment in these circumstances, while a defendant who received no benefit in exchange for a guilty plea is not.

enhancement may not form part of the charges in this case. But that does not mean his sentence may be unilaterally altered. The invalidity of part of the plea, under *Estrada*, is of direct consequence to the bargain that the prosecutor agreed to. And because Senate Bill 136 is not intended to work an exception to the general principles governing plea bargains, "the court is not authorized to unilaterally modify the plea agreement by striking the . . . enhancement but otherwise keeping the remainder of the bargain." (*Stamps*, *supra*, 9 Cal.5th at p. 708.) Rather, the remedy is to remand to the trial court to permit the prosecutor to either accept a reduction of the sentence or to withdraw from the plea agreement. (See *id.* at pp. 703-709.)

Esquivel agreed to serve five years in prison. (See 1CT 42-45; 1RT A12-A14, A20-A21.) However, if he obtains the benefit of Senate Bill 136, that term would be reduced by forty percent. (See *Harris*, *supra*, 1 Cal.5th at p. 993 [approving withdrawal from plea where "change [in law] eviscerated the judgment and the underlying plea bargain entirely"].) In other words, Esquivel wants to whittle down the sentence "but otherwise leave the plea bargain intact. This is bounty in excess of that to which he is entitled." (*Collins*, *supra*, 21 Cal.3d at p. 215; see *Stamps*, *supra*, 9 Cal.5th at p. 703; *People v. Hester* (2000) 22 Cal.4th 290, 295 ["defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process"].)

Settling on an overall level of culpability and punishment is often more integral to the bargain than inclusion of a particular

enhancement as a component of the sentence. The circumstances here—where whittling down the sentence would reduce it by almost half—illustrate well why renegotiation in light of the new law, and taking into consideration the dismissed charges or enhancements, makes sense. That remedy gives effect to the Legislature's intent to eliminate the sentence enhancement while preserving the parties' ability to reach an appropriate disposition without granting the defendant a windfall or putting either party at a disadvantage. (See *Stamps*, *supra*, 9 Cal.5th at p. 702.)[15]

Several courts of appeal, addressing this issue, have similarly found that a plea bargain may not be unilaterally whittled down by the courts. (See *Joaquin*, *supra*, 58 Cal.App.5th at pp. 177-179; *Griffin*, *supra*, 57 Cal.App.5th at pp. 1093-1096; *Hernandez*, *supra*, 55 Cal.App.5th at pp. 956-960, review granted Jan. 27, 2021, S265739; *People v. Barton* (2020) 52 Cal.App.5th 1145, 1154-1159.)[16] One court, in a divided

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[15] To the extent *People v. Matthews* (2020) 47 Cal.App.5th 857, 868-869, suggests that the legislative intent of Senate Bill 136 supports unilateral alteration of a plea agreement without affording the prosecutor an opportunity to withdraw, that decision is irreconcilable with this Court's subsequent opinion in *Stamps* and should be disapproved. (See OBM 39.)

[16] The Court granted review in *Hernandez* to decide two issues identical to the remedy issues raised by Esquivel here: "(1) If a defendant's prior prison term enhancements are stricken under Senate Bill No. 136, does the remainder of the sentence agreed to under a plea agreement remain intact or must the case be remanded to allow the People to withdraw from the plea agreement and to obtain the trial court's approval (see *People v. Stamps* (2020) 9 Cal.5th 685)? (2) If the plea agreement is

opinion, has disagreed. (See *France*, *supra*, 58 Cal. App. 5th at pp. 723-730.) The opinions in *Joaquin*, *Griffin*, *Hernandez*, and *Barton*—as well as the dissent in *France*—have the better reasoning.

In deciding to whittle down a plea-bargained sentence, the *France* majority relied upon the fact that Senate Bill 1393 involved discretionary sentencing choices, while Senate Bill 136 does not:

> Under Senate Bill 1393 [addressed in *Stamps*], it is ultimately a trial court that chooses whether an enhancement is eliminated—meaning that Senate Bill 1393 directly implicates the prohibition on a trial court's ability to unilaterally modify an agreed-upon sentence. But under Senate Bill 136, the Legislature itself has mandated the striking of affected prison priors by making the enhancement portion of France's sentence illegal. [Citation.] Thus, Senate Bill 136 does not involve *Stamps*'s repeated and carefully phrased concern with the "long-standing law that a *court* cannot *unilaterally* modify an agreed-upon term by striking portions of it under section 1385."

(*France*, *supra*, 58 Cal.App.5th at pp. 728-729.) But this is a difference without meaning.

"The question is not whether striking an enhancement is discretionary or mandatory but whether, after a court does strike the enhancement, it has the authority to modify the plea agreement by leaving the remnants of the agreed-upon sentence intact without securing the parties' assent to the modification."

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rescinded in light of Senate Bill No. 136, can the defendant be sentenced to a term longer than provided for in the original agreement?"

(*France*, *supra*, 58 Cal.App.5th at p. 734 (dis. opn. of Pollack, P.J.).) As described above, plea bargains are fundamentally about voluntary contractual arrangements. (*Segura*, *supra*, 44 Cal.4th at p. 930.) Allowing defendants to serve reduced sentences at their request, and over a prosecutor's objection, would contravene the basic tenets of contract law. (See *Serpa v. California Surety Investigations, Inc.*, *supra*, 215 Cal.App.4th at p. 706 ["an agreement is illusory if it leaves one party 'free to perform or to withdraw from the agreement at his own unrestricted pleasure'"].) So in the absence of clear evidence that "the legislature intended to overturn" these normal rules, a court should not do so unilaterally. (*Stamps*, *supra*, 9 Cal.5th at p. 701.)

France also reasoned that "[p]reventing Senate Bill 136 from applying to plea-bargained sentences would thwart or delay the full achievement of the Legislature's intent to reduce the expense and ineffectiveness of enhanced prison sentences based on prior prison terms." (*France*, *supra*, 58 Cal.App.5th at p. 728.) But declining to unilaterally alter the plea bargain would not "[p]revent[] Senate Bill 136 from applying" to any defendant. It would not "undermine the *Estrada* principle that the Legislature intends a lighter penalty to apply 'to every case to which it constitutionally could apply.'" (*Id.* at p. 728.) Instead, remanding for further proceedings would put defendants who entered into plea bargains years ago (like Esquivel) into the exact same position as defendants who were just charged yesterday: prior prison term enhancements would not be available, and any plea

bargain or other sentence would have to be crafted on some other basis.

This is precisely the point of the *Estrada* rule. Where new laws imposing lesser punishments have been enacted, "the punishment provided by the amendatory act should be imposed." (*Estrada*, *supra*, 63 Cal.2d at p. 742.) And "the punishment provided by" Senate Bill 136—or rather, the relief provided by it—is simply that prior prison term enhancements may no longer be imposed. Going further than this, allowing defendants to serve a new sentence that no prosecutor ever agreed to and no sentencing court ever approved, would do something neither *Estrada* nor the Legislature ever contemplated. It would give a defendant seeking retroactive relief under Senate Bill 136 a more favorable outcome than a defendant being prosecuted under the prospective application of Senate Bill 136, who must still secure a prosecutor's agreement and court's approval before entering a plea bargain.

Accordingly, rather than permit Esquivel to unilaterally withdraw from his section 667.5 enhancements, this Court should impose the remedy specified by *Stamps*: if Esquivel wishes to renege on his half of the plea agreement, the prosecutor may likewise withdraw from the agreement. The trial court "'must restore the parties to the status quo ante.'" (*Stamps*, *supra*, 9 Cal.5th at p. 707, quoting *People v. Ellis* (2019) 43 Cal.App.5th 925, 944.) "The state may therefore seek to reestablish defendant's vulnerability by reviving the counts dismissed." (*Collins*, *supra*, 21 Cal.3d at p. 215; cf. *Segura*, *supra*, 44 Cal.4th

at p. 931, quoting *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 ["'Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly.'"]; *Barton*, *supra*, 52 Cal.App.5th at p. 1155 [where the "plea agreement is now unenforceable," parties must be restored to the status quo ante].)

C. Returning to the status quo ante necessarily means that a new sentence may exceed the original sentence

Finally, restoring the parties to the status quo ante definitionally reopens the entire spectrum of prosecution and punishment. Esquivel asks the Court to "limit [his] total sentencing exposure to the five year prison term he previously agreed to." (OBM 40.) But nothing in *Stamps* supports such a resolution.

Collins, admittedly, "allowed the prosecution to refile the previously dismissed charges as long as the defendant was not resentenced to a greater term than provided in the original plea agreement," but *Stamps* did not endorse or impose such a limitation. (*Hernandez*, *supra*, 55 Cal.App.5th at p. 959, review granted Jan. 27, 2021, S265739, citing *Collins*, *supra*, 21 Cal.3d 208; see OBM 40-47.) Instead, it "held the People could completely withdraw from the plea agreement . . ." (*Hernandez*, *supra*, 55 Cal.App.5th at p. 959, review granted Jan. 27, 2021, S265739.) The trial court "cannot 'proceed to apply and enforce certain parts of the plea bargain, while ignoring' others." (*Ellis*,

supra, 43 Cal.App.5th at p. 944, cited with approval in *Stamps*, *supra*, 9 Cal.5th at p. 708.)[17]

Indeed, trial courts are expressly forbidden from taking such action. "[T]he court may not proceed as to the plea other than as specified in the plea." (§ 1192.5.) And "the plea" was not for a five-year sentence under any conceivable combination of charges and enhancements. "The plea" required an admission that Esquivel had committed an attempt to burn and served two prior prison terms. (1CT 42-45; 1RT A12.)

This remedy also comports with the process by which a court might reject a plea bargain in the first instance. "'Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly.'" (*Ames*, *supra*, 213 Cal.App.3d at p. 1217.) That is, if Esquivel had never been sentenced, and the plea bargain rejected in the first instance, the prosecutor would not now be limited to seeking a five-year sentence.

Nor can Esquivel succeed in his claim that the People are estopped from seeking a higher prison term under the doctrine of detrimental reliance. (See OBM 45, citing *People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1353-1354.) As his own authority states, detrimental reliance:

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[17] To the extent *Collins* is inconsistent with the Court's later decision in *Stamps*, it should be disapproved for the reasons stated here. (See *Griffin*, *supra*, 57 Cal.App.5th at p. 110 (conc. opn. of Reardon, J.) ["*Stamps* indicates a willingness to reconsider *Collins* on this point. I write here to encourage that reconsideration"].)

> ". . . may not be shown 'by the mere passage of time.' [Citation.] . . . *Nor may detrimental reliance be shown by the prospect of a longer sentence.* [Citation.]"

(*Rhoden*, *supra*, 75 Cal.App.4th at p. 1355, italics omitted and added, cited in OBM 45.)

More critically, the doctrine of estoppel and a "showing of detrimental reliance" require:

> "(1) the party to be estopped knew the facts; (2) the other party was ignorant of the true facts; (3) the party intended his [or her] conduct would be acted upon, or acted in a manner that the party asserting the estoppel had a right to believe it so intended; and (4) the other party relied upon the conduct to his [or her] injury."

(*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1155, quoting *Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1110, alterations made in *Dollinger*.) "Where one of the elements is missing, there can be no estoppel." (*Ibid.*)

The prosecutor here plainly did not know—when the plea bargain was made in 2015—that Senate Bill 136 would be enacted four years later.[18] Unlike the authorities relied upon by

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[18] Moreover, in reality it is not the prosecutor who seeks to withdraw from the plea bargain in circumstances such as these. Instead, it is the defendant who wishes to withdraw from the agreed-upon bargain. (See *People v. Mancheno* (1982) 32 Cal.3d 855, 860-861 [""usual remedies for violation of a plea bargain are to allow *defendant* to withdraw"].) Although the decisions sometimes speak it terms of a remand to permit the prosecution to withdraw from the plea agreement, the remedy may more accurately be described as permitting the prosecution, as a result of the defendant's withdrawal, either to acquiesce in a simple

Esquivel, the first prong of the detrimental reliance and estoppel inquiry therefore cannot be met. (See OBM 45, citing *In re Kenneth H.* (2000) 80 Cal.App.4th 143, 149 [prosecutor promised to dismiss case upon successful completion of polygraph exam but reneged after the exam, claiming "the matter could no longer be dismissed because the District Attorney's Office had received various calls from the community concerned about the dismissal"]; see also *Rhoden*, *supra*, 75 Cal.App.4th at pp. 1353-1354 [finding no detrimental reliance].)

Two other arguments for limiting the sentence on remand, raised by appellate courts confronted with this issue, should also be rejected. The First District, Division Five, observed:

> The purpose of [Senate Bill 136] was to *decrease* the length of sentences imposed on repeat felons by substantially narrowing the scope of application of the prior prison term enhancement. An increased sentence due to retroactive application of the enactment would be directly contrary to the result the Legislature intended. The risk of an increased sentence would also discourage defendants from exercising their right to challenge unauthorized section 667.5 subdivision (b) enhancements.

(*Griffin*, *supra*, 57 Cal.App.5th at p. 1097.) But "decreasing the length of sentences" is better understood as a consequence, rather than the principal purpose, of Senate Bill 136.

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reduction of penalty or to insist on renegotiation. In other words, it is Esquivel's, not the People's, attack on the bargain that upsets any reliance interest he may have had in the original sentence.

As phrased by its author, Senate Bill 136 would eliminate an enhancement that "re-punishe[d] offenders for previous jail time served – not the actual crime committed." (Sen. Bill No. 136, Assem. Floor Analysis, Sept. 3, 2019, at p. 1.) Arguments in support of the bill similarly highlighted the point that it would eliminate "fundamentally unjust" enhancements, "predicated on a conviction for which the person was already punished." (*Id.* at p. 2.) So long as a sentence on remand does not re-impose the prior prison term enhancements, this goal will not be affected.[19]

The prospect of discouraging the exercise of appellate rights also does not require the Court to impose a cap on the remand sentence. *Griffin* noted that a defendant wishing to raise unrelated appellate issues would face "the possibility that a reviewing court will reverse a judgment including an unauthorized enhancement even absent a request from a party to do so," (*Griffin*, *supra*, 57 Cal.App.5th at p. 1097), particularly in light of the rule that "'[a]n appellate court may 'correct a sentence that is not authorized by law whenever the error comes to the attention of the court'" (*ibid.*, quoting *In re Harris* (1993) 5 Cal.4th 813, 842). But this possibility could be eliminated by a

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[19] And even if part of the motivation behind Senate Bill 136 was to reduce prison terms, that does not mean the legislation must be interpreted in every way that would maximize that particular goal. (Cf. *People v. Morales* (2016) 63 Cal.4th 399, 408 ["But the purpose of saving money does not mean we should interpret the statute in every way that might maximize any monetary savings"].) Rather, the issue here is the much more specific one of how the new law affects nonfinal plea bargains.

very simple expedient—while a court "may" correct an unauthorized sentence, it is not required to undo a plea bargain when the unauthorized term is not challenged by the defendant.[20]

Even if a court decided to undo such a bargain, though, *Griffin* simply did not follow the *Harris* rule far enough. *Harris* addressed the sentence-correction rule in an abbreviated four-line discussion, because it was not central to the case. (See *Harris*, *supra*, 5 Cal.4th at p. 842.) But the authorities upon which *Harris* relied went further: "[a]uthority exists for an appellate court to correct a sentence that is not authorized by law whenever the error comes to the attention of the court, *even if the correction creates the possibility of a more severe punishment*." (*In re Ricky H.* (1981) 30 Cal.3d 176, 191, italics added, citing *People v. Serrato* (1973) 9 Cal.3d 753, 763-765 [disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1] and *In re Sandel* (1966) 64 Cal.2d 412.) The reason is simple: if a sentence is unauthorized, the paramount concern is reaching a correct and legal sentence. (See *In re Sutherland* (1972) 6 Cal.3d 666, 672 [undoing a plea bargain and permitting unfettered prosecution for previously dismissed counts].)

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[20] Moreover, the universe of issues that a defendant might be chilled from bringing on appeal after a guilty plea is sharply limited. (See, e.g., Pen. Code, § 1237.5.) If the chilling effect of correcting an unauthorized sentence to a higher one is insufficient to foreclose that possibility in ordinary appeals, then there is no reason to conclude that such a potential chilling effect should support a sentence cap in the plea bargain context where part of the resulting sentence has become unauthorized.

In contrast, the limitation on the imposition of a higher-than-original sentence has typically been applied in the context of the "full resentencing rule," where part of a sentence that was imposed after a trial or an open plea is invalidated and the matter is remanded for the trial court to exercise its discretion as to all aspect of the sentence. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258-1259.) That limitation on the court's sentencing discretion is based in double jeopardy and due process concerns. (*Ibid.*) Those concerns do not apply where the sentence was unauthorized in the first place. And similarly, the unravelling of a plea bargain because of a subsequent law that invalidates part of the agreement does not implicate the same constitutional concerns that a court's exercise of sentencing discretion does. (See *Weatherford v. Bursey* (1977) 429 U.S. 545, 561 ["there is no constitutional right to a plea bargain"].)

In any event, imposing a cap on remand would be inconsistent with *Stamps* and the general contract principles described above. It could also easily lead to bizarre and untenable results.

Collins and *Griffin* reasoned that imposing a cap on any subsequent plea bargain "'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.'" (*Griffin*, *supra*, 57 Cal.App.5th at p. 1098, quoting *Collins*, *supra*, 21 Cal.3d at p. 217.) But a remedy in which the defendant realizes *all* of the benefits, and the People receive only an approximation, is quite different from returning the parties to

the "status quo ante" according to basic contract principles. (*Stamps*, *supra*, 9 Cal.5th at p. 707.) The simple fact is that, because of the manner in which felony sentences and enhancements are structured, a cap frequently could *not* approximate the People's bargained-for benefits, and it would sometimes even result in an extraordinary windfall for defendants.

For instance, if a defendant were charged with two counts of second-degree murder (§ 189) and three prior serious felony enhancements (§ 667, subd. (a)) the maximum sentence would be 45 years to life in prison: 15 to life for each of the two murders (§ 190, subd. (a)), plus 15 years for the section 667 enhancements (§ 667, subd. (a)). A plea bargain under those circumstances might require a defendant to admit two of the enhancements and plead guilty to one of the murders, resulting in a total sentence of 25 years to life in prison.

But if the five-year enhancements were stricken (as contemplated by *Stamps* and Senate Bill 1393) the remaining case would only include two counts of second-degree murder. Since that offense has only one possible sentence—15 years to life (§ 190, subd. (a))—remand could only result in one of three possible outcomes: 0 years (in the event of acquittal or dismissal), 15 years (in the event of conviction on one count), or 30 years (in the event of conviction on both counts).[21] A cap, as

[21] To be sure, the prosecutor could file lesser or related charges, such as manslaughter. But doing so would require the prosecutor to amend the charging document to plead new counts,

proposed by *Griffin* and *Collins*, would reduce this further. The 30-year option would be impermissible. So the defendant who agreed to serve 25 years would instead be freed after a maximum of 15 years—a full decade less than the original term, which is hardly an "approximation" of the People's position before the bargain was invalidated.

The concurring opinion in *Griffin* cogently sets forth similar concerns:

> Take as an example a defendant charged, prior to the passage of Senate Bill No. 136, with one count of residential burglary (§ 460) and one prison prior (§ 667.5, subd. (b)). The state prison term options upon a plea as charged would be the principal offense triad of two, four, or six years, plus one year for the enhancement. The parties could structure an agreed-upon term of two, three, four, five, six or seven years. Suppose the defendant proposes two years, the People propose four years, and they settle on three years: low term for the burglary plus the one-year enhancement. Following a post-Senate Bill No. 136 remand, in the absence of the one-year enhancement, the parties' statutory options would be limited to the burglary triad: two, four, or six years. The proposed cap would further limit them to one option—two years—the only term not

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and courts have no power to order prosecutors to file any specific charge in the first instance. (See *People v. Birks* (1998) 19 Cal.4th 108, 134 ["the prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. . . . The prosecution's authority in this regard is founded . . . on the principle of separation of powers, and generally is not subject to supervision by the judicial branch."]; Cal. Const. Art. III, § 3 ["The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."].)

> to exceed the previous agreement. Thus, in order to resolve the matter by plea, the People would have to accept the two-year term. . . . But, the People, who originally rejected the idea that two years was an appropriate resolution of the case, now have that resolution thrust upon them. They may well assess that two years is appropriate in light of the new exposure, but possibly not. Instead, they could choose to go to trial. I know of no authority whereby the appellate court or the trial court could force the People to enter into a plea agreement. In that case, the cap could have the unintended consequence of forcing a trial. . . .
>
> Take a second example in which a defendant pleads guilty to one of many counts, the plea is invalidated, and the matter remanded. Suppose further that no new agreement is reached and the matter goes to trial. If the defendant is convicted of more offenses at trial than incorporated in the plea bargain, any cap would act to hamstring the trial court's appropriate exercise of sentencing discretion. Certainly, a court approving a plea bargain weighs different interests and different information when approving that bargain than does a court at sentencing following trial.

(*Griffin*, *supra*, 57 Cal.App.5th at p. 1102 (conc. opn. of Reardon, J.).)

These concerns are present in concrete terms here. Like the hypotheticals posed above, it is now impossible to require specific performance by limiting Esquivel's sentence to five years. Without the prior prison terms, the remaining charges and enhancements include attempt to burn (§ 455; count 1), possession of flammable material (§ 453, subd. (a); count 2), one prior serious felony (§ 667, subd. (a)), and one prior strike (§§ 667, subds. (b)-(j) & 1170.12).

Count 1 carries a possible sentence of 16 months, two years, or three years. (§ 455, subd. (a).) Count 2 is also punishable by a sentence of 16 months, two years, or three years. (§ 453, subd. (a) & § 1170, subd. (h)(1).) Given the facts of the offense, one of those two counts would likely be stayed pursuant to section 654. (See *People v. Deloza* (1998) 18 Cal.4th 585, 591 ["Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct."].) But if the section 654 prohibition on multiple punishment did not apply, section 1170.1 would limit any subordinate term to eight months—one-third of the two-year mid-term on either count. (See *People v. Williams* (2007) 156 Cal.App.4th 898, 907, fn. 5 ["'The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed.'"].) Meanwhile, a strike enhancement would double the principal and subordinate terms. (§§ 1170.1, subd. (a) & 1170.12, subd. (c)(1); see *People v. Nguyen* (1999) 21 Cal.4th 197, 200 ["for second strike defendants the consecutive determinate term to be doubled ordinarily is one-third of the middle term"].)

The result is that Esquivel would be theoretically eligible for a number of possible sentences, some longer than five years, and some shorter than five years—but not one of them would be for *exactly* five years. Since it is no longer possible to impose the originally agreed upon sentence, a five-year cap would presumably limit Esquivel's sentence to the highest sentence available without exceeding five years: four years and eight

months in prison (comprised of the mid-term on one count, doubled for the strike, plus one-third the mid-term on another count). Of course, this necessarily puts the prosecutor in a worse position than before the plea bargain, and hardly restores the case to the "status quo ante." (*Stamps*, *supra*, 9 Cal.5th at p. 707; *id.* at p. 701 [parties should "'resume proceedings where they left off"'].)

Under these circumstances, the prosecutor—who must, in the end, agree before a new plea bargain can be struck—might decide to proceed to trial, implicating all of the concerns noted by the *Griffin* concurrence. (*Griffin*, *supra*, 57 Cal.App.5th at p. 1102 (conc. opn. of Reardon, J.).) And, if the post-*trial* maximum were also somehow limited to avoid this possibility, Esquivel himself would have no incentive to accept a 4-year, 8-month plea bargain. He would have nothing to lose by forcing a trial and gambling on acquittal. Or he might refuse to admit committing count 2, which he has so far refused to do, and which would be a prerequisite for any 4-year, 8-month sentence.

Because a plea bargain is a voluntary arrangement, there is ultimately nothing unjust about setting the parties back to the status quo ante in these circumstances, even with the possibility of a higher sentence. Neither party was obligated or entitled to enter into the agreement to begin with. (See *Weatherford v. Bursey*, *supra*, 429 U.S. at p. 561; § 1192.5.) Nor is a defendant obligated to upset the bargain in light of new laws. A full return to the status quo ante simply reflects the reality that what was initially acceptable to both parties in order to avoid litigation may

no longer be maintained, and the case must now start anew in light of the changed legal landscape. What Esquivel asks, in essence, is to be put in a *better* position than those charged with the same crimes even after the enactment of Senate Bill 136, due only to the fortuitous timing of when his judgment became final. That position is not consistent with *Estrada*, *Stamps*, or any other authority.

In short, even if Senate Bill 136 applied to Esquivel, there is no reason to impose a five-year cap on subsequent sentences. The remedy should be a remand for further proceedings, at which the parties would return to a genuine status quo ante.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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February 26, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 13,505 words.

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February 26, 2021

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Case Name***: People v. Randolph Steven Esquivel*** No. **S262551**

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Governor George Deukmejian Courthouse
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Department S22
Long Beach, CA 90802

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Second Appellate District Division Five
Los Angeles, CA 90013
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Paul K. Kraus
Counsel for Appellant
(served via TrueFiling)

Marilyn Seymour
Deputy District Attorney
(courtesy copy via email)

California Appellate Project (CAP LA)
(courtesy copy served via TrueFiling)

I declare under penalty of perjury under the laws of the State of California, the foregoing is true and correct and that this declaration was executed on **February 26, 2021**, at Los Angeles, California.

M. Hunglau
Declarant

/s/ M. Hunglau
Signature

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STATE OF CALIFORNIA
Supreme Court of California

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