ARGUMENT

I. APPELLANT'S TERM OF PROBATION MUST BE MODIFIED FROM [THREE/TWO] TO [TWO/ONE] YEARS PURSUANT TO ASSEMBLY BILL 1950.

A. Introduction

On September 30, 2020, the Governor signed Assembly Bill No. 1950 (Stats. 2020, ch. 328 eff. Jan. 1, 2021, hereafter "AB 1950") which amends Penal Code section 1203.1[1], subdivision (a) to authorize a court to impose a term of probation not longer than two years in felony cases, except under limited circumstances that do not apply to this case. AB 1950 also amended section 1203a to limit the term of probation in a misdemeanor case to one year. The amendments will take effect on January 1, 2021.

For the reasons discussed below, the amendments should be applied retroactively to all cases not yet final on appeal because they constitute ameliorative legislation under the reasoning of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), *People v. Conley* (2016) 63 Cal. 4th 646, 657 (*Conley*); *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, and *People v. Frahs* (2020) 9 Cal.5th 618 (*Frahs*). Appellant was placed on probation in this matter for a period of [____] years on [date]. Because the maximum possible length of probation for appellant is now limited to [one/two years], this Court should order that his/her probation term be modified accordingly.

B. Standard of Review

The question of whether an amended statute applies retroactively is reviewed de novo. (*People v. Arroyo* (2016) 62 Cal.4th 589, 593; *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1348.)

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[1] All further undesignated statutory references are to the Penal Code.

C. AB 1950 Applies Retroactively To Cases Not Yet Final Because It Is An Ameliorative Change To The Criminal Law

[For Felony Cases]

1. AB 1950 shortens the maximum term of probation to two years in this felony case

At the time of appellant's sentencing, section 1203.1, subdivision (a) read:

> 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 the maximum possible term of the sentence, except as hereinafter set forth, and upon those terms and conditions as it shall determine. The court, or judge thereof, in the order granting probation and as a condition thereof, may imprison the defendant in a county jail for a period not exceeding the maximum time fixed by law in the case.

(§ 1203.1, subd. (a).)

On September 30, 2020, the Governor signed AB 1950. This measure amended section 1203.1, subdivision (a) so that, as of January 1, 2021, it will provide:

> (a) 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. The court, or judge thereof, in the order granting probation and as a condition thereof, may imprison the defendant in a county jail for a period not exceeding the maximum time fixed by law in the case.

(§ 1203.1, subd. (a) [as amended eff. Jan. 1, 2021], emphasis added.)

The amendment will become effective on January 1, 2021. (Cal. Const., art. IV, § 8, subd. (c).) While there are certain exceptions to the new limit on felony probationary periods, none apply to the case at bar. Those exceptions

include violent felonies (§ 667.5, subd. (c)) and an offense with specific probation lengths within its provisions. For these offenses, the court may suspend imposition or execution of sentence and direct that the suspension may continue "for a period of time not exceeding the maximum possible term of the sentence and under conditions as it shall determine." (§ 1203.1, subd. (m)(1) [as amended eff. Jan. 1, 2021].) The amended statute also carves out exceptions for grand theft by an employee (§ 487, subd. (b)(3)); embezzlement (§ 503) and furnishing a false financial statement (§ 532a) where the value of the property taken exceeds $25,000. For these offenses, the court may suspend imposition or execution of sentence for a period not exceeding three years. (§ 1203.1, subd. (m)(2) [as amended eff. Jan. 1, 2021].)

[For Misdemeanor Cases]

1. AB 1950 shortens the maximum term of probation to one year in this misdemeanor case

At the time of appellant's sentencing, section 1203a, subdivision (a) read:

> In all counties and cities and counties the courts therein, having jurisdiction to impose punishment in misdemeanor cases, shall have the power to refer cases, demand reports and to do and require all things necessary to carry out the purposes of Section 1203 of this code insofar as they are in their nature applicable to misdemeanors. Any such court shall have power to suspend the imposing or the execution of the sentence, and to make and enforce the terms of probation for a period not to exceed three years; provided, that when the maximum sentence provided by law exceeds three years imprisonment, the period during which sentence may be suspended and terms of probation enforced may be for a longer period than three years, but in such instance, not to exceed the maximum time for which sentence of imprisonment might be pronounced.

(§ 1203a.)

On September 30, 2020, the Governor signed AB 1950, which amended section 1203a. As of January 1, 2021, a newly added subdivision (a) will provide in relevant part that in all misdemeanor cases:

> The court may suspend the imposition or execution of the sentence and make and enforce the terms of probation for a period *not to exceed one year*.

(§ 1203a, subd. (a) [as amended eff. Jan. 1, 2021], emphasis added.)

The amendments carve out an exception to the one-year limit, adding a new subdivision (b) that provides: "The one-year probation limit in subdivision (a) shall not apply to any offense that includes specific probation lengths within its provisions." (Pen. Code, § 1203a, subd. (b) [as amended eff. Jan. 1, 2021].) This exception might apply to misdemeanors involving driving under the influence or domestic violence, which have distinct statutory probation requirements separate from section 1203a. (See Veh. Code, § 23600 [mandating a period of probation "not less than three nor more than five years" for driving under the influence]; Pen. Code, § 1203.097 [minimum period of probation of 36 months for domestic violence offenses].)

Here, appellant was convicted of violating [Code Section] and placed on probation for a period of [two/three] years. This offense does not include specific probation lengths within its provisions. Thus, based on the amended version of section 1203a, the maximum period of probation that may be imposed on appellant is one year.

2. The *Estrada* inference of retroactivity

"The rationale of *Estrada, supra*, 63 Cal.2d 740 mandates retroactive application of the amended statutes. *Estrada* constitutes "an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively[.]" (*People v. Brown* (2012) 54 Cal.4th 314, 323.) In general, there is a "presumption that statutes operate prospectively absent a

clear indication the voters or the Legislature intended otherwise. [Citations.] (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 230.) However, there is an exception to this general rule in the case of statutory amendments that mitigate the punishment for criminal acts. (*Estrada, supra*, 63 Cal.2d at p. 748.) Such an amendment, if it does not contain a saving clause -- that is, a clear indication that the amendment is intended to apply only prospectively -- "will operate retroactively so that the lighter punishment is imposed." (*Ibid.*; *People v. Babylon* (1985) 39 Cal.3d 719, 722 ["absent a savings clause, a criminal defendant is entitled to the benefit of a change in the law during the pendency of his appeal"].)

The retroactivity of a statutory amendment that ameliorates the punishment for an offense is limited to cases not yet final when the amendment takes effect. (*Estrada, supra*, 63 Cal.2d at p. 745 ["amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final"]; *People v. Brown*, *supra*, 54 Cal.4th at p. 323 [Legislature presumed to have intended mitigated punishments to apply to all judgments not yet final as of effective date of amendment].)

"[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306; see also *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.) A case is final on appeal 90 days after the California Supreme Court denies a petition for review. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Thus, appellant's judgment is not yet final and, even if this Court denied appellant's appeal today, the judgment will not become final until after January 1, 2021 because the 90-day window

for filing a petition for writ of certiorari will now extend past January 1st. (See *People v. Garcia, supra*, 28 Cal.App.5th at p. 973 [SB 1393 applied to defendant, even though his appeal was decided before the effective date of the law, because his case would not be final until after the effective date of the law].)

Under the *Estrada* rule, a court must assume that the Legislature intended the sentence-ameliorating legislation to apply to all defendants whose judgments are not yet final on the statute's operative date unless a contrary legislative intent can be gleaned from the language of the enactment or its legislative history. (*Estrada, supra*, 63 Cal.2d at p. 742.) The key consideration is whether the amendment lessens punishment. If it does, that leads to the "inevitable inference that the Legislature must have intended that the new statute" controls. (*Id.* at p.745.) Thus, in *People v. Francis* (1969) 71 Cal.2d 66, the court determined the *Estrada* rule applied to an amended statute even when it did not automatically lessen the minimum penalty but only provided the opportunity for discretionary imposition of a lesser penalty.

The *Estrada* rule has been invoked in a wide variety of circumstances, including recent reforms to sentencing procedures that were previously in place. For example, in *People v. Valenzuela* (2018) 23 Cal.App.5th 83, 87-88, the Court of Appeal determined Senate Bill 620, amending sections 12022.5 and 12022.53 to grant courts discretion to strike a firearm enhancement where they previously had no such discretion, applied retroactively under the *Estrada* rule to cases not yet final. Similarly, in *People v. Jones* (2019) 32 Cal.App.5th 267, 273, the Court of Appeal applied Senate Bill 1393, which gives trial court the discretion to strike five-year enhancements under section 667, subdivision (a), retroactively.

Importantly, *Estrada* has been held to apply in the context of delinquency cases, which are generally not considered punishment no matter the disposition. (See, e.g., *In re David C.* (2020) 53 Cal.App.5th 514, 519 [holding that *Estrada* applies in juvenile delinquency cases].)

3. Estrada's inference applies to AB 1950.

"The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for *ameliorative changes to the criminal law* to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*Conley, supra,* 63 Cal. 4th at p. 657, emphasis added.) As such, the *Estrada* inference of retroactivity applies not only to changes in the law that reduce jail and prison sentences, but to any legislative changes to the criminal law that are ameliorative.

The most compelling application of this broader understanding of the *Estrada* inference occurred in *Lara, supra,* 4 Cal.5th at p. 299, where the California Supreme Court ruled that the *Estrada* inference of retroactivity applied to Proposition 57. That voter initiative prevented prosecutors from charging juveniles with crimes directly in adult court, instead providing a "transfer hearing" for juveniles to allow a court to determine whether the matter should be heard in adult or juvenile court. (*Id.* at p. 303.) Notwithstanding the fact that "Proposition 57 does not reduce the punishment for a crime" the court held that the rationale of the *Estrada* inference still applied. (*Ibid.*)

Applying the language of *Conley*, the Court held 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, citing *Conley*, *supra*, 63 Cal.4th at p. 657.) "We find an 'inevitable

inference' that the electorate 'must have intended' that the potential 'ameliorating benefits' of rehabilitation (rather than punishment), which now extend to every eligible minor, must now also 'apply to every case to which it constitutionally could apply.'" (*Ibid*.) In short, the Court concluded that "the potential effect of that 'ameliorating benefit' is analogous to the potential reduction in a criminal defendant's sentence as in *Estrada* and *Francis*." (*Lara, supra*, 4 Cal.5th at pp. 308-309, citations omitted.)

The Supreme Court continued to apply the inference of *Estrada* outside the strict context of punishment-based amendments in *Frahs, supra*, 9 Cal.5th at p. 618. There, the Court held that *Estrada's* inference of retroactivity applied to a newly-enacted mental-health diversion program under section 1001.36. The reason for applying *Estrada's* inference did not turn on whether the diversion was *punishment*, but whether the legislation was *ameliorative*: "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.)

AB 1950 is similarly an "ameliorative change[ ] to the criminal law." (*Conley, supra*, 63 Cal.4th at p. 657.) According to the legislative analyses of AB 1950, the purpose of the bill was to reduce the possibility that probationers will be found to be in violation of probation for minor offenses:

> Proponents of reducing the length of probation terms argue that probation supervision is most beneficial in the early part of a probation term. In addition, advocates argue that increased levels of supervision can lead to increased involvement with the criminal justice system due to the likelihood that minor violations will be detected.

(Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading of AB 1950 (2019-2020 Reg. Sess.)[2]

The Attorney General may argue that the *Estrada* inference does not apply because courts have held that, at least in certain circumstances, probation is not punishment. (See, e.g., *People v. Howard* (1997) 16 Cal.4th 1081, 1092.) As discussed above, however, the relevant consideration is whether the legislation is ameliorative, not whether it pertains to "punishment." As the above cases make clear, courts apply a contextualized approach in considering whether *Estrada* applies. Because probation is at the very least the functional equivalent of punishment, statutory amendments reducing the length of a probationary term would fall "squarely within the spirit of the *Estrada* rule." (*Frahs, supra*, 9 Cal.5th at p. 631.)

Nor is there any merit to the argument that *Estrada* retroactivity does not apply because probation is an act of "clemency" (*People v. Gilchrist* (1982) 133 Cal.App.3d 38, 47) or that its "primary purpose is rehabilitative in nature" (*People v. Cookson* (1991) 54 Cal.3d 1091, 1097). In fact, probation is imposed on an individual after a criminal conviction and unquestionably restricts to varying degrees that individual's liberty.

Indeed, if the legislation *increased* the length of probation, it would appear that the change could not be applied retroactively as it would violate ex post facto: "statutory changes that retroactively impose greater punishment in probation cases violate the ex post facto clause." (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1170, citing *People v. Williams* (1988)

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[2] Available at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1950

200 Cal.App.3d Supp. 1, 4-6 [imposition of five-year probationary term pursuant to amended statute prohibited by ex post facto clause because under statute in effect when crime committed, defendant could not receive more than three years].) Such language recognizes that, notwithstanding the fact that probation is an act of "grace and clemency," it does act as a form of punishment. (*Ibid*., citing *People v. Edwards* (1976) 18 Cal.3d 796, 801 ["[T]he traditional view that a grant of probation is a privileged act of grace or clemency has been discredited in favor of the modern view that such a grant should be deemed an alternative form of punishment in those cases when it can be used as a correctional tool[.]"]; but see *People v. Moran* (2016) 1 Cal.5th 398, 402 [adhering to the view that probation is not a traditional form of punishment].)

While it may be true that the goal is rehabilitation, and it is an alternative to harsher forms of punishment available under the law, there can be no doubt that probation imposes multiple burdens and infringements upon the subject's liberty. It also carries the constant risk of revocation and repeated imprisonment. These are the very burdens that the legislation was intended to ameliorate according to the author of the legislation:

> A 2018 Justice Center of the Council of State Governments study (https://csgjusticecenter.org/publications/confined-costly/?state=CA#primary) found that a large portion of people violate probation and end up incarcerated as a result. The study revealed that 20% of prison admissions in California are the result of supervised probation violations, accounting for the estimated $2 billion spent annually by the state to incarcerate people for supervision violations. 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.
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> Probation -- originally meant to reduce recidivism --has instead become a pipeline for re-entry into the carceral system.

…

> AB 1950 would restrict the period of adult probation for a misdemeanor to no longer than one year, and no longer than two years for a felony. In doing so, AB 1950 allows for the reinvestment of funding into supportive services for people on misdemeanor and felony probation rather than keeping this population on supervision for extended periods.

(Assembly Floor Analysis, 3d Reading June 10, 2020, p. 1.)[3]

There can be no doubt that probation imposes burdens on the probationer as a result of their criminal conviction. AB 1950 ameliorates those burdens by shortening the period of probation to a maximum of two years. AB 1950 is therefore an "ameliorative change[] to the criminal law." (*Conley, supra*, 63 Cal.4th at p. 657.) The legislation contains no "savings clause" or other indication that it was intended to apply only prospectively. (See *Id.* at p. 656.) Therefore, this Court should find "an 'inevitable inference' that the [Legislature] 'must have intended' that the potential 'ameliorating benefits' of [a limitation on the length of probation to [one/two] years] 'apply to every case to which it constitutionally could apply.'" (*Lara, supra*, 4 Cal.5th at p. 309.)

Because this case will not be final before the law goes into effect, the maximum term of probation available to impose on appellant is (one/two) year[s].

CONCLUSION

For the reasons set forth above, this Court should order that appellant's probation term be modified to the new statutory maximum of (one/two) year[s].

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[3] Available at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1950