

No. S281488

**In the Supreme Court of the State of California**

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THE PEOPLE OF THE STATE OF CALIFORNIA,  
*Plaintiff and Respondent,*  
v.  
OSCAR LOPEZ,  
*Defendant and Appellant.*

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Fourth Appellate District, Division Two, Case No. E080032  
San Bernardino County Superior Court, Case No. FWV1404692  
The Honorable Bridgid M. McCann, Judge

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**ANSWER TO PETITION FOR REVIEW**

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## ISSUE PRESENTED

Do Assembly Bill No. 333's changes to the Penal Code section 186.22 gang enhancement apply to appellant's case, in which his gang enhancement was affirmed on appeal and the legislative changes were enacted thereafter while the case was conditionally remanded only for resentencing?

## INTRODUCTION

This case concerns a question about the retroactive application of new ameliorative criminal legislation. Under *In re Estrada* (1965) 63 Cal.2d 740, it is presumed that: "(i) in the absence of a contrary indication of legislative intent, (ii) legislation that ameliorates punishment (iii) applies to all cases that are not yet final as of the legislation's effective date." (*People v. Esquivel* (2021) 11 Cal.5th 671, 675.) Here, appellant Oscar Lopez appealed his convictions for various offenses and sentence enhancements, including a gang enhancement under Penal Code section 186.22.<sup>1</sup> The Court of Appeal affirmed in part and conditionally remanded for resentencing on grounds unrelated to the gang enhancement. After the remittitur issued in that appeal, but before the resentencing hearing, the Legislature passed Assembly Bill No. 333 (2021-2022 Reg. Sess.) (AB 333), which altered the requirements for the gang enhancement, making it harder to prove. The resentencing court, over Lopez's objection, declined to apply AB 333 to his gang enhancement.

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<sup>1</sup> All further statutory references are to the Penal Code.

On appeal from that resentencing, the People argued that the trial court's decision not to apply AB 333 was proper because Lopez's convictions and enhancements were final for purposes of the *Estrada* rule before the passage of AB 333. The People's theory, based primarily on statements by this Court in *People v. Padilla* (2022) 13 Cal.5th 152 and *People v. Wilson* (2023) 14 Cal.5th 839, was that Lopez's convictions and enhancements became final when they were affirmed on appeal, even though the case was conditionally remanded to the trial court for resentencing. The Court of Appeal rejected that theory but affirmed on a different ground. The Court of Appeal reasoned instead that the trial court at the resentencing hearing properly declined to apply AB 333 because, given the limited remand specified by the Court of Appeal's prior opinion, it lacked jurisdiction to do so.

Lopez now seeks review of that decision, arguing principally that the Court of Appeal's jurisdictional analysis is in conflict with other authority and is also meritless. But there is no square conflict on the issue. And to the extent the Court of Appeal's jurisdictional analysis is in tension with other authority, it is unlikely that an entrenched conflict will develop. In the briefing below, the People did not advance the jurisdictional theory espoused by the Court of Appeal, nor do the People intend to do so in future cases. The People instead maintain that appellant's convictions and enhancements were final in this case for purposes of the *Estrada* rule before passage of AB 333. But the Court of Appeal below rejected that theory, and there does not

appear to be any conflict of authority among the Courts of Appeal on that issue. Review is therefore unnecessary to secure uniformity or to settle an important question. (See Cal. Rules of Court, rule 8.500(b).)<sup>2</sup>

### STATEMENT OF THE CASE

Lopez, along with an accomplice, issued a gang challenge to two other men and then shot at them, killing one and injuring the other. (Opn. 3.) After a jury trial, Lopez was convicted of: first degree murder (§§ 187, subd. (a), 189, subd. (a)), with an enhancement for the discharge of a firearm by a principal in a gang-related crime causing great bodily injury or death (§ 12022.53, subds. (d), (e)(1)); willful, deliberate, and premeditated attempted murder (§§ 187, subd. (a), 664, subd. (a)), with an enhancement for personally and intentionally discharging a firearm (§ 12022.53, subd. (c)); shooting at an occupied motor vehicle (§ 246), with an enhancement for personally using a firearm (§ 12022.5, subd. (a)); and unlawful possession of a firearm (§ 29800, subd. (a)(1)). (Opn. 3.)

The jury also found true a gang-enhancement allegation (§ 186.22, subd. (b)) as to each of those convictions. (Opn. 3.) The

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<sup>2</sup> In a September 25, 2023, letter, the Office of the State Public Defender (OSPD) suggests depublication as an alternative to review. For the reasons discussed below, this case is not a suitable candidate for review. But the People agree that depublication would be appropriate here. In light of the possible tension between the Court of Appeal's analysis in this case—an analysis the People did not put forward below—and prior decisional authority, the opinion could cause confusion and mischief in future cases. (See Cal. Rules of Court, rule 8.1125.)

trial court found that Lopez had previously been convicted of a “strike” (§§ 667, subds. (b)-(i), 1170.12) and a serious felony (§ 667, subd. (a)) and had served three prior prison terms (former § 667.5, subd. (b)). (Opn. 3-4.) It sentenced Lopez to prison for 141 years to life. (Opn. 4.)

The Court of Appeal affirmed Lopez’s convictions and enhancements (Opn. 2), but it stayed the sentence on the shooting-at-an-occupied-vehicle conviction and struck the firearm enhancement attached to that conviction as well as all of the prior-prison-term enhancements (Opn. 4). The court stated: “The judgment as thus modified is conditionally reversed. On remand, the trial court shall consider whether to strike . . . the prior serious felony conviction enhancement[ ] or any of the firearm enhancements. If it does so . . . , it must resentence . . . defendant. Otherwise, it must reinstate the modified judgment.” (Opn. 4 [quoting the court’s own prior opinion]; see also CT 92, 130-131.) The remittitur in that appeal issued on September 11, 2020. (CT 90.)

On January 1, 2022, AB 333 became effective. (Opn. 4.) Among other things, AB 333 narrowed the definition of “criminal street gang” set forth in section 186.22, making it more difficult for the prosecution to establish the “criminal street gang” element of the gang offense and enhancements in that section. (Stats. 2021, ch. 699, § 3.)

The trial court held a hearing on October 13, 2022, at which it struck the prior-serious-felony enhancement but declined to do the same for the remaining firearm enhancements. (Opn. 2; CT

139-141, 145, 147; RT 33-34.) Regarding the gang enhancement, the People argued that AB 333's amendments to section 186.22 were "not retroactive for purposes of [today's re]sentencing hearing." (RT 23-26.) Defense counsel countered that AB 333 retroactively applied and that insufficient evidence now supported the gang enhancement. (RT 26-28.) Agreeing with the People, the trial court reimposed a stayed two-year term for the gang enhancement attached to the firearm-possession conviction. (CT 141; RT 31-36.)

Lopez again appealed, arguing that the gang enhancement was not supported by sufficient evidence in light of AB 333's amendments to section 186.22. (Opn. 4.) The People responded that, for purposes of retroactive application of AB 333 under *Estrada*, Lopez's convictions and sentence-enhancement findings became final when the remittitur in his first appeal issued before AB 333 took effect. (Opn. 6; RB 17-26.) The Court of Appeal affirmed, but on a different theory. (Opn. 1, 20.) It focused its analysis on two decisions in particular: *Padilla, supra*, 13 Cal.5th 152 and *People v. Salgado* (2022) 82 Cal.App.5th 376. (Opn. 7.)

In *Padilla*, this Court held that new ameliorative criminal legislation applied retroactively under *Estrada* to a judgment that had become final on direct appeal before the change in law but was later "reopened" when the sentence was vacated in habeas corpus proceedings. (*Padilla, supra*, 13 Cal.5th at pp. 158, 162.) In addressing the People's argument that applying the *Estrada* retroactivity rule to reopened judgments would be

inconsistent with principles that generally limit the scope of subsequent modification of a judgment after initial finality, this Court stated that “the right and remedy we recognize today does not allow Padilla to raise claims unrelated to his sentence.” (*Id.* at p. 169.) This Court observed that the remedy in the case was to hold a new juvenile transfer hearing, and it concluded that, “[w]hatever potential that hearing may have for reducing [the defendant’s] punishment (the nonfinal part of his judgment), it does not authorize or constitute relitigation of guilt.” (*Id.* at p. 170.)

In *Salgado*, the defendant “was convicted of active participation in a criminal street gang and the jury made true findings on five gang enhancements.” (*Salgado, supra*, 82 Cal.App.5th at p. 380.) After Salgado’s conviction became final, his sentence was recalled under former section 1170, subdivision (d) (now section 1172.1), and he was resentenced. (*Id.* at p. 379.) Salgado argued that AB 333’s new requirements for the section 186.22 gang offense and enhancements applied to his case upon recall of his sentence, and the Court of Appeal agreed. (*Id.* at p. 380.) The Court of Appeal rejected the People’s argument that Salgado’s underlying conviction and enhancements remained final for purposes of *Estrada* even after his sentence was recalled, and it cited *Padilla, supra*, 13 Cal.5th 152, 163, for the proposition that “once a court has determined that a defendant is entitled to resentencing, the result is vacatur of the original sentence, whereupon the trial court may impose any appropriate sentence.” (*Ibid.*)

The Court of Appeal below rejected the People’s argument that Lopez’s convictions and enhancements became final before the passage of AB 333. (Opn. 8.) It stated that, under *Padilla, supra*, 13 Cal.5th 152, “a judgment cannot be partially final and partially nonfinal.” (Opn. 8.) But the court went on to reason that this Court in *Padilla* had accepted, as a jurisdictional matter, “that the vacation of a sentence would not authorize the relitigation of guilt—even if the conviction is nonfinal and an amendment ameliorating guilt has gone into effect.” (Opn. 10.) It thus concluded that, because Lopez’s “conviction had been affirmed and only the sentence had been vacated, the trial court did not have *jurisdiction* to readjudicate the conviction.” (Opn. 10-11, citing *Padilla*, at pp. 169-170.) The Court of Appeal declined to follow *Salgado, supra*, 82 Cal.App.5th 376, stating, among other things, that the *Salgado* decision had failed to address the relevant portion of the *Padilla* opinion or consider the jurisdictional issue. (Opn. 12.)

One justice dissented, concluding: “This case is still on direct appeal. It has not been reduced to a final judgment. For that reason, the legislation the majority agrees applies retroactively to non-final cases applies to this one. That is all we need to know to remand the case and direct the trial court to apply the new law.” (Dis. Opn. 1.)

### **REASONS FOR DENYING REVIEW**

Lopez argues that review of the Court of Appeal’s decision is warranted because it conflicts with *Salgado, supra*, 82 Cal.App.5th 376 and *People v. Trent* (Oct. 3, 2023, C096306) \_\_\_\_

Cal.App.5th \_\_\_ [2023 WL 6399045]. (PR 9, 15, 20-21; Oct. 5, 2023, New Authority Letter.) And in a September 25, 2023, letter urging review or depublication, OSPD, as amicus curiae, additionally points to *People v. Ramirez* (2019) 35 Cal.App.5th 55, *People v. Garcia* (2022) 85 Cal.App.5th 290, *People v. Hargis* (2019) 33 Cal.App.5th 199, and *People v. Hughes* (2019) 39 Cal.App.5th 886 as “conflicting” with the Court of Appeal’s opinion in this case. None of these decisions, however, squarely conflicts with the Court of Appeal’s decision below holding that the trial court was without jurisdiction to apply AB 333 in Lopez’s case.

*Salgado* was decided on the ground that resentencing under former section 1170, subdivision (d) (now section 1172.1) effectively vacated the earlier judgment, rendering the entire judgment “no longer final.” (*Salgado, supra*, 82 Cal.App.5th at pp. 378, 380.) It was not decided on the basis of the jurisdictional confines of a remittitur. And in *Trent*, the Court of Appeal held that vacatur of the defendant’s murder conviction under section 1172.6 also rendered his gang-participation conviction nonfinal for purposes of retroactively applying AB 333 (*Trent, supra*, 2023 WL 6399045 at \*6), a markedly different procedural posture from the one presented here.<sup>3</sup>

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<sup>3</sup> Senate Bill No. 1437 (2017-2018 Reg. Sess.) “added section 1172.6, which provides a procedure for defendants convicted of murder to seek resentencing if they are able to establish they could not be convicted of murder under the amendments to sections 188 and 189 effective January 1, 2019.” (*People v. Williams* (2022) 86 Cal.App.5th 1244, 1250.)

In *Ramirez*, the Court of Appeal accepted that the trial court was bound by the scope of a remand order but, rejecting the district attorney's argument, held that the trial court had not exceeded the scope of the remittitur by considering "any and all factors affecting sentencing," including Proposition 57's provisions regarding juvenile transfer hearings. (*Ramirez, supra*, 35 Cal.App.5th at p. 64.) *Hargis* held that Proposition 57 applied retroactively regardless of whether it exceeded the scope of a remittitur. (*Hargis, supra*, 33 Cal.App.5th at pp. 207-208.) But the *Hargis* court explained that it was presented with "unique circumstances" under which "a change in the law of such a fundamental nature . . . intervened between a reviewing court's issuance of its opinion and the return of jurisdiction to the trial court through issuance of the remittitur." (*Id.* at pp. 205, 207.) Moreover, *Hargis* dealt solely with sentencing, not convictions or enhancement findings. (*Id.* at p. 208, fn. 4 ["Defendant is not entitled to a jurisdictional hearing, or the equivalent of a second trial, in juvenile court, however"].) And *Hughes* did not address the jurisdictional limitations of a remittitur at all. It held that the defendant was entitled to the retroactive benefit of a new mental health diversion scheme that became effective during the pendency of an appeal. (*Hughes, supra*, 39 Cal.App.5th at pp. 891-896.)

*Garcia, supra*, 85 Cal.App.5th 290 comes closest to conflicting with Court of Appeal's decision in the present case. It held that the trial court erred in failing to grant a continuance to allow the defendant to prepare a discovery motion under the

California Racial Justice Act of 2020 (Stats. 2020, ch. 317, § 1) (RJA), which applied retroactively to the defendant’s case even though the case had been remanded only for specific sentencing corrections. (*Garcia*, at pp. 293, 297-298.) In so holding, the Court of Appeal noted that the RJA allows convictions and sentences to be challenged. (*Id.* at pp. 295-297.) The court’s mention of convictions, however, was not necessary to the decision because the defendant there challenged only his sentence. (See *id.* at p. 294.)

To the extent there is some tension between the Court of Appeal’s decision below and the cases pointed to by Lopez and OSPD, there is no square or entrenched conflict in need of this Court’s resolution. (See Cal. Rules of Court, rule 8.500(b).) Nor is it likely that one will develop. In the respondent’s brief below, the People did not advance the jurisdictional theory espoused by the Court of Appeal in its opinion, which Lopez and OSPD challenge on the merits as “not workable” and “confusing.” (PR 9, 21; OSPD Letter 3-8.) And the People do not intend to do so in future cases.

Instead, the People argued below—and would maintain if review were granted in this case—that AB 333 did not apply to Lopez’s convictions and gang enhancement because they were already final when AB 333 came into effect, even though his appeal had been remanded for resentencing. That position is supported by this Court’s statements in *Padilla* and *Wilson*.

As noted, *Padilla* held that a new ameliorative law applied to the defendant’s case, which had become final on direct appeal

before the new legislation was enacted but was later “reopened” on habeas corpus for purposes of resentencing. (*Padilla, supra*, 13 Cal.5th at pp. 158, 162.) In so holding, this Court stated that application of the new law in these circumstances “does not authorize or constitute relitigation of guilt.” (*Id.* at p. 170.)

In *Wilson*, the defendant was convicted of capital murder and sentenced to death. (*Wilson, supra*, 14 Cal.5th at p. 844.) On appeal, this Court affirmed as to guilt but remanded for a penalty-phase retrial, after which Wilson was again sentenced to death. (*Id.* at pp. 844-845.) Thereafter, the Legislature enacted reforms to the law of murder, and Wilson sought to challenge the validity of his murder conviction on that basis in his appeal from the retried penalty-phase proceedings. (*Id.* at pp. 868-869; see former § 1170.95 (now § 1172.6), as added by Stats. 2018, ch. 1015, § 4 and as amended by Stats. 2021, ch. 551, § 2.) In addressing that claim, this Court explained that it had unanimously affirmed the judgment of guilt nearly 15 years earlier and that, for purposes of applying the new legislation retroactively, Wilson’s murder conviction “would appear to have become final no later than 2009, when the time expired for seeking certiorari in the United States Supreme Court.” (*Wilson*, at p. 870; see also *ibid.*, fn. 10.)

This Court pointed to *People v. Jackson* (1967) 67 Cal.2d 96, 98, which similarly held that new decisional authority did not apply retroactively to the guilt phase of a capital case that had “long before become final,” even though the penalty phase was vacated on habeas corpus after the new authority issued.

(*Wilson, supra*, 14 Cal.5th at p. 870.) Nonetheless, because the People in *Wilson* assumed for purposes of the penalty-phase appeal that the defendant could seek relief as to his murder conviction under section 1172.6, subdivision (g), this Court “assumed without deciding” that the claim was properly raised. (*Id.* at p. 871.) It went on to conclude that Wilson was not entitled to relief under that statute. (*Id.* at p. 875.)

The Court of Appeal below, however, expressly rejected the People’s finality analysis based on *Padilla* and *Wilson*. (Opn. 8 & fn. 2.)<sup>4</sup> And there does not appear to be any conflict on that issue among the Courts of Appeal. Review is therefore not necessary to secure uniformity or settle an important issue with respect to that finality analysis. (See Cal. Rules of Court, rule 8.500(b).)

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<sup>4</sup> In the briefing in *Padilla*, the People resisted the appellant’s alternative position that a noncapital judgment is separable between guilt and punishment for *Estrada* purposes and argued that *Jackson*’s reasoning was limited to “the context of the unique bifurcated nature of capital proceedings.” (*Padilla*, No. S263375, OBM 34-36; see also RBM 9, fn. 2.) In this case, the People’s position is based primarily on later pronouncements by this Court in *Padilla* itself and in *Wilson*.

## CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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October 31, 2023

**CERTIFICATE OF COMPLIANCE**

I certify that the attached **ANSWER TO PETITION FOR REVIEW** uses a 13-point Century Schoolbook font and contains 3,065 words.

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October 31, 2023

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

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