IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S238929

THE PEOPLE,
Plaintiff and Respondent,

v.

LORENZO CHAVEZ,
Defendant and Appellant.

Court of Appeal of California
Third District
C074138

Superior Court of California
Yolo County
CRF042140
Hon. Stephen Mock

Opening Brief on the Merits

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By Appointment of the California Supreme Court

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OPENING BRIEF ON THE MERITS

QUESTIONS PRESENTED

1. Does Penal Code section 1203.4[1] eliminate a trial court's discretion under Penal Code section 1385 to dismiss a matter in the interests of justice?
2. Do trial courts have authority to grant relief under Penal Code section 1385 after sentence has been imposed, judgment has been rendered, and any probation has been completed?

INTRODUCTION

When imposition of sentence has been suspended, courts retain jurisdiction under Penal Code section 1385, even after probation terminates, because there is no final judgment and thus there is still an action pending upon which section 1385 authority can be exercised. Courts retain fundamental jurisdiction over probation cases even after the term of probation has expired, and therefore a defendant can invoke this residual jurisdiction of the court to dismiss - just as Mr. Chavez did in this case.

Furthermore courts' broad discretion under section 1385 cannot be impinged upon by another statutory scheme such as section 1203.4 without clear evidence the Legislature intended such a narrowing. No such evidence exists here, and this Court should decline to limit courts' authority in the absence of clear legislative intent. Moreover, the statutes are addressed to

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1 Statutory references are to the Penal Code unless otherwise designated.

different purposes and different circumstances, and can be harmonized without unduly limiting section 1385 or undermining section 1203.4.

STATEMENT OF THE CASE AND FACTS

Petitioner adopts the statement of the case and facts as set forth in the opinion below. (*People v. Chavez* (2016) 5 Cal.App.5th 110, 114–115 *(Chavez)*[2].)

ARGUMENT

I. COURTS RETAIN JURISDICTION OVER AN ACTION SO LONG AS THERE IS NO FINAL JUDGMENT, AND THEREFORE HAVE AUTHORITY TO DISMISS AN ACTION UNDER SECTION 1385 AFTER THE TERM OF PROBATION HAS EXPIRED

The power to dismiss a criminal action pursuant to section 1385 is a broad grant of authority to the courts from the Legislature.[3] A criminal action is a "proceeding by which a party

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2 Since the Court of Appeal's decision is under review, the opinion may cited for persuasive value only; appellant cites to the reported decision rather then the slip opinion for ease of reference. (See Cal. Rules of Court, rule 8.1105(e)(1)(B); *Id.*, rule 8.1115(e).)

3 The statute provides: "(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by

charged with a public offense is accused and brought to trial and punishment." (§ 683; *People v. Hernandez* (2000) 22 Cal.4th 512, 521.) The discretion of a trial judge to dismiss a criminal action under section 1385 may be exercised at any time before or during the trial, including after a jury verdict of guilty. (*People v. Superior Court of Marin Cnty.* (1968) 69 Cal.2d 491, 501–502.) As discussed herein, so long as there is an action pending, courts have the power to dismiss.

A. Courts Retain Fundamental Jurisdiction Over Cases Where Probation Has Been Granted and the Absence of a Formal Judgment Means There is Still an Action Pending Which Can Be Dismissed

Courts retain the power to dismiss in circumstances where probation has been granted, even after the term of probation has expired. This is because courts have jurisdiction in a fundamental sense over the action and the defendant after a grant of probation. (*People v. Ford* (2015) 61 Cal.4th 282, 2867.) On the

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either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.

(b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.

(c)(1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a). (2) This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a)."

other hand, a "court lacks jurisdiction in a fundamental sense when it has *no authority at all over the subject matter or the parties, or when it lacks any power to hear or determine the case.*" (*Id.* at p. 286 (emphasis supplied).)[4] Such a lack of jurisdiction is not at issue here, because as this Court recently noted, "it is well settled that the expiration of a probationary period does not terminate a court's fundamental jurisdiction." (*People v. Ford*, *supra*, at p. 287.) "Neither the probation statutes nor the cases applying them support a holding that expiration of the probationary period terminates the court's jurisdiction of the subject matter." (*In re Bakke* (1986) 42 Cal.3d 84, 89, quoting *In re Griffin* (1967) 67 Cal.2d 343, 347.) This Court has thus consistently held that fundamental jurisdiction exists even after the expiration of probation.

Of course, the existence of fundamental jurisdiction does not confer unbridled authority to act; "the Constitution, a statute, or relevant case law may constrain the court to act only in a particular manner, or subject to certain limitations." (*People v. Ford, supra,* 61 Cal.4th at pp. 286–287.) Thus, for example, a court cannot act to extend the period of probation after the expiration of the initial term. (*In re Bakke, supra*, 42 Cal.3d at p. 90.) And of course, probation generally cannot be revoked or modified after the expiration of the term. (§ 1203.3; *In re Daoud* (1976) 16 Cal.3d 879, 882.) Nor does a court "have jurisdiction to modify a defendant's probation to impose restitution after the

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[4] When a court has subject matter jurisdiction, but acts erroneously within that jurisdiction, it is often referred to as excess of jurisdiction. (*Moffat v. Moffat* (1980) 27 Cal.3d 645, 655–656.)

defendant's probationary term has expired." (*Hilton v. Superior Court* (2014) 239 Cal.App.4th 766, 769.) As discussed herein, nothing *prohibited* the court from exercising its fundamental jurisdiction to act in this instance; section 1385 continued to provide the power to dismiss the "action." Moreover, here Mr. Chavez *invoked* the court's jurisdiction by inviting it to dismiss under section 1385 and "if the court has jurisdiction of the subject matter, ... a party may voluntarily submit himself to the jurisdiction of the court." (*Harrington v. Superior Court* (1924) 194 Cal. 185, 188–189.) The court had subject matter jurisdiction and, as an action was still pending, still had authority to act under section 1385.

The court's jurisdiction is also a function of the way in which California's system of probation has been crafted. "An order granting probation is not considered a 'judgment' for most purposes." (*People v. Bastidas* (2017) 7 Cal.App 5th 591, 605, citing *People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796.) Arguably, if judgment is imposed and a defendant is sentenced to state or county prison, section 1385 likely does not provide authority to dismiss the case, because there is no longer a criminal action pending that can be dismissed. (See e.g., *People v. Benjamin* (1957) 154 Cal.App.2d 164, 173 (noting that power to dismiss ends at imposition of sentence).)[5] However, where, as

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5 This conclusion is bolstered by the Legislature's creation of new forms of post-conviction relief, such as section 1203.41 and section 1473.7 which apply broadly to persons who suffered convictions which included jail or prison sentences, and for whom jurisdiction does not otherwise exist. These statutes suggest that once a judgment has been rendered, courts lose their authority under section 1385. This is consistent with the interpretation

here, judgment is not imposed, but its imposition is suspended in favor of a grant of probation, courts retain their authority under section 1385.

Courts retain their authority in such circumstances because a grant of probation is not a criminal judgment. (*People v. Howard* (1997) 16 Cal.4th 1081, 1092.) "Although such an order granting probation is 'deemed to be a final judgment' for the limited purpose of taking an appeal therefrom [citation], it does not have the effect of a judgment for other purposes." (*People v. Superior Court of San Francisco* (1974) 11 Cal.3d 793, 796 (internal citation omitted).) As no final judgment has been imposed, when probation is granted and imposition of sentence is suspended, a court continues to have authority to dismiss the matter under section 1385.

Given the court's fundamental jurisdiction to act, section 1385 permitted the court to dismiss the action in this case after successful completion of probation. "Section 1385 permits dismissals in the interest of justice in any situation where the Legislature has not clearly evidenced a contrary intent." (*People v. Williams* (1981) 30 Cal.3d 470, 482.) Courts will not "interpret a statute as eliminating courts' power under section 1385 'absent a clear legislative direction to the contrary.'" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 518, quoting *People v.*

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advocated here - that dismissal power persists as long as there is an action pending. Once judgment as been rendered, there is no action pending. However, the limited issue here focuses on the court's power to dismiss when no judgment has been imposed.

Thomas (1992) 4 Cal.4th 206, 210.) Because there is no statute prohibiting the exercise of section 1385 authority in this case, courts retain the power to dismiss.

As discussed above, when criminal proceedings are suspended and a grant of probation is made, there is still an "action" pending in the court. And while the expiration of the term of probation limits what a court can do with regard to the grant of probation, it does not terminate its overall authority over the action. Thus, in the limited circumstances where a court has suspended imposition of sentence and placed the defendant on probation, the court continues to have the authority dismiss the action under section 1385.

B. There Is Authority For Finding Courts' Power to Dismiss Continues After a Grant of Probation

People v. Orabuena (2004) 116 Cal.App.4th 84 provides support for appellant's position. In *Orabuena*, the Sixth District Court of Appeal held the Superior Court had discretion, under section 1385, to dismiss a misdemeanor conviction in the interests of justice for the purpose of qualifying the defendant for drug treatment under Proposition 36, where a plea of guilty had been entered, imposition of sentence had been suspended, and the defendant had already been placed on probation. After careful analysis, the court concluded that a grant of probation, as opposed to the imposition of judgment, did not bar use of section 1385 to dismiss an action after sentencing in the interests of justice. (*Orabuena, supra*, at p. 96.) The court relied on the broad power of section 1385 and the absence of any legislative directive

limiting it in these circumstances. (*Orabuena*, *supra*, at p. 95.) Moreover, the *Orabuena* court noted the fact the defendant was already on probation did not preclude the exercise of section 1385 authority, so long as judgment had not been imposed. (*Orabuena*, *supra*, at pp. 96–98.)

The opinion below distinguished *Orabuena* on the basis that the defendant in that case may still have been on probation and was thus yet not eligible for relief under section 1203.4. (*Chavez*, *supra*, 5 Cal.App.5th at p. 122.) This is a distinction without a difference, because in both cases no judgment had been imposed, and, in any event, probation can always be terminated early and the defendant thereby rendered eligible for relief. Moreover, the necessary conclusion of the Court of Appeal's distinction, is that once a defendant successfully completes probation, courts *lose* their power under section 1385 to dismiss. But it cannot be *eligibility* for section 1203.4 relief that divests a court of its authority under section 1385, because section 1203.4 itself allows for relief in the court's discretion, *even* if the defendant has not successfully completed probation.

Under the Court of Appeal's reasoning, the successful completion of probation thereby divests a court of its authority under section 1385, but when a defendant violates his probation and becomes presumptively ineligible, a court *retains* its authority under section 1385, unless the court then exercises its discretion to grant section 1203.4 relief, in which case it again is divested of authority under section 1385. Such an interpretation is strained, at best. The better approach, and that taken by the *Orabuena* court, is that when imposition of sentence has been

suspended, courts have concurrent authority to grant relief under section if 1203.4 if the defendant is eligible, or under section 1385 if the circumstances so warrant.

People v. Kim (2012) 212 Cal.App.4th 117 also supports appellant's position. In *Kim*, the Sixth District Court of Appeal held that the trial court had no authority to dismiss the action pursuant to section 1385 because judgment had been imposed and defendant had served his prison sentence. (*People v. Kim, supra*, at p. 125.) The *Kim* court was aware of the distinction between a grant of probation and a prison sentence in terms of its relevance for being a "judgment," because Kim's argument was that he had not been subject to a proper "judgment" based on procedural irregularities in the case. (*Id.* at p. 123 ("Defendant does not dispute the principle that section 1385 does not authorize a dismissal after imposition of sentence and rendition of judgment. Instead, he counterintuitively urges that there has not yet been a judgment in this case").) The court disagreed that the procedural irregularities in the case meant judgment had not been imposed. Yet, the court did not dispute Kim's point of law - that section 1385 applies so long as no judgment has been rendered. Had the *Kim* court disagreed with that contention, there would have been no need for it to evaluate Kim's argument on the merits that he had not been subject to a judgment; the court could simply have held that section 1385 did not apply even if he had not been subject to a judgment. It did not do so. (*People v. Kim, supra*, at pp. 123–126.)

Moreover, *Kim* did not cite the Sixth District's own prior precedent in *Orabuena*, a concession that contention at issue did not apply to grants of probation. Had the *Kim* court sought to

render a broader ruling to the effect that section 1385 could not be used once probation had been granted, it would have had to contend with its own prior precedent in *Orabuena,* and yet it did not do so. In any event, it is well established that decisions are not authority for propositions not considered therein. (*People v. Myers* (1987) 43 Cal.3d 250, 265 n.5; *People v. Dillon* (1983) 34 Cal.3d 441, 473–474.) Thus the *Kim* court's holding that imposition of judgment barred section 1385 relief does not preclude a finding that relief is available where no judgment has been imposed. Rather, by highlighting the difference between cases in which judgment has been imposed and those in which it has not, *Kim* is consistent with *Orabuena.*

Because courts retain fundamental jurisdiction in probation cases, and because in probation cases where imposition of judgment is suspended there is still an action pending, in such circumstances courts retain their broad power of dismissal under section 1385.

II. A COURT'S POWER TO DISMISS PURSUANT TO SECTION 1385 IS NOT LIMITED BY SECTION 1203.4

This Court also granted review on the question of whether section 1203.4 eliminates a trial court's discretion to dismiss a matter under section 1385. The resolution of this issue requires an analysis of whether there is sufficient evidence of legislative intent to override the broad authority of section 1385, the relationship of section 1385 and 1203.4, and a determination of whether the statutes can be harmonized. As discussed herein, there is no clear legislative intent for section 1203.4 to limit

courts' authority under section 1385, and the different purposes of the two statutes show that they are not in conflict. A court's discretion under section 1385 in the limited circumstances where imposition of judgment is suspended is unaffected by section 1203.4.

A. Legal Standards

The interpretation of a statute is a question of law subject to independent review. (*People ex. rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

B. Section 1203.4 Does Not Eliminate a Court's Discretion to Dismiss Under Section 1385

Courts will not "interpret a statute as eliminating courts' power under section 1385 'absent a clear legislative direction to the contrary.'" (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 518, quoting *People v. Thomas, supra*, 4 Cal.4th at p. 210.) Section 1203.4 lacks any such clear legislative direction, and therefore should not be interpreted to eliminate courts' power under section 1385.

"[W]hen determining legislative intent, ... look first to the words themselves for the answer." (*Owen v. Superior Court* (1979) 88 Cal.App.3d 757, 762.) Section 1203.4 is a rehabilitative

statute designed to provide an incentive to probationers to be of
good conduct in order to be able to mitigate the consequences of

their conviction by restoring certain pre-conviction rights. [6] (*People v. Field* (1995) 31 Cal.App.4th 1778, 1787.) Nothing in the

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[6] The statute provides in full:

(a) (1) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code. The probationer shall be informed, in his or her probation papers, of this right and privilege and his or her right, if any, to petition for a certificate of rehabilitation and pardon. The probationer may make the application and change of plea in person or by attorney, or by the probation officer authorized in writing. However, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed. The order shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission.

(2) Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or

her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

(3) Dismissal of an accusation or information underlying a conviction pursuant to this section does not permit a person prohibited from holding public office as a result of that conviction to hold public office.

(4) This subdivision shall apply to all applications for relief under this section which are filed on or after November 23, 1970.

(b) Subdivision (a) of this section does not apply to any misdemeanor that is within the provisions of Section 42002.1 of the Vehicle Code, to any violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 288.5, subdivision (j) of Section 289, Section 311.1, 311.2, 311.3, or 311.11, or any felony conviction pursuant to subdivision (d) of Section 261.5, or to any infraction.

(c) (1) Except as provided in paragraph (2), subdivision (a) does not apply to a person who receives a notice to appear or is otherwise charged with a violation of an offense described in subdivisions (a) to (e), inclusive, of Section 12810 of the Vehicle Code.

(2) If a defendant who was convicted of a violation listed in paragraph (1) petitions the court, the court in its discretion and in the interests of justice, may order the relief provided pursuant to subdivision (a) to that defendant.

(d) A person who petitions for a change of plea or setting aside of a verdict under this section may be required to reimburse the court for the actual costs of services rendered, whether or not the petition is granted and the records are sealed or expunged, at a rate to be determined by the court not to exceed one hundred fifty dollars ($150), and to reimburse the county for the actual costs of services rendered, whether or not the petition is granted and the records are sealed or expunged, at a rate to be determined by the county board of supervisors not to exceed one hundred fifty dollars ($150), and to reimburse any city for the actual costs of services rendered, whether or not the petition is granted and the records are sealed or expunged, at a rate to be determined by the city council not to exceed one hundred fifty dollars ($150). Ability to make this reimbursement shall be determined by the court using the standards set forth in paragraph (2) of subdivision (g)

language of the statute references section 1385. Nor does the statute contain the key legislative "term of art," "notwithstanding any other provision of law." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 983 (the phrase reflects legislative intent to override all contrary law).) And while "an express reference to section 1385 is not required, ...any legislative intent to abrogate a trial court's section 1385 discretion must be clear." (*People v. Fuentes* (2016) 1 Cal.5th 218, 227.) "This clear expression of intent may be found either in the relevant statutory language or in the statute's legislative or initiative history." (*Ibid.*)

The opinion below relied on the amendatory history of section 1203.4 to justify its conclusion that the Legislature intended

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of Section 987.8 and shall not be a prerequisite to a person's eligibility under this section. The court may order reimbursement in any case in which the petitioner appears to have the ability to pay, without undue hardship, all or any portion of the costs for services established pursuant to this subdivision.

(e) (1) Relief shall not be granted under this section unless the prosecuting attorney has been given 15 days' notice of the petition for relief. The probation officer shall notify the prosecuting attorney when a petition is filed, pursuant to this section.

(2) It shall be presumed that the prosecuting attorney has received notice if proof of service is filed with the court.

(f) If, after receiving notice pursuant to subdivision (e), the prosecuting attorney fails to appear and object to a petition for dismissal, the prosecuting attorney may not move to set aside or otherwise appeal the grant of that petition.

(g) Notwithstanding the above provisions or any other provision of law, the Governor shall have the right to pardon a person convicted of a violation of subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 288.5, or subdivision (j) of Section 289, if there are extraordinary circumstances.

section 1203.4 to divest courts of authority under section 1385. (*Chavez, supra*, 5 Cal.App.5th at pp. 119–122.) What that amendatory history shows is an intent to create a comprehensive rehabilitative system that would offer specific, but limited, relief to a certain class of probationers. However, the existence of this system is not itself evidence that the Legislature sought to *eliminate* the court's power under section 1385 to provide relief when considerations of equity so require. Indeed, what the amendatory history reflects instead is the Legislature's desire to have a flexible tool which could be continually shaped to foster rehabilitative goals.

The Court of Appeal concluded that the Legislature could not have intended to preserve power to dismiss under 1385 when it passed the original section 1203.4, because at that time the statute had the same impact as section 1385 - rendering the conviction a legal nullity. (*Chavez, supra*, 5 Cal.App.5th at p. 119.) But then, the Court of Appeal continues, because the Legislature continually *narrowed* the scope of relief section 1203.4 provided, this is evidence that section 1385 has been eclipsed by section 1203.4. (*Chavez, supra*, at pp. 119–121, citing amendments in 1961, 1978, 1989, 2005 and 2008.) However, none of the statutory amendments narrowing the scope of relief evidence a clear intent to *eliminate* a trial court's discretion under section 1385; nor do any of the cited amendments even mention section 1385. Rather, these amendments sought to either narrow the scope of relief available under section 1203.4 or to clarify existing law. (See, e.g., Sen. Rules Com., Office of Senate Floor Analyses, 3d reading analysis of AB 439 (2004–2005 reg. session), p. 8 ("The failure of Sections 290 and 1203.4 to

advise petitioners of [the] continuing registration requirement has led to confusion amongst petitioners and their attorneys as to whether the registration requirement continues after the expungement."); Sen. Rules Com., Office of Senate Floor Analyses, 3d reading analysis of AB 2092 (2007–2008 reg. session), p.4 (clarifying that persons prohibited from holding office by virtue of suffering certain convictions were still so prohibited, even if section 1203.4 relief was granted).) Nothing in these amendments reflect an intention to in any way affect a court's authority under section 1385. Instead, they reflect the continuing refinement of the rehabilitative tool of section 1203.4 for the multitude of cases in which dismissal under section 1385 is not available (because judgment was imposed) or not warranted under the circumstances.

The very history upon which the opinion below relies demonstrates that section 1203.4 is a rehabilitative tool that courts can use in a wide array of circumstances, in addition to exercising their discretion under section 1385 in more limited circumstances. The Court of Appeal found that because the Legislature has demonstrated an ongoing effort to narrow and limit the relief available to probationers as part of a rehabilitative process, that effort eclipsed the discretion of a court to exercise the *different* equitable power of section 1385 when the interests of justice so required. Yet there is nothing inconsistent about having a detailed scheme for promoting rehabilitation by creating and refining tools to use in granting a form of post-conviction relief on the one hand, while on the other preserving a court's broad authority to do justice for reasons unconnected to rehabilitation.

The Court of Appeal also concluded that it "[i]t would not have been necessary for the Legislature to amend section 1203.4 to authorize a court to dismiss 'in its discretion and the interests of justice' if courts had retained authority to dismiss 'in furtherance of justice' under section 1385 after the Legislature enacted the original section 1203.4." (*Chavez*, *supra*, 5 Cal.App.5th at pp. 119–120.) This does not consider the different purposes of the statutes. When the Legislature changed the nature of section 1203 relief by replacing it with section 1203.4, it created a system of limited rehabilitative relief and gave judges discretion to provide relief even to probationers who did not strictly qualify under the system. (See, § 1203.4, subd. (a)(1) (1935) (permitting relief "in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section").) This reflects a legislative intent to be inclusive with the grant of relief. The Legislature was creating a rehabilitative system designed to provide incentives for successful probationers, and apparently wanted to provide judges the discretion to extend that incentive to other probationers, where appropriate. There is nothing inconsistent about that system co-existing with courts' residual equitable power to dismiss an action in appropriate circumstances under section 1385; these may be alternative forms of relief, but they are not conflicting ones. Many defendants are eligible for section 1203.4 relief, but not section 1385 (because sentence was imposed, but not executed). And, there can be instances where a defendant is not strictly eligible for section 1203.4, and yet a court's exercise of section 1385 may be appropriate.

In reaching its conclusion, the Court of Appeal also relied on canons of statutory interpretation that favor applying the more specific and more recently-enacted statute. (*Chavez, supra*, 5 Cal.App.5th at p. 119.) However, there is no need to apply such techniques of statutory interpretation, because the statutes are neither vague nor in conflict with each other. (See, e.g., *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 ("the rule giving precedence to the later statute is invoked only if the two cannot be harmonized").) Indeed, this Court "has recently emphasized the importance of harmonizing potentially inconsistent statutes." (*State Dept. of Pub. Health v. Superior Court* (2015) 60 Cal.4th 940, 955.) As this Court has cautioned, "A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. [Citations.] This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject." (*Ibid.*; quoting *Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805.)

As they stand in relation to each other, section 1203.4 and section 1385 are not in conflict, and in any event can be harmonized. Section 1203.4 provides a court with the authority to dismiss all but a specified few convictions as part of a rehabilitative inducement, regardless of whether sentence was imposed and execution stayed. Section 1385 allows courts to dismiss any case in which in action is pending - prior to trial, during trial, or after a grant of probation. Section 1203.4 is only a post-conviction remedy; section 1385 is an equitable power that applies whenever the court has jurisdiction over the action. But,

section 1385's post-conviction reach is more limited than that of section 1203.4 - it only applies where imposition of sentence has been suspended. The fact that courts' authority under both sections may overlap in narrow instances does not create a conflict. (See, e.g., *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1038 (noting that the presumption against repeal by implication assumes that statutes can overlap, unless the "two acts are so inconsistent that there is no possibility of concurrent operation").)

The Court of Appeal also considered the fact that section 1203.4 is an explicit articulation of the conditions under which a court must and may grant dismissal after a grant of probation, and that such an explicit set of conditions reflects legislative intent to override section 1385. This Court recently rejected just such an argument in *People v. Fuentes*:

> the People assert that by virtue of delineating specific powers of the court to "strike the additional punishment for the enhancement" or "refuse to impose the minimum jail sentence" in [section] 186.22(g), the Legislature provided direction to limit a court's general discretion over all gang enhancements. [Citation.] We rejected this very argument in *Romero*, declining to interpret any statute defining punishment for a crime "as implicitly eliminating" the court's discretion under section 1385. [Citation.] "This is because the statutory power to dismiss in furtherance of justice has always coexisted with statutes defining punishment and must be reconciled with the latter. [Citations.] Thus, while helpful in ascertaining legislative intent in most cases, statutory maxims have limited utility in this context; these tools of interpretation cannot take

> the place of the "'clear legislative direction'" that trial?courts are divested of their section 1385 discretion. [Citation].

(*People v. Fuentes*, *supra*, 1 Cal.5th at p. 229 (internal citations omitted).)

Fuentes is instructive because there the statute at issue, section 186.22, subdivision (g), *did* contain the talismanic phrase "notwithstanding any other provision of law," and *still* this Court found that the statute "'falls short' of the requisite clear direction" necessary to find an intent to circumscribe the authority to dismiss under section 1385. (*People v. Fuentes*, *supra*, 1 Cal.5th at p. 229.)

Section 1203.4 subdivision (a) states that the court may act in any case in which "defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section..." (§ 1203.4, subd. (a).) The only place the phrase "notwithstanding any other provision of law" appears is in the statute is in subdivision (g), which confers upon the Governor the right, under extraordinary circumstances, to pardon people convicted of certain specified offenses. Thus section 1203.4 does not ever contain the kind of limiting language that was found to be insufficient in *Fuentes*.

C. Section 1385 and Section 1203.4 are Addressed to Different Purposes and Courts Can Retain Their Authority Under Section 1385 Without Undermining Section 1203.4

Subject to certain exceptions, section 1203.4 is a *mandatory* grant of relief upon proof of rehabilitation through successful completion of probation. (*People v. Field, supra*, 31 Cal.App.4th at p. 1787.) The court does have the discretion to grant the relief "in any other case" so long as there was a grant of probation. (*People v. Morrison* (1984) 162 Cal.App.3d 995.)[7] Thus, for example, section 1203.4 relief is proper even where the probationer has violated probation but nonetheless demonstrated genuine rehabilitation. (*People v. McLernon* (2009) 174 Cal.App.4th 569.)

In other words, the power of relief under section 1203.4 is fundamentally a part of a *rehabilitative* inducement to successfully complete probation. By contrast, the power under section 1385 is an equitable power to serve the interests of justice; a notion so broad that, as this Court has recognized, a court may enter a dismissal even after a jury's guilty verdict. (*People v. Superior Court of Marin Cnty.* (1968) 69 Cal.2d 491, 501; *People v. Orin* (1975) 13 Cal.3d 937, 946.) A dismissal under section 1385 is fundamentally an act in equity, which requires "consideration both of the constitutional rights of the defendant, and the interests of society represented by the People." (*People v. Beasley* (1970) 5 Cal.App.3d 617, 636.) Although there are many

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[7] Although even that discretion is limited, as the statute specifically precludes relief for probationers convicted of certain sex offenses and other enumerated offenses. (§ 1203.4, subd. (b).)

valid reasons for a judge to exercise the power of dismissal under section 1385, the one thing it is *not* is a tool of rehabilitation. (*People v. McAlonan* (1972) 22 Cal.App.3d 982, 987.)

The power of relief under section 1203.4 is part of a rehabilitative inducement to successfully complete probation, whereas the power under section 1385 is an equitable power to serve the interests of justice, of which one consideration may be the extent of a defendant's rehabilitation, or to remedy a constitutional violation. Moreover, courts exercising authority under section 1203.4 are *required* to grant relief in qualifying cases. The authority courts retain under section 1385 is purely discretionary. Thus, given the fundamental differences between the statutes, section 1203.4 does not infringe on the scope of a court's post-conviction discretion under section 1385. Section 1203.4 provides a broad system of relief for successful probationers; the broad equitable powers under section 1385 only extend into limited post-conviction circumstances.

Nor does section 1385 necessarily interfere with implementing the rehabilitative system of section 1203.4. A defendant eligible for relief under section 1203.4 will normally pursue that course of action. However, if there are unusual circumstances that warrant the exercise of discretion, a court can elect on its own motion or at the request of the prosecutor to dismiss a case in the interests of justice. Defendants have no right to make a motion to the court to dismiss under section 1385,[8] and thus there is no reason to

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[8] "But he or she does have the right to 'invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the defendant in support of his assertion that the

expect that defendants will forgo their guaranteed right to relief under section 1203.4 for the possibility of a rare exercise of section 1385 discretion. Moreover, this Court's precedents make clear that a court's refusal to dismiss under section 1385 is rarely overturned due to the deferential abuse of discretion standard. (See, e.g., *People v. Carmony*, *supra*, 33 Cal.4th 367; *In re Large* (2007) 41 Cal.4th 538, 553 (noting that a refusal to dismiss a strike will be affirmed even in a close case because "[t]he concept of discretion implies that, at least in some cases, a decision may properly go either way).) The remote possibility of a dismissal under section 1385 will not act as a disincentive for probationers to comply with the terms of their probation. Therefore, the rehabilitative scheme of section 1203.4 is not undermined by courts' retention of jurisdiction to exercise the discretion to dismiss in appropriate (and presumably unusual) cases.

D. *People v. Tanner* Does Not Control the Result Here, Because in That Case There Was Strong Evidence of Legislative Intent and the Statutory Purposes at Issue Differed in Important Ways

The Court of Appeal relied on this Court's decision in *People v. Tanner* (1979) 24 Cal.3d 514 *(Tanner)* to find that section 1203.4 limits a court's authority under section 1385. But *Tanner* is inapposite. In *Tanner*, the question involved the interpretation of section 1203.06, which explicitly limited the power of a court to

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dismissal would be in furtherance of justice.'" (*People v. Carmony* (2004) 33 Cal.4th 367, 375; quoting *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 441.)

grant probation to anyone who personally used a firearm during the commission of a robbery. The *Tanner* Court considered whether section 1385 permitted a court to strike a firearm allegation and thereby avoid the mandatory prohibition contained in section 1203.06. *Tanner* concluded that there was clear statutory intent to apply section 1203.06 in *all* circumstances, and that therefore the allegation could not be dismissed under section 1385:

> Our conclusion is supported by pertinent and timely expression of legislative intent existing when section 1203.06 was enacted. The Legislative Counsel's summary of the 1975 enactment states that trial court discretion to grant probation in unusual cases is eliminated so that "probation and suspension of sentence would be denied, *without any exception in unusual cases in the interests of justice*, to any person who uses a firearm during the commission of various felonies, including . . . robbery . . . ." (Leg. Counsel's Dig. of Sen. Bill No. 278, 1 Stats. 1975 (Reg. Sess.) Summary Dig., ch. 1004, p. 262; italics added.) This statement is consistent with a staff memorandum prepared by the Senate Committee on the Judiciary stating that Senate Bill No. 278 (in which the 1975 amendments to §§ 1203 and 1203.06 were introduced), "Prohibits, *without exception*, the granting of probation to persons who have carried or used firearms in connection with certain crimes, for which probation may be obtained under existing law in unusual cases in the interests of justice." (Italics added.) Finally, there exists the executive statement of Governor Brown issued by press release in which he explained the effects of the legislation. He stated: "By signing this bill, I want to send a clear message to every person in this state that using a gun in the commission of a serious crime means a stiff prison sentence. Whatever the circumstances, however

> eloquent the lawyer, *judges will no longer have discretion to grant probation even to first offenders.*" (Governor's Press Release No. 284 (Sept. 23, 1975), italics added.)

(*Tanner, supra,* 24 Cal.3d at p. 520.)

Thus, the *Tanner* Court was faced with clear evidence that use of section 1385 to dismiss the allegation would directly contravene legislative intent. No such expression of legislative intent exists with respect to section 1203.4. The use of courts' equitable authority to dismiss a conviction under section 1385 in no way contravenes legislative intent, and *Tanner* does not provide support to the contrary.

Here, the Court of Appeal drew a number of conclusions from *Tanner*. The opinion below relies on the fact that "like the probation statute in *Tanner* [citation], the original section 1203.4 contained mandatory terms."[9] (*Chavez, supra,* 5 Cal.App.5th at page 118.) Such mandatory terms in section 1203.4 do not reflect exclusivity, however. The mandatory language in *Tanner* stated that probation "shall not be granted to" specified persons. (*Tanner, supra,* 24 Cal.3d at p. 528, fn. 4, citing then-extent section 1203.06.) Here, the mandatory language upon which the Court of Appeal relies makes *granting relief* under section 1203.4 *mandatory*. In *Tanner*, the mandatory prohibition on grants of probation was seen to override a court's ability to strike the allegation in order to grant probation. That is a different issue than whether the *requirement* that a court grant one kind of relief to qualified individuals in certain circumstances overrides a

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[9] The current version of the statute also contains mandatory terms.

court's discretionary ability to provide a different kind of relief in *other* circumstances. In other words, *Tanner* was concerned that striking the allegation undermined the mandatory *prohibition* on probation. That is not the same as dismissing a case where a defendant, if he applied, would be otherwise be eligible for mandatory post-conviction relief.

In any event, *Tanner*'s holding is not actually inconsistent with appellant's position. *Tanner* cited legislative history showing clear intent that the prohibition on grants of probation under section 1203.06 was intended to apply without any exceptions whatsoever. (*Tanner*, *supra*, 24 Cal.3d at pp. 520–521.) The *Tanner* court concluded that allowing courts discretion to dismiss allegations of probation ineligibility using section 1385 would defeat the clear legislative intent to deny probation to those who use a firearm during the commission of certain specified offenses. Here, however, exercise of discretion under section 1385 does *not* defeat legislative intent to provide a post-conviction rehabilitative benefit. Mr. Chavez, unlike the defendant in *Tanner*, would otherwise be *eligible* for section 1203.4 relief. Granting him relief under section 1385 is not a means to improperly render him eligible for section 1203.4 relief, and thus the concern expressed in *Tanner* does not apply here.

The opinion below draws another lesson from *Tanner*. According to the Court of Appeal, because section 1203.4 relates to the "limited power of dismissal for purposes of probation" it necessarily overrides section 1385 because of its greater specificity. (*Chavez*, *supra*, 5 Cal.App.5th at p. 118, quoting *Tanner*, *supra*, 24 Cal.3d at p. 521.) However, the dismissal power at issue here is not "for purposes of probation," indeed, it is

precisely outside the scope of the rehabilitative scheme of probation; thus the specificity of section 1203.4 is irrelevant. In any event, the canon of interpretation applying a more specific statute only applies when the statutes are in conflict; as discussed above the statutes do not conflict. (See e.g., *People v. Vargas* (1985) 175 Cal.App.3d 271, 277 (noting that where there is a "general statute on the same subject," the "specific statute constitutes an exception so as to control and take precedence over conflicting provisions").) Moreover, this Court has recently emphasized that canons of interpretation are of limited use when the issue involves whether a statute implicitly limits a court's authority under section 1385. (*People v. Fuentes, supra*, 1 Cal.5th at p. 229.)

For these reasons, *Tanner* is inapplicable to the issue at bar.

E. The Authority Supporting the Opinion Below is Either Inapt Or Incorrectly Decided

The cases the Court of Appeal cited in support of its holding do not provide authority for such a conclusion. The Court of Appeal relied on *In re Disbarment of Herron* (1933) 217 Cal. 400 *(Herron)*, an attorney disbarment case in which this Court was considering the effects of the trial court's actions in the underlying criminal proceeding that precipitated disbarment. (See *Chavez, supra*, 5 Cal.App.5th at pp. 119–120.) In this 1933 case, the trial court had set aside the conviction one month after the expiration of the probation period. This Court found that the trial court's action was explicitly authorized by then-extant section 1203(4), and therefore because the attorney had been

relieved of the disabilities from the conviction, disbarment was unwarranted. (*Herron*, *supra*, at p. 406.) *Herron* never mentions section 1385. Yet the opinion below observes, "[t]he Supreme Court did not say section 1385 gave the trial court the power to dismiss after a defendant completed probation." (*Chavez*, *supra*, at p. 120.) However, cases are "not authority for a proposition not therein considered." (*Strauss v. Horton* (2009) 46 Cal.4th 364, 496.) The argument specifically made to the *Herron* court was that section 1203(4) authorized the trial court's action granting relief, not section 1385. (*Herron*, *supra*, at pp. 403, 405.) There was no reason for the *Herron* court to consider the potential impact of section 1385, as it was not at issue. Thus, *Herron* does not provide support for the opinion below.

The Court of Appeal also cites as authority *In re Phillips* (1941) 17 Cal.2d 55, *People v. Banks* (1959) 53 Cal.2d 370 and *Stephens v. Toomey* (1959) 51 Cal.2d 864. (*Chavez*, *supra*, 5 Cal.App.5th at pp. 120–121.) Yet none of those cases considered whether section 1385 bore any significance to the issues they addressed. *Phillips* held that operation of section 1203.4 relief did not act to reverse the automatic order of disbarment that was entered when the attorney in the underlying case was sentenced for a crime of moral turpitude. (*In re Phillips*, *supra*, at pp. 56–59.) In *People v. Banks*, this Court considered the case of a defendant who claimed he was wrongfully convicted of being a felon in possession of a gun because he had completed probation on the underlying case and was entitled to section 1203.4 relief even though he had not availed himself of it. (*People v. Banks*, *supra*, at pp. 375–377.) The *Banks* Court determined that because the defendant had not sought section 1203.4 relief, nor

had he been sentenced to a misdemeanor under section 17, "his status was that of one convicted of felony within the meaning of [former] section 12021 of the Penal Code at the time of his alleged [offense]." (*People v. Banks, supra,* at pp. 375–376.) The *Banks* Court had no occasion to consider the role of section 1385 in the proceedings, and the matter was not raised. Finally, *Stephens v. Toomey* involved a petition for a writ of mandate to compel the registrar of voters to permit the petitioner to vote; this Court held the matter was not ripe because the petitioner was still on probation. (*Stephens v. Toomey, supra,* at p. 875.) Thus none of these cases provides foundation for the Court of Appeal's conclusion.

The opinion below also relies to some extent on *People v. Barraza* (1994) 30 Cal.App.4th 114. (*Chavez, supra,* 5 Cal.App.5th at p. 120.) However, *Barraza* is inapposite. In that case, the prosecution and defense sought to enter into a stipulated reversal of judgment (and a subsequent new plea) in order to provide some immigration relief to the defendant, and petitioned the Court of Appeal for the stipulated reversal. The *Barraza* court held that unlike in civil matters, criminal judgments are not subject to stipulated reversals, particularly where they involve post-judgment plea bargains. (*People v. Barraza, supra,* at pp. 119–120.) The opinion below relied on this language in the *Barraza* opinion:

> We do not know whether the relief from deportation appellant seeks could have been provided under Penal Code section 1203.4 and deem it inappropriate to make that inquiry because appellant has not sought such relief. Section 1203.4 is pertinent to our

> analysis only because it is the only postconviction relief from the consequences of a valid criminal conviction available to a defendant under our law.

(*People v. Barraza*, *supra*, 30 Cal.App.4th at pp. 120–121.)

However, the *Barraza* court immediately followed that statement with a footnote acknowleding:

> Although the discretion of a trial judge to dismiss a criminal action under Penal Code section 1385 in the interests of justice "may be exercised at any time during the trial, including after a jury verdict of guilty" [citation], this statute has never been held to authorize dismissal of an action after the imposition of sentence and rendition of judgment. [Citation.] In any event, section 1385 can be invoked only by a trial judge or magistrate on his or her own motion or that of the prosecuting attorney, it does not confer any right of relief upon the defendant. [Citation.]

(*People v. Barraza*, *supra*, 30 Cal.App.4th at p. 121, fn. 8 [citations omitted].)

Thus, the *Barraza* court never held that section 1385 could not be used after imposition of sentence is suspended, and it does not stand for that proposition.

There is one published case that comes to the same conclusion as the opinion below; albeit for different reasons. In *People v. Espinoza* (2014) 232 Cal.App.4th Supp. 1, the Appellate Division of the Fresno Superior Court considered the issue at bar under similar circumstances as those of Mr. Chavez. *Espinoza* mistakenly concluded that a grant of probation was a final judgment, and that because a "trial court lacks postjudgment jurisdiction to dismiss a final conviction under section 1385" it

therefore also lacked jurisdiction to dismiss after a grant of probation. (*People v. Espinoza, supra,* at pp. 7–8.) For the reasons discussed in Argument I, *infra*, the *Espinoza* court erred in determining that a grant of probation was a final judgment, and failed to recognize longstanding precedent holding that fundamental jurisdiction persists after a grant of probation. Thus *Espinoza* was incorrectly decided and provides no persuasive authority for the Court of Appeal's conclusion.

CONCLUSION

Courts retain fundamental jurisdiction over probationers when - as here - no judgment has been imposed. A court's power to dismiss under section 1385 survives so long as it has authority over the action. Here, Mr. Chavez invoked the fundamental jurisdiction of the court in requesting that it exercise its authority under section 1385, and the court was empowered to act.

Section 1203.4 does not eliminate a trial court's authority to dismiss an action under section 1385 because there is no clear legislative intent to support such a limit on section 1385. Furthermore, the statutes are addressed to different purposes and different circumstances, and section 1385 authority only applies when there has been no judgment imposed.

For the reasons stated herein, the Court should reverse the Court of Appeal and remand the matter to the Superior Court to determine whether to exercise its discretion under section 1385.

Law Office of Matthew A. Siroka

Respectfully submitted,

Dated: June 2, 2017 By: ______________________

Matthew A. Siroka

Attorney for Defendant and Appellant

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **8,501** words, excluding the cover, tables, signature block, and this certificate.

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Law Office of Matthew A. Siroka

Dated: June 5, 2017

By: ______________________

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S238929

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Woodland, CA, 95695
(for Hon. Stephen Mock)

Yolo County District Attorney
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(for Appellant)

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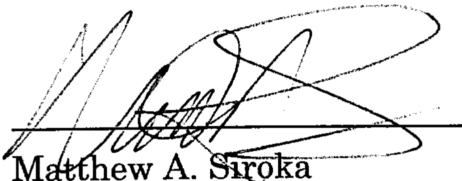
By: 
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