

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

JOSE GUADALUPE TIRADO,

Defendant and Appellant.

Case No. S257658

Court of Appeal, Fifth Appellate District, Case No. F076836
Kern County Superior Court, Case No. BF163811A
The Honorable John Oglesby, Judge

ANSWER TO PETITION FOR REVIEW

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ISSUE PRESENTED

Whether Penal Code section 1385 authorizes a trial court to strike or dismiss individual pled and proven facts of an enhancement for the purpose of imposing sentence on a “lesser included” but uncharged enhancement.

STATEMENT OF THE CASE

Appellant was charged, in pertinent part, with robbery (Pen. Code,¹ § 211) and personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)). A jury found him guilty of robbery and found the firearm enhancement true.

Appellant was sentenced on January 8, 2018, after the effective date of Senate Bill No. 620 (2017-2018 Reg. Sess.) (SB 620), which bestowed trial courts with newfound discretion to dismiss section 12022.53 enhancements pursuant to section 1385. The trial court denied his request to exercise its new discretion to strike the section 12022.53, subdivision (d) (section 12022.53(d)), enhancement because the facts of the case did not justify such an exercise of discretion. The trial court imposed three years in prison for robbery and a consecutive 25 years to life for the section 12022.53(d) enhancement.

Appellant timely appealed the judgment and claimed that the trial court had been unaware of its discretion to strike the section 12022.53(d) enhancement and to impose a lesser term under section 12022.53, subdivisions (b) or (c). While the appeal was pending, the First District Court of Appeal published its opinion in *People v. Morrison* (2019) 34 Cal.App.5th 217, 222-223 (*Morrison*), holding that a trial court may use its power under section 1385 to strike a section 12022.53(d) enhancement and

¹ All further section references shall be to the Penal Code.

impose an uncharged enhancement under section 12022.53, subdivisions (b) or (c).

Thereafter, the Fifth District Court of Appeal affirmed appellant's conviction in a published opinion, holding that sections 1385 and 12022.53 do not authorize a trial court to impose an uncharged subdivision (b) or (c) enhancement when only the 12022.53(d) enhancement has been pled and proven. (*People v. Tirado* (2019) 38 Cal.App.5th 637, 643 (*Tirado*)). The Fifth District acknowledged the holding in *Morrison* and expressly disagreed with it. (*Id.* at p. 644.)

Appellant filed a petition for review raising the same issue as in the Court of Appeal. This Court asked respondent to file an answer.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT IN THE COURTS OF APPEAL

Newly amended section 12022.53, subdivision (h), authorizes a trial court to “strike or dismiss an enhancement otherwise required to be imposed by this section” “in the interest of justice pursuant to Section 1385.” The question presented here is whether section 1385 authorizes a trial court to strike the facts required to prove a section 12022.53(d) enhancement, rather than the enhancement in its entirety, and then to impose sentence on an uncharged enhancement. The First and Fifth Districts of the Court of Appeal have come to different conclusions on this issue. This Court should grant review because it is “necessary to secure uniformity of decision” (Cal. Rules of Court, rule 8.500(b)(1)) and resolve this conflict between the Courts of Appeal.

A. An Amendment to Section 12022.53 Gave Trial Courts Discretion to Strike or Dismiss Enhancements

Section 12022.53 provides tiered enhancements for use of a firearm based on the severity of one's conduct. Subdivision (b) provides for a 10-

year sentence enhancement where one personally uses a firearm. (§ 12022.53, subd. (b).) Subdivision (c) provides for a 20-year sentence enhancement where one personally and intentionally discharges a firearm. (§ 12022.53, subd. (c).) Subdivision (d) provides for a 25-years-to-life sentence enhancement where one personally and intentionally discharges a firearm and causes great bodily injury or death. (§ 12022.53, subd. (d).) Former section 12022.53, subdivision (h) stated: “Notwithstanding Section 1385 . . . the court shall not strike an allegation under this section” (Stats. 2010, ch. 711, § 5.)

Effective January 1, 2018, SB 620 amended section 12022.53, subdivision (h), in relevant part to read: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section.” Section 1385, subdivision (a), also provides that the trial court may “in the furtherance of justice, order an action to be dismissed.”

B. Courts Have Disagreed on Whether Section 1385 Authorizes a Trial Court to Modify an Enhancement to a “Lesser Included” Enhancement That Is Not Expressly Pled and Proven

Both the First and Fifth Districts of the Court of Appeal have addressed the scope of a trial court’s power under section 1385 in relation to a section 12022.53(d) enhancement. Their conclusions are in conflict.

1. *People v. Morrison*

The First District held that, when only section 12022.53(d) is pled and proven, a trial court has discretion under section 1385 to strike the enhancement and replace it with a “lesser included” but uncharged enhancement. (*Morrison, supra*, 34 Cal.App.5th at pp. 222-223.) In *Morrison*, the prosecution charged the defendant with first degree murder with an enhancement for causing death with a firearm under section

12022.53(d). (*Id.* at p. 220.) The prosecution did not allege a firearm enhancement under subdivision (c) [20-year term for intentional discharge of a firearm] or subdivision (b) [10-year term for personal use of a firearm]. (*Id.* at pp. 220-221.) A jury found the defendant guilty as charged and found the alleged section 12022.53(d) enhancement true. (*Id.* at p. 220.) When the defendant was sentenced, the Penal Code did not provide trial courts discretion to strike enhancements under section 12022.53. (*Id.* at p. 221.) About one month later, the governor signed SB 620, which gave trial courts the discretion, under section 1385, to strike or dismiss an enhancement imposed under section 12022.53. (*Id.* at pp. 221-222.) The trial court recalled the sentence pursuant to section 1170, subdivision (d)(1), and declined to strike the firearm enhancement. (*Id.* at p. 220.)

The defendant argued on appeal that the case should be remanded for resentencing because the trial court had misunderstood its discretion under section 1385 to modify the section 12022.53(d) enhancement by imposing a lesser sentence under section 12022.53, subdivision (b) or (c). (*Morrison, supra*, 34 Cal.App.5th at p. 221.) The *Morrison* court agreed, noting that a trial court can impose an uncharged enhancement in lieu of a section 12022.53(d) enhancement if the 12022.53(d) enhancement is unsupported by substantial evidence or is legally inapplicable. (*Id.* at p. 222.) *Morrison* held that it could “see no reason” why, when only section 12022.53(d) is pled and proven, a trial court could not strike the enhancement under section 1385 and replace it with a lesser uncharged enhancement. (*Id.* at pp. 222-223.)

2. *People v. Tirado*

Here, on the same facts, the Fifth District expressly disagreed with the First District’s opinion in *Morrison*. (*Tirado, supra*, 38 Cal.App.5th at p. 644.) Appellant’s robbery charge was enhanced by section 12022.53(d). (*Id.* at p. 640.) No other firearm enhancements were alleged in relation to

the robbery charge. (*Ibid.*) A jury found appellant guilty of robbery and found the section 12022.53(d) enhancement true. (*Id.* at p. 641.) Sentenced after SB 620 took effect, appellant invited the trial court to strike the section 12022.53(d) enhancement. (*Ibid.*) The trial court found that the egregiousness of appellant’s conduct did not warrant such an exercise of discretion. (*Ibid.*)

On appeal, appellant claimed the trial court had not understood that sections 1385 and 12022.53 authorized it to substitute the section 12022.53(d) enhancement with an enhancement under subdivision (b) or (c). (*Tirado, supra*, 38 Cal.App.5th at p. 641.) The Fifth District explained that the “plain language” of sections 1385 and 12022.53, subdivision (h), informed the scope of the trial court’s power under these sections. (*Id.* at p. 643) Specifically, section 12022.53, subdivision (h), authorizes the trial court to “strike” and “dismiss” and, section 1385 authorizes the trial court to “order an action to be dismissed.” (*Ibid.*) Thus, a trial “court’s power pursuant to these sections is binary: the court can choose to dismiss a charge or enhancement in the interest of justice, or it can choose to take no action. There is nothing in either statute that conveys the power to change, modify, or substitute a charge or enhancement.” (*Ibid.*) The Fifth District further noted that there is no “authority interpreting section 1385 to include the power to modify, change, or substitute a charge or enhancement.” (*Ibid.*) The Fifth District concluded that “[h]ad the Legislature intended the trial court’s power to be broader than what is proscribed by section 1385, it would have said so.” (*Ibid.*)

As demonstrated, the published opinions in *Morrison* and *Tirado* are in conflict. Accordingly, this Court should grant the petition for review to “secure uniformity of decision.” (Cal. Rules of Court, rule 8.500(b)(1).)

II. WHETHER SECTION 1385 AUTHORIZES A TRIAL COURT TO STRIKE INDIVIDUAL PLED AND PROVEN FACTS OF AN ENHANCEMENT FOR THE PURPOSE OF IMPOSING SENTENCE ON A “LESSER INCLUDED” BUT UNCHARGED ENHANCEMENT IS AN IMPORTANT QUESTION OF LAW THAT SHOULD BE SETTLED BY THIS COURT

This Court should also grant review to “settle an important question of law.” (Cal. Rules of Court, rule 8.500(b)(1).) Though *Morrison* and *Tirado* addressed the discretion of the trial court to strike a certain gun enhancement, the decisions implicate a broader question. The core conflict between the courts is whether section 1385 grants trial courts the discretion to strike the facts required to prove an element of an enhancement and then to impose punishment on an uncharged enhancement.

The *Morrison* court presumed that, since a trial court can reduce or modify an enhancement that it is unsupported by substantial evidence or is legally inapplicable, then the trial court can also reduce or modify an enhancement under its statutorily granted discretion bestowed by section 1385. In other words, *Morrison* presumed, without analysis, that a trial court’s discretion under section 1385 includes the power to strike an individual fact proven for imposition of punishment on an enhancement and to impose a “lesser included” uncharged enhancement. By doing so, *Morrison* authorizes the imposition of a “lesser included” enhancement where one is not expressly pled. *Tirado* expressly rejects *Morrison*’s presumption, stating that the legislature has given the court discretion “to dismiss a *charge or enhancement*” or “to take no action. There is nothing . . . that conveys the power to change, modify, or substitute a charge or enhancement.” (*Tirado, supra*, 38 Cal.App.5th at p. 643, italics added.) Indeed, *Tirado* noted that other statutes allow a trial court to take such an action and, had the Legislature intended for section 1385 to

empower a trial court to strike an individual fact alleged in an enhancement, it could have drafted section 1385 to authorize such. (*Ibid.*)

Morrison's holding, and its underlying presumptions, could be applied beyond the facts of the two cases here. *Morrison's* interpretation of section 1385 could be expanded to include discretion to modify substantive offenses. Thus, a trial court could strike a greater offense in lieu of a lesser included offense, such as reducing a first degree burglary to a second degree burglary or a battery causing serious bodily injury to a simple battery. While a trial court's discretionary power under section 1385 is broad, it is not without limitations. Under section 1385, "[t]he only action that may be dismissed . . . is a criminal action or a part thereof." (*People v. Hernandez* (2000) 22 Cal.4th 512, 524.) "Criminal action" (*id.* at p. 521) has consistently been interpreted to mean the "individual charges and allegations" (*id.* at p. 522) in a "proceeding by which a party charged which a public offense is accused and brought to trial and punishment" (*id.* at p. 521). Additionally, section 1385 has not been interpreted to apply to sentencing factors (*In re Varnell* (2003) 30 Cal.4th 1132, 1135); to sanity proceedings or a plea of insanity (*People v. Hernandez* (2000) 22 Cal.4th 512, 522-524); to reduce a verdict of first degree murder to second degree murder (*People v. Superior Court (Prudencio)* (1927) 292 Cal. 165, 173-174, disapproved on other grounds in *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 501); to reduce the offense of a conviction to an uncharged lesser-related offense (*People v. Smith* (1975) 53 Cal.App.3d 655, 657-658); or to enter a judgment of acquittal after a jury conviction (*People v. Superior Court (Jonsson)* (1966) 240 Cal.App.2d 90, 92-93, disapproved on other grounds in *People v. Superior Court (Howard)*, *supra*, 69 Cal.2d at p. 501). Therefore, while section 1385 has been interpreted to authorize a trial court to strike an entire charge, allegation, or enhancement, it has not been interpreted to allow a trial court to strike the individual facts

supporting a charge, allegation, or enhancement for the purpose of imposing punishment on a lesser uncharged offense or enhancement. Whether the discretion statutorily authorized by section 1385 is that broad is for this Court to decide in the first instance.

CONCLUSION

Respondent respectfully requests that this Court grant review.

Dated: October 28, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER TO PETITION FOR REVIEW** uses a 13-point Times New Roman font and contains 2,138 words.

Dated: October 28, 2019

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Tirado**

No.: **S257658**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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/s/ D. Boggess

Declarant

Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Lower Court Case Number: **F076836**

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