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

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RANDOLPH STEVEN ESQUIVEL,

Defendant and Appellant.

No. S262551

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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By Appointment of The
Supreme Court of California

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

Appellant's Reply Brief on the Merits is limited to the rebuttal of specific points in Respondent's Answering Brief on the Merits ("ABM"). This limitation does not constitute a waiver of any arguments raised in Appellant's Opening Brief on the Merits ("OBM"). Appellant submits that the points in Respondent's Answering Brief to which partial or no reply has been made herein have been fully covered in Appellant's Opening Brief on the Merits and that only those points requiring additional comments will be addressed herein.

ARGUMENT

In *In re Estrada* (1965) 63 Cal.2d 740 ("*Estrada*"), this Court established the presumption that, unless the Legislature or the electorate says otherwise, an ameliorative statutory amendment applies retroactively to every case to which it constitutionally could apply. Appellant, Respondent, and numerous appellate courts agree that Senate Bill 136 (2019-2020 Reg. Sess.) ("SB 136") applies retroactively to all non-final judgments at the time it became effective on January 1, 2020. (OBM 13-15; ABM 22-24) The issue before this Court, therefore, is whether appellant's case became final when the trial court imposed but suspended the execution of sentence pending probation ("ESS" probation) in 2015, or if his case remained a non-final judgment pending the instant appeal from the subsequent revocation of probation and execution of sentence.

This Court recently held that a judgment was not final for purposes of *Estrada* where the trial court suspended the *imposition* of sentence pending probation ("ISS" probation). (OBM 15-23; *People v. McKenzie* (2020) 9 Cal.5th 40 ("*McKenzie*") [an ISS probation case remains a non-final judgment during an appeal from an order revoking probation, and thus an enhancement for a prior drug conviction had to be stricken.].) In so holding, this Court cited *People v. Chavez* (2018) 4 Cal.5th 771, 781 ("*Chavez*"), which recognized that "neither forms of probation—suspension of the imposition of sentence [ISS] or suspension of the execution of sentence [ESS] —results in a final judgment." *McKenzie's* reasoning applies with equal force to ESS

probation cases. (OBM 15-23) Therefore, this Court should hold that appellant is entitled to the retroactive benefit of SB 136 because his case remained a non-final judgment until probation was revoked and his suspended sentence executed. (OBM 12-34)

Respondent disagrees. According to Respondent, where the trial court imposes ESS probation, the judgment becomes final when the ability to appeal the *imposition* of a sentence has ended. (ABM 22-48) Respondent asserts that this disparate treatment of ISS and ESS probationers is required because 1) the reasoning in *McKenzie* and *Chavez* is inapposite to *Estrada* finality in ESS probation cases, 2) the legislative history of the statutes governing a trial court's ability to impose the two types of probation, and the defendant's ability to appeal such orders, shows that ESS probation is a final order at the time sentence is imposed, 3) the trial court's ability to suspend execution of punishment in other contexts demonstrates that *Estrada* finality should be determined based on the imposition of sentence, and 4) treating ESS probation cases as final upon imposition of sentence is consistent with the goals behind the two types of probation.

Respondent's contentions are without merit and must be rejected.

I. FOR PURPOSES OF APPLYING AMELIORATIVE LEGISLATION, A PROBATION CASE IS NOT FINAL UNTIL PROBATION IS REVOKED.

A. ***McKenzie* Incorporated *Chavez's* Concept Of Finality In Probation Cases.**

The holding of *McKenzie* was, in significant part, based on the observation in *Chavez* that an order imposing *either* form of probation is not a final judgment until the trial court revokes probation. Respondent, nevertheless, argues that because *McKenzie* only addressed ISS probation, and *Chavez* did not address finality under *Estrada*, "[n]othing about *McKenzie* is inconsistent with the principle that an imposed-but-suspended sentence is a final judgment." (ABM 44-45)

At the outset, Respondent complains that it is inconsistent for appellant to distinguish other authorities addressing "finality" or "judgment" outside of the *Estrada* context while also relying on *Chavez*. (ABM 45, fn. 11.) As numerous lower courts have observed, however, *McKenzie's* reliance on *Chavez* demonstrates that "it is relevant authority on the question of *Estrada* retroactivity." (*People v. France* (2020) 58 Cal.App.5th 714, 721 review granted Feb. 24, 2021, S266771; *People v. Martinez* (2020) 54 Cal.App.5th 885, review granted Nov. 10, 2020, S264848; *People v. Conatser* (2020) 53 Cal.App.5th 1223, review granted Nov. 10, 2020, S264721; *People v. Contreraz* (2020) 53 Cal.App.5th 965, 971, review granted Nov. 10, 2020, S264638.)

Respondent, nevertheless, urges this Court to reject *McKenzie's* adoption of *Chavez's* approach to finality in probation cases. Instead, Respondent argues that ESS probation cases are

final when the sentence is first imposed because, in "criminal cases, the term 'judgment is synonymous with the imposition of sentence…'" (ABM 25, citing *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 2.) This argument must be rejected.

First, the quoted statement in *Perez* was unrelated to *Estrada* finality and instead referred to the type of order from which the People may appeal under Penal Code section 1238, subdivision (a)(5).[1] (*People v. Perez*, *supra*, 23 Cal.3d 545, 549, fn. 2.) As this Court found in *McKenzie*, finality under *Estrada* is not synonymous with finality or judgment in other contexts. It was thus "irrelevant" that under section 1237, "'an order granting probation is deemed a "final judgment" for purposes of taking an appeal.' [Citation.]" (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 47.) It is similarly irrelevant that the imposition of a sentence in a probation case triggers the People's right to appeal.

For the same reasons, Respondent's reliance on authorities addressing "finality" or "judgment" in other unrelated contexts (ABM 26-33) is misplaced. (OBM 28-34 [distinguishing *People v. Scott* (2014) 58 Cal.4th 1415 and *People v. Howard* (1997) 16 Cal.4th 1081.].) As Respondent concedes, the sentencing scheme at issue in *Scott* is distinguishable from SB 136 because it was "expressly prospective, and expressly excluded any case where 'sentencing' occurred prior to the effective date." (ABM 27) Similarly, *Howard's* holding regarding the ability to modify a

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

previously imposed sentence upon revocation of probation is inapposite because it did not address finality under *Estrada*. (See ABM 27-28)

Respondent also cites *In re Phillips* (1941) 17 Cal.2d 55 ("*Phillips*"), to argue this Court has long distinguished between the two types of probation for purposes of "finality," and should thus apply that distinction in the context of *Estrada*. (ABM 28-30) Respondent's reliance on *Phillips* is misplaced.

Most notably, *Phillips* predates *Estrada* by nearly twenty-five years and could not have considered finality for that purpose. Instead, *Phillips* drew a distinction regarding "finality" in probation cases in the context of the rules governing the disbarment of attorneys. (*In re Phillips* (1941) 17 Cal.2d 55, 56-63.) Moreover, when *Phillips* was decided, a trial court could order either ISS or ESS probation, but only in the case of ESS probation was there a final judgment from which the defendant could appeal. (*Id.* at p. 58.) Thus, this Court reasoned that the petitioner's case was final when the trial court imposed but suspended the sentence pending probation, and the judgment was affirmed on appeal. (*Id.* at pp. 58-59.) The "judgment of *conviction* in [*Phillips*] was 'final' in the sense that it was *no longer possible to contest the guilt of the defendant upon the merits of the case*." (*Id.* at p. 59 [Emphasis Added.].)

As Respondent acknowledges (ABM 29), since 1951, *both* ISS and ESS probation orders are "deemed" final judgments for appeal purposes. (*In re Bine* (1957) 47 Cal.2d 814, 817 [language "deem[ing]" probation order to be a final judgment under section

1237 was added in 1951].) Notably, the 1951 amendment to section 1237 was apparently prompted by the concurring opinion in *Phillips*, which criticized the distinction in the appealability of probation orders. (See *In re Phillips*, *supra*, 17 Cal.2d 55, 63-65 (conc. opn. of Spence J.) The amendment of section 1237 thus "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.) It is questionable whether *Phillips* remains good law, even in the limited context of attorney discipline.

Applying the concept of finality in *Phillips* to *Estrada* would also be inconsistent with the holding in *McKenzie*. Like the probationer in *Phillips*, the probationer in *McKenzie* could appeal the ISS probation order before revocation. Applying the reasoning of *Phillips* under current law, both an ISS and ESS probationer have a final judgment of conviction when probation is initially ordered, because the right to appeal arises. After that time, it is "no longer possible to contest the guilt of the defendant upon the merits of the case." (*In re Phillips*, *supra*, 17 Cal.2d 55, 59.) As noted, *supra*, this Court rejected a similar approach to "finality" in *McKenzie*. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 47 ["finality" for purposes of taking an appeal is a distinct concept from "finality" under *Estrada*.].) Accordingly, the reasoning of *Phillips* should not be applied in the context of *Estrada* finality.

Respondent also asks this Court to adopt the reasoning of the Court of Appeal in *McKenzie*, which drew a distinction

between ISS and ESS probation for purposes of *Estrada* retroactivity. (ABM 30; see *People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1214, review granted and aff'd in *People v. McKenzie*, *supra*, 9 Cal.5th 40.) The lower court opinion in *McKenzie* should not be followed because, as discussed *supra*, this Court has adopted a vastly different approach to *Estrada* finality.

B. ***Stephens*** **Supports The Conclusion That An ESS Probation Case Is Not Final Under** ***Estrada*** **Until Probation Is Revoked.**

While not directly disagreeing with *McKenzie's* reliance on *Chavez*, Respondent criticizes a significant premise upon which *Chavez* was based. Specifically, in *Chavez*, this Court noted that:

> Going as far back as *Stephens v. Toomey* (1959) 51 Cal.2d 864, 338 P.2d 182, 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. In a case where a court suspends imposition of sentence, it pronounces no judgment at all, and a defendant is placed on probation with "no judgment pending against [him]." [Citation.] In the case where the court suspends execution of sentence, the sentence constitutes "a judgment provisional or conditional in nature." [Citation.] The finality of the sentence "depends on the outcome of the probationary proceeding" and "is not a final judgment" at the imposition of sentence and order to probation.

(*People v. Chavez*, *supra*, 4 Cal.5th 771, 781.) According to Respondent, *Stephens* "does not go that far" and instead compels a distinction between ISS and ESS probation under *Estrada*. (ABM 45-48) Respondent is mistaken.

In *Stephens*, the petitioner sought a writ to compel his registration as a voter, which was rejected based on his conviction for robbery. (*Stephens v. Toomey*, *supra*, 51 Cal.2d 864, 868.) The sentence in the robbery case, however, was suspended while he was on probation, which was still pending. (*Id.* at pp. 868-869) He thus argued that he was "entitled to exercise the right of an elector during probation." (*Id.* at p. 869.) The issue, therefore, was whether the judgment constituted a "conviction" for voting eligibility purposes. (*Ibid.*) This Court concluded that the "word conviction, used in this connection, must mean a final judgment of conviction" and a "judgment is not final if there still remains some legal means of setting it aside." (*Ibid.*) The Court then identified three subcategories of probation cases whose "varying circumstances" affected "the powers of the court and the rights of the accused." (*Id.* at pp. 869-870.)

As relevant, the second subcategory included ESS probation cases. (*Stephens v. Toomey*, *supra*, 51 Cal.2d 864, 870.) In that context, if the "conditions of probation are fulfilled the plea or verdict of guilty may be changed to not guilty, the proceedings be expunged from the record and the case dismissed." (*Ibid.*) "When such an order has been entered there is no further criminal prosecution pending against the defendant." (*Id.* at pp. 870-871.) The judgment "*is not* a final judgment," it is "a judgment provisional or conditional in nature." (*Id.* at p. 871 [Emphasis Added.].) "It is in the process of becoming final in that *its finality depends on the outcome of the probationary proceeding*." (*Ibid.* [Emphasis Added.].)

Because the petitioner in *Stephens* was granted ESS probation, the "judgment may or may not become final depending" on the outcome of probation. (*Stephens v. Toomey*, *supra*, 51 Cal.2d 864, 875.) "If probation be revoked the judgment may be ordered in full force and effect." (*Ibid.*) "The judgment would then be final and the constitutional provision fully effective." (*Ibid.*) If probation was successful, however, and the "proceedings be expunged from the record and the case dismissed there will then be no final or any judgment pending against him." (*Ibid.*) Accordingly, until probation concluded, it was premature to determine if he was eligible to vote. (*Ibid.*)

Respondent first cites *Stephens* for the proposition that a judgment remains non-final only "'if there still remains some legal means of setting it aside' *on direct review*." (ABM 25 [Emphasis Added.].) Respondent's addition of the words "direct review," however, is inconsistent with *Stephens'* analysis, which observed that a traditional appeal was only one "legal means" to avoid a judgment, as the defendant could also complete probation.[2] (*Stephens v. Toomey*, *supra*, 51 Cal.2d 864, 869 ["The

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[2] A defendant in an ESS probation case also possesses additional legal means to avoid a previously imposed sentence. For example, he can appeal the order revoking probation. (See *People v. Munoz* (1975) 51 Cal.App.3d 559, 562, fn. 1 [order revoking probation and imposing previously suspended sentence is appealable pursuant to section 1237 as an "order made after judgment."].) Further, section 1203.3, subdivision (a) "may in some situations allow a reduction of sentence previously imposed and suspended during probation" prior to revocation. (*People v. Howard*, *supra*, 16 Cal.4th 1081, 1094.)

traditional method was by appeal. The probation laws then intervened."].) It was this possibility of completing probation successfully that caused the Court to find the ESS probation sentence was not a final judgment until probation was revoked.

Respondent further argues, however, that *Stephens* is inapposite to *Estrada* because it was concerned only with felony disenfranchisement and thus turned on the possibility of expungement, not completing probation. (RB 47-48) Again, Respondent misreads *Stephens*. To be sure, the possibility of expungement was relevant to the issue of voter disenfranchisement. However, the petitioner was only entitled to expungement *if* probation was completed successfully. Under current law, a defendant placed on either ISS or ESS probation continues to have the ability to seek expungement upon successful completion of probation in most cases. (§ 1203.4, subd. (a)(1).) Thus, if anything, the entitlement to expungement strengthens the notion that an order granting probation is not a final order due under *Estrada*.

In any event, the holding in *Stephens* was not based solely on the possibility of expungement. Instead, this Court reasoned that the petitioner's ESS probation case would become final, not when the conviction was expunged, but when probation was *revoked*. (*Stephens v. Toomey*, *supra*, 51 Cal.2d 864, 875 ["If probation be revoked the judgment may be ordered in full force and effect" … and the judgment "*would then be final* …" (Emphasis Added.)].) *Stephens* thus supports this Court's

reasoning in *Chavez*, incorporated in the context of *Estrada*, that neither form of probation results in a final order.

Respondent also takes issue with *Chavez's* reliance on *Stephens* for the proposition that a probationary sentence is "conditional in nature." (ABM 46) According to Respondent, "the type of conditionality that a suspended sentence case involves should not affect finality of the judgment" because it does not impact the sentence. (ABM 46) Respondent further notes that "[e]ven when a case is reduced to a final judgment, it is still 'conditional' in some sense because a defendant may often obtain some form of postconviction resentencing or other relief…" (ABM 46, fn. 12.) The adoption of *Chavez* and *Stephens*' reasoning regarding finality in the context of *Estrada*, however, does not raise this concern. Probation cases are non-final judgments because the defendant may complete probation, not because of the possibility of postconviction relief.

It is true that a trial court cannot modify the sentence following ESS probation revocation. (ABM 45-46; *People v. Howard*, *supra*, 16 Cal.4th 1081.) *Stephens* and *Chavez*, however, recognize that a probation case is not final simply because the trial court cannot modify the sentence once it revokes probation. Accordingly, *McKenzie's* incorporation of that concept in the context of *Estrada* is dispositive of the issue in this case. (*People v. France*, *supra*, 58 Cal.App.5th 714, 721 ["*McKenzie's* reliance on *Chavez* demonstrates that it is relevant authority on the question of Estrada retroactivity."].)

C. **The Legislative History Of The Different Types Of Probation Does Not Support Treating ISS And ESS Probation Differently Under *Estrada*.**

As Respondent observes, before 1911, a trial court could only suspend the execution of sentence if it required the defendant to either pay a fine or be imprisoned until the fine was paid. (ABM 34-35) The power to suspend sentence was later expanded to permit the suspension of both the imposition and execution of sentence while the defendant was on probation. (ABM 35) If ESS probation was ordered, case law provided that the conviction and sentence was considered a final judgment for purposes of seeking appellate review. (ABM 36) An ISS probation order, in contrast, was not immediately appealable, which Respondent describes as "an apparent defect in suspended-imposition cases." (ABM 36) In 1951, this "defect" was addressed by an amendment to section 1237, which "deemed" all probation orders, ISS and ESS, as a "final judgment of conviction" for purposes of seeking appellate review. (ABM 36)

According to Respondent, this legislative history demonstrates "the finality of a suspended-execution sentence is the ordinary and long-established rule." (ABM 38) "Such finality gives defendants in these cases direct access to the appellate process, just like all defendants with similar judgments." (ABM 38) "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." (ABM 38 [Emphasis in Original.].) Respondent thus argues that ESS probation "differs from probation cases like *McKenzie*, where the imposition of a sentence

itself has been suspended, and which represent a conspicuous exception to the rule of finality." (ABM 38) Respondent's argument fails for two reasons.

First, as discussed, *supra*, *McKenzie* rejected Respondent's argument that finality for purposes of seeking an appeal in probation cases is synonymous with finality or judgment under *Estrada*. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 47.) Second, the historical "defect" Respondent identifies hardly supports treating ISS and ESS probation differently under current law. *Estrada* was based on "one consideration of paramount importance," that where the Legislature has "expressly determined that its former penalty was too severe and that a lighter punishment is proper", it is "an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty … should apply to every case to which it constitutionally could apply." (*In re Estrada*, *supra*, 63 Cal.2d 740, 744-745.) It is irrational to infer an intent to treat ESS probation cases differently from ISS based on a distinction in appealability that has not existed for nearly seventy years.

D. Respondent's Attempt To Analogize ESS Probation To Suspension Of The Execution Of Sentence For Other Purposes Fails.

Respondent next claims that an "examination of other types of suspended execution sentences likewise reaffirms the finality principles described above." (ABM 38) Specifically, Respondent notes that execution of sentence may also be suspended to permit the defendant to have a later surrender date

and during the pendency of an appeal. (ABM 38) In both situations, the defendant must still appeal within 60 days of the court pronouncing the sentence. (ABM 38-39) Respondent thus suggests that the ability to suspend the execution of sentence in these alternative situations, and the timing of any appeal from such orders, demonstrates further that *Estrada* "finality is rooted in the imposition of sentence." (ABM 38)

As Respondent notes, no court has ever addressed *Estrada* finality in those contexts. (ABM 39-40) Moreover, these alternative situations, where the execution of sentence can be suspended, are in no way analogous to suspending the execution of a sentence in a probation case. As *McKenzie* and *Chavez* demonstrate, a probation order is not a final judgment because the defendant may complete probation successfully. It is this "conditional nature" of a probation order that keeps it from being a final order prior to revocation of probation.

In contrast, if the trial court suspends the execution of sentence to delay the surrender date, there is nothing conditional about the suspended sentence. Only the timing of when the sentence will be served is affected by the stay, and there are no other means for the defendant to avoid punishment. Further, analogizing ESS probation to suspending the execution of sentence pending an appeal adds nothing to the analysis in this case because, in the latter scenario, the judgment remains non-final under *Estrada* until the appeal is completed. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 45; *People v. Vieira* (2005) 35 Cal.4th 264, 306; *People v. Kemp* (1974) 10 Cal.3d 611, 614.)

E. The Purpose Of ESS Probation Does Not Justify Treating The Two Types Of Probation Differently Under *Estrada*.

Respondent next argues that the "different approaches to the two forms of probation also support the conclusion that suspended sentences are final." (ABM 40-42) Specifically, Respondent notes that one purpose of ESS probation, as compared to ISS, is to "emphasize the definite and concrete consequences of violating probation" because the sentence cannot later be modified. (ABM 40) Respondent thus argues that allowing an ESS probationer to take advantage of ameliorative legislation undermines the threat of irreversible consequences, and ESS probation should thus be treated differently than ISS probation. There are several problems with this argument.

First, it is not always the case that an ESS sentence will result in a greater incentive to comply with probation terms as compared to ISS probation, because an ESS sentence often represents something less than the maximum possible sentence. In this case, the ESS sentence was substantially less than the possible sentence, as the parties agreed to strike a prior strike and a serious felony enhancement that appellant had admitted. Accordingly, ESS probation may, in some cases, allow the defendant to lock in a more favorable sentence.

Conversely, ISS probation leaves open the full range of sentencing options. (Cal. Judges Benchbook: Misdemeanor Sentencing (CJER 2018) § 75.54 ["If the court wishes to retain the full range of sentencing options in the event of a future probation violation, it should suspend the imposition of

sentence."].) Thus, an ISS probationer may have a greater incentive not to violate probation based on the range of possible sentences that the trial court can later impose. A trial court may even be more inclined to impose a harsher punishment in an ISS case, as sentencing occurs after the defendant violates probation.

Moreover, the argument, that the consequences of violating probation might be reduced by legislation and thus undermine the incentive to comply with probation, applies equally to ISS probation. In *McKenzie*, the defendant's sentencing exposure was reduced by twelve years due to Senate Bill 180. *Estrada* also rejected similar arguments about "diminish[ing]" the "'intended deterrent effect'" by applying subsequent legislation. (*People v. McKenzie*, *supra*, 9 Cal.5th 40, 49.)

Second, it is entirely speculative to assume that a defendant will be less inclined to comply with ISS or ESS probation based on the possibility that the Legislature might pass ameliorative legislation while probation is pending. (See *People v. McKenzie*, *supra*, 9 Cal.5th 40, 49 [it is "highly doubtful" a probationer would violate probation to extend the probationary period in the hopes that the Legislature "would enact some ameliorative legislation."].) Here, appellant was alleged to have violated probation before SB 136 was enacted.

Accordingly, this Court should apply the reasoning of *McKenzie*, *Chavez*, and *Stephens* to hold that an order of ESS probation is not a final judgment under *Estrada*.

II. THIS COURT MUST REJECT ANY REMEDY THAT PERMITS APPELLANT TO RECEIVE A LONGER SENTENCE BASED ON HIS ENTITLEMENT TO THE NON-DISCRETIONARY BENEFIT OF SB 136.

The appropriate remedy, in this case, is to strike the sentencing enhancements and leave the remainder of the sentence intact. (OBM 34-40) Alternatively, if SB 136 fatally undermines the plea agreement, the appropriate remedy is to remand to the trial court to either 1) allow the prosecution to modify the plea agreement to reflect a lower sentence, or 2) permit the prosecution to reinstate previously dismissed charges or enhancements, while limiting any sentencing exposure to that in the original agreement (five years). (OBM 40-47)

Respondent argues that the prosecution should be permitted to withdraw from the agreement under basic contract principles and reinstate any previously dismissed counts or enhancements. (ABM 48-60) Respondent also argues that, if the prosecution withdraws from the plea agreement, any subsequent sentence can exceed the original sentence. (ABM 60-72)

Respondent's contentions must be rejected.

A. The Reasoning Of *Stamps* Was Based On Concerns That Are Not Implicated By SB 136.

According to Respondent, *People v. Stamps* (2020) 9 Cal.5th 685, stands for the proposition that "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." (ABM 50)

Respondent further argues that the only exception to this rule is where the Legislature clearly expresses an intent "'to overturn long-standing law that a court cannot unilaterally modify an agreed-upon term.'" (ABM 50-51; citing *People v. Stamps*, *supra*, 9 Cal.5th 685, 701.) Accordingly, as neither SB 136 nor its legislative history expressly addresses its application to cases resolved by a plea agreement, Respondent argues that it is distinguishable from Proposition 47, which this Court found was intended to unilaterally alter plea agreements in *Harris v. Superior Court* (2016) 1 Cal.5th 984. (ABM 51-53.)

Stamps, however, did not go as far as Respondent suggests, and its reasoning is largely inapplicable, because SB 136 does not require an exercise of the trial court's discretion. (OBM 36-37) As the court in *France* recently explained:

> Preventing 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, especially given that pleas of guilty or no contest "represent the vast majority of felony and misdemeanor dispositions in criminal cases." [Citations.]

(*People v. France*, *supra*, 58 Cal.App.5th 714, 728.) "The same could have been said with respect to the legislative goals" of Senate Bill No. 1393 (2017-2018 Reg. Sess.) ("SB 1393"), at issue in *Stamps*. (*Ibid.*) However, SB 1393 "sought to achieve its aims through a different mechanism." (*Ibid.*) "Rather than reducing sentences directly by significantly narrowing the scope of an enhancement (in the way [SB 136] does), [SB 1393] merely gave trial courts discretion … to strike an enhancement." (*Ibid.*)

Finding this difference "significant," the court further observed that under SB 1393, "it is ultimately a trial court that chooses whether an enhancement is eliminated—meaning that [SB 1393] directly implicates the prohibition on a trial court's ability to unilaterally modify an agreed-upon sentence." (*People v. France*, *supra*, 58 Cal.App.5th 714, 728.) In contrast, under SB 136, the "Legislature itself has mandated the striking of affected prison priors by making the enhancement portion of [the defendant's] sentence illegal." (*Id.* at p. 729.) "Thus, [SB 136] does not involve *Stamps'* 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.'" (*Ibid.* [Emphasis in Original.].) Accordingly, because SB 136 "has a direct and conclusive effect on the legality of existing sentences pursuant to *Estrada*, rather than merely giving trial courts discretion to modify sentences under section 1385, it stands closer to Proposition 47 and *Harris*, despite the absence of an express resentencing provision." (*Ibid.*)

The dissent in *France* reasoned that, under *Stamps*, the relevant question is not whether a trial court has discretion to modify the sentence, but whether a trial court can "modify" the plea agreement without obtaining the parties' consent. (*People v. France*, *supra*, 58 Cal.App.5th 714, 734 (disn. opn. of Pollak, P.J.).) *Doe v. Harris* (2013) 57 Cal.4th 64, 73, however, established that "plea agreements generally incorporate the Legislature's reserve power to change the law." (*People v. France*, *supra*, 58 Cal.App.5th 714, 729, fn. 6.) "Under *Doe*, it matters

very much whether a court makes a discretionary change to a plea bargain (as in *Stamps*) or the Legislature makes a change in the law that necessarily affects the bargain." (*Ibid.*)

The holding in *Stamps* was also based on a second concern not implicated by SB 136, that permitting the trial court to strike a prior serious felony enhancement, while maintaining the remainder of a plea agreement, "would frustrate the Legislature's intent to have section 1385 apply uniformly, regardless of the type of enhancement at issue, by granting the court a power it would otherwise lack for any other enhancement." (*People v. Stamps*, *supra*, 9 Cal.5th 685, 704.) SB 136 "raises no such concerns" because it eliminated an enhancement "without any reference to creating uniformity with other types of enhancements." (*People v. France*, *supra*, 58 Cal.App.5th 714, 729.) "[U]nlike [SB 1393], there is nothing in [SB 136's] text or legislative history that runs contrary to the view that [it] requires a court to strike the one-year enhancements while leaving the remainder of the plea bargain intact." (*Ibid.*)

Respondent's reliance on the lack of an express reference to plea bargaining in the text or legislative history of SB 136 is misplaced for another reason. Specifically, it would "mean that any retroactive ameliorative change in a criminal law that does not contain such an express reference would entitle the prosecution to re-open the plea bargain to add back previously-dismissed charges or allegations." (*People v. France* (2020) 58 Cal.App.5th 714, 730.) *Estrada's* presumption of retroactivity, however, "arises only when an ameliorative amendment lacks an

express retroactivity provision." (*Ibid.*) Respondent's broad reading of *Stamps*, therefore, "would create a rule that defendants who plead guilty may benefit from the retroactive operation of any law whose retroactivity depends on the *Estrada* presumption only if the prosecution assents." (*Ibid.*) Such a rule significantly undermines the central principle of *Estrada*, that "the Legislature intends a lighter penalty to apply 'to every case to which it constitutionally could apply' [Citation.]" (*Ibid.*) This is particularly true, given that "defendants who plead guilty represent the vast majority of convictions." (*Ibid.*, citing *In re Chavez* (2003) 30 Cal.4th 643, 654, fn. 5 [only a small percentage of felony and misdemeanor convictions result from a trial].)

Accordingly, because SB 136 does not implicate any of the concerns underlying this Court's reasoning in *Stamps*, it is inapposite, and the proper remedy is to strike the enhancements without otherwise disturbing the plea agreement.

B. **Appellant Has Not Repudiated The Plea Agreement, Which Implicitly Contemplated Future Ameliorative Legislation.**

To further justify permitting the prosecution to withdraw from the plea if SB 136 applies to this case, Respondent characterizes appellant's invocation of SB 136 in this appeal as an act to repudiate the terms of his plea. (ABM 59 [[I]f Esquivel wishes to renege on his half of the plea agreement, the prosecutor may likewise withdraw."].) Appellant, however, has not sought to renege on or repudiate the plea agreement.

First, as this Court observed in *People v. Collins* (1978) 21

Cal.3d 208, 216, a defendant has not "repudiated" the terms of a plea bargain by challenging the judgment based on "external events" that "have rendered the judgment insupportable." (*Ibid.*) Accordingly, "it is not useful to inquire into whether the defendant repudiated his guilty plea when determining if the state has been deprived of the benefit of its bargain." (*Id.* at p. 216, fn. 3 [such an inquiry, however, is significant "when determining whether the defendant ought to be permitted to enforce a plea bargain undermined by external events."].) (*Ibid.*) Here, as in *Collins*, appellant challenges his sentence based on external events that rendered his sentence insupportable. (*People v. Griffin* (2020) 57 Cal.App.5th 1088, 1098, review granted Feb. 17, 2021, S266521 [following *Collins* to find defendant did not repudiate plea agreement by asserting entitlement to resentencing under SB 136.].)

Second, "the general rule in California is that plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy." (*Doe v. Harris*, *supra*, 57 Cal.4th 64, 71; *Harris v. Superior Court*, *supra*, 1 Cal.5th 984, 991 ["entering into a plea agreement does not insulate the parties 'from changes in the law that *the Legislature has intended to apply to them*.'" (Emphasis in Original.)].) Accordingly, if prosecutors "want to insulate" a plea agreement "from future changes in the law they should 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.)

Conversely, as Respondent concedes, since “plea bargains sound in contract law,” the failure to expressly insulate a plea from future legislation “could form the basis for enforcing a bargain even when [the sentence is] subsequently modified by a court.” (ABM 53, fn. 13.)

Respondent notes, however, that following the enactment of Assembly Bill 1618 (2019-2020 Reg. Sess.) (“AB 1618”), “prosecutors are now forbidden from insulating their plea bargains against changes in the law.” (ABM 52, fn. 13; § 1016.8, subd. (b) [“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.”].) Respondent thus argues that “now that prosecutors have no control over whether a plea agreement will incorporate a future change in the law [citation], they can hardly be deemed to ‘accept’ such a change.” (ABM 53, fn. 13.)

Respondent’s observations about the ability to insulate a plea bargain from future changes in the law undermine the argument that reducing appellant’s sentence denies the prosecution of the benefit of the plea agreement. Before AB 1618, and at the time of the plea here, the failure to insulate a plea agreement from future legislation could be construed as an acceptance of future statutory changes to the sentence. There is no indication that the plea agreement in this case was insulated from future changes in the law. (See Clerk’s Transcript (“CT”) 42-45 [minute order from plea hearing]; Reporter’s Transcript (“RT”) A-1 to A-21 [transcript of plea hearing].)

Accordingly, because the plea implicitly contemplated the subsequent enactment of ameliorative legislation, the remedy should be to strike the sentence enhancements. *Stamps* is inapplicable, and there is no basis to permit the prosecution to withdraw from the original plea agreement. (OBM 36-37) Further, enabling the unwinding of plea agreements, based on the application of SB 136, directly undermines the legislative intent behind SB 136. (OBM 37-40; see *People v. France*, *supra*, 58 Cal.App.5th 714, 730 [allowing the prosecution to withdraw from a plea essentially gives the prosecution veto power over whether a defendant can benefit from legislation that otherwise applies].) Unwinding or modifying the plea agreement also raises separation of powers concerns, to the extent it may require the prosecution to refile lesser or related charges to restore to the original sentence. (See ABM 67-68, fn. 21.)

C. If The Application Of SB 136 Permits The Prosecution To Withdraw From The Plea Agreement, *Collins* Controls The Remedy.

Alternatively, if the application of SB 136 fatally undermines the plea deal, in this case, appellant's sentencing exposure on remand should be limited to the five-year term he originally bargained for. Imposing a cap on the remand sentence avoids the problem of appellant facing a longer sentence based on the application of SB 136, which was designed to benefit defendants, not increase their punishment. It is also consistent with this Court's remedial approach in *People v. Collins*, *supra*, 21 Cal.3d 208, 216-217. (OBM 40-47)

Respondent acknowledges that *Collins* permitted the prosecution to withdraw from a plea that was undermined by subsequent legislation "'"as long as the defendant was not resentenced to a greater term than provided in the original plea agreement."' (ABM 60) Respondent, however, notes that *Stamps* "did not endorse or impose such a limitation." (ABM 60) Respondent also argues that *Collins* "should be disapproved" to the extent it is inconsistent with *Stamps*. (ABM 61, fn. 17.)

Stamps is not inconsistent with *Collins*; it "merely limited its application to situations where a trial court receives retroactive discretion to strike enhancements." (*People v. France*, *supra*, 58 Cal.App.5th 714, 730, fn. 7.) "*Stamps* never addressed the language in *Collins* capping the sentence that could be imposed on remand, and *Stamps* never addressed whether the trial court could properly impose a longer sentence on remand." (*People v. Griffin*, *supra*, 57 Cal.App.5th 1088, 1099, fn. 7 ["*Stamps* questions no aspect of the *Collins* decision."].)

Importantly, because appellant asserts the benefit of non-discretionary ameliorative legislation, the instant case is "more like *Collins* than *Stamps*." (*People v. Griffin*, *supra*, 57 Cal.App.5th 1088, 1099.) To the extent a new plea agreement was required in *Stamps*, it was because the defendant decided to seek *discretionary* relief under SB 1393. (*People v. Stamps*, *supra*, 9 Cal.5th 685, 708.) In contrast, in *Collins* and this case, "the legislative enactments were 'external events' that simply rendered the plea agreements unenforceable." (*People v. Griffin*, *supra¸* 57 Cal.App.5th 1088, 1099.) This distinction "supports

different remand instructions" than in *Stamps*. (*Ibid.*)

Accordingly, if SB 136 fatally undermines the plea agreement, this Court "must fashion a remedy that restores to the state the benefits for which it bargained without depriving defendant of the bargain to which he remains entitled." (*People v. Collins*, *supra*, 21 Cal.3d 208, 215-216.) In *Collins*, the prosecution obtained the plea's approximate benefit even where the ultimate sentence was shorter than contemplated under the original plea agreement. (*Id.* at pp. 216-217.)

Here, the prosecution will similarly receive the plea agreement's approximate benefit even if the total exposure is limited to no more than the original five-year term. (See ABM 70-71 [calculating that it would be possible to reach a sentence of four years and eight months in this case].) Moreover, appellant was sentenced on November 15, 2018 (CT 100), and has now served nearly two and a half years of his sentence. With custody credits, he will likely complete his original sentence before this appeal is final. (See § 2933.) Thus, even if it is not possible to resentence appellant to a five-year term, the prosecution will still likely receive the *full* benefit of the plea.

D. **Any Remedy That Permits A Longer Sentence Must Be Rejected On Public Policy Grounds.**

Respondent argues that because the prosecution must be permitted to withdraw from the original plea agreement, thus returning the parties to the status quo ante, any new sentence on remand "may exceed the original sentence." (ABM 60) This Court must reject any remedy that permits a longer sentence.

First, Respondent asserts that permitting a longer sentence on remand is consistent with the process by which a trial court can reject a plea bargain in the first instance, because had appellant never been sentenced, the prosecutor "would not now be limited to seeking a five-year sentence." (ABM 61) Appellant, however, was sentenced in the first instance and as discussed, *supra*, has already served most of his sentence. If the prosecution can obtain a longer sentence, appellant will clearly be deprived of the benefit of the plea agreement upon which he detrimentally relied. (OBM 45-46) Thus, the remedy in *Collins* is necessary.

Respondent argues that the principle of detrimental reliance is inapplicable because "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." (ABM 61-63) The prosecutor was undoubtedly unaware that SB 136 would be enacted at the time of the plea. Nevertheless, as discussed, *supra*, the prosecutor was or should have been aware that the Legislature might enact new sentencing laws and that the lack of an express provision insulating the plea from future statutory changes should be treated as an implicit acceptance of that possibility. (See *Doe v. Harris*, *supra*, 57 Cal.4th 64, 66 [Entering a plea agreement generally "does not have the effect of insulating" the agreement "from changes in the law that the Legislature has intended to apply to them."].)

Second, Respondent argues that the "prospect of discouraging the exercise of appellate rights also does not require the Court to impose a cap on the remand sentence." (ABM 64)

As this Court recognized in *Collins*, where "external events" affect the judgment, limiting sentencing exposure on remand is necessary precisely to preclude "penalizing a defendant for pursuing a successful appeal." (*People v. Collins*, *supra*, 21 Cal.3d 208, 216; see also *People v. Hanson* (2000) 23 Cal.4th 355, 366 [emphasizing "the chilling effect on the right to appeal generated by the risk of a more severe punishment"].) If this Court adopts Respondent's remedy, the "risk of an increased sentence" will unquestionably "discourage defendants from exercising their right to challenge unauthorized section 667.5 subdivision (b) enhancements." (*People v. Griffin*, *supra*, 57 Cal.App.5th 1088, 1097.) Moreover, the chilling effect would extend to any new legislation in non-final cases where the sentence resulted from a plea agreement.

Importantly, the risk of a greater sentence will also "discourage some defendants from filing or maintaining an appeal on non-sentencing issues." (*People v. Griffin*, *supra*, 57 Cal.App.5th 1088, 1097.) "For example, a defendant who lost a search and seizure motion and then entered into a plea bargain impacted by [SB 136] or other sentencing reform measures might be hesitant to appeal the search issue, fearing the possibility that a reviewing court will reverse a judgment including an unauthorized enhancement even absent a request from a party to do so." (*Ibid.*; see *In re Harris* (1993) 5 Cal.4th 813, 842 ["An appellate court may 'correct a sentence that is not authorized by law whenever the error comes to the attention of the court.'"].)

The instant case demonstrates this possibility. When

appellant filed the notice of appeal in this case, SB 136 had yet to be enacted. (CT 103 [notice of appeal filed on 11/15/18].) After this case was fully briefed, the Court of Appeal, *sua sponte*, requested supplemental briefing on the impact of SB 136. (Online Docket, B294024, Order dated 11/14/19.)

Respondent suggests that this Court can avoid any chilling effect by precluding an appellate court from correcting an unauthorized sentence if 1) the sentence is not challenged by the defendant, and 2) correcting the sentence would require the court to undo a plea agreement. (ABM 65) This rule, however, would effectively grant prosecutors veto power over the application of ameliorative legislation in probation cases by refusing to accept a modified plea. The Court of Appeal also would not know whether correcting an unauthorized sentence would require undoing a plea deal, as that decision would be up to the prosecutor.

Respondent also notes that "the universe of issues that a defendant might be chilled from bringing on appeal after a guilty plea is sharply limited." (ABM 65, fn. 20.) Respondent thus argues that, 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." (ABM 65, fn. 20.)

Respondent is correct that the risk of an unauthorized sentence coming to light on appeal following a plea is equal to the risk in a case resolved by a trial. There is still, however, an

important difference. If a sentence is unauthorized in the first instance, the defendant can weigh the risk of it being corrected against the benefit of an appeal. A defendant cannot weigh this risk if it arises due to legislation enacted after the appeal commences. Thus, the chilling effect of imposing a greater sentence because of ameliorative legislation is more ubiquitous and unpredictable than the risk that a sentence might be increased due to an error.

Respondent also argues that "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 aspects of the sentence." (ABM 66) According to Respondent, this limitation is based on due process concerns that "do not apply where the sentence was unauthorized in the first place." (ABM 66)

Appellant's sentence, however, was *not* unauthorized "in the first place." Instead, it was the external event of the Legislature enacting SB 136 that rendered his sentence unauthorized. The instant case is thus distinguishable from the authorities cited by Respondent (ABM 65), which permit a trial court to correct an "in the first place" unauthorized sentence, even if doing so results in more severe punishment.

Moreover, it is well settled that, based on due process concerns, "a felony defendant's original aggregate prison term cannot be *increased* on remand for resentencing following a

partially successful appeal." (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1253 [Emphasis in Original.].) Appellant's exposure to a longer sentence here is based solely on whether he successfully asserts his entitlement to resentencing under SB 136, a remedy that the Court of Appeal raised *sua sponte*. Imposing a greater sentence on remand, therefore, invokes significant due process concerns.

Finally, and perhaps most importantly, permitting a longer sentence cannot be squared with the legislative intent of SB 136, which was, inter alia, to 1) eliminate an ineffective and costly sentence enhancement and reduce prison and jail populations, 2) address racial and socio-economic disparities exacerbated by the enhancement, and 3) to save public funds that can be reallocated towards evidence-based rehabilitation and reintegration programs. (OBM 27) These benefits cannot be fully realized if the prosecution can abandon a plea agreement whenever a defendant seeks to retroactively eliminate an enhancement. This is particularly true if defendants face *longer* sentences, which would increase spending on our "failed mass incarceration policies." (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business of Sen. Bill No. 136 (2019-2020 Reg. Sess.) p. 2.)[3] Further, preventing SB 136 from "applying to plea-bargained sentences would thwart or delay the full achievement of the Legislature's intent" as "pleas of guilty or no contest

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[3] The legislative history documents cited herein are the subject of appellant's Motion for Judicial Notice, filed concurrently to the Opening Brief on the Merits in this case.

'represent the vast majority of felony and misdemeanor dispositions in criminal cases.'" (*People v. France*, *supra*, 58 Cal.App.5th 714, 728; see Judicial Council of Cal., Court Statistics Rep., Statewide Caseload Trends, 2009–2010 Through 2018–2019 (2020), at pp. 55–56, 85–86.)

The drafters of SB 136 also expressed an intent to address "existing racial and socio-economic disparities in our criminal justice system," which were exacerbated by the former version of section 667.5, subdivision (b). (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business of Sen. Bill No. 136 (2019-2020 Reg. Sess.) pp. 2-3.) The same racial disparities are pervasive in the context of plea agreements. (See e.g. Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining* (2018) 59 B.C. L. Rev. 1187.) If the Legislature intended SB 136 to apply retroactively, it makes little sense that they also intended to frustrate its application in many cases in which it might apply.

Respondent, however, asserts that it is consistent with the purpose of SB 136 for some defendants to end up with a longer sentence because decreasing the length of sentences was not a "principal purpose" of SB 136. (ABM 63-64) Respondent argues, instead, that the principal purpose of SB 136 was only to eliminate, in most cases, the enhancement under section 667.5, subdivision (b). (ABM 63-64) Accordingly, "so long as a sentence on remand does not re-impose the prior prison term enhancements, this goal will not be affected." (ABM 64)

Respondent's argument requires an absurdly narrow interpretation of the intent behind SB 136. To be sure, the

drafters of SB 136 were concerned with the "ineffective" section 667.5, subdivision (b) enhancement. The drafters, however, also recognized that this ineffective enhancement, and the longer sentences that resulted from it, diverted resources from other programs, perpetuated a failed policy of mass incarceration, and separated families. Reducing sentences and the prison population was not an incidental goal of SB 136. (See *People v. France*, *supra*, 58 Cal.App.5th 714, 729-730 ["construing [SB 136] to allow the People to withdraw from plea deals containing the affected enhancements could prevent the Legislature from fully realizing its goals of departing from mass incarceration, saving money on prison costs, and keeping families together."].)

However, even if Respondent is correct, that reducing sentences or the prison population was not the intent of SB 136, there is simply no basis for the converse inference: that the Legislature intended for SB 136 to result in *increased* sentences. Accordingly, and at a minimum, the remedy in this case should include a cap, limiting any remand sentence to no more than the five-year term appellant agreed to.

CONCLUSION

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

DATED: March 17, 2021

Respectfully submitted,

Mark R. Feeser
MARK R. FEESER
Attorney for Appellant

CERTIFICATE OF LENGTH

I, Mark R. Feeser, counsel for Randolph Steven Esquivel, certify pursuant to California Rules of Court, rule 8.520(c), that the word count for this document is 8,342 words. This document was prepared in Microsoft Word, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Luis Obispo, California, on March 17, 2021.

Mark R. Feeser
MARK R. FEESER
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE

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

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

On **March 17, 2021**, I served the following:

APPELLANT'S REPLY BRIEF ON THE MERITS

by placing a true copy in an envelope addressed to each addressee, respectively as follows:

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

Randolph Steven Esquivel
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California Correctional Institute
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Tehachapi, CA 93561

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

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

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DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE (Cont.)

On **March 17, 2021**, I transmitted a PDF version of this document by electronic mail to each of the following using the email addresses indicated:

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I declare under penalty of perjury that the foregoing is true and correct. Executed **March 17, 2021**, at San Luis Obispo, California.

Mark R. Feeser
MARK R. FEESER