

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 BRIEF ON THE MERITS

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ISSUE PRESENTED

Can the trial court impose an enhancement under Penal Code section 12022.53, subdivision (b), for personal use of a firearm, or under section 12022.53, subdivision (c), for personal and intentional discharge of a firearm, as part of its authority under section 1385 and subdivision (h) of section 12022.53 to strike an enhancement under subdivision (d), for personal and intentional discharge of a firearm resulting in death or great bodily injury, even if the lesser enhancements were not charged in the information or indictment and were not submitted to the jury?

INTRODUCTION

Penal Code¹ section 12022.53 provides for a tiered sentencing structure for firearm enhancements based on the severity of one's conduct and, before the Legislature amended the statute in 2017, expressly prohibited the striking of those enhancements. As amended, the statute now expressly allows for those firearm enhancements to be stricken in the interest of justice pursuant to section 1385.

Tirado was charged with a section 12022.53(d) enhancement that a jury found true. The trial court considered whether to strike the enhancement and exercised its discretion not to. Tirado now urges this Court to expand the trial court's

¹ All further statutory references are to the Penal Code. To improve readability and for conciseness, when particular subdivisions of section 12022.53 are referenced, they will be referenced without the word "subdivision."

discretionary power by holding that section 1385 empowers the trial court to strike or dismiss an element of a section 12022.53 enhancement in order to impose a lesser uncharged section 12022.53 enhancement supported by the remaining elements of the greater enhancement.

The Fifth District Court of Appeal correctly held that the trial court does not have such power. Under a plain reading of section 12022.53, where only a greater enhancement is pled and proven, a trial court may only strike or dismiss that particular enhancement. Though a trial court's powers under section 1385 are broad, section 1385 is not a scalpel to excise one element of an enhancement so as to reduce the greater enhancement to one of its lesser included enhancements. This interpretation effectuates the legislature's intent to allow trial courts discretion to relieve deserving defendants of the additional punishment while being consistent with the separation of powers doctrine and sentencing rules regarding enhancements.

STATEMENT OF THE CASE

A. Charging Decision and Jury Verdict

Tirado's accomplice attempted to exit a convenience store without paying for a case of beer. (*People v. Tirado* (2019) 38 Cal.App.5th 637, 640.) A good Samaritan tackled him. (*Ibid.*) While they struggled on the ground, Tirado shot the good Samaritan in the lower back with a semiautomatic pistol. (*Ibid.*) Tirado and his accomplice then fled. (*Ibid.*) The victim underwent surgery to remove the bullet and suffered the loss of

movement in his foot and a fractured right hip. (*Id.* at p. 640, fn. 3.)

The Kern County District Attorney filed an amended information charging Tirado, in pertinent part, with second degree robbery (§ 211) and personal and intentional discharge of a firearm causing great bodily injury or death (§ 12022.53(d)). (*Tirado, supra*, 38 Cal.App.5th at p. 640.) The jury found Tirado guilty of second degree robbery and found true the firearm enhancement. (*Id.* at p. 641.)

B. Sentencing Hearing and Appeal

Tirado was sentenced on January 8, 2018, after the effective date of Senate Bill No. 620 (2017-2018 Reg. Sess.), which bestowed trial courts with newfound discretion to dismiss section 12022.53 enhancements pursuant to section 1385. Prior to sentencing, Tirado filed a request asking the trial court to exercise its discretion under section 1385 “to strike the punishment for the section 12022.53, subdivision (d), enhancement.” (*Tirado, supra*, 38 Cal.App.5th at p. 641.) The trial court declined to exercise its discretion to strike the enhancement in light of the egregiousness of Tirado’s conduct. (*Ibid.*) The trial court imposed three years in prison for robbery and a consecutive 25 years to life for personally and intentionally discharging a firearm causing great bodily injury or death. (*Ibid.*)

On appeal, Tirado argued that the trial court was unaware of its discretion to strike an element of the section 12022.53(d) enhancement, thereby imposing and executing sentence on the lesser subdivision (c) or (b) enhancement. (*Tirado, supra*, 38

Cal.App.5th at p. 641, fn. 5.) The Fifth District Court of Appeal affirmed, holding that, although the trial court had the discretion to strike or dismiss the section 12022.53(d) enhancement pursuant to sections 1385 and 12022.53(h), it did not have the discretion to “substitute another enhancement for it.” (*Id.* at p. 639.) This Court granted Tirado’s petition for review.

ARGUMENT

I. SECTION 12022.53(H) AUTHORIZES A TRIAL COURT TO STRIKE AN ENHANCEMENT IN THAT SECTION BUT NOT AN ELEMENT OF THAT ENHANCEMENT

A. Background of Sections 12022.53 and 1385

Section 12022.53 provides for tiered punishment for a defendant who uses a firearm in the commission of an enumerated felony based on the severity of his or her conduct. Section 12022.53(b) provides for a 10-year sentence enhancement when the defendant has personally used a firearm. Section 12022.53(c) provides for a 20-year sentence enhancement when the defendant has personally and intentionally discharged a firearm. Section 12022.53(d) provides for a 25-years-to-life sentence enhancement when the defendant has personally and intentionally discharged a firearm caused great bodily injury or death. “For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.” (§ 12022.53(j).) Section 12022.53(f) provides, “Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one

enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment”

Prior to 2017, section 12022.53(h) prohibited a trial court, notwithstanding section 1385, from striking either an allegation under the section or a finding bringing a person within the provisions of the section. In 2017, the Legislature enacted Senate Bill No. 620 (Stats. 2017, ch. 682, § 2, pp. 5104-5106, eff. Jan. 1, 2018, amending §§ 12022.5 & 12022.53). Senate Bill No. 620 amended section 12022.53(h) to provide trial courts with the discretion to strike a firearm enhancement. Section 12022.53(h) now provides that a trial 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, enacted in 1872, gives trial courts discretion ‘in furtherance of justice [to] order an action to be dismissed.’” (*People v. Fuentes* (2016) 1 Cal.5th 218, 224.) A trial court’s discretion to dismiss an “action” under section 1385, subdivision (a), encompasses the power to strike or dismiss a sentencing enhancement allegation. (*In re Varnell* (2003) 30 Cal.4th 1132, 1137 [“action” means “individual charges and allegations in a criminal case”]; *People v. Burke* (1956) 47 Cal.2d 45, 51 [“authority to dismiss the whole, includes, of course, the power to dismiss or ‘strike out’ a part”].) Where the trial court has the authority to strike or dismiss an enhancement, it may “instead

strike the additional punishment for that enhancement”²
(§ 1385, subd. (b)(1).)

**B. The Plain Language of Section 12022.53(h),
Does Not Authorize a Trial Court to Strike an
Element of an Enhancement**

Section 12022.53(h) confers the authority to “strike or dismiss an enhancement” set forth in section 12022.53. Neither the term “enhancement” nor the phrase “strike or dismiss” is ambiguous. A plain reading of section 12022.53(h) dictates that a trial court has the discretion to strike an enhancement set forth in that section but not to strike an element of an enhancement for the purpose of imposing and executing sentence on a lesser included but uncharged enhancement.

1. Standards of statutory construction

Issues of statutory construction are questions of law that are reviewed de novo on appeal. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) ““When we interpret a statute, [o]ur fundamental task . . . is to determine the Legislature’s intent so as to effectuate the law’s purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a

² Section 1385 was amended effective January 1, 2019, to remove a prohibition on striking certain prior convictions. (Stats. 2019, ch. 1013, § 2.)

literal interpretation would result in absurd consequences the Legislature did not intend.””” (Hassell v. Bird (2018) 5 Cal.5th 522, 540.) If the statutory terms are ambiguous, this Court may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history. (Day v. City of Fontana (2001) 25 Cal.4th 268, 272.) In such circumstances, this Court will choose the construction that comports most closely with the Legislature’s apparent intent, endeavoring to promote rather than defeat the statute’s general purpose, and avoiding a construction that would lead to absurd consequences. (Ibid.)

2. The phrase “strike or dismiss an enhancement,” as used in section 12022.53(h), is not ambiguous

The phrase “strike or dismiss,” as used in section 12022.53(h), authorizes the trial court to delete or remove from consideration the punishments set forth in subdivisions (b)-(d), as they are explained *post*. Colloquially, to “strike” is understood to mean to delete. (See also Merriam-Webster’s Collegiate Dict. (10th ed.) p. 1165 [“to delete something”].) Similarly, one definition of “dismiss” is “to put out of judicial consideration.” (*Id.* at p. 334; see also Black’s Law Dictionary (11th ed. 2019) [defining “dismiss” as “to terminate (an action or claim) without further hearing”].) “Strike or dismiss” does not mean the trial court may delete a part of an enhancement so as to modify it.

In turn, as used in section 12022.53, the term “enhancement” refers to the additional penalties set forth in subdivisions (b), (c), and (d). (See generally *People v. Oates* (2004) 32 Cal.4th 1048.) By conferring the authority to strike an

enhancement, section 12022.53(h) allows a trial court to strike the penalty imposed by each of the three subdivisions. (See Cal. Rules of Court, rule 4.405(3) [“Enhancement’ means an additional term of imprisonment added to the base term.”]; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 898 [“By definition, a sentence enhancement is ‘an additional term of imprisonment added to the base term.’”].) “Enhancement” does not mean an element of an enhancement. The plain meaning then, of the phrase “strike or dismiss an enhancement” in section 12022.53(h), is that a trial court may delete the enhancement, in its entirety, as it is set out in section 12022.53(b)-(d).

The Legislature demonstrated that it understood the difference between an enhancement and the elements of an enhancement. For instance, before section 12022.53 was amended, subdivision (h) provided that “the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.” (Former § 12022.53(h).) After the amendment, the Legislature removed the reference to the trial court’s ability (or lack thereof) to strike allegations or findings and replaced it with authority for the trial court to strike or dismiss the enhancement. (§ 12022.53(h).) The former language encompassed Tirado’s proposed interpretation of section 12022.53(h) because it recognized the difference between an enhancement and findings bringing a person within the provisions of section 12022.53. The amended language removed the reference to allegations and findings in lieu of allowing the trial court to strike the “enhancement.” In comparison, section

12022.53(j), which remained unchanged after Senate Bill No. 620, provides that “the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading.”

Had the Legislature intended to authorize the trial court to strike an element or finding of one of the section 12022.53 enhancements, it could have done so by mirroring this language of subdivision (j) or former subdivision (h). (See *County of San Bernardino v. City of San Bernardino* (1997) 15 Cal.4th 909, 926 [absent contrary indications, words or phrases given a particular meaning in one part of the law should be given the same meaning in other parts of the law].) Yet, subdivision (h) says nothing about striking or dismissing elements of an enhancement. (See *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 727 [“failure to include a requirement in one statute is significant when the legislative body has included that requirement in other statutes”].) But the Legislature has demonstrated that it understands how to draft a statute to empower a trial court to modify a verdict by reducing it to a lesser verdict. For example, section 1181, subdivision (6), provides that upon a motion for a new trial, “the court may modify the verdict” if the defendant is “not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree . . . or of a lesser crime included therein.”³ Similarly, section 1260 allows a reviewing court to

³ Section 1181 provides in part, “When a verdict has been rendered or a finding made against the defendant, the court may . . . grant a new trial . . . only [¶] . . . [¶] 6. When the verdict or
(continued...) ”

“modify a judgment . . . or reduce the degree of the offense.”⁴ No such language is present in section 12022.53(h). Because there is no ambiguity, this Court should presume the lawmakers meant what they said, and that the plain meaning of section 12022.53(h) allows a trial court to strike the section 12022.53(b)-(d) enhancements but not an element of an enhancement so as to modify the enhancement.

3. That section 1385 authorizes a trial court to strike or dismiss a 12022.53 enhancement does not render section 12022.53(h) ambiguous

a. The power to strike or dismiss under section 1385 does not extend to the elements of an enhancement

As discussed *ante*, section 12022.53(h) allows a trial court to strike a firearm enhancement in the interest of justice pursuant to section 1385. Tirado relies on section 12022.53(h)’s inclusion of section 1385 to urge this Court to conclude that a trial court may strike an element of an enhancement. (OBM 20, 22.) For instance, as Tirado would have it, a trial court could, in effect,

(...continued)

finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed.”

⁴ Section 1260 provides in part, “The court may reverse, affirm, or modify a judgment . . . or reduce the degree of the offense . . . or the punishment imposed”

reduce or modify a section 12022.53(d) enhancement to a lesser subdivision (c) enhancement by striking the element that one caused death or great bodily injury. (OBM 20.)

But the power to strike or dismiss an enhancement under section 1385 does not include the broad discretion to strike an element of an enhancement. Though section 1385 authorizes a trial court to order an action to be dismissed, by its plain terms, it limits the trial court's power only to dismissal of "actions." (§ 1385, subd. (a).) "The *only* action that may be dismissed under Penal Code section 1385, subdivision (a), is a criminal action or a part thereof.' [Citation.] We have consistently interpreted 'action' to mean the 'individual charges and allegations in a criminal action' [citations] and have never extended it to include mere sentencing factors. Thus, our courts have refused to permit trial courts to invoke section 1385 to dismiss sanity proceedings or a plea of insanity [citation], to reduce a verdict of first degree murder to second degree murder [citation]; to reduce the offense of conviction to an uncharged lesser related offense [citation]; or to enter a judgment of acquittal [citation]." (*In re Varnell, supra*, 30 Cal.4th at p. 1137, original italics.)

No case has held that the court's power under 1385 authorizes the trial court to strike an element of an enhancement that has been found true. That section 1385 extends to dismissal of not only an entire action but also a count or charge within an action is not authority for such a proposition, since there are as many "actions" as there are counts or charges. (§ 954 [different counts can be tried separately].) And, though *People v. Burke*,

supra, 47 Cal.2d at page 51, held that section 1385 empowers the trial court to dismiss an action in whole or in part by striking a prior conviction enhancement, nothing in *Burke* suggests that the statement was intended to mean a trial court can strike out a few words of an enhancement, thereby reducing or modifying it to another. To hold that section 1385 contemplates striking or dismissing an element of an enhancement requires a leap in logic. Great bodily injury or death within section 12022.53(d), is not an action, a count, or a charge, as it does not constitute a distinct offense that a defendant has committed. (Black’s Law Dictionary (11th ed. 2019 [defining cause of action as a “group of operative facts giving rise to one or more bases for suing,” defining count as “part of a charging document alleging that the suspect has committed a distinct offense,” and defining charge as a “formal accusation of an offense”].)

b. *People v. Marsh* does not extend the power to strike under section 1385 to the elements of an enhancement

To the extent Tirado suggests that section 1385 renders the phrase “strike or dismiss an enhancement” in 12022.53(h) is ambiguous, he is mistaken. *People v. Marsh* (1984) 36 Cal.3d 134 does not support Tirado’s position that section 1385 renders the phrase “strike or dismiss an enhancement” in section 12022.53(h) ambiguous. (OBM 27.) *Marsh* involved a kidnap for ransom charge (§ 209, subd. (a)) with a factual allegation of bodily harm.⁵

⁵ At the time, section 209, subdivision (a), provided, “Any person who . . . kidnaps or carries away any individual by any
(continued...)”

(*Id.* at p. 137.) The question before this Court was whether the trial court had “abused its discretion in denying [Marsh’s] motion under section 1385 to strike the ransom and bodily harm allegations in the kidnaping count.” (*Id.* at p. 139.) This Court described the factual findings on ransom and bodily harm as “similar in effect to prior conviction and weapons use findings in that they require an enhanced sentence.”⁶ (*Id.* at p. 144.) In this regard, the ransom and bodily harm allegations are akin to the firearm enhancements set forth in section 12022.53(b)-(d) rather than elements of the kidnaping charge. *Marsh* approved the dismissal of these individual factual allegations in connection with the kidnaping charge, just as a court may strike or dismiss a prior conviction or weapons use finding, reasoning that there is no “specific statutory prohibition” against doing so. (*Ibid.*) “For example, the court could strike only the bodily harm allegation, thereby reducing the kidnaping sentence to life with possibility of parole” (*Ibid.*) *Marsh* did not, however, consider or approve of striking an element of an enhancement so as to reduce the

(...continued)

means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom . . . is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm.” (Former § 209, subd. (a).)

⁶ Section 209, subdivision (a), provides for a punishment of life without the possibility of parole where the victim suffers death or bodily harm and life with the possibility of parole where the victim does not suffer death or bodily harm. The ransom allegation does not increase the punishment in a similar way.

enhancement to a lesser included but uncharged enhancement. Moreover, section 12022.53(h) contains a specific statutory prohibition limiting section 1385's power to the whole enhancement rather than an element of an enhancement.

Additionally, even if *Marsh* is relevant here, there is cause to restrict *Marsh* to its facts and the unique aspects of the aggravated kidnapping statute it considered. *Marsh* was decided after this Court held that a trial court does not have authority to reduce a jury's verdict on a greater offense to a lesser offense in *People v. Superior Court (Prudencio)* (1927) 202 Cal. 165, disapproved on another ground in *People v. Superior Court of Marin County* (1968) 69 Cal.2d 491. In *Prudencio*, the defendant was charged with first degree murder. (*Id.* at p. 166.) The jury found Prudencio guilty of first degree murder and fixed the punishment at death. (*Ibid.*) At sentencing, Prudencio sought a new trial, which the trial court denied. (*Id.* at p. 168.) The trial court then pronounced that the evidence sustained a verdict of second degree rather than first degree murder and sentenced Prudencio as though he were convicted of second degree murder. (*Id.* at p. 169.) The prosecution appealed the judgment, and this Court held that the trial court was "clearly without authority" to reduce the first degree murder conviction to a second degree murder conviction. (*Id.* at p. 170.) On appeal, Prudencio argued that section 1385 permitted the trial court's sentencing action. (*Id.* at p. 173.) This Court disagreed and held that section 1385 does not confer upon the trial court authority to dismiss a greater charge and retain jurisdiction over lesser degrees of the greater

charge. (*Ibid.*) *Marsh* did not address *Prudencio* nor offer a basis of authority for a trial court to retain jurisdiction over a lesser degree of a greater charge where the greater charge is the only which is pled and which is dismissed. To reconcile *Prudencio* and *Marsh*, this Court should limit *Marsh* to its facts.

It is true that a body of authority holds that a lesser enhancement may be imposed when there is a legal impediment to the imposition of a greater enhancement. (*People v. Fialho* (2014) 229 Cal.App.4th 1389, 1395-1396 [§ 12022.53 enhancement precluded by conviction of offense not listed in § 12022.53(a)]; *People v. Strickland* (1974) 11 Cal.3d 946, 961 [§ 12022.5 enhancement precluded by jury's conviction on voluntary manslaughter rather than murder]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 743 [§ 12022, subd. (a)(1), substituted for § 12022.5 where insufficient evidence of use for purposes of § 12022.5]; *People v. Allen* (1985) 165 Cal.App.3d 616, 627 [armed enhancement per § 12022 imposed where § 12022.5 did not apply to conviction]; *People v. Dixon* (2007) 153 Cal.App.4th 985, 1001-1002 [§ 12022, subd. (b), deadly weapon enhancement substituted for § 12022.53(b), where BB or pellet gun was used and did not qualify as a firearm under the statute].) However, the statutory source for a court's authority to substitute and impose a lesser uncharged enhancement is found under section 1181, subdivision (6), which expressly permits such an action *only* "[w]hen the verdict or finding is contrary to law or evidence" In contrast, no legal defect or factual deficiency exists here. And in *Allen*, the reviewing court reduced the conviction pursuant to section 1260,

which expressly allows a court to modify a judgment, not section 1385. (*Allen, supra*, at p. 627 [relying on *People v. Enriquez* (1967) 65 Cal.2d 746, 749-750 which modified a judgment utilizing § 1260].) It is not a logical extension of this authority to hold that a trial court may utilize section 1385 to strike an element of a greater enhancement in order to impose sentence on a lesser uncharged enhancement.

As explained in greater detail *post* in Argument I.C, the power of the court to substitute a lesser enhancement when there is a legal or factual impediment to impose the greater enhancement serves the purpose of salvaging a jury’s verdict. No such purpose is served when a trial court strikes an element of a greater enhancement found true and supported by sufficient evidence, so that it may impose and execute sentence as if a lesser uncharged enhancement were found true. Rather, in such a scenario, the trial court’s sentencing choices are limited by the prosecutor’s initial charging decisions and the factfinder’s verdict. (See, e.g., *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 976; *People v. Superior Court (Prudencio)*, *supra*, 202 Cal. at pp. 174-175.)

c. Any conflict between sections 1385 and 12022.53(h) must be resolved in favor of section 12022.53(h)

Should this Court find any conflict between sections 1385 and 12022.53(h) with regard to what may be stricken, that conflict should be resolved in favor of the more specific language of section 12022.53(h). “[W]here the general statute standing alone would include *the same matter* as the special act, and thus

conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment.” (*People v. Gilbert* (1969) 1 Cal.3d 475, 479, original italics.) Both sections 1385 and 12022.53(h) address a trial court’s power to strike. Section 1385 contains the trial court’s broad discretionary power to strike. In comparison, section 12022.53(h) expressly limits the trial court’s authority to strike or dismiss to the entirety of a firearm enhancement. Thus, section 12022.53(h) is the more specific provision addressing the power to strike as it applies to a firearm enhancement rather than section 1385’s broad discretion to order an action dismissed. The Legislature’s express wording of section 12022.53(h) permitting the trial court to strike an enhancement rather than the existence of any fact required under section 12022.53, subdivisions (b), (c), or (d) is evidence of the Legislature’s “clear legislative direction” (*People v. Thomas* (1992) 4 Cal.4th 206, 210) to restrict the trial court’s otherwise broad power under section 1385. Consequently, by the proscription in section 12022.53(h), the exercise of judicial discretion permitted pursuant to section 1385 was restricted to apply to the enhancement itself rather than to an element of the enhancement.

4. Finding that a trial court may only strike a firearm enhancement in its entirety is consistent with legislative intent

Even assuming that section 12022.53(h) is ambiguous, a finding that the trial court may strike a firearm enhancement in its entirety, rather than an element of the enhancement, is consistent with the legislative intent behind section 12022.53.

Assembly Bill No. 4 (1997-1998 Reg. Sess.) “enacted section 12022.53, specifying a range of different enhancements for the use of firearms in the commission of offenses. In an uncodified preamble, the Legislature found and declared ‘that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime.’” (*People v. Robinson* (2012) 208 Cal.App.4th 232.) Twenty years later, Senate Bill No. 620 was introduced. The author acknowledged that section 12022.53 enhancements were mandatory, stating, “Existing law prohibits the court from striking an *allegation or finding* that would make a crime punishable pursuant to [section 12022.53].” (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 620 (2017-2018) April 25, 2017, p. 3, italics added.) The stated effect of the legislation was “to provide the court with discretion to strike a firearm *enhancement* in any case in which that would be in the interests of justice to do so.” (*Id.* at p. 7, italics added.)

It is significant that the author noted a prohibition on striking an allegation or finding yet described an intent to allow striking an enhancement rather than an element. The People’s position is consistent with the legislative goal of making “relief . . . available to a deserving defendant.” (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 620 (2017-2018) April 25, 2017, p. 7.) Consistent with the People’s position, when a defendant stands convicted of a qualifying crime and only a section 12022.53(d) enhancement, the trial court may strike the enhancement so that the defendant is relieved from facing a 25-years-to-life penalty.

Similarly, a defendant convicted of just a section 12022.53(c) enhancement may be relieved of a 20-year penalty when it is in the furtherance of justice. In other words, despite the legislative control evidenced in 12022.53(h), the trial court is still “afforded maximum leeway in fitting the punishment to the offender” (*People v. Williams* (1981) 30 Cal.3d 470, 482).

Notably, there is no evidence that the Legislature intended to allow a trial court to reduce a greater enhancement to a lesser enhancement or select the term of punishment when the enhancement is structured in a tiered fashion like section 12022.53 where two lesser included enhancements are subsumed by a greater enhancement as Tirado argues (OBM 46). In the event section 12022.53’s amendment is interpreted as an attempt to allow a trial court the power to select the appropriate term of punishment for an enhancement, this Court is limited to the express language of subdivision (h). The plain language of section 12022.53(h) itself best reflects the Legislature’s intent and provides that the trial court has a binary power to strike or decline to strike an enhancement. (See *People v. Cook* (2015) 60 Cal.4th 922, 935 [“the statutory language is the best indicator of the Legislature’s intent”].) The binary discretion to strike or dismiss the entire enhancement, when only the greater enhancement is alleged and found true, is consistent with a desire to allow the trial court to reduce the punishment a defendant faces. The trial court may strike the enhancement, drastically reducing the defendant’s sentence.

5. Tirado's interpretation of the trial court's discretionary power under section 1385 is too expansive

Tirado advances an expansive interpretation of section 1385, expressly arguing that trial courts may strike elements of substantive offenses as well as elements of enhancements. (OBM 23, 27.) In his view, when one is convicted of a greater offense, a trial court may strike the greater offense and impose a sentence on a lesser offense and, similarly, a trial court may strike an element of a greater offense and impose sentence on the remaining elements which make up a lesser offense. Thus, for instance, upon a first degree burglary conviction, a trial court may strike the finding that the structure was inhabited and thereby reduce the conviction to a second degree burglary; or, upon a conviction of a battery causing serious bodily injury, a trial court may strike the finding of serious bodily injury and thereby reduce the conviction to a simple battery. Tirado's interpretation should be rejected because, as this Court explained in *Prudencio*, there is no procedure or mechanism that authorizes a trial court to strike a greater offense and retain jurisdiction over its lesser included offenses where only the greater offense is charged and found true. (*People v. Superior Court (Prudencio)*, *supra*, 202 Cal. at p. 173.) Tirado's interpretation is an unprecedented expansion of section 1385 discretion that would permit widespread rejection of jury findings, encourage courts to disregard legislative mandates regarding sentencing choices, and seriously undermine prosecutorial charging discretion. No court

has interpreted section 1385 in such a manner. Thus, the Court should reject Tirado's expansive view of section 1385.

C. The Separation of Powers Doctrine Precludes a Trial Court From Striking an Element of a Greater Enhancement so as to Impose Sentence on an Uncharged Lesser Enhancement

The People's position is consistent with the prosecution's traditional discretion to determine which charges to bring. The power to determine whether to bring charges, against whom to bring charges, and what charges to bring among those potentially available is vested in the prosecuting authority as a member of the executive branch. Separation of powers principles prohibit the judiciary from supervising or interfering with that prosecutorial discretion (*People v. Birks* (1998) 19 Cal.4th 108, 134-135) even though a decision to charge one offense rather than another may, on conviction, require the court to impose a harsher sentence (*United States v. Batchelder* (1979) 442 U.S. 114, 122-125). The prosecutor's charging authority extends to charging enhancements. (*People v. Bizieff* (1990) 226 Cal.App.3d 130, 138.) After the charging decisions have been made and the proceedings instituted, the process leading to conviction or acquittal and the choice of the sentence or other disposition is a judicial function (*People v. Tenorio* (1970) 3 Cal.3d 89, 94), and the court's authority to select from the legislatively-prescribed sentencing options cannot be controlled by the prosecution (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 516).

The prosecutor's charging authority includes the authority to seek the maximum available enhancements. (*People v. Bizieff*,

supra, 226 Cal.App.3d at p. 138.) Construing section 1385 to allow a trial court to strike an element from a greater enhancement to effectively modify the enhancement to a lesser enhancement invades the prosecutor’s charging authority. If the prosecutor elects to charge just the section 12022.53(d) enhancement and no others, the trial court, after a true finding, is empowered to strike the enhancement or the penalty for the enhancement. (§ 1385, subd. (b)(1).) If two enhancements are found true, the trial court has the discretion to strike one or both. (§ 12022.53(f) [“Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment.”].) This limitation on the trial court’s discretion is consistent with both the separation of powers doctrine and a trial court’s ability to impose an uncharged lesser enhancement when a greater enhancement turns out to be legally inapplicable or factually unsupported. A finding that the trial court may not strike an element within an enhancement does not amount to the prosecution impermissibly controlling the trial court’s sentencing options (OBM 52-53) because the trial court may still relieve a deserving defendant of an enhanced sentence.

As noted earlier, a trial court may impose an uncharged lesser enhancement when the original enhancement does not apply or is unsupported by the evidence. (*People v. Majors* (1998) 18 Cal.4th 385, 410; *People v. Fialho*, *supra*, 229 Cal.App.4th at

pp. 1396-1397; *People v. Lucas, supra*, 55 Cal.App.4th at p. 743; *People v. Allen, supra*, 165 Cal.App.3d at p. 627; *People v. Dixon, supra*, 153 Cal.App.4th at p. 1002.) But none of these cases presents an example of a tiered statute such as 12022.53; rather, in each case an enhancement under a different Penal Code section was imposed. And, the purpose of this power is so that the trial court may salvage not just the prosecutor's charging decision but also the jury's verdict.

For example, a defendant may be charged with murder and one of the section 12022.53 enhancements. The trial court will instruct the jury on murder and, because of its sua sponte obligation, will also instruct on the uncharged lesser-included offenses if there is substantial evidence that the defendant committed only the lesser offenses. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1224-1225.) Trial courts do not, however, have a sua sponte duty to instruct on lesser-included enhancements. (*People v. Majors, supra*, 18 Cal.4th at p. 411.) Even if requested by the defense to give an instruction on a lesser enhancement, the trial court may conclude that there is not substantial evidence from which a rational jury could find that the defendant committed only the lesser enhancement. (*People v. Whalen* (2013) 56 Cal.4th 1, 68.)

If in this example the jury convicts on a lesser included offense of murder such as manslaughter but also finds true the section 12022.53 enhancement because it is the only one presented, the trial court is faced with a legal impediment to

carrying out the jury’s verdict.⁷ In the example, the prosecutor properly exercised her discretion to charge and present to the jury a legally valid combination of offense and enhancement. If the trial court imposes no enhancement at all, it disregards and undercuts the jury’s verdict. Allowing the trial court to substitute a charged enhancement with an uncharged enhancement resolves this problem. Consequently, the People’s position preserves the prosecution’s traditional charging discretion while permitting the trial court to exercise its discretion to strike or dismiss an enhancement, whether it benefits the prosecution or the defense.

D. The People’s Position Is Supported by Rules Governing Lesser Enhancements

The People’s position is consistent with this Court’s guidance on imposing and staying section 12022.53 enhancements in those instances where the greater and lesser enhancements are pled and proven. In *People v. Gonzalez* (2008) 43 Cal.4th 1118, this Court held that “after a trial court imposes punishment for the section 12022.53 firearm enhancement with the longest term of imprisonment, the remaining section 12022.53 firearm enhancements . . . that were found true for the same crime must be imposed and then stayed” rather than stricken. (*Id.* at p. 1130.) This is to prevent a windfall to a defendant when a greater enhancement is invalidated on appeal and the lesser

⁷ The enhancements set forth in section 12022.53 apply only to enumerated offenses in section 12022.53(a). For the purposes of this example, murder is a qualifying offense, but manslaughter is not.

enhancements have been stricken. (*Id.* at p. 1128.) It follows then that, in the absence of a true finding under section 12022.53, subdivision (b) or (c), or both, there is no remaining enhancement to impose and execute if the subdivision (d) enhancement is invalidated. This principle is also consistent with this Court's holding in *Prudencio* that a trial court has no jurisdiction over uncharged lessers where the greater is stricken. And, as explained earlier, in cases where a trial court was permitted to substitute an uncharged lesser enhancement when a greater enhancement was found true, the issue turned on the greater enhancement's insufficiency or defect. Thus, where only a greater enhancement is pled, found true, and legally sufficient, the trial court cannot strike the greater and impose and execute sentence as if a lesser enhancement were also found true, as Tirado urges this Court to conclude.

Additionally, construing section 1385 to allow the trial court to strike an element of an enhancement, thereby modifying the enhancement to a lesser enhancement, conflicts with the rules governing when to instruct on lesser offenses and enhancements. A trial court instructs on a lesser included offense only if there is substantial evidence that the defendant is guilty of the lesser but not the greater offense. To the extent the same holds true for enhancements, if only a section 12022.53(d) enhancement is pled and there is insufficient evidence to support instructing the jury on a lesser enhancement, the jury would only make a finding on the section 12022.53(d) enhancement. If the jury finds the enhancement true, empowering the trial court to modify the

enhancement pursuant to section 1385 invades the prosecutor's charging discretion and allows the trial court to do after verdict what it could not do so before.

Finally, the People's position is consistent with the rules of court regarding sentencing enhancements. California Rules of Court, rule 4.428(b), provides, in pertinent part: "If the court has discretion under section 1385(a) to strike an enhancement in the interests of justice, the court also has the authority to strike the punishment for the enhancement under section 1385(c)." Absent is the option for the trial court to strike an element of an enhancement or to select the term of the punishment for the enhancement.

CONCLUSION

For all of these reasons, the People respectfully ask this Court to affirm the judgment.

Dated: July 8, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13-point Century Schoolbook font and contains **6,647** words.

Dated: July 8, 2020

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/s/ Dina Petrushenko

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Case Name: People v. Tirado
No.: S257658

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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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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 8, 2020, at Sacramento, California.

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Signature

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STATE OF CALIFORNIA
Supreme Court of California

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