IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-85,447-01

EX PARTE JEREMY WADE PUE, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. CR2008-214-1 IN THE 207TH DISTRICT COURT
COMAL COUNTY

RICHARDSON, J., delivered the opinion of the Court in which HERVEY, ALCALA, NEWELL, KEEL, and WALKER, JJ., joined. KELLER, P.J., filed a concurring opinion in which KEASLER, J., joined. KEEL, J., filed a concurring opinion in which HERVEY and NEWELL, JJ., joined. YEARY, J., filed a dissenting opinion.

OPINION

In 2008, Applicant Jeremy Wade Pue was convicted by a jury of the third degree felony offense of evading arrest or detention with a vehicle.[1] He was sentenced as a habitual

[1] TEX. PENAL CODE § 38.04 (West 2008). In 2008, the offense of evading arrest or detention with a vehicle was a state jail felony so long as the defendant had not been previously convicted under that section. TEX. PENAL CODE § 38.04(b)(1) (West 2008). However, in this case, because the State charged, and the jury found, that Applicant's vehicle was a deadly weapon, his punishment range before any further enhancement, was elevated to a third degree felony under TEX. PENAL CODE § 12.35(c)(1) (West 2008).

offender because his sentence was enhanced by two California felony convictions—one from 2002 and the other from 2007. The trial court sentenced Applicant to thirty years in prison. His conviction was affirmed on direct appeal.[2] Applicant now claims in this application for writ of habeas corpus[3] that his thirty-year sentence is illegal because it was improperly enhanced by the 2007 California conviction.[4] Applicant had only two prior felony convictions, and both of them occurred in California. There were no other felony convictions the State could have used to enhance Applicant's sentence.[5] We agree that Applicant's sentence was improperly enhanced by the 2007 California conviction. We grant relief.

I.
Overview

An illegal sentence is one that is not authorized by law; therefore, a sentence that is outside the range of punishment authorized by law is considered illegal.[6] A claim that a

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[2] *Pue v. State*, No. 07-09-0020-CR, 2009 WL 1941297 (Tex. App.—Amarillo June 30, 2009, no pet.). His appellate counsel raised only one issue—that the evidence was legally and factually insufficient to support the jury's finding that Applicant used a deadly weapon in the commission of the offense.

[3] TEX. CODE CRIM. PROC. art. 11.07 (West 2008).

[4] Applicant's 2002 California felony conviction is not at issue.

[5] *See*, *e.g.*, *Ex parte Parrott*, 396 S.W.3d 531, 536–37 (Tex. Crim. App. 2013) (demonstrating that, in analyzing harm, a court may consider whether the State had other prior felony convictions that were available to enhance the applicant's punishment.).

[6] *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003); *Ex parte Beck*, 922 S.W.2d 181, 182 (Tex. Crim. App. 1996).

sentence is illegal because it exceeds the statutory maximum is cognizable in a writ of habeas corpus and may be raised at any time.[7] Thus, Applicant's claim that his sentence was illegally enhanced is cognizable even though he failed to raise that issue on direct appeal.[8]

In 2008,when Applicant was sentenced in this case, the State sought to enhance his punishment with two prior felony convictions. One was a 2007 California felony conviction for possessing a "useable quantity" of a controlled substance under California Health and Safety Code § 11377(a). Applicant pled guilty to that 2007 possession charge before the Superior Court of Orange County, California, on May 21, 2007. Imposition of sentence was suspended, and Applicant was placed on probation for three years.[9] Applicant was still on

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[7] In this case, Applicant has claimed that his sentence was improperly enhanced to thirty years (which is ten years more than the statutory maximum for a second degree felony) by a prior California conviction that does not qualify as an enhancing conviction as a matter of law. We have previously held that *that* type of a claim is cognizable on habeas, even if not raised on direct appeal. *Ex parte Rich*, 194 S.W.3d 508, 511 (Tex. Crim. App. 2006) (holding that an applicant is allowed to raise a claim of illegal sentence based on an improper enhancement for the first time on a writ of habeas corpus, and such claim is not forfeited by the applicant's failure to raise it on direct appeal or the applicant's plea of true to such enhancement during the plea proceedings). We recognize that simply labeling a claim as one asserting an "illegal" or "void" sentence does not automatically make it cognizable in an application for writ of habeas corpus. But, because we hold that Applicant's 2007 California conviction was not a "final" conviction, it could not, as a matter of law, enhance his punishment range. Thus, Applicant's sentence exceeded the maximum range allowed by statute, it was indeed "illegal," and thus we find that Applicant's claim is cognizable.

[8] *Ex parte Rich*, 194 S.W.3d at 511.

[9] Applicant's probation on his 2007 California conviction was revoked on November 21, 2007, but then it was reinstated on December 11, 2007. On November 30, 2015, the 2007 California conviction was reduced to a misdemeanor "for all purposes" under section 1170.18 of the California Penal Code.

probation for that 2007 California felony conviction when he was sentenced in this case in 2008.

We filed and set this writ application to decide whether Applicant's sentence in this case was improperly enhanced. The first issue we specifically agreed to address was

> whether Applicant's prior 2007 probated conviction from California, which was alleged in one of the habitual enhancement paragraphs, could have been used as a punishment enhancement in California and was therefore available for use as a punishment enhancement in this Texas prosecution.

We ordered briefing on this issue and have reviewed the parties' briefs and considered their arguments. By order dated November 1, 2017, we noted that further briefing would be useful and invited both parties to provide this Court with legal and policy arguments as to whether the "finality" of an out-of-state conviction, for purposes of punishment enhancement in a Texas prosecution, should be determined in accordance with the law of the foreign jurisdiction or in accordance with Texas law.

We now hold that, whether the 2007 California conviction could have been used as a punishment enhancement *in California* does not control whether such prior conviction was available for use as a punishment enhancement *in this Texas prosecution*. More importantly, we hold that, whether a prior conviction—in-state or out-of-state—is "final" under Texas Penal Code § 12.42 is to be determined in accordance with Texas law. This means that the law of another state does not control whether a defendant's conviction is properly enhanced

under Texas law.[10]

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[10] The concurring opinion would grant relief based instead on Applicant's claim of ineffective assistance of counsel, which was a ground for relief he raised in addition to his claim that his sentence was improperly enhanced. Specifically, the concurring opinion states that Applicant's "counsel was deficient for failing to challenge the use of this conviction for enhancement purposes." (Keller, P.J., concurring opinion, page 2).

However, the record reflects that trial counsel did argue that under both Texas and California law this 2007 conviction is not available for enhancement:

> COUNSEL: [California] did not contemplate their laws determining the nature of Texas enhancement and habitual offender statutes. This is clearly the purview of the Texas Legislature and the courts. . . . California has made statutory through Section 667.5(e) of the California Penal Code what Texas has done through case law, that is, an actual sentence in prison is required, not simply a probated sentence, for that sentence to be used for enhancement purposes. . . . Jeremy Pue is a repeat offender, not a habitual offender. Texas law must be applied in cases wherein Texas courts have exclusive jurisdiction to try and sentence a defendant.

This was an insightful argument—definitely not deficient—considering that the law on this issue was not clear. And, because there were existing intermediate Texas appellate court decisions to the contrary, *see* note 21, *infra*, and the California enhancement statutes and related cases could be considered quite complicated, *see* notes 40-41, *infra*, we are hesitant to label appellate counsel as ineffective, particularly since he has disputed such claim by sworn affidavit. The issue of ineffective assistance of counsel was neither filed and set by us nor briefed by the parties, and we need not address it. Rather, we resolve Applicant's claim by squarely addressing the issue that, after two briefing orders, was thoroughly argued by the parties—does Texas law or out-of-state law control whether a prior out-of-state conviction is final for purposes of enhancement under Texas Penal Code § 12.42(d). By clarifying that Texas law controls whether a prior out-of-state conviction is final under Section 12.42(d), our opinion serves a useful purpose to the bench and the legal profession and benefits the future jurisprudence of the state. *See Morris v. State*, 361 S.W.3d 649, 676 (Tex. Crim. App. 2011) (Price, J., dissenting) (noting that, "our primary purpose, in our capacity as a discretionary review court, is to shepherd the jurisprudence . . . [so that] the courts of appeals have at their disposal the clearest possible articulation of the most important legal principles").

II.
Punishment Enhancement Involving Out-of-State Prior Convictions

Punishment enhancement for habitual offenders falls generally under Texas Penal Code § 12.42(d), which provides as follows:

> Except as provided by Subsection (c)(2) or (c)(4), if it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been *finally convicted* of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years. A previous conviction for a state jail felony punishable under Section 12.35(a) may not be used for enhancement purposes under this section.[11]

Section 12.42(c)(2) and 12.42(c)(4) address enhancement when the charged offense and previous felony offenses were sexual assault or human trafficking related offenses. Neither section applies in this case. Moreover, since this offense was a third degree felony under section 12.35(c)(1),[12] section 12.35(a), which addresses punishment for state jail felonies, does not apply here.

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[11] TEX. PENAL CODE § 12.42(d) (West 2008) (emphasis added).

[12] Texas Penal Code § 12.35(c)(1), elevated Applicant's punishment to a third degree felony due to the jury's finding that he used his vehicle as a deadly weapon.

It is well established that under Texas law only convictions that are "final" can be used for enhancement purposes.[13] "[I]t is equally well established that a conviction is not final for enhancement purposes where the imposition of sentence has been suspended and probation granted."[14] "A successfully served probation is not available for enhancement purposes."[15] The imposition of a sentence is required to establish the finality of a conviction.[16] However, a probated sentence can turn into a final conviction if probation is

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[13] Section 12.42(d) requires that, in order for a defendant's felony sentence to be enhanced into the "habitual" range of 25 to 99 years or life, the State must show that the defendant was "finally convicted" of two prior felony offenses, the second previous felony conviction occurring after the first previous offense becomes final. *See also Ex parte Murchison*, 560 S.W.2d 654, 656 (Tex. Crim. App. 1978) (noting that "only final convictions could be used for enhancement purposes"); *Spiers v. State*, 552 S.W.2d 851, 852 (Tex. Crim. App. 1977) (holding that, to enhance the punishment of a felony offense, the State must prove that the prior felony was a "final" conviction).

[14] *Ex parte Murchison*, 560 S.W.2d at 656 (first citing *White v. State*, 353 S.W.2d 229 (Tex. Crim. App. 1962); then citing *Ex parte Langley*, 833 S.W.2d 141 (Tex. Crim. App. 1992); then citing *Ellis v. State*, 115 S.W.2d 660 (Tex. Crim. App. 1938); then citing *Arbuckle v. State*, 105 S.W.2d 219 (Tex. Crim. App. 1937); then citing *Fetters v. State*, 1 S.W.2d 312 (Tex. Crim. App. 1927); and then citing *Brittian v. State*, 214 S.W. 351 (Tex. Crim. App. 1919)). In its supplemental briefing the State argues that most other state and federal courts consider probated sentences to be final convictions. We have not been asked to change our longstanding Texas rule on this issue nor are we persuaded that we should do so on our own motion.

[15] *Ex parte Langley*, 833 S.W.2d at 143.

[16] *Martinez v. State*, 531 S.W.2d 343, 345 (Tex. Crim. App. 1976) ("A sentence is also required to establish the finality of a conviction used at the punishment stage of a trial under Art. 37.07 [of the Texas Code of Criminal Procedure] . . . ."); *Snodgrass v. State*, 150 S.W. 162, 172 (Tex Crim. App. 1912) ("[The] sentence is distinct from, and independent of, the judgment, and is, in fact, the final judgment in the cause.")

revoked.[17] It is the State's burden to prove finality for purposes of enhancement under Art. 12.42(d).[18]

An out-of-state prior final felony conviction can be used to enhance a sentence imposed in Texas. Under the Full Faith and Credit Clause of the United States Constitution, the various states must recognize "public acts, records, and judicial proceedings of every other State."[19] The Full Faith and Credit Clause ensures that judicial decisions rendered by a court in one state are recognized and honored in every other state. However, the out-of-state conviction must be a "final" conviction. In *Spiers v. State*, this Court reversed the appellant's conviction because there was no proof that his previous conviction for burglary in Mississippi, which resulted in a suspended sentence, was a final conviction:

> The record reveals that in the burglary conviction appellant's sentence was suspended. There is no showing that this suspended sentence was ever revoked. Accordingly, there is no proof that the burglary conviction was a final conviction. Absent such proof such conviction cannot be used for enhancement.[20]

The question, however, is whether the finality of the out-of-state conviction is to be determined under the other state's law or Texas law. There are several Texas appellate court

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[17] *Ex parte Murchison*, 560 S.W.2d at 656; *Ex parte Langley*, 833 S.W.2d at 143.

[18] *Spiers v. State*, 552 S.W.2d 851, 852 (Tex. Crim. App. 1977).

[19] U.S. CONST. Art. IV, § 1.

[20] *Spiers v. State*, 552 S.W.2d at 852.

opinions (many of them unpublished) that have held that a conviction from another state is considered "final" under Texas law for enhancement purposes if it is considered "final" under the other state's law.[21] However, only two opinions from this Court have been cited in appellate court opinions as authority to support such rule of law—*Ex parte Blume*[22] and *Diremiggio v. State*.[23] As we explain below, neither case persuades us to follow such rule.

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[21] *See Ramos v.* State, 351 S.W.3d 913, 915 (Tex. App.—Amarillo 2011, pet. ref'd) (holding that "we use the law of the jurisdiction from which the conviction arose to determine its finality for purposes of enhancement in Texas"); *Ajak v. State*, No. 07-14-00018-CR, 2014 WL 3002811 (Tex. App.—Amarillo 2014, no pet.) (holding that the law of Virginia determines whether the judgment was final; the evidence proved in this case that the Virginia conviction was final because the prior conviction occurred in Virginia and since Virginia law provided that judgments become final 21 days after their entry); *Dominque v. State*, 787 S.W.2d 107, 108–09 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd, untimely filed) ("Clearly, under Louisiana law, the prior felony probations constituted final convictions which could be used for enhancement purposes."); *Moore v. State*, No. 05-10-01306-CR, 2012 WL 858606, at *9. (Tex. App.—Dallas March 12, 2012) (not designated for publication) (citing to Oklahoma's repeat offender statute to determine whether the conviction could have been used for enhancement in Oklahoma: "The fact that appellant's Oklahoma sentence was suspended after he served time in custody for violating his probation does not affect its finality or its availability for enhancement purposes under [Oklahoma's enhancement statute]"); *Skillern v. State*, 890 S.W.2d 849, 883 (Tex. App.—Austin 1994, pet. ref'd), *declined to follow on other grounds by Ex parte Jones*, 440 S.W.3d 628 (Tex. Crim. App. 2014) (finding under federal law a probated sentence is regarded as a final conviction for enhancement purposes just as any other final conviction); *Dunn v. State*, No. 14-05-00276-CR, 2006 Tex. App. LEXIS 7425, at *5–6 (Tex. App.—Houston [14th Dist.] August 17, 2006, pet. ref'd) (not designated for publication) (permitting a probated Delaware conviction to be used to enhance punishment in Texas since it was considered final in Delaware); *Mitchell v. State*, No. 05-06-01706-CR, 2008 WL 713635 (Tex. App.—Dallas March 18, 2008) (holding that "if an out-of-state conviction may be used for enhancement in the foreign state, it may be used under section 12.42 for enhancement even though it would not be available for enhancement under Texas law" because a probated sentence does not constitute a final conviction until there is a revocation of probation).

[22] 618 S.W.2d 373 (Tex. Crim. App. 1981).

[23] 637 S.W.2d 926 (Tex. Crim. App. 1982).

In *Ex parte Blume*, the defendant brought an action for post conviction writ of habeas corpus, asserting that his federal felony conviction was improperly used for enhancement because the prior federal felony conviction would not have been a felony under our state penal code. The "sole question presented" in *Blume* was whether a federal felony conviction for an offense which does not constitute a felony under the Texas Penal Code could still be used to enhance punishment under section 12.42.[24] We held in *Blume* that it could, since the federal felony offense for which the applicant was previously convicted carried "confinement in the penitentiary . . . as a possible punishment" in accordance with Texas state law—Penal Code § 12.41(1).[25] Therefore, under *Blume*, section 12.41(1) of the Texas Penal Code rendered the prior federal conviction a "felony of the third degree" under Texas law *for the purposes of the enhancement subchapter*. *Ex parte Blume* involved a federal conviction, not an out-of-state conviction, and the issue still was whether a conviction was properly enhanced *under Texas law*. Moreover, the finality issue currently before us was not at issue in *Blume*. We therefore find *Blume* distinguishable and not controlling of the issue before us today.

The State maintains that under the rule of *Diremiggio v. State*, an out-of-state conviction is final in Texas if it is final under the law of the convicting state. We recognize

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[24] *Blume*, 618 S.W.2d at 374.

[25] *Id*. at 376 (citing TEX. PEN. CODE § 12.41(1)).

that *Diremiggio* has been cited to support that position.[26] However, we do not agree that such is the holding of that case. Nor do we interpret *Diremiggio v. State* as standing for the proposition that if a conviction from another state is available for enhancement purposes in that state, then it is available for enhancement purposes under Texas law.

In *Diremiggio*, the appellant had a prior conviction in Virginia for uttering a forged check with intent to defraud, and he was sentenced to the penitentiary for five years, with four years suspended on condition of good behavior for ten years. The State argued that only four out of the five years was suspended, so the appellant necessarily received a final conviction as to the one year actually served. This Court held that such "partial" imposition/suspension of a sentence was insufficient to make a prima facie showing that the prior conviction was a "final" conviction. This Court did not specifically hold that we must interpret whether a conviction from another state is available for enhancement purposes under that other state's law. Rather, in *Diremiggio* this Court held that the State had not met its burden to prove that there was a prior "final" conviction available to enhance the appellant's sentence. In so holding, this Court noted that, "while the method of partial imposition and partial suspension of execution of a sentence is alien to Texas law, the State made no effort whatever to enlighten the trial court if it had proof that such a conviction was

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[26] *See e.g.*, cases cited in note 21.

considered to be 'final' under Virginia law."[27] As authority to support what we believe to be no more than a side comment, this Court cited to the case of *Almand v. State*.[28] However, *Almand v. State* does not stand for the rule that a prior out-of-state conviction is "final" for purposes of enhancement if it is "final" under the other state's law. Rather, in *Almand*, this Court simply recognized that the State had met its burden to prove that the prior conviction out of Louisiana was indeed a "final" felony conviction *under Texas law*. The State had introduced a pen packet showing that the defendant had been convicted of an offense in Louisiana. As punishment for such offense, he had served seven and a half years in the Louisiana State Penitentiary. This Court noted that, under the Texas Penal Code, a "felony" is defined as an offense punishable by "confinement in a penitentiary."[29] Since, "in the absence of any showing to the contrary, it is assumed the laws of another State are the same as Texas," this Court agreed that the State had met its burden to show that the appellant had a prior final felony conviction.[30] Despite these distinctions, *Diremiggio* has been cited by appellate courts in Texas as the prevailing authority from this Court to support the conclusion that if an out-of-state conviction is available for enhancement under the other state's law,

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[27] *Diremiggio v. State*, 637 S.W.2d 926, 928 (Tex. Crim. App. 1982).

[28] 536 S.W.2d 377 (Tex. Crim. App. 1976).

[29] *Almand*, 536 S.W.2d at 379.

[30] *Id*.

then it is available for enhancement under Texas law, even if it would *not* otherwise be considered a "final" conviction in Texas.

Diremiggio and *Blume* have been stretched to stand for the proposition that if it is good enough for them, it is good enough for us. Today, we dispel such "rule" and clarify that the "finality" of an out-of-state conviction for purposes of enhancement must be determined in accordance with Texas law.

Our decision today is consistent with previous cases we have decided. In *Jordan v. State*,[31] this Court said that "[i]n connection with section 12.42 enhancement provisions and their predecessors, we have held uniformly that the prior convictions must be final convictions."[32] Similarly, in *Ex parte White,*[33] we relied on Texas Penal Code subsections 12.42(c)(2)(B)(v) and 12.42(g)(1) and (2) in deciding that there was a statutory exception to this finality requirement. In *Ex parte White*, the applicant's convictions for indecency with a child and aggravated sexual assault of a child were properly enhanced by a prior Delaware offense of unlawful sexual contact even though the applicant's prior Delaware conviction was probated and probation was never revoked.[34] We held that, "[b]ecause of his prior

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[31] 36 S.W.3d 871 (Tex. Crim. App. 2001).

[32] *Jordan*, 36 S.W.3d at 873.

[33] 211 S.W.3d 316 (Tex. Crim. App. 2007).

[34] *White*, 211 S.W.3d at 319–20.

conviction in Delaware, applicant had been 'previously convicted,' under the laws of another state, of an offense containing elements that are substantially similar to the elements of an offense listed in subparagraph 12.42.(c)(2)(B)(ii)."[35] Thus, the prior Delaware conviction could be used for enhancement under subsections 12.42(c)(2), 12.42(g)(1), and 12.42(g)(2), even though probation had not been revoked because the specific language *of our statutes* allowed for enhancement "regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the defendant was subsequently discharged from community supervision."[36] We specifically noted that "[b]ecause our own legislature has spoken specifically" to the issues before this Court in *Ex parte White*, it was not "necessary to determine whether such convictions are considered final by the originating jurisdiction or the effect of finality in a foreign jurisdiction on enhancements in Texas."[37]

It is clear that the Texas Legislature has enacted specific statutory provisions allowing for enhancement for non-final convictions. But there is no specific Texas statutory provision allowing for enhancement in this case using the 2007 California non-final conviction. More importantly, there is no statutory authority allowing for out-of-state law to control punishment enhancement in Texas. The State argues that *the absence* of a post-*Diremiggio*

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[35] *White*, 211 S.W.3d at 318.

[36] *Id*. at 319.

[37] *Id*. at 319 n.4.

amendment to section 12.42 addressing this issue illustrates the Legislature's intent that the law of the convicting state will determine the finality of an out-of-state conviction. In light of our interpretation of *Diremiggio*, and for the reasons discussed herein, we are not persuaded by this argument.

Because Applicant was on probation for his 2007 California conviction at the time he was sentenced in this case, it would not have been considered a "final" conviction under Texas law. We hold, therefore, that since the 2007 California conviction was not available for enhancement under Texas law, it could not properly enhance Applicant's 2008 Texas sentence.

In arguing that we should abide by California law to determine conviction finality, the State urges us to follow the California case of *People v. Laino*.[38] *People v. Laino* held that "a plea of guilty constitutes a conviction" and "for purposes of a prior conviction statute, a conviction occurs at the time of entry of the guilty plea."[39] However, *People v. Laino* does not address whether the conviction was "final" under California law, just that a guilty plea is a conviction. Thus, it is inapplicable.

Moreover, the complexity of California's various enhancement laws further illustrates

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[38] 87 P.3d 27 (Cal. 2004).

[39] 87 P.3d at 38; *People v. Castello*, 77 Cal. Rptr. 2d 314, 321 (Cal. Ct. App. 1998); *People v. Balderas*, 711 P.2d 480, 515 (Cal. 1985) ("For purposes of a 'prior conviction' statute, defendant suffers such a conviction when he pleads guilty.").

why it would be impractical for us to decide whether another state's law dictates whether a conviction is "final" under Texas law. First, contrary to the State's argument that the 2007 conviction was final under California law, we have found California case law to support the conclusion that Applicant's 2007 felony conviction—where the imposition (rather than the execution) of the sentence was suspended— was *not* "final," even under California law.[40] Second, under California's "Three Strikes" laws, it is not clear whether Applicant's conviction could be used for enhancement in California.[41] We will not require a Texas trial court to sort through the nuances of forty-nine other states's enhancement laws, some of which may have no similarities with Texas enhancement requirements.

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[40] Under California law, "[f]inality in probation cases turns on whether the trial court suspended imposition of the sentence or merely suspended execution of the sentence." *People v. Penilla*, No. E06445, 2016 WL 6305374, at *4 (Cal. Ct. App. Oct. 18, 2016), *review granted* (Jan. 11, 2017). A probationer's judgment is "final" if the trial court imposed sentence and merely suspended execution thereof. *People v. Scott*, 324 P.3d 827, 831–32 (Cal. 2014). "When the trial court suspends imposition of sentence, no judgment is then pending against the probationer, who is subject only to the terms and conditions of probation. The probation order is considered to be a final judgment only for the 'limited purpose of taking an appeal therefrom.'" *People v. Howard*, 946 P.2d 828, 831–32 (Cal. 1997). "Unlike the situation in which sentencing itself has been deferred, where a sentence has actually been imposed but its execution suspended, 'the revocation of the suspension of execution of the judgment brings the former judgment into full force and effect. . . .'" *Id*. at 832; *People v. Martinez*, 240 Cal. App. 4th 1006, 1011–12 (Cal. 2015)."An order imposing sentence, the execution of which is suspended and probation is granted, is an appealable order. When that order is not appealed, it becomes final. This is so regardless of the fact the defendant will not serve the sentence unless the court revokes and terminates probation before the probationary period expires." When Applicant pled guilty in 2007, the California Superior Court suspended the imposition, not the execution, of Applicant's sentence. Thus, since the *imposition* of Applicant's sentence was suspended, it would not be a "final" conviction under California law.

[41] California's Three Strikes laws consist of a statutory scheme "designed to increase the prison terms of repeat felons." *Ewing v. California*, 538 U.S. 11, 15–16 (2003) (citing *People v. Super. Ct. of San Diego Cty.*, 917 P.2d 628, 630 (Cal. 1996)).

III.
Conclusion

Unless a more specific *Texas* statute applies, Texas courts should follow Texas Penal Code § 12.42, requiring that a defendant be "finally convicted" of the alleged prior offense before punishment can be enhanced. And the determination of whether a defendant has been "finally convicted" for enhancement purposes under section 12.42 is to be made in accordance with Texas law.[42] In this case, because Applicant had been placed on probation for his 2007 California felony conviction, and probation had not been revoked at the time that he was sentenced in this case in 2008, his 2007 California conviction was not "final" under Texas law, and thus it could not be used to enhance his sentence in this case.[43]

We grant relief based upon Applicant's first ground and hold that Applicant was improperly sentenced as a habitual offender.[44] Applicant's sentence is set aside, and he is

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[42] We are not ignoring the Full Faith and Credit Clause of the United States Constitution. U.S. CONST. art. IV, § 1. "Full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state." *Hughes v. Fetter*, 341 U.S. 609, 611–12 (1951). While we still recognize that a prior conviction from another state is indeed a conviction under Texas law, section 12.42(d) simply requires that it be "final" in order to be available to enhance the punishment of a defendant's Texas conviction in a Texas prison. Our decision today establishes that the finality of any prior conviction (in or out of Texas) for enhancement in Texas is determined under Texas law.

[43] Our decision today does not affect the admissibility of an out-of-state conviction as evidence being offered by the State as to any matter the court deems relevant to sentencing pursuant to Texas Code of Criminal Procedure art. 37.07, Sec. 3(a)(1).

[44] Because we grant relief based upon Applicant's first ground, it is not necessary for us to address his other grounds for relief.

remanded to the custody of the Sheriff of Comal County so that a new punishment hearing may be conducted by the trial court.

DELIVERED: February 28, 2018

PUBLISH