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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ANTHONY QUIRINO, Defendant and Appellant.	G050926 (Super. Ct. No. 14CF1858) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed in part, reversed in part and remanded with directions.

Paul J. Katz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Peter Quon, Jr., and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Richard Quirino appeals following his convictions by jury on charges of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1); counts 1 & 4),[1] possession of methamphetamine while armed (Health & Saf. Code, § 11370.1, subd. (a); count 2), and second degree robbery (§§ 211, 212.5, subd. (c); count 3). The jury also found true allegations that defendant committed counts 2 and 4 for the benefit of a gang (§ 186.22, subd. (b)(1) and personally used a firearm in the commission of count 3 (§ 12022.53, subd. (b)). The court subsequently found true an allegation that defendant sustained a prior prison term. (§ 667.5, subd. (b).)

The court sentenced defendant to an aggregate state prison term of 18 years as follows: (1) the upper term of five years for the second degree robbery count, plus 10 years for the firearm enhancement; (2) a consecutive term of one year (one-third the midterm) for the possession of methamphetamine count, plus one year for a gang enhancement; and (3) one year for a prior prison term enhancement. Sentences on counts 1 and 4 were stayed pursuant to section 654.

Quirino does not challenge his convictions, which stem from two separate incidents. Instead he challenges the sufficiency of the evidence to support findings that he committed the firearm possession in the first incident, and the methamphetamine possession in the second incident, for the benefit of a criminal street gang. He also contends his sentence enhancement for a prior prison term under section 667.5, subdivision (b) must be set aside because the earlier felony for which the prison term was served has since been reduced to a misdemeanor pursuant to Proposition 47, an initiative passed by the California voters in November 2014.

Finally, Quirino contends the court erred by imposing a $50 laboratory analysis fee pursuant to Health and Safety Code section 11372.5. He points out the statute applies only to specified drug offenses, not including the one he was convicted of.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

The Attorney General concedes the imposition of the laboratory fee was erroneous, but disputes Quirino's other contentions.

On August 15, 2016, we issued an opinion reversing the judgment in part and remanding the case to the trial court with directions to strike the laboratory fee and resentence Quirino in accordance with our opinion. We agreed with Quirino that the evidence was insufficient to support his gang enhancements. We also agreed with Quirino's assertion that the reduction of his earlier felony to a misdemeanor pursuant to Proposition 47 means that offense is no longer eligible to support imposition of a prior prison enhancement under section 667.5, subdivision (b).

On October 26, 2016, the California Supreme Court granted review and, on September 26, 2018, transferred the matter to us "with directions to vacate [our] decision and reconsider the cause in light of [Senate Bill No.] 620 (Stats. 2017, ch. 682)." Senate Bill No. 620 (S.B. 620) took effect on January 1, 2018 and provides trial courts with discretion to strike or dismiss firearm enhancements, including the one imposed in this case, in the interest of justice.

On October 5, 2018, pursuant to the direction by the Supreme Court, we vacated our prior decision. We now reissue our prior opinion (which had not addressed the firearm enhancement because the issue was not raised). In addition to our prior directions to the trial court on remand, we direct the court to exercise its discretion as to whether to strike the firearm enhancement. In all other respects, our decision regarding Quirino's claims of error remains the same as the California Supreme Court's order does not affect the issues we previously considered.

FACTS

The first incident occurred in the afternoon of November 11, 2011. The victim was riding a bicycle along the Santa Ana riverbed trail when he passed Quirino

and a younger male, also riding bicycles. Quirino, who was wearing a red baseball cap, then rode up next to the victim and forced him to stop by grabbing his backpack. Quirino told the victim "now you're fucked up," and lifted his shirt to show a wooden-handled revolver tucked into his waistband. He then demanded the victim "give me all your fucking money," and took the victim's wallet from his back pocket. The victim gave Quirino his backpack as well, and noted Quirino's breath smelled of alcohol.

Quirino told the victim he needed the money for his sick mother, warned him not to call the police, and rode away. The younger male who had been with Quirino when the victim first rode by, stayed about 80 feet away from Quirino and the victim during the robbery. After Quirino and his friend departed, the victim called the police.

The second incident occurred 12 days later, on November 23, 2011. Police officers were patrolling an area claimed by a criminal street gang — about one-half mile from the river trail where the earlier robbery had taken place. When the officers spotted Quirino, and told him to stop, he ran away. The officers chased him and then shot him with a taser as he attempted to scale a chain link fence. After the officers subdued Quirino, they searched him and found a loaded .22 caliber revolver, a baggie containing five grams of methamphetamine, and a syringe. The officers also seized a light blue bandana that Quirino had been wearing around his neck, as well as a gang registration notification with his name on it.

Based on Quirino's resemblance to the robber described by the victim in the first incident, plus the proximity of the two incidents, Quirino was identified as a possible suspect in the first incident. He was later identified by the victim as the robber.

Quirino was charged with one count of second degree robbery and one count of being a felon in possession of a firearm in connection with the first incident, and one count of possessing methamphetamine while armed and one count of being a felon in possession of a firearm in connection with the second incident.

At trial, the prosecution's gang expert testified about Hispanic gangs generally, and about gangs in the City of Santa Ana in particular. He stated that Hispanic gangs are "turf oriented" and tend to commit their crimes within their own territory. Gang members gain "respect" by sowing fear in the community, and committing serious or violent crimes enhances an individual gang member's status within the gang, as well as enhancing the gang's status within the gang community. They are expected to "put[] in work" for the gang, meaning they will commit crimes such as "narcotic sales, robberies and other types of theft to support the gang . . . ." Hispanic gang members like to brag about their crimes to fellow gang members and usually commit their crimes with other gang members as witnesses.

The expert described Quirino's alleged gang as a traditional Hispanic street gang with a territory claimed by the gang on the perimeter of the Santa Ana river trail. He characterized the trail as a "robbery zone" shared between Quirino's alleged gang and a rival gang. He explained that Quirino's alleged gang in particular is known for committing assaults with firearms, robberies and thefts, narcotics trafficking, and possessing firearms and other weapons. Its gang color is light blue, which members sometimes display by carrying a light blue bandana.

DISCUSSION

Sufficiency of the Gang Evidence

Quirino contends the evidence was insufficient to sustain the findings that his crime of possessing a gun during the first incident, and his crime of possessing methamphetamine during the second incident, were committed for the benefit of a criminal street gang and with the intent to promote the gang's criminal conduct. (§ 186.22, subd. (b) [providing for a sentence enhancement when a defendant "is convicted of a felony committed for the benefit of, at the direction of, or in association

with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members"].)

"We review claims of insufficient evidence by examining the entire record in the light most favorable to the judgment below. [Citation.] We review to determine if substantial evidence exists for a reasonable trier of fact to find the [allegations] true beyond a reasonable doubt." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) By definition, however, evidence is not substantial if based on mere speculation, guesswork or conjecture. (*Reese v. Smith* (1937) 9 Cal.2d 324, 328.)

Quirino's gang enhancements were based on the expert testimony of the prosecutor's gang expert. Such testimony is appropriate because "'California law permits a person with "special knowledge, skill, experience, training, or education" in a particular field to qualify as an expert witness [citation] and to give testimony in the form of an opinion [citation]. Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." [Citation.] The subject matter of the culture and habits of criminal street gangs . . . meets this criterion.'" (*People v. Vang* (2011) 52 Cal.4th 1038, 1044.) However, "[w]here an expert bases his conclusion upon . . . factors which are speculative, remote or conjectural, . . . [Citations.] . . . the expert's opinion cannot rise to the dignity of substantial evidence." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.)

As explained in *People v. Ochoa* (2009) 179 Cal.App.4th 650 (*Ochoa*), "[a] gang expert's testimony alone is insufficient to find an offense gang related. [Citation.] '[T]he record must provide some evidentiary support, *other than merely the defendant's record of prior offenses and past gang activities or personal affiliations*, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.'" (*Id*. at p. 657, first set of italics added.)

The First Incident

In the first incident, the gang enhancement was tied to the count alleging Quirino's possession of the gun used in the robbery, rather than the robbery itself. Although Quirino was seen with a companion on the bike path, he acted alone in the robbery. He displayed no gang colors, did not invoke the gang's name, and only displayed the gun he possessed to the victim, by raising his shirt to reveal it tucked in the waistband of his pants. He told the victim he needed money because his mother was sick.

The expert testified, in somewhat conclusory fashion, that a gang member's gun possession would benefit the gang because the gun *could be* used for offensive purposes, such as in a robbery, and could also be used for defensive purposes like protection from rival gang members. However, such generic opinion evidence, standing alone, does not rise to the level of substantial evidence. As stated in *Ochoa, supra,* 179 Cal.App.4th 650, a gang expert's testimony "that the carjacking could benefit defendant's gang in a number of ways" was insufficient in the absence of "specific evidentiary support for drawing such inferences" in connection the particular incident. (*Id*. at p. 662). Thus, in *Ochoa*, "there was no indication that defendant had used the vehicle to transport other gang members. There was no testimony that defendant used the vehicle to transport drugs or manifested any intention to do so. While the [expert] testified that defendant may have been motivated to commit the instant crimes in order to exact retaliation against another individual, he failed to provide any evidentiary support for this conclusion. There was never any suggestion that the alleged victim of the brandishing charge was a rival gang member or had committed any offenses against defendant or his gang. The sergeant's testimony, as to how defendant's crimes would benefit [the criminal street gang], was based solely on speculation, not evidence." (*Id*. at pp. 662-663, fn. omitted.)

Here, although there was evidence Quirino used the gun offensively to commit a robbery, there was no evidence that robbery was carried out for the benefit of a

gang. The expert testified the robbery would benefit a criminal street gang because "the proceeds go back to the gang [and if] they happen to be with anyone else, then it's witnessed." But there again, our record contains no evidence that the proceeds of this robbery actually did go back to any criminal street gang. The only evidence directly bearing on the point was Quirino's own statement — quoted by the victim — that he needed the money because his mother was sick. That suggests a personal, rather than gang-related, motive for the crime. Of course, the jury was free to disbelieve that statement, but that disbelief would not constitute affirmative evidence the crime was committed for the benefit of the gang. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205 [disbelief of testimony has "the effect of removing that testimony from the evidentiary mix. Without more, the disregard or disbelief of the testimony of a witness is not affirmative evidence of a contrary conclusion"].)

And as to the assertion Quirino's crime benefitted the gang because it was "witnessed," the gang expert explained that Quirino's gun possession in this particular incident would enhance his reputation within the gang, and enhance the gang's reputation, because both his companion and the victim would be expected to talk about the robbery. However, as Quirino points out, there is no evidence that his companion was a gang member, and there is no evidence the companion would have even seen the gun when Quirino lifted his shirt to display it to the victim, given that the companion was standing more than 80 feet behind Quirino and his victim. In fact, the victim stated that Quirino's companion was standing so far away "I couldn't see him very well."

As for the victim himself, he did see a gun, but there was no evidence he associated either the gun or Quirino with a gang. And the mere fact the victim may have suspected Quirino was a member of *some* gang is not sufficient evidence to demonstrate his commission of a crime benefitted *his* gang. (*Ochoa, supra,* 179 Cal.App.4th at p. 663 ["While it is true that the carjacking victim testified that he believed 'a little' that

defendant may have been a gang member, it is difficult to imagine how that would benefit [a criminal street gang] because the victim did not know to which gang, if any, defendant may have belonged"].)

In this case then, the only *evidence* that Quirino was acting for the benefit of his gang when he possessed the gun in the first incident was his membership in the gang, and the fact he possessed a gun. That is insufficient. "The gang enhancement cannot be sustained based solely on defendant's status as a member of the gang and his subsequent commission of crimes." (*Ochoa, supra*, 179 Cal.App.4th at p. 663.)

The Attorney General relies on this court's opinion in *People v. Garcia* (2007) 153 Cal.App.4th 1499, which she implies demonstrates that an active gang member that holds guns in high importance can be found guilty of possessing a gun for the benefit of a gang based on those facts alone, despite the fact the gang member claimed to have the gun for self-protection. (*Id*. at p. 1512.) But the gang expert in *Garcia* based his opinion in part on the fact Garcia's gun was given to him by other gang members, which "shows that they know it's for the — it's going to be used against rival gang members, or for the protection of the [gang]." (*Id.* at p. 1506.) In this case, by contrast, we have no information about the source of Quirino's gun, and the expert did not mention it.

Because there was insufficient evidence to support the gang expert's conclusion that Quirino's possession of a gun in the first incident was done for the benefit of a gang, the true finding on that gang enhancement cannot be sustained.

The Second Incident

In the second incident, the jury found it was Quirino's possession of the methamphetamine while armed that was committed with the intent to benefit his gang. The incident took place late at night, when police officers were patrolling gang territory. Quirino was alone when the officers spotted him, riding a bike in an alley, and when the

officers told him to stop, he fled on foot. When apprehended, Quirino was wearing a baby blue bandana around his neck, and he was carrying 5 grams of methamphetamine, a syringe, and a loaded gun.

The gang expert testified that a gang member's possession of a gun while riding around the neighborhood late at night would benefit the gang because such behavior would be considered "posting up or patrolling the neighborhood to protect it from rivals that may enter while they are conducting business." However, as Quirino points out, what is missing from this scenario is any evidence that other gang members were "conducting business" in the area at that time. Absent such evidence, there is no basis to infer Quirino's conduct amounted to "posting up."

The expert also stated the gang would benefit from Quirino's crime because "they can gain the resources from the narcotic sales. He is protecting the neighborhood and is actually spreading fear within the neighborhood wearing the bandana, riding around at night, and people know he is out there, and they are aware." But again, there is no evidence in the record of any narcotic sales — by Quirino or anyone else — or that anything else was going on that Quirino might have needed to provide protection either for or against.

And while it may be true that Quirino's wearing of the bandana could spread fear, that sartorial act — as contrasted with the gun and methamphetamine possession — is not a crime being committed. The actual crimes Quirino was committing were possessory in nature, and could not be seen by anyone. There was no evidence he had displayed either the methamphetamine or the gun to any person in the second incident.

Consequently, while the gang expert demonstrated there were gang-related reasons why a gang member might engage in the sort of conduct Quirino was engaged in during the second incident, there was no evidence that any of those gang-related scenarios happened. As explained in *People v. Ramon* (2009) 175 Cal.App.4th 843, in

the absence of such evidence, there is nothing to support the inference suggested by the gang expert. In *Ramon*, the defendant was stopped by police while driving a stolen truck in his gang's territory, with another gang member in the passenger seat. A gang expert testified at trial that car theft was one of the gang's primary activities. (*Id*. at p. 847.) He opined that by driving a stolen vehicle within his gang's territory, the defendant could use it to conduct crimes and then be free to abandon it without it being tied to him. (*Id*. at pp. 847-848.) Moreover, the vehicle could be used to spread fear and intimidation within the gang's territory. (*Id*. at p. 848.) However, the defendant's gang enhancements were vacated on appeal because there was no evidence in the record demonstrating why the defendant and his companion were driving around in the stolen truck, and the mere possibility they were doing so for gang-related reasons was not sufficient to support a verdict: "While it is possible the two were acting for the benefit of the gang, a mere possibility is nothing more than speculation. Speculation is not substantial evidence." (*Id*. at p. 851.)

Ultimately, the gang expert in this case opined that Quirino must have been acting for the benefit of a gang in the second incident because the notion of a gang member riding around the neighborhood with a gun and methamphetamine for his own use is not consistent with gang culture. He stated that the gang would not allow a gang member "to sell drugs or roam around that neighborhood without it benefitting [the gang]." But here again, there was no evidence Quirino was engaging in narcotics sales during the incident in question. To the contrary, he was alone and riding a bicycle. Unlike the defendant in *People v. Ferraez* (2003) 112 Cal.App.4th 925, in which the defendant admitted he had been attempting to sell rock cocaine found in his possession, and had been given permission to do so at that particular location by a gang aligned with his own. (*Id*. at p. 928.) As to the expert's broader point, it amounts to a blanket assertion that the gang controls every aspect of a gang member's conduct within the gang's territory — and thus that any conduct engaged in by a gang member can be

presumed to have been carried out for the benefit of the gang. But because "[t]he gang enhancement cannot be sustained based solely on defendant's status as a member of the gang and his subsequent commission of crimes" (*Ochoa, supra*, 179 Cal.App.4th at p. 663), such a contention does not meet the definition of substantial evidence.

Based on the foregoing, we conclude the evidence was also insufficient to support the jury's finding that Quirino's possession of methamphetamine while armed was done for the benefit of a criminal street gang. Consequently, the true finding on that gang enhancement cannot stand.

Propriety of the Enhancement Based on Prior Prison Term

Section 667.5, subdivision (b) provides for a one-year sentence enhancement "for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony . . . ."[2]

Quirino's sentence in this case included one such enhancement, stemming from a prison term he served for a felony burglary. However, in November 2014, after Quirino was sentenced, Proposition 47 went into effect and Quirino filed a petition under section 1170.18 to have his felony burglary conviction reduced to a misdemeanor. Section 1170.18, subdivision (k) — enacted as part of Proposition 47 — states that "[a] felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) [of section 1170.18] shall be considered a misdemeanor for all purposes . . . ."

In May 2015, Quirino's petition was granted. We have taken judicial notice of the order reducing that felony to a misdemeanor. Quirino now asks us to strike the prior prison enhancement (which was properly imposed as of the day he was sentenced) on the ground the underlying conviction has since been reduced to a non-

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[2] Section 1170, subdivision (h)(1) allows certain felonies to be punished by "a term of imprisonment in a county jail . . . ."

qualifying misdemeanor, and contends it is appropriate to do so because his sentence is not yet final.

In our August 15, 2016 opinion, we agreed with Quirino that the reduction of his earlier felony to a misdemeanor pursuant to Proposition 47 means the offense is no longer eligible to support imposition of a prior prison enhancement under section 667.5, subdivision (b). In September 2016, the Attorney General filed a petition for review asking the California Supreme Court to defer further action pending resolution of a similar issue in *People v. Valenzuela* (S232900). In October 2016, the California Supreme Court granted review and deferred further action pending disposition of *People v. Valenzuela* (S232900).

In July 2018, the California Supreme Court issued *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), a consolidated decision in *Buycks*, *People v. Valenzuela* (S232900), and *In re Guiomar* (S238888), regarding the effect of Proposition 47 on felony-based enhancements. Our Supreme Court considered "Proposition 47's mandate that the felonies reduced under its provisions 'shall be considered a misdemeanor for all purposes.'" (*Buycks* at p. 876, fn. omitted.) "[B]ecause Proposition 47 is a measure designed to ameliorate punishment," our Supreme Court held the "'misdemeanor for all purposes' language . . . requires felony-based section 667.5 and 12022.1 enhancements to be retroactively stricken, but only with regard to judgments that were not final at the time the initiative took effect." (*Ibid.*, fn. omitted.) In reaching this conclusion, our Supreme Court disagreed with the Attorney General's argument that "voters did not intend for Proposition 47 to retroactively reach back to unravel a . . . felony-based enhancement that had already been imposed *before* any successful petition for resentencing under section 1170.18, even if that judgment was not final." (*Id.* at p. 879.) Instead, our Supreme Court emphasized "a successful Proposition 47 petitioner may subsequently challenge, under subdivision (k) of section 1170.18, any felony-based enhancement that is based on that previously designated felony, now reduced to misdemeanor, so long as the judgment

containing the enhancement was not final when Proposition 47 took effect." (*Ibid.*)

Here, because Quirino's judgment was not final when Proposition 47 took effect, "the . . . rule [in *In re Estrada* (1965) 63 Cal.2d 740] applies to strike [his] section 667.5, subdivision (b) prior felony prison term enhancement." (*Buycks*, *supra*, 5 Cal.5th at p. 896.) Given our Supreme Court's recent holding in *Buycks*, we need not address the Attorney General's reliance on other case law. On remand, the court must resentence Quirino in accordance with the facts currently in existence, including the fact that his prior felony burglary conviction has been reduced to a misdemeanor.

Laboratory Fee

Quirino's final contention is that the court erred by ordering him to pay a laboratory analysis fee pursuant to Health and Safety Code section 11372.5. That statute states, in pertinent part: "(a) Every person who is convicted of a violation of Section 11350, 11351, 11351.5, 11352, 11355, 11358, 11359, 11361, 11363, 11364, 11368, 11375, 11377, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, 11382, 11383, 11390, 11391, or 11550 or subdivision (a) or (c) of Section 11357, or subdivision (a) of Section 11360 of this code, or Section 4230 of the Business and Professions Code shall pay a criminal laboratory analysis fee in the amount of fifty dollars ($50) for each separate offense."

As Quirino points out, he was not convicted of any of the offenses specified in the statute. Instead, he was convicted of violating section 11370.1 of the Health and Safety Code. He thus contends the laboratory analysis fee was not warranted. The Attorney General concedes the point, and agrees the laboratory fee should be stricken. We agree as well.

S.B. 620

Quirino's sentence in this case includes a firearm enhancement of 10 years under subdivision (b) of section 12022.53. At the time of Quirino's sentencing, the court had no power to strike or dismiss the firearm enhancement. While this case was pending on appeal, Governor Jerry Brown signed S.B. 620 into law, which took effect on January 1, 2018. (*People v. Mathews* (2018) 21 Cal.App.5th 130, 132.) S.B. 620 amended sections 12022.5 and 12022.53, which set forth firearm enhancements, so the court may now, in its discretion, strike the enhancements in the interest of justice. (§§ 12022.5, subd. (c), 12022.53, subd. (h).) As amended, section 12022.53, subdivision (h) provides: "The court may, in the interest of justice pursuant to [s]ection 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Although the parties have not expressed their view on the matter in supplemental briefing in this case, the Attorney General has conceded the *Estrada* rule retroactivity applies to S.B. 620. (See, e.g., *People v. Mathews*, *supra*, 21 Cal.App.5th at p. 132; *People v. Phung* (2018) 25 Cal.App.5th 741, 763.) We agree S.B. 620 applies retroactively and that remand is necessary: "[T]he amendment to subdivision (h) of Penal Code section 12022.53, which [took] effect before the judgment in this case is final, necessarily reflects a legislative determination that the previous bar on striking firearm enhancements was too severe, and that trial courts should instead have the power to strike those enhancements in the interest of justice. Moreover, because there is nothing in the amendment to suggest any legislative intent that the amendment would apply prospectively only, we must presume that the Legislature intended the amendment to apply to every case to which it constitutionally could apply, which includes this case. Accordingly, remand is appropriate in this case to allow the trial court to exercise its

discretion as to whether to strike the firearm enhancement." (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1091.)

DISPOSITION

The matter is remanded to the court with directions to exercise its discretion whether to strike the firearm enhancement in the interest of justice pursuant to section 1385. The court shall conduct a noticed hearing and shall give the parties a reasonable opportunity to file briefs on the resentencing issue. The court also is instructed to strike the gang enhancements to the firearm possession and methamphetamine possession counts, to strike the laboratory fee imposed pursuant to Health and Safety Code section 11372.5, and to resentence Quirino in accordance with this opinion. In all other respects, we affirm the judgment.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.