

11 NO. 13F03312 11

IN THE SUPREME COURT OF THE UNITED STATES

IN RE DAVID KONEPACHIT

DAVID KONEDACHIT  
PETITIONER,  
v.

CALIFORNIA.

RESPONDENT,

RAYMOND MADDEN

ON PETITION FOR WRIT OF CERTIORARI

"APPENDIX ATTACHED THERETO."

DAVID KUNEPA CHIT  
APPEARING IN PROPER PERSONA  
CSCR NO. AX-6829  
CENTINELA STATE PRISON  
PO BOX 911  
IMPERIAL, CA  
92281

SUPREME COURT  
**FILED**

MAR 11 2020

Jorge Navarrete Clerk

S259538

Deputy

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

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In re DAVID KONEPACHIT on Habeas Corpus.

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The petition for writ of habeas corpus is denied.

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**CANTIL-SAKAUYE**

*Chief Justice*

# SUPREME COURT COPY

HC-001

Name: DAVID KONEPACHT  
Address: CENTINELA STATE PRISON  
P.O. BOX 941  
IMPERIAL, CA. 92251  
PRO SE

CDC or ID Number: AX- 6329

*CONFORMED COPY*

SUPREME COURT  
FILED

DEC - 9 2019

Jorge Navarrete Clerk

Deputy

(Court)

DAVID KONEPACHT

Petitioner

vs.

RAYMOND MADDEN

Respondent

## PETITION FOR WRIT OF HABEAS CORPUS

No.

**S259538**

(To be supplied by the Clerk of the Court)

## INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.

- Read the entire form before answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original of the petition and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2018). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

RECEIVED

Page 1 of 6

This petition concerns:

HC-001

A conviction

Parole

A sentence

Credits

Jail or prison conditions

Prison discipline

Other (specify): \_\_\_\_\_

1. Your name: DAVID KONEPACHIT

2. Where are you incarcerated? CENTINELA STATE PRISON, CALIFORNIA

3. Why are you in custody?  Criminal conviction  Civil commitment

Answer items a through i to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

SECOND DEGREE ROBBERY; ASSAULT W/ SERIOUS BODILY INJURY; WITH SERIOUS BODILY INJURY ENHANCEMENTS; ON BAIL ENHANCEMENT.

b. Penal or other code sections: § 211; § 243; § 197(c)(8); AND § 12022.1(d).

c. Name and location of sentencing or committing court:

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO,  
720 NINTH STREET, SACRAMENTO, CA. 95814.

d. Case number: 13FO3312

e. Date convicted or committed: 11-04-2013

f. Date sentenced: 12-13-2013

g. Length of sentence: TOTAL OF 16 YEARS

h. When do you expect to be released? CONCLUSION OF MATTER

i. Were you represented by counsel in the trial court?  Yes  No If yes, state the attorney's name and address:

PETER J. BOLDIN - 917 G STREET, SUITE 202, SACRAMENTO, CA.  
95814

4. What was the LAST plea you entered? (Check one):

Not guilty  Guilty  Nolo contendere  Other: \_\_\_\_\_

5. If you pleaded not guilty, what kind of trial did you have?

Jury  Judge without a jury  Submitted on transcript  Awaiting trial

## 6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)

PLEASE SEE ATTACHMENT - A

## a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, who did exactly what to violate your rights at what time (when) or place (where).

PLEASE SEE ATTACHMENT - A

## b. Supporting documents:

Attach declarations, relevant records, transcripts, or other documents supporting your claim. (See *People v. Duval* (1995) 9 Cal. 4th 464, 474.)

PLEASE SEE EXHIBIT - 2

## c. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

PLEASE SEE ATTACHMENT - A

7. Ground 2 or Ground \_\_\_\_\_ (if applicable):

N/A

a. Supporting facts:

N/A

b. Supporting documents:

N/A

c. Supporting cases, rules, or other authority:

N/A

8. Did you appeal from the conviction, sentence, or commitment?  Yes  No If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"): USDC — EASTERN DISTRICT OF CALIFORNIA

b. Result: DENIED

c. Date of decision: JUNE 27, 2017

d. Case number or citation of opinion, if known: 2:16-CV-00454-JAM-CKD

e. Issues raised: (1) 8TH AND 14TH AMENDMENT VIOLATION  
 (2) N/A  
 (3) N/A

f. Were you represented by counsel on appeal?  Yes  No If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court?  Yes  No If yes, give the following information:

a. Result: N/A

b. Date of decision: N/A

c. Case number or citation of opinion, if known: N/A

d. Issues raised: (1) N/A  
 (2) N/A  
 (3) N/A

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal (see *In re Dixon* (1953) 41 Cal.2d 756, 759):  
NEWLY IMPOSED LAW THAT WENT INTO EFFECT ON JANUARY 01, 2019, WHICH GAVE THE COURT DISCRETION TO STRIKE THE FIVE-YEAR LIMITATIONS!

11. Administrative review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Dexter* (1979) 25 Cal.3d 921, 925.) Explain what administrative review you sought or explain why you did not seek such review:  
N/A

b. Did you seek the highest level of administrative review available?  Yes  No  
Attach documents that show you have exhausted your administrative remedies. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court, including this court? (See *In re Clark* (1993) 5 Cal.4th 750, 767-769 and *In re Miller* (1941) 17 Cal.2d 734, 735.)  
 Yes If yes, continue with number 13.  No If no, skip to number 15.

13. a. (1) Name of court: U.S. D.C. — EASTERN DIST. OF CALIFORNIA  
 (2) Nature of proceeding (for example, "habeas corpus petition"): HABEAS CORPUS PETITION  
 (3) Issues raised: (a) CONSTITUTIONAL VIOLATIONS (6TH AND 14TH AMENDMENT)  
 (b) N/A  
 (4) Result (attach order or explain why unavailable): DENIED (Lost Document)  
 (5) Date of decision: JUNE 27, 2017

b. (1) Name of court: SUPERIOR COURT OF SACRAMENTO  
 (2) Nature of proceeding: PETITION FOR WRIT OF HABEAS CORPUS  
 (3) Issues raised: (a) FIVE-YEAR PRIOR SERIOUS FELONY ENHANCEMENT  
 (b)   
 (4) Result (attach order or explain why unavailable): DENIED (SEE, EXHIBIT-1.)  
 (5) Date of decision: AUG. 07, 2019

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:  
N/A

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Robbins* (1998) 18 Cal.4th 770, 780.)

THROUGH DUE DILIGENCE AND WHILE EXERCISING DILIGENCE THE CLAIM IS BEING RAISED WITHOUT SUBSTANTIAL DELAY.

16. Are you presently represented by counsel?  Yes  No If yes, state the attorney's name and address, if known:  
 \_\_\_\_\_  
 \_\_\_\_\_

17. Do you have any petition, appeal, or other matter pending in any court?  Yes  No If yes, explain:  
 \_\_\_\_\_  
 \_\_\_\_\_

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

AN ABUSE OF DISCRETION WHICH THE RULING IS NOT IN ACCORDANCE WITH THE LAW OR IN THE INTEREST OF JUSTICE. THIS COURT HAVE JURISDICTION TO ORDER REMAND AND RESENTENCE.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 12/14/19

  
 (SIGNATURE OF PETITIONER)

FOR: PAGE 10 OF 10, 13 (C.I.)

2 C. (1) NAME OF COURT: COURT OF APPEAL, THIRD APPELLATE DISTRICT

3 (2) NATURE OF PROCEEDING: PETITION FOR WRIT OF HABEAS CORPUS

4 (3) ISSUES RAISED (2): WHETHER TRIAL COURT ABUSED ITS DISCRETION  
5 REGARDING THE FIVE-YEAR PRIOR SERIOUS FELONY  
6 ENTRANCEMENT

7 (4) RESULT: DENIED (UNABLE TO COPY)

8 (5) DATE OF DECISION: NOVEMBER 15, 2019

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14 **Attachment - A**  
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16  
17 • ABUSE OF DISCRETION ATTACHMENT  
18 (ANSWERS TO QUESTION 6)  
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QUESTION PRESENTED

WHETHER THE COURT OF APPEAL ERRED IN ITS RULING, THAT  
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION REGARDING  
PETITIONERS FIVE-YEAR PRIOR ENHANCEMENT.

## REVIEW AUTHORITY

WHEN "A DISCRETIONARY POWER IS INHERENTLY OR BY EXPRESS STATUTE RESTED IN THE TRIAL JUDGE," THE JUDGE'S RULING IS REVIEWED FOR AN ABUSE OF DISCRETION. *PEOPLE V. JORDAN*, 42 CAL. 3D. 308, 316 (1986).

## ABUSE OF DISCRETION ATTACHMENT:

## ANSWERS TO QUESTION 6, GROUNDS FOR RELIEF

(Judicial Council Form MC-275)

## QUESTION 6 : GROUNDS FOR RELIEF

5 GROUND 1 : PETITIONER ALLEGES THAT HE IS ENTITLED  
6 TO HAVE THIS ACTION REMANDED FOR RESENTENCE FOR THE  
7 COURT ABUSING ITS DISCRETION BY NOT STRIKING OR DISMISSING  
8 PETITIONER'S PRIOR CONVICTION, WHICH RESULTED IN AN  
9 ENHANCEMENT THAT IS GREATER THAN THE BASE-TERM.  
10 PETITIONER CONTENDS THAT THE ERROR IS PLAIN ERROR THAT  
11 AFFECTS PETITIONER'S SUBSTANTIAL RIGHTS. U.S. V. OLANO, 507  
12 U.S. 725, 732-33 (1993); IN RE BUTLER, 4 CAL. 5TH 728 (2018); PEOPLE  
13 V. CRAIG (1998) 66 CAL. APP. 4TH 1444, 1448.

## (2) SUPPORTING FACTS:

15 (i) ELIGIBILITY AND ENTITLEMENT FOR REMAND AND

16 SENTENCE.

17 THE OFFENSE(S) FOR WHICH I WAS CONVICTED AND THE SENTENCE  
18 I AM SERVING ARE SHOWN ABOVE IN QUESTION 3 OF MY MC-275 FORM.

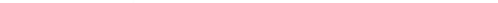
I AM SERVING A SENTENCE OF A MANDATORY TERM OF

20 FIVE-YEARS FOR VIOLATING 6 PENAL CODE, SECTION 667, SUBD. (a)(1).

THE GORET WHEAT PRESSURE WITH THE APPARATUS

23 COURTS HAVE THE POWER TO STRIKE OR DISMISS A DEFENDANT'S  
24 PETITION OR COMPLAINT ON THE BASIS OF THE NEW STATUTORY LAW

DOI: 10.1007/s00339-006-0177-7 © Springer 2006

22  Research has a positive impact on society.

20 NORTH OF HADDEAS CORPUS. HERE, THE CARK KILLED ON NOV. 5, 2011.

21 THAT SENATE BILL NO. 1393 IS NOT RETROACTIVE. (SEE EXHIBIT)

28 However, petitioner had ascertained and is under the

1 ASSUMPTION THAT THE NEW SENATE BILL NO. 1393 IS ONLY A  
2 CLARIFICATION.

3       THUS, AS A MATTER OF LAW AND IN FURTHERANCE OF  
4 JUSTICE, THE SENTENCING JUDGE AND PROSECUTING ATTORNEY HAD  
5 DISREGARDED CLEARLY ESTABLISHED RELEVANT STATE AUTHORITY—  
6 PEOPLE V. FRITZ (1985) 40 CAL. 3d 227, 231, AND PEOPLE V.  
7 WHIGHAM (1984) 158 CAL. APP. 3d 1161, 1169.

8       THE COURT IN PEOPLE V. FRITZ, SUPRA, AT PP. 229-230,  
9 HOLD THAT THE COURT HAVE THE POWER TO STRIKE A PRIOR  
10 CONVICTION, WHICH THE CASE WAS REMANDED FOR RESENTENCING.  
11 Id. WHEREAS, THE COURT IN PEOPLE V. WHIGHAM, SUPRA, AT 1169,  
12 HOLD THAT AN ENHANCEMENT MUST BE STAYED IF IT CAUSES THE  
13 TOTAL SENTENCE TO EXCEED THE DOUBLE-THE-BASE-TERM.  
14 IF SO, THE CASE MUST BE REMANDED TO SEE WHETHER THE COURT  
15 WILL EXERCISE ITS DISCRETION UNDER PENAL CODE SECTION 1385.

16       Id. APPLYING THESE PRINCIPLES HERE, THE COURT CLEARLY  
17 VIOLATED PEOPLE V. FRITZ, SUPRA, BY ITS FAILURE, AT THE TIME OF  
18 SENTENCING, TO STRIKE PETITIONER'S PRIOR CONVICTION OF THAT  
19 CONVICTED OF ROBBERY. Id. AT PP. 229-230. AND, CLEARLY  
20 VIOLATED PEOPLE V. WHIGHAM, SUPRA, BY NOT STAYING PETITIONER'S  
21 ENHANCEMENTS THAT IS GREATER THAN THE BASE-TERM OF FIVE  
22 (5) YEARS; FOR CRIME CONVICTED OF ROBBERY. Id. AT P. 1169. SEE ALSO,  
23 PEOPLE V. CRAIG (1998) 66 CAL. APP. 4TH 1444, 1448 (PETITIONER MAY  
24 NOT RECEIVE AN AGGREGATE SENTENCE GREATER THAN THAT  
25 PREVIOUSLY IMPOSED). THAT VIOLATION ALONE ENTITLES PETITIONER  
26 TO RECEIVE A REMAND AND RESENTENCE.

27       REMAND IS PROPER FOR AN INCORRECT SENTENCE. Id.; SEE,  
28 E.G., U.S. V. CASTRO-DAVIS, 612 F. 3d 53, 69 (1st Cir. 2010)

1 (PLAIN ERROR REQUIRED REMAND WHEN ERROR AT SENTENCING  
2 HEARING RESULTED IN INCORRECT SENTENCE). ALSO, RELIEF IS  
3 A MUST IF A MISCARRIAGE OF JUSTICE WOULD RESULT IN NOT  
4 CORRECTING THE ERROR. SEE, E.G., IN RE HARRIS (1993) 5 CAL.  
5 4TH 813.

6 FURTHER, THE SENTENCING COURT HAD FAILED TO USE ITS  
7 DISCRETION IN STRIKING OR DISMISSING THE PRIOR CONVICTION;  
8 AND AFTER BEING AWARE OF THE ERROR NO ACTION WAS  
9 TAKEN TO CORRECT THE INCORRECT SENTENCE. (SEE, PEOPLE V.  
10 SANDOVAL, 41 CAL.4TH 825, 847-48 (2007); RENICO V. LETT, 559 U.S.  
11 766, 775 (2010). AND, HAD EXERCISED THAT DISCRETION, BUT IN A  
12 WAY THAT "EXCEEDS THE BOUNDS OF REASON", (PEOPLE V. BEAUMES, 40  
13 CAL.4TH 907, 920 (2007); SISSON V. SUPERIOR COURT, 216 CAL. APP. 4TH  
14 24, 34 (2013). HOWEVER, A DISPOSITION THAT REST ON AN ERROR OF  
15 LAW CONSTITUTES AN ABUSE OF DISCRETION. IN RE BUTLER (2018) 4  
16 CAL. 5TH 728. PETITIONER BELIEVES THAT SENATE BILL NO. 1393  
17 IS NOW A CLARIFICATION, BUT AGAIN THE COURT HAD THE POWER  
18 TO MAKE THE SENTENCING CORRECTION, BUT FAILED TO ACT.

19 (iii) PREJUDICIAL ERROR

20 AFTER BEING PRESENTED WITH THE LEGAL AUTHORITY  
21 REGARDING THE COURTS EXISTING POWER TO STRIKE OR DISMISS  
22 PETITIONERS PRIOR CONVICTION, AND NOT CORRECTING THE INCORRECT  
23 SENTENCE WHERE THE ENHANCEMENT IS GREATER THAN THE  
24 BASE-TERM A MISCARRIAGE OF JUSTICE WILL RESULT IF THIS  
25 COURT FAILS TO RULE IN PETITIONERS FAVOR, AS PRESENTED.  
26 ALSO, BOTH CONSTITUTED PLAIN ERRORS MENTIONED ARE INTERTWINED  
27 WITH EACH OTHER.

### (iii) SUFFICIENT REASONS.

2 THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT HAD  
3 DISREBUARDED A LONG-STANDING LAW THAT A TRIAL COURT  
4 HAVE THE POWER TO STRIKE A PRIOR CONVICTION. PEOPLE V. FRITZ  
5 (1985 40 CAL. 3d 227, 231). AS A RESULT, THE ENHANCEMENTS  
6 BECAME GREATER THEN THE BASE-TERM OF FIVE-YEARS. SEE,  
7 PEOPLE V. CRAIG (1998 66 CAL. APP. 4TH 1444, 1448) (PETITIONER MAY  
8 NOT RECEIVE AN AGGREGATE SENTENCE GREATER THAN THAT  
9 PREVIOUSLY IMPOSED). HOWEVER, THE UNCONSTITUTIONAL ERRORS  
10 ARE PLAIN ERROR THAT AFFECTS PETITIONERS SUBSTANTIAL  
11 RIGHTS. IN RE BUTLER, 4 CAL. 5TH 728 (2018); U.S. V. ULANO, 507  
12 U.S. 725, 732-33 (1993). PWS, THE NEW IMPOSED STATUTORY LAW  
13 THAT WAS PRESENTED AND RULED ON, GAVE THE COURT THE  
14 POWER TO USE ITS DISCRETION TO STRIKE OR DISMISS THE PRIOR  
15 CONVICTION. PENAL CODE SECTION 1385 (2019). THEREFORE,  
16 THIS COURT SHOULD REMAND AND REVERSE THIS ACTION

(b) PRINCIPLE SUPPORTING AUTHORITY:

<sup>18</sup> U.S. v. OLANO, 507 U.S. 725 (1993).

<sup>19</sup> U.S. v. GASTRO-DAVIS, 602 F.3d 53, 69 (1st Cir. 2010).

20 PEOPLE V. FRITZ (1985) 40 CAL. 3d 227.

21. PEOPLE v. WHITMAN (1984) 158 CAL. APP. 3d 1161.

22 | SENATE BILL NO. 1393

23 U.S. CONST. 14th AMENDMENT.

24 PLEASE SEE THE FOLLOWING "MEMORANDUM OF POINTS AND  
25 AUTHORITIES IN SUPPORT OF QUESTION 6" FOR MORE AUTHORITIES AND  
26 MORE DETAILS.

27 | 111

28 //

MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF QUESTION 6 OF MC-275

THIS MEMORANDUM SUPPORTS PETITIONER'S POSITION  
THAT THE TRIAL COURT HAD ABUSED ITS DISCRETION BASED ON  
ITS POWER TO STRIKE OR DISMISS PETITIONERS PRIOR CONVICTION.

A. THE LEGISLATURE HAS IMPOSED A NEW FIVE-YEAR PRIOR STRIKE ENHANCEMENT LAW.

9                   SENATE BILL NO. 1393, BECAME EFFECTIVE JANUARY 01,  
10                  2019 AND AMENDS SECTIONS 66.7, SUBDIVISION (3) AND 1385 TO  
11                  GIVE TRIAL COURTS DISCRETION AT SENTENCING TO STRIKE THE  
12                  FIVE-YEAR PRIOR SERIOUS FELONY ENHANCEMENTS IN "FURTHERANCE  
13                  OF JUSTICE" (STATS, 2018, CH. 1013, §§ 1-2.)

14 PEOPLE V. FRITZ (1985) 40 CAL. 3d 227, 231 (THE COURT  
15 "CONCLUDE THAT NEITHER (CALIFORNIA PENAL CODE) SECTION 667  
16 NOR (CALIFORNIA CONSTITUTION) ARTICLE I, SECTION 28, SUBDIVISION  
17 (F) CAN BE CONSTRUED TO ABROGATE A TRIAL COURT'S WELL-ESTABLISHED  
18 STATUTORY AUTHORITY TO STRIKE A PRIOR CONVICTION." JUDGMENT  
19 VACATED AND REMANDED FOR RESENTENCING); SEE id. AT PP. 229-230  
20 ("(A) LONG LINE OF DECISIONS, STRETCHING OVER 30 YEARS, HAS  
21 ESTABLISHED THAT A TRIAL COURT'S GENERAL STATUTORY AUTHORITY  
22 TO 'DISMISS' AN ACTION 'IN FURTHERANCE OF JUSTICE' UNDER  
23 SECTION 1385 INCLUDES THE POWER TO 'STRIKE' A PRIOR CONVICTION  
24 FOR PURPOSES OF SENTENCING, WHETHER OR NOT THE CONVICTION HAS  
25 BEEN ADMITTED OR ESTABLISHED BY THE EVIDENCE." (FOOTNOTE  
26 OMITTED; CITING PEOPLE V. BURKE (1956) 47 CAL. 2d 45, 50-51.)".

27 PEOPLE v. WIGHTMAN (1984) 158 Cal. App. 3d 1161, 1169 (HOU), "THE COURT  
28 COURTS MAY IMPOSE ENHANCEMENTS WITHOUT LIMITATION AS REQUIRED

1 OR ALLOWED BY LAW BUT MUST STAY EXECUTION OF THE ENHANCEMENTS  
2 TO THE EXTENT THEY CAUSE THE TOTAL SENTENCE TO EXCEED THE  
3 DOUBLE-THE-BASE-TERM LIMITATION OF SECTION 1170, SUBDIVISION  
4 (e)" (OTHER CITATIONS OMITTED.); SEE id. ("IN LIGHT OF THE AMBIGUITY  
5 OF THE "WITHOUT LIMITATION" LANGUAGE, THE TRIAL COURT HAS THE POWER  
6 UNDER SECTION 1385 TO STRIKE OR STAY THE FIVE-YEAR ENHANCEMENT  
7 UNDER SECTION 667, SUBDIVISION (e)". "THE CASE THEREFORE MUST  
8 BE REMANDED TO ALLOW THE COURT TO DECIDE WHETHER TO  
9 EXERCISE ITS DISCRETION UNDER SECTION 1385". (CITATIONS  
10 OMITTED.)).

11 CALIFORNIA PENAL CODE 667, SUBDIVISION (e) STATES: "(e)  
12 ANY PERSON CONVICTED OF A SERIOUS FELONY WHO PREVIOUSLY HAS  
13 BEEN CONVICTED OF A SERIOUS FELONY IN THIS STATE OR OF ANY  
14 OFFENSE COMMITTED IN ANOTHER JURISDICTION WHICH INCLUDES  
15 ALL OF THE ELEMENTS OF ANY SERIOUS FELONY, SHALL RECEIVE, IN  
16 ADDITION TO THE SENTENCE IMPOSED BY THE COURT FOR THE PRESENT  
17 OFFENSE, A FIVE-YEAR ENHANCEMENT FOR EACH PRIOR CONVICTION  
18 ON CHARGES BROUGHT AND TRIED SEPARATELY, THE TERMS OF THE  
19 PRESENT OFFENSE AND EACH ENHANCEMENT SHALL RUN  
20 CONSECUTIVELY!"

21 FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION  
22 PROVIDES THAT NO STATE SHALL "DEPRIVE ANY PERSON OF LIFE, LIBERTY,  
23 OR PROPERTY, WITHOUT DUE PROCESS OF LAW". (U.S. CONST., 14TH  
24 AMEND., § 1.); PEOPLE V. CASTILLO (2010) 49 CAL. 4TH 145, 165-166.) THUS,  
25 TO DEPRIVE AN INDIVIDUAL OF HIS LIBERTY, THE STATE MUST HAVE THE  
26 LEGAL AUTHORITY TO HOLD THAT INDIVIDUAL. (EX PART MASON (1984) 102  
27 CAL. 171, 173; BELL V. WULFISH (1979) 441 U.S. 520.)

28 A REVIEWING COURT MAY GRANT RELIEF FOR "PLAIN ERROR"

1 EVEN IF THE ERROR WAS NOT RAISED AND PRESERVED AT TRIAL OR  
2 SENTENCING. FEDERAL RULE OF CRIMINAL PROCEDURE 52 (b). SEE ALSO,  
3 U.S. V. OLANO, 507 U.S. 725, 732-33 (1993) ("DEVIATION FROM A LEGAL  
4 RULE IS 'ERROR' UNLESS THE RULE HAS BEEN WAIVED.") PLAIN ERROR IS  
5 ERROR THAT IS "CLEAR" OR "OBVIOUS". OLANO, 507 U.S. AT 732-33. AND,  
6 AN ERROR IS NOT PLAIN "UNLESS THE ERROR IS CLEAR UNDER CURRENT  
7 LAW", Id. AT 734, THAT AFFECTS THE DEFENDANT'S "SUBSTANTIAL  
8 RIGHTS". Id. AT 734-35; U. S. V. ATKINSON, 297 U.S. 157, 160 (1936)  
9 (ONLY IF THE ERROR "SERIOUSLY AFFECTS THE FAIRNESS, INTEGRITY OR  
10 PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS.")

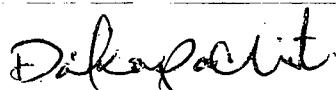
11 CONCLUSION

12 FOR ALL THAT STATED, UNDER PLAIN ERROR, THE TRIAL  
13 COURT HAD ABUSED ITS DISCRETION BY NOT STRIKING PETITIONERS  
14 PRIOR CONVICTION, WHICH ACTIVATED AN ENHANCEMENT THAT IS  
15 GREATER THAN THE BASE-TERM; FAILURE TO CORRECT THE  
16 INCORRECT SENTENCE SERIOUSLY AFFECTS THE FAIRNESS AND  
17 INTEGRITY OF A COURT PROCEEDINGS, AND PETITIONER'S SUBSTANTIAL  
18 RIGHTS. REMAND AND RESENTENCE IS WARRANTED.

19 DATED:

20 12/4/19

21 RESPECTFULLY,

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DAVID KONEPACHIT

23 PETITIONER  
24 PRO SE

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# Exhibit - 1

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16 COURT ORDER — DATED: AUG. 07, 2019; TWO PAGES  
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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

DATE : AUGUST 07, 2019  
JUDGE : DELBERT W. OROS  
REPORTER : NONE

DEPT. NO : 16  
CLERK : M. HUNTER  
BAILIFF : NONE

FILED / ENDORSED

AUG - 7 2019

M. Hunter, Deputy Clerk

In re the Matter of

Case No. 19HC00416

DAVID KONEPACHIT,

Nature of Proceedings: PETITION FOR HABEAS CORPUS: ORDER

The Court has received and considered the above-entitled petition for writ of habeas corpus. The petition is DENIED.

A petitioner seeking relief by way of habeas corpus has the burden of stating a prima facie case. (*In re Bower* (1985) 38 Cal.3d 865, 872.) A petition should attach as exhibits all reasonably available documentary evidence or affidavits supporting the claim. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

Petitioner asks that the trial court exercise its discretion under Senate Bill 1393 ("SB 1393") to strike or dismiss the enhancements imposed pursuant to Penal Code section 667(a). SB 1393, effective on January 1, 2019, deleted the provision of Penal Code section 1385 that previously stated: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." Since the Legislature did not state that Senate Bill 1393 would or would not apply retroactively, it may be inferred that it intended the bill only to apply to cases not yet final on appeal when the amendment became effective. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) As Petitioner's case was final on appeal before January 1, 2019, he has not shown that he is eligible for relief under SB 1393.

Dated: 08/07/2019



DELBERT W. OROS

Delbert W. Oros  
Judge of the Superior Court

BOOK : 16 PAGE : 20 DATE : AUGUST 07, 2019  
PAGE : 20 DATE : AUGUST 07, 2019  
CASE NO. : 19HC00416

CASE TITLE

IN RE: DAVID KONEPACHIT

BY: M. HUNTER  
Deputy Clerk

CASE NUMBERS: 19HC00416  
CASE TITLE: IN RE: DAVID KONEPACHIT  
PROCEEDINGS: ORDER RE: PETITION FOR HABEAS CORPUS

CERTIFICATE OF SERVICE BY MAILING  
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing ORDER RE: PETITION FOR HABEAS CORPUS by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

DAVID KONEPACHIT  
CENTINELA STATE PRISON  
IMPERIAL, CA 92251  
CDC#: AX6329

OFFICE OF THE ATTORNEY GENERAL,  
XAVIER BECERRA  
P.O. BOX 944255  
SACRAMENTO, CA 94244

I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: AUGUST 8, 2019

Superior Court of California,  
County of Sacramento

By: M. HUNTER  
Deputy Clerk

BOOK : 16  
PAGE :  
DATE : AUGUST 07, 2019  
CASE NO. : 19HC00416

Superior Court of California,  
County of Sacramento

CASE TITLE IN RE: DAVID KONEPACHIT

BY: M. HUNTER  
Deputy Clerk

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## Exhibit ~ 2

• COPY OF RECENT H. C., # 19HC00416

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Name: DAVID KONEPACHIT  
Address: CENTINELA STATE PRISON  
P.O. BOX 911  
IMPERIAL, CA. 92251  
(PRO SE)

FILED  
ENDORSED  
MC-275

JUN 10 2019	
By	J. PEARCE

CDC or ID Number: AX6329

IN THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA, FOR THE  
COUNTY OF SACRAMENTO

(Court)

<u>DAVID KONEPACHIT</u> Petitioner	vs.	<u>RAYMOND MADDEN</u> Respondent
---------------------------------------	-----	-------------------------------------

PETITION FOR WRIT OF HABEAS CORPUS

No. 19HC00416

(To be supplied by the Clerk of the Court)

Dept. 16 Judge Oros

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.

- Read the entire form before answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal in paper form and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal electronically and you are an attorney, follow the requirements of the local rules of court for electronically filed documents. If you are filing this petition in the Court of Appeal and you are not represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

A conviction  Parole  
 A sentence  Credits  
 Jail or prison conditions  Prison discipline  
 Other (specify): \_\_\_\_\_

1. Your name: DAVID KONEPACHT

2. Where are you incarcerated? CENTINELA STATE PRISON, CALIFORNIA

3. Why are you in custody?  Criminal conviction  Civil commitment

Answer items a through i to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

SECOND DEGREE ROBBERY; ASSAULT W/SERIOUS BODILY INJURY; WITH SERIOUS BODILY INJURY ENHANCEMENTS; ON BAIL ENHANCEMENT.

b. Penal or other code sections: § 211; § 243; § 1197(c)(8); AND § 12022.1(d).

c. Name and location of sentencing or committing court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO,  
720 N 14TH STREET, SACRAMENTO, CA. 95814.

d. Case number: 13FO3312

e. Date convicted or committed: 11-04-2013

f. Date sentenced: 12-13-2013

g. Length of sentence: TOTAL OF 16 YEARS

h. When do you expect to be released? CONCLUSION OF MATTER

i. Were you represented by counsel in the trial court?  Yes  No If yes, state the attorney's name and address:

PETER J. BOLDIN - 917 6. STREET, SUITE 202, SACRAMENTO, CA. 95814.

4. What was the LAST plea you entered? (Check one):

Not guilty  Guilty  Nolo contendere  Other: \_\_\_\_\_

5. If you pleaded not guilty, what kind of trial did you have?

Jury  Judge without a jury  Submitted on transcript  Awaiting trial

## 6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement" (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)

"PLEASE SEE ATTACHMENT"

## a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

"PLEASE SEE ATTACHMENT"

## b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

"PLEASE SEE ATTACHMENT"

7. Ground 2 or Ground \_\_\_\_\_ (if applicable):

a. Supporting facts:

b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment?  Yes  No If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"):

USDC - EASTERN DIST. OF CALIFORNIA

b. Result: DENIED

c. Date of decision: JUNE 27, 2017

d. Case number or citation of opinion, if known: 2:16-CV-00454-JAM-CKD

e. Issues raised: (1) 8TH AND 14TH AMENDMENT VIOLATION

(2) N/A

(3) N/A

f. Were you represented by counsel on appeal?  Yes  No If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court?  Yes  No If yes, give the following information:

a. Result: N/A

b. Date of decision: N/A

c. Case number or citation of opinion, if known: N/A

d. Issues raised: (1) N/A

(2) N/A

(3) N/A

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

NEWLY-GRANTED DISCRETION TO STRIKE THE FIVE-YEAR SENTENCE ENHANCEMENTS THAT WENT INTO EFFECT ON JANUARY 01, 2019.

11. Administrative review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:

N/A

b. Did you seek the highest level of administrative review available?  Yes  No  
Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court?  Yes . If yes, continue with number 13.  No . If no, skip to number 15.

13 a. (1) Name of court: U.S.D.C. - EASTEN DIST. OF CALIFORNIA

(2) Nature of proceeding (for example, "habeas corpus petition"): HABEAS CORPUS ЧЕТИОН

(3) Issues raised: (a) CONSTITUTIONAL VIOLATIONS 6TH AND 14TH AMENDMENT

(b) N/A

(4) Result (attach order or explain why unavailable): Denied (Lost Document)

(5) Date of decision: June 27, 2017

b. (1) Name of court: N/A

(2) Nature of proceeding: 2/A

(3) Issues raised: (a) N/A

(b) 2

(4) Result (attach order or explain why unavailable): N/A

(5) Date of decision: 12/12/2012

*For additional page partitions, applications, or motions, provide the same information on a separate page.*

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

www.EasyEngineering.net

Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

THE NEW LAW WAS DISCOVERED THROUGH DUE DILIGENCE WITHOUT DELAY, AND WHILE EXERCISING DUE DILIGENCE THE CLAIM IS BEING PRESENTED.

16. Are you presently represented by counsel?  Yes  No If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court?  Yes  No If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

THIS COURT IS THE PROPER COURT WHICH HAS JURISDICTION TO TAKE ACTION IN  
ACCORDANCE WITH LAW.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 6/6/19

► Dikembe Mutombo  
SIGNATURE OF PETITIONER

Attachment

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1 FIVE-YEAR PRIOR SERIOUS FELONY ENHANCEMENT

2 ANSWERS TO QUESTIONS 6: GROUNDS FOR RELIEF

3 (JUDICIAL COUNCIL FORM MC-275)

4 QUESTION 6: GROUNDS FOR RELIEF

5 GROUND 1: PETITIONER ALLEGES THAT HE IS ENTITLED FOR THE TRIA  
6 COURT TO UTILIZE ITS POWER OF DISCRETION REGARDING WHETHER TO STRIKE THE  
7 FIVE-YEAR PRIOR SERIOUS FELONY ENHANCEMENT (PENAL CODE, SECTION 667(2)(1)).  
8 PETITIONER ALLEGES THAT RECENTLY IMPOSED SENATE BILL NO. 1393 (2018-2019)  
9 APPLIES TO HIS CASE SINCE HE WAS SENTENCED TO A MANDATORY FIVE-YEARS  
10 FOR VIOLATING PENAL CODE, SECTION 667(2)(1). THE TRIAL COURT HAVE DISCRETION  
11 TO IMPOSE A LESSER PENALTY. (PEOPLE V. FRANCIS (1969) 71 CAL. 2D 666, 76.) AND,  
12 DO SO IN THE INTEREST OF JUSTICE PURSUANT TO PENAL CODE, SECTION 1385. THE  
13 AMENDED SECTION 667, SUBDIVISION (2) SHOULD BE APPLIED RETROACTIVELY  
14 PURSUANT TO IN RE ESTRADA (1965) 63 CAL. 2D 740; FRANCIS, SUPRA, 71 CAL. 2D AT  
15 PP. 75-76.)

16 (a) SUPPORTING FACTS:

17 (i) ENTITLEMENT AND ELIGIBILITY TO SENATE BILL NO. 1393 - FIVE YEAR PRIOR  
18 SERIOUS FELONY ENHANCEMENT.

19 THE OFFENSE(S) FOR WHICH I WAS CONVICTED AND THE SENTENCE I AM  
20 SERVING ARE SHOWN ABOVE IN QUESTION 3 OF MY MC-275 FORM.

21 I WAS SENTENCED TO A MANDATORY TERM OF 5-YEARS FOR VIOLATING  
22 PENAL CODE, SECTION 667, SUBD. (2)(1), ON DECEMBER 13, 2013. (SEE EXHIBIT - A,  
23 FELONY ABSTRACT JUDGMENT).

24 ON SEPTEMBER 30, 2018, THE GOVERNOR SIGNED SENATE BILL NO. 1393,  
25 EFFECTIVE JANUARY 01, 2019, THAT AMENDED SECTION 1385 TO DELETE FORMER  
26 SUBDIVISION (B) AND GRANT TRIAL COURTS DISCRETION TO DISMISS THE FIVE-YEAR  
27 SENTENCE ENHANCEMENTS UNDER SECTION 667(2) IN "FURTHERANCE OF JUSTICE".  
28 (STATS. 2018, CH. 1013, §§ 1-2.). AT THE TIME I WAS SENTENCED THE MODIFIED

1 PROVISIONS WERE NOT EFFECTIVE TO GIVE THE TRIAL COURT DISCRETION TO STRIKE  
2 THE PRIOR SERIOUS FELONY ENHANCEMENT. THIS AMENDMENT SHOULD BE RETROAC-  
3 EFFECT UNDER IN RE ESTRADA (1965) 63 CAL. 2d 740.

4 (iii) SUFFICIENT REASONS.

5 THE TRIAL COURT HAVE THE POWER TO USE ITS DISCRETION, HERE, TO STRIKE  
6 THE FIVE-YEAR PRIOR SERIOUS FELONY ENHANCEMENT, WHICH WOULD GIVE ME A  
7 LESSER SENTENCE. THERE IS NOTHING IN THE LANGUAGE OF PENAL CODE,  
8 SECTION 1385, OR IN THE SENATE BILL NO. 1393, THAT THE SUBDIVISION IS TO BE ON  
9 PROSPECTIVE. (SEN. BILL NO. 1393 (2018-2019).)

10 FORTUNATELY, THE SENATE BILL NO. 1393 WHICH AMENDED SECTION 1385, IS  
11 PROPER TO APPLY HERE SINCE (1) IT GIVES THE TRIAL COURT POWER TO LOWER MY  
12 SENTENCE, (PEOPLE V. FRANCIS, SUPRA, 71 CAL. 2d AT PP. 75-76.), AND (2) IT APPLIES  
13 RETROACTIVE, (IN RE ESTRADA, SUPRA, 63 CAL. 2d 740.). ALSO, MY PRIMARY  
14 CHARGE BASE TERM IS FIVE-YEARS; DUE TO PENAL CODE SECTION 667(e)(1) IT WAS  
15 DOUBLED GIVING A PRINCIPLE TERM OF TEN YEARS. (SEE EXHIBIT-B, FIXED TERM  
16 WORKSHEET) THEREFORE, THIS COURT SHOULD EXERCISE ITS DISCRETION UNDER SEN.  
17 BILL NO. 1393, THAT AMENDED SECTION 1385 TO DELETE FORMER SUBDIVISION(b) AND  
18 GRANTED THE TRIAL COURTS DISCRETION TO STRIKE THE FIVE-YEAR PRIOR SERIOUS  
19 FELONY ENHANCEMENTS UNDER SECTION 667(e); TO STRIKE OR DISMISS THE FIVE-YEAR  
20 SENTENCE ENHANCEMENT IN THE "INTEREST OF JUSTICE". (PEV. CODE § 1385.)

21 (b) PRINCIPLE SUPPORTING AUTHORITY:

22 PEOPLE V. FRANCIS (1969) 71 CAL. 2d 66

23 IN RE ESTRADA (1965) 63 CAL. 2d 740

24 CALIFORNIA PENAL CODE SECTION 1385

25 CALIFORNIA PENAL CODE SECTION 667(a)(1)

26 SENATE BILL NO. 1393 (2018-2019.)

27 PLEASE SEE THE FOLLOWING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF QUESTION 6<sup>th</sup>

28 FOR MORE AUTHORITIES AND MORE DETAILS.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF QUESTION 6  
OF WIC-275

THIS MEMORANDUM SUPPORTS PETITIONER'S POSITION THAT HE IS ENTITLED TO HAVE THE TRIAL COURT TO UTILIZE ITS POWER OF DISCRETION TO STRIKE THE FIVE-YEAR PRIOR SERIOUS FELONY ENHANCEMENT UNDER SENATE BILL NO. 1393 (2018-2019).

A. THE LEGISLATURE HAS CREATED A NEW FIVE-YEAR PRIOR STRIKE ENHANCEMENT

LAW

SENATE BILL NO. 1393, BECAME EFFECTIVE JANUARY 01, 2019 AND AMENDS  
SECTION 667, SUBDIVISION (2) AND 1385 TO GIVE TRIAL COURTS DISCRETION AT  
SENTENCING TO STRIKE THE FIVE-YEAR PRIOR SERIOUS FELONY ENHANCEMENTS IN  
"FURTHERANCE OF JUSTICE" (STATS. 2018, CH. 1013, §§1-2). THE AMENDED SECTION  
667, SUBDIVISION (2) SHOULD BE GIVEN RETROACTIVE EFFECT PURSUANT TO IN RE  
ESTRADA (1965) 63 CAL. 2d 740. BECAUSE AT THE TIME OF SENTENCING THE TRIAL COURT  
HAD NO DISCRETION TO STRIKE THE FIVE-YEAR PRIOR SERIOUS FELONY ENHANCEMENT,  
AND TRIAL COUNSEL COULD NOT ARGUE AGAINST SUCH IMPOSITION. NOW, THE TRIAL  
COURT HAVE DISCRETION TO UTILIZE ITS DISCRETION TO MODIFY SENTENCING. (SEE PEOPLE  
V. FRANCIS, SUPRA, (1969) 71 CAL. 2D 66, 76 (THE TRIAL COURT HAVE DISCRETION TO IMPOSE A  
LESSER PENALTY).

B. OTHER RELEVANT AUTHORITY

20 PEOPLE V. FRITZ (1985) 40 CAL.3D 227, 231 (THE COURT CONCLUDE THAT  
21 NEITHER (CALIFORNIA PENAL CODE) SECTION 667 NOR (CALIFORNIA CONSTITUTION)  
22 ARTICLE I, SECTION 28, SUBDIVISION (F) CAN BE CONSTRUED TO ABRUGATE A TRIAL  
23 COURT'S WELL-ESTABLISHED STATUTORY AUTHORITY TO STRIKE A PRIOR CONVICTION." JUDGMENT  
24 VACATED AND REMANDED FOR RESENTENCING); SEE id. AT PP. 229-230 ("A LONG LINE  
25 OF DECISIONS, STRETCHING OVER 30 YEARS, HAS ESTABLISHED THAT A TRIAL COURT'S  
26 GENERAL STATUTORY AUTHORITY TO 'DISMISS' AN ACTION 'IN FURTHERANCE OF JUSTICE'  
27 UNDER SECTION 1385 INCLUDES THE POWER TO 'STRIKE' A PRIOR CONVICTION FOR  
28 PURPOSES OF SENTENCING, WHETHER OR NOT THE CONVICTION HAS BEEN ADMITTED OR

1 ESTABLISHED BY THE EVIDENCE" (FOOTNOTE OMITTED); CITING PEOPLE V. BURKE  
2 (1956) 47 CAL. 2D 45, 50-51.).

3 PEOPLE V. WHIGAM (1984) 158 CAL. APP. 3D 1161, 1169 (HOLD, "TRIAL  
4 COURTS MAY IMPOSE ENHANCEMENTS WITHOUT LIMITATION AS REQUIRED OR  
5 ALLOWED BY LAW BUT MUST STAY EXECUTION OF THE ENHANCEMENTS TO THE  
6 EXTENT THEY CAUSE THE TOTAL SENTENCE TO EXCEED THE DOUBLE - THE - BASE -  
7 TERM LIMITATION OF SECTION 1170.1, SUBDIVISION (9)!" (OTHER CITATIONS OMITTED.)  
8 SEE id. ("IN LIGHT OF THE AMBIGUITY OF THE "WITHOUT LIMITATION" LANGUAGE,  
9 THE TRIAL COURT HAS THE POWER UNDER SECTION 1385 TO STRIKE OR STAY THE  
10 FIVE - YEAR ENHANCEMENT UNDER SECTION 667, SUBDIVISION (2)." "THE CASE  
11 THEREFORE MUST BE REMANDED TO ALLOW THE COURT TO DECIDE WHETHER TO  
12 EXERCISE ITS DISCRETION UNDER SECTION 1385." (CITATIONS OMITTED.)).

13 CALIFORNIA PENAL CODE 667, SUBDIVISION (2) STATES: "(3) ANY PERSON  
14 CONVICTED OF A SERIOUS FELONY WHO PREVIOUSLY HAS BEEN CONVICTED OF A SERIOUS  
15 FELONY IN THIS STATE OR OF ANY OFFENSE COMMITTED IN ANOTHER JURISDICTION  
16 WHICH INCLUDES ALL OF THE ELEMENTS OF ANY SERIOUS FELONY, SHALL RECEIVE, IN  
17 ADDITION TO THE SENTENCE IMPOSED BY THE COURT FOR THE PRESENT OFFENSE,  
18 A FIVE - YEAR ENHANCEMENT FOR EACH PRIOR CONVICTION ON CHARGES  
19 BROUGHT AND TRIED SEPARATELY, THE TERMS OF THE PRESENT OFFENSE AND EACH  
20 ENHANCEMENT SHALL RUN CONSECUTIVELY."

21 CALIFORNIA PENAL CODE SECTION 1170.1, SUBDIVISION (9) STATES IN  
22 RELEVANT PART: "THE TERM OF IMPRISONMENT SHALL NOT EXCEED TWICE THE  
23 NUMBER OF YEARS IMPOSED BY THE TRIAL COURT AS THE BASE TERM PURSUANT TO  
24 SUBDIVISION (b) OF SECTION 1170 UNLESS THE DEFENDANT STANDS CONVICTED OF A  
25 'VIOLENT FELONY' AS DEFINED IN SUBDIVISION (c) OF SECTION 667.5, OR A  
26 CONSECUTIVE SENTENCE IS BEING IMPOSED PURSUANT TO SUBDIVISION (c) OF THIS  
27 SECTION, OR AN ENHANCEMENT IS IMPOSED PURSUANT TO SECTION 12022, 12022.5,  
28 12022.6 OR 12022.7 OR THE DEFENDANT STANDS CONVICTED OF FELONY ESCAPE

1 FROM AN INSTITUTION IN WHICH HE IS LAWFULLY CONFINED!"

2 CALIFORNIA PENAL CODE SECTION 1385 STATES IN RELEVANT PART:

3 "THE JUDGE OR MAGISTRATE MAY, EITHER OF ITS OWN MOTION OR UPON THE  
4 APPLICATION OF THE PROSECUTING ATTORNEY, AND IN FURTHERANCE OF JUSTICE,  
5 ORDER AN ACTION TO BE DISMISSED. THE REASON OF THE DISMISSAL MUST BE  
6 SET FORTH IN AN ORDER ENTERED UPON THE MINUTES!"

7 THE CALIFORNIA CONSTITUTION GUARANTEES THAT A PERSON IMPROPERLY  
8 DEPRIVED OF HIS OR HER LIBERTY HAS THE RIGHT TO PETITION FOR A WRIT OF HABEAS  
9 CORPUS. (CALIFORNIA CONSTITUTION, ARTICLE I, § 11; IN RE CLARK (1993) 5 CAL.  
10 4TH 750, 764 & FN. 2.).

11 THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION  
12 PROVIDES THAT NO STATE SHALL "DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY  
13 WITHOUT DUE PROCESS OF LAW" (U.S. CONST., 14TH AMEND., § 1.); PEOPLE V. CASTILLO  
14 (2010) 49 CAL. 4TH 145, 165-166.)

15 THUS, TO DEPRIVE AN INDIVIDUAL OF HIS LIBERTY, THE STATE MUST HAVE THE  
16 LEGAL AUTHORITY TO HOLD THAT INDIVIDUAL. (EX PARTE MASON (1984) 102 CAL. 171,  
17 173; BELL V. WOLFISH (1979) 441 U.S. 520.)

18 CONCLUSION

19 FOR ALL STATED ABOVE, PETITIONER IS ENTITLED TO HAVE THIS COURT  
20 UTILIZE ITS POWER OF DISCRETION ON WHETHER TO STRIKE THE FIVE-YEAR PRIOR  
21 SERIOUS FELONY ENHANCEMENT UNDER PENAL CODE SECTION 667(a)(1).

22  
23 DATED: 6/6/19

24  
25 RESPECTFULLY,

26 David Konepachit  
27 DAVID KONEPACHIT  
28 PETITIONER  
PRO SE

# Exhibit A

## FELONY ABSTRACT OF JUDGMENT - DETERMINATE

[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED]

CR-290

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: SACRAMENTO

FILED / ENDORSED  
DEC 13 2013  
By R. Zawodny, Deputy Clerk

PEOPLE OF THE STATE OF CALIFORNIA vs. DAVID KONEPACHIT		DOB: 3/18/84	13F03312	-A
AKA:				-B
CIV NO.:		<input type="checkbox"/> NOT PRESENT		-C
BOOKING NO.:				-D
FELONY ABSTRACT OF JUDGMENT <input checked="" type="checkbox"/> PRISON COMMITMENT <input type="checkbox"/> COUNTY JAIL COMMITMENT		<input type="checkbox"/> AMENDED ABSTRACT		
DATE OF HEARING 12/13/2013		DEPT. NO. 10	JUDGE GRETA C. FALL	
CLERK R. ZAWODNY		REPORTER J. SMART #9706	PROBATION NO. OR PROBATION OFFICER A-477,614	<input type="checkbox"/> IMMEDIATE SENTENCING
COUNSEL FOR PEOPLE M. EIXENBERGER		COUNSEL FOR DEFENDANT P. BOLDIN, PD		<input type="checkbox"/> APPTD.

1. Defendant was convicted of the commission of the following felonies:

Additional counts are listed on attachment  
\_\_\_\_\_ (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YEAR)	JURY	COURT	Plea	CONVICTED BY		CONCURRENT	18 CONSECUTIVE	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE (Refer to Item 5)	667 STAY	SERIOUS FELONY	VIOLENT FELONY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED	
									YRS.	MOS.									
1	PC	211**	2ND DEGREE ROBBERY	2013	11/04/2013	X		U			X					X	10	0	
2	PC	243(d)	ASSAULT w/SERIOUS BODILY INJ	2013	11/04/2013	X		U			IFC				X				
						I	I												
						I	I												
						I	I												
						I	I												

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

COUNT	ENHANCEMENT	TIME IMPOSED "S" or "PS"	ENHANCEMENT	TIME IMPOSED "S" or "PS"	ENHANCEMENT	TIME IMPOSED "S" or "PS"	TOTAL
1	12022.1(d)	S					

3. ENHANCEMENTS charged and found to be true for PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

ENHANCEMENT	TIME IMPOSED "S" or "PS"	ENHANCEMENT	TIME IMPOSED "S" or "PS"	ENHANCEMENT	TIME IMPOSED "S" or "PS"	TOTAL
667(a)	5 YRS	667.5(b)	1 YR			6 0

4.  Deft. sentenced per:  to county jail per 1170(h)(1) or (2)  
 To prison per 1170(a), 1170.1(a) or 1170(h)(3) due to  current or prior serious or violent felony  PC-290 or  PC 186.11 enhancement  
 per PC 667(b)-(i) or PC 1170.12 (strike prior)  
 per PC 1170(a)(3). Pre confinement credits equal or exceed time imposed.  Defendant ordered to report to local parole or probation office.

## 5. INCOMPLETED SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER

## 6. TOTAL TIME ON ATTACHED PAGES:

16 0

7.  Additional indeterminate term (see CR-292).

## 8. TOTAL TIME:

16 0

Attachments may be used but must be referred to in this document.

Page 1 of 2

00203

# Exhibit B

### FIXED TERM WORKSHEET

DEFENDANT: DAVID KONEPACHIT

PRINCIPAL TERM: Court No.: 13F03312 COUNT: 1

Offense: 211 P.C., 2nd Degree Triad: 2/3/5 Base Term: = 5 yrs

Specific Enhancements: 667 (e) (1) P.C. = X2

PRINCIPAL TERM: = 10 yrs.

**SUBORDINATE, CONCURRENT & FULL TERM CONSECUTIVE TERMS + SPECIFIC ENHANCEMENTS:**

### Term

\*\*\*\*\*  
TST. TERMS:

Court No.	Count	Offense	Term	Enhancement/Term	Limit	CC	CS

\*\*\*\*\* GENERAL ENHANCEMENTS \*\*\*\*\*

CODE SECTION/TERMS: 667(a) B.C. 15 years

667-5(b)-B.C. (1)(b)(iii)

in 19 years.

Sagto Co. Prob

2/99

AGGREGATE PRISON TERM (DSL): = Sixteen (16) years

TOTAL ISL TERMS: =

1 DAVID KONEPACHIT  
2 CDFR NO.: AX-6329  
3 CENTINELA STATE PRISON  
4 P.O. BOX 911, BG 224  
5 IMPERIAL, CA 92251  
6 PRO SE

7 PROOF OF SERVICE BY MAIL -

8 DAVID KONEPACHIT,

9 PETITIONER,

10 V.

11 CASE NO.: 13FO3312.

12 RAYMOND MADDEN,

13 RESPONDENT.

14 I DECLARE: THAT ON 12/4/12, I FILED THE FOLLOWING DOCUMENT  
15 PETITION FOR WRIT OF H.C. TO THE INDIVIDUALS LISTED BELOW  
16 BY PROVIDING A COPY AND MAILING IT OFF AT CENTINELA STATE PRISON.  
17 THE COPY OF SAID DOCUMENT WAS IN THE FULL-PAID ENVELOPE AND ADDRESSED AS  
18 FOLLOWS:

19 SUPREME COURT OF CALIFORNIA

20 OFFICE OF THE STATE ATTORNEY

21 350 MCALLISTER STREET

22 GENERAL, P.O. BOX 944255

23 SAN FRANCISCO, CA 94102

24 SACRAMENTO, CA

25 94244-2550

26 I DECLARE UNDER PENALTY OF PERJURY THAT THE ABOVE IS TRUE AND CORRECT.

27 Dik-pachit

28 DAVID KONEPACHIT  
DECLARANT