SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. RICKY PRUDHOLME, Defendant and Appellant.	Case No. S271057 Court of Appeal No. E076007 (San Bernardino County Superior Court No. FWV18004340)

APPELLANT'S OPENING BRIEF ON THE MERITS

After the unpublished decision of the Court of Appeal,
Fourth Appellate District, Division 2
dated August 26, 2021

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ISSUES PRESENTED

1. Does Assembly Bill No. 1950 (Stats. 2020, ch. 328) apply retroactively under *In re Estrada* (1965) 63 Cal.2d 740?

2. If so, does the remand procedure of *People v. Stamps* (2020) 9 Cal.5th 685 apply?

INTRODUCTION

Effective January 1, 2021, Assembly Bill No. 1950 ("AB 1950") amended Penal Code section 1203.1,[1] subdivision (a), to limit the probation term for most felony offenses to two years. In the present case, the trial court imposed three years of formal probation after appellant entered a no contest plea to a single count of felony second degree burglary. At the time of his initial sentencing, the trial court had discretion to impose this three-year term of probation for this felony offense. Under AB 1950, there is no such discretion as the term of probation may not exceed two years.

At issue here is whether AB 1950 applies retroactively under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) to cases not yet final and, if so, whether the remand procedure discussed and outlined in *People v. Stamps* (2020) 9 Cal.5th 685 (*Stamps*) applies. There is widespread agreement among reviewing courts

[1] Statutory references herein are to the Penal Code unless otherwise stated.

that AB 1950 retroactively applies to probationers whose cases are not yet final. *Estrada* retroactivity applies since AB 1950 is an ameliorative law, decreasing the amount of time a person can spend on probation for a conviction, that went into effect prior to the finality of appellant's case, and that contains no saving clause. Retroactivity is discussed herein in Argument I.

Remand under the procedure set forth in *Stamps* is inappropriate in appellant's situation. Appellant acknowledges that unless the Legislature intends to bypass longstanding law that courts cannot unilaterally modify plea agreements, courts lack the power to do so. (*Stamps*, *supra*, 9 Cal.5th at p. 701.) But here, the Legislature *did* intend to mandate that AB 1950 reduce the probationary term to two years. No further discretion is vested in the courts by virtue of this change in law.

Additionally, plea agreements are not insulated from retroactive changes in the law that the Legislature intends apply to them. (*Doe v. Harris* (2013) 57 Cal.4th 64.) Since the Legislature mandated the maximum authorized term of probation is now two years, the trial court must apply the new law to nonfinal sentences. This sentence modification also has the effect of correcting now unlawful probation sentences. The applicability of the *Stamps* remand procedure is discussed in Argument II.

This Court should find (1) AB 1950 is ameliorative legislation that is retroactive to cases not yet final, and (2) the

Stamps remand procedure is not applicable, because with AB 1950 the Legislature intended to mandate the reduction of probation duration, and negotiated sentences are not insulated from changes in the law the Legislature intends apply to them. Thus, appellant's probation term should be ordered reduced to two years to correct his now unauthorized probationary period.

STATEMENT OF THE CASE

On December 10, 2018, an information charged appellant in count 1 with second degree robbery (§ 211). (CT: 85-87.)[2]

On April 5, 2019, defense counsel declared a doubt as to appellant's competence pursuant to section 1368. (CT: 126, RT: 10-13.) On May 24, 2019, appellant was found incompetent and criminal proceedings were suspended. (CT: 131; RT: 14.)

On September 2, 2020, appellant was found competent and criminal proceedings were reinstated. (CT: 190-191; RT: 79.) That same day, appellant entered into a no contest plea to added count 2 alleging second degree burglary pursuant to section 459, subdivision (b), in exchange for time served and a probationary term of three years. (CT: 190-191, 192-194; RT: 72-78.)

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[2] "CT" refers to the Clerk's Transcript on appeal, "RT" refers to the Reporter's Transcript on appeal, and "SCT" refers to the Supplemental Clerk's Transcript on appeal in the above-entitled case.

On October 14, 2020, appellant was sentenced to three years of formal probation in conformance with his plea bargain, and count 1 was dismissed. (SCT: 15; RT: 79-84.)

Appellant filed an amended notice of appeal on November 16, 2020, and the trial court denied appellant's request for a certificate of probable cause. (SCT: 4.) In his appeal, appellant argued that his term of probation must be reduced to two years under the ameliorative principles of AB 1950. (AOB: 6-10.) On August 26, 2021, the Fourth District Court of Appeal, Division Two, issued an unpublished decision agreeing that AB 1950 applies retroactively but remanding the matter to the trial court pursuant to *Stamps*. Appellant petitioned this Court for review on September 27, 2021.

STATEMENT OF FACTS

A summary of the facts of the incident, taken from the probation report[3] dated October 14, 2020, is as follows:

On November 22, 2018, appellant and two co-defendants were seen by employees of a trucking company loading boxes of merchandise from that company's loading area into the beds of their trucks. After stowing over $4,000 worth of merchandise

[3] The court found a factual basis existed for the no contest plea. (CT: 194.) As appellant did not admit to specific facts, the probation report summary is used here to provide context. Appellant does not make any admissions by including this summary.

onto the beds of these trucks, appellant and the co-defendants drove toward the exit. Two employees blocked the exit to prevent appellant and the co-defendants from leaving. (CT: 199.)

Appellant was detained by police and later taken into custody. He denied taking property belonging to the company and asserted he was on the property for employment purposes. (CT: 200.)

ARGUMENT

I. UNDER *ESTRADA* PRINCIPLES, AB 1950 IS RETROACTIVE TO CASES NOT YET FINAL.

A. Section 1203.1 now caps the probationary term for most offenses at two years.

At the time appellant was sentenced, section 1203.1 gave the court discretion to grant felony probation "for a period of time not exceeding the maximum possible term of the sentence[.]" (Former § 1203.1, subd. (a) (Stats. 2010, c. 178, § 75, operative Jan. 1, 2012).) Where the maximum possible term was five years or less, "the period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over five years." (*Ibid*.)

Effective January 1, 2021, AB 1950 amended section 1203.1, subdivision (a), to provide, "The court, or judge thereof, in the order granting probation, may suspend the imposing or the execution of the sentence and may direct that the suspension

may continue for a period of time not exceeding two years, and upon those terms and conditions as it shall determine." (Former § 1203.1, subd. (a) (Stats. 2020, ch. 328, § 2).) Certain felonies, not including second degree burglary, are excluded from the two-year probation limitation. (Former § 1203.1, subd. (m). (Stats. 2020, ch. 328, § 2; § 1203.1)[4] The statute was subsequently amended again and the exceptions moved to subdivision (l). (Stats. 2021, c. 257, § 22, eff. Sept. 23, 2021, operative Jan. 1, 2022.)

In the present case, the trial court imposed a three-year term of probation after appellant entered a no contest plea to a single count of felony second degree burglary. (SCT: 15; RT: 79-84.) In conformance with the plea agreement, the trial court sentenced appellant to 365 days with credit for time served and granted probation for three years. (RT: 82.)

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[4] As amended by AB 1950, the two-year probation limit in subdivision (a) does not apply to:

> (1) An offense listed in subdivision (c) of Section 667.5 and an offense that includes specific probation lengths within its provisions.
>
> (2) A felony conviction for paragraph (3) of subdivision (b) of Section 487, Section 503, and Section 532a, if the total value of the property taken exceeds twenty-five thousand dollars ($25,000).

B. AB 1950 is retroactive to cases that are not yet final on appeal.

Generally, "where [an] 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," so long as the amended statute takes effect before the judgment of conviction is final. (*Estrada, supra,* 63 Cal.2d at p. 748.) "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' [citation] 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' [citation]." (*People v. DeHoyos* (2018) 4 Cal.5th 594, 600.) " 'The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses.' [Citations.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 881-882 (*Buycks*).)

1. *AB 1950 is ameliorative in nature.*

Reviewing courts are in widespread agreement that AB 1950 ameliorates punishment and is therefore retroactively applicable to probationers whose cases are not yet final. (*People v. Butler* (2022) 75 Cal.App.5th 216, ___ [2022 Cal.App. LEXIS 121]; *People v. Greeley* (2021) 70 Cal.App.5th 609, 627 [with concession by Attorney General that AB 1950 is retroactive]; *People v.*

Schulz (2021) 66 Cal.App.5th 887, 895; *People v. Lord* (2021) 64 Cal.App.5th 241, 246 (*Lord*) [with concession by Attorney General]; *People v. Stewart* (2021) 62 Cal.App.5th 1065, 1070-1074, review granted Jun. 30, 2021, S268787 (*Stewart*); *People v. Sims* (2021) 59 Cal.App.5th 943, 955-964 (*Sims*); *People v. Quinn* (2021) 59 Cal.App.5th 874, 879-885 (*Quinn*); see also *People v. Burton* (2020) 58 Cal.App.5th Supp. 1, 11-19 (*Burton*) [finding amendments to section 1203a retroactive].) The basis for this finding is that AB 1950 decreases punishment: "With certain exceptions, the new law limits the term of probation for a felony conviction to two years. While probation is not considered punishment in the same way incarceration is, it is clear probation is a 'form of punishment.'" (*Lord, supra,* 64 Cal.App.5th at p. 245, internal quotations marks omitted.)

This issue was discussed at length in *Burton,* in which the reviewing court held that AB 1950's one-year limit on the maximum length of probation terms for misdemeanor offenses has retroactive effect under *Estrada*. (See *Burton, supra,* 58 Cal.App.5th Supp. at pp. 7-10.) "It is unquestionable the reduction of the maximum amount of time a person may be placed on probation from three years (or more), to one year, inures greatly to the benefit of many persons subject to supervision. At any time a person is on probation, the court has the authority to revoke probation and sentence the person to jail, and a probation violation may even be based on violating court

rules that do not amount to new crimes." (*Id.* at p. 7.) The *Burton* court continued by identifying the risks of further punishment faced by probationers during their terms of probation. For instance, "[t]he longer a person is on probation, the potential for the person to be incarcerated due to a violation increases accordingly." (*Ibid.*) In fact, it was this risk of lengthy incarceration, sometimes for periods longer than one year "based on minor probation violations" that "was relied on by the Legislature in enacting the provision lowering the maximum probationary period." (*Ibid.*, citing Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1950 (2019-2020 Reg. Sess.) as amended May 6, 2020, p. 5 [shortening supervisory period can decrease an individual's involvement in the criminal justice system for minor infractions].)

Specifically, the *Burton* court noted the punitive nature of probation, explaining that

> while a person is on probation, the individual may lawfully be ordered to comply with numerous and varied conditions, including . . . ordering the person to provide prosecutors a list of properties they own. In other situations, they may be subject to search and seizure by law enforcement with or without a warrant (see *People v. Robles* (2000) 23 Cal.4th 789, 795), submitting urine samples for narcotics use monitoring (see *People v. Beagle* (2004) 125 Cal.App.4th 415, 419), and regularly interrupting persons' work and schooling and traveling to court for progress reports.

(*Burton, supra,* 58 Cal.App.5th Supp. at p. 7.) Further, should a probationer violate the terms and conditions of probation, "courts

have power to increase a probationer's supervision and intensify restrictions by modifying probation conditions." (*Ibid.,* citing § 1203.3, subd. (a).) Probation looms over individuals with a constant threat of further punishment. Certainly, "the longer the length of probation, the greater the encroachment on a probationer's interest in living free from government intrusion." (*Burton, supra*, 58 Cal.App.5th Supp at p. 7.) This benefit of a shorter probation period, as it is ameliorative in nature, should apply likewise retroactively under *Estrada* to probationers whose cases are not yet final.

Moreover, *Estrada* retroactivity applies to laws that have a *possible* ameliorative benefit. This Court considered the retroactive effect of Proposition 57, which prohibits prosecutors from charging juveniles with crimes directly in adult court, requiring them instead to commence the action in juvenile court and seek a "transfer hearing" for the juvenile court to determine whether the matter should be transferred to adult court. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 303 (*Lara*); see Welf. & Inst. Code, § 707, subd. (a).) *Lara* concluded that "Proposition 57 is an 'ameliorative change[ ] to the criminal law' that we infer the legislative body intended 'to extend as broadly as possible.' " (*Lara*, *supra,* 4 Cal.5th at p. 309.) This Court found that " 'for a minor accused of a crime, it is a potential "ameliorating benefit" to have a neutral judge, rather than a district attorney, determine that he or she is unfit for

rehabilitation within the juvenile justice system . . . . And the impact of the decision to prosecute a minor in criminal court rather than juvenile court can spell the difference between a 16-year-old minor [ ] being sentenced to prison for 72 years to life, or a discharge from the DJJ's custody at a maximum of 23 years of age.' " (*Lara*, *supra*, 4 Cal.5th at p. 308.)

In *People v. Frahs* (2020) 9 Cal.5th 618 (*Frahs*) this Court considered another application of *Estrada,* this time to the enactment of sections 1001.35 and 1101.36 creating a pretrial diversion program for certain defendants with mental health disorders. Under the new laws, criminal defendants are afforded the *opportunity* to establish suitability for a mental health diversion program. (§ 1001.36, subd. (c)(1).) Upon successful completion of the program, the trial court must dismiss the criminal charges, and the arrest leading to the charges is deemed not to have occurred. (§ 1001.36, subd. (e).) Hence, "the possibility of being granted mental health diversion rather than being tried and sentenced 'can result in dramatically different and more lenient treatment.' [Citation.]" (*Frahs*, *supra*, 9 Cal.5th at p. 631) Indeed, "the impact of a trial court's decision to grant diversion can spell the difference between, on the one hand, a defendant receiving specialized mental health treatment, possibly avoiding criminal prosecution altogether, and even maintaining a clean record, and on the other, a defendant serving a lengthy prison sentence," leading this Court to find that "the ameliorative

nature of the diversion program places it squarely within the spirit of the *Estrada* rule." (*Frahs*, *supra*, 9 Cal.5th at p. 631.)

With AB 1950, the legislative intent shows a reduction in probation duration is "significantly beneficial" to probationers and spending longer than two years on felony probation was detrimental rather than rehabilitative. (*Burton, supra,* 58 Cal.App.5th Supp. at p. 16.) It is widely recognized that "a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible." (*People v. Conley* (2016) 63 Cal.4th 646, 657 (*Conley*).) *Estrada* therefore applies to AB 1950, where the change in law reduces the amount of time a defendant may spend on felony probation. (See *Burton*, *supra*, 58 Cal.App.5th Supp at p. 16.)

The history surrounding AB 1950 shows the Legislature's concern that a lengthy term of probation fails to serve any rehabilitative function. The author's statement to the bill provides,

> Eight percent of people incarcerated in a California prison are behind bars for supervised probation violations. Most violations are 'technical' and minor in nature, such as missing a drug rehab appointment or socializing with a friend who has a criminal record.
>
> Probation — originally meant to reduce recidivism — has instead become a pipeline for re-entry into the carceral system.
>
> Research by the California Budget & Policy Center shows that probation services, such as mental healthcare and addiction treatment, are most effective during the first 18

> months of supervision. Research also indicates that providing increased supervision and services earlier reduces an individual's likelihood to recidivate. A shorter term of probation, allowing for an increased emphasis on services, should lead to improved outcomes for both people on misdemeanor and felony probation while reducing the number of people on probation returning to incarceration.

(Assem. Com. on Public Safety, Analysis of AB 1950 (2019-2020 Reg. Sess.) as amended May 6, 2020, p. 3; *Quinn*, *supra*, 59 Cal.App.5th at p. 880.) Most significantly, the legislative history states that a two-year period of supervision is sufficient to fulfill the rehabilitative function of probation. (Assem. Com. on Public Safety, Analysis of AB 1950 (2019-2020 Reg. Sess.) as amended May 6, 2020, p. 6.)

Based on an analysis of the legislative history of AB 1950, this Court should conclude that since the Legislature has determined probation's rehabilitative function does not extend beyond two years, a longer probation term is punitive, so AB 1950 is within the scope of *Estrada*. (*Quinn*, *supra*, 59 Cal.App.5th at p. 883; see also *Burton, supra,* 58 Cal.App.5th. Supp. at p. 19.)

2. *AB 1950 contains no saving clause.*

The second requirement for *Estrada* retroactivity is the absence of a saving clause. (*Estrada*, *supra*, 63 Cal.2d at pp. 746-748.) A saving clause is language articulating how an amended law is to be applied, if at all, to cases decided under prior law. (*Conley*, *supra*, 63 Cal.4th at p. 662.) The plain language of AB 1950 does not restrict its amendments to judgments imposed on

or after a particular date or otherwise prospectively limit the new two-year maximum probationary term. The lack of a saving clause indicates the Legislature did not intend to limit the shorter probation term of AB 1950 to prospective use only.

The intent of the Legislature, the ameliorative nature of AB 1950, and lack of saving clause, given the reasoning set forth in *Estrada* and its progeny, establish AB 1950 is retroactive to cases that are not yet final. Thus, the law decreasing terms of probation to two years maximum is applicable to appellant's case.

II. A *STAMPS* REMAND IS INAPPROPRIATE, BECAUSE WITH AB 1950, THE LEGISLATURE INTENDED TO MANDATE THE REDUCTION OF NONFINAL PROBATION JUDGMENTS.

A. Introduction

Because the Legislature mandated the reduction of the period of probation for nonfinal probation terms under AB 1950, the *Stamps* remand procedure does not apply. The limited remand is only appropriate when the Legislature intended plea bargain sentences to be, in essence, subject to renegotiation, because a court's power to modify sentences was to remain secondary to the parties' contractual obligations and benefits.

Stamps found remand was necessary to allow the prosecution to withdraw from a plea agreement because the defendant's remedy required unilateral action by the trial court to modify the plea, a power courts generally lack by virtue of

section 1192.5. (*Stamps*, *supra*, 9 Cal.5th at p. 709.) Here, a probation term in excess of two years in now unauthorized, and AB 1950 gave courts no discretion to reject a nonfinal plea due to the change in law. Rather, the dictate of *Doe v. Harris, supra,* 57 Cal.4th at p. 66, that parties to a plea agreement are not insulated by changes in the law that the Legislature intended to apply to them, controls and mandates the amendment of a sentence. Appellant's term of probation should be reduced from three years to two years without a limited remand under *Stamps*.

B. Law relating to a court's sentencing modification power.

1. *Generally, a court cannot unilaterally modify an agreed-upon term by striking portions of it.*

When a plea bargain includes a negotiated sentence and is approved by the court, the defendant generally "cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea." (§ 1192.5, subd. (b).) A court has the power to disapprove of a plea agreement up until the time of sentencing. (§ 1192.5, subd. (a); *Stamps*, *supra*, 9 Cal.5th at p. 706.) Such power is "near-plenary." (*Stamps*, *supra*, 9 Cal.5th at p. 708.)

Stamps analyzed a trial court's power to modify a sentence in a nonfinal case when a new law is enacted after sentencing on a plea bargain. The defendant had accepted a negotiated sentence in exchange for a plea to first degree burglary with a strike prior plus a serious felony enhancement. The agreed-upon sentence was the low term of two years for the burglary, doubled for the strike to four years, plus five years for the enhancement, for a total of nine years. The remaining counts and allegations were dismissed. (*Stamps*, *supra*, 9 Cal.5th at p. 693.)

After the defendant was sentenced, Senate Bill No. 1393 (SB 1393) took effect. SB 1393 amended section 1385 to remove a provision prohibiting a court from striking a serious felony enhancement in the furtherance of justice.[5] The defendant argued the amended law was retroactive to his case and required remand for the court to determine whether to strike his five-year enhancement. The Court of Appeal agreed with the defendant.

This Court granted respondent's petition for review to determine, inter alia, the proper remedy. The defendant again argued the trial court was authorized to exercise its discretion to strike the enhancement while otherwise maintaining the plea bargain. (*Stamps*, *supra*, 9 Cal.5th at p. 705.)

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[5] Prior to amendment by SB 1393, subdivision (b) of section 1385 prohibited a court from striking any prior serious felony for purposes of an enhancement. After SB 1393, a court has the same power to strike or dismiss a serious prior enhancement as it does with any other enhancement.

The *Stamps* Court concluded the proper remedy was to remand the case to allow the defendant to seek relief under the new law, but if the court intended to strike the enhancement the prosecution must be permitted to withdraw from the plea. (*Stamps*, *supra*, 9 Cal.5th at p. 707.) The opinion noted the defendant's situation differed from other cases in that it involved a negotiated prison term, and section 1385 does not permit a court to exercise discretion in contravention of a plea to a negotiated term of imprisonment. (*Stamps*, *supra*, 9 Cal.5th at p. 700.) Rather, a court that found a plea bargain to be unacceptable could only reject it unless the parties agreed to an alternate disposition. (*Id*. at p. 701.)

In addition, the Court noted long-standing law has held that this limitation on the court's power "only prohibit[s] the court from unilaterally modifying the terms of the bargain without affording . . . an opportunity to the aggrieved party to rescind the plea agreement and resume proceedings where they left off." (*Stamps*, *supra*, 9 Cal.5th at p. 701.) Therefore, in addition to establishing a law applies retroactively, a defendant desiring a provision to be applied must also prove the Legislature intended to bypass settled law that a court cannot unilaterally modify an agreed-upon term by striking portions of it. (*Ibid*.)

The Court noted the legislative history was silent as to whether SB 1393 affected nonfinal plea bargains. (*Stamps*, *supra*, 9 Cal.5th. at p. 702.) As the new law brought a court's discretion

vis-à-vis serious felony enhancements in line with the court's discretion on all other enhancements, the passage of SB 1393 was not intended to change long-standing law that a court lacks discretion to modify a plea agreement without the assent of the parties. (*Ibid*.)

In contrast, Proposition 47, which reduced some drug and theft felonies to misdemeanors, demonstrated the Legislature's intent for the reduction to apply to plea bargains because the language of the statute itself stated it applied to a person "serving a sentence for a conviction, whether by trial or by plea" (*Stamps*, *supra*, 9 Cal.5th. at p. 703 citing *Harris v. Superior Court* (2020) 1 Cal.5th 984, 991.) *Harris v. Superior Court* noted that Proposition 47's resentencing process would be rendered meaningless if the prosecution could withdraw from plea agreements and reinstate a defendant's original charges, frustrating voter intent in passing the law. (*Stamps*, *supra*, 9 Cal.5th. at p. 703, citing *Harris v. Superior Court*, *supra*, 1 Cal.5th at 992.) And while section 1192.5 prohibits courts from modifying or invalidating terms of a plea bargain, the Legislature and the electorate are free to do so. (*Harris v. Superior Court*, *supra*, 1 Cal.5th at p. 992.) With Proposition 47, the electorate did just that. (*Ibid*.)

The legislative history of AB 1950 evidences the fact that in passing AB 1950 the Legislature *rejected* the idea that the term of probation should be tailored to case. Analysis of the bill states

the California District Attorneys Association opposed modification of section 1203.1 because "[a] one-size-fits-all approach to the length of probation takes away the judicial discretion and flexibility that is necessary to fashion an appropriate sentence." (Assem. Com. on Pub. Saf., proposed amend. of Sen. Bill. No. 1393 (2019-2020 Reg. Sess.) May 19, 2020, p. 7.) Both the statements in favor and in opposition note that the bill would apply to *all* probations. (*Id*. at p. 4 [bill would limit felony probation to two years unless specific statute states otherwise] and p. 7 [opposition statement that bill would apply to serious felonies as well as misdemeanors].) With the passage of the bill, the Legislature implicitly rejected a tailored approach, finding probation should be uniform in all cases to which the revised provision applies.

A vast majority of convictions – approximately 97 percent – are the result of plea bargains. (Judicial Council of Cal., Disposition of Criminal Cases According to the Race and Ethnicity of the Defendant (2021) p. 3.) Virtually all guilty pleas – with the exception of "open pleas to the court" – are the result of some negotiation or compromise. Benefits to the defendant in accepting a plea bargain for *probation* include the benefit of avoiding the risk of the execution of a judgment of imprisonment that may result with going to trial. Thus, given the reasonable inference that virtually all guilty plea are bargained guilty pleas, AB 1950's uniform decrease in probation duration would

reasonably be intended by the Legislature to apply to cases resolved by plea bargain.

Another reason compels this conclusion. Section 1203.1 as amended limits the term of probation for most felonies to two years. If the legislation is retroactive to appellant's case, his current three-year term of probation becomes an unauthorized sentence. A sentence is unauthorized when "it could not lawfully be imposed under any circumstances in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) A court lacks authority to impose a sentence other than that prescribed by law. (*Scott, supra*, 9 Cal.4th at p. 354; *In re Andrews* (1976) 18 Cal.3d 208, 212; see *People v. Harvey* (1980) 112 Cal.App.3d 132, 139 ["in computing one's sentence under a plea bargain, even though agreed to by the parties, the court may not give effect to an enhancement unauthorized by law"].) The Legislature was presumptively aware that retroactive application of AB 1950 would render nonfinal probation sentences over two years unauthorized. (*Estate of McDill* (1975) 14 Cal.3d 831, 839 [in adopting legislation the Legislature is presumed to know existing law].) A probationary term in excess of two years, unauthorized under the new law, must be reconciled by decreasing the term as the Legislature intended.

SB 1393 presented a different situation in which a sentence would not be unauthorized. Rather, if the law had not been applied to a defendant whose plea bargained sentence was

nonfinal, e.g., if for whatever reason, a defendant never chose to seek relief under SB 1393, the original sentence would still be valid. The issue would have been for the defendant to have been *permitted* the opportunity for a court to exercise its discretion to strike the sentence component. Remand of a case for a court to make that determination would, in turn, have triggered the full resentencing rule. The full resentencing rule gives the court "jurisdiction to modify every aspect of a defendant's sentence on the counts that were affirmed, including the term imposed as the principal term." (*Buycks*, *supra*, 5 Cal.5th at p. 893, citations omitted.) Thus, in a hypothetical case in which the court was inclined to strike a five-year enhancement from a nine-year sentence, the court could retain the lower term doubled sentence of four years, or select the upper term doubled to reach an eight-year sentence; the prosecution would have the option to retain the bargain or withdraw. Remand in a *Stamps* scenario therefore served a purpose since full resentencing could impact the sentence.

Probation sentences such as those affected by AB 1950 are not amenable to a similar outcome. There is normally no other sentence component other than a custodial period or probation condition or time served. The full resentencing rule is inapplicable since there is no other sentence component to adjust.

"Where the ameliorative change in law is *mandatory*, the question is not whether the Legislature intended to allow the

trial court to alter the terms of a plea bargain but whether *the Legislature intended to, in effect, do so directly*." (*Stewart, supra*, 62 Cal.App.5th at p. 1077, emphasis added.) *Stewart* acknowledged the *Stamps* holding that SB 1393 did not give courts authority to unilaterally modify a plea bargain. (*Id*. at p. 1074.) However, *Stewart* also pointed out that AB 1950 did not confer discretion upon the court but rather invalidated probation terms over two years in most cases. (*Ibid*.) The *Stewart* court concluded that AB 1950 " 'does not involve *Stamps*' repeated and carefully phrased concern with the 'long-standing law that a court cannot unilaterally modify an agreed-upon term by striking portions of it under section 1385' but rather 'has a direct and conclusive effect on the legality of existing sentences pursuant to *Estrada.*' " (*Stewart*, supra, 62 Cal.App.5th at p. 1078, italics omitted, citing *People v. France* (2020) 58 Cal.App.5th 714, 729, review granted Feb. 24, 2021, S266771 [analyzing Senate Bill No. 136].)

More recently, *Butler* agreed with the reasoning in *Stewart* and *France* and "recognized that *Stamps* was only concerned with a discretionary law and thus had no reason to consider the difference between discretionary laws and laws that directly invalidate the term of a plea bargain, like our Supreme Court was concerned with in *Harris v. Superior Court*. [Citation.]." (*Butler, supra,* 75 Cal.App.5th at p. ___ [2022 Cal.App. LEXIS 121, *9].) The *Butler* court noted that because *Doe v. Harris*

acknowledged plea bargains generally incorporate the Legislature's authority to change the law, whether a law conferred discretion upon the court or mandated a change was crucial. (*Ibid.,* citing *Stewart*, *supra*, 62 Cal.App.5th at p. 1078.) AB 1950 mandates a change in the law. The bill must apply to plea bargained sentences since the history and effect of the bill compels the conclusion that the Legislature intended to bypass the general rule that a court cannot unilaterally modify an agreed-upon term by striking portions of it. (Cf. *Stamps*, *supra*, 9 Cal.5th at p. 701.)

2. *Plea agreements are not insulated from changes in the law the Legislature intends apply to them.*

Stamps also addressed another long-standing rule that is in harmony with limits on a court's power to unilaterally modify plea agreements. This second principle is that parties entering into plea agreements are not insulated from statutory changes that the Legislature has intended to apply to them. (*Stamps*, *supra*, 9 Cal.5th. at pp. 702-703, citing *Doe v. Harris, supra,* 57 Cal.4th at p. 66.) Section 1016.8, which became effective in 2020, codified this concept: "The California Supreme Court held in *Doe v. Harris* [ ] that, as a general rule, plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. That the parties enter into a plea agreement does not have the effect of insulating them from changes in the law

that the Legislature has intended to apply to them." (§ 1016.8, subd. (a)(1).)

In *Doe v. Harris*, this Court confronted the following question regarding contractual interpretation of plea agreements: "[D]oes the law in effect at the time of the plea agreement bind the parties or can the terms of a plea agreement be affected by changes in the law?" (*Doe v. Harris*, *supra*, 57 Cal.4th at p. 66.) The factual scenario was that the defendant entered a plea bargain that required sex offender registration under section 290. At the time of the plea agreement, the offender registry was closed to the public. Over a decade later the Legislature passed Megan's Law, which allowed for public disclosure of sex offender registry data. The *Doe* defendant challenged the new law as violating his plea agreement since he had not agreed to public disclosure. (*Ibid.*)

The *Doe v. Harris* Court resolved the question by explaining that parties to an agreement – including a plea agreement – "are deemed to know and understand that the state, again subject to the limitations imposed by the federal and state Constitutions, may enact laws that will affect the consequences attending the conviction entered upon the plea." (*Doe v. Harris*, *supra*, 57 Cal.4th at p. 70.) These laws include those promulgated for the public good or in the pursuit of public policy. (*Id.* at p. 71.) The *Doe v. Harris* Court ultimately held "requiring the parties' compliance with changes in the law made retroactive to them

does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law." (*Id.* at pp. 73-74.).

Stamps found the *Doe v. Harris* rule inapplicable in the context of SB 1393. The *Stamps* Court noted SB 1393's legislative history failed to suggest the Legislature intended section 1192.5's limitation on the court's power to modify plea bargains to apply to this change in the law. (*Stamps*, *supra*, 9 Cal.5th at p. 704.) That the bill was "silent as to pleas and provides no express mechanism for relief undercuts any suggestion that the Legislature intended to create specific rules for plea cases involving serious felony enhancements." (*Ibid.*) This general rule that plea agreements are subject to changes in the law works hand in hand with the general principle that courts lack power to unilaterally modify negotiated plea agreements benefitting a particular party.

Here, the parties are deemed to understand that the Legislature may pass laws affecting the plea bargain and will be subject to the change in law. Like Megan's Law, AB 1950 was passed to advance public policy. While appellant's plea agreement is silent as to the effect of changes in law, both *Doe v. Harris* and

section 1016.8 mandate the parties are not insulated from statutory changes by virtue of entering into a plea agreement. (§ 1016.8, subd. (a)(1); *Doe v. Harris*, *supra,* 57 Cal.4th at pp. 73-74.) This is so because, as argued above, the legislative history contemplated pleas, probation dispositions are most often the result of plea bargaining, the Legislature contemplated a one-size-fits-all approach (see *ante* at pp. 23-24), and if all cases are to be treated the same, the unauthorized sentences in nonfinal cases resulting from the passage of AB 1950 require adjustment of the probation duration down to two years.

3. *The remedy on appeal is to reduce the probationary term to two years.*

Given the above arguments that the Legislature intended both to bypass the general rule that a court cannot unilaterally alter plea bargains while at the same time acknowledging recently codified law that plea bargains are subject to future changes in the law, remand under the procedures set out in *Stamps* is not appropriate. An examination of the *Stamps* remedy demonstrates why that solution is inconsistent with our overall legal framework.

The *Stamps* remedy achieved two goals. First, in light of the fact that plea bargains are not insulated from retroactive changes in the law under *Doe v. Harris*, the limited remand is necessary to afford a defendant the chance to have the court exercise discretion to strike the enhancement. (*Stamps*, *supra*, 9

Cal.5th at pp. 708-709.) Second, once the defendant has had this opportunity, and because this Court found the Legislature did not intend SB 1393 to bypass longstanding law that courts could not unilaterally modify plea bargain sentences, a limited remand gives the prosecution the opportunity to withdraw from a plea if the prosecution does not concur with a court's exercise of discretion, including a *Buycks* full resentencing, that results in a lower sentence. (*Ibid*.)

A limited *Stamps* remand under the circumstances of the present case would frustrate the legislative intent. The prosecution in this case cannot negotiate for a lengthier term of probation as that is no longer lawful. The only option here would be to renegotiate for a prison term, an action that would run counter to the legislative intent to reduce incarceration for probationers. (*Stewart*, *supra*, 62 Cal.App.5th at p. 1078; *Sims*, *supra*, 59 Cal.App.5th at pp. 961–962; *Butler, supra,* 75 Cal.App.5th 216 [2022 Cal.App. LEXIS 121, *5].) Refusing to apply AB 1950 to nonfinal cases would ignore the *Doe v. Harris* precept regarding plea bargains and future changes in the law.

One case has found the *Stamps* remand procedure appropriate for AB 1950, but that case misses the mark. *People v. Scarano* approved of a limited remand, expressly noting the defendant had not made the case that the Legislature intended to prevent trial courts from withdrawing consent to a plea agreement after the fact. (*People v. Scarano* (2022) 74

Cal.App.5th 993, 1013.) In contrast, appellant in the instant case argues the Legislature mandated the reduction of the probation term in *all* pleas. (AB 1950 (Stats. 2020, ch. 328).)

Further, the *Scarano* sentencing transcript was explicit that the defendant and prosecution had agreed to search, drug programming, and drug testing conditions that would be in effect for a five-year period. (*Scarano*, *supra*, 74 Cal.App.5th at p. 1009.) The court wrote, "Indeed, defense counsel appears to have sold the negotiated resolution in this case to the court, and apparently to the prosecution, based on the duration of probation and the search condition, stating that if the court were to impose a local sentence with probation, defendant would "be *searchable for five years which would be far more than he would get if he were to go to prison on this case in terms of searchability and supervision*." (*Ibid*., emphasis in original.) These facts, however, fail to consider the Legislature's intent that AB 1950 is a "one-size-fits-all" approach to probation sentences. (See Argument I.B., *ante*.) The Legislature's rejection of a "tailored approach," as put forth by the prosecutor's opposition to the legislation, must be recognized.

Nor does the decision consider the *Doe v. Harris* principle that plea bargains are subject to changes in the law that the Legislature intends to apply to them. Requiring the parties to comply with retroactive statutory changes does not violate the terms of a plea agreement. (*Doe v. Harris, supra*, 57 Cal.4th at p.

73.) While costs are inevitably involved in policy change, *Scarano* also neglects to consider that per the Legislature, the People as a whole benefit from the amended criminal justice policy. The fact that the prosecution may be perceived at losing a benefit of the bargain is an unavoidable consequence of amending public policy but not violative of the plea agreement. *Scarano* is wrongly decided.

CONCLUSION

For the reasons set forth above, appellant respectfully requests that this Court find AB 1950 applies retroactively to his case and that remand pursuant to *Stamps* is inappropriate since the law conferred a mandatory change upon the duration of probation, and the Legislature intended to mandate reduced probationary duration in plea agreements under AB 1950, and nonfinal plea agreements are subject to retroactive changes in the law.

Dated: March 21, 2022

_____

Attorney for Appellant

CERTIFICATION OF WORD COUNT

Appellate counsel certifies in accordance with California Rules of Court, rule 8.520(c)(1) that this brief contains approximately 6,967 words as calculated by the software in which it was written.

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

Dated: March 21, 2022 _____

Attorney

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 21, 2022 in Mission Viejo, California.

/*s*/ Erica Gambale
Erica Gambale, SBN 214501

STATE OF CALIFORNIA
Supreme Court of California

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