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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

LUIS DANIEL RIOS,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA  
CRUZ COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

No. H038585

(Santa Cruz County  
Super. Ct. No. F21479)

Petitioner Luis Daniel Rios was convicted of four felony counts. Three Penal Code section 12022.55<sup>1</sup> allegations were also found true. This court concluded that instructional error had occurred and remanded the case with directions that Rios *either* be retried on the section 12022.55 allegations “within 60 days of the filing of the remittitur in the trial court” *or* resentenced without enhancements. Rios was not retried within 60 days, so he moved to dismiss the enhancements and for resentencing. The trial court denied the motion and calendared a trial setting date on the enhancement allegations.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise noted.

This court issued a peremptory writ of mandate in the first instance directing the trial court to grant the motion to dismiss and resentence Rios as directed in the earlier remittitur. The trial court complied with these directions. The People then filed a *new* complaint indicating on its face that it was a “REFILE” of the original complaint. Rios demurred. The People conceded that Rios could not be retried on the substantive counts, and the trial court sustained the demurrer to those counts without leave to amend, but it overruled the demurrer to the enhancement allegations. Rios seeks a writ of mandate directing the trial court to sustain the demurrer in its entirety and to dismiss the enhancement-allegations-only case against him.

We conclude that the trial court’s ruling amounted to “‘clear error under well-settled principles of law and undisputed facts.’” (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1258 (*Lewis*)). Accordingly, we will issue a peremptory writ in the first instance directing the trial court to vacate its order overruling Rios’s demurrer to the enhancement allegations, to enter a new order sustaining the demurrer in its entirety without leave to amend, and to enter a judgment of dismissal.

## I. BACKGROUND

Rios was convicted in 2003 of three counts of involuntary manslaughter (§ 192, subd. (b)) and one count of discharging a firearm from a vehicle (former § 12034, subd. (c)). Three section 12022.55 allegations were also found true. This court reversed for instructional error. (*People v. Garcia* (Apr. 28, 2005, H026159) [nonpub. opn.].)

Rios was retried and again convicted in 2009, and the section 12022.55 allegations were again found true. He appealed, and this court concluded that the trial court had prejudicially erred in failing to instruct the jury on the mental state required to prove the section 12022.55 allegations. (*People v. Rios* (Sept. 2, 2010, H034085) [nonpub. opn.].) The disposition of the court’s unpublished opinion stated, “We reverse the true findings on the . . . section 12022.55 enhancements. We remand with instructions that the People

may, if they choose, retry appellant on the . . . section 12022.55 enhancement allegations within 60 days after the filing of the remittitur in the trial court pursuant to . . . section 1382, subdivision 2, unless time is waived by defendant, but if the People do not choose the retrial option, the trial court is to resentence appellant on counts one, two, three and four.” (*Ibid.*) The remittitur was filed in the trial court on December 20, 2010.

Rios did not waive time, nor was he retried within 60 days. On February 28, 2011, 70 days after the remittitur was filed in the trial court, he moved to dismiss the enhancement allegations and for resentencing without enhancements, citing this court’s “quite clear” instructions. The trial court denied the motion and calendared a trial-setting date.

Rios petitioned for writ relief. This court issued a peremptory writ of mandate in the first instance (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180 (*Palma*); *Lewis, supra*, 19 Cal.4th at pp. 1240-1241) directing the trial court to grant Rios’s motion to dismiss and to resentence him “as directed in the remittitur issued in . . . H034085.” (*Rios v. Superior Court* (June 30, 2011, H036757) [nonpub. opn.].) The opinion explained in unambiguous language that the California Supreme Court “has established the following rule regarding the trial court’s jurisdiction upon the filing of the appellate court’s remittitur: ‘The order of the reviewing court is contained in its remittitur, which defines the scope of jurisdiction of the court to which the matter is returned. “The order of the appellate court as stated in the remittitur, ‘is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.’” [Citation.]’ [Citations.] [¶] *Thus, where, as here, the decision on appeal reverses with directions, ‘the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not*

*conform to those directions is void. [Citations.] [Citations.] This ‘strict rule’ applies even if ‘the directions of the reviewing court are based upon an erroneous concept. The remedy of the party aggrieved by the error lies only in a petition [for rehearing] to a reviewing court. [Citations.] [Citation.]” (Id. at pp. 8-9, italics added.) This court expressly declined to reach “the People’s contentions that refiling of the section 12022.55 enhancement allegations after the expiration of the 60-day period following the filing of the remittitur is statutorily authorized under sections 1382 and 1387,” explaining that “[t]hat issue is not before us because the trial court did not dismiss the enhancement allegations and the People did not attempt to refile the enhancement allegations at the February 28, 2011 hearing.” (Id. at p. 10.)*

At a September 13, 2011 hearing, the trial court complied with this court’s directive, vacating its earlier order, entering a new order granting Rios’s motion to dismiss, and setting a date for resentencing. At the same hearing, the People filed a new complaint indicating on its face that it was a “REFILE” of the original complaint.

Rios was resentenced on October 18, 2011. He served his sentence and was released. He demurred to the new complaint on the ground that it was legally barred (§ 1004, subd. (5)) by section 654, subdivision (a)’s proscription against multiple prosecutions and by this court’s specific directives.

The People argued in opposition that section 654 did not bar reprosecution of the section 12022.55 allegations because Rios had never been sentenced on them. They further contended that this court had specifically *not* barred reprosecution of the enhancement allegations: “The Sixth District specifically did not address the People’s inherent authority to re-file dismissed counts and enhancements.” The People argued that the discussion of relevant California Supreme Court authority in this court’s writ opinion “addressed what the trial court could not do in the *original* case. It did not address at all what the trial court could or could not do should the People elect to re-file the enhancement allegations as they are entitled to do pursuant to [section 1387].”

In his reply, Rios countered that “[n]owhere in either the original opinion or the opinion granting the Writ of Mandate (filed June 30, 2011) does the Sixth District state [that] the special allegations ‘could be re-tried’ if the prosecution failed to retry them within 60 days.” Citing *People v. Martin* (1978) 87 Cal.App.3d 573 (*Martin*), he noted that “[t]he prosecution fails to grasp the basic principle that the special allegations cannot, and do not, exist in space. They must be attached to substantive charges. . . . If the demur[rer] is sustained as to the substantive charges, as everyone agrees it should be, then by operation of law the demur[rer] is also sustained as to special allegations attached to the substantive charges. There is no case law or statutory authority that would support the absurd position that [Rios] can be retried on the special allegations alone.”

In a surreply, the People contended that *Martin* applied only to prior conviction allegations. This court’s initial directive “clearly” contemplated retrying the enhancement allegations alone, they argued, and doing so would not run afoul of double jeopardy. Construing their failure to retry Rios within 60 days not as a violation of this court’s directives but as a mere violation of Rios’s statutory speedy trial right, they claimed the law was “clear” that “a dismissal based on a statutory speedy trial violation does not bar re-filing of the charges.”

At the hearing on the demurrer, Rios’s trial counsel pointed out that “we are in a completely different procedural posture than any of the cases cited by the prosecution.” This court’s “mandate,” she argued, “was either retry within 60 days or dismiss and [re]sentence.”

The People conceded that they could not retry Rios on the substantive counts, and the trial court sustained the demurrer to those counts without leave to amend, but it overruled Rios’s demurrer to the section 12022.55 allegations. The court focused on this court’s express refusal in *Rios v. Superior Court, supra*, H036757 to reach “the People’s contentions that re-filing of the section 12022.55 enhancement allegations after the expiration of the 60-day period following the filing of the remittitur is statutorily

authorized under sections 1382 and 1387,” characterizing that statement as creating an “ambiguity” and “an opening” in an otherwise clear “order.” “[T]aking into account the distinction in [*Martin*], looking at *People v. Carreon* [(1997) 59 Cal.App.4th 804], also reading *People v. Anderson* [(2009) 47 Cal.4th 92], I am going to overrule the demurrer as to the special allegations only.” “[T]he words of the Court of Appeal in this unpublished decision that governed the Court are such that the Court believes that a second filing of enhancements only would be permitted under Section 1387 of the Penal Code.” The trial court then asked the People to file a first amended complaint “stating only the allegations.”

Rios petitioned the appellate division of the superior court for writ relief. After further briefing and several hearings, the court acknowledged that Rios had been tried, convicted, and sentenced on the substantive charges, but it nonetheless concluded (relying on *People v. Anderson* (2009) 47 Cal.4th 92 (*Anderson*) and *People v. Villanueva* (2011) 196 Cal.App.4th 411 (*Villanueva*)),<sup>2</sup> that “[t]he refiling of

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<sup>2</sup> Neither case involved the retrial of an enhancement allegation by itself in a purported “new” action *after* the case that decided the underlying offense was over. *Villanueva* was convicted of two felonies, and several enhancement allegations were found true, but the jury deadlocked on two other enhancement allegations, and the court declared a mistrial on those. Neither side moved to dismiss those allegations at sentencing, and *Villanueva* did not offer to waive time to permit their immediate retrial. He appealed, his convictions were reversed for instructional error, and he was subsequently rearraigned on the original information. On the date set for trial, the trial court granted the prosecutor’s section 1382 motion. The case was retried, *Villanueva* was found guilty of attempted voluntary manslaughter and mayhem, and *all* of the enhancement allegations, including the previously mistried ones, were found true. *Villanueva*’s motion to strike those two on grounds of vindictive prosecution was denied, and he appealed. The Court of Appeal rejected his contention that the retrial on the mistried enhancement allegations was a vindictive prosecution, pointing out that he was retried “on *exactly the same charges*” and that he could not argue that his intervening appeal “somehow eliminated the mistried firearm enhancement allegations from the list of charges to which he was subject to retrial.” (*Villanueva, supra*, 196 Cal.App.4th at p. 419.) Here, by contrast, the intervening appeal gave the People 60 days, and 60 days

enhancements alone” “does not constitute a bar under Penal Code Section 654 because the defendant has not been sentenced on the enhancements.” The court noted that it was “not making a ruling on whether or not double jeopardy bars the prosecution,” nor was it “reaching the issue as to whether or not the fact of conviction and final judgment precludes the prosecution of the special enhancement[s] because that’s not a proper subject of demurrer.” “So I’m overruling the demurrer on the grounds previously stated.” The court granted Rios’s subsequent request for a rehearing but ultimately found nothing that was “different or change[d] the position of the Court as to the status of this particular case.”

Rios filed another writ petition in this court. He maintains that it was “not appropriate” for the trial court to permit the People to make “an end run” around this court’s “specific command.” Rios contends that the trial court lacked jurisdiction to do anything beyond dismissing the enhancements and resentencing him without enhancements.

This court issued a *Palma* notice (*Palma, supra*, 36 Cal.3d at p. 180) and stayed all proceedings in the trial court “until further order of this court.” The Attorney General submitted a letter brief, and Rios filed a Response to Opposition to Petition for Writ of Mandate (hereinafter reply).

## II. DISCUSSION

The Attorney General adopts the People’s arguments below “as our opposition here” and makes several “additional observations” in her letter brief. Taking issue with Rios’s conclusion that once he was resentenced on the substantive charges, “the case was at an end,” and the trial court “had no further jurisdiction in the matter,” she asserts that

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*only* to retry the enhancement allegations, and the People’s failure to act within those 60 days eliminated those allegations. *Villanueva* is inapposite.

“sentencing on substantive offenses does not bar retrial of enhancement allegations.” That general assertion may occasionally be true (see, e.g., *Porter v. Superior Court* (2009) 47 Cal.4th 125, 131 (*Porter*), in which the defendant’s counsel agreed to that procedure) but it is not true in the procedural posture of this case. The flaw in the Attorney General’s assertion is that it divorces Rios’s statements from this court’s two directives.

Rios’s argument is that the remittitur provided an either/or choice: *either* retrial on the section 12022.55 allegations within 60 days of the remittitur’s issuance *or* resentencing without enhancements. The dismissal ordered here was not an ordinary section 1382 dismissal. Once the 60 days were up in this case, there was, *by order of this court*, only one option left: resentencing Rios without enhancements. That is how the remittitur defined the trial court’s jurisdiction. The remittitur did not authorize the trial court to do anything else. (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655-656 [“The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void.”].) When the trial court resentenced Rios, it had fully complied with this court’s orders, and this case was over. The remittitur did not permit the People to refile the original case with a new case number, and it certainly did not permit the trial court to allow the new case to go forward with enhancement allegations only. The People’s section 1387 argument was, as Rios contends, “an end run” around this court’s “specific command.”

The Attorney General next asserts that “[t]here is no merit to [Rios’s] claim that it would be unfair to sentence him on the enhancement allegations.” What Rios actually said (in concluding his argument that the cases on which the People relied were inapposite) was that “[t]here really can be no dispute that allowing the filing of enhancement allegations, standing alone, after [Rios] has been tried, convicted, sentenced and has served his sentence on the underlying substantive charges, is completely and utterly improper and directly contrary to due process of law.” To the extent Rios’s

concluding sentence can be construed as an argument, the cases the Attorney General cites fail to refute it.

In *People v. Statum* (2002) 28 Cal.4th 682 (*Statum*), the defendant argued that allowing the People to challenge the trial court's discretionary decision to reduce his "wobbler" offense (Veh. Code, § 2800.2) to a misdemeanor at sentencing (§ 17, subd. (b)) "'would be unfair to [him] because he has served his sentence in full.'" (*Statum*, at p. 695.) The California Supreme Court expressly declined to address that argument. (*Id.* at p. 697.) *Statum* does not advance the People's position.

In *In re Borlik* (2011) 194 Cal.App.4th 30 (*Borlik*), this court rejected a parolee's argument that it would be "unjust" to order his reincarceration "because he completed his imposed term of imprisonment, ha[d] reintegrated into society and [wa]s in full compliance with his parole condition[s]." (*Id.* at p. 42.) It did so in a case that bears absolutely no resemblance to this one. Borlik pleaded no contest to four felony charges, admitted a great bodily injury enhancement allegation, and began serving a six-year sentence. In 2009, the superior court ordered that if he was eligible for release, he should be released immediately. The Warden appealed, arguing that Borlik was ineligible for worktime credits in excess of 15 percent because the great bodily injury enhancement triggered section 2933.1's 15 percent limitation. While the appeal was pending, the California Supreme Court issued a decision agreeing with the Warden's position. This court then had to decide whether the high court's decision should be applied retroactively to Borlik, who had by that time been released on parole. In rejecting Borlik's argument that reincarceration would be unjust, this court pointed out that he had not, in fact, completed his imposed term but had instead "received an unauthorized early release on parole." (*Borlik*, at p. 42.) *Borlik* is inapposite here.

The Attorney General next argues that, contrary to Rios's position, enhancement allegations *can* "exist in space." She cites *Anderson* and *Porter*, neither of which support that proposition.

*Anderson* stands for the unremarkable proposition that an enhancement allegation can be retried apart from its underlying offense without violating double jeopardy where the jury convicted the defendant of the underlying offense but the court declared a mistrial on the enhancement allegation. (*Anderson, supra*, 47 Cal.4th at p. 123.) *Anderson*'s companion case, *Porter*, stands for the same proposition.

Porter was convicted of multiple felonies arising out of a drive-by shooting, and various enhancement allegations were found true. (*Porter, supra*, 47 Cal.4th at p. 131.) The trial court ordered a new trial on the premeditation and gang enhancement allegations, and Porter's counsel agreed with the court's suggestion that Porter could be sentenced before the retrial and resentenced if the jury found the retried enhancement allegations true. (*Ibid.*)

A few months later, Porter challenged the refiled allegations, characterizing them as elements of greater offenses under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and arguing, among other things, that the trial court could not limit a retrial to an element standing alone. (*Porter, supra*, 47 Cal.4th at p. 131.) The trial court rejected Porter's arguments, but this court ordered the enhancement allegations dismissed. The California Supreme Court granted review "to decide whether double jeopardy principles permit retrial of a penalty allegation after the jury's verdict is found 'contrary to . . . evidence' under section 1181(6)." (*Porter*, at p. 132.) The court held that an order granting a new trial is not tantamount to an acquittal but is instead "the equivalent of a mistrial caused by a hung jury." (*Id.* at p. 133.) As such, it did not bar retrial on double jeopardy grounds. (*Ibid.*) Nor did *Apprendi* convert the challenged enhancement allegations into elements of greater offenses for purposes of the statutory double jeopardy protection of section 1023. (*Porter*, at p. 138.) Thus, Porter's conviction of the underlying offenses did not bar retrial of the enhancement allegations. (*Ibid.*)

Neither *Anderson* nor *Porter* says anything about whether an enhancement allegation can be retried by itself in a purported new action *after* the case that decided the underlying offense is over. Both cases are inapposite.

The Attorney General claims the trial court complied with this court's directives by granting Rios's motion to dismiss and resentencing him without enhancements *in the original case*. She asserts that this court "did not preclude the People from refiling the enhancement allegations in a complaint *in a new case*." We reject the contention. This court clearly intended the case to be over if the People failed to retry Rios within 60 days—that is why the court provided for resentencing without enhancements at the expiration of the 60-day period. As Rios correctly points out, moreover, the People did not file "a new case." Instead, they filed "an unheard of document containing only enhancement allegations." Enhancement allegations are not offenses that can be charged all by themselves. (See Cal. Rules of Court, rule 4.405(3) [defining "[e]nhancement" as "an additional term of imprisonment added to the base term"].) As the California Supreme Court has explained, "[u]nder California law, a sentencing enhancement or penalty allegation is not a complete offense in itself. It is 'separate from the underlying offense . . . .' [Citation.] Conceptually, a penalty provision is an appendage that attaches to an offense and, if proven, prescribes additional punishment for the crime. [Citation.]" (*Anderson, supra*, 47 Cal.4th at p. 115.) "In California, 'sentence enhancements are not "equivalent" to, nor do they "function" as, substantive offenses.'" (*Id.* at p. 118.) In sum, the People have failed to identify any legal basis for prosecuting enhancement allegations by themselves in a purported new action *after* the case that decided the underlying offenses has concluded. There is none.

This court's original opinion unambiguously directed the trial court *either* to retry Rios "within 60 days after the filing of the remittitur in the trial court" *or* to resentence him without enhancements. This wording cannot be interpreted to permit trial on the enhancement allegations *after* 60 days. At the expiration of the 60-day period, only one

option remained: to resentence Rios *without* enhancements. (*Hampton, supra*, 38 Cal.2d at p. 655.) When the trial court finally resentedenced Rios, the case against him was over. It was error for the trial court to exceed this court’s directives. (*Palma, supra*, 36 Cal.3d at p. 180; *Lewis, supra*, 19 Cal.4th at pp. 1240-1241.)

In limited situations, an appellate court may issue a peremptory writ in the first instance without issuance of an alternative writ or order to show cause and without providing an opportunity for oral argument. (Code Civ. Proc., § 1088; *Lewis, supra*, 19 Cal.4th at pp. 1252-1253.) “A court may issue a peremptory writ in the first instance “only when petitioner’s entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue—for example, when . . . there has been clear error under well-settled principles of law and undisputed facts . . . .” [Citation.]” (*Lewis*, at p. 1241.) However, Code of Civil Procedure section 1088 “requires, at a minimum, that a peremptory writ of mandate . . . not issue in the first instance unless the parties adversely affected by the writ have received notice . . . that the issuance of such a writ in the first instance is being sought or considered. In addition, an appellate court, absent exceptional circumstances, should not issue a peremptory writ in the first instance without having received, or solicited, opposition from the party or parties adversely affected . . . .”” (*Lewis*, at pp. 1240-1241.)

The procedural requirements have been satisfied here. The applicable principles of law are well established, the relevant facts are undisputed, and Rios’s entitlement to relief is so obvious that plenary consideration of the issues is unnecessary. (*Lewis, supra*, 19 Cal.4th at p. 1241.) Issuance of a peremptory writ of mandate in the first instance is appropriate.

### **III. DISPOSITION**

Let a peremptory writ of mandate issue directing respondent court (1) to vacate its November 30, 2011 order overruling Rios’s demurrer to the enhancement allegations, (2)

to enter a new order sustaining the demurrer in its entirety without leave to amend, and (3) to enter a judgment of dismissal. Upon finality of this decision, the temporary stay order is vacated.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Márquez, J.