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## **Sample argument that *Estrada* retroactivity applies to SB 180**

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### **THE ENACTMENT OF SENATE BILL 180 REQUIRES STRIKING THE THREE-YEAR ENHANCEMENT IMPOSED ON APPELLANT'S SENTENCE UNDER HEALTH AND SAFETY CODE SECTION 11370.2.**

#### **A. Introduction and background.**

On October 11, 2017, the Governor signed [Senate Bill 180](#).<sup>1</sup> This legislation amends Health and Safety Code section 11370.2, which imposes a separate, consecutive, three year enhancement term for persons convicted of specified crimes relating to controlled substances based on prior convictions for specified controlled-substance-related crimes. Before the amendment, the enhancement applied when a defendant had suffered a conviction for one of 11 enumerated offenses. After SB 180, the enhancement applies only where the defendant has suffered a prior

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<sup>1</sup>[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180SB180](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB180)

conviction for Health and Safety Code section 11380, an adult using a minor as an agent of drug sales.

Appellant's sentence includes an enhancement term of three years under section 11370.2, based on a prior conviction under Health and Safety Code section *[code section number of defendant's prior]*. *(Cite to record.)* After enactment of SB 180, the three-year enhancement under section 11370.2 no longer applies to a prior conviction under section *[code section number of defendant's prior]*.

As explained in section B, below, SB 180 applies to all cases not yet final as of January 1, 2018. Accordingly, this court should strike the enhancement under section 11370.2 attached to appellant's sentence.

**B. *In re Estrada* (1965) 63 Cal.2d 740 requires the amended Health and Safety Code section 11370.2 be applied to retroactively to cases not yet final .**

The ameliorative, punishment-lessening provisions of Senate Bill 180 apply to all affected cases not final as of the new law's effective date, January 1, 2018.

In *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), the California Supreme Court held that an amendment to a criminal statute that mitigates punishment operates retroactively so that the lighter punishment is imposed, unless there is a savings clause. (*Id.* at p. 748.) "Whether a statute operates

prospectively or retroactively is, at least in the first instance, a matter of legislative intent.” (*People v. Brown* (2012) 54 Cal.4th 314, 319.) When a criminal statute is amended to repeal another criminal statute, reduce the punishment for a criminal offense, or modify the elements of a penalty enhancement, an offender of the law that has been so amended is entitled to the benefit of the amendment unless the Legislature indicates a contrary intent. (*In re Estrada, supra*, 63 Cal.2d at pp. 748-749.)

The “consideration . . . of paramount importance” is whether the amendment lessens punishment. Doing so leads to

an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The 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. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.

(*Estrada, supra*, 63 Cal.2d at p. 745.)

The *Estrada* principle is applicable not only to statutes concerning underlying offenses, but also to statutes defining penalty enhancements. (*People v. Nasalga* (2002) 12 Cal.4th 784, 792 [monetary value of taking]; *People v. Roberts* (1994) 24 Cal.App.4th 1462, 1465 [monetary value of

taking]; *People v. Figueroa* (1993) 20 Cal.App.4th 65, 69-71 [drug trafficking near school yards].)

Senate Bill 180 modified the elements of the enhancement under Health and Safety Code section 11370.2, significantly reducing the number of offenses that result in imposition of a three-year enhancement. The former version of the law imposed the enhancement term on defendants convicted of specified drug-related offenses if they had a prior conviction under sections 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383. (Health & Saf. Code, § 11370.2 [effective until Dec. 31, 2017].) The amended law removes 10 of the 11 offenses, making the enhancement applicable only to a prior conviction under section 11380, using a minor as an agent in drug sales or giving drugs to minors. Since the amended statute results in a lesser punishment for defendants with prior convictions under the other ten sections, the amendment is retroactive as to those defendants if their cases are not yet final when the law becomes effective.

*People v. Figueroa, supra*, 20 Cal.App.4th 65 is analogous. That case addressed an amendment to Health and Safety Code section 11353.6, subd. (b), a sentence enhancement for selling drugs near schools. (*Id.* at p. 69.) At the time the defendant was convicted, the enhancement applied to

crimes occurring within 1,000 feet of a school. (*Ibid.*) While the defendant's appeal was pending, i.e., before his case became final, the Legislature amended section 11353.6, subdivision (b), to further require the underlying offense occur either during school hours or other times minors are using the facility. (*Ibid.*) The court found the amended statute applied under *Estrada* because "[t]he amendment clearly benefits appellant since the enhancement can no longer be imposed unless it is proven that school was in session or that minors were using it when the narcotics offense was committed." (*Id.* at p. 70.) In other words, a statutory amendment that reduces the number of offenses to which an enhancement applies is retroactive to cases not yet final on the amendment's effective date. (See also *People v. Vinson* (2011) 193 Cal.App.4th 1190 [amendment to petty theft sentencing statute requiring at least three prior convictions for felony sentencing was retroactive].)

SB 180's penalty-reducing amendments to section 11370.2 apply retroactively to cases like appellant's that are not yet final as of the revised statute's effective date, January 1, 2018.

**C. Since the enhancement defined by the amended Health and Safety Code section 11370.2 no longer applies to appellant, this court should strike the three-year term attached to appellant's sentence under that statute.**

Appellant's sentence includes a three-year enhancement term under section 11370.2 based on a prior conviction under section *[code section number of defendant's prior]*. (*Cite to record.*) SB 180 eliminated section *[code section number of defendant's prior]* as a qualifying prior offense for the enhancement under section 11370.2. The amended statute does not call for any trial court discretion or fact-finding in application of the enhancement; it either applies, if the defendant has a prior conviction under section 11380, or not. It does not apply to appellant's prior conviction under section *[code section number of defendant's prior]*. In this situation, the Court of Appeal should use its power under Penal Code section 1260 to reduce the punishment imposed by striking the now-inapplicable enhancement under section 11370.2 currently attached to appellant's sentence.

This situation is different than the one in *People v. Figueroa, supra*, 20 Cal.App.4th 65, which required remand to the trial court for factual findings to determine whether the amended enhancement applied, i.e., whether minors were using the facility at the time of the offense. (*Id.* at pp. 71-72.) By contrast, the amendment at issue in this case is analogous to the

one in *People v. Nasalga, supra*, 12 Cal.4th 784 (*Nasalga*), where the Supreme Court struck an enhancement that no longer applied after the statute defining it was amended.

*Nasalga* dealt with amendments to Penal Code section 12022.6, subdivisions (a) and (b), increasing the value of a property loss required for a sentence enhancement. (*Nasalga, supra*, at p. 787.) Previously, a property loss of \$25,000 resulted in an enhancement term of one year (subd. (a)), and a loss of \$100,000, resulted in a two year enhancement (subd. (b)). Under the amended statutes, the amounts went up to \$50,000 and \$150,000, respectively. (*Ibid.*)

The defendant in *Nasalga* committed grand theft by stealing \$124,000 worth of checks, and the trial court imposed the two-year enhancement under subdivision (b). (*Nasalga, supra*, at p. 788.) The Supreme Court ruled that *Estrada* applied, making the amendments retroactive. (*Id.* at pp. 797-798.) Accordingly, Nasalga’s sentence was properly enhanced by one year under the amended subdivision (a), rather than the two years called for under subdivision (b). (*Ibid.*) The court concluded that no fact-finding was required to reach this result and therefore “there is no basis for resentencing and, thus, under these circumstances, no purpose would be served by a remand.” (*Id.* at p. 798.)

The same analysis applies in this case. Appellant's prior conviction for violating section *[code section number of defendant's prior]* no longer falls under the enhancement defined in the amended section 11370.2. No fact-finding is required to reach this conclusion. Accordingly, this court should use its power under Penal Code section 1260 to reduce the punishment imposed by striking the now-inapplicable enhancement under section 11370.2 currently attached to appellant's sentence.