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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID EUGENE THOMAS, JR.,

Defendant and Appellant.

C073701

(Super. Ct. No. 62107466B)

Defendant David Eugene Thomas, Jr., committed a home invasion robbery with four companions. Two residents of the home were held at gunpoint while the home was ransacked. Items of personal property were stolen.

Defendant pleaded no contest to two counts of residential robbery (Pen. Code, §§ 211, 213, subd. (a)(1)(A)<sup>1</sup> -- counts one and two) and two counts of false

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

imprisonment by violence (§ 236 -- counts three and four). He admitted personally using a firearm in the commission of the offenses (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)) and also admitted three prior strike convictions from a prior juvenile court proceeding (§§ 667, subds. (b)-(i), 1170.12). In exchange for the pleas and admissions, the prosecutor agreed not to file an amended information asserting the prior convictions as a five-year enhancement pursuant to section 667, subdivision (a)(1), and the trial court agreed to consider striking one or more of the prior strike convictions. At sentencing, the trial court dismissed one of the prior strikes and sentenced defendant to an aggregate prison term of 35 years to life (25 to life on count one, plus 10 years consecutive for personally using a firearm, with concurrent terms of 25 to life on counts two, three, and four).

On appeal, defendant contends (1) his three prior juvenile court adjudications were not prior convictions under the three strikes law, because the meaning of the Sixth Amendment exception for prior convictions must be ascertained based on what it would have meant to the framers of the Bill of Rights; (2) although the California Supreme Court held otherwise in *People v. Nguyen* (2009) 46 Cal.4th 1007 (*Nguyen*), that case was wrongly decided; and (3) the sentences on counts three and four must be stayed pursuant to section 654.

We conclude defendant's first and second contentions are, in essence, a challenge to the validity of his plea, and are not reviewable because he did not obtain a certificate of probable cause.<sup>2</sup> (§ 1237.5.) But we agree with his third contention that the sentences on counts three and four must be stayed pursuant to section 654.

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<sup>2</sup> The parties did not address in their appellate briefs whether defendant's failure to obtain a certificate of probable cause prevents us from reviewing his first and second contentions. But because the law is clear, we conclude, without further briefing and in the interests of judicial economy, that his first and second contentions are not reviewable. Any party aggrieved may petition for rehearing. (Gov. Code, § 68081.)

We will modify the judgment and affirm the judgment as modified.

## DISCUSSION

### I

Defendant contends his three prior criminal adjudications in juvenile court do not constitutionally qualify as prior convictions for purposes of sentencing under the three strikes law, because they were obtained without the right to a jury trial. He acknowledges that the California Supreme Court, in *Nguyen, supra*, 46 Cal.4th 1007, held to the contrary, but he says he is making an argument not discussed in *Nguyen*: that the meaning of the Sixth Amendment exception for prior convictions must be determined by ascertaining what it would have meant to the framers of the Bill of Rights.

Ultimately, however, defendant's contention is a challenge to the validity of his plea, requiring a certificate of probable cause. "Section 1237.5 provides that a defendant may not appeal a judgment of conviction entered on a plea of guilty or nolo contendere without obtaining a certificate of probable cause from the trial court, unless the appeal is based solely upon grounds occurring after entry of the plea and which do not challenge its validity." (*People v. Placencia* (2011) 194 Cal.App.4th 489, 493.) Because defendant did not obtain a certificate of probable cause, we are precluded from reviewing his contention. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1099 [appellate court must decline to review an issue that requires a certificate of probable cause in the absence of such a certificate].)

### II

Defendant also claims *Nguyen, supra*, 46 Cal.4th 1007, was wrongly decided. He acknowledges that this court "may consider itself required" to follow California Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Nonetheless, he asserts the contention to preserve his argument for further review.

Again, however, his contention is ultimately a challenge to the validity of his plea. As we explained in part I, *ante*, it is not reviewable without a certificate of probable cause.

### III

In addition, defendant asserts that the sentences on counts three and four (false imprisonment by violence) must be stayed pursuant to section 654 because the objective of those offenses was to facilitate the residential robberies for which he was convicted and sentenced on counts one and two. The Attorney General agrees.

We may review this contention even though defendant did not obtain a certificate of probable cause. Defendant's plea agreement did not specify a lid sentence, i.e., a sentence less than the maximum he could receive if sentenced on all the charges and enhancements. Instead, the trial court informed defendant that his plea did not prevent the trial court from imposing the maximum sentence. Because defendant's sentence was not negotiated, he did not waive or forfeit his claim under section 654. (See, e.g., *People v. Shelton* (2006) 37 Cal.4th 759, 769 [defendant's section 654 challenge to a negotiated lid sentence required a certificate of probable cause].)

Turning to the merits of defendant's contention, section 654 "prohibits punishment for more than one crime arising from a single indivisible course of conduct." (*People v. Williams* (2013) 57 Cal.4th 776, 780-781.) " 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507, italics omitted.)

The factual basis for defendant's plea shows that defendant and his companions held the victims at gunpoint to prevent the victims from leaving the residence and interfering with the residential robbery. Because the false imprisonments were incident to the robberies, the sentences on counts three and four must be stayed.

DISPOSITION

The judgment is modified to stay the concurrent sentences of 25 years to life on counts three and four. The judgment is affirmed as modified. The trial court is directed to prepare an amended abstract of judgment reflecting the modified judgment, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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MAURO, J.

We concur:

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BUTZ, Acting P. J.

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HOCH, J.