

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

VALDAMIR FRED MORELOS,

Defendant and Appellant.

No. S051968

(Santa Clara Superior
Court No. SC169362)

Death Penalty Case

Appeal from the Judgment of the Superior Court
of the State of California for the County of Santa Clara

THE LATE HONORABLE DANIEL CREED, JUDGE

**APPELLANT'S THIRD SUPPLEMENTAL OPENING
BRIEF**

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APPELLANT’S THIRD SUPPLEMENTAL OPENING BRIEF

**I
REMAND IS REQUIRED FOR THE TRIAL COURT TO
EXERCISE THE DISCRETION CONFERRED BY
AMENDMENTS TO THE FIREARM AND SERIOUS
FELONY ENHANCEMENT STATUTES, AND THIS COURT
MUST STRIKE THE INVALID ONE-YEAR PRISON PRIOR**

At the time that appellant was sentenced¹, trial courts did not have discretion to strike enhancements for prior serious felonies under Penal Code² section 667, subdivision (a) or use of a firearm

¹ At the time of his offense in 1992, the firearm and serious felony enhancements were governed by Stats. 1990, ch. 41, § 1 (serious felony). Both were also amended during the course of his trial, but not in a manner that introduced discretion to strike the enhancement. (See Stats. 1995, ch. 377, § 9; Stats. 1994, ch. 12, § 1.)

² All references are to the Penal Code unless otherwise stated.

under section 12022.5, subdivision (a). The Legislature has since amended state law to allow trial courts discretion to strike either enhancement if doing so is in the interests of justice. In light of the changes in the law, this Court should remand the case to the trial court to exercise its discretion to consider striking the “serious felony” and firearm enhancements. In addition, the one-year prison prior imposed pursuant to 667.5, subdivision (b) has been rendered invalid by amendments to that statute, and must be struck.

A. The Serious Felony and Firearm Enhancements Imposed on Appellant Are Now Discretionary

By first amended information, appellant was charged with the personal use of a firearm as to count one within the meaning of section 12022.5, subdivision (a). (2CT:444.) In addition, the information charged several enhancements for prior convictions. (2CT:445-446.) The information alleged that, prior to the instant offense, appellant was convicted of assault with a deadly weapon in Amador County, and that the conviction was both a prior serious felony within the meaning of section 667, subdivision (a) and section 1192.7 and therefore led to a prison term within the meaning of section 667.5, subdivision (a) [three-year prior]. (2CT:445.) The information further alleged that prior to the instant offense appellant was convicted in Santa Clara County of first degree robbery and that the conviction was a prior serious felony within the meaning of sections 667, subdivision (a) and 1192.7. (*Ibid.*) Finally, the information alleged that, in the same Santa Clara County prosecution, appellant was convicted of first degree burglary and

served a prison term therefore within the meaning of 667.5, subdivision (b) [one-year prior]. (2CT:446.)

The court found appellant guilty on count one of the first amended information and found the section 12022.5, subdivision (a) enhancement on that count true. (1RT:324). After the guilty verdicts, the court found the priors true as charged. (2RT:325; 3CT:537-538; People's Exh. Nos. 29 and 30.)

At sentencing, the trial court imposed a five-year consecutive sentence on the section 12022.5, subdivision (a) enhancement. (2RT:550.) The court next sentenced a five-year consecutive sentence for the first serious felony prior and another five-year consecutive sentence on the second serious felony prior. (*Ibid.*) The sentence for the sections 667.5, subdivision (a) [three-year prior] and (b) [one year prior] were stayed pursuant to section 654. (*Ibid.*)

At the time the trial court sentenced appellant, section 12022.5, subdivision (a) required the trial court to impose a firearm enhancement. In addition, section 667, subdivision (a) required a sentencing court to add a five-year enhancement for each prior serious felony conviction that was charged and tried separately, and section 1385, subdivision (b) stated that courts did not have discretion to strike section 667, subdivision (a) enhancements.

The Legislature has since, however, given trial courts the discretion to strike both prior serious felony and firearm enhancements. In 2017, the Legislature passed Senate Bill No. 620 (2016-2017 Reg. Sess.), which gave a trial court discretion to strike a variety of firearm enhancements including those based on section 12022.5, specifically amending section 12022.5, subdivision (c) to

state that “the court may, in the interest of justice . . . strike or dismiss an enhancement otherwise required to be imposed by this section.” The statute was signed into law on October 11, 2017, and it became effective on January 1, 2018. (*People v. Humphrey* (2020) 44 Cal.App.5th 371, 376-377 (*Humphrey*); see Stats. 2017, ch. 682, § 1.) Similarly, in 2018, the Legislature passed Senate Bill No. 1393, which gave a trial court the discretion to strike section 667, subdivision (a) enhancements in the interest of justice pursuant to section 1385. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.)) The statute was signed into law on September 30, 2018 and became effective on January 1, 2019. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 965 (*Garcia*); Stats. 2018, ch. 1013, §§ 1-2.)

When a statutory amendment mitigates the punishment for an existing crime, it applies retroactively to all cases not yet final when the new law takes effect, regardless of whether the Legislature expressly states an intent for the law to apply retroactively. (*In re Estrada* (1965) 63 Cal.2d 740, 742 (*Estrada*)). In *Estrada*, this Court determined that any attempt by the Legislature to lessen a punishment through statutory amendment showed that the Legislature had concluded the punishment was too great, and that it must have intended to correct that error for as many defendants as constitutionally possible. (*Id.* at p. 745.)

The same is true of statutes, like Senate Bills Nos. 620 and 1393, that give the trial court the discretion to impose a lesser punishment rather than automatically mitigating the greater sentence. In *People v. Francis* (1969) 71 Cal.2d 66, 75-77 (*Francis*), this Court held that the rule set forth in *Estrada*, *supra*, 63 Cal.2d

at p. 748, also applies to such amendatory statutes. Specifically, *Francis* held that *Estrada*'s reasoning applied to a statute that changed a felony to a wobbler. (*Francis, supra*, 71 Cal.2d at pp. 75-77.) This change granted discretion to the trial court to mitigate punishment. (*Id.* at p. 77.) This Court held that *Estrada* applies to such a change because the Legislature must have determined that "the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*Id.* at p. 76.) Thus the statute, and the new discretion to reduce the punishment, should apply to all cases that were not yet final on appeal. (*Id.* at p. 77.)

Following this logic, the Courts of Appeal have held that trial courts have the discretion to strike firearm enhancements and serious felony enhancements under the amendments of Senate Bills Nos. 620 and 1393 and that the discretion applies retroactively to all cases not yet final on appeal when the statutory change was granted. (See, e.g., *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080 [Sen. Bill No. 620]; *Humphrey, supra*, 44 Cal.App.5th at pp. 376-377 [same]; *Garcia, supra*, 28 Cal.App.5th at pp. 972-973 [Sen. Bill No. 1393]; *People v. Alexander* (2020) 45 Cal.App.5th 341, 344 [same]; *People v. Reneaux* (June 17, 2020) ---Cal.Rptr.3d--- [2020 WL 3263666] at *13 [same]; *People v. Ellis* (2019) 43 Cal.App.5th 925 [same].)

Because appellant's conviction is not yet final on appeal, Senate Bills Nos. 620 and 1393 apply retroactively to this case. Remand is the appropriate remedy when a law passes while an

appeal is pending that gives the trial court discretion to lessen punishment. (*Francis, supra*, 71 Cal.2d at pp. 77-79.) While remand may be unnecessary if the trial court “clearly indicated that it would not . . . have exercised its discretion to strike the allegations” even if it had discretion (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13), the trial court made no such indication in this case. This Court should vacate the sentence and remand the case to the trial court to exercise its discretion to consider striking the prior serious felony enhancements under section 667, subdivision (a) and the firearm enhancement imposed under section 12022.5, subdivision (a).

B. Senate Bill No. 136 Eliminates One-year Prison Prior Enhancements For All But Sexually Violent Offenses and Applies Retroactively to Appellant

At the time appellant was sentenced, section 667.5, subdivision (b), required courts to impose a one-year enhancement for any prior prison term for a felony if it was not followed by a period of at least five years in which the defendant remained free of either a felony conviction or any further prison or jail custody. As of January 1, 2020, however, section 667.5, subdivision (b), applies only to prior prison terms for a sexually violent offense as defined in subdivision (b) of section 6600 of the Welfare and Institutions Code. (Stats. 2019, ch. 590, § 1.)

Appellant was charged with one section 667.5, subdivision (b) enhancement. (2CT:437.) At sentencing, the trial court stayed punishment for this enhancement. (2RT:550.)

Senate Bill No. 136 (SB 136) applies retroactively. The logic of *Estrada* also applies when, as here, a statutory amendment lowers a sentencing enhancement rather than the punishment for the substantive crime. (See *People v. Nasalga* (1996) 12 Cal.4th 784, 692-793 [noting that the rule in *Estrada* has been applied to statutes governing penalty enhancements].) The courts of appeal that have addressed the issue have thus correctly determined that SB 136 applies retroactively, and that section 667.5, subdivision (b) enhancements for non-sexually violent crimes must now be struck. (See, e.g., *People v. Keene* (2019) 43 Cal.App.5th 861, 861 [court of appeal and all parties agree that SB 136 applies retroactively]; *People v. Lopez* (2019) 42 Cal.App.5th 337, 340-42 [same].)

For all these reasons, SB 136 retroactively applies to appellant's still-pending case. Appellant's conviction for first degree burglary in an inhabited dwelling house in violation of sections 459 and 460.1 was not a sexually violent crime within the meaning of subdivision (b) of section 6600 of the Welfare and Institutions Code, and this Court must strike the one-year sentencing enhancement imposed under section 667.5, subdivision (b).

C. The Three-Year Prior Should be Stricken

On remand, should the trial court impose the five-year enhancement pursuant to section 667.5, subdivision (a) on the assault with a deadly weapon conviction, the proper remedy is to strike, not stay, the attendant three-year enhancement under section 667.5, subdivision (a). (*People v. Jones* (1993) 5 Cal.4th 1142, 1152 [where the section 667.5, subdivision (a) enhancement

arises from the same conviction, only the greater applies, and the proper remedy is to strike the lesser enhancement[.] On remand, the trial court should be so instructed.

CONCLUSION

For all the foregoing reasons, the trial court should vacate the sentence and remand it to the trial court for an exercise of its discretion.

Dated: August 5, 2020

Respectfully submitted,

Mary K. McComb
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/s/ Kathleen M. Scheidel
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CERTIFICATE OF COUNSEL
Cal. Rules of Court, rule 8.630(b)(2))

I, Kathleen M. Scheidel, am the Assistant State Public Defender assigned to represent appellant, Valdamir F. Morelos, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of the computer generated word count, I certify that this brief is 1,830 words in length excluding the tables and this certificate.

Dated: August 5, 2020

Respectfully submitted,

/s/ Kathleen M. Scheidel
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Attorney for Appellant

DECLARATION OF SERVICE

Case Name: ***People v. Valdamair Fred Morelos***
Case Number: **Supreme Court Case No. S051968**
Santa Clara County Superior Court No. SC169362

I, **Lauren Emerson**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county of Alameda. My business address is 1111 Broadway, Suite 1000, Oakland, California 94607. I served a true copy of the following document:

APPELLANT'S THIRD SUPPLEMENTAL OPENING BRIEF

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **August 5, 2020**, at San Joaquin County, CA.

/s/ Lauren Emerson

LAUREN EMERSON

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. MORELOS (VALDAMIR FRED)**

Case Number: **S051968**

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Scheidel, Kathleen (141290)

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