S281488

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	) No. _____
Plaintiff and Respondent,	) (Court of Appeal,) Fourth Appellate) District, Div. 2,
v.	) No. E080032)
OSCAR LOPEZ,	) (San Bernardino) Co. Superior
Defendant and Appellant	) Court No.) FWV1404692)

APPELLANT'S PETITION FOR REVIEW

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO,
HONORABLE BRIDGID MCCANN, JUDGE PRESIDING

RACHEL VARNELL (State Bar #197649)
P.O. Box 799
Los Gatos, California 95031
650-483-4248
rachv2002@yahoo.com

Attorney for Petitioner,
OSCAR LOPEZ

Table of Contents

Table of Authorities

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	) No. _____
Plaintiff and Respondent,	) (Court of Appeal,) Fourth Appellate) District, Div. 2,
v.	) No. E080032)
OSCAR LOPEZ,	) (San Bernardino) Co. Superior
Defendant and Appellant	) Court No.) FWV1404692)
_____	)

TO THE HONORABLE PATRICIA GUERRERO, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

ISSUES PRESENTED FOR REVIEW

1. Was appellant's right to due process under the Fifth and Fourteenth Amendments violated because the evidence is insufficient to support the gang enhancement attached to count five, where no evidence was presented that the predicate offenses benefitted the gang in a way that was more than reputational?

2. Should appellant's case have been remanded for resentencing pursuant to Senate Bill Number 567 because the trial court imposed upper terms with no aggravating facts admitted by appellant or found true by a jury beyond a reasonable doubt?

3. Did the trial court abuse its discretion in refusing to strike the Penal Code section 12022.53, subdivisions (c) and (d) enhancements pursuant to Senate Bill Number 81?

REASONS FOR GRANTING REVIEW

Assembly Bill Number 333

As to the first issue, in the published portion of its opinion, the Court of Appeal held that appellant was entitled to the ameliorative benefits of Assembly Bill Number 333 (Stats. 2021, ch. 699, § 3, eff. Jan. 1, 2022), as the judgment against him was not final. (Exhibit A, p. 2.) However, because the Court of Appeal had originally reversed and remanded appellant's case to the trial court "solely with respect to the sentence and directed the trial court to resentence" appellant, it concluded the trial court "did not have jurisdiction to reconsider the gang enhancement." (*Ibid.*) In so holding, the Court of Appeal relied on dictum from *People v. Padilla* (2022) 13 Cal.5th 152, a case that did not involve Assembly Bill Number 333 or an ameliorative change in the law as to guilt, but instead the application of Proposition 57 to a juvenile's sentence after it was vacated in a habeas corpus proceeding. (Exhibit A, p. 10; *Padilla, supra*, 13 Cal.5th at pp. 160-163.)

Review is warranted on this issue for a number of reasons. This portion of the opinion is published, it is a split opinion (see Exhibit A, diss. opn. of Raphael, J.), and it creates a split of authority with *People v. Salgado* (2022) 82 Cal.App.5th 376, which held Assembly Bill Number 333 applied to a defendant who was resentenced under former section 1170. (*Id.* at p. 380.)

As noted in the dissenting opinion, however, it is not even necessary to reach *People v. Padilla* and *People v. Salgado*, as appellant's case was never reduced to a final judgment. (Exhibit

A, diss. opn. of Raphael, J., at p. 3.) *Padilla* and *Salgado,* in contrast, were reopened following postjudgment proceedings. (*Padilla, supra*, 13 Cal.5th at pp. 160-163; *Salgado, supra,* 82 Cal.App.5th at p. 378.) Additionally, *In re Estrada* (1966) 63 Cal.2d 740 "presumed that our Legislature intends for ameliorative enactments to apply as broadly as is constitutionally permissible. The significance of finality was that legislation 'constitutionally could apply' to nonfinal judgments." (*People v. Esquivel* (2021) 11 Cal.5th 671, 677.) Based on *Estrada's* holding, Assembly Bill Number 333 should apply to appellant's case, which resulted from a resentencing following an original appeal.

Even assuming *People v. Padilla* and *People v. Salgado* are applicable to appellant's case, the "crucial passage" of *Padilla*, relied heavily on by the Court of Appeal (Exhibit A, p. 10), was specific to the facts of *Padilla.* In response to the Attorney General's argument that vacatur of a defendant's sentence does not allow a resentencing court to consider new claims or affect any part of the judgment other than the sentence, *Padilla* noted, in the context of Proposition 57, that whatever potential a juvenile transfer hearing might have for reducing the juvenile defendant's punishment, "it does not authorize or constitute relitigation of guilt." (*Padilla, supra,* 13 Cal.5th at pp. 169-170.)

Because Proposition 57 is not an ameliorative change as to guilt, *Padilla* was correct that relitigating guilt *under Prop 57* would have been improper. *Padilla*, however, did not address ameliorative changes that do affect guilt issues. *Salgado,* in contrast, did specifically address the application of Assembly Bill

Number 333 to a postjudgment proceeding and, relying on *Padilla,* it concluded its defendant was "entitled to the benefit of Assem. Bill 333 because his criminal judgment is no longer final," following recall and resentencing pursuant to Penal Code section 1170. (*Salgado, supra,* 82 Cal.App.5th at p. 378.)

Lastly, in separating finality from jurisdiction, the Court of Appeal's opinion creates an unworkable framework for the trial courts and practitioners who, since *Estrada,* have focused on whether a judgment is final to determine retroactivity. In separating finality from jurisdiction, the Court of Appeal's opinion will lead to confusion amongst all lower courts. Where the Court of Appeal's split opinion also creates a published conflict with *People v. Salgado*, review is warranted to provide guidance to the Courts of Appeal and the trial courts on this issue.

Senate Bill Number 567

As to the second issue, the Court of Appeal concluded the trial court erred in finding the aggravating circumstances true based on the probation report, rather than a certified record of conviction, but it found the error was not prejudicial, citing *People v. Watson* (1956) 46 Cal.2d 818. Currently pending before this Court is *People v. Lynch* (2022) 2022 WL 1702283 (rev. granted 08/10/2022 [S274942]), which will determine the following: What prejudice standard applies on appeal when determining whether a case should be remanded for resentencing in light of newly-enacted Senate Bill No. 567 (Stats. 2021, ch. 731)? (Cal. Supreme Court Case Summary, Case No. S274942.)

Because the applicable standard of prejudice is currently pending before this Court, this Court should issue a "grant and hold" order pursuant to California Rules of Court, rule 8.512(d)(2).

Senate Bill Number 81

As to the third issue, while the Court of Appeal agreed the mitigating factor of multiple enhancements (Pen. Code, § 1385, subd. (c)(2)(B)) was applicable here, it disagreed that dismissal of one of the two firearm enhancements was mandatory, citing *People v. Anderson* (2023) 88 Cal.App.5th 233 (rev. granted 4/19/2023 [S278786]) and *People v. Walker* (2022) 86 Cal.App.5th 386 (rev. granted 3/22/2023 [S278309]). (Exhibit A, p. 18.) Both *Walker* and *Anderson* are currently pending before this Court, and *Walker* will decide the following:

> Does the amendment to Penal Code section 1385, subdivision (c) that requires trial courts to "afford great weight" to enumerated mitigating circumstances (Stats. 2021, ch. 721) create a rebuttable presumption in favor of dismissing an enhancement unless the trial court finds dismissal would endanger public safety?

(Cal. Supreme Court, Case Summary, Case No. S278309.)

Because the issue of whether a rebuttable presumption is created in favor of dismissing an enhancement is currently pending before this Court, this Court should issue a "grant and hold" order pursuant to California Rules of Court, rule 8.512(d)(2).

For all of these reasons and because this case presents legal issues of statewide importance (Cal. Rules of Court, rule 8.500(b)(1)), this Court should grant review.

STATEMENT OF THE CASE AND THE FACTS

For purposes of this petition only and except as otherwise noted, the beginning of the opinion of the Court of Appeal, including the introduction and the sections headed "Statement of Facts" and "Statement of the Case," as supplemented by any factual matters and procedural details described herein, adequately summarizes the facts and the procedural posture of this case. (Exhibit A, pp. 3-4.)

On July 25, 2023, in a published portion of its opinion, the Court of Appeal held the trial court did not have jurisdiction to reconsider the gang enhancement. (Exhibit A, p. 2.) In the unpublished portion of the opinion, it affirmed the trial court's judgment. (*Ibid*.)

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER, PURSUANT TO ASSEMBLY BILL NUMBER 333, APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WAS VIOLATED BECAUSE THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE GANG ENHANCEMENT ATTACHED TO COUNT FIVE, WHERE NO EVIDENCE WAS PRESENTED THAT THE PREDICATE OFFENSES BENEFITTED THE GANG IN A WAY THAT WAS MORE THAN REPUTATIONAL

Prior to the resentencing hearing, the prosecutor filed a sentencing brief in which she argued Assembly Bill Number 333 did not apply to such a hearing. (CT 80-82.) Because appellant's judgment was final when Assembly Bill Number 333 went into effect on January 1, 2022, the prosecutor argued, appellant could

not "avail himself of AB 333 at his resentencing hearing." (CT 83.)

At the resentencing hearing, defense counsel argued the evidence was insufficient to support the gang enhancement:

> [I]n AB 333, the common benefit of the gang must be more than reputational. What the DA needs to prove is the crimes were committed for a pattern, from a pattern of criminal gang activity and the crimes benefit a gang and the common benefit must be more than reputational.
>
> Therefore I think we need to strike any gang enhancements because I don't believe it was more than reputational.

(RT 28.)

The trial court denied defense counsel's request, finding Assembly Bill Number 333 inapplicable to resentencing hearings:

> The Court does believe that [*Padilla, supra,* 13 Cal.5th 152] is more appropriate to follow in this case than [*Salgado, supra,* 82 Cal.App.5th 376]. This is a situation where we are dealing with a sentencing scheme, not proof in this case. The Court of Appeal did render an opinion. The remittitur was as to the sentence errors that the Court did, not as to the substantive evidence in this case.
>
> And as such, I am not inclined to either order a new trial for the 186.22 or apply the new law for the 186.22.

(RT 31-32.)

"Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear with respect to a particular statute, the Legislature's generally applicable declaration in section 3 provides the default rule: 'No

part of [the Penal Code] is retroactive, unless expressly so declared.'" (*People v. Brown* (2012) 54 Cal.4th 314, 319.)

However, under *Estrada, supra,* 63 Cal.2d 740, "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*Id.* at pp. 744-745.) As Assembly Bill 333's amendments to section 186.22 "increased the threshold for conviction under the gang enhancement statute" (*People v. Ramirez* (2022) 79 Cal.App.5th 48, 64, rev. granted 08/17/2022 [S275341]), a defendant whose conviction is not yet final is entitled to the retroactive application of those amendments. (*Ibid.*; *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1087; *People v. Ramos* (2022) 77 Cal.App.5th 1116, 1126-1127; *People v. Sek* (2022) 74 Cal.App.5th 657, 666-667.)

The Court of Appeal found that appellant's case was not yet final and he was therefore "entitled to the ameliorative benefits of A.B. 333." (Exhibit A, p. 2.) Nonetheless, because appellant's original case had been "reversed solely with respect to the sentence" and the trial court was directed only to resentence appellant, it held the trial court "did not have *jurisdiction* to reconsider the gang enhancement." (*Ibid.*, emphasis added.)

In so holding, the majority relied on *People v. Padilla,* which held a judgment against a juvenile defendant became nonfinal when his sentence was vacated in a habeas corpus proceeding. (*Padilla, supra*, 13 Cal.5th at pp. 160-163.) It thus found Proposition 57 applicable to the defendant, reasoning that

"[w]hen Padilla's sentence was vacated, the trial court regained the jurisdiction and duty to consider what punishment was appropriate for him, and Padilla regained the right to appeal whatever new sentence was imposed." (*Id.* at pp. 161-162.)

Because the judgment in the defendant's case had "thus became nonfinal," there was "no constitutional obstacle to applying the *Estrada* presumption to his case." (*Padilla, supra,* 13 Cal.5th at p. 162, internal citations and quotation marks omitted.) In response to the Attorney General's argument that applying Proposition 57 to defendants whose sentences are vacated would be inconsistent with principles that "limit the scope of subsequent modification of a judgment after initial finality," *Padilla* noted as follows: "Whatever potential that [transfer] hearing [in a juvenile court] may have for reducing his punishment (the nonfinal part of his judgment), it does not authorize or constitute relitigation of guilt." (*Id.* at pp. 169-170.)

The Court of Appeal found this "crucial passage" of *Padilla* "provides the key to deciding this case." (Exhibit A, p. 10.) "In it, the Supreme Court accepted that the vacation of a sentence would not authorize the relitigation of guilt -- even if the conviction is nonfinal and an amendment ameliorating guilt has gone into effect." (*Ibid.*)

> It would have been easier for *Padilla* to say that, as long as a conviction is nonfinal, an amendment ameliorating guilt *always* authorizes the relitigation of guilt -- if that is the law. Why was it careful instead to note that its opinion was not authorizing the relitigation of guilt?

(*Ibid.*, emphasis original.)

Because Padilla's conviction had been affirmed, the Court of Appeal noted, and "only the sentence had been vacated, the trial court did not have *jurisdiction* to readjudicate the conviction. The Supreme Court implicitly acknowledged this, but pointed out that Proposition 57 did not require adjudication of the conviction." (Exhibit A, p. 11, emphasis original.) Here, where appellant's conviction was affirmed and only the sentence was reversed and remanded with directions to resentence appellant, the Court of Appeal accepted that on remand, appellant "was fully entitled the ameliorative benefits of A.B. 333. However, those benefits consisted of the redefinition of a gang enhancement, *which was irrelevant to anything the trial court had jurisdiction to do.*" (*Ibid.,* emphasis original.)

In so holding, the Court of Appeal declined to follow *People v. Salgado,* which involved the application of Assembly Bill Number 333 to a recall and resentencing under former Penal Code section 1170 and held a defendant "is entitled to the benefit of Assem. Bill 333 because his criminal judgment is no longer final following the recall and resentencing." (*Salgado, supra,* 82 Cal.App.5th at p. 378.) In *Salgado,* the defendant argued Assembly Bill Number 333 applied retroactively to his case and therefore his conviction on the substantive gang offense and gang enhancements must be reversed because the jury "was not asked and thus did not make the newly required factual determinations under Assem. Bill 333." (*Id.* at p. 380.)

The Attorney General argued Assembly Bill Number 333 did not apply because the defendant's conviction and

enhancements "were final long before the enactment of Assem. Bill 333." (*Salgado, supra,* 82 Cal.App.5th at p. 380.) *Salgado* was "not persuaded." (*Ibid.*) Citing *Padilla, Salgado* noted when the defendant was resentenced under former section 1170, his criminal judgment was "no longer final": "'[O]nce a court has determined that a defendant is entitled to resentencing, the result is vacatur of the original sentence, whereupon the trial court may impose any appropriate sentence.'" (*Ibid.*, quoting *Padilla, supra,* 13 Cal.5th at p. 163.)

However, the Court of Appeal declined to follow *Salgado* because it "did not discuss the crucial passage in *Padilla;* it also did not consider the argument the Attorney General made in *Padilla* that a conviction may not be relitigated when only the sentence is vacated." (Exhibit A, p. 12.)

A. Assembly Bill Number 333 is Applicable to Appellant's Case because his Conviction was Never Reduced to a Final Judgment.

"In criminal actions, the terms 'judgment' and 'sentence' are generally considered 'synonymous,' and there is no 'judgment of conviction' without a sentence." (*People v. McKenzie* (2020) 9 Cal.5th 40, 46, internal quotation marks and citations omitted.) "Moreover, in *Estrada*, we also referred to the cutoff point for application of ameliorative amendments as the date when the 'case[ ]' or 'prosecution[ ]' is reduced to final judgment." (*Ibid.*, internal quotation marks and citations omitted.) An amendatory statute applies in "any [criminal] *proceeding* [that], at the time of the supervening legislation, has not yet reached final disposition

in the highest court authorized to review it." (*Ibid.,* internal quotation marks omitted, emphasis original.)

As noted in the dissenting opinion, appellant's case here was never reduced to final judgment, "so A.B. 33 applies retroactively to it." (Exhibit A, diss. opn. of Raphael, J., at p. 3.) There is a "single moment of finality for retroactivity purposes, and that is when the case as a whole comes to an end." (*Ibid.*) Appellant was originally sentenced on January 19, 2018. (CT 50-53.) Appellant appealed, and the Court of Appeal found the trial court violated Penal Code section 654 in imposing a sentence for count three and remanded with directions to consider striking the prior serious felony conviction enhancements and the firearm enhancements. (CT 92, 94.) On October 13, 2022, years after remittitur issued, the trial court resentenced appellant, and the case at issue here is appellant's appeal from that resentencing. (CT 142.) Because appellant was finally sentenced at the resentencing hearing that is the subject of this appeal, his case has never been reduced to a final judgment. (See *McKenzie, supra,* 9 Cal.5th at p. 46.)

Additionally, "*Estrada* presumed that our Legislature intends for ameliorative enactments to apply as broadly as is constitutionally permissible. The significance of finality was that legislation 'constitutionally could apply' to nonfinal judgments." (*Esquivel, supra,* 11 Cal.5th at p. 677.)

> When the Legislature amends a statute so as to lessen the punishment[,] it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the

> Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.

(*Estrada*, *supra*, 63 Cal.2d at p. 744.) Based on *Estrada's* holding that ameliorative enactments should apply to every case to which they constitutionally could apply, Assembly Bill Number 333 should apply in this case, where "[t]his case is still on direct appeal, even though it is the second appeal after remand. The case has not been reduced to a final judgment." (Exhibit A, diss. opn. of Raphael, J., at p. 4.)

Thus, it is not even necessary to analyze appellant's case under *Padilla* and *Salgado,* which were reopened following postjudgment proceedings. In *Padilla,* the juvenile defendant's sentence was vacated in a habeas corpus proceeding. (*Padilla, supra*, 13 Cal.5th at pp. 160-163.) *Salgado* involved recall and resentencing under former Penal Code section 1170. (*Salgado, supra,* 82 Cal.App.5th at p. 378.) Here, "this case has never become final, so it has never been reopened." (Exhibit A, diss. opn. of Raphael, J., at p. 7.)

B. Assembly Bill Number 333 is Applicable to Appellant's Case, Despite the Fact that it was Remanded for Resentencing.

The Court of Appeal held while appellant's case was not yet final, the trial court lacked *jurisdiction* to apply Assembly Bill Number 333 because the case was remanded for resentencing only. (Exhibit A, pp. 10-11.) In so holding, as previously noted, the majority relied on the following language from *Padilla:* "Whatever potential that [transfer] hearing [in a juvenile court] may have for reducing his punishment (the nonfinal part of his judgment), it does not authorize or constitute relitigation of guilt." (*Padilla, supra,* 13 Cal.5th at pp. 169-170.)

Padilla involved the application of Proposition 57 after a juvenile's sentence was vacated in a habeas corpus proceeding (*Padilla, supra*, 13 Cal.5th at pp. 160-163), and Proposition 57 ameliorated "the possible punishment for a class of persons, namely juveniles" -- not criminal liability (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308). Because Proposition 57 is not an ameliorative change as to guilt, *Padilla* was correct that relitigating guilt *under Prop 57* would have been improper. *Padilla*, however, did not address ameliorative changes that do affect guilt issues.

This Court has already indicated what the proper course is when an ameliorative change affects guilt issues and the case is set for a full resentencing. In *People v. Valenzuela* (2019) 7 Cal.5th 415, a grand theft conviction was reduced to a misdemeanor petty theft conviction under Proposition 47. (*Id.* at pp. 426-427.) This Court held the trial court could not reimpose a

substantive gang offense based on the petty theft conviction at the full resentencing that followed. (*Id.* at p. 427.) Instead, under *Estrada*, the trial court was required to apply ameliorative changes to the counts of conviction where applicable:

> It is more reasonable, in light of the limited retroactivity rule of *Estrada*, . . . which presumes that ameliorative changes in the criminal laws were intended to be applied to cases with nonfinal judgments, to conclude that the felonious character of this conduct is susceptible to reassessment as may be appropriate in light of pertinent developments affecting the criminal codes, so long as the judgment is nonfinal or validly reopened.

(*Id.* at p. 428.)

Here, the Court of Appeal found it would have been "easier for *Padilla* to say that, as long as a conviction is nonfinal, an amendment ameliorating guilt *always* authorizes the relitigation of guilt -- if that is the law." (Exhibit A, p. 10, emphasis original.) To the contrary, this was not necessary for *Padilla* to state because, again, *Padilla* did not involve an ameliorative change in the law as to guilt.

Additionally, while appellant's case was remanded with directions to only resentence appellant, *People v. Salgado* addressed the application of Assembly Bill Number 333 at a resentencing hearing and held a defendant "is entitled to the benefit of Assem. Bill 333 because his criminal judgment is no longer final following the recall and resentencing." (*Salgado, supra,* 82 Cal.App.5th at p. 378.) The Court of Appeal declined to follow *Salgado,* thus creating a published conflict amongst the Courts of Appeal, because it "did not discuss the crucial passage

in *Padilla*." (Exhibit A, p. 12.) There was no need for *Salgado* to do so, however, because *Salgado* did not involve Proposition 57 but instead involved an ameliorative change as to guilt under Assembly Bill Number 333.

Finally, the Court of Appeal's decision, in seeking to narrow jurisdiction in some cases, creates an unworkable framework for trial courts and practitioners, who, since *Estrada,* have focused on whether a judgment is final, which presents a clear test of retroactivity. The limited retroactivity rule of *Estrada* does not make a distinction between finality and jurisdiction but instead presumes ameliorative changes in criminal laws were intended to be applied to cases with nonfinal judgments. (*Valenzuela, supra,* 7 Cal.5th at p. 428.) For example, this Court held that to determine retroactivity in criminal law "a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing *only* as necessary *between sentences that are final and sentences that are not*." (*Lara, supra,* (2018) 4 Cal.5th 299, 308, emphasis added.)

Additionally, there will be confusion as to which statutes allow for ameliorative changes following a resentencing. For example, as to defendants who have their sentences vacated due to Senate Bill Number 1437, Penal Code section 1172.6 requires those defendants to be "resentenced as if they have not been sentenced before." (Pen. Code, § 1172.6, subd. (d)(1).) Thus, the framework put forth by the majority, which allows for cases that are not yet final but in which the trial courts lack jurisdiction to apply ameliorative changes to the law, is simply not workable.

C. The Evidence is Insufficient to Prove the Gang Enhancement.

Due process requires that no person suffer a criminal conviction unless there is sufficient proof -- evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Here, the evidence is insufficient to support the gang enhancement attached to count five because no evidence was presented that the predicate offenses benefitted the gang in a way that was more than reputational, which is now required pursuant to Assembly Bill Number 333. (Pen. Code, § 186.22, subd. (e)(1).)

Prior to the enactment of Assembly Bill Number 333, the "criminal street gang" component of a gang enhancement required proof of three essential elements: "(1) that there be an ongoing association involving three or more participants, having a common name or common identifying sign or symbol; (2) that the group has as one of its primary activities the commission of one or more specified crimes; and (3) the group's members either separately or as a group have engaged in a pattern of criminal gang activity." (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 610–611.)

Penal Code section 186.22 has new requirements for establishing liability. (Assem. Bill No. 333, Stats. 2021, ch. 699, § 3.) Predicate offenses must be shown to have "commonly benefited" the alleged gang, and the common benefit must have been "more than reputational." (Pen. Code, § 186.22, subd.

(e)(1).) Currently charged offenses no longer qualify (Pen. Code, § 186.22, subd. (e)(2)), and at least one predicate offense must have been committed "within three years of the date the current offense is alleged to have been committed" (Pen. Code, § 186.2, subd. (e)(1)). "Among other additional changes, the terms 'benefit,' 'promote,' 'further,' and 'assist' are now defined to mean providing 'a common benefit to members of a gang where the common benefit is more than reputational.'" (*People v. Lopez* (2022) 82 Cal.App.5th 1, 12, quoting Pen. Code, § 186.22, subd. (g).) The existence of a criminal street gang is a prerequisite to proving the enhancement. (Pen. Code, § 186.22, subd. (f); *Lopez, supra,* 73 Cal.App.5th at pp. 345-347.)

The requirement that the predicate offenses commonly benefit the gang in a way that is "more than reputational" (Pen. Code, § 186.22, subd. (e)(1)) was not satisfied here. In his original appeal, appellant argued there was insufficient evidence to support the gang enhancements because appellant and Vidrio were members of rival gangs. (CT 93, 108.) Appellant was a member of Pomona Sur Locotes (PSL). (CT 98.) In discussing the gang evidence, the Court of Appeal noted appellant's jury heard that appellant "had been convicted of carrying a loaded firearm, committed in February 2013. It also heard that another member of PSL had been convicted of burglary, committed in January 2014." (CT 99.)

A gang expert testified as to a hypothetical involving the facts of the crime at issue that the shooting promoted each gang's reputation for violence. (CT 99, 113.) Thus, not only did the

expert's testimony involve *only* refer to reputational benefit to the gang, but there is no mention of any expert testimony regarding how the predicate offenses benefitted the gang. Based on the testimony the expert did provide, however, any testimony regarding benefit of the predicate offenses would not have been more than reputational.

Therefore, as in *People v. Vasquez* (2022) 74 Cal.App.5th 1021, "the proof offered at trial does not satisfy the brand new requirements of AB 333. While there was evidence of predicate offenses offered at trial, the evidence did not establish that they 'commonly benefited a criminal street gang, and the common benefit of the offense [was] more than reputational.'" (*Id.* at p. 1032 [gang enhancements reversed for insufficient evidence]; see also *People v. Rodriguez* (2022) 75 Cal.App.5th 816, 823 [gang enhancements reversed where no evidence predicate offenses proven at trial commonly benefitted a gang]; *People v. Montano* (2022) 80 Cal.App.5th 82, 104 [gang enhancements reversed where gang expert failed to describe how predicate offenses commonly benefitted the gang].) As a result, the evidence presented failed to support the gang enhancement attached to count five. (*Jackson, supra,* 443 U.S. at p. 319.)

II. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER, PURSUANT TO SENATE BILL NUMBER 567, APPELLANT'S CASE SHOULD HAVE BEEN REMANDED FOR RESENTENCING BECAUSE THE TRIAL COURT IMPOSED THE UPPER TERM FOR COUNT FIVE WITH NO AGGRAVATING FACT ADMITTED BY APPELLANT OR FOUND TRUE BY A JURY BEYOND A REASONABLE DOUBT

At resentencing, the trial court stated it was "not sure if" aggravating factors "have to be proven at this point to a jury." (RT 33.) Nonetheless, in imposing the upper term for count five, the court noted as follows:

> But the Court does note that there were several aggravating factors which the Court could find, even under the new sentencing format, in that his prior performance on probation was -- or parole was unsatisfactory, and his criminal record was of increasing seriousness. And with those two, will find the upper term . . . is appropriate.

(*Ibid.*)

Senate Bill Number 567 requires the trial court to impose the middle term in all cases, unless there are circumstances in aggravation of the offense beyond its own elements. The new statute also codifies the Sixth Amendment requirement established in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and reiterated in *Cunningham v. California* (2007) 549 U.S. 270 that the facts underlying aggravating circumstances must either be admitted by the defendant or found to be true beyond a reasonable doubt by the jury:

> It is important, proper, and constitutionally conforming to change the law to ensure that aggravating facts are presented to the jury before a judge imposes a maximum

sentence as decided in *Cunningham v. California*.

(Senate Third Reading, Sen. Bill No. 567 (2021–2022 Reg. Sess.) Sept. 3, 2021, p. 2.)

Senate Bill Number 567 makes an exception only for the fact of a prior conviction. Amended Penal Code section 1170 reads, in pertinent part, as follows:

> (1) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph (2).
>
> (2) The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. Except where evidence supporting an aggravated circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law, upon request of the defendant, trial on the circumstances in aggravation alleged in the indictment or information shall be bifurcated from the trial of charges and enhancements. The jury shall not be informed of the bifurcated allegations until there has been a conviction of a felony offense.
>
> (3) Notwithstanding paragraphs (1) and (2), the court may consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury. This paragraph does not apply to enhancements imposed on prior convictions.

(Pen. Code, § 1170, subd. (b).)

Here, in imposing the upper term for count five, the trial court relied on the facts that appellant's prior performance on parole was unsatisfactory and his criminal record was of increasing seriousness. (RT 33.) Again, the jury trial right under amended section 1170, subdivision (b) has one specified limitation, allowing the court to consider the defendant's prior convictions. (Pen. Code, § 1170, subd. (b)(3).) This exception should only apply to the "fact of" the prior conviction and the elements of the prior crime, and should not include other recidivism facts, which encompass the two factors cited by the trial court.

People v. Flores (2022) 75 Cal.App.5th 495 supports this argument, as it suggests that facts such as a defendant being on probation when the crime was committed and prior poor performance on probation could not be properly considered without them being stipulated to or found true beyond a reasonable doubt. (*Id.* at p. 500.) Certified records of appellant's prior convictions cannot prove the judgment calls such as those made here by the trial court as to whether appellant's prior performance on parole was unsatisfactory and his criminal record was of increasing seriousness.

The Court of Appeal disagreed, finding "prior convictions" in the context of Penal Code section 1170, subdivision (b)(3) "includes the fact that a defendant's prior performance on parole or probation was unsatisfactory; it also includes the fact that a defendant's prior convictions are increasingly serious." (Exhibit

A, pp. 14-15, citing *People v. Pantaleon* (2023) 89 Cal.App.5th 932, 938 [fact of prior conviction encompasses findings that prior convictions are numerous or of increasing seriousness and defendant was on probation or parole at time crime was committed].)

The Court of Appeal did hold the trial court erred in finding these aggravating circumstances based on the probation report rather than a certified record of conviction, but it concluded this error was not prejudicial because there was no reason to suppose the probation report was inaccurate. (Exhibit A, p. 15.) In finding no prejudice, the Court of Appeal relied on *People v. Watson, supra,* 46 Cal.2d at p. 824.

Penal Code section 1170, subdivision (b)(3) specifically states that "the court may consider the defendant's prior convictions in determining sentencing based on a *certified record of conviction* without submitting the prior convictions to a jury." (Emphasis added.) Thus, the Court of Appeal's application of the *Watson* standard of prejudice is subject to review. Currently pending before this Court is *People v. Lynch, supra,* 2022 WL 1702283, which will determine the applicable standard of prejudice when determining whether a case should be remanded for resentencing in light of Senate Bill Number 567. Because the applicable standard of prejudice is currently pending before this Court, this Court should issue a "grant and hold" order pursuant to California Rules of Court, rule 8.512(d)(2).

III. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO STRIKE THE PENAL CODE SECTION 12022.53, SUBDIVSIONS (C) AND (D) ENHANCEMENTS PURSUANT TO SENATE BILL NUMBER 81[1]

In arguing the trial court should strike the Penal Code section 12022.53, subdivisions (c) and (d) enhancements, defense counsel noted appellant had a drug problem at the time of the crime. (RT 17.) At the time of sentencing, appellant was no longer active in a gang, and he was enrolled in drug, ARC, and Gobi programs. (*Ibid*.) "Even without these gang enhancements," counsel noted, "he's still going to do a life sentence, a very long sentence." (RB 18.)

The trial court declined to strike the section 12022.53 enhancements, although it did "recognize that 1385 (c)(2)(B), as well as (c)(2)(C) both apply in this case, in that multiple enhancements were alleged and the application of those enhancements resulted in a sentence greater than 20 years." (RT 30.)

> But where with the Court looks at subdivision (b) and subdivision (c) specifically, is that at no point in time do I believe that the legislature or the voters at any time indicated that simply because the crime committed resulted in a sentence of more than 20 years or with more than one enhancement, that that means that every other enhancement has to be considered to be stricken. . . .

---

[1] While the Court of Appeal listed this issue as "the effect of S.B. 567 on the firearm enhancements" (Exhibit A, p. 16), the Senate Bill at issue is Senate Bill Number 81.

(RT 31.) The court also relied on the fact that there were two victims in this case, and a section 12022.53 enhancement was imposed as to each victim. (*Ibid*.)

Following Senate Bill Number 81, amended Penal Code section 1385 now provides mitigating circumstances that the court must consider and give great weight to in determining whether to strike an enhancement:

> (c)(1) Notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so, except if dismissal of that enhancement is prohibited by any initiative statute.
>
> (2) In exercising its discretion under this subdivision, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in subparagraphs (A) to (I) are present. Proof of the presence of one or more of these circumstances *weighs greatly* in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety. "Endanger public safety" means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others.

(Pen. Code, § 1385, subds. (c)(1) and (2), emphasis added.)

Appellant suffered a Penal Code section 12022.53, subdivision (d) enhancement, a Penal Code section 12022.53, subdivision (c) enhancement, and a Penal Code section 186.22, subdivision (b)(1)(A) enhancement. (CT 145, 147.) Penal Code section 1385 lists the following as a mitigating factor: "Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed." (Pen. Code, § 1385, subd. (c)(2)(B).) In refusing to dismiss the

enhancements, the trial court relied on the fact that the 12022.53 enhancements each applied to different victims, but the mitigating factor of multiple enhancements does not make that distinction.

It is also worth noting that the statute states the remainder of the enhancements *must* be dismissed, strongly suggesting such dismissal is mandatory. (See *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 133 [word "shall" is ordinarily used in laws, regulations, or directives to express what is mandatory, while "may" is usually permissive]; *In re J.N.* (2006) 138 Cal.App.4th 450, 457-458 [absent any indicia of a contrary legislative intent, the word "shall" is ordinarily construed as mandatory, whereas "may" is ordinarily construed as permissive].) Based on this language, the Legislature appears to have been primarily concerned with the allegation of multiple enhancements, not whether multiple victims were involved.

The Court of Appeal agreed the mitigating factor that multiple enhancements were alleged applied to appellant's case. (Exhibit A, p. 18.) Nonetheless, it found dismissal was mandatory not, as "all case authority is to the contrary," citing *People v. Anderson, supra,* 88 Cal.App.5th 233 and *People v. Walker, supra,* 86 Cal.App.5th 386. (Exhibit A, p. 18.) As previously noted, both *Walker* and *Anderson* are currently pending before this Court. Because the issue of whether Penal Code section 1385, subdivision (c) creates a rebuttable presumption in favor of dismissing an enhancement is currently pending before this Court, this Court should issue a "grant and

hold" order pursuant to California Rules of Court, rule 8.512(d)(2).

CONCLUSION

For the reasons expressed above, review should be granted.

DATED: August 21, 2023

Respectfully submitted,

_____/s/_____
RACHEL VARNELL
Attorney for Appellant Oscar Lopez

CERTIFICATE OF COUNSEL

I, Rachel Varnell, certify that the attached Petition for Review contains 6,423 words.

Executed under penalty of perjury at Los Gatos, California on August 21, 2023.

_____/s/_____
Rachel Varnell

Re: *People v. Lopez,* Case No. E080032

ATTORNEY'S CERTIFICATE OF ELECTRONIC SERVICE AND SERVICE BY MAIL

(Code Civ. Proc., § 1013a, subd. (2); Cal. Rules of Court, rules 8.71(f) and 8.77)

I, Rachel Varnell, certify: I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is rachv2002@yahoo.com and my business address is Rachel Varnell, Esq., P.O. Box 799, Los Gatos, California, 95031. On August 21, 2023, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of **Petition for Review** by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. Transmission occurred at approximately 7:00 a.m. For those marked "Served by Mail," I deposited in a mailbox regularly maintained by the United States Postal Service at Los Gatos, California a copy of the above document in a sealed envelope with postage fully prepaid, addressed as provided below.

Attorney General
P.O. Box 85266
San Diego, CA 92186-5266
sdag.docketing@doj.ca.gov
_x_ Served Electronically
___Served by Mail

Mr. Oscar Lopez, #BF3682
SVSP; P.O. Box 1050
Soledad, CA 93960-1050
__Served Electronically
x_Served by Mail

Appellate Defenders, Inc.
555 West Beech St., Ste. 300
San Diego, CA 92101
eservice-court@adi-sandiego.com
_x_ Served Electronically
___Served by Mail

Hon. Bridgid McCann
San Bernardino Sup. Court
8303 Haven Avenue
Rancho Cucamonga, CA 91730
x_Served by Mail
__Served Electronically

San Bernardino County District Attorney
303 W. Third Street
San Bernardino, CA 92415
appellateservices@sbcda.org
_x_ Served Electronically
__ Served by Mail

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 21, 2023, at Los Gatos, California.

_____/s/_____
Rachel Varnell, SBN 197649

EXHIBIT A

See Dissenting Opinion

CERTIFIED FOR PARTIAL PUBLICATION[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OSCAR LOPEZ, Defendant and Appellant.	E080032 (Super.Ct.No. FWV1404692) OPINION

APPEAL from the Superior Court of San Bernardino County. Bridgid M. McCann, Judge. Affirmed.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Senior Assistant Attorney General, and Melissa A. Mandel, Warren J. Williams, and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

---

[1] Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts IV and V.

Defendant Oscar Lopez was convicted of crimes including first degree murder and willful, deliberate, and premeditated attempted murder and sentenced to 141 years to life. In his direct appeal, we modified the sentence; we also reversed conditionally and remanded with directions to consider striking defendant's prior serious felony conviction enhancement and firearm enhancements. On remand, in October 2022, the trial court struck the prior serious felony enhancement but refused to strike the firearm enhancements. It resentenced defendant to 101 years to life.

Defendant appeals again. He contends that at resentencing, the trial court erred under various amendments to the Penal Code,[1] all of which went into effect on January 1, 2022. In the published portion of this opinion, we address his contention that under section 186.22 — as amended by Assembly Bill No. 333 (2021-2022 Reg. Sess.) (A.B. 333) — there was insufficient evidence to support the gang enhancement to count 5 (unlawful possession of a firearm).

We will hold that, because the judgment against defendant was not final, he was entitled to the ameliorative benefits of A.B. 333. However, because we had reversed solely with respect to the sentence and directed the trial court to resentence defendant, the trial court did not have jurisdiction to reconsider the gang enhancement. A.B. 333 was simply irrelevant to anything the trial court had jurisdiction to do.

In the unpublished portion of this opinion, we find no other error. Hence, we will affirm.

---

[1] All statutory citations are to the Penal Code.

I

STATEMENT OF FACTS

Defendant Oscar Lopez and an accomplice, in a car, pulled up next to two men in another car. Both defendant and the accomplice said, "[W]here you guys from?," then pulled out guns and started shooting. One of the victims was killed and the other was wounded.

II

STATEMENT OF THE CASE

In 2017, in a jury trial, defendant was found guilty of:

Count 1: First degree murder (§§ 187, subd. (a), 189), with an enhancement for the discharge of a firearm by a principal in a gang-related crime causing great bodily injury or death (§ 12022.53, subds. (d), (e)(1)).

Count 2: Willful, deliberate, and premeditated attempted murder (§§ 187, subd. (a), 664), with an enhancement for personally and intentionally discharging a firearm (§ 12022.53, subd. (c)).

Count 3: Shooting at an occupied motor vehicle (§ 246), with an enhancement for personally using a firearm (§ 12022.5, subd. (a)).

Count 5: Unlawful possession of a firearm (§ 29800, subd. (a)(1)).

Gang enhancements (§ 186.22, subd. (b)) on every count were found true.

In a bifurcated proceeding, after defendant waived a jury, the trial court found true one strike prior (§§ 667, subds. (b)-(i), 1170.12), one prior serious felony conviction

enhancement (§ 667, subd. (a)), and three prior prison term enhancements (former § 667.5, subd. (b)).

Defendant was sentenced to a total of 141 years to life in prison.

In 2020, in defendant's direct appeal, we stayed the sentence on count 3; we struck the firearm enhancement to count 3 and all of the prior prison term enhancements. We then said: "The judgment as thus modified is conditionally reversed. On remand, the trial court shall consider whether to strike . . . the prior serious felony conviction enhancement[] or any of the firearm enhancements. If it does so . . . , it must resentence . . . defendant. Otherwise, it must reinstate the modified judgment."

On remand, in October 2022, the trial court struck the prior serious felony enhancement but refused to strike any of the firearm enhancements. It resentenced defendant to a total of 101 years to life in prison.

III

THE EFFECT OF A.B. 333 ON THE GANG ENHANCEMENT TO COUNT 5

Defendant contends that under section 186.22 — as amended by A.B. 333 — there is insufficient evidence to support the gang enhancement to count 5.

Defense counsel raised this argument in the trial court. The trial court, however, agreed with the prosecution that defendant was not entitled to the benefit of A.B. 333 because his conviction had previously become final.

A.B. 333, effective January 1, 2022, made a number of amendments to section 186.22. "First, Assembly Bill 333 'narrows the definition of "'criminal street gang'" to

"an *ongoing, organized association or group* of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members *collectively* engage in, or have engaged in, a pattern of criminal gang activity." [Citations.]' [Citation.]" (*People v. Renteria* (2022) 13 Cal.5th 951, 961, fn. 6.)

Second, "'imposition of a gang enhancement requires proof of the following additional requirements with respect to predicate offenses: (1) the offenses must have "commonly benefited a criminal street gang" where the "common benefit . . . is more than reputational"; (2) the last predicate offense must have occurred within three years of the date of the currently charged offense; (3) the predicate offenses must be committed on separate occasions or by two or more gang members, as opposed to persons; and (4) the charged offense cannot be used as a predicate offense. [Citation.] With respect to common benefit, the new legislation explains: "[T]o benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational. Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant." [Citation.]' [Citation.]" (*People v. Ramirez* (2022) 79 Cal.App.5th 48, 63, review granted Aug. 17, 2022, S275341.)

Third, A.B. 333 "also includes a provision stating that, as used in [section 186.22], 'to benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational. Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.' [Citation.]" (*People v. Renteria*, *supra*, 13 Cal.5th at p. 561, fn. 6.)

Under the so-called "*Estrada* rule," "[n]ewly enacted legislation lessening criminal punishment or reducing criminal liability presumptively applies to all cases not yet final on appeal at the time of the legislation's effective date. [Citation.] This presumption 'rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' [Citations.]" (*People v. Gentile* (2020) 10 Cal.5th 830, 852; see *In re Estrada* (1965) 63 Cal.2d 740, 743–746 (*Estrada*).) A.B. 333, to the extent that it adds new elements to a gang enhancement, reduces criminal liability; therefore, it applies to any judgment not yet final when it went into effect. (*People v. Tran* (2022) 13 Cal.5th 1169, 1206–1207.)

The People argue, however, that our conditional reversal did not reopen the conviction itself, as opposed to the sentence, and therefore the conviction became final when we issued our remittitur in 2020.

As both sides agree, two cases are crucial to our analysis: The Supreme Court's decision in *People v. Padilla* (2022) 13 Cal.5th 152 (*Padilla*), and the subsequent court of appeal decision in *People v. Salgado* (2022) 82 Cal.App.5th 376 (*Salgado)*.

When Padilla was 16, he committed murder and conspiracy to commit murder. (*Padilla*, *supra*, 13 Cal.5th at p. 159; see also *id.*, at p. 170 [dis. opn. of Corrigan, J.].) He was convicted and sentenced in adult court. After that judgment was final, he filed a habeas petition, seeking resentencing. The trial court vacated the sentence and reconsidered it but decided to reimpose the same sentence. Padilla appealed. The court of appeal vacated the second sentence and remanded for resentencing. (*Id.* at p. 159.)

Two weeks later, Proposition 57 was enacted. It provided that a juvenile could be tried in adult court only after a transfer hearing. The trial court nevertheless once again imposed the same sentence, without holding a transfer hearing. (*Padilla*, *supra*, 13 Cal.5th at p. 159.)

The Supreme Court had previously held that, under the *Estrada* rule, Proposition 57 applied in cases not yet final. (*Padilla*, *supra*, 13 Cal.5th at p. 160, citing *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 303, 309.) In *Padilla*, it further held that Padilla's conviction was not yet final for this purpose. (*Padilla*, *supra*, at pp. 160–163.) It rejected the argument that there was a meaningful difference between a conviction that has been vacated after becoming final and a conviction that has never become final at all. (*Id.* at pp. 162–163.)

Padilla also indicated that a judgment cannot be partially final and partially nonfinal. It noted that the *Estrad*a rule presumed a legislative intent that an ameliorative amendment apply as broadly as constitutionally permissible. (*Padilla*, *supra*, 13 Cal.5th at p. 160.) "We have not had occasion to delineate the parameters of 'the Legislature's power to intervene in judicial decisionmaking.' [Citation.] But we have indicated that any restrictions on that power would attach at 'the conclusion of a criminal proceeding as a whole' — i.e., when '"the last word of the judicial department with regard to a particular case or controversy"' has issued. [Citation.]" (*Padilla*, *supra*, 13 Cal.5th at pp. 160–161.) Thus, "[a] case is final when 'the criminal proceeding as a whole' has ended [citation] and 'the courts can no longer provide a remedy to a defendant on direct review' [citation]." (*Id.* at p. 161; see also *People v. Esquivel* (2021) 11 Cal.5th 671, 679 ["*Estrada*'s . . . concerns appear to point toward an inquiry focused on whether the criminal prosecution or proceeding as a whole is complete."]; *People v. McKenzie* (2020) 9 Cal.5th 40, 46 ["there is no 'judgment of conviction' without a sentence"].)[2]

---

[2] It appears that *Padilla* overruled, sub silentio, *People v. Jackson* (1967) 67 Cal.2d 96, which had held that when a habeas petition is granted solely on the issue of penalty, "the original judgment on the issue of guilt remains final during the retrial of the penalty issue and during all appellate proceedings reviewing the trial court's decision on that issue." (*Jackson*, *supra*, 67 Cal.2d at pp. 98–99; but see *Padilla, supra,* at pp. 183–184 [dis. opn. of Corrigan, J.] ["*Jackson* did not involve an interpretation of *Estrada* and provides little guidance on the limits of *Estrada*'s presumption regarding legislative or electoral intent"]; but see also *People v. Wilson* (2023) ___ Cal.6th. ___, ___ [2023 Cal. LEXIS 3158 at pp. *54–*55] [citing *Jackson* with apparent approval but ultimately not relying on it].)

In a crucial passage, however, *Padilla* also said: "[T]he Attorney General argues that vacatur of a defendant's sentence 'does not allow a resentencing court to consider new claims or affect any part of the judgment other than the sentence.' But the right and remedy we recognize today does not allow Padilla to raise claims unrelated to his sentence. . . . He must receive a transfer hearing in a juvenile court, where the court will decide whether criminal adjudication is appropriate for the murder of his mother and conspiracy to kill his stepfather. Whatever potential that hearing may have for reducing his punishment (the nonfinal part of his judgment), it does not authorize or constitute relitigation of guilt." (*Padilla*, *supra*, 13 Cal.5th at pp. 169–170.)

In other words, in *Padilla*, the Attorney General argued that the vacation of a sentence does not allow the relitigation of guilt. The Supreme Court responded that the vacation of Padilla's sentence was not going to result in the relitigation of his guilt. Thus, it *assumed* the Attorney General's argument was correct; it did not *hold* that it was correct (or incorrect).

The People argue that this crucial passage was not dictum, because it was necessary to the decision: "If the entire judgment . . . had been rendered nonfinal by the sentence's vacatur, the defendant would have been entitled to a juvenile transfer hearing potentially resulting in a new adjudication hearing on the issue of guilt." Not so.

The Supreme Court had previously held that a juvenile convicted in adult court whose conviction was not yet final when Proposition 57 went into effect is entitled to a new transfer hearing, but not a new trial. (*People v. Superior Court* (*Lara*), *supra*, 4

Cal.5th at pp. 303, 309–310, 312–313.) It reasoned, essentially, that Proposition 57 ameliorated only punishment, not criminal liability. (See *id.*, at pp. 303, 308–309.) Thus, "'[n]othing is to be gained by having a "jurisdictional hearing," or effectively a second trial, in the juvenile court.' [Citation.]" (*Id.* at pp. 309–310.) Accordingly, in *Padilla*, even though the entire judgment was nonfinal, the application of Proposition 57 meant only that Padilla was entitled to a new transfer hearing; even if the result of the transfer hearing was that he should remain in the juvenile system, he was not entitled to a new adjudication of guilt. (*Padilla*, supra, 13 Cal.5th at pp. 169–170.)

Nevertheless, the crucial passage provides the key to deciding this case. In it, the Supreme Court accepted that the vacation of a sentence would not authorize the relitigation of guilt — even if the conviction is nonfinal and an amendment ameliorating guilt has gone into effect. On one hand, this was dictum. On the other hand, "'"[e]ven if properly characterized as dictum, statements of the Supreme Court should be considered persuasive."' [Citations.]" (*People v. Reyes* (2020) 56 Cal.App.5th 972, 994.) It would have been easier for *Padilla* to say that, as long as a conviction is nonfinal, an amendment ameliorating guilt *always* authorizes the relitigation of guilt — if that is the law. Why was it careful instead to note that its opinion was not authorizing the relitigation of guilt?

The answer is that the Attorney General in *Padilla* was right — when an appellate court affirms a judgment as to guilt, reverses it as to the sentence, and orders a limited remand for resentencing (see *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1254–

1256), "'[t]he order of the appellate court as stated in the remittitur, "is decisive of the character of the judgment to which the appellant is entitled."' [Citation.] On remand, the lower court may act only within these express jurisdictional limits. [Citation.]" (*People v. Lewis* (2004) 33 Cal.4th 214, 228.) However, the point the Attorney General was making went to whether the trial court has *jurisdiction*. Because Padilla's conviction had been affirmed and only the sentence had been vacated, the trial court did not have *jurisdiction* to readjudicate the conviction. The Supreme Court implicitly acknowledged this, but pointed out that Proposition 57 did not require readjudication of the conviction.

Here, similarly, defendant's conviction was affirmed; only the sentence was reversed, and we remanded with directions to resentence defendant. "When there has been a decision upon appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void. [Citations.]" (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655; accord, *Medina v. Superior Court* (2021) 65 Cal.App.5th 1197, 1226; *People v. Ramirez* (2019) 35 Cal.App.5th 55, 64.)

We *accept* that on remand, defendant was fully entitled to the ameliorative benefits of A.B. 333. However, those benefits consisted of the redefinition of a gang enhancement, *which was irrelevant to anything the trial court had jurisdiction to do.*

We turn, then, to our sister court's opinion in *Salgado*. Salgado was convicted of five crimes, including murder, each with a gang enhancement, and sentenced. After that

judgment was final, the Department of Corrections and Rehabilitation recommended resentencing under former section 1170, subdivision (d)(1). The trial court duly resentenced Salgado, including on one gang enhancement. (*Salgado*, *supra*, 82 Cal.App.5th at p. 379.)

Salgado appealed. While his appeal was pending, A.B. 333 went into effect. (*Salgado*, *supra*, 82 Cal.App.5th at p. 378.) Thus, he argued that the jury had never made the necessary findings on the elements of the gang enhancements under A.B. 333. The People responded that the conviction and the gang enhancements were already final before A.B. 333 went into effect. (*Id.* at p. 380.)

The appellate court rejected the People's argument: "The California Supreme Court has recently held that 'once a court has determined that a defendant is entitled to resentencing, the result is vacatur of the original sentence, whereupon the trial court may impose any appropriate sentence.' (*People v. Padilla* (2022) 13 Cal.5th 152, 163 . . . .) Accordingly, when Salgado was resentenced under former section 1170, subdivision (d), his criminal judgment was 'no longer final.' [Citation.]" (*Salgado*, *supra*, 82 Cal.App.5th at p. 380.)

The discussion in *Salgado* is short. The court did not discuss the crucial passage in *Padilla*; it also did not consider the argument the Attorney General made in *Padilla* that a conviction may not be relitigated when only the sentence is vacated. "It is axiomatic that a case is not authority for an issue that was not considered. [Citation.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 110.) Therefore, we decline to follow *Salgado*.

In sum, then, we hold that defendant's conviction was nonfinal, and therefore the law that applied to his case on remand included A.B. 333. However, on remand, the trial court had no jurisdiction to readjudicate the gang enhancements. Even assuming that, under A.B. 333, there was insufficient evidence to support the gang enhancement to count 5, there was nothing the trial court could or should have done about it.

IV

THE EFFECT OF SENATE BILL NO. 567 ON THE IMPOSITION OF THE UPPER TERM

Defendant contends that under section 1170 — as amended by Senate Bill No. 567 (2021-2022 Reg. Sess.) (S.B. 567) — the trial court erred by imposing the upper term on count 5 based on aggravating circumstances that had not been found true by a jury nor admitted by defendant. In the event that defense counsel forfeited this contention by failing to raise it below, defendant also contends that defense counsel rendered ineffective assistance.

On count 5, the trial court imposed six years (double the upper term). It explained: "The Court is considering aggravating factors. That I'm not sure if they have to be proven at this point to a jury. But the Court does note that there were several aggravating factors which the Court could find, even under the new sentencing format, in that his prior performance on . . . parole was unsatisfactory, and his criminal record was of increasing seriousness. And with those two, will find the upper term . . . is appropriate." Defense counsel did not object.

Section 1170, subdivision (b)(2) provides: "The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial."

Section 1170, subdivision (b)(3) further provides: "Notwithstanding paragraph[] . . . (2), the court may consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury."

The People respond that defense counsel forfeited this contention by failing to raise it below. We disagree. The trial court raised on its own the question of whether "aggravating factors . . . have to be proven at this point to a jury . . . ." Moreover, it resolved it by ruling "there were several aggravating factors which the Court could find, even under the new sentencing format . . . ." This was sufficient to preserve the issue for appeal. (*People v. Stitely* (2005) 35 Cal.4th 514, 537, fn. 12.)

And this ruling was correct, except in one trivial respect. Under section 1170, subdivision (b)(3), the trial court could "consider the defendant's prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury." "Prior convictions," in this context, includes the fact that a defendant's prior performance on parole or probation was unsatisfactory; it also includes

the fact that a defendant's prior convictions are increasingly serious. (*People v. Pantaleon* (2023) 89 Cal.App.5th 932, 938; see also *People v. Towne* (2008) 44 Cal.4th 63, 70–71 [for Sixth Amendment purposes, the fact that a defendant's prior performance on probation or parole was unsatisfactory may be determined by a judge based on the defendant's prior convictions]; *People v. Black* (2007) 41 Cal.4th 799, 819–820 [for Sixth Amendment purposes, the fact that a defendant's prior convictions are increasingly serious may be determined by a judge based on the defendant's prior convictions].)

The trial court's only error, then, was in finding these aggravating circumstances based on the probation report, rather than based on a certified record of conviction. However, this error was not prejudicial. There is no reason to suppose the probation report was inaccurate.[3] Indeed, had it overstated defendant's criminal history, presumably defendant and his counsel would have called the discrepancy to the trial court's attention. Thus, the appellate record does not show that, if the trial court had considered defendant's certified record of conviction, he would have enjoyed a more favorable outcome. (See *People v. Watson* (1956) 46 Cal.2d 818, 824.)

---

[3] Defendant's "969b packet" (see § 969b) is in our record. It shows only two of the three adult convictions listed in the probation report. However, only those two convictions were alleged in the information. Thus, there was no reason for the 969b packet to reflect the third.

V

THE EFFECT OF S.B. 567 ON THE FIREARM ENHANCEMENTS

Defendant contends that under section 1385 — as amended by S.B. 567 — the trial court abused its discretion by refusing to strike the firearm enhancements.

A. *Additional Factual and Procedural Background.*

As mentioned (see part II, *ante*), we directed the trial court to consider whether to strike any of the firearm enhancements. On remand, defense counsel argued that the trial court should strike one or both firearm enhancements because defendant was no longer using drugs, was no longer active in a gang, and was enrolled in several self-help programs; she also argued that, even without the firearm enhancements, he was going to die in prison. The prosecution responded that, in light of defendant's culpability, "he is not deserving of any reduced punishment."

The trial court refused to strike any firearm enhancements. It explained: "[T]here were two separate individuals involved. And . . . Mr. Lopez did personally use that firearm as to both of the individuals. [¶] Based upon that, . . . the Court is not inclined to use its discretion on either the 12022.53(c) or the 12022.53(d)."

It added: "The Court does recognize that 1385(c)(2)(b), as well as (c)(2)(c) both apply in this case. Under (c)(2)(b) there are multiple enhancements. At which point, unless it is not in the furtherance of justice, the Court must dismiss one of the enhancements. And (c), that if the application could result in a greater sentence than 20 years, the Court shall dismiss the enhancements. There are two factors that the Court

considers in this. . . . [A]t no point in time do I believe that the legislature or the voters . . . indicated that simply because the crime committed resulted in a sentence of more than 20 years or with more than one enhancement, that that means that every other enhancement has to be considered to be stricken[4] unless —

"And I recognize both the legislature's intent to reduce population in the prison. But that in taking 1385(c)(2) on its face, a situation like this, where there are two victims, would render one victim's sentence or the sentence for one was the crimes against the second victim, completely null. And I don't believe that that was the intent at any time."

B. *Discussion.*

Section 1385, subdivision (c), as relevant here, provides:

"(1) Notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so . . . .

"(2) In exercising its discretion under this subdivision, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in subparagraphs (A) to (I) are present. Proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the

---

4 The People concede that, because the trial court said "has to be considered to be stricken," rather than "has to be stricken," it could be understood to mean that it did not even consider striking the firearm enhancements. In his reply brief, defendant notes this concession, then asserts that "the trial court erred in failing to consider striking the enhancements, and remand is required for the trial court to do so." He forfeited this contention by failing to raise it in his opening brief. (*People v. Nelson* (2015) 240 Cal.App.4th 488, 497.) In any event, it is clear from the totality of the trial court's remarks that it did consider striking the firearm enhancements.

enhancement, unless the court finds that dismissal of the enhancement would endanger public safety. . . . [¶] . . . [¶]

"(B) Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.

"(C) The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed."

Subdivision (c)(2)(C) — the "enhancement could result in a sentence of over 20 years" — did not apply here. Even aside from the firearm enhancements, defendant was sentenced to 75 years to life in prison. Thus, the firearm enhancements could not "result in" — i.e., they could not be the "but for" cause of — a sentence of over 20 years.

However, subdivision (c)(2)(B) — multiple enhancements in a single case — clearly did apply.

Defendant argues that, under these subdivisions, dismissal is mandatory (at least when dismissal of the enhancement would not endanger public safety). So far, all case authority is to the contrary. (*People v. Anderson* (2023) 88 Cal.App.5th 233, 239–241, review granted Apr. 19, 2023, S278786; *People v. Walker* (2022) 86 Cal.App.5th 386, 396–398, review granted Mar. 22, 2023, S278309.) "[T]he statement that a court 'shall' dismiss certain enhancements appears as a subpart to the general provision that a 'court shall dismiss an enhancement *if* it is in the furtherance of justice to do so.' [Citation.] In other words, the dismissal of the enhancement is conditioned on a court's finding

dismissal is in the interest of justice." (*People v. Anderson*, *supra*, at p. 239.) Rather than prolong this opinion unduly, we adopt the reasoning in these cases.

Defendant also argues that the trial court's stated reason for refusing to dismiss the enhancements — i.e., the existence of two victims — was irrational, arbitrary, and "not required or contemplated by the legislature." The overriding consideration, however, was whether dismissal was "in the furtherance of justice . . . ." (§ 1385, subd. (c)(1); *People v. Anderson*, *supra*, 88 Cal.App.5th at p. 239.) It is long-established that "[a] defendant who commits an act of violence with the intent to harm more than one person . . . is more culpable than a defendant who harms only one person." (*Neal v. State* (1960) 55 Cal.2d 11, 20, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 334; see also *In re Tameka C.* (2000) 22 Cal.4th 190, 196 [firearm enhancements; "An increased sentence measured by the risk of harm to multiple victims reflects a rational effort to deter . . . ."]; *People v. Smart* (2006) 145 Cal.App.4th 1216, 1225 [firearm enhancements].)

Defendant complains that the trial court did not make a finding that dismissal of the enhancement would endanger public safety. However, it did not have to. It could refuse to dismiss the enhancements if it found *either* that dismissal would endanger public safety *or* was not in the interests of justice. (*People v. Anderson*, *supra*, 88 Cal.App.5th at p. 240.) It made the latter finding, and as discussed, that finding was not arbitrary or irrational.

VI

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RAMIREZ
P. J.

I concur:

MILLER
J.

[*People v. Lopez*, E080032]

RAPHAEL, J., Dissenting.

This case is still on direct appeal. It has not been reduced to a final judgment. For that reason, the legislation the majority agrees applies retroactively to non-final cases applies to this one. That is all we need to know to remand the case and direct the trial court to apply the new law.

The majority has been diverted because this is Lopez's second appeal, as we remanded for resentencing the first time. That the case has been here before does not matter. The California Supreme Court has directed courts to presume the Legislature intended a new statutory lighter penalty to apply to any case which has not reached final judgment. The judgment in this case is non-final because it is still on direct appeal.

The majority focuses on caselaw involving completed direct appeals where the judgments *have* become final, but the judgments have been reopened in postjudgment proceedings. In *those* circumstances, the question arises as to whether a motion that reopens the case for one purpose reopens it for purposes of allowing application of a retroactive law. This case has never been reopened because it was never closed. New laws that are retroactive on direct appeal apply here. Based on this simple principle—articulated in binding Supreme Court precedent—I respectfully dissent.

I

In 2017, defendant Oscar Lopez was convicted of a firearm offense. He received a gang enhancement for that conviction under Penal Code section 186.22. He appealed, and in 2020, we remanded his case for resentencing. Before that resentencing, the law

changed. Effective January 1, 2022, Assembly Bill No. 333 (2021-2022 Reg. Sess.) (A.B. 333) heightened the standard for proving a gang enhancement.

About 10 months later, the trial court resentenced Lopez. He asked the trial court to apply A.B. 333 and find insufficient evidence supported the gang enhancement. (Maj. opn., *ante*, at p. 4.) The trial court, however, found Lopez "was not entitled to the benefit of A.B. 333 because his *conviction* had previously become final." (*Ibid.*, italics added.)

The question before us is whether the trial court was correct in refusing to apply A.B. 333, which the majority agrees is retroactive to non-final cases, by finding Lopez's *conviction* was final at the time of resentencing. Answering that question is easy under settled law because this case was never reduced to final judgment.

If an ameliorative statute is silent as to its retroactivity, our Supreme Court has since *People v. Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*) applied a presumption "that the Legislature must have intended that the new statute . . . should apply to every case to which it constitutionally could apply." That means that such a new law applies "provided the judgment convicting the defendant of the act is not final." (*Ibid.*) That is, such laws apply to "all cases not reduced to final judgment." (*Id.* at p. 746.)

It has been clear since *Estrada* that criminal cases are not final until final judgment. The leading recent authorities on precisely when a case becomes final for *Estrada* retroactivity purposes are two opinions of our Supreme Court, *People v. McKenzie* (2020) 9 Cal.5th 40 (*McKenzie*), and *People v. Esquivel* (2021) 11 Cal.5th 671 (*Esquivel*). In these cases, the court made clear that a criminal case does not become final in *part*. Rather, the question is whether the "criminal *prosecution or proceeding*

concluded before the ameliorative legislation took effect." (*McKenzie*, *supra*, 9 Cal.5th at p. 46 [italics added].) The test for finality is "whether the criminal prosecution or proceeding as a whole is complete." (*Esquivel*, *supra*, 11 Cal.5th at p. 679.)

Esquivel and *McKenzie* involved situations where criminal defendants had failed to appeal to challenge the imposition of their sentences, yet later appealed after they were found to have violated conditions of probation. (*McKenzie*, *supra*, 9 Cal.5th at p. 43; *Esquivel*, *supra*, 11 Cal.5th at p. 673.) In each of those cases, our Supreme Court rejected the People's argument that the sentence had earlier become final, though the probation revocation portion of the case had not. (See *McKenzie*, at pp. 48-51; *Esquivel*, at pp. 679-680.) Those cases make clear there is a single moment of finality for retroactivity purposes, and that is when the case as a whole comes to an end.

That principle has been maintained through the half-century before *Esquivel* and *McKenzie*. (See, e.g., *Estrada*, *supra*, 63 Cal.2d at p. 747 [finality when "prosecutions" are "reduced to final judgment"]; *People v. Rossi* (1976) 18 Cal.3d 295, 304 ["any such proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"] [cleaned up]; *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn.5 ["a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed"] [plur. opn.]).

The simple application of this principle here: this case has not reached a final judgment, so A.B. 333 applies retroactively to it. The majority instead reasons that Lopez's conviction is final but the sentence is not. (Maj. opn., ante, at pp. 10-11.) This is a misapplication of the binding precedent from the Supreme Court cases cited above,

as there is only one final judgment in a criminal case. (See *McKenzie*, *supra*, 9 Cal.5th at p. 46 ["there is no 'judgment of conviction' without a sentence"].)

The majority's invocation of the limited "jurisdiction" the trial court had on remand (maj. opn., ante, at pp. 11-12) confuses the ordinary acts that a trial court is authorized to take with its fundamental jurisdiction over a case. (See *People v. Chavez* (2018) 4 Cal.5th 771, 780 [discussing two meanings of the term "jurisdiction"].) The *Estrada* presumption is a construction of what the legislature intends for the application of an ameliorative law if it is silent on retroactivity. Our Supreme Court has articulated that we presume that the legislature desires that an ameliorative law apply at any stage before final judgment, because "any constraint on the Legislature's power to affect 'final' criminal judgments would appear to arise from the conclusion of a criminal proceeding as a whole." (*Esquivel*, *supra*, 11 Cal.5th at p. 678; see id. at p. 679 [earlier "final judgment for purposes of appealability" did not make part of case final for *Estrada*].)

Today's opinion contradicts *Esquivel*, *McKenzie*, and cases that apply A.B. 333 retroactively where there was an earlier remand for resentencing. (See *People v. Campbell* (June 30, 2023) __Cal.App.5th__ [2023 Cal.App. Lexis 500]; *People v. Boukes* (2022) 83 Cal.App.5th 937; *People v. Sek* (2022) 74 Cal.App.5th 657; see also *People v. Montes* (2021) 70 Cal.App.5th 35, 39 [new law requiring juvenile transfer hearing applies after resentencing].)

This case is still on direct appeal, even though it is the second appeal after remand. The case has not been reduced to a final judgment. We should remand for the trial court to apply A.B. 333.

II

The majority is shadowboxing with cases in the wrong arena.

The retroactivity discussion in the opinion features two cases. The majority purports to reject *People v. Salgado* (2022) 82 Cal.App.5th 376 (*Salgado*) and its application of *People v. Padilla* (2022) 13 Cal.5th 152 (*Padilla*). (Maj. opn., *ante*, at pp. 7-12.) Those cases arose from a situation two steps beyond ours. First, they *had* become final. When final, a new law would not apply retroactively to them under *Estrada*.

Second, *Padilla* and *Salgado* were each reopened through postjudgment proceedings on a particular issue. The appellate opinions addressed the difficult question of the scope of the reopening: whether, for *Estrada* retroactivity purposes, the *reopened case* remained final for purposes of a different new law that addressed a different issue than the law and issue that reopened it. That is, did the *whole* previously final case return to being non-final? Or was the case effectively reopened for a single issue only?

In *Padilla*, our Supreme Court split on the issue. The defendant's juvenile murder conviction became final in 2001 when our Supreme Court denied his petition for review and he did not petition the United States Supreme Court for certiorari. (*Padilla*, *supra*, 13 Cal.5th at p. 170 [Corrigan, J., dissenting].) More than a decade later, he successfully obtained a resentencing on a petition for a writ of habeas corpus, due to new constitutional procedures applicable to his life-without-parole sentence. (*Id.* at p. 158.) While the case was on appeal from his new post-habeas sentence, California voters passed a *different* new law that would help him if retroactive to his case. (*Ibid.*) *Padilla*

was final before the habeas grant, so the new law would not have applied. The question for our Supreme Court was whether it reverted to non-final with the habeas resentencing.

The justices divided on that question. But all the justices accepted that *Estrada* retroactivity applied to cases that had never become final at all. (See *Padilla*, *supra*, 13 Cal.5th at p. 161 ["A case is final when the criminal proceeding as a whole has ended"][cleaned up]; *id.* at p. 173 [Corrigan, J., dissenting] ["we have consistently understood *Estrada*'s rule to apply to a case that had not been reduced to a final judgment"].) That is the easy issue before us today. We are in the posture of *Padilla* in the year 2000, before it became final. The tougher *Padilla* question of what to do in a final-but-reopened case has no application here.[1]

Salgado, likewise, was a final case that was reopened. The defendant's murder conviction was affirmed on direct appeal in 2007 (82 Cal.App.5th at p. 379), meaning under *Estrada* no new laws would apply. In 2021, however, the defendant was resentenced after a recommendation from the California Department of Corrections and Rehabilitation under Penal Code section 1170, subdivision (d)(1). (*Salgado*, *supra*, at p. 379.) While the appeal from the resentencing was pending, A.B. 333 went into effect.

---

[1] The majority declares *Padilla* silently overruled *People v. Jackson* (1967) 67 Cal.2d 96 (*Jackson*), a case where a death penalty sentence reopened for a retrial was held non-final even though the murder conviction was not reopened. (Maj. opn., *ante*, at p. 8, fn.2.) Because *Jackson* also involves a postjudgment motion's reopening of a final criminal case, it should not be at issue in our direct appeal. *Jackson* correctly stated that "[a] judgment becomes final when all avenues of direct review are exhausted." (*Jackson*, *supra*, 67 Cal.2d at p. 98.) As to the postjudgment reopening, it stated that its decision on how much of the case was reopened was "a matter of state procedure," and cited prior caselaw under which murder convictions remained when errors caused the death penalty phase of a trial to be reopened for retrial. (*Id.* at p. 99)

(*Salgado*, at p. 378.) Citing *Padilla* for the proposition that the resentencing was a vacatur of the original sentence, the Court of Appeal concluded that *Salgado* was "no longer final," so A.B. 333 applied. (*Salgado*, at p. 380 [cleaned up].)

The majority disagrees with *Salgado*'s reasoning, so it purports to create a legal split with that case. The majority believes *Salgado* should have held that the *sentence* in the case was rendered non-final when it was reopened for resentencing, but that does not reopen the *conviction* to an A.B. 333 challenge.[2]

The majority is correct about one crucial thing: today's decision conflicts with case law. But it is wrong about what the conflict is. *Salgado*'s reasoning is not at issue here because this case has never become final, so it has never been reopened. This case has not been reduced to a final judgment, and the criminal proceeding as a whole has not ended. Today's opinion instead conflicts with *Esquivel* and other case law holding that cases are not final for *Estrada* retroactivity purposes while on direct appeal.

RAPHAEL

J.

[2] The majority's reasoning raises a question as to whether it is correct that the conviction, rather than the sentence, includes what is known as the "criminal street gang sentencing enhancement." (*In re Lopez* (2023) 14 Cal.5th 562, 567).

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **P v. Lopez**
Case Number: **TEMP-KL2599D1**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **rachv2002@yahoo.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR REVIEW	E080032_PR_Lopez

Service Recipients:

Person Served	Email Address	Type	Date / Time
District Attorney	appellateservices@sbcda.org	e-Serve	8/21/2023 7:10:09 AM
ADI	eservice-court@adi-sandiego.com	e-Serve	8/21/2023 7:10:09 AM
Attorney General	sdag.docketing@doj.ca.gov	e-Serve	8/21/2023 7:10:09 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

8/21/2023
Date

/s/Rachel Varnell
Signature

Varnell, Rachel (197649)
Last Name, First Name (PNum)

Rachel Varnell, Esq.
Law Firm