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 REPLY 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After the unpublished decision of the Court of Appeal,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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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES:

OTHER SOURCES:

INTRODUCTION

The issues here involve newly passed Assembly Bill 1950 ("AB 1950"); namely whether this new law applies retroactively under *In re Estrada* (1965) 63 Cal.2d 740 and, if so, if the remand procedure of *People v. Stamps* (2020) 9 Cal.5th 685 should apply.

Effective January 1, 2021, 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.

The parties ultimately agree that AB 1950 applies retroactively under *In re Estrada, supra,* to cases not yet final.[2]

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

[2] Appellant believes that a reduction in the length of a term of probation is an ameliorative benefit as it reduces punishment (see AOBM: 12-18). Respondent believes the legislative history of the new law shows that the Legislature "reasonably viewed the reduction in the length of probation as tantamount to a direct amelioration in punishment." (RB: 30.) Both sides agree that, since AB 1950 contains no savings clause, the law nevertheless applies retroactively under the principles set forth in *Estrada*. (AOBM: 12-18; RB: 22-30.)

Thus, that issue will not be addressed in this reply brief. Rather, this brief addresses the proper remedy; namely whether the remand procedure discussed and outlined in *People v. Stamps, supra,* applies. Simply put, it does not.

Respondent claims that the Legislature did not specify its intent that AB 1950 apply to plea bargains, like that here, nor did it specify its intent that the trial court could unilaterally modify the length of the term of probation, an act respondent claims would violate section 1192.5. Therefore, according to respondent, the only remedy is that discussed in *Stamps*. Respondent is mistaken.

First, a look at the history of AB 1950 shows the Legislature intended the new law apply to all probations, including those that result from plea bargains. Moreover, reducing the length of appellant's probation to two years does not require a discretionary act of the trial court, therefore does not violate section 1192.5. However, assuming, arguendo, the trial court must act to reduce the length of appellant's probation in order to comply with the new law, it could do so under the power it retains under section 1203.3. Section 1203.3 grants the trial court the power and authority to modify, revoke, even terminate probation at any time after judgment. Section 1203.3 exists in harmony with section 1192.5 because and affords the trial court this ability *after* judgment was imposed.

More importantly, contrary to respondent's claim, remand

under the procedure set forth in *Stamps* is inappropriate in appellant's situation. Appellant is differently situated than the defendant in *Stamps*. 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. *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 a material and agreed upon term of that plea, a power courts generally lack by virtue of section 1192.5. (*Stamps*, *supra*, 9 Cal.5th at p. 709.) In this case, a probation term in excess of two years, like appellant's, is now unauthorized, and AB 1950 gave courts no discretion to reject a nonfinal plea due to the change in law. This case must be governed by the finding in *Doe v. Harris* (2013) 57 Cal.4th 64, namely that parties to a plea agreement are not insulated by changes in the law that the Legislature intended to apply to them. Moreover, in *Stamps,* whether the defendant could obtain the requested relief depended upon whether the trial court would choose to exercise its newly vested discretion. Appellant is not seeking a discretionary act of the trial court. The trial court in this case cannot exercise discretion to impose longer than a two-year grant of probation. Because appellant is differently situated than the defendant in *Stamps*, the *Stamps* remedy should not apply.

Further, the *Stamps* remand procedure is not available to

appellant in this case. In *Stamps*, this Court remanded the matter in order for the defendant to decide if he wanted to seek relief in light of the fact that both the trial court and/or the prosecution could potentially withdraw from the agreement if he chose to do so. Thus, the defendant was permitted to make an informed decision: preserve the status quo or seek relief and risk the opposing party withdraw from the bargain. Appellant is differently situated than that the defendant in *Stamps*. Here, if this Court were to remand the matter, appellant cannot preserve the status quo as the status quo is no longer authorized. Here, the only available option for appellant is the reduction of the length of his term of probation. The three-year term originally imposed is no longer legally valid.

Finally, respondent claims the prosecution should be permitted to withdraw from this plea agreement and reinstate a previously dismissed robbery count (section 211). This is misguided. To permit the prosecution to do so would force appellant to suffer consequences far greater than those he suffered when he filed this appeal. It would frustrate long standing policy to place appellant in a position where he would suffer more severe consequences because he chose to proceed with a valid appellate argument.

This Court should find (1) AB 1950 is retroactive to cases not yet final, and (2) the *Stamps* remand procedure is not applicable. Thus, appellant's probation term should be ordered

reduced to two years to correct his now unauthorized probationary period.

ARGUMENT

I. THIS COURT SHOULD ACT TO REDUCE THE LENGTH OF APPELLANT'S TERM OF PROBATION TO TWO YEARS BECAUSE THE LEGISLATURE INTENDED TO MANDATE THE REDUCTION OF NONFINAL PROBATION JUDGMENTS WHEN PASSING AB 1950.

A. The Legislature intended that AB 1950 apply to all probations, including those that are the result of negotiated pleas.

Appellant and respondent agree that a plea agreement is a form of contract accepted both parties and agreed upon by the trial court. (RB: 31; see *People v. Segura* (2008) 44 Cal.4th 921, 929-930.) However, these contracts are not insulated from changes in the law. The "general rule in California is that the plea agreement will be ' "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy...." ' [Citation.] That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them." (*Doe v. Harris, supra,* 57 Cal.4th at p. 66.)

Here, the Legislature intended this new law to apply to all felony probations, including appellant's that resulted from a negotiated plea. Thus, contrary to respondent's claim (see RB: 35-43), the length of appellant's term of probation must be reduced to two years.

In passing AB 1950, the Legislature acted and intended to change the length of the term of all eligible felony probation, including appellant's. Respondent claims that AB 1950 "does not entitled appellant to whittle down one-third of his negotiated probation term yet leave the remainder of his plea bargain intact." (RB: 30.) This is misguided. Respondent discusses the process of plea bargaining in detail, essentially claiming that the only manner in which the Legislature can contravene a plea agreement is to state their intent to do so either in the language of the new law or in the legislative history. (RB: 32-33.) Respondent then claims the legislature offered no indication of its intent to have AB 1950 modify plea agreements. Again, respondent is mistaken.

The legislative history of AB 1950 indicates it was the intent of the Legislature to apply AB 1950 to all probations, including those resulting from negotiated pleas. Several key aspects of that history establish this intent. For instance, the Legislature made clear its intent to remove the ability of the parties to tailor a term of probation to a specific case. Namely, this new law removes the previous ability to impose a term of

probation up to five years in most felonies, simply as part of the negotiation process. (see Pen. Code, § 1203.1, subd. (a) (2019).) Now, absent specific exceptions not applicable here, felony probation is a maximum of two years in length. The very idea that prosecutors and courts should possess the ability to negotiate the length of a probation term based on the facts and circumstances of a specific case was rejected by the Legislature when they passed AB 1950. The new law removes the trial court's discretion, mandating a maximum of two years of probation for all eligible felonies. It does not differentiate between the manner of conviction. Hence, the new probation mandate applies to all convictions, whether by trial or plea. Indeed, an analysis of the history of AB 1950 shows that the Legislature found, and the new law supposes that every eligible felony conviction, like that here, necessitates a maximum of a two-year term of probation. This issue was addressed when the opposition to this new law claimed, that "[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. 1950 (2019-2020 Reg. Sess.) May 19, 2020, p. 7.) Nevertheless, those in favor of the new law stated that it 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].) Therefore, in passing AB 1950, the Legislature did indicate its intent that the new, two-year mandate on a term of felony probation would apply to all cases, removing the discretion of the parties to tailor probation specific to a case.

In addition, one of the stated intents of AB 1950 was to allow for significant costs savings, "possibly in the hundreds of thousands of dollars to low millions of dollars annually, to counties" in order to alleviate fiscal pressure on local governments and allow these local governments to reallocate funds to better suit the criminal justice system. (see Assembly Committee on Appropriations, Analysis of AB 1950, as amended May 21, 2020.) The cost savings estimated here stem from the reduced number of probationers placed in custody as a result of a violations of probation. "Reducing the amount of time people spend on probation will likely reduce the number of people returned to county jail" as the result of a probation violation. (*Ibid.*) This reduction in probation violation incarcerations could potentially result in cost savings well over $1 million per county. (*Ibid.*) The money saved from the unnecessary longer terms of probation could be used to better support and assist the jails. (*Ibid.*) Thus, while the length of the term for probation may be less, the county's ability to support and provide services to the criminal justice system is greater. Understanding the need for cost saving measures to alleviate the pressures on local

governments suggests that the Legislature intended the new law to apply to all convictions, even those resulting from a negotiated plea. Indeed, the Legislature must know that the 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.) It therefore stands to reason that the Legislature contemplated those grants of probation would be reduced to two years in order to experience the significant cost savings. Grants of probation resulting from plea agreements were not specifically excluded from the calculation of those costs savings when discussing the fiscal impact of the new law. (see Assembly Committee on Appropriations, Analysis of AB 1950, as amended May 21, 2020.) Had the Legislature sought to exclude plea agreements from this new law, they would have specifically stated as such and altered their costs savings calculation to reflect such an exclusion. They did not do so.

Further, the Legislature discussed the fact that research showed that longer grants of probation to do not serve the rehabilitative function. Indeed, respondent acknowledged the "apparent absence of a need for longer grants of probation for the purpose of rehabilitation." (RB: 25 citing Senate Public Safety Analysis at pp. 4, 6.) The discussion surrounding the rehabilitative function of probation was applicable to all grants of probation, regardless of whether they were the result of a plea or

trial. It is absurd to believe that research surrounding the function of probation would decipher between those cases in which probation was granted as a result of a trial or those cases in which probation was granted as the result of plea. Probation is the same in all cases. Clearly, the Legislature understood this, or they would have explicitly excluded plea bargained cases from new law.

Respondent then claims that the fact that AB 1950 incorporated a trial court's authority to modify and change the terms and conditions of probation on a case-by-case basis supports their claim that the Legislature did not intend to reduce the terms of probation imposed as a part of a plea agreement. (RB: 38.) Again, respondent is mistaken. The very fact that a trial court can modify the terms and conditions of probation supports the need to simply reduce the length of appellant's term of probation to two years, in compliance with the new law. Reducing the probation to two years does not remove the trial court's ability to modify or change the terms of that probation. It simply results in a two-year term of probation under whatever terms and conditions are imposed by the trial court. The trial court retains the ability to modify the terms and conditions of probation in any probationary case, this case included. (see § 1203.3.) Nothing in this case involved a request to the trial court to modify any material term of a plea agreement. (c.f. *People v. Segura, supra,* 44 Cal.4th 921.) Nor does this case involve a

request of the trial court to modify or change and specific term and condition of probation. Rather, this case involves the length of the grant of probation and nothing more. Again, the Legislature acted to reduce the maximum length of the term of felony probation to two years because it found that two years best served the rehabilitative function of probation and the court's function to protect the community. (Assem. Com. on Public Safety, Analysis of AB 1950 (2019-2020 Reg. Sess.) as amended May 6, 2020, p. 6.).) It therefore stands to reason that appellant and his community are best served by a two-year term of probation and that the Legislature intended this new law to apply to all probations, including appellant's, regardless of whether it was the result of a plea.

B. Reducing the length of appellant's term of probation to two years does not violate section 1192.5.

Reducing appellant's term of probation from three years to the newly mandated two years does not violate section 1192.5. It is true that, 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 trial 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.) This case involves the mandatory reduction of the length of the term of probation far after the time of sentencing. Appellant maintains this court should simply order the reduction in the length of the term of probation without involving the trial court. However, assuming, arguendo, the trial court must act to order this reduction, it would not violate section 1192.5 as this reduction does not alter a material term of the plea and it is within the trial court's authority and discretion as codified in section 1203.3.

Respondent mistakenly claims that because there is no mention of section 1192.5 in AB 1950's legislative materials, the legislature did not intend for the trial court to harbor the ability to reduce the length of a term of probation. (RB: 42.) Yet, because of section 1203.3, the Legislature need not directly state such an intent. Respondent acknowledges that the Legislature is " 'deemed to be aware of existing laws and judicial construction in effect at the time legislation is enacted.' " (RB: 42 quoting *People v. Weidert* (1985) 39 Cal.3d 836, 844.) Also, as acknowledged by respondent, this Legislature was aware of the trial court's " 'broad discretion to impose conditions that foster the defendant's rehabilitation and protect the public safety.' " (RB: 41 quoting Sen. Public Safety Analysis, p. 5.) This discretion stems from section 1203.3. Hence, it was unnecessary for the Legislature to specifically identify the trial court's authority to reduce the

length of a term of probation under AB 1950. The trial court already had this authority.

Section 1203.3, subdivision (a) states, in pertinent part that "[t]he court may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation, and discharge the person held." (§ 1203.3.) The ability of the trial court to modify, change, and even terminate probation, as codified in in section 1203.3, exists in harmony with section 1192.5. More importantly, it is widely accepted that "[t]he authority for early termination of probation is found in section 1203.3." (*People v. Butler* (1980) 105 Cal.App.3d 585, 589; accord, *People v. Holman* (2013) 214 Cal.App.4th 1438, 1471 [§ 1203.3, subd. (a) "is the source of the court's power to terminate probation early"]; see *People v. Killion* (2018) 24 Cal.App.5th 337, 341 [referring to § 1203.3 as a "remedial provision[] of which a defendant might avail herself to reduce the terms and/or length of probation"]; *People v. Johnson* (2012) 211 Cal.App.4th 252, 262 [referring to § 1203.3, subd. (a) as "authorizing discretionary early termination of probation"].) The law differentiates the ability to oppose a plea, prior to the final judgment pursuant to section 1192.5, and the ability to modify the probation imposed pursuant to that plea, at any point after judgment, pursuant to section 1203.3.

The law further differentiates between a trial court's

inability to modify a material term of a plea agreement and the trial court's inherent ability to modify, change, or terminate probation after the acceptance of a plea agreement. For instance, in *People v. Segura, supra,* the defendant sought a reduction in the specified and agreed upon jail term imposed as part of his plea agreement in order to help his immigration status. After a lengthy discussion, this Court found that the trial court lacked the ability to reduce that jail term because the specified jail term was a "condition precedent to" the granting of probation. (*People v. Segura* (2008) 44 Cal.4th 921, 929-36.) This jail term was specified as tantamount to the plea, i.e., the defendant must serve that jail term if he wants a grant of probation. Thus, the defendant needed to serve that jail term before he was released on probation. That specified and agreed upon jail term was deemed a "material term" of the plea. (*Id.* at p. 936.) Because it was a material term of the plea and a condition precedent to probation, the trial court could not unilaterally reduce the term. However, in so finding, this Court acknowledged that, "following the entry of judgment, the trial court retained its authority pursuant to section 1203.3 to revoke, modify, or change probation." (*Ibid.*) Here, appellant does not seek a reduction in his specified and agreed upon jail term. Indeed, he served that time. (CT: 192.) He simply seeks to reduce the length of the term of his probation pursuant to the new law well after the time that sentence was imposed in this case. Section 1203.3 grants

the trial court the authority to make this reduction without violating section 1192.5. Again, while appellant maintains this Court should simply mandate his term of probation be reduced to two years without involving the trial court, he contends nonetheless that the trial court is deemed to have the authority to modify the length of his probation under section 1203.3 without violating section 1192.5.

Importantly, under the new law, the trial court lacks the ability to reject a two-year term of probation in lieu of some other probationary term length. This is not a situation in which the trial court can exercise its discretion to fashion the length of a term of probation it finds more suitable to a particular defendant or circumstance. This is a legal mandate. Felony probation is now a maximum of two years. If the parties agree that certain felonies are worthy of probation, as they did here, that term of probation can no longer exceed two years. The need to simply reduce appellant's term of probation is supported by the legislative history of the new law discussed above.

Respondent also claims that "allowing defendants to serve reduced sentences at their request, and over a prosecutor's objection, would contravene the basic tenets of contract law that are applicable to plea bargains." (RB: 46 citing *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 706.) This is not so. Appellant is not requesting to serve a reduced sentence. Again, this is not a situation like *Segura* in

which a defendant went to the trial court and asked for a reduced sentence after entering into a negotiated plea. (*People v. Segura, supra,* 44 Cal.4th at pp. 929-36.) Appellant made no such request. Instead, the Legislature acted to invalidate appellant's three-year term of probation. The Legislature acted to mandate felony probation not to exceed two years. It is disingenuous to claim appellant is asking for a reduced sentence. Appellant served his full jail term. (see CT: 192.) Now, he is asking that his probation comply with the law. Respondent appears to liken this situation to one in which a defendant asks for a discretionary modification to his or her sentence after entering into a plea. (RB: 46-47.) Appellant is not seeking a discretionary modification. The Legislature acted to modify the length of appellant's probation. Appellant cannot remain on three years of felony probation because the law invalidated such a probationary term.

Understanding the intent of the Legislature and the law surrounding a trial court's ability to modify, change, revoke, or terminate probation at any time after judgment, the only proper remedy here is to reduce the length of appellant's term of probation to two years.

C. The *Stamps* remand procedure is inappropriate in this case.

Despite the intent of the Legislature and the trial court's inherent power to at any time revoke or terminate probation,

respondent claims the remand procedure set forth in *Stamps* must apply. (RB: 58-63.) Respondent is again mistaken.

Insofar as respondent relies on *People v. Collins* (1978) 21 Cal.3d 208 and the *Stamps* analysis of *Collins* to support this claim, appellant contends this reliance is misplaced. In *Collins*, the defendant pled guilty to one count of non-forcible oral copulation in exchange for dismissal of fourteen other charges. (*People v. Collins*, *supra*, 21 Cal.3d at p. 211.) Prior to the judgment, the Legislature then repealed the statute defining that crime to which the defendant pled, decriminalizing the conduct. (*Ibid.*) The defendant appealed, and this Court reversed his conviction. (*Ibid.*) In reversing that conviction, this Court held that because the change in law at issue had "destroy[ed] a fundamental assumption underlying the plea bargain" that the People were entitled to reinstate the dismissed counts. (*Id.* at pp. 215-216.) This Court reasoned, "[w]hen a defendant gains total relief from his vulnerability to sentence, the state is substantially deprived of the benefits for which it agreed to enter the bargain." (*Id.* at p. 215.)

Significant to this analysis, in *Stamps*, the remedy that respondent now seeks, the sentencing enhancement at issue was imposed as part of negotiated plea for a specified and agreed upon amount of prison time. Crucial to that plea was the imposition of five years in state prison pursuant to a five-year enhancement filed under Penal Code section 667, subdivision (a).

The imposition of that enhancement was a material term of and a fundamental assumption underlying the plea. Indeed, the enhancement provided for more than fifty percent of the agreed upon prison sentence. (*People v. Stamps, supra,* 9 Cal.5th at p. 700.) Because of a change in the law that granted a trial court newly vested discretion to strike that enhancement, the defendant in *Stamps* asked for his case, the result of a negotiated plea, to be remanded to the trial court, so he could request the enhancement be stricken while leaving the remainder of the plea intact. (*Ibid.*) While this Court agreed that defendant could seek relief from the trial court, it disagreed that he could do so while leaving the remainder of his plea intact. Certainly, *Collins* applied to the situation in *Stamps* since removing that five-year enhancement that amounted to more than half of the amount of specified and agreed upon prison time destroyed a material term and a fundamental understanding of the plea bargain, in essence eviscerating that plea. Hence, the *Stamps* reliance on the *Collins* analysis was appropriate. (*Id.* at pp. 705-706.) It is not appropriate here.

This case involves a negotiated plea to a single count of felony second degree burglary with a three-year term of probation. The plea contained a specified and agreed upon jail term of 365 days. (CT: 192.) The record is devoid of any evidence to suggest the length of the term of probation, three years, played any part in the negotiation process. Nor does this record imply

the trial court contemplated and considered the length of the term of probation or that this specific length of probation played any significant role in the trial court's acceptance of the plea, or the offer made by the prosecution. Rather this record implied the length of the term of probation was of no import. There was no discussion about the length of the term of probation. Nor was there any discussion about special or unique terms specific to appellant that would necessitate the three-year term to complete. Here, appellant stands convicted of a felony and could face further incarceration should he violate the terms and conditions of his probation. Certainly, that is of great benefit to the prosecution. Yet, the law since changed and made part of that sentence invalid. The prosecution cannot now negotiate for a three-year term of probation. The trial court lacks the discretion to impose more than a two-year term of probation. An agreement that a felony burglary conviction is worthy of probation must result in a maximum two-year term of that probation.

Relying on the decision in *People v. Scarano* (2022) 74 Cal.App.5th 995, respondent cites to facts of appellant's case in an attempt to claim that this probation term was tailored specifically to him. (see RB: 58-62.) This attempt fails. First, appellant maintains that *Scarano* was wrongly decided (see AOBM: 32-33.) Nevertheless, assuming, arguendo, it is correct, this case is decidedly different. In *Scarano,* the 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.) Contrary to respondent's suggestion, nothing in this record indicates that the length of the term of probation and/or the terms and conditions of that probation were specifically considered or tailored to this case. Indeed, this record supports the opposite. Here, the parties agreed to a plea to a felony burglary for probation. It appears that the trial court simply imposed the then standard length of probation with the standard terms and conditions. Nothing specific was ever discussed on the record. The record suggests that no crucial or case specific terms and conditions of probation were imposed. The plea form signed by appellant and the prosecution appears to be the standard felony plea form used in the County of San Bernardino. (see CT: 192-193.) It is a pre-printed form with appellant's name and date of birth added by handwriting. (CT: 192.) Additionally, the charge to which appellant is entering his plea and the charge to be dismissed are handwritten in the form. (CT: 192, paragraphs 2 and 3(a).) Below the indicated charge, an indicated sentence is handwritten on the form. This indicated sentence is 365 days in county jail, with credit for 365 days, three years of probation, and restitution. (CT: 192, paragraph 3(b).) Above this indicated sentence are two boxes that are left unchecked. The boxes allow for either the trial court or the district attorney to agree to the indicated sentence. This form

lacks any indication that either the trial court or the district attorney specifically agreed to these terms. (see CT: 192, paragraph 3(b).)

After he entered the plea, appellant was referred to the probation department to participate in the preparation of a probation report to assist in the imposition of sentence. (RT: 78.) That report was completed by probation and filed on October 7, 2020. (CT: 198.) In that report, the probation department recommends three years of probation with 21 terms and conditions. (CT: 205-207.) None of these recommended terms and conditions require any extended length of time to complete (i.e. there are not specific program completion requirements, nor was there a request for an extended period of time to subject appellant to search and seizure). Nor do any of these terms and conditions appear to by unique or necessitate significant guidance and/or supervision by any member of the probation department. Instead, these recommended terms and conditions appear to be the standard, pro forma terms and conditions that apply in most felony cases. (see CT: 205-207.)

Significant to this case, at the sentencing hearing, defense counsel objected to two of the recommended terms and conditions in that probation report. The trial court accepted the defense argument and, over the prosecutions' objection, struck those two conditions from appellant's probation. (RT: 80-83.) Of further significance, in imposing the sentence, the trial court chose not to

explain any of the terms and conditions of probation with appellant. Instead, the trial court accepted appellant's statement that he reviewed these terms and conditions with his attorney. (RT: 83.) This action by the trial court suggests that this grant of probation was normal, common, and standard as it required no detailed discussion, explanation, or conversation with appellant.

It is important to understand the state of the law at the time appellant was sentenced to this three-year term of probation. Prior to the amendment at issue in this case, section 1203.1 provided for broad judicial discretion in the imposition of the length of the term probation. For instance, at the time appellant was sentenced, section 1203.1, subdivision (a) allowed the trial court discretion to impose up to five years of supervised probation in cases where the maximum term of sentence was five years or less, like this case. (see Pen. Code, § 1203.1, subd. (a) (2019).) In appellant's case, the term imposed was three years, far less than the five-year potential maximum term.

Finally, following the *Stamps* remand procedure, as suggested by respondent, could lead to an unlawful and unjust result. Citing *Stamps*, respondent suggests that the prosecution should be permitted to reinstate the dismissed robbery count (§ 211) upon remand. (RB: 59-60.) A look at case law discussing situations in which the prosecution may be permitted to withdraw from a plea agreement due to changes in the law rejects the very claim respondent made here. For instance, in

Collins, supra, the Court noted that, while the prosecution is entitled to the benefit of the bargain and may withdraw from a plea agreement and reinstate previously dismissed counts, *so is the defendant.* *Collins* stated, "[c]ritical to plea bargaining is the concept of *reciprocal* benefits. When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made." (*People v. Collins, supra* , 21 Cal.3d at p. 214, italics added.) While, as discussed above, the change in the law in *Collins* was found to eviscerate the plea and deprive the prosecution of the substantial benefits to which it bargained, therefore permitting the prosecution to withdraw from the plea agreement in order to be made whole, this Court noted that "the defendant is *also* entitled to the benefit of his bargain." (*Id.* at p. 216.) As a result, *Collins* concluded that where "external events and not [the] defendant's repudiation undermined th[e] plea bargaining agreement[,]" the trial court "must fashion a remedy that restores to the state the benefits for which it bargained *without depriving* [*the*] *defendant of the bargain to which he remains entitled.*" (*Ibid.*, italics added.) Because the plea bargain resulted in the dismissal of 14 other counts, the *Collins* court opined that the remedy might "best be effected by permitting the state to revive one or more of the dismissed counts, but limiting [the] defendant's potential sentence ...." (*Ibid.*) The court explained that limiting the defendant's potential sentence was "based on

principles of double jeopardy," and was necessary in order "to preclude vindictiveness and more generally to avoid penalizing a defendant for pursuing a successful appeal." (*Ibid.*) "[A] defendant should not be penalized for properly invoking [his right] to overturn his erroneous conviction and sentence by being rendered vulnerable to punishment more severe than under his plea bargain." (*Id.* at p. 217.)

Harris v. Superior Court (2016) 1 Cal.5th 984 reiterated this rule. In *Harris*, this Court summarized the remedy found in *Collins* , which, as just discussed, provided that the People could withdraw from the plea agreement and reinstate one or more counts, but noted that the defendant could not be subject to more severe punishment than under the original plea agreement. (*Harris, supra*, 1 Cal.5th at pp. 989–990.) *Harris* made clear that *Collins* was still good law. (*Id.* at p. 993.)

Here, respondent claims the prosecution should be able to reinstate a serious and violent felony, a robbery, resulting in a "strike" conviction for appellant. (see RB: 56; §§ 667.5, subd, (c)(9) and 1192.7, subd. (c)(19).) However, reinstating a dismissed robbery, a serious and violent felony, serves to unlawfully penalize appellant for properly invoking his right to appeal his now invalid probation length. (see *Collins, supra,* 21 Cal.3d at p. 217.) As stated, reinstating the robbery would result in "strike" conviction for appellant. It would also result in a serious felony conviction under section 667, subdivision (a). It

would negatively impact any future sentencing should appellant suffer a new felony conviction. (see §§ 667, subds. (b)-(i) and 1170.12, subds. (a)-(d).) Appellant cannot now face the consequences of a strike conviction simply because he filed a successful appeal. While it is true that probation could be imposed as part of a plea to a robbery, appellant would suffer significant consequences as a result, consequences he did not suffer, nor did he contemplate as a result of this original plea. Appellant pleaded no contest to a felony burglary (§ 459). This is not a strike offense. (see §§ 667, subds. (b)-(i) and 1170.12, subds. (a)-(d).) It carries no significant consequence to any future criminal filings or sentences. Should appellant violate probation, he faces a maximum term of three years in prison. (see § 459.) With a robbery conviction, that maximum term nearly doubles to five years. (see § 213.) With a robbery conviction, appellant faces a potential doubling of his sentence for a future conviction and a potential additional five years in state prison imposed consecutively to any future felony sentence. (see §§ 667, subds. (a) and (b)-(i) and 1170.12, subds. (a)-(d).) Moreover, should appellant violate his current probation and suffer a state prison sentence as result, he will receive credits pursuant to section 4019, namely 50% credits unless he participates in programming that permits even greater credit accrual. (see § 4019.) If he suffers a robbery conviction, his credits are limited to 15%, significantly impacting the length of a prison stay. (see § 2933.1.)

Respondent's suggested remedy unlawfully penalizes appellant for pursuing a successful appeal by subjecting appellant to the severe consequences associated with a strike conviction.

Moreover, a *Stamps* remand, as suggested by respondent, would not only frustrate the purpose and intent of this new law, it would potentially violate the law. In *Stamps,* this Court emphasized that it was the defendant's choice whether to continue to seek relief, under SB 1393 on remand, because the trial court or prosecution might withdraw consent from the plea agreement. (*Stamps*, *supra*, 9 Cal.5th at p. 708.) This Court explained: " 'we anticipate that there will be defendants who determine that, notwithstanding their entitlement to seek relief based on the change in the law, their interests are better served by preserving the status quo. That determination, however, lies in each instance with the defendant.' " (*Ibid.*, quoting *People v. Ellis* (2019) 43 Cal.App.5th 925, 944.) "While it is true that defendant has consistently argued on appeal that Senate Bill 1393 should retroactively apply to him, his argument has always been coupled with his claim that the proper remedy should be to simply allow the trial court to reduce his sentence by five years while otherwise maintaining the remainder of the plea agreement. Now that we have rejected his proposed remedy, defendant's calculus in seeking relief under Senate Bill 1393 may have changed. Defendant should be allowed to make an informed decision whether to seek relief on remand." (*Stamps*, at p. 708.)

Thus, *Stamps* remanded the "matter to the superior court to allow defendant an opportunity to seek relief under Senate Bill 1393." (*Id.* at p. 709.)

The *Stamps* decision permits a defendant to make an informed decision about whether to request a trial court exercise its newly vested discretion, risking the prosecution's and/or that trial court's request to withdraw from the plea, or simply preserve the status quo. In *Stamps,* the status quo, namely the imposition of five additional years under Penal Code section 667, subdivision (a), is still a legally valid sentence. Appellant is differently situated. Upon remand, he cannot choose to preserve the status quo because his three-year term of probation is no longer authorized. "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) Three years of probation can no longer be imposed for a conviction for a felony second degree burglary. If the *Stamps* remand procedure were followed here, appellant does not have the option to preserve the status quo because the status quo is a legally invalid sentence. This is not a situation, like that in *Stamps*, where the original sentence remains valid, and a defendant seeks a modification under a new discretionary sentencing scheme. The *Stamps* remand should not apply. The proper remedy is for this Court to simply reduce the length of appellant's probation to two years.

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.

Dated: August 26, 2022

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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 7,414 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: August 26, 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 August 26, 2022 in Mission Viejo, California.

/s/ Erica Gambale
Erica Gambale, SBN 214501

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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