

**S286371**

**IN THE SUPREME COURT OF THE STATE OF  
CALIFORNIA**

THE PEOPLE OF THE STATE OF  
CALIFORNIA,  
Plaintiff and Respondent,

vs.

MIGUEL ALBERTO ESQUIVIAS,  
Defendant and Appellant.

No. \_\_\_\_\_  
2 Crim.  
B329800

Superior Court  
No. PA077370

**APPELLANT'S PETITION FOR REVIEW**

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APPELLANT'S PETITION FOR REVIEW
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**TO THE HONORABLE PATRICIA GUERRERO, CHIEF  
JUSTICE, AND TO THE HONORABLE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE STATE OF  
CALIFORNIA**

Pursuant to California Rules of Court, rule 8.500, Miguel Alberto Esquivias appellant and petitioner hereby petitions this Honorable Court for review in the above entitled matter after the published decision rendered by the Court of Appeal of the State of California Second Appellate District, Division Two on July 18, 2024, Affirming the judgment. No petition for rehearing was filed. A copy of the opinion of the Court of Appeal is attached as Appendix I.

DATED: August 12, 2024

A handwritten signature in blue ink that reads "Lenore De Vita". The signature is written in a cursive style with a large initial 'L'.

Lenore De Vita,

Attorney for Appellant/Petitioner Miguel Alberto Esquivias

## **JURISDICTION AND GROUNDS**

This petition is filed pursuant to California Rules of Court, rule 8.500 to settle important questions of law. This Court obtains jurisdiction under rule 8.500 of those rules.

In addition, this petition is filed to preserve potential issues for federal habeas corpus review. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838 [all potential federal habeas claims must be submitted to the highest state court for discretionary review in order to preserve the claim for federal habeas corpus].)

## **ISSUE PRESENTED**

1. Does a trial court's grant of habeas corpus to review one aspect of a defendant's sentence entitle the defendant to retroactive application of Assembly Bill 333 and to the benefits of all other ameliorative laws that took effect after the conviction and sentence became final?

## **STATEMENT OF THE CASE AND FACTS**

For purposes of this petition, petitioner adopts the statements of the case and statement of facts contained in the opinion of the court of appeal, attached as an appendix. Additional facts will be cited in the arguments where appropriate.

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# ARGUMENTS IN SUPPORT OF PETITION FOR REVIEW

## I

### **REVIEW SHOULD BE GRANTED TO DETERMINE IF A TRIAL COURT’S GRANT OF HABEAS CORPUS AS TO ONE ASPECT OF A DEFENDANT’S SENTENCE ENTITLE THE DEFENDANT TO RETROACTIVE APPLICATION OF ASSEMBLY BILL 333 AND TO THE BENEFITS OF ALL OTHER AMELIORATIVE LAWS THAT TOOK EFFECT AFTER THE CONVICTION AND SENTENCE BECAME FINAL**

Appellant contends the trial court erred in failing to reconsider other aspects of his sentence after it granted his writ of habeas corpus to review possible sentencing modifications stemming from Senate Bill 620, discretion to dismiss firearm enhancements. Specifically, appellant asked the trial court to apply other ameliorative legislative changes; namely Assembly Bill no. 333, addressing the gang enhancement, and Senate Bill 1393, discretion to strike or dismiss a prior serious felony.

The Court of Appeal, Second Appellate District, Division Two, in its July 18, 2024, published opinion rejected appellant’s argument finding that a “revisit-*any*-on-habeas, revisit-*all*-on habeas” rule is inconsistent with the law governing postconviction criminal procedure and would inevitably lead to a “cascading retroactively.” (Slip. opn. 8-15.)

Appellant disagrees as the Court of Appeal’s opinion ignores the long standing rule set forth in *In re Estrada* (1965) 63 Cal.2d 740, that courts presume that the Legislature intends that statutes lessening punishment apply in every case in which they

constitutionally can apply, i.e., every case in which judgment is not final. The Court of Appeal's opinion aims to chip away and erode *Estrada's* foundations by crafting a rule providing for partial and piecemeal finality if resentencing is achieved via habeas corpus.

The Court of Appeal's restricted view of the trial court's grant of habeas corpus is too narrow and disregards the principles this Court set forth in *People v. Buycks* (2018) 5 Cal.5th 857, 893, labeled as the "the full resentencing rule."

This Court should grant review to determine if the granting of a habeas corpus petition as to one aspect of a defendant's sentence entitles the defendant to the application and benefit of any and all ameliorative laws that took effect after his judgment became final.

## **A. Procedural History**

### **1. Underlying Conviction and Direct Appeal**

Appellant Miguel Alberto Esquivias<sup>1</sup> was charged by Information filed June 10, 2014, as follows:

Count 1: murder in violation of section 187, subdivision (a). It was further alleged the crime was committed for the benefit of a criminal street gang pursuant to section 186.22, subdivision (b)(4), that appellant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c), and (d), and that a principal personally and intentionally

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<sup>1</sup> Appellant was charged along with defendants Kimberly Alexis Garcia and Alondra Salinas neither of whom are parties in this appeal. (1CT 1-7.)

discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c), (d), (e), and (e)(1). (1CT 1-3.)

Count 2: felon in possession of a firearm in violation of section 29800, subdivision (a)(1). The prior conviction was in 2012 and for a violation of section 459. (1CT 4.)

Count 3: criminal threats in violation of section 422, subdivision (a). (1CT 4.)

Counts 4 and 5: second degree robbery in violation of section 211. It was further alleged that in the commission of the offense appellant personally used a handgun within the meaning of section 12022.5, subdivision (a) and that a principal was armed with a handgun in violation of section 12022, subdivision (a)(1). (1CT 5.)

As to Counts 1 and 5 it was further alleged the crime was committed for the benefit of a criminal street gang pursuant to section 186.22, subdivision (b)(1)(c).

As to Counts 3 and 5 it was further alleged the crime was committed for the benefit of a criminal street gang pursuant to section 186.22, subdivision (b)(1)(B), and that a principal personally used a handgun within the meaning of section 12022.53, subdivision (b) and (e)(1).

As to Counts 1, 2, 3, 4, and 5 it was alleged appellant had suffered a prior conviction, a violation of section 459, which qualified as a strike under the two strikes provision of the Three Strikes Law pursuant to sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), and had suffered a

prior conviction, a violation of section 459, pursuant to section 667, subdivision (1)(1). (1CT 7.)

Appellant was convicted of murder, felon in possession of a firearm, and two counts of second degree robbery as charged in Counts 1, 2, 4 and 5. The jury found true the firearm enhancement attached to Counts 1, 4, and 5, the section 667, subdivision (a) prior, and the gang enhancements. The jury acquitted appellant of making criminal threats as charged in count 3. (1CT 10-13.)

The trial court denied appellant's motion to dismiss the strike prior and sentenced appellant to 75 years to life, plus 37 years 8 months calculated as follows:

- Count 1: 25 years to life doubled to 50 years to life because of the strike prior, plus an additional 25 years to life for the section 12022.53, (d) allegation.
- Count 2: the low term of 16 months state prison, stayed pursuant to section 653. The stay included the gang enhancement.
- Count 4: 8 years 8 months consisting of one third the middle term of 3 years which is one year doubled to 2 years due to the strike prior, plus one third the term of 10 years which is 3 years 4 months plus another consecutive term of 3 years 4 months per section 186.22, subdivision (b)(1)(c).
- Count 5: the low term of 2 years double to 4 years due to the strike prior, plus 27 years consisting of 10 years for the personal use of the gun per section 12022.53, subdivision

(b), plus 10 years for the gang enhancement, and 5 years for the 667, subdivision (a) allegation. (1CT 13-23; 59-61.)

Appellant appealed and the appellate court affirmed in an unpublished opinion (*People v. Esquivias*, July 26, 2017, B268972), with directions to correct sentencing mistakes on the abstract of judgment. The California Supreme Court denied review on November 1, 2017, and the remittitur from the Court of Appeal was filed on November 29, 2017. Appellant's convictions became final on January 30, 2018. (*People v. Vieira* (2005) 35 Cal.4th 264, 306 [conviction becomes final once "the time for petitioning for a writ of certiorari in the United States Supreme Court has passed"].) (1CT 25-58; 1RT 609.)

## **2. Habeas Petition and Resentencing Hearing**

On January 24, 2022, appellant, acting in pro per, filed a writ of habeas corpus seeking relief under Senate Bill 620, (SB 620), asserting SB 620, which became effective January 1, 2018, provided retroactive relief. Appellant sought to have the trial court exercise its discretion and strike the firearm enhancements. (1CT 63-71.)

On February 17, 2022, the People filed an informal response to appellant's writ of habeas corpus and a supplemental response on July 29, 2022, arguing that while SB 620 applied retroactively to appellant's case, the firearm enhancements should not be stricken. (1CT 74-78; 87-93.)

On January 17, 2023, court appointed counsel for appellant filed a reply in support of appellant’s resentencing petition, motion to strike the gang enhancements and to vacate the convictions pursuant to AB 333. Counsel asserted appellant was retroactively eligible for all other ameliorative changes in the law and the striking of his strike prior. (1CT 95, 98-115.)

On February 24, 2023, the trial court found a “prima facie showing for consideration of habeas petition seeking relief for the firearm enhancements.” (1CT 117-118.)

At the March 24, 2023, resentencing hearing the trial court ruled appellant was eligible for retroactive relief under SB 620. The trial court struck all of the firearm enhancements and resentenced appellant. Appellant’s overall sentence was shortened by 38 years and four months. (1RT 602, 619.)

- Count 1: the 25 years consecutive to life enhancement pursuant to section 12022.53, subdivision (d) was stricken. The new sentence is 50 years to life.
- Count 4: the consecutive determinate term of three years four months pursuant to section 12022.53, subdivision (b) was stricken. The new sentence is five years four months to run consecutively to the sentence imposed on Count 5.
- Count 5: the determinate term of 10 years pursuant to section 12022.53, subdivision (b) was stricken. The sentence is 19 years.
- The total new aggregate term is 50 years to life plus 24 years four months. (1CT 122-123.)

The trial court denied appellant's request to strike the gang enhancement and/or his strike prior and to resentence him in the absence of those enhancements. (1CT

**B. The Resentencing Hearing**

The parties were in agreement that SB 620 applied retroactively to appellant's case. (1RT 301-302; 602-603.) As noted above, the trial court exercised its discretion and struck all of the firearm enhancements reducing appellant's sentenced by 38 years four months.

Appellant also sought to have the trial court consider other retroactive ameliorative changes in the law including Assembly Bill (AB) 333, which applies to the gang allegation, as well as Senate Bill 1393, which grants trial courts discretion to strike or dismiss prior serious felony convictions. (1RT 603-604.)

The prosecutor conceded AB 333 applied retroactively to "nonfinal" cases and the issue here was the status of appellant's case at the time of the resentencing hearing. (1CT 75; 1RT 607-608.) While the prosecutor could not find a case specifically on point with appellant's situation, he recognized that *People v. Padilla* (2022) 13 Cal.5th 152, may apply to appellant's case and therefore appellant's case might be considered "nonfinal" for purposes of AB 333. (1RT 606-607.)

The trial court remarked that appellant directly filed a writ of habeas corpus, and there has been no vacatur of his sentence. If appellant's case became final it did so on January 30, 2018, before AB 333 took effect. The trial court couched the issue

before it as “would any of the new case laws that were enacted after [appellant’s] case became final” now apply retroactively to appellant? (1RT 608-609.)

The trial court noted that *People v. Buycks, supra*, 5 Cal.5th 857, talks about “the full sentencing rule” which held that when part of a sentence is stricken on review, on remand for resentencing, a full resentencing as to all counts is appropriate. But no part of appellant’s sentence was stricken on review or on remand. The matter was before the trial court for resentencing because appellant directly filed a writ of habeas corpus. (1RT 609-610.)

The trial court exercised its discretion and struck the section 12022.53, subdivisions (b) and (d) firearms enhancement on Counts 1, 4, and 5, and resentenced appellant without the application of the enhancements. The trial court found the hearing “was not a fully retroactive petition that would include every ameliorative change in law up to today’s date.” (1RT 612.) The trial court was not “going beyond” this modification, as it believed it did not have jurisdiction to address any other aspect of appellant’s sentence. (1RT 616-621.)

### **C. The Court of Appeal Reads the Trial Court’s order Granting Habeas Far Too Narrowly**

The Court of Appeal characterized appellant’s claims as “is there a ‘revisit-*any*-on habeas, revisit-*all*-on habeas rule.’” (Slip opn. 8, italics in original.) In answering that question, the Court of appeal concluded that a trial court is “*not* obligated to revisit a

defendant's *entire* sentence on habeas review merely because it grants review to revisit a portion of that sentence." (Slip opn. 8, italics in original.) Appellant disagrees and maintains that the Court of Appeal reads the trial court's order granting habeas far too narrowly and ignores the principles this Court set forth in *People v. Buycks, supra*, 5 Cal.5th at p. 893, labeled as the "the full resentencing rule" and the long standing principles of *In re Estrada, supra*, 63 Cal.2d 740.

On February 24, 2023, the trial court found appellant's habeas petition set forth a prima facie case for relief. (1CT 117.) As the Court of Appeal noted, the issuance of an "order to show cause" based on the showing of a prima facie entitlement to relief is what "creates a 'cause'" that re-invokes the trial court's jurisdiction. (Slip opn. 9, citing *In re Serrano* (1995) 10 Cal.4th 447, 455.) Appellant maintains, the trial court's jurisdiction was restored due to the granting of the habeas and as such, it had jurisdiction and an obligation to consider all other aspects of appellant's sentence.

The "revisit-*any*-on habeas, revisit-*all*-on habeas rule" is not inconsistent with the law governing postconviction criminal procedure as the Court of Appeal finds. (Slip. opn 8-10.) In appellant's case the trial court granted his petition for writ of habeas corpus and struck a portion of his sentence but declined to resentence appellant on the grounds that it lacked jurisdiction to do so. Having struck a portion of defendant's sentence, the court was required to consider whether other portions of the sentence were also incorrect. (See *People v. Walker* (2021) 67 Cal.App.5th,

205-206.) It is immaterial as to what “vehicle” appellant used to secure the trial court’s power to revisit his sentence. The matter was before the trial court for resentencing reconsideration and as such, the trial court was obligated to consider all other aspects of appellant’s sentence.

As this Court stated “when part of a sentence is stricken on review, on remand for resentencing ‘a full resentencing on all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.’” (*People v. Buycks, supra*, 5 Cal.5th at p. 893.) The Court of Appeal, Second Appellate District Division Two, held with exceptions not applicable here:

“when a trial court corrects one part of a sentence on remand, it is obligated to address the effect of subsequent events that render other parts of that sentence legally incorrect. By correcting one part of the sentence, the trial court is resentencing the defendant and, in so doing, is not only permitted, but also obligated to look at the facts and the law in effect at the time of that resentencing, including “ ‘any pertinent circumstances which have arisen since the prior sentence was imposed’ ” and whether they render a different part of the sentence legally incorrect. [Citations.] And where the facts and law in effect at the time of resentencing dictate that some other component of the sentence is incorrect and

hence unauthorized, the trial court is required to correct that component as well. [Citations.] That is because a criminal sentence is, like an atom, indivisible: ‘[A]n aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme.’ [Citations.]” (*People v. Walker* (2021) 67 Cal.App.5th 198, 205-206, fn. omitted.)

Yet, this same division now advocates that a trial court may focus only on making non-final a portion of a sentence while maintaining finality as to other aspects of the sentence. In other words the trial court may now “split the atom.” Here, the trial court granted appellant’s petition for writ of habeas corpus and struck a portion of his sentence but declined to resentence appellant on the grounds that it lacked jurisdiction to do so. Having struck a portion of appellant’s sentence, the court was required to consider whether other portions of the sentence were also incorrect. (See *People v. Walker, supra*, 67 Cal.App.5th at pp. 205-206.)

*People v. Padilla, supra*, 13 Cal.5th 152, applies to appellant’s situation. As this Court explained in *Padilla*, “When a habeas corpus court vacates a prior judgment and orders ... a new sentencing hearing, the prior judgment –now ineffective- can no longer be a final one.” (*Id.* at p. 164.) That is what happened here. The trial court granted appellant’s habeas corpus and

struck the firearm enhancement. The judgment was no longer final, and under *Buycks* and *Padilla* the trial court had the jurisdiction to consider the full range of sentencing options available to it when resentencing appellant. Even the prosecutor conceded that appellant's case might be considered "nonfinal" based on *Padilla*. (1RT 606-607.)

The Court of Appeal also suggests that a "revisit-*any-on-habeas*, revisit-*all-on-habeas*" rule would inevitable lead to "cascading retroactively" which may end up "*hurting*" defendants because trial courts aware that granting relief as to part of a sentence will obligate them to grant relief as to the entire sentence may elect not to grant habeas relief at all. (Slip opn. 11-12, italics in original.) This conclusion ignores the fact trial courts do not have the discretion to leave intact unlawful sentences and therefore shall continue to grant habeas relief under those circumstances regardless if it means the trial court will now have to revisit the entire sentence.

**D. The Court of Appeal Ignores the Longstanding Precedent under *In re Estrada* (1965) 63 Cal.2d 740 Applies to All Cases in Which Judgment is Not Final**

The Court of Appeal ignores *In re Estrada, supra*, 63 Cal.2d 740, which established the founding principle that once a case is non-final, as appellant's was, the defendant shall receive the benefit of all ameliorative laws. An amendment to a statute that reduces punishment gives rise to an inference that the statute applies retroactively to all judgments not final on appeal. (*In re Estrada, supra*, 63 Cal.2d at p. 744.) The question of finality is

focused on “whether the criminal prosecution or proceeding as a whole is complete.” (*People v. Esquivel* (2021) 11 Cal.5th 671, 679.) *In re Estrada*’s inference of retroactivity extends to legislation that constricts the range of criminally liable conduct by creating an affirmative defense, contracting a criminal offense, or otherwise lessens punishment in a meaningful manner. (*People v. Burgos* (2024) 16 Cal.5th 1, 27.) “*Estrada* applies to statutory amendments ‘which redefine, to the benefit of defendants, conduct subject to criminal sanctions.’” (*People v. Tran* (2022) 13 Cal.5th 1169, 1207 citing *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 301.) “The amendatory act . . . can be applied constitutionally to acts committed before its passage.” (*In re Estrada, supra*, 63 Cal.2d at p. 745.) For nearly 70 years it has been clear that the amelioration will “apply to every case to which it constitutionally could apply.” (*Id.* at p. 745.)

As noted above, appellant’s case was non-final at the time of the resentencing hearing. By exercising its discretion and striking the firearm enhancements, the trial court necessarily re-sentenced appellant in effect, as reflected by its issuance of a new abstract of judgment. For these reasons, appellant asserts his judgment was not final at the time of the hearing and pursuant to *Estrada*, he is entitled to be re-sentenced fully in accordance with the law in effect at the time of his resentencing hearing on remand.

### **E. AB 333 Applies Retroactively to Appellant's Sentence**

At the resentencing hearing appellant argued AB 333 applied retroactively to his case as his judgment was not final. The prosecutor conceded that *Padilla* provides language that would render appellant's case non-final. (1RT 603-608.) The trial court taking a tunnel vision view of *Buycks*' "full resentencing rule" determined that since the Court of Appeal had upheld appellant's original sentence, since no part of appellant's sentence was stricken on review and the matter was not on remand, it followed that appellant's situation was not a "fully retroactive petition that would include every ameliorative change in the law up to today's date." (1RT 609-612.)

The Court of Appeal found appellant's argument that *Padilla* and *Buycks* mandates a full revisit as to all aspects of appellant's sentence to be unpersuasive. According to the Court of Appeal, because *Padilla* and *Buycks* arose "in different procedural postures" they do not support appellant's broader principle. (Slip opn. 12-14.) Appellant asserts this is a "form over substance" conclusion and the procedure by which appellant's case came to be before the trial court for resentencing, that is by grant of habeas, does not in and of itself limit a defendant's entitlement to ameliorative changes in the law.

Appellant asserts his case cannot be both partially final and partially nonfinal such that upon resentencing it can be deemed to include a final judgment for *Estrada* purposes, which is what the Court of Appeal concluded. It is well-settled that a case is final for *Estrada* purposes when the proceeding as a whole is complete and

finality cannot be achieved in a piecemeal process. The point at which a case is “reduced to final judgment” – i.e., when “the last word of the judicial department with regard to a particular case or controversy” has issued – is the point at which the conviction *and* sentence are final. (*People v. Esquivel, supra*, 11 Cal.5th at pp. 676-678.) Clearly, appellant’s sentence was not final as of the date of the resentencing hearing and AB 33 should have been applied to appellant’s sentence.

While the gang allegations must be reversed, appellant acknowledges that the gang allegations may be retried on remand. (*People v. E.H.*, (2022) 75 Cal.App.5th 467, 480 [“proper remedy for this type of failure of proof—where newly required elements were ‘never tried’ to the jury—is to remand and give the People an opportunity to retry the affected charges”], citing *People v. Figueroa* (1993) 20 Cal.App.4th 65, 71-72, fn. 2 [statutory amendment retroactively adding additional element to offense allowed prosecution to establish additional element on remand without offending double jeopardy or ex post facto principles]; see also *People v. Sek* (2022)74 Cal.App.5th 675, 669-670 [gang enhancements may be retired upon remand].)

In *People v. Lopez* (2023) 93 Cal.App.5th 1110, review granted November 15, 2023, S281488, the appellate court conditionally reversed the judgment on direct appeal and remanded with the direction to the trial court to consider striking various enhancements. (*Id.* at p. 1113.) At a remand hearing in 2022, the trial court struck an enhancement but refused to consider AB 333, which had passed earlier that year. (*People v.*

*Lopez, supra*, 93 Cal.App. 5th at p. 1115.) *People v. Lopez, supra*, 93 Cal.App. 5th at page 1120, found that AB 333 applied to the defendant on remand, but the trial court had no jurisdiction to relitigate the gang enhancements. In reaching this conclusion, *Lopez* cited language in *People v. Padilla, supra*, 13 Cal.5th at pages 169-170, that the right and remedy it was recognizing did not allow the defendant to raise claims unrelated to his sentence and that 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.” *People v. Lopez, supra*, 93 Cal.App.5th at page 1119, interpreted this language to mean that “when an appellate court confirms a judgment as to guilt, reverses it as to the sentence, and orders a limited remand for resentencing,” the lower court may act only within the express jurisdictional limits as stated in the remittitur. The court therefore concluded that although the defendant's conviction was nonfinal and AB 333 applied, the trial court had no jurisdiction to readjudicate the gang enhancements. (*People v. Lopez, supra*, 93 Cal.App.5th *Lopez*, at p. 1120.)

*People v. Mitchell* (2023) 97 Cal.App.5th 1127, review granted February 21, 2024, S283474, disagreed with *Lopez*'s interpretation of *Padilla*. *People v. Mitchell, supra*, 97 Cal.App.5th at page 1130, involved a similar scenario as in *Lopez*: vacatur of the defendant's sentence on appeal and remand for resentencing because an enhancement had been improperly imposed. *People v. Mitchell, supra*, 97 Cal.App. 5th at page 1139, noted that “judgment” and “sentence” are synonymous in criminal

cases, so there “is no judgment of conviction without a sentence.” Because Mitchell’s sentence was still being adjudicated when AB 333 took effect, his criminal judgment never became final and he was entitled to the benefit of that new law. (*People v. Mitchell*, *supra*, 97 Cal.App. 5th at p. 1140; accord *People v. Trent* (2024) 96 Cal.App.5th 33, review granted Dec. 20, 2023, S282644 [vacatur of conviction under § 1172.6 renders conviction not final for purposes of Assem. Bill 333; *People v. Salgado* (2022) 82 Cal.App.5th 376, 380 [resentencing under former § 1170, subd. (d) rendered judgment no longer final]; *People v. Keel* (2022) 84 Cal.App.5th 546, 551 [Prop. 57 and Sen. Bill No. 1391 applied to resentencing after vacatur of conviction]; *People v. Ramirez* (2021) 71 Cal.App.5th 970, 996 [same].)

Appellant urges this court to follow *Mitchell*. The trial court granted the habeas corpus to consider striking the firearm enhancements. The grant of habeas corpus effectively rendered appellant’s conviction not final and reopened the judgment for the purpose of retroactive ameliorative laws.

## **F. Conclusion**

This Court should grant review to determine if a trial court’s grant of habeas corpus review to review one aspect of a defendant’s sentence entitles the defendant to retroactive application of Assembly Bill 333 and to the benefits of all other ameliorative laws that took effect after the conviction and sentence became final. Alternatively, this Court should issue a

grant and hold order behind *People v. Lopez* (2023) 93 Cal.App.5th 1110, review granted November 15, 2023, S281488.

## CONCLUSION

This Court should order the judgment of the trial court reversed and the gang enhancements stricken pursuant to Assembly Bill 333. The matter should be remanded to the trial court with directions for it to hear argument in support of further sentencing reductions based on intervening ameliorative changes in the law and to permit the prosecution to elect to retry the gang enhances should it choose to do so. Alternatively, this Court should grant review to determine if a trial court's grant of habeas corpus to review one aspect of a defendant's sentence entitles the defendant to retroactive application of Assembly Bill 333 and to the benefits of all other ameliorative laws that took effect after the conviction and sentence became final, or this Court should issue a grant and hold order behind *People v. Lopez* (2023) 93 Cal.App.5th 1110, review granted November 15, 2023, S281488.

DATED: August 12, 2024

Respectfully submitted,



Lenore De Vita

Attorney for Appellant/Petitioner Miguel Alberto Esquivias

## **CERTIFICATION OF WORD COUNT**

Pursuant to Rule 8.504, I certify the attached Petition for Review uses a 13-point Century Schoolbook font and contains less than 8,400. This Petition contains 4,627 words, excluding the Tables and this Certification.

In making this certification, counsel has relied on the word count of the word processing system used to prepare this brief (Word).

A handwritten signature in blue ink that reads "Lenore De Vita". The signature is written in a cursive style with a large initial "L".

Lenore De Vita  
Attorney for Appellant/Petitioner Miguel Alberto Esquivias

**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY MAIL, STATE OF CALIFORNIA**

I, Lenore De Vita, declare I am over the age of eighteen (18) years, and not party to the within action; my business address is 3900 Montclair Road, Suite 131144, Birmingham, AL 35213, and my email address is lenoredevita@aol.com.

On August 12, 2024, I served a true and correct copy of Appellant’s Petition for Review in sealed envelope with postage fully prepaid via the United States mail, on:

Hon. Daniel B. Feldstern  
San Fernando Courthouse  
900 Third Street  
San Fernando, CA 91340

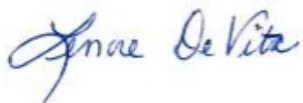
Miguel Alberto Esquivias  
AY6998  
Pelican Bay State Prison  
P. O. Box 7000  
Crescent City, CA 95531-7000

On August 12, 2024, I electronically served a PDF copy of Appellant’s Petition for Review via email on:

The Office of the Attorney General at [docketingLAawt@doj.ca.gov](mailto:docketingLAawt@doj.ca.gov)  
The California Appellate Project at [capdocs@lacap.com](mailto:capdocs@lacap.com)  
The District Attorney at [truefiling@da.lacounty.gov](mailto:truefiling@da.lacounty.gov)

Notwithstanding the requirements set forth in California Rules of Court, Rule 8.500(f)(1), submission of a Petition for Review through True Filing that is accepted for filing by the Supreme Court constitutes service of the petition on the Court of Appeal.”

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct and this proof of Service was executed on August 12, 2024.



Lenore De Vita

## APPENDIX I

## APPENDIX I

FILED

Jul 18, 2024

EVA McCLINTOCK, Clerk

mreal

Deputy Clerk

Filed 7/18/2024

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ALBERTO  
ESQUIVIAS,

Defendant and Appellant.

B329800

(Los Angeles County  
Super. Ct. No. PA077370)

APPEAL from an order of the Superior Court of Los Angeles County, Daniel B. Feldstern, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant

Attorney General, Steven D. Matthews and Amanda V. Lopez,  
Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \* \* \*

In 2022, Miguel Alberto Esquivias (defendant) filed a petition for a writ of habeas corpus asking the trial court to dismiss his firearm enhancements because his convictions were not final on January 1, 2018—when a new law took effect granting courts the discretion to dismiss those enhancements. The trial court ruled that defendant had made a “prima facie showing” as to those “firearm enhancements,” held a hearing on defendant’s habeas petition limited to that “specific relief,” and went on to dismiss those enhancements. Relying on *People v. Padilla* (2022) 13 Cal.5th 152 (*Padilla*) and *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), defendant argues that once the court agreed to revisit one part of his sentence, it was obligated to revisit his entire sentence—and vacate his underlying convictions—in light of new laws that took effect after his convictions became final. He is wrong. Habeas review is issue specific (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 572 (*Pearson*)), and the trial court here understandably limited its review to only those enhancements affected by the new law retroactively applicable to defendant’s conviction. Defendant’s proffered “revisit-*any*-on-habeas, revisit-*all*-on-habeas” rule is inconsistent with these fundamental tenets of habeas review, is inconsistent with our Legislature’s express intent to make only certain new laws fully retroactive, and is likely to *discourage* trial courts from revisiting any part of a sentence on habeas—thereby *harming* defendants. *Padilla* and *Buycks* do not dictate

otherwise, as they arose in different procedural contexts. We accordingly affirm the trial court's order.

## **FACTS AND PROCEDURAL BACKGROUND**

### **I. Facts<sup>1</sup>**

#### **A. *Murder***

In June 2013, defendant walked up to Manuel Haro (Haro) and shot him several times, killing him. This shooting was the culmination of an internecine feud among members of the "818" clique of the Wicked Insane Diablos street gang. Defendant and his friend Kimberly Garcia (Garcia) had a falling out with Haro and Haro's friend James Posey (Posey). Before acting on his soured feelings, Esquivias got permission from the "older homies" overseeing the Wicked Insane Diablos to "handle" the problem; he also got "the okay" to kill Haro and Posey. After defendant, Garcia, and Alondra Salinas (Salinas) spent a few weeks taunting and threatening to kill Haro and Posey, defendant ultimately had Garcia and Salinas drive him to Haro's location, where he got out of the car, walked up to an unarmed Haro, and shot him repeatedly.

#### **B. *Armed robberies***

Fifteen days after killing Haro, defendant and Garcia robbed two people at gunpoint. In the midst of one of the robberies, defendant asked one victim for his gang affiliation.

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<sup>1</sup> We draw these facts from our prior opinion affirming defendant's convictions. (*People v. Esquivias* (July 26, 2017, B268972) [nonpub. opn.] )

## II. Procedural Background

### A. *Prosecution, conviction, and direct appeal*

The People charged defendant with murder (Pen. Code, § 187, subd. (a))<sup>2</sup> and two counts of robbery (§ 211).<sup>3</sup> The People also alleged that (1) the murder involved the discharge of a firearm causing death (§ 12022.53, subd. (d)); (2) the robberies involved the use of a firearm (§ 12022.5); and (3) the murder and robberies were for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22). The People further alleged that defendant’s prior conviction for first degree burglary constituted a “strike” within the meaning of our “Three Strikes” law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(j)) as well as a prior serious felony conviction (§ 667, subd. (a)).

A jury convicted defendant of first degree murder and both counts of robbery, and found all of the enhancements true.

After denying defendant’s motion to dismiss his prior strike conviction, the trial court sentenced defendant to prison for 75 years to life, plus 37 years and 8 months. For the murder count, the court imposed a base term of 50 years (25 years, doubled due

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<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>3</sup> The People also charged defendant with being a felon in possession of a firearm at the time of the charged murder (§ 29800, subd. (a)(1)) and making criminal threats (§ 422). Because the jury acquitted defendant of the latter count, and because the sentence for the former count was stayed (and thus does not affect any of our sentencing calculations), we will not discuss them further.

Garcia and Salinas were also charged, but their convictions and sentences are not at issue here, so we will also not discuss them further.

to the prior strike) plus a consecutive 25 years to life for intentionally discharging a firearm causing death. For the first robbery count, the court imposed a consecutive sentence of 29 years comprised of a base term of four years (a midterm sentence of two years, doubled due to the prior strike), plus 10 years for the personal use of a firearm, plus 10 years for the gang enhancement, plus five years for the prior serious felony conviction. For the second robbery count, the court imposed a consecutive sentence of eight years and eight months comprised of a base term of two years (one-third of a midterm three-year sentence, doubled due to the prior strike), plus three years and four months (one-third of 10 years) for the personal use of a firearm, plus three years and fourth months (one-third of 10 years) for the gang enhancement.

On July 26, 2017, we affirmed defendant's convictions and sentence. (*People v. Esquivias* (July 26, 2017, B268972) [nonpub. opn.]<sup>1</sup>.) The California Supreme Court denied review on November 1, 2017. Defendant's convictions accordingly became final on January 30, 2018. (*People v. Vieira* (2005) 35 Cal.4th 264, 306 [conviction becomes final once "the time for petitioning for a writ of certiorari in the United States Supreme Court has passed"]<sup>2</sup>.)

### **B. Habeas petition**

On January 24, 2022, defendant acting in propria persona filed a petition for writ of habeas corpus asking the trial court to exercise the discretion newly conferred upon it by Senate Bill No. 620 (2017-2018 Reg. Sess.) to dismiss the firearm enhancements and thereby reduce his sentence. Defendant's convictions were not final when Senate Bill No. 620 took effect on January 1, 2018. (Stats. 2017, ch. 682, §§ 1, 2.) The trial court appointed counsel

for defendant and ordered further briefing. The People filed two responses. Defendant filed a traverse in which, for the first time, he asked the trial court to (1) resentence him on the gang enhancement and vacate all of his convictions under Assembly Bill No. 333 (2021-2022 Reg. Sess.) (Stats. 2021, ch. 699, § 4, eff. Jan. 1, 2022); and (2) revisit its earlier decision not to dismiss his prior strike conviction.

The trial court issued an order finding a “prima facie showing” as to defendant’s “petition seeking relief *for the firearm enhancements*” and set a hearing “for potential sentencing modification *on that specific issue.*” (Italics added.)

At a hearing in March 2023, the court ruled that defendant was eligible for retroactive relief under Senate Bill No. 620, found that defendant’s overall sentence was not “proportional,” and exercised its discretion to strike all of the firearm enhancements. The court rejected defendant’s request to expand the scope of the habeas proceeding to reach defendant’s other sentencing challenges. The court explained that it had “done [its] best to . . . limit th[e] scope” of “this particular habeas” proceeding to the “firearm enhancements,” that the court accordingly lacked “jurisdiction” to “include every ameliorative change in law up to today’s date,” and that forcing the court to revisit and shorten other aspects of defendant’s sentence beyond the firearm enhancements would “undermine” the court’s “intention[]” to dismiss the firearm enhancements.

Without the firearm enhancements, defendant’s overall sentence was shorter by 38 years and four months. Specifically, without the firearm enhancements, defendant’s sentence on the murder conviction became 50 years to life, defendant’s sentence on the first robbery count became 19 years, and defendant’s

sentence on the second robbery count became five years and four months.

**C. *Appeal***

Defendant filed this timely appeal.

**DISCUSSION**

It is undisputed that the trial court limited its grant of habeas review in this case to the “potential sentencing modification” resulting from Senate Bill No. 620’s grant of discretion to dismiss firearm enhancements. Defendant argues that the court’s decision to grant review on this specific issue *also* obligated the court to reconsider his convictions and sentence in their entirety in light of two laws taking effect after his convictions became final—namely, (1) Assembly Bill No. 333, which adds new elements to the gang enhancement and requires that gang enhancement allegations be bifurcated from the underlying charges (§§ 186.22, subds. (e) & (f), 1109);<sup>4</sup> and (2) Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1013, eff. Jan. 1, 2019), which grants courts discretion to strike or dismiss prior serious felony convictions.

This appeal<sup>5</sup> thus presents the following question: Is a trial court that grants habeas review to reconsider one aspect of a

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<sup>4</sup> In *People v. Burgos* (2024) 16 Cal.5th 1, our Supreme Court held that the bifurcation aspect of Assembly Bill No. 333 was not retroactive even to nonfinal convictions. (*Id.* at p. 8.)

<sup>5</sup> It is not entirely clear whether the matter before us is more properly viewed as (1) a challenge to the denial of a habeas petition, which is subject to review by filing a separate habeas petition in this court and not by appeal (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 983); or (2) an appeal of the order the trial court ultimately issued striking the firearm enhancements. We

defendant's sentence obligated to grant review to reconsider *all* aspects of the defendant's sentence and thereby give the defendant the benefit of all ameliorative laws that took effect after the defendant's conviction and sentence became final? In other words, is there a "revisit-*any*-on-habeas, revisit-*all*-on-habeas" rule? This is a question of law that we review de novo. (*Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190.)

## **I. Analysis**

We hold that a trial court is *not* obligated to revisit a defendant's *entire* sentence on habeas review merely because it grants review to revisit a portion of that sentence. We so hold for two reasons.

### **A. *Inconsistent with postconviction criminal procedure***

First, a "revisit-*any*-on-habeas, revisit-*all*-on-habeas" rule is inconsistent with the law governing postconviction criminal procedure, and particularly the law governing habeas corpus.

Once a criminal defendant's conviction and sentence become final, trial courts lack jurisdiction to revisit that judgment absent a specific, authorized vehicle for doing so; there is no free-floating jurisdiction to revisit a final criminal judgment. (*In re G.C.* (2020) 8 Cal.5th 1119, 1129-1130 (*G.C.*); *People v. Karaman* (1992) 4 Cal.4th 335, 344; *People v. King* (2022) 77 Cal.App.5th 629, 634, 636-637.) The writ of habeas corpus is one such vehicle, and it empowers trial courts to revisit unauthorized

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have jurisdiction either way: If defendant should have filed a habeas petition, we have the discretion to construe what was filed as such a petition (*People v. Hodges* (2023) 92 Cal.App.5th 186, 190); and if defendant should have filed an appeal, he did just that.

criminal judgments (*Buycks, supra*, 5 Cal.5th at p. 895; *In re Harris* (1993) 5 Cal.4th 813, 838-839, overruled on another ground in *Shalabi v. City of Fontana* (2021) 11 Cal. 5th 842, 855; *King*, at p. 637), including sentences that are unauthorized because they do not comply with existing statutory law (*Harris*, at p. 839).

A trial court does not regain jurisdiction over a criminal judgment through habeas corpus until the court issues an order finding that a habeas petition has set forth a prima facie case for relief. (*In re Serrano* (1995) 10 Cal.4th 447, 455 [the issuance of an “order to show cause” based on the showing of a prima facie entitlement to relief is what “creates a ‘cause’” that re-invokes the court’s jurisdiction]; *In re Bacigalupo* (2012) 55 Cal.4th 312, 332.) Acts prior to such a finding—including a defendant’s filing of a petition and a court’s consideration of *whether* that petition sets forth a prima facie case—do *not* re-open jurisdiction. (*People v. Guillory* (2022) 82 Cal.App.5th 326, 335 [“*filing* a collateral attack does not make a judgment nonfinal”]; see also *People v. Walker* (2021) 67 Cal.App.5th 198, 205 (*Walker*) [trial court’s decision whether to resentence does not re-open a conviction if court ultimately elects not to resentence].)

A trial court’s issuance of an order to show cause is not an “all-or-nothing” proposition: A trial court has discretion in deciding how to exercise its habeas jurisdiction and may limit a grant of habeas review to a “specific claim or claims” presented in a petition. (*Pearson, supra*, 48 Cal.4th at p. 572; *Robinson v. Lewis* (2020) 9 Cal.5th 883, 895 [“[a]ll courts in California have original habeas corpus jurisdiction, but that does not mean all courts must exercise it in all circumstances”]; *Schlup v. Delo* (1995) 513 U.S. 298, 319 [“habeas corpus is, at its core, an

equitable remedy”]; *In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16, superseded by statute on other grounds as stated in *Briggs v. Brown* (2017) 3 Cal.5th 808, 842.) Indeed, a trial court’s grant of review on one “specific issue [constitutes] an implicit determination that a prima facie case has not been made as to the other issues presented in the [habeas] petition.” (*People v. Bloyd* (1987) 43 Cal.3d 333, 363 (*Bloyd*).)

A “revisit-*any*-on-habeas, revisit-*all*-on-habeas” rule is inconsistent with the above-stated principles for two reasons. It is inconsistent with the rules governing habeas relief. That is because it would mandate the grant of habeas review as to an entire sentence whenever a trial court grants review on one part of that sentence. By depriving trial courts of their longstanding discretion to tailor their exercise of habeas jurisdiction, we would be converting habeas from an elegant, issue-specific scalpel into a blunt, “in for a penny, in for a pound” cudgel. It is also inconsistent with—and arguably perverts—the rules governing postconviction relief more generally. As our Supreme Court recently reaffirmed, the existence of an *unauthorized* sentence does not by itself create jurisdiction to correct that error (*G.C., supra*, 8 Cal.5th at pp. 1129-1130), yet defendant’s proffered rule would mandate the grant of habeas review as to portions of a sentence that are not even unauthorized. Here, for example, defendant was not eligible for relief under Assembly Bill No. 333 and Senate Bill No. 1393 at the time he filed his habeas petition because his criminal judgment became final before these bills took effect, which means that his sentence was not unauthorized for failure to take those bills into consideration, yet defendant urges a rule that would *require* a trial court to accept jurisdiction over those claims.

**B. No “cascading retroactivity”**

Second, a “revisit-*any*-on-habeas, revisit-*all*-on-habeas” rule would inevitably lead to “cascading retroactivity”: Once a defendant shows an entitlement to retroactive relief under one ameliorative statute (because his criminal judgment was not final when that statute took effect), the court would be obligated to grant habeas review on the defendant’s *entire* sentence, which would render that entire sentence “nonfinal,” which in turn would render the defendant eligible for retroactive relief under all ameliorative statutes enacted up to the time the court considers the defendant’s habeas petition.

Such cascading retroactivity is problematic for several reasons.

To begin, it is inconsistent with legislative intent. When enacting statutes that grant criminal defendants ameliorative relief (that is, statutes that reduce sentences or add new elements to existing crimes or sentencing enhancements), our Legislature has the choice of whether to make them purely prospective, retroactively applicable to defendants whose convictions are not yet final, or fully retroactive to all defendants regardless of the finality of their convictions. By effectively making all ameliorative relief statutes fully retroactive, cascading retroactivity impermissibly rewrites the text of statutes and ignores legislative intent as to those statutes our Legislature opted *not* to make fully retroactive. (*J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648, 657, fn. 7 [“It is not for us to rewrite . . . statute[s]”]; *People v. Alatorre* (2021) 70 Cal.App.5th 747, 765 [courts may not “contraven[e] a manifest legislative intent”].)

More to the point, cascading retroactivity may end up *hurting* defendants. Trial courts aware that granting relief as to part of a sentence will obligate them to grant relief as to the entire sentence may elect not to grant relief at all, even if they were otherwise inclined to grant relief as to just one part. The trial court’s ruling here is a case in point: The court expressly noted that its “intention[]” to reduce defendant’s sentence by dismissing just the firearm enhancements would be “undermined” if it were also obligated to dismiss the gang enhancement, dismiss the prior serious felony enhancement, and, under the law in effect at the time, ostensibly vacate all of defendant’s convictions due to the failure to bifurcate the gang enhancement. If forced to choose between leaving defendant’s sentence untouched and vacating all of his convictions, the trial court here indicated its inclination to leave it untouched—even though it was otherwise ready (and willing) to reduce defendant’s sentence by nearly 40 years if that partial-grant option were on the table.

## **II. Defendant’s Arguments**

Defendant offers what boils down to two arguments in support of his proffered “revisit-*any-on-habeas*, revisit-*all-on-habeas*” rule.

First, defendant argues that his proffered rule is mandated by the following syllogism: (1) *Padilla, supra*, 13 Cal.5th at pp. 162-164 holds that the grant of habeas relief to vacate a sentence renders that sentence “nonfinal” for purposes of applying ameliorative relief statutes; (2) *Buycks, supra*, 5 Cal.5th at p. 893 holds that “full resentencing” as to *all* aspects of a sentence is required if a “part of a sentence” is revisited (accord, *People v. Valenzuela* (2019) 7 Cal.5th 415, 424-425); so (3) putting *Padilla*

and *Buycks* together, a grant of habeas relief as to a part of a sentence mandates a *full* resentencing and hence renders the *entire* sentence “nonfinal” and eligible for application of all ameliorative relief statutes in effect at the time of the habeas proceeding.

We find this syllogism unpersuasive for several reasons.

For starters, its two building blocks—*Padilla* and *Buycks*—arose in different procedural postures and hence do not support the broader principle for which defendant is using them. In *Padilla*, the question was the effect of an earlier order on a habeas petition that had already vacated the defendant’s entire sentence (*Padilla, supra*, 13 Cal.5th at p. 158); here, the question is whether a court is required to vacate the entire sentence in the first place. In *Buycks*, the question was the effect of an earlier order that had already recalled a sentence under section 1170.18 (*Buycks, supra*, 5 Cal.5th at pp. 873, 893-895); here, the question is whether a court is required to recall the entire sentence in the first place.

Moreover, the syllogism is flatly inconsistent with the law of habeas corpus detailed above because it would deprive trial courts of their longstanding discretion to grant habeas review on an issue-by-issue basis. By overriding a trial court’s express or implied discretion *not* to grant review on certain issues, the syllogism also runs afoul of the corollary that courts generally respect one another’s exercise of that discretion. (*Walker, supra*, 67 Cal.App.5th at pp. 204-205 [where an appellate court order on remand “limits the scope of resentencing” to one issue, trial court must adhere to that limit]; *People v. Ramirez* (2019) 35 Cal.App.5th 55, 64 [same]; *Bloyd, supra*, 43 Cal.3d at p. 363 [implying declination of jurisdiction on some issues from exercise

of jurisdiction on others]; cf. *Walker*, at p. 201 [if remand order does not explicitly limit scope of resentencing, court must consider all aspects of sentence]; *In re A.M.* (2024) 102 Cal.App.5th 557, 568 (*A.M.*) [order to show cause encompassed retroactive application of new sentencing laws].)

Second, defendant contends that a full resentencing in this case is supported by *People v. Salgado* (2022) 82 Cal.App.5th 376 and *People v. Sek* (2022) 74 Cal.App.5th 657. He is wrong. *Salgado* held that a defendant is entitled to the benefit of ameliorative relief statutes as of the date of resentencing after his sentence was *recalled* under section 1172.1. (*Salgado*, at pp. 379-381.) Here, however, the trial court only granted review as to the firearm enhancements and did not exercise jurisdiction over—let alone recall—any other part of his sentence. *Sek* held that a defendant was entitled to the benefit of Assembly Bill No. 333, which was in effect at the time that he was resentenced after his conviction and sentence had already been vacated on appeal. (*Sek*, at pp. 664, 666-667; accord, *A.M.*, *supra*, 102 Cal.App.5th at pp. 560-561 [defendant entitled to benefit of Senate Bill No. 1391 (2017-2018 Reg. Sess.), which was in effect after his sentence was “conditionally reversed on habeas corpus”].) Here, however, there was no prior remand order from this court vacating defendant’s sentence; defendant’s sentence remained intact and final except to the extent the trial court granted habeas review of the firearm enhancements.

**DISPOSITION**

The trial court's order is affirmed, or, in the alternative, defendant's petition for a writ of habeas corpus is denied.

**CERTIFIED FOR PUBLICATION.**

\_\_\_\_\_, J.  
HOFFSTADT

We concur:

\_\_\_\_\_, Acting P.J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
CHAVEZ