# In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**DOUGLAS EDWARD McKENZIE,**

**Defendant and Appellant.**

Case No. S251333



Fifth Appellate District, Case No. F073942
Madera County Superior Court, Case Nos.
MCR047554/MCR047692/MCR047982
The Honorable Ernest J. LiCalsi, Judge

## REPLY BRIEF ON THE MERITS

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## ARGUMENT

### I. McKENZIE'S ARGUMENT SHOULD BE REJECTED BECAUSE IT IS CONTRARY TO LEGISLATIVE INTENT AND THIS COURT'S PRECEDENT: A PROBATIONER'S CONVICTION IS FINAL FOR THE PURPOSE OF *ESTRADA* WHEN THE AVAILABILITY OF A DIRECT APPEAL CHALLENGING THE PROBATION ORDER HAS BEEN EXHAUSTED

#### A. Introduction

The issue presented in this case is: After the time to appeal the underlying conviction in a probation case has expired, may the probationer still claim the benefit of a change in the law on appeal from the revocation of probation and imposition of a sentence that had been suspended? That is, when, for retroactivity, does a determination of guilt that results in an order granting probation and suspending imposition of sentence become final? The People contend that the answer is: when the availability of a direct appeal challenging the probation order has been exhausted.

The parties agree that the amendment to Health and Safety Code section 11370.2 applies retroactively to defendants whose convictions are not final (Opening Brief on the Merits (OBM) at 24-25; Answer Brief on the Merits (ABM) 14, 16). (See *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) And the parties agree that a conviction is final for this purpose when direct appeal concludes (OBM 26; ABM 21). (See *People v. Vieira* (2005) 35 Cal.4th 264, 305-306.) But here, the parties diverge.

The People turn to Penal Code section 1237, which generally defines the availability of direct appeal. (See OBM 13, 18-19, 27-30.) Section 1237 provides that an order granting probation is an appealable judgment.[1]

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[1] According to Penal Code section 1237, subdivision (a), "An appeal may be taken by the defendant . . . from a final judgment of conviction. . . . . A sentence [or] an order granting probation . . . shall be deemed to be (continued...)

Therefore, the People explain, McKenzie could have appealed his conviction and enhancements when he was convicted and placed on probation. (OBM 13, 27-29.) He did not, and so his direct appeal necessarily concluded 60 days later, before the amendment to Health and Safety Code section 11370.2 went into effect. (OBM 14, 30, 48.) McKenzie finds section 1237 irrelevant, and insists that the sentence is the relevant appealable judgment for *Estrada* purposes (see ABM 5, 21-22, 2-30, 34, 36-37), even though a probationer may not be sentenced until years after his or her guilt was adjudicated and he or she was first placed on probation.

### B. All Probation Orders Are Appealable Judgments, and When That Appeal Has Concluded, a Probationer Is No Longer Entitled to *Estrada* Retroactivity

McKenzie adopts the uncomfortable position that, while a probation order accompanied by a suspended execution of sentence is an appealable judgment, a probation order accompanied by a suspended imposition of sentence is not, at least not for *Estrada*. (ABM 25-27, 36.) McKenzie relies heavily on cases that point out that, while an order granting probation is "deemed to be a final judgment" in the words of Penal Code section 1237 "for the limited purpose of taking an appeal therefrom," such an order "does not have the effect of a judgment for other purposes." (*People v.*

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(...continued)
a final judgment within the meaning of this section." The use of the tern "final" in section 1237 is a bit confusing in the context of *Estrada* retroactivity, which uses "final" in the sense of the conclusion of direct review. "'[W]hile it is pending on appeal a judgment is both "final" in the sense that it is appealable and not "final" in the sense that the appeal remains unresolved.' [Citation.]" (*Principal Life Ins. Co. v. Peterson* (2007) 156 Cal.App.4th 676, 688.) Because the People's point is that Penal Code section 1237 defines appealability, the People generally refer to the judgments and orders included in section 1237 as "appealable."

*Superior Court* (*Giron*) (1974) 11 Cal.3d 793, 796 (*Giron*); see also *People v. Chavez* (2018) 4 Cal.5th 771, 786; *People v. Howard* (1997) 16 Cal.4th 1081, 1087; see ABM 26.)

The problem with McKenzie's argument, though, is that Penal Code section 1237 cannot be so easily separated from the determination of finality in the *Estrada* context. To begin with, this Court has cautioned against strictly limiting Penal Code section 1237 to providing an appeal:

> [S]ection 1237 purports to do more than simply provide that a defendant may appeal from an order granting probation. The section provides in addition that an order granting probation is to be "*deemed a final judgment*" for the purposes of appeal. We accord to this language of the statute a legislative intent that a defendant, as in an appeal from a final judgment, may challenge on appeal *all matters necessarily adjudicated in the proceedings culminating in the order granting probation* as to which he has preserved the right to contest. This includes all factual findings of criminal conduct as well as legal determinations made by the superior court.

(*People v. Flores* (1974) 12 Cal.3d 85, 94, second italics added.) Whatever other meanings that the term "final judgment" may have, it is clear that if McKenzie was going to appeal the adjudication of the Health and Safety Code section 11370.2 allegations, he had to appeal the probation order as provided by Penal Code section 1237, and could not wait until probation was revoked.

The term "final judgment" does indeed have multiple meanings, as discussed in the opening brief. (OBM at 42-48.) But we are not in fact dealing with its "other purposes" here. Penal Code section 1237 sets appellate direct review into motion by defining what judgments and orders are appealable. (*People v. Mazurette* (2001) 24 Cal.4th 789, 792.) And if a judgment or order is appealable according to section 1237, then the disappointed party must timely perfect and pursue the appeal according to the court rules governing appellate procedure or lose the right to appeal.

(*People v. Mendez* (1999) 19 Cal.4th 1084, 1094; see Pen. Code, §1235, subd. (a).) Court rules then guide the pursuit of direct review through the Court of Appeal, this Court, and the United States Supreme Court. The purpose of this scheme is "to further the finality of judgments by causing the defendant to take an appeal expeditiously or not at all." (*People v. Mendez, supra*, 19 Cal.4th at p. 1094.) Because section 1237 initiates appellate direct review, it is integral to the analysis of when appellate direct review has concluded, ending the retroactive application of ameliorative criminal laws. Using its definition in considering the retroactive application of new laws certainly falls within the purpose of section 1237.

This Court's decision in *People v. Flores* illustrates that Penal Code section 1237 sometimes does "more than simply provide that a defendant may appeal from an order granting probation." (*People v. Flores, supra*, 12 Cal.3d at p. 94.) In that case, this Court turned to section 1237 to decide when a superior court had to fix the degree of the crime as required by Penal Code section 1192. (*Id.* at pp. 93-95; see *People v. Chavez, supra*, 4 Cal.5th at pp. 785-786.) Penal Code section 1192 provides that a superior court "must, before passing sentence, determine the degree" of the crime of conviction. If the court fails to do so, the crime "shall be deemed to be of the lesser degree." (Pen. Code, § 1192.) In *People v. Flores*, as here, imposition of sentence had been suspended, so the Court found that Penal Code section 1167 controlled the timing. (*People v. Flores, supra*, 12 Cal.3d at p. 94.) Penal Code section 1167 provides that a superior court must state its factual findings "at the conclusion" of a court trial. (*Flores*, at pp. 94-95 & fn. 8.) This Court reasoned that, because an order granting probation is a "final judgment" that can be appealed under Penal Code section 1237, "it must follow that trial proceedings were to be deemed concluded with the granting of that 'final judgment' order." (*Flores*, at p. 95.)

If this Court can turn to Penal Code section 1237 to define the conclusion of a court trial within the meaning of Penal Code section 1167 and the superior court's obligation under Penal Code section 1192, courts can certainly rely on section 1237 in analyzing finality within the meaning of *Estrada*. Notably, this Court said in *People v. Flores*, "It is thus manifest that when the imposition of sentence is not contemplated, as when proceedings are indefinitely suspended and probation is granted, section 1192 is not intended to constitute legislative authorization for a continuing, indefinite delay until the time of sentencing before making a finding as to an important factual element of the charged criminal conduct." (*People v. Flores, supra*, 12 Cal.3d at pp. 94-95.) So too with the inference of legislative intent articulated in *Estrada*. It cannot be stretched to authorize "a continuing, indefinite delay" (*ibid.*) before a conviction may be considered final and no longer vulnerable to the retroactive application of new laws. (Cf. *In re Pedro T.* (1994) 8 Cal.4th 1041, 1046-1047 [declining to interpret legislative intent underlying a statutory sunset clause in a manner that "would provide a motive for delay and manipulation in criminal proceedings"].)

California courts recognize and respect the "state's powerful interest in the finality of its judgments." (*People v. Jordan* (2018) 21 Cal.App.5th 1136, 1143; see also *In re Robbins* (1998) 18 Cal.4th 770, 777-778.) In *Estrada*, it was entirely consistent with that important interest for this Court to limit its inference that the Legislature intends retroactive application of ameliorative criminal laws only to cases in which the judgment of conviction is not final. (See *Estrada, supra*, 63 Cal.2d at pp. 745, 746-747.) Since statutes like Penal Code section 1237, along with court rules regarding appeals, guide and govern appeals from inception to finality, they must define the finality of a judgment for *Estrada* retroactivity.

### C. McKenzie's Position Does Not Further the Legislative Intent Underlying the Amendment to Health and Safety Code Section 11370.2 and It Thwarts the Legislative Intent Underlying Penal Code Section 1237

McKenzie argues at some length that the amendment to Health and Safety Code section 11370.2 is retroactive to cases that were not final on appeal when it became effective. (ABM 13-16.) The People have always agreed with this. (See OBM 25.) McKenzie also offers legislative history reflecting the Legislature's goals and purposes in amending the statute. (ABM 15-16.) This is not in dispute, either.[2] Yet, despite the ameliorative purposes of the amendment, the Legislature did not extend the reach of the amendment to defendants whose convictions are final, even if they are serving sentences under the old version, although it certainly could have. (See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307.) The Legislature knows how to do so. (See, e.g., Pen. Code, §§ 1170.95 [procedure for petitioning for relief under the amendment to Pen. Code, § 188], 1170.126 [procedure for petitioning for relief under Three Strikes Reform Act of 2012].) The People's position does not contravene the legislative intent behind the amendment to Health and Safety Code section 11370.2.

McKenzie's proposed rule, on the other hand, is not compelled by the legislative intent underlying the amendment, and it is contrary to both the statutory language and legislative intent of Penal Code section 1237. McKenzie does not contend that probationers who had execution of sentence suspended are entitled to benefit from the amendment if their convictions and probation orders are final on appeal, even if their sentences have not been executed. Rather, McKenzie proposes that direct review of

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[2] The People do not oppose McKenzie's request that this Court take judicial notice of the legislative history.

convictions proceeds and concludes in different ways for probation orders with a suspended execution of sentence and probation orders with a suspended imposition of sentence. (ABM 25-27, 36.) This proposed rule cannot be reconciled with the statutory language and legislative intent of Penal Code section 1237.

In construing Penal Code section 1237, this Court "'must first look at the plain and common sense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose.'" (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185, quoting *People v. Cochran* (2002) 28 Cal.4th 396, 400.) The plain language of Penal Code section 1237 makes "an order granting probation" an appealable judgment, and does not distinguish between types of probation. The Legislature did not say, "an order granting probation *and suspending execution of sentence.*"

"'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (*People v. Skiles*, *supra*, 51 Cal.4th at p. 1185, quoting *People v. Pieters* (1991) 52 Cal.3d 894, 898.) Notably, the effect of adding the language making an order granting probation an appealable judgment was to put probation orders in suspended-imposition cases on the same footing as suspended-execution cases in terms of appealability.

Before 1951, an appeal could be taken from "a final judgment of conviction," "an order denying a motion for a new trial," and "[f]rom any order made after judgment, affecting the substantial rights of the party." (Former Pen. Code, § 1237 (1872).) Then, as now, there were two ways of granting probation. (*In re Phillips* (1941) 17 Cal.2d 55, 58.) Under the version of Penal Code section 1237 in effect before 1951, a defendant who was placed on probation by suspending the execution of a pronounced sentence could appeal, but a defendant who was placed on probation with

imposition of sentence suspended could not appeal. (*In re Phillips*, *supra*, 17 Cal.2d at p. 58; see also *id.* at p. 64 (conc. opn. of Spence, J.).)[3]

In 1941, Justice Spence discussed this "anomalous" situation in a concurrence to one of this Court's decisions. (*In re Phillips*, *supra*, 17 Cal.2d at pp. 63-65.) He observed that the two procedures for granting probation—suspending imposition of sentence and suspending execution of sentence— are each "based upon the record of conviction. . . ." (*Id.* at p. 63.) Justice Spence continued, "and the order or judgment of the court in either case is in the nature of a judgment of conviction. . . ." (*Ibid.* at p. 63.) Justice Spence suggested "that the legislature might well consider the desirability of according to the defendant a right of appeal in either case." (*Id.* at p. 64.)

Justice Spence reasoned that "[a]n application for probation is directed to the matter of punishment and not to the matter of guilt. If there is a serious question regarding the sufficiency of the evidence to establish the guilt of the defendant or a serious question regarding the fairness of the trial in which he was found guilty, it would seem appropriate that a defendant should not be deprived of his right of appeal by applying for probation and by the granting thereof without the imposition of sentence." (*In re Phillips*, *supra*, 17 Cal.2d at p. 64 (conc. opn. of Spence, J.).)

In 1951, the Legislature did as Justice Spence had recommended. Ever since, "an order granting probation shall be deemed to be a final judgment within the meaning of this section." (Pen. Code, § 1237, subd. (a).)[4] The effect of the amendment was "to provide that *every* order

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[3] "[T]he right of appeal is statutory and . . . a judgment or order is not appealable unless expressly made so by statute." (*People v. Mazurette*, *supra*, 24 Cal.4th at p. 792.)

[4] The amendment was made as part of "a comprehensive overhaul of the procedural provisions of the Penal Code . . . implemented by Senate Bill (continued...)

granting probation 'shall be deemed to be a final judgment within the meaning of this section.' . . . This amendment seriously undercut the logic of the case law which distinguished between the two modes of granting probation for purposes of the classification of the action as a judgment of conviction." (*Padilla v. State Personnel Bd.* (1992) 8 Cal.App.4th 1136, 1144 [determining that Padilla had suffered a conviction of moral turpitude subjecting him to discipline pursuant to Gov. Code, § 19572, subd. (k)— even though his sentence had been probation with imposition of sentence suspended— because it was an appealable judgment].)

Given the Legislature's action in adding language to Penal Code section 1237 that permitted probationers with suspended imposition of sentence to appeal their convictions just like probationers with suspended execution of sentence, it would create a new anomaly to treat the two types of probationers completely differently for *Estrada* purposes. Again, retroactive application under *Estrada* is limited by the conclusion of direct appeal. (*People v. Vieira*, *supra*, 35 Cal.4th at pp. 305-306.) When the Legislature extended the right to appeal a conviction and probation order to defendants for whom imposition of sentence was suspended, it necessarily

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(...continued)
No. 543, in view of the division of the state's court system into municipal and superior courts." (*People v. Henson* (2018) 28 Cal.App.5th 490, 517, citing Stats. 1951, ch. 1674, §§ 1-161, pp. 3829-3860; and see Credits following Pen. Code, § 1237, noting that the section was amended by Stats. 1951, ch. 1674, p. 3855, § 133.) The objective was to "'make all the procedural provisions of the Penal Code applicable to all proceedings in all courts, so far as it is possible and practicable. . . .'" (*People v. Henson*, *supra*, 28 Cal.App.5th at p. 517.) This general purpose does not seem to specifically apply to the amendment to Penal Code section 1237, and no legislative history is available to illuminate its specific purpose. But the Legislature is presumed to be aware of judicial decisions and to have enacted or amended statutes considering that decisional law. (*People v. Giordano* (2007) 42 Cal.4th 644, 659.)

gave them the same starting point for a direct appeal and subjected them to the same court rules governing appeal. And, as argued in the opening brief (OBM 27-29), under section 1237 all probationers can challenge the merits of their convictions (including, of course, the adjudication of enhancement allegations) by appealing from the probation order. (*People v. Flores*, *supra*, 12 Cal.3d at p. 94; *People v. Howard* (1965) 239 Cal.App.2d 75, 77.) If a defendant does not appeal the order granting probation, he cannot challenge the order or the underlying determination of guilt through a later appeal. (*Howard*, at p. 77.)

### D. The Many Meanings of Finality and the One That Matters

McKenzie points out that there are multiple definitions of "finality." (ABM 21.) The People agree, as discussed in the opening brief. (OBM 42-46 & fn. 11.) But for *Estrada*, we do not need to sort out the various definitions because this Court has identified the one relevant here. "[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*People v. Vieira*, *supra*, 35 Cal.4th at p. 306.) In other words, a judgment is final within the meaning of *Estrada* when the "courts can no longer provide a remedy on direct review." (*In re Pine* (1977) 66 Cal.App.3d 593, 595 (cited in *Vieira*, at p. 306); cf. *Beard v. Banks* (2014) 542 U.S. 406, 411 ["Ordinarily. . . State convictions are final 'for purposes of retroactivity analysis *when the availability of direct appeal to the state courts has been exhausted* and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.' [Citation.]" (italics added)]; *People v. Kemp* (1974) 10 Cal.3d 611, 614 [in context of applying new United States Supreme Court rulings, "[b]y final we mean where the judgment of conviction was rendered, *the availability of appeal*

*exhausted*, and the time for petition for certiorari had elapsed . . . ." (italics added)].) As discussed above, this is why Penal Code section 1237, which governs appealability, matters. When direct review of a judgment identified in section 1237 has run its course, it is final for *Estrada* purposes.

Despite telling this Court that finality has different meanings in different contexts, McKenzie directs this Court's attention to the definitions adopted in contexts other than the retroactive application of ameliorative legislation under *Estrada*. (ABM 22-26, 30-33.) His cited cases include *People v. Chavez, supra*, 4 Cal.5th 771 (finality of a probationer's judgment for the purpose of a superior court's jurisdiction to dismiss an action under Penal Code section 1385); *People v. Howard, supra*, 16 Cal.4th 1081 (where the superior court has imposed and then suspended sentence when granting probation, it cannot reduce that sentence after revoking probation); *Giron, supra*, 11 Cal.3d 793 (motion to withdraw guilty plea due to ignorance of immigration consequences available because no judgment or sentence when imposition of sentence suspended); *In re White* (1969) 1 Cal.3d 207 (no judgment for the purpose of sentencing under Penal Code section 669 when imposition of sentence suspended); *Stephens v. Toomey* (1959) 51 Cal.2d 864 (finality of conviction for the purpose of defendant being allowed to register as an elector). *None* of these cases discuss *Estrada* or the retroactive application of new laws. Instead, they all consider the finality of judgments in the context of other specific issues and statutes. (See OBM 44-46.) They do not even purport to define the finality of a judgment for all purposes or for any purpose other than the purpose before them. And they are "not authority for propositions not considered." (*People v. Ghobrial* (2018) 5 Cal.5th 250, 285.)

### E. The Two Types of Probation Are Different but in Both Types a Probation Order Means Guilt Has Been Adjudicated

McKenzie also emphasizes the difference between suspended execution of sentence and suspended imposition of sentence, again relying on cases that deal with issues other than the retroactive application of new laws.

McKenzie relies on this Court's opinion in *People v. Scott* for the proposition that "'a defendant is "sentenced" when a judgment imposing punishment is pronounced even if execution of the sentence is then suspended.'" (ABM 27, quoting *People v. Scott* (2014) 58 Cal.4th 1415, 1423.) In *Scott*, this Court was focused on the term "sentenced" as it was used in the Realignment Act, because the Act expressly provided that "'[t]he sentencing changes made by the [Realignment Act] . . . shall be applied prospectively to any person sentenced on or after October 1, 2011.'" (*Scott*, at pp. 1421, 1426, quoting Pen. Code, § 1170, subd. (h)(6), italics omitted; see also *Scott*, at p. 1421, fn. 3.) McKenzie points out that a defendant with a suspended imposition of sentence would not be considered sentenced at the same time for this purpose. (ABM 28, citing *Scott*, at p. 1423.)

The People have already discussed that the difference in sentencing options distinguishes the two types of probation. (OBM 21-22.) It made sense in *People v Scott* to treat the two types of probation differently because, unlike the amendment to Health and Safety Code section 11370.2, the Realignment Act included express language requiring that its application depended on sentencing. That is, it limited its application to cases in which defendants had not yet been sentenced and superior courts could still make sentencing choices.

The amendment to Health and Safety Code section 11370.2, by contrast, included no language about its prospective or retroactive application. And the amendment did not affect sentencing choices; it affected guilt. As to both types of probationers, guilt has been adjudicated when probation is ordered. Another case that McKenzie relies on, *People v. Phillips* (ABM 28), actually makes this point: "The powers possessed by the trial courts under the probation statutes (Penal Code, secs. 1203, et seq.) are concerned with mitigation of punishment and confer discretion upon the courts in dealing with a convicted defendant. . . . [A]ction in mitigation of the defendant's punishment should not affect the fact that his guilt has been finally determined according to law." (*In re Phillips, supra*, 17 Cal.2d at p. 61.) Or, as Justice Spence put it, "[e]ither procedure is based upon the record of conviction and the order or judgment of the court in either case is in the nature of a judgment of conviction." (*Phillips*, at p. 63 (conc. opn. of Spence, J.).) The two types of probation are the same in this respect: all probationers can and must challenge the merits of their convictions by appealing from the probation order. (*People v. Flores, supra*, 12 Cal.3d at p. 94; *People v. Howard, supra*, 239 Cal.App.2d at p. 77.)

Of course, the People agree that a superior court retains authority and jurisdiction, as defined by statute and rule, to act after ordering probation. (See *In re Pine, supra*, 66 Cal.App.3d at p. 596, fn. 2.) And in a case in which imposition of sentence was suspended, the superior court may exercise any discretion in sentencing that would have been available had sentence been imposed upon conviction. (Pen. Code, § 1203.3, subd. (c); *People v. Howard, supra*, 16 Cal.4th at p. 1087; Cal. Rules of Court, rule 4.435(b)(1).)

But while McKenzie characterizes the issue as one of sentencing discretion (ABM 36), his challenge is to the adjudication of his guilt—specifically, the adjudication of the allegations of prior narcotics-related

convictions. It has to be, because the amendment to Health and Safety Code section 11370.2 did not change the sentence or the superior court's sentencing discretion as to the former enhancements, it did away with them altogether.

McKenzie's guilt was established by his pleas and admissions and resulted in a conviction and probation order. Again, a defendant may not challenge the conviction underlying his probation order on appeal from a subsequent probation revocation. (See, e.g., *People v. Howard*, *supra*, 239 Cal.App.2d at p. 77 [precluding conviction review where no initial appeal from order suspending imposition of sentence and granting probation]; *People v. Glaser* (1965) 238 Cal.App.2d 819, 821-824 [same], disapproved on another ground in *People v. Barnum* (2003) 29 Cal.4th 1210, 1219-1222.)

### F. *Rodas* Cannot Be Disregarded As Distinguishable

As discussed in the opening brief (OBM 37-40), the Third District of the Court of Appeal has held that an order granting probation is the relevant appealable judgment for *Estrada* purposes in a case in which imposition of sentence was suspended. (*People v. Superior Court* (*Rodas*) (2017) 10 Cal.App.5th 1316 (*Rodas*).) McKenzie, however, thinks that *Rodas* is distinguishable from his case. (ABM 33-35.) The distinctions between the two cases are not meaningful. And if they are, that does not change the People's position that the appellate court's reasoning in this case is flawed and its conclusion should be reversed.

Rodas pleaded no contest to transportation of heroin for personal use (Health & Saf. Code, § 11352), imposition of sentence was suspended, and she was placed on probation for three years. (*Rodas*, *supra*, 10 Cal.App.5th at p. 1319.) She did not appeal. (*Ibid.*) Six and a half years later, the Legislature limited section 11352 to transportation for sale. (*Id.* at p. 1321.) Meanwhile, Rodas had violated probation and had been reinstated several

times, so she was still on probation. (*Id.* at pp. 1319-1320.) A year after the law changed, she successfully sought to withdraw her plea based on the change in the law. (*Id.* at p. 1320.)

The People filed a petition for writ of mandate, challenging the superior court's action on two grounds. (*Id.* at pp. 1320-1322.) First, the superior court lacked jurisdiction to grant Rodas's motion to withdraw her plea because the motion was not made within six months of the plea as required by Penal Code section 1018. (*Id.* at p. 1322.) Second, because Rodas did not appeal the probation order, her conviction had long been final for retroactivity purposes. (*Ibid.*) The Third District agreed with both arguments. (*Id.* at pp. 1324-1325.)

The *McKenzie* court distinguished *Rodas* by saying "[t]his is an appeal from a judgment of conviction, not from an order granting a motion to withdraw a plea." (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1217.) While these two issues were necessarily related in Rodas's case, examination of the *Rodas* opinion shows that resolution of each issue independently required reversal in the case.

The Third District held that Rodas was not entitled to retroactive application of the statutory amendment nor withdrawal of her plea (*Rodas, supra*, 10 Cal.App.5th at p. 1319) because she did not appeal the superior court's order granting probation, and so her conviction for transporting heroin became final for *Estrada* retroactivity purposes years before the change in the law (*id.* at p. 1326). The court reasoned that "'[s]tate convictions are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." [Citations.]'" (*Id.* at p. 1325, quoting *Beard v. Banks, supra*, 542 U.S. at p. 411.) Orders granting probation are considered a final judgment for purposes of filing an appeal — as to that

order and to all that led up to it. (*Rodas*, at p. 1325.) This is because Penal Code section 1237, subdivision (a), allows a defendant to appeal from "a final judgment of conviction" and defines that term to include "an order granting probation." (*Rodas*, at p. 1322.) "If the time to appeal the probation order lapses without an appeal having been taken, however, the defendant may not thereafter challenge the underlying conviction when appealing a subsequent order revoking probation and imposing a suspended sentence. [Citations.]" (*Rodas*, *supra*, 10 Cal.App.5th at p. 1325.)

This was an independent ground for the *Rodas* decision. Even if Rodas had first raised the issue of retroactive application of the amendment to Health and Safety Code section 11352 in the appellate court, and even if Penal Code section 1018 had not been at issue, the Third District's analysis of finality would necessarily have been the same. The Third District got it right.

## CONCLUSION

For the foregoing reasons, McKenzie's position, and the position of the Fifth District Court of Appeal below, should be rejected. The People respectfully request that the judgment be reversed.

Dated: August 26, 2019

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 4,996 words.

Dated: August 26, 2019

XAVIER BECERRA
Attorney General of California

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## DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

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

On August 26, 2019, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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(Attorney for Appellant)
(2 copies)

The Honorable Sally O. Moreno
District Attorney
Madera County District Attorney's Office
209 West Yosemite Avenue
Madera, CA 93637

Clerk of the Court
Main Courthouse - Madera
Madera County Superior Court
200 South G Street
Madera, CA 93637

Fifth District Court of Appeal
2424 Ventura Street
Fresno, CA 93721
(service via this Court's TrueFiling system)

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 August 26, 2019, at Sacramento, California.

P. Robles
Declarant

Signature

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