S251333

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DOUGLAS EDWARD McKENZIE,** **Defendant and Appellant.**	Case No.

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

PETITION FOR REVIEW

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The People of the State of California respectfully petition for review of the published decision by the Court of Appeal, Fifth Appellate District, filed on August 10, 2018, in *People v. McKenzie* (case number F073942), striking McKenzie's enhancements for four prior felony convictions for controlled substances violations. (See typed opn., attached.) No petition for rehearing was filed. This petition is timely. (Cal. Rules of Court, rule 8.500.)

ISSUE PRESENTED FOR REVIEW

After the time to appeal the underlying conviction in a probation case has expired, may the probationer still claim the benefit of a change in the law on appeal from the revocation of probation and imposition of a sentence that had been suspended?

STATEMENT OF THE CASE

On November 4, 2014, defendant Douglas Edward McKenzie resolved the charges in three cases by pleading guilty in Madera County Superior Court to two felony counts of transportation or sale of methamphetamine (Health & Saf. Code, § 11379, subd. (a)), two felony counts of possession for sale of methamphetamine (Health & Saf. Code, § 11378), and a misdemeanor. (Clerk's Transcript [CT] 17, 21, 25.) McKenzie also admitted that he had suffered four prior felony convictions for controlled substances violations, subjecting him to enhanced punishment pursuant to the version of Health and Safety Code section 11370.2, subdivision (c), in effect at that time. (CT 17, 21, 25.) And McKenzie admitted that he had suffered three prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). (CT 17, 21, 25.)

The superior court suspended imposition of sentence, granted McKenzie probation for five years on all three cases and ordered him to attend drug court. (CT 18, 22, 26.) McKenzie's time to appeal the

judgment expired on January 3, 2015 (Cal. Rules of Court, rule 8.308) without any appeal having been filed.

About a year and a half later, McKenzie was back in court, admitting probation violations in all three cases. (CT 47-49.) On June 1, 2016, the superior court denied probation and sentenced McKenzie to a split aggregate county jail term sentence of 22 years—10 years in county prison and 12 years of mandatory supervision, pursuant to Penal Code section 1170, subdivision (h)(5)(A). (I CT 83-91.) As part of that sentence, the superior court imposed sentences for the enhancements now at issue in this case: consecutive three-year terms for each of the four prior controlled-substance convictions pursuant to the version of Health and Safety Code section 11370.2, subdivision (c) still in effect at that time. (CT 83; 2 Reporter's Transcript [RT] 318-321.) The superior court imposed sentences for these enhancements, among others, in two of McKenzie's three cases, but then stated that they were stayed in one of the two cases. (2 RT 319-321.)

McKenzie appealed this sentence, claiming, inter alia, that that his sentencing enhancements should have been imposed only once. (See *People v. McKenzie* (Sept. 13, 2017, F073942) 2017 WL 4022359 [nonpub. opn][1].) The Court of Appeal agreed with McKenzie that, as status enhancements, they should have been imposed only once on the aggregate term. (*Ibid*.) The Court of Appeal therefore struck the stayed enhancement terms as requested. (*Ibid*.) As modified, the judgment was affirmed on September 14, 2017. (*Ibid*.)

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[1] The Court of Appeal's unpublished opinion in this case is relevant here because "it states reasons for a decision affecting the same defendant or respondent in another such action." (Cal. Rules of Court, rule 8.1115 (b)(2).)

McKenzie filed a petition for review, raising a single new issue: "does newly enacted Senate Bill 180, amending Health and Safety Code, section 11370.2 to abolish all previous qualifying prior convictions except for those involving a minor, apply retroactively to appellant's case which is not yet final on appeal?" (Petition for review in case no. S244929 at 5, some capitalization omitted.) This Court transferred the matter back to the Court of Appeal, with directions to "vacate its decision and reconsider the cause in light of S.B. 180 (Stats. 2017, ch. 677)."

The Court of Appeal found that the amendment to Health and Safety Code section 11370.2 applied in McKenzie's case. (*People v. McKenzie*, *supra*, typed opn. at p. 12 (*McKenzie*)). The court first agreed with the parties that the amendment applies retroactively to all cases that were not final on the effective date, January 1, 2018. (Typed opn. at p. 6.) It identified the issue as *when* the judgment in McKenzie's case was final for this purpose. (*Ibid*.) The Court disagreed with the People's argument that the order granting probation was a final judgment under Penal Code section 1237. (*Id.* at pp. 7-8.) Rather, the court reasoned that "the *sentence* is the judgment" for probation cases in which imposition of sentence was suspended. (*Id*. at p. 6.) That meant that McKenzie's case was not final, and the Court of Appeal ordered McKenzie's enhancements for his four prior controlled-substance convictions stricken. (*Id.* at pp. 12-14.)

The People did not file a petition for rehearing. The People seek review to resolve a conflict between districts of the Court of Appeal, to promote the uniformity of decisions, and to settle an important question of law that is likely to recur. (Cal. Rules of Court, rule 8.500 (b)(1))

REASON FOR GRANTING REVIEW

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT IN THE DISTRICTS OF THE COURT OF APPEAL ON AN IMPORTANT QUESTION OF LAW CONCERNING WHEN A JUDGMENT IS FINAL FOR PROBATIONERS WHO SEEK THE BENEFIT OF A CHANGE IN THE LAW

There is no question that the amendment to Health and Safety Code section 11370.2, like other ameliorative changes in criminal law, applies retroactively to judgments that are not yet final. The question presented here is *when* is the judgment in a probationer's case final for this purpose if the probationer's guilt has been adjudicated or admitted, he or she is placed on probation with imposition of sentence suspended, and then sentence is imposed at some later date? The Third and Fifth Districts of the Court of Appeal have come to different conclusions.

A. The Change in the Law: Effective January 1, 2018, An Amendment to Health and Safety Code Section 11370.2 Abolished All but One of the Sentencing Enhancements in Former Section 11370.2

At the time of McKenzie's guilty plea, Health and Safety Code section 11370.2, subdivisions (a) through (c), included a series of sentencing enhancements for convictions for prior drug crimes. Defendants convicted of certain drug offenses received an additional three-year sentence for each prior qualifying conviction. (*Ibid*.) Those qualifying convictions, listed in former section 11370.2, consisted of eleven different drug offenses and conspiracy to commit them. (*Ibid*.)

Senate Bill 180 amended the section and abolished most of these enhancements. (Stats. 2017, ch. 677, § 1.) It removed ten of the eleven qualifying prior convictions. (*Ibid*.) The only remaining qualifying conviction is the use of a minor as an agent in the commission of a drug offense (Health & Saf. Code § 11380, subd. (a)). (Stats. 2017, ch. 677,

§ 1.) Put simply, section 11370.2 now provides for a sentencing enhancement only if the defendant has a prior conviction under section 11380.

Senate Bill 180 did not contain an urgency clause. (Stats. 2017, ch. 677, § 1.) Thus, it went into effect on January 1, 2018. (See *People v. Camba* (1996) 50 Cal.App.4th 857, 865-866 [operative date is "January 1 of the year following" enactment].)

B. The Recent Amendment to Health and Safety Code Section 11370.2 Applies Retroactively to Non-Final Judgments

The general principles of *Estrada* retroactivity are familiar to this Court. Section 3 of the Penal Code creates a default presumption that new laws apply prospectively only. (See *People v. Brown* (2012) 54 Cal.4th 314, 324.) Yet the courts will presume that the Legislature intended to apply a law reducing the punishment of an offense "to all nonfinal judgments." (*Ibid.*) Courts will make the same exception for laws that abolish a crime or enhancement. (See, e.g., *People v. Rossi* (1976) 18 Cal.3d 295, 301.) This exception to Penal Code section 3 draws its name from this Court's decision in *In re Estrada* (1965) 63 Cal.2d 740.

Here, Senate Bill 180 abolished numerous sentencing enhancements when it amended Health and Safety Code section 11370.2. Nothing in Senate Bill 180 indicates that the Legislature intended prospective-only application. (Stats. 2017, ch. 677, § 1.) Thus, current section 11370.2, effective January 1, 2018, applies retroactively to judgments that are not yet final for the purpose of review.

A conviction is final for purposes of retroactivity analysis when direct appeal has concluded and a petition for writ of certiorari in the United States Supreme Court has been denied or the time for filing such a petition

has expired. (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306; see *Caspari v. Bohlen* (1994) 510 U.S. 383, 390.)

C. Courts Have Disagreed on the Question of When the Determination of Guilt Underlying an Order Granting Probation Become Final in a Probation Case

When McKenzie pleaded guilty to drug-related charges and admitted four prior felony convictions for controlled-substance offenses, the law provided that he "shall receive. . . a full, separate, and consecutive three-year term for each" of those prior convictions. (Former Health & Saf. Code § 11380, subd. (c)). The Legislature abolished those enhancements about three years later. McKenzie would be entitled to the benefit of the change if the determination of his guilt was not final. Thus, the question becomes, when, for retroactivity, does a determination of guilt that results in an order granting probation and suspending imposition of sentence become final?

The Third and Fifth Districts of the Court of Appeal have come to different conclusions.

1. *People v. Superior Court* (*Rodas*) (2017) 10 Cal.App.5th 1316 – Under section 1237, a probation order is a "final judgment" for the purpose of appeal and retroactivity, even if imposition of sentence is suspended

The Third District held that the order granting probation is the relevant final judgment for *Estrada* purposes. (*People v. Superior Court* (*Rodas*), *supra*, 10 Cal.App.5th at p. 1322 (*Rodas*).) In 2007, Rodas pleaded no contest to transportation of heroin for personal use (Health & Saf. Code, § 11352). (*Id*. at p. 1319.) Imposition of sentence was suspended and she was placed on probation for three years. (*Ibid*.) She proceeded to violate probation four times. The court reinstated probation three times, and then she absconded. (*Ibid*.) In 2014, some six and a half years after Rodas's no-contest plea, the Legislature limited section 11352 to

transportation for *sale*. A year after that, Rodas reappeared and convinced the superior court to allow her to withdraw her plea because of the change in the law. The People filed a petition for writ of mandate, and the Third District reversed.

The Third District held that Rodas was not entitled to retroactive application of the statutory amendment nor withdrawal of her plea (*Rodas, supra*, 10 Cal.App.5th at p. 1319) because she did not appeal the superior court's order granting probation, and so her conviction for transporting heroin became final for *Estrada* retroactivity purposes in 2007 (*id*. at p. 1326). The court reasoned that "'State convictions are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." [Citations.]'" (*Id*. at p. 1325, quoting *Beard v. Banks* (2004) 542 U.S. 406, 411.) Orders granting probation are considered a final judgment for purposes of filing an appeal — as to that order and to all that led up to it. (*Rodas*, at p. 325.) This is because Penal Code section 1237, subdivision (a), allows a defendant to appeal from "a final judgment of conviction" and defines that term to include "an order granting probation."

Because Rodas could have challenged her underlying convictions and admissions on appeal from the probation order, the Third District decided that Rodas could not challenge the matters adjudicated by her plea and admissions years later by appealing from the revocation of probation and imposition of sentence. "If the time to appeal the probation order lapses without an appeal having been taken, however, the defendant may not thereafter challenge the underlying conviction when appealing a subsequent order revoking probation and imposing a suspended sentence. [Citations.]" (*Rodas, supra*, 10 Cal.App.5th at p. 1325.) This is as true when imposition of sentence was suspended (*id.* at p. 1326) as it is when execution of

sentence is suspended. The *Rodas* court cited *People v. Howard*, which held: "'Since no appeal was taken within the allowable time from this [probation] order, appellant is now precluded from going behind the order granting probation' to challenge the merits of his conviction." (*Rodas, supra*, 10 Cal.App.5th at p. 1325, quoting *People v. Howard* (1965) 239 Cal.App.2d 75, 77.) The Third District also relied on *People v. Glaser*, which held that "following revocation of probation after imposition of sentence had been suspended, the defendant was precluded from challenging any matters giving rise to his conviction and the ensuing order granting him probation because he failed to timely perfect an appeal under Penal Code section 1237 from the probation order." *Rodas, supra*, 10 Cal.App.5th at p. 1325, citing *People v. Glaser* (1965) 238 Cal.App.2d 819, 821, disapproved on another ground by *People v. Barnum* (2003) 29 Cal.4th 1210, 1219, fn. 1 & 1221.)

In short, according to *Rodas*, finality depends on when the time for direct appeal has ended. To appeal the underlying determination of guilt in a probation case, a probationer must appeal from the order granting probation. When the time to file that appeal passes, the time for direct appeal has ended and the determination of guilt becomes final for *Estrada* purposes. This is true whether imposition or execution of sentence was suspended.

The Third District observed that important policies are at stake. First, "'[s]trict adherence to procedural deadlines and other requirements governing appeals that emanate from judgments entered upon pleas of guilty or no contest is *vital*, in view of the circumstance that such judgments represent the vast majority of felony and misdemeanor dispositions in criminal cases.'" (*Rodas, supra*, 10 Cal.App.5th at p. 1326, quoting *In re Chavez* (2003) 30 Cal.4th 643, 654, fn. 5, italics by the *Rodas* court.) Second, allowing defendants to set aside judgments of conviction

(or enhancement adjudications) years later "would also have the absurd effect of encouraging defendants to violate the terms of their probation in the hopes of extending the probation term to take advantage of any beneficial changes in the law during the probationary period." (*Rodas*, at p. 1326.) And finally, "it would severely prejudice the People by virtue of the passage of time . . . ." (*Ibid*.)

2. The opinion here — The sentence is the judgment, and when probation is granted and imposition of sentence has been suspended, there is no final judgment at that point for the purpose of retroactivity

When McKenzie pleaded guilty in three cases, he admitted that he had suffered four prior felony convictions for controlled substances violations, subjecting him to enhanced punishment pursuant to the version of Health and Safety Code section 11370.2, subdivision (c), in effect at that time. (*McKenzie*, *supra*, typed opn. at p. 2.) As McKenzie knew (see CT 17, 21, 25), those admissions potentially meant sentences of three years each. (Former Health & Saf. Code § 11370.2, subds. (a)-(c).) As in *Rodas*, imposition of sentence was suspended, and like Rodas, McKenzie was granted probation. Neither Rodas nor McKenzie appealed.

Like Rodas, McKenzie violated probation and then sought to improve his position based on a change in the law that occurred well after the time for appealing the probation order (and all antecedent proceedings) had expired. (*McKenzie*, *supra*, typed opn. at p. 3.)

But in contrast with Rodas, the Court of Appeal in McKenzie's case extended the benefit of the changed law to him. The Fifth District drew a distinction between probation cases in which sentence is imposed with execution suspended and cases in which imposition of sentence is suspended. (*McKenzie*, *supra*, typed opn. at pp. 6-7.) This distinction mattered because the Fifth District reasoned that "[i]n a criminal case, the

sentence is the judgment." (*Id.* at p. 6.) In the court's view, no judgment was pending against McKenzie until sentence was imposed. (*Ibid*.) The *McKenzie* Court acknowledged that Penal Code section 1237 states that an order granting probation is a "final judgment" for the purpose of appeal. (*Id.* at p. 7 & fn. 6.) But the Fifth District cited this Court's statement that a probation order "'does not have the effect of a judgment for other purposes.'" (*Id*. at p. 8, quoting *People v. Chavez* (2018) 4 Cal.5th 771, 786.) So, the Fifth District continued, McKenzie's appeal from the 2016 probation revocation proceeding was an "appeal from a judgment of conviction" and that judgment was therefore not final. (*McKenzie, supra*, typed opn. at p. 11.) The court stuck the four three-year enhancements for McKenzie's prior drug-related convictions. (*Id*. at pp. 12-14.)

3. The *McKenzie* court's attempt to distinguish *Rodas* does not solve the problem

The Fifth District disagreed with the Third District's opinion in *Rodas*. (*McKenzie, supra*, typed opn. at p. 11, fn. 8.) Yet, the Fifth District also found *McKenzie* distinguishable. (*Id*. at pp. 11-12.) However, the distinctions between the two cases are not meaningful and cannot obscure the conflict in the two decisions.

The Fifth District pointed out that, unlike Rodas, McKenzie did not file an untimely motion to withdraw his plea (see Pen. Code, § 1018). (*McKenzie, supra*, typed opn. at p. 11.) It is true that the two cases came before their respective courts in different ways. In *McKenzie*, the issue of retroactive application of the amendment to Health and Safety Code section 11370.2 was raised for the first time in a petition for review filed in this Court. (*Id*. at p. 3.) In *Rodas*, the People filed a petition for writ of mandate after the superior court granted Rodas's oral motion to withdraw her plea. (*Rodas, supra*, 10 Cal.App.5th at p. 1320.) The People challenged the superior court's action on two grounds in *Rodas*. (*Id*. at pp.

1321-1322.) First, the superior court lacked jurisdiction to grant Rodas's motion to withdraw her plea, because the motion was not made within six months of the plea as required by Penal Code section 1018. (*Id.* at p. 1322.) Second, because Rodas did not appeal the probation order, her conviction had long been final for retroactivity purposes. (*Ibid*.) The Third District agreed with both arguments.[2] (*Id*. at pp. 1324-1325.)

While these two issues were necessarily related in Rodas's case, examination of the *Rodas* opinion shows that resolution of each issue independently required reversal in the case. Even if Rodas had first raised the issue of retroactive application of the amendment to Health & Safety Code section 11352 in the appellate court, the Third District's analysis of finality would necessarily have been the same. And it would simply make no sense for McKenzie to avoid finality for the reason that he did *not* file a motion to withdraw his pleas.

The *McKenzie* court also distinguished *Rodas* by saying "[t]his is an appeal from a judgment of conviction, not from an order granting a motion to withdraw a plea." (*McKenzi*e, *supra,* typed opn. at p. 11.) But under the analysis of the *Rodas* court, McKenzie was not appealing from a "judgment of conviction," either. Under *Rodas*'s reasoning, McKenzie's time for challenging his "conviction," including the true finding of the prior-conviction allegations, began to run from the date of the probation order

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[2] Having found Rodas's motion to withdraw her plea untimely, the Third District did not discuss whether such a motion could be the right vehicle for raising a claim that the defendant is entitled to the benefit of a change in the law. Motions to withdraw a plea are generally supposed to be based on mistake, ignorance, or inadvertence or other factors overreaching defendant's free and clear judgment. (*People v. Patterson* (2017) 2 Cal.5th 885, 894.) "[G]ood cause" to withdraw a plea "does not include mere 'buyer's remorse' regarding a plea deal." (*People v. Simmons* (2015) 233 Cal.App.4th 1458, 1466.)

that issued upon his pleas and admissions. (See *Rodas*, *supra*, 10 Cal.App.5th at pp. 1322, 1325.) That was the "'final judgment' for purposes of taking an appeal," according to the Third District. (*Id.* at p. 1322, quoting Pen. Code, § 1237.) Under *Rodas*, McKenzie could no longer challenge the merits of his underlying convictions by appealing the revocation order and resulting imposition of sentence. (*Rodas*, at p. 1322.) In short, the *McKenzie* Court's comment, which appears to be framed as a distinction, actually highlights the conflict between the two cases.

D. This Court Should Grant Review to Resolve the Conflict and Further the Uniformity of Decisions

Had McKenzie's appeal been decided by the *Rodas* court, he would have gotten a different result. The Third District would have found that the order granting McKenzie probation was a final judgment for purposes of filing an appeal. The Third District would have reasoned that Penal Code section 1237, subdivision (a), allows a defendant to appeal from "a final judgment of conviction" and defines that term to include "an order granting probation." (See *Rodas*, *supra*, 10 Cal.App.5th at pp. 1322, 1325.) The Third District would have said that once McKenzie allowed the time to appeal the probation order to "lapse[] without an appeal having been taken," he could not later "challenge the underlying conviction when appealing a subsequent order revoking probation" and imposing sentence after imposition of sentence had been suspended. (*Ibid.*)

The Fifth District recognized as much, saying: "To the extent *Rodas* concluded a grant of probation with suspended imposition of sentence operates as a final judgment for the purposes of *Estrada*'s retroactivity, such that defendants who are granted probation with imposition of sentence suspended are never entitled to the retroactive benefit of a change in the law because their judgments are final 60 days after probation is granted, we respectfully disagree." (*McKenzie*, *supra*, typed opn. at p. 11, fn. 8.)

For the purpose of the retroactive application of new laws, "[t]he key date is the date of final judgment." (*In re Estrada*, *supra*, 63 Cal.2d at p. 744.) This Court should grant review "to secure uniformity of decision" (Cal. Rules of Court, rule 8.500 (b)(1)) regarding the "key" date of finality in probation cases in which imposition of sentence is suspended.

II. *RODAS* AND *MCKENZIE* PRESENT IMPORTANT QUESTIONS THAT SHOULD BE SETTLED BY THIS COURT

Whether or not *Rodas* and *McKenzie* are in conflict, they raise important questions that should be answered by this Court.

A. This Will Be a Recurring Issue

The issue of whether a conviction is final for *Estrada* retroactivity is of course not limited to the amendment to Health and Safety Code section 11370.2. Whenever the Legislature's or the electorate's creation, amendment, or repeal of statutes results in the potential reduction of the punishment, the question of whether the change in the law applies to probationers[3] will arise in multiple cases in the following common situation: the probationer's conviction (and any true findings on enhancements) is final before the effective date of the new law, but imposition of sentence was suspended in the probationer's case and he or she is still on probation after the effective date.

Many probation orders follow pleas of guilty or no contest and admissions to enhancement allegations. Clear identification of the "key" date of finality for probation cases in which imposition of sentence is suspended affects not only what happens after probation violations but also affects the post-charging decisions by all parties regarding the wisdom of a plea agreement and its terms. And, as this Court has said, "strict

[3] In 2017, 137,412 California defendants were placed on probation. (https://openjustice.doj.ca.gov/crime-statistics/adult-probation.)

adherence" to the requirements that govern appeals from judgments based on pleas of guilty or no contest is "vital," because they "represent the vast majority of felony and misdemeanor dispositions in criminal cases." **(***In re Chavez*, *supra*, 30 Cal.4th at p. 654, fn. 5.) The People agree, and add that adherence is aided by clarity and certainty. Guidance from this Court on the "key" date of finality for probation cases in which imposition of sentence is suspended would be most welcome.

B. *McKenzie* and *Rodas* Call into Question the Correctness and Viability of at Least Two Prior Published Opinions

1. *McKenzie* and *Rodas* place the continued viability of *People v. Eagle* at issue

Before the Third District decided *Rodas*, it decided *People v. Eagle* (2016) 246 Cal.App.4th 275, 279.) In *Eagle*, the People conceded that for purposes of retroactivity an order granting probation and suspending imposition of sentence was not a final judgment. (See *id*. at p. 279.) The Third District accepted the concession without further analysis, and went on to discuss the remedy. (*Id.* at pp. 279-280.) By the time *Rodas* and *McKenzie* came along, the People, with the benefit of further deliberation, were no longer making that concession. The Third District, however, has been understandably reluctant to disapprove its recent decision in *Eagle*. The Third District's attempt to distinguish *Eagle* in *Rodas*, while the Fifth District relied on *Eagle* in *McKenzie*, has muddied the water by making it seem like a motion to withdraw the guilty plea and Penal Code section 1018 are an integral part of the retroactivity analysis. (See *McKenzie*, *supra*, typed opn. at pp. 8-10; *Rodas*, *supra*, 10 Cal.App.5th at pp. 1322-1323.)

2. *McKenzie* and *Rodas* place the continued viability of *In re May* at issue

The Fifth District cited *In re May* (1976) 62 Cal.App.3d 165 for the proposition that "an order granting probation does not have the effect of a final judgment in the context of *Estrada*'s retroactivity." (*McKenzie*, *supra*, typed opn. at p. 8, citing *In re May*, at p. 169.) And to be sure, in *In re May*, the court declared that "no final judgment was issued" for purposes of *Estrada* retroactivity because proceedings in May's case were suspended and he was granted probation. (*In re May*, at p. 169.) The court concluded that May was entitled to benefit when the law changed some four years[4] after he was placed on probation, and granted his habeas corpus petition.

On the other hand (and as the Fifth District recognized, *McKenzie*, *supra*, typed opn. at p. 11, fn. 8), the *Rodas* court questioned whether *May*'s conclusion — that May's conviction was not final for retroactivity purposes under *Estrada* — remained viable under subsequent authority. (*Rodas*, 10 Cal.App.5th at pp. 1324.) The *Rodas* court pointed out that "'[s]tate convictions are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." [Citations.]' (*Beard v. Banks* (2004) 542 U.S. 406, 411.)" (*Rodas*, at p. 1325.)

[4] Like Rodas, May was still on probation when the law changed in part because he absconded for a while and violated probation more than once. (See *Rodas*, 10 Cal.App.5th at p. 1319, 1326; *In re May*, 62 Cal.App.3d at p. 167.)

CONCLUSION

The People respectfully request that this Court grant review of the Fifth Appellate District's decision in *People v. McKenzie*.

Dated: September 18, 2018 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 4,547 words.

Dated: September 18, 2018

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/S/ CATHERINE CHATMAN

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ATTACHMENT

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DOUGLAS EDWARD MCKENZIE, Defendant and Appellant.	F073942 (Super. Ct. Nos. MCR047554, MCR047692, MCR047982)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Ernest J. LiCalsi, Judge.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, R. Todd Marshall, Raymond L. Brosterhous II, Eric L. Christoffersen and Catherine Chatman, Deputy Attorneys General, for Plaintiff and Respondent

-ooOoo-

Defendant Douglas Edward McKenzie was convicted by guilty plea of several drug-related charges in three cases. On appeal, he contended (1) he was entitled to three more days of custody credit, and (2) the trial court erred in staying prior felony drug conviction enhancements and prior prison term enhancements. We modified the

judgment on these two issues and affirmed as modified. Our opinion was granted review and remanded to this court with directions to vacate our decision and reconsider in light of the new Senate Bill No. 180 (Stats. 2017, ch. 677, § 1), which amended the sentencing enhancements included in Health and Safety Code section 11370.2.[1] We received supplemental briefing from the parties. In addition to our previous modifications, we now order stricken all of the section 11370.2, subdivision (c) enhancements, vacate the sentence, and remand for resentencing.

BACKGROUND

On November 4, 2014, defendant pled guilty to charges in three cases and admitted the special allegations, as follows.

In case No. MCR047554 (case 1), defendant pled guilty to transportation or sale of methamphetamine (§ 11379, subd. (a)) and misdemeanor possession of narcotics paraphernalia (§ 11364.1). He admitted having suffered four prior felony drug convictions (§ 11370.2, subd. (c)) and having served three prior prison terms (Pen. Code, § 667.5, subd. (b)).

In case No. MCR047692 (case 2), defendant pled guilty to possession for sale of methamphetamine (§ 11378) and transportation or sale of methamphetamine (§ 11379, subd. (a)). He admitted committing these offenses while on bail or release (Pen. Code, § 12022.1).

In case No. MCR047982 (case 3), defendant pled guilty to possession for sale of methamphetamine (§ 11378). He admitted having suffered the same four prior felony drug convictions (§ 11370.2, subd. (c)) and having served the same three prior prison terms (Pen. Code, § 667.5, subd. (b)) as he had admitted in case 1.

The same day, the trial court suspended imposition of sentence, granted defendant five years' probation in all three cases, and ordered him to attend drug court.

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1 All statutory references are to the Health and Safety Code unless otherwise noted.

On March 3, 2016, the Madera County Probation Department filed a first amended petition for revocation of probation in all three cases.

On April 1, 2016, defendant admitted the probation violations.

On June 1, 2016, the trial court revoked probation and declined to reinstate it. The court heard argument and considered the probation officer's report, then sentenced defendant to an aggregate term of five years, plus four three-year prior felony drug conviction enhancements (§ 11370.2, subd. (c)) and three one-year prior prison term enhancements (Pen. Code, § 667.5, subd. (b)). The court imposed these seven enhancements in case 1. In case 3, the court imposed the same seven enhancements, but either stayed or struck them. In sum, the court sentenced defendant to a split term of 22 years—10 years to be served in county jail and 12 years on mandatory supervision (Pen. Code, § 1170, subd. (h)(5)(B)).

On June 16, 2016, defendant filed a notice of appeal in all three cases. On September 13, 2017, we filed our opinion.

On October 11, 2017, the governor signed Senate Bill No. 180, which would become effective on January 1, 2018.

On October 20, 2017, defendant petitioned the California Supreme Court for review based on Senate Bill No. 180.

On December 20, 2017, the California Supreme Court granted review and remanded the case back to us with directions to vacate our decision and reconsider in light of Senate Bill No. 180.

On January 1, 2018, Senate Bill No. 180 became effective.

DISCUSSION

I. PRESENTENCE CUSTODY CREDITS

Defendant contends he is entitled to three more days of conduct credit in case 1, and thus his current sentence is unauthorized.[2] The People counter that defendant was actually granted one extra day. Defendant replies that the People's contention is based on the incorrect presumption that credits are not calculated cumulatively. We agree with defendant.

For purposes of calculating presentence conduct credit, time is cumulative. (*People v. Culp* (2002) 100 Cal.App.4th 1278, 1284.) Therefore, a defendant's noncontinuous periods of presentence custody must be aggregated to calculate the conduct credit earned. (*Id.* at p. 1283.) Penal Code section 4019 provides that a person confined prior to sentencing may earn two days of conduct credit for every two days served. (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 588.) Here, because defendant was confined for an aggregate of 118 actual days for noncontinuous periods prior to sentencing, he earned 118 days of conduct credit, for a total of 236 days of credit.

II. STATUS ENHANCEMENTS

The parties agree that the trial court imposed the same seven status enhancements—four prior felony drug conviction enhancements and three prior prison term enhancements—in both case 1 and case 3. In the latter case, the trial court orally imposed the enhancements and then stayed them pursuant to section 654.[3]

A. Section 11370.2, Subdivision (c) Enhancements

By way of petition for review, defendant contended that he should receive the benefit of Senate Bill No. 180, which recently amended section 11370.2. The Supreme

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2 Defendant attempted to resolve this issue in the trial court by sending a letter to the court.

3 The sentencing minute orders state that the enhancements were stricken pursuant to section 1385, not stayed.

Court granted review and remanded the case to us with directions to vacate and reconsider in light of this recent amendment. The parties have submitted supplemental briefs.

Senate Bill No. 180 became effective on January 1, 2018. The bill narrows and limits the scope of section 11370.2 enhancements only to prior convictions for sales of narcotics involving a minor in violation of section 11380.[4] In this case, defendant's prior felony drug convictions were for violations of sections 11379.6, subdivision (a) and 11378; none was for a violation of section 11380, involving a minor, as required by the new amendment.

Absent some indication to the contrary in the bill, courts presume the Legislature intended amendments that reduce the punishment for a crime to apply retroactively, at least in cases that are not yet final. (See *People v. Brown* (2012) 54 Cal.4th 314, 323-324; see *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) Nothing in Senate Bill No. 180 indicates the Legislature intended prospective application only. (Stats. 2017, ch. 677, § 1.)

Generally, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed" (*Estrada, supra,* 63 Cal.2d at p. 748) if the amended statute takes effect before the judgment of conviction becomes final. (*Id.* at p. 744 ["If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when

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4 Section 11370.2, subdivision (c) now provides: "Any person convicted of a violation of, or of a conspiracy to violate, Section 11378 or 11379 with respect to any substance containing a controlled substance specified in paragraph (1) or (2) of subdivision (d) of Section 11055 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and *consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11380*, whether or not the prior conviction resulted in a term of imprisonment." (Italics added.)

the prohibited act was committed, applies."].) "This rule rests on an inference that when the Legislature has reduced the punishment for an offense, it has determined the 'former penalty was too severe' (*Estrada*, at p. 745) and therefore 'must have intended that the new statute imposing the new lighter penalty ... should apply to every case to which it constitutionally could apply' (*ibid.*)." (*People v. DeHoyos* (2018) 4 Cal.5th 594, 600.)

Accordingly, Senate Bill No. 180 applies retroactively to cases in which the judgment was not yet final on January 1, 2018, as the parties agree. The threshold question, then, is whether defendant's judgment was final on that date. On this question, the parties disagree.

In a criminal case, the *sentence* is the judgment. (*People v. Wilcox* (2013) 217 Cal.App.4th 618, 625 ["'A "sentence" is the judgment in a criminal action [citations]; it is the declaration to the defendant of his disposition or punishment once his criminal guilt has been ascertained.'"'"].) When probation is granted, however, the timing of the judgment can vary because a trial court may grant probation by either suspending *imposition* of the sentence, or by imposing the sentence and suspending its *execution*. (*People v. Segura* (2008) 44 Cal.4th 921, 932.) These two situations affect when the judgment becomes final, which in turn affects whether a defendant is eligible to seek the retroactive benefit of a change in law.

In the first situation, when the trial court initially suspends *imposition* of sentence and grants probation, "no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation." (*People v. Howard* (1997) 16 Cal.4th 1081, 1087 (*Howard*).) No judgment has been rendered against him, or ever will be if he successfully completes probation. But if he fails to successfully complete probation and instead violates probation, the trial court may revoke and terminate probation, and then impose sentence in its discretion, thereby rendering judgment. (Pen. Code, § 1203.2, subd. (c); *Howard, supra,* at p. 1087.) That judgment will become final

if the defendant does not appeal within 60 days. (See California Rules of Court, rule 8.308(a).)[5]

In the second situation, when the trial court initially imposes sentence, but suspends *execution* of that sentence and grants probation, a judgment has been rendered. (*People v. Mora* (2013) 214 Cal.App.4th 1477, 1482 [imposition of a sentence is equated with entry of a final judgment, even if its execution is suspended and the defendant is placed on probation].) That judgment will become final if the defendant does not appeal within 60 days. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1420-1421; see rule 8.308(a).) If the defendant violates probation, the trial court may revoke and terminate probation, but it must then order execution of the originally imposed sentence; the trial court has no jurisdiction to do anything other than order the exact sentence into execution. (Pen. Code, § 1203.2, subd. (c); *Howard, supra,* 16 Cal.4th at pp. 1087-1088; *People v. Martinez* (2015) 240 Cal.App.4th 1006, 1017.)

In this case, the People argue that even though the trial court suspended *imposition* of sentence, defendant's judgment is nevertheless final because Penal Code section 1237 deems an order granting probation a final judgment.[6] Thus, the People assert, defendant's judgment became final 60 days after the trial court granted probation in 2014, and *Estrada* does not apply to him to allow retroactive application of Senate Bill No. 180. We disagree.

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5 All references to rules are to the California Rules of Court unless noted otherwise.

6 Penal Code section 1237 provides: "An appeal may be taken by the defendant from both of the following: [¶] (a) Except as provided in [Penal Code] Sections 1237.1, 1237.2, and 1237.5, from a final judgment of conviction. A sentence, *an order granting probation*, or the commitment of a defendant for insanity, the indeterminate commitment of a defendant as a mentally disordered sex offender, or the commitment of a defendant for controlled substance addiction shall be deemed to be a final judgment within the meaning of this section. Upon appeal from a final judgment the court may review any order denying a motion for a new trial. [¶] (b) From any order made after judgment, affecting the substantial rights of the party." (Italics added.)

"It is true that, under [Penal Code] section 1237, an order granting probation is deemed a 'final judgment' for the purpose of taking an appeal. [Citation.] [The Supreme Court has] explained, however, that such an order 'does not have the effect of a judgment for other purposes.'" (*People v. Chavez* (2018) 4 Cal.5th 771, 786; *Howard, supra,* 16 Cal.4th at p. 1087 ["The probation order is considered to be a final judgment only for the 'limited purpose of taking an appeal therefrom.'"]; *People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796 [same].) Indeed, it has been held that an order granting probation does not have the effect of a final judgment in the context of *Estrada*'s retroactivity. (*In re May* (1976) 62 Cal.App.3d 165, 169 (*May*) [order suspending proceedings and granting probation did not have the effect of a final judgment for purposes of this case; "the rationale of *Estrada* applies to this case because the amendatory statute became effective after the commission of the act but before the judgment of conviction was final"].)

To support their argument that defendant's judgment is final under Penal Code section 1237, the People rely on *People v. Superior Court (Rodas)* (2017) 10 Cal.App.5th 1316 (*Rodas*). In 2007, Rodas pled no contest to transporting heroin under former section 11352. (*Rodas*, *supra,* at p. 1318.) The trial court suspended imposition of sentence and granted three years' probation. Rodas violated probation multiple times, the last time in 2009, and then absconded. She appeared in court in 2015, and filed a "motion to vacate her felony transportation conviction and replace it with a misdemeanor sentence for simple possession" based on an amendment to section 11352 effective on January 1, 2014. (*Rodas, supra,* at pp. 1319, 1321.) She later moved to withdraw her nearly nine-year-old plea. The trial court granted the motion to withdraw the plea and reinstated all the original charges. (*Id.* at p. 1320.)

The People petitioned for a writ of mandate directing the trial court to vacate its order allowing Rodas to withdraw her plea. (*Rodas, supra,* 10 Cal.App.5th at pp. 1319-1320.) In granting writ relief, the appellate court considered the People's argument that

Rodas's judgment was final because of the "interplay" between Penal Code section 1018, which addresses when a guilty plea may be withdrawn (e.g., within six months of an order granting probation),[7] and Penal Code 1237, which addresses orders (in addition to a final judgment) from which a defendant may appeal (e.g., an order granting probation). (*Rodas*, *supra,* at p. 1321.)

The *Rodas* court acknowledged it had recently decided *People v. Eagle* (2016) 246 Cal.App.4th 275 (*Eagle*), where it concluded a change in law applied retroactively under *Estrada*. There, in September 2013, Eagle pled no contest to transporting methamphetamine (§ 11379, subd. (a)). The trial court suspended imposition of sentence and granted Eagle three years' probation. In March 2015, Eagle moved to vacate his felony conviction for transporting methamphetamine (§ 11379, subd. (a)) and have it replaced with a misdemeanor conviction for possessing methamphetamine (§ 11377, subd. (a)), based on an amendment to section 11379 that had become effective on January 1, 2014. The trial court denied the motion. (*Eagle, supra,* at p. 278.) On appeal, the People conceded Eagle's "sentence was not final at the time the amendments to section 11379 took effect, as the trial court had suspended imposition of sentence and placed defendant on probation. The People also concede[d] that because the judgment was not final, [Eagle] was entitled to benefit retroactively from the changes to section 11379." (*Id* at p. 279.) The appellate court agreed, reversing the conviction and remanding. (*Id.* at pp. 279-280.)

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[7] Penal Code section 1018 provides in relevant part: "On application of the defendant at any time before judgment *or within six months after an order granting probation is made if entry of judgment is suspended*, the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." (Italics added.) The six-month limit was added to this provision in 1991. (Stats. 1991, ch. 421, § 1; see *People v. Miranda* (2004) 123 Cal.App.4th 1124, 1131-1133.)

The *Rodas* court pointed out that, in *Eagle*, it did not consider Penal Code section 1018 or its "effect ... on a trial court's jurisdiction to grant an untimely motion to withdraw a guilty plea," and thus *Eagle* was "of no help in determining the effect of the statute on Rodas's ability to belatedly withdraw her guilty plea." (*Rodas, supra,* 10 Cal.App.5th at pp. 1322-1323.) *Rodas* concluded the trial court exceeded its jurisdiction when it granted Rodas's motion to withdraw her plea after expiration of Penal Code section 1018's six-month period following the order granting probation. (*Rodas, supra,* at p. 1324.) *Rodas* explained: "Because Rodas did not appeal the court's order granting probation, the judgment of conviction for transporting heroin became final for retroactivity purposes in 2007. She is not entitled, then, to the benefit of the amendment to section 11352, which became effective nearly seven years later in 2014. In other words, *in this context, although imposition of Rodas's sentence was suspended, the process to appeal the conviction based on her no contest plea has ended, rendering final the conviction for retroactivity purposes.*" (*Id.* at p. 1326, italics added.)[8]

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[8] Although the *Rodas* court did not explicitly disapprove its own prior opinion in *Eagle, supra,* 246 Cal.App.4th 275, it did point out that the People conceded in *Eagle* that *Estrada* applied, whereas the People did not concede in *Rodas*. (*Rodas, supra,* 10 Cal.App.5th at p. 1322.) And, as noted, *Rodas* especially distinguished *Eagle* on the basis of Penal Code section 1018, concluding *Eagle* was not authority for unconsidered propositions and was not helpful in determining the effect of the statute on Rodas's ability to belatedly withdraw her guilty plea. *Rodas* concluded: "Now that the issue is squarely before us, we conclude the People have the better argument." (*Rodas, supra,* at p. 1323.)

We note that *Rodas* distinguished *May*, as it did *Eagle*, because it did not consider Penal Code section 1018, but *Rodas* also questioned the continued viability of *May*'s conclusion regarding the applicability of *Estrada*:

"We also conclude that *In re May*[, *supra,*] 62 Cal.App.3d 165, 167-169 ..., which Rodas argues should control the instant matter, does not dictate a different result. There, the court granted a petition for writ of habeas corpus to set aside the trial court's order modifying probation to include a jail term after the Legislature had amended the statute to which the defendant pleaded guilty to make the offense a misdemeanor punishable by a fine. *May* was decided decades before the Legislature amended Penal Code section 1018

Unlike *Rodas*, defendant did not seek to withdraw his plea, and there is no interplay between Penal Code sections 1018 and 1237 to consider. This is an appeal from a judgment of conviction, not from an order granting a motion to withdraw a plea. Had the trial court initially imposed sentence in 2014 and suspended its execution, we would agree that defendant's judgment would have become final 60 days later and he could not now obtain the retroactive benefit of a change in law under *Estrada*. But this did not occur. Instead, the trial court suspended imposition of sentence when it granted probation. Defendant timely appealed the trial court's 2016 sentence, which included

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to include the strict six-month time limit for withdrawing a guilty plea when the court grants probation. (Stats. 1991, ch. 421, § 1, p. 2172.) Because *May* did not consider Penal Code section 1018 and the statute's effect on a court's jurisdiction to grant a belated motion to withdraw a no contest plea, the opinion is not helpful.

"Even if *May* was not distinguishable on that ground, we question the continued viability of the court's conclusion that the defendant's conviction was not final for retroactivity purposes under *Estrada*. (*May, supra,* 62 Cal.App.3d at p. 169.) 'State convictions are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."'" (*Rodas, supra*, 10 Cal.App.5th at pp. 1324-1325, fn. omitted.)

In a footnote attached to the first sentence of the second paragraph above, *Rodas* noted: "*People v. Amons* (2005) 125 Cal.App.4th 855, 869, footnote 8, in dicta, also appears to recognize that a defendant who is granted probation with imposition of sentence suspended is entitled to the retroactive benefit of a change in the law even though the judgment of conviction is final for purposes of appeal. For the same reasons, we disagree." (*Rodas, supra*, 10 Cal.App.5th at pp. 1324-1325, fn. 1; see *People v. Amons*, *supra,* at p. 869, fn. 8 ["If imposition of sentence has instead been suspended and probation has been granted, while the judgment is final for the limited purpose of taking an appeal therefrom, for other purposes '"the criminal proceedings have been 'suspended' prior to the imposition of judgment and pending further order of the court,"' so 'no judgment has been entered and no sentence has been imposed.'"].)

To the extent *Rodas* concluded a grant of probation with suspended imposition of sentence operates as a final judgment for the purposes of *Estrada*'s retroactivity, such that defendants who are granted probation with imposition of sentence suspended are never entitled to the retroactive benefit of a change in the law because their judgments are final 60 days after probation is granted, we respectfully disagree.

section 11370.2 enhancements, and the time for petitioning for a writ of certiorari in the United States Supreme Court has not yet passed. (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306.)[9] Accordingly, we conclude defendant's judgment is not final, *Estrada* applies, and defendant is entitled to the benefit of Senate Bill No. 180. (See *Eagle, supra,* 246 Cal.App.4th 279-280; *May, supra,* 62 Cal.App.3d at p. 169.) The section 11370.2 enhancement allegations must be stricken.

B. Penal Code Section 667.5, Subdivision (b) Enhancements

Status enhancements, such as those imposed pursuant to Penal Code section 667.5, subdivision (b), go to the nature or status of the defendant in general, such as his criminal history of prior convictions and prior prison terms. (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936 ["Sentence enhancements for prior prison terms are based on the defendant's status as a recidivist, and not on the underlying criminal conduct, or the act or omission, giving rise to the current conviction."])[10] Status enhancements are not

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9 "'[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1046, citing *In re Pine* (1977) 66 Cal.App.3d 593, 594; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)'" (*People v. Vieira, supra,* 35 Cal.4th at p. 306, quoting *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.)

A petition for writ of certiorari is deemed timely filed with the United States Supreme Court if filed with its clerk within 90 days after entry of judgment of a state court of last resort. (U.S. Sup. Ct. Rule 13(1) ["Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."]; see *In re Pine, supra,* 66 Cal.App.3d at p. 596.)

10 As noted above, section 11370.2, subdivision (c) sentencing enhancements are also status enhancements. (*People v. Edwards* (2011) 195 Cal.App.4th 1051, 1058 ["The enhancements provided for in section 11370.2 are status enhancements, in that they pertain to defendant's status as a drug conviction recidivist."].)

specifically attached to certain offenses, but are instead added one time only to the total aggregate sentence for determinate terms, regardless of the number of counts. (*People v. Williams* (2004) 34 Cal.4th 397, 402 [status enhancements "'have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence'"].)

Status enhancement are not subject to the one-third term limitation of Penal Code section 1170.1, subdivision (a), and must be imposed at full term. (Pen. Code, § 1170.1, subd. (a) ["the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for *applicable enhancements for prior convictions, prior prison terms*, and [Penal Code] Section 12022.1.... The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any *specific enhancements* applicable to those subordinate offenses" (italics added)]; Pen. Code, § 1170.11 ["[a]s used in [Penal Code] Section 1170.1, the term 'specific enhancement' means an enhancement that relates to the circumstances of the crime"]; *People v. Beard* (2012) 207 Cal.App.4th 936, 941-942 [Pen. Code, § 1170.1's reference to *specific* enhancements is not a reference to *status* enhancements; Pen. Code "[s]ection 1170.1, subdivision (a) applies the one-third limit to 'specific enhancements applicable to those subordinate offenses'"].)

Here, the Penal Code section 667.5, subdivision (b) status enhancements should have been imposed only once on the aggregate term. The second set of enhancements should not have been imposed, and they must be stricken.

DISPOSITION

The sentence is vacated and the matter remanded to the trial court for resentencing with the following considerations: (1) in case No. MCR047554, the number of conduct credits must be increased to 118, for a total of 236 days of credits; (2) all of the prior

felony drug conviction enhancements (Health & Saf. Code, § 11370.2, subd. (c)) must be stricken; and (3) in case No. MCR047982, the three prior prison term enhancements (Pen. Code, § 667.5, subd. (b)) must be stricken. In all other respects, the judgment of conviction is affirmed. The court is directed to forward certified copies of the amended sentencing orders and abstract of judgment to the appropriate entities.

Franson

FRANSON, Acting P.J.

WE CONCUR:

Smith

SMITH, J.

Meehan

MEEHAN, J.

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On September 18, 2018, I electronically served the attached **PETITION FOR REVIEW** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on September 18, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 18, 2018, at Sacramento, California.

P. Robles
Declarant

/s/ P. Robles
Signature

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