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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

NOEL HERNANDEZ et al.,

Defendant and Appellant.

E070630

(Super.Ct.No. INF1402996)

OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood,
Judge. Affirmed with directions.

Gene D. Vorobyov, under appointment by the Court of Appeal, for Defendant and
Appellant Noel Hernandez.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and
Appellant Carlos J. Martinez.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney
General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Michael R.
Johnson and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendants Noel Hernandez and Carlos Martinez were convicted by a jury of second degree murder in the death of Fabian Martinez. In addition, the jury found Hernandez had personally discharged a firearm within the meaning of Penal Code,¹ section 12022.53, subdivision (d), and that Martinez personally used a deadly weapon (screwdriver), within the meaning of section 12022.5, subdivision (b)(1). Martinez was also convicted of a second count, assault with a deadly weapon (§ 245, subd. (a)(1)), and was found to have suffered a prior serious felony conviction (§ 667, subd. (a)) and a prior conviction under the Three Strikes Law (§ 667, subds. (c), (e)(1)). Hernandez was sentenced to prison for 40 years to life, while Martinez received a sentence of 36 years to life. Both defendants appeal.

On appeal, Hernandez claims (1) the court erred in refusing to instruct the jury on the lesser offense of involuntary manslaughter, and (2) his sentence should be remanded to allow the court to exercise its discretion to strike or modify the section 12022.53, subdivision (d) enhancement. Martinez argues (1) the court misinstructed the jury in defining malice; (2) his conviction for murder is precluded by the recent amendment to section 188 pursuant to Senate Bill No. 1437 (Senate Bill 1437), relating to the abrogation of the natural and probable consequences theory; (3) the court abused its discretion in denying his motion to strike his prior Strike conviction; (4) his sentence

¹ All statutory references are to the Penal Code, unless otherwise stated.

must be remanded to give the trial court an opportunity to strike his prior serious felony conviction (§ 667, subd. (a)) pursuant to the amendment to section 1385 under Senate Bill No. 1393 (Senate Bill 1393); and (5) he is entitled to a youthful offender hearing.² We affirm with directions.

BACKGROUND

Defendants Noel Hernandez and Carlos Martinez were longtime friends. Liliana A. (Lily) is the older sister of Hernandez. Lily and her brother were very close and even shared a room in their parents' home. Lily also had a close relationship with Carlos,³ whom she thought of as a brother.

Prior to October 26, 2014, Lily had been in an on-again-off-again relationship with Fabian. A year earlier, the two had gotten into an argument while driving in Fabian's car and he had left her off at the side of a road in an area of the desert. Fabian would not answer his phone, so Lily called his grandparents and asked them to pick her up. She walked toward a gas station where she encountered two homeless men, one of whom brutally raped her. After the incident, Fabian's grandparents came and picked her up. As a result of the brutal attack, Lily was bedridden for two weeks. Noel knew about the rape. After the rape incident, Lily and Fabian resumed their on-again-off-again

² Each defendant joins in the arguments of the other defendant.

³ Carlos Martinez is not related to Fabian Martinez. In reciting the facts, we will refer to Fabian and Carlos by their first names to avoid confusion.

relationship. However, Jose Benevides, Fabian's grandfather, had not seen Lily in eight months and Fabian had told him he did not want to see Lily anymore.

On October 26, 2014, Lily was hung over from drinking the night before and needed a ride to her job. Her brother Noel was unavailable because he was working with their father, who had a landscaping business, so Carlos came to pick her up. As they were on their way to her place of employment, Lily decided she did not feel like working because of her hangover. She and Carlos bought some beer and went to a park to drink it.

At the park, she and Carlos discussed their respective relationship problems. Lily believed Fabian was cheating on her, but she wanted to see him. She sent Fabian a text message and he told her to come over, but she had to wait until he got home from working. Carlos took Lily home, by which time it was already dark, and then returned to pick her up with Noel in the car, to take her to Fabian's house. On the way to Fabian's house, they bought more beer.

At about 9:30 p.m., they arrived and parked in front of Fabian's house, at which time Lily noticed that Concepcion Fernandez, also called "Poncho," was parked behind them. The plan was for Noel and Carlos to drop Lily off and leave. Poncho was a neighbor of Lily and Noel's who also worked for their father's landscaping business. Lily got out of the car and went up to knock on Fabian's door. Fabian eventually came outside and had a conversation with Lily in front of the house. Fabian and Lily walked to where Carlos was looking at his car, which appeared to have damage from hitting something. Fabian asked what happened and after the men shook hands, Fabian and Lily

walked away to talk. Lily told Fabian she had not gone to work. Fabian told Lily he would be right back. When Lily asked if they were going inside his house, Fabian told her “Fuck no.”

Lily became upset and got back into Carlos’s car, waiting for Fabian to come over. Lily was sad and her eyes were welling with tears as she sat in the back seat. Noel came over and asked her what was wrong, but Lily told him everything was okay, so he went back over to Poncho’s truck.

A short time later, Fabian came back out of the house and Lily walked toward him. Fabian asked Lily how much she had been drinking and why she couldn’t remember if they had crashed. Lily admitted she had been “drinking a lot.” Carlos approached Fabian and told Fabian, “We’re going to leave, dog.” Carlos held out his hand as if to shake hands and Fabian extended his hand. Carlos grabbed Fabian’s hand and pulled Fabian into the street. Fabian fell to his knees and Carlos started kneeing him. Noel ran up.

Lily tried to pull Carlos away from Fabian, telling Carlos to leave Fabian alone, but Noel got Fabian in a headlock. While Noel had Fabian in the headlock, Lily saw that Carlos had something shiny and pointed that he held up to Fabian’s neck. Carlos and Noel asked Fabian what Fabian had done to Lily, but Fabian denied doing anything to her. Lily told Carlos and Noel to let Fabian go, because he had not done anything.

During this assault, Fabian never hit back; he just tried to get away. At one point they did lose control of Fabian, but Noel got him back in a headlock. Carlos still had the

shiny object pointed at Fabian's neck, and Carlos and Noel kept asking Fabian what he had done to Lily. Then Noel switched hands so he was holding Fabian in the headlock with his left hand instead of his right hand. They continued to struggle for a few seconds until Lily noticed that Noel had pulled out something black from his waistband and pointed it at Fabian's head.

While Lily was trying to get Carlos off of Fabian, Carlos elbowed her, causing her to fall backwards. When she tried to get up, she heard a clicking sound, that sounded like racking a gun, a sound with which she was familiar. A few seconds later, as she was still getting up, she heard a gunshot. Carlos and Noel immediately ran to Carlos's car, and Poncho left in his truck. Lily screamed for help as Fabian had been shot in the head. Noel led her to the car and the three of them drove off. A neighbor, hearing Lily's scream and the sound of a car "peeling out," went out to find Fabian in the middle of the street and called for paramedics.

The defendants and Lily drove until they reached the Spotlight 29 Casino where the car broke down. They emptied the car, including the box of Modelo beer they had bought before going to Fabian's house. They started to walk through the desert along the freeway as Noel tried to get rid of something that was wrapped in a white shirt near some bushes that bordered the freeway. When he returned from the area of the bushes, the three of them proceeded to walk through the desert wash area.

Along the way, they talked about what had happened to Fabian and Carlos told Lily not to say anything to the police. Carlos told her to tell the police that he and Noel

had just dropped her off at Fabian's and did not return and that she had walked home, leaving Fabian alive when she left. They ended up on Indio Boulevard. Carlos called his mother to get a ride home, while Noel and Lily took a cab to get home.

The Riverside County Sheriff's Department responded to the dispatch regarding the shooting. At the scene of the shooting, deputies found a cold unopened bottle of Modelo beer, a small caliber casing near Fabian's head, and a broken brick.⁴ In addition to interviewing witnesses, including Fabian's grandfather who informed the officers of Lily's visit earlier, the officers requested helicopter assistance to see if the suspect vehicle was parked at Lily's house. Later, they interviewed Lily, learned that Noel was involved, and arranged for his transport. They also contacted Carlos later that morning, after contacting his mother at work, and transported him to the station.

A sergeant with the sheriff's department obtained information about Carlos's vehicle from Carlos's father and obtained the license number of the vehicle, for which a records check was conducted. They learned that the vehicle had been towed away at the request of the casino, after a casino security officer found the vehicle abandoned. Upon inspecting the vehicle, sheriff's investigators found traces of blood near the passenger door. The blood matched Fabian's DNA. The vehicle also appeared to have damage on the driver's side door.

⁴ The brick apparently came from the bed of Poncho's truck, which could have fallen out when leaving abruptly.

The desert wash area where Lily, Noel and Carlos had walked was also searched by sheriff's investigators, who had seen surveillance video of the threesome circling the parking lot, parking briefly, and then driving to the frontage road. A gun, a Browning 9-millimeter, was found in the vicinity where the car stopped, near a tree among some trash, wrapped in a black sweatshirt; and a magazine was also found in the area. The ammunition found was RP 9-millimeter Luger. The black sweatshirt had Noel's DNA in the collar and blood spots on the sweatshirt matched Fabian's DNA.

Another magazine for a 9-mililimeter Luger was found in a search of Noel's backyard. In Noel's bedroom, they found some Nike Jordan high top shoes, the sole pattern of which matched shoe tracks found in the desert. They also seized some tan pants which had blood spots that matched Fabian's DNA. The gun was later found to have traces of blood on it, which matched Fabian's blood. The magazine in evidence was found to fit perfectly into the gun. A cartridge from that magazine was test fired and the casing matched the casing found at the scene of the shooting. A comparison of the bullet found in Fabian's body and the test fired bullet resulted in a match.

An autopsy showed that Fabian had died of a gunshot wound, and that he had sustained multiple abrasions, lacerations, and contusions on his face. The bullet had entered the top of the head on the left side, exited through the neck on the left side, and then entered the top of his shoulder, where it was located just beneath the surface. The shot was fired from approximately one foot away.

During Lily's first interview with detectives, she told them that Noel and Carlos had dropped her off at Fabian's and gone off with Poncho. The next day, however, she told police that she lied about her brother's involvement and that her prior statement was what she was instructed by Carlos to say, and that she had given that statement because she was afraid.⁵

Noel and Carlos were arrested and charged by information with the murder of Fabian (§187, subd. (a), count one.) As to Noel, it was further alleged he had personally and intentionally discharged a firearm causing death, within the meaning of section 12022.53, subdivision (d). As to Carlos, it was further alleged that he personally used a deadly weapon, a screwdriver, within the meaning of section 12022, subdivision (b)(1). After being amended, the information included a second count against Carlos, only, which, alleged an assault with a deadly weapon, pursuant to section 245, subdivision (a)(1). Also as to Carlos only, the information alleged he had suffered a prior serious felony under the Three Strikes law, as well as a serious felony (nickel)⁶ prior, pursuant to section 667, subdivision (a).

⁵ The second statement is the version of events to which she testified at the preliminary hearing, and which was read to the jury when the trial court found her inability to recall certain facts to be incredible, pursuant to *People v. Green* (1971) 3 Cal.3d 981 (on remand from the United States Supreme Court, *California v. Green* (1970) 399 U.S. 149 [26 L. Ed. 2d 489, 90 S.Ct. 1930]).

⁶ Martinez mistakenly refers to the section 667, subdivision (a) enhancement as a Strike enhancement. The term "nickel" prior refers to a five-year enhancement for a prior serious felony conviction pursuant to section 667, subdivision (a). A Strike prior
[footnote continued on next page]

Prior to the jury returning their verdicts, defendant Martinez waived his right to a jury trial on the issues relating to his prior convictions. When the verdicts were received, both defendants were convicted as charged of second-degree murder in count 1, and Martinez was convicted of assault with a deadly weapon in count 2. The jury found true the allegation that Hernandez had personally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)), and that Martinez had personally used a deadly weapon (screwdriver) in the commission of the murder (§ 12022, subd. (b)(1)).

On May 18, 2018, the court sentenced defendant Hernandez to an indeterminate term of 15 years to life for the second-degree murder, and a consecutive term of 25 years to life for the gun discharge enhancement, for a total term of 40 years to life. The court imposed a restitution fine in the amount of \$10,000 pursuant to section 1202.4, and a parole revocation restitution fine in the same amount, which was suspended pending any violation of parole. The court also ordered both defendants to reimburse the Victim's Compensation Fund in the amount of \$7,871.

As for Martinez, the court found both the Strike prior and "nickel prior" allegations true. Martinez made a motion for a mistrial, which was denied, and requested

refers to a prior serious or violent felony under the Strikes law, section 667, subdivisions (b) through (i). The difference is not insignificant. A "nickel" prior adds a five-year enhancement to a defendant's term. A Strike prior results in a sentence under an alternate sentencing scheme, either doubling, tripling, or imposing an indeterminate 25 years-to-life sentence. (§ 667, subd. (e)(2)(A)(i)-(iii); *People v. Sipe* (1995) 36 Cal.App.4th 468, 485.)

that the court exercise its discretion to strike the Strike allegation, pursuant to *People v. Superior Court (Romero)*(1996) 13 Cal.4th 497, which was also denied.

The court sentenced Martinez to an indeterminate term of 36 years to life, comprised of a term of 15 years to life, doubled under the Strikes law (§ 667, subd. (e)(1)) for count 1, plus a consecutive determinate term of one year for the deadly weapon allegation, plus five years for the “nickel prior,” pursuant to section 667, subdivision (a). The court stayed a six-year midterm sentence for count 2 pursuant to section 654. Carlos was ordered to pay \$3,000⁷ for a restitution fine and parole revocation restitution fine (suspended), plus additional fees, with victim restitution to be determined by the probation department.

Both defendants timely appealed.

⁷ The court originally imposed restitution fines in the amount of \$10,000 for Martinez without objection. This ordinarily results in a forfeiture of the issue. (See *People v. Avila* (2009) 46 Cal.4th 680, 729; see also, *People v. Smith* (2020) 46 Cal.App.5th 375, 395; *People v. Taylor* (2019) 43 Cal.App.5th 390, 401. However, after the appeal had been perfected, Martinez’s appellate counsel submitted a letter to the sentencing court pursuant to section 1237.2, arguing the court erroneously imposed the restitution fines without considering his inability to pay. The trial court reduced the restitution fine and parole revocation restitution fines to \$3000. Currently, the Supreme Court is considering the question of whether a trial court lacks jurisdiction to entertain such motion, where issues other than the imposition of the restitution fine are raised on appeal. (See *People v. Jenkins* (2019) 40 Cal.App.5th 30, 38, review granted Nov. 26, 2019, S258729.)

DISCUSSION

1. *Hernandez's Appeal*

a. *Court's Refusal to Instruct on Involuntary Manslaughter as a Lesser Offense*

At trial, both defense counsel requested a jury instruction on involuntary manslaughter (CALCRIM No. 580) as a lesser included offense. Hernandez argued that if the jury found that defendant assaulted Fabian with the gun, threatening him, and in the course of that conduct the gun discharged, it could conclude he acted with criminal negligence. The People countered that such conduct manifested a conscious disregard for human life.

The trial court refused to give the instruction. Hernandez contends the trial court committed reversible error in refusing his requested instruction on involuntary manslaughter, and in failing to instruct *sua sponte* on that lesser offense. He grounds his argument on the theory that he brandished the firearm or committed an aggravated assault with a firearm during which act the gun discharged accidentally, without malice. Defendant Martinez joins. We disagree.

“[A] defendant has a constitutional right to have the jury determine every material issue presented by the evidence [and] . . . an erroneous failure to instruct on a lesser included offense constitutes a denial of that right . . .” (*People v. Sedeno* (1974) 10 Cal. 3d 703, 720, overruled on other points in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12, and in *People v. Breverman* (1998) 19 Cal.4th 142, 176.) “Due process requires

that the jury be instructed on a lesser included offense *only* when the evidence warrants such an instruction.” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145, citing *Hopper v. Evans* (1982) 456 U.S. 605, 611 [72 L. Ed. 2d 367, 102 S. Ct. 2049]; *People v. Avena* (1996) 13 Cal.4th 394, 424.)

Hernandez asserts (and Martinez joins) there was substantial evidence warranting instruction on involuntary manslaughter under the theory that he was only trying to frighten Fabian by brandishing a firearm and that the gun went off accidentally. Such a theory is inconsistent with the theory Hernandez argued to the jury as well as the jury’s findings, themselves.

To protect this right and to safeguard the jury’s function of ascertaining the truth, a trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present. (*People v. Breverman, supra*, 19 Cal.4th at p. 154; *People v. Barton* (1995) 12 Cal.4th 186, 196.) “Substantial evidence is evidence sufficient to ‘deserve consideration by the jury,’ that is, evidence that a reasonable jury could find persuasive.” (*Barton, supra*, at p. 201, fn. 8.)

Manslaughter, both voluntary and involuntary, is a lesser included offense of murder. (*People v. Ochoa* (1998) 19 Cal.4th 353, 422; *People v. Barton, supra*, 12 Cal.4th at pp. 200-201; *People v. Berryman* (1993) 6 Cal.4th 1048, 1080.) Specifically, involuntary manslaughter is a lesser offense included within the offense of murder. (*People v. Prettyman* (1996) 14 Cal.4th 248, 274.)

Involuntary manslaughter is defined to include a killing that occurs “in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” (§ 192, subd. (b); *People v. Prettyman*, *supra*, 14 Cal.4th at p. 274.) Brandishing a weapon is committed when a person draws or exhibits a firearm, in the presence of another person, “in a rude, angry, or threatening manner.” (§ 417, subd. (a)(2).) “[A]n accidental shooting that occurs while the defendant is brandishing a firearm in violation of section 417 could be involuntary manslaughter.” (*People v. Thomas* (2012) 53 Cal.4th 771, 814, citing *People v. Lee* (1999) 20 Cal.4th 47, 60–61; *People v. Southack* (1952) 39 Cal.2d 578, 584.)

However, where the brandishing of a weapon is dangerous to human life and the defendant acted in conscious disregard of life, such an act could, nevertheless, result in murder, rather than involuntary manslaughter. (*People v. Thomas*, *supra*, 53 Cal.4th at pp. 814-815, citing *People v. Benitez* (1992) 4 Cal.4th 91, 108–109.) In *Thomas*, an eyewitness testified that defendant put the gun to the victim’s head and threatened to kill him.

In the *Thomas* case, the Supreme Court held that such conduct is highly dangerous and exhibits a conscious disregard for life, which constitute implied malice, supporting murder. Thus, the court acknowledged that “[a]n unintentional shooting . . . can be murder if the jury concludes that the act was dangerous to human life and the defendant acted in conscious disregard of life.” (*People v. Thomas*, *supra*, 53 Cal.4th at pp. 814-815.) It went on to observe that in such a scenario, “[i]n order to find defendant guilty of

only involuntary manslaughter, the jury would have had to conclude *both* that the shooting was accidental and that defendant had acted without malice.” (*Id.* at p. 815.)

Even if Hernandez had presented the brandishing theory to the court, he did not merely draw or exhibit a firearm. He held the firearm against Fabian’s head, threatened him and “racked” the weapon. Under such circumstances, an unintentional shooting resulting from putting a gun to a person’s head, while threatening him, would not support an involuntary manslaughter instruction where the act was dangerous to human life.

Additionally, at trial Hernandez did not rely on a theory of accidental discharge during the commission of a misdemeanor brandishing offense. Instead, as Hernandez acknowledges on appeal, his argument was that the firearm went off accidentally during the commission of an assault with a firearm. An assault with a firearm, like assault with a deadly weapon, is a circumstance from which malice to support murder may be inferred. “It is settled that the necessary element of malice may be inferred from the circumstances of the homicide.” (*Jackson v. Superior Court* (1965) 62 Cal.2d 521, 525 (*Jackson*).

Thus, when it is proved that the defendant assaulted the victim with a deadly weapon in a manner endangering life and resulting in death, ““malice is implied from such assault in the absence of justifying or mitigating circumstances.”” (*People v. Lines* (1975) 13 Cal.3d 500, 505, quoting *Jackson, supra*, 62 Cal.2d. at p. 526.) Holding a gun at Fabian’s head and chambering a bullet is more than criminal negligence: the assault

with a loaded weapon, chambered and ready to fire, endangered Fabian's life and resulted in his death.

Further, the jury found defendant intentionally, not accidentally, discharged a firearm causing death during the commission of the murder by finding the firearm enhancement allegation pursuant to section 12022.53, subdivision (d) true, thereby deciding the factual question of accidental or negligent discharge adversely to defendant. Under such circumstances the failure to instruct on involuntary manslaughter was not prejudicial. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085-1086.) In the present case, the jury found Hernandez intentionally discharged the firearm, demonstrating that the evidence did not support a factual theory for involuntary manslaughter.

Because assault with a firearm resulting in death gives rise to an inference of implied malice under *Jackson, supra*, and because the jury necessarily decided the factual question posed by the proffered involuntary manslaughter instruction adversely to defendant under other properly given instructions (*People v. Sedeno, supra*, 10 Cal.3d at p. 721), it was not error to refuse to give the instruction.

b. Court's Discretion to "Strike or Modify" the Gun Discharge Enhancement

Hernandez notes that effective in January 2018, trial courts have discretion to strike gun discharge enhancements, imposed pursuant to section 12022.53, subdivision (d), by reason of Senate Bill No. 620 (Senate Bill 620). That legislation amended section 12022.53, subdivision (h), to allow a trial court to exercise discretion under section 1385 to strike or stay a gun discharge enhancement. Hernandez argues that we must remand

the matter because the trial court did not understand that it had discretion to “strike or modify” the enhancement pursuant to either section 12022.53, subdivision (b) or (c).

The People argue that Hernandez forfeited the issue by failing to request that the trial court strike or stay the enhancement at sentencing, where the amendment went into effect in January 2018, while the sentencing hearing in this case occurred the following May. But section 1385 does not confer upon the defendant the privilege of moving to dismiss in the furtherance of justice. (*People v. Belton* (1979) 23 Cal.3d 516, 521; *People v. Ritchie* (1971) 17 Cal.App.3d 1098, 1104, citing *People v. Shaffer* (1960) 182 Cal.App.2d 39, 44.) Instead, a defendant can informally “suggest” that the court consider a dismissal of the case and the court on its own motion can adopt the suggestion. (*Shaffer, supra*, at p. 44.) It is difficult to conceive of how the failure to make a motion the defendant is unauthorized to make can give rise to forfeiture.

In any event, as a reviewing court, we are not prohibited from reaching questions that have not been preserved for review by a party. (*People v. Smith* (2003) 31 Cal.4th 1207, 1215, citing *People v. Williams* (1998) 17 Cal.4th 148, 161–162, fn. 6.) We address the issue on the merits here in order to forestall a claim of ineffective assistance of counsel. (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1014, citing *People v. Riel* (2000) 22 Cal.4th 1153, 1192.)

Section 12022.53, subdivision (d), provides that, “Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally

discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.” Subdivision (j) of section 12022.53 provides, “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.*” (Italics added.)

Prior to 2017, section 12022.53, subdivision (h), prohibited the trial court from striking an allegation under the section or a finding bringing a person within the provisions of the section, notwithstanding section 1385. (Former § 12022.53, subd. (h).) However, in 2017, the Legislature enacted Senate Bill 620 (Stats. 2017, ch. 682 § 2, pp. 5104-5106, eff. Jan. 1, 2018, amending §§ 12022.5 and 12022.53). The Legislative Counsel’s Digest explains that SB 620 “would delete the prohibition on striking an allegation or finding and, instead, would allow a court, in the interest of justice and at the time of sentencing or resentencing, to strike or dismiss an enhancement otherwise required to be imposed”

Notably, both the current and former versions of subdivision (h) of section 12022.53 referred to a trial court’s discretion to dismiss or strike pursuant to section 1385. The power to dismiss an action includes the power to dismiss or strike an enhancement. (*People v. Thomas* (1992) 4 Cal.4th 206, 209; *People v. Lockett* (1996) 48 Cal.App.4th 1214, 1218.)

Hernandez requests a remand to allow the trial court to “strike or modify” the gun discharge enhancement. But the power to dismiss or strike does not necessarily include a broad discretion to “modify” an enhancement or to impose a lesser enhancement, except when the original enhancement allegation is either legally inapplicable or unsupported by sufficient evidence. (*People v. Fialho* (2014) 229 Cal.App.4th 1389, 1395-1396 [§ 12022.53 enhancement precluded by conviction of offense not listed in § 12022.53, subd. (a)]; *People v. Strickland* (1974) 11 Cal.3d 946, 961; *People v. Lucas* (1997) 55 Cal.App.4th 721, 743; *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, subd. (b) where BB or pellet gun was used and did not qualify as a firearm under the statute].)

The appellate courts of this state are presently in disagreement about whether the power to strike or dismiss also includes the power to impose a lesser included enhancement. (See *People v. Morrison* (2019) 34 Cal.App.5th 217 [saying “yes”]; *People v. Tirado* (2019) 38 Cal.App.5th 637, review granted Nov. 13, 2019, No. S257658 [saying “no”]; see also, *People v. Garcia* (2020) 46 Cal.App.5th 786, 788 and *People v. Yanez* (2020) 44 Cal.App.5th 452, 458 [agreeing with *Tirado*].) That question is currently pending in the California Supreme Court.

Fortunately, we do not need to decide that controversial question in this opinion. Instead, we remand the matter back to the trial court to give that court an opportunity to exercise its discretion under section 1385 to strike or dismiss the enhancement.

2. *Martinez's Appeal*

a. *The Trial Court Correctly Instructed the Jury on Principles of Malice*

Aforethought

Martinez asserts that he could not have been convicted of implied malice murder under a direct aiding and abetting theory if Hernandez committed express malice murder. He does not point to any defect in the instructions given on the subjects of murder and malice. Instead, he focuses on the prosecutor's argument that defendant could be found to have the requisite malice aforethought, "[w]hether you believe [Hernandez] had an intent to kill when he put that gun to Fabian's head or implied malice, conscious disregard for human life. Either one is sufficient." To the extent Martinez is challenging the prosecutor's argument, to which there was no objection, it has been forfeited. (*People v. Collins* (2010) 49 Cal.4th 175, 198, citing *People v. Stanley* (2006) 39 Cal.4th 913, 952.)

Martinez concentrates on direct aider/abettor liability, arguing that outside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator. Relying on *People v. McCoy* (2001) 25 Cal.4th 1111, 1118 (*McCoy*), defendant goes on to argue that if a jury found Hernandez

intended to kill, it could not as a matter of logic or of law, find that Martinez directly aided and abetted implied malice murder.

Defendant misreads *McCoy* and seems to assume it stands for the proposition that the direct aider/abettor must inevitably be found to have the same or a lesser mental state than the direct perpetrator. To the contrary, the Supreme Court emphasized that a direct aider and abettor's mens rea is personal and may be different than the direct perpetrator's because guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's own acts and own mental state. (*McCoy, supra*, 25 Cal.4th at p. 1117.) It concluded that an aider and abettor may be convicted of second degree murder while the direct perpetrator is convicted of first degree murder, *and vice versa*. (*Id.* at p. 1119, italics added; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164.)

In fact, *McCoy* acknowledged that in some situations, an aider and abettor may actually harbor a greater mental state than that of the direct perpetrator: An accomplice may be convicted of first-degree murder, even though the primary party is convicted of second-degree murder or of voluntary manslaughter. (*McCoy, supra*, 25 Cal.4th at p. 1122; see also, *People v. Nero* (2010) 181 Cal.App.4th 504, 514-515.) *McCoy* simply recognized that *where the intended crime and the charged crime are the same*, the direct aider/abettor's mens rea must be *at least* equal to the actual perpetrator (*McCoy, supra*, at p. 1118, fn. 1, italics added); it did not hold it must always be less than or equal to that of the actual perpetrator, and its holding does not apply where liability is grounded on the

natural and probable consequences theory, that is, where the charged crime (murder) was a natural and probable consequence of a different intended crime (a violent assault).

Proceeding from his incorrect premise, Martinez argues that an aider/abettor cannot logically commit implied malice murder if the perpetrator expressly intends to kill, citing *People v. Swain* (1996) 12 Cal.4th 593, 603. His reliance there is misplaced because *Swain* involved a conspiracy charge, where the target crime was second degree murder. There, the court held that a conviction of conspiracy to commit murder requires a finding of intent to kill so it cannot be based on a theory of implied malice. (*Id.*, at p. 607.) This authority does not support Martinez's notion a direct aider/abettor must invariably be less culpable than the direct perpetrator. Instead, as his own authority (*McCoy, supra*) acknowledges, direct aider/abettors can be found to have the mens rea of express malice even if the direct perpetrator does not.

Leaving aside the People's closing argument regarding Martinez's liability, or the abstract question whether a properly instructed jury could properly find Martinez guilty of implied malice second degree murder if it concluded Hernandez committed express malice second degree murder, the court defined both express and implied malice and then instructed the jury that if it found the defendant guilty of murder, "it is murder of the second degree." Because there was no risk that Martinez would be convicted of a greater degree of murder than Hernandez, whether the jury concluded Hernandez acted with express or implied malice makes no difference to Martinez's level of culpability because his culpability is measured independently.

Turning to the correctness of the instructions themselves, Martinez does not complain that the patterned CALCRIM instructions, either with or without adaptations, were incorrect statements of the law. To the contrary, CALCRIM Nos. 520 [murder in general], 521 [first degree murder], and 522 [provocation reducing first degree murder to second degree], have all been found to be correct statements of the law. (*People v. Jones* (2014) 223 Cal.App.4th 995, 1001; see also, *People v. Lucero* (1988) 44 Cal.3d 1006, 1021 [CALJIC No. 8.20, predecessor to CALCRIM No. 521, was a correct statement of law].)

The question of whether Hernandez acted with express as opposed to implied malice was irrelevant to the question of whether Martinez acted with the requisite mental state. Martinez's real concern appears to relate to the instructions relating to his status as an aider/abettor and the natural and probable consequences doctrine. We will proceed to discuss that in the next section.

b. The Court Properly Instructed the Jury Regarding Theories of Martinez's Liability as a Direct Aider/Abettor and the Alternative Theory Under the Natural and Probable Consequences Doctrine.

At trial, the People proposed two theories of accomplice liability: (1) either as a direct aider and abettor to second degree murder or (2), as an aider and abettor to Hernandez's crime of assault with a firearm, under the natural and probable consequences doctrine. Specifically, the prosecutor argued that Martinez could only be found guilty of aiding and abetting Hernandez based on implied malice.

Martinez argues the trial court improperly instructed the jury under invalid theories of accomplice liability. He asserts that he could not have been convicted of implied malice murder under a direct aiding and abetting theory if Hernandez committed express malice murder, which we had just analyzed. He also claims that he could not have been convicted under a natural and probable consequences theory because recently enacted legislation eliminated that theory of murder. Specifically, he asserts that the natural and probable consequences doctrine is no longer a valid theory of law. As such, he asserts his conviction must be reversed because the trial court instructed the jury on at least one invalid theory and it cannot be discerned on which theory the jury relied as to each defendant. We disagree.

i) *Nothing in SB 1437 Completely Eradicated Aider/Abettor Liability.*

Martinez's entire argument revolves around an assumption that an aider and abettor may not be convicted of any degree of murder under the natural and probable consequences doctrine. This is a false premise. Although first degree premeditated murder is now impermissible under the natural and probable consequences doctrine (*People v. Covarrubias* (2016) 1 Cal.5th 838, 906, citing *People v. Chiu* (2014) 59 Cal.4th 155 167 (*Chiu*)), the holding of *Chiu* did not entirely invalidate all theories of vicarious liability.

The Supreme Court in *Chiu* upheld the principle that an aider/abettor could be convicted of first degree murder based on *direct* aiding and abetting principles. (*Chiu, supra*, 59 Cal.4th at p. 166, italics added.) As for convictions under the natural and

probable consequences doctrine, *Chiu* held that punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine. (*Ibid.*)

It is therefore incorrect to say that the Supreme Court eliminated all murder liability under the natural and probable consequences doctrine.

ii) *The Instructions on Aiding/Abetting*

Martinez claims that the trial court instructed the jury on two invalid legal theories of aider and abettor liability. We have already addressed his first assertion that he could not have been convicted of implied malice murder under a direct aiding and abetting theory if Hernandez committed express malice murder. Martinez also argues that the court committed prejudicial error by instructing the jury that it could find him guilty of second degree murder under an "invalid natural and probable consequences doctrine." He erroneously states that under the recent amendments enacted pursuant to Senate Bill 1437, "the law no longer recognizes the natural and probable consequences doctrine as it relates to murder." Thus, he argues, instructing the jury that Martinez could be found guilty of second degree murder under the natural and probable consequences doctrine is reversible error. We disagree.

Chiu concluded the first degree murder conviction must be reversed unless the court could conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder.

(*Chiu, supra*, 59 Cal.4th at p. 167, citing *People v. Chun* (2009) 45 Cal.4th 1172, 1201, 1203–1205.) It did not discuss the propriety of instructions that the jury may find the defendant guilty of *second degree* murder based on such a theory, and it did not invalidate the instructions given in the context of a second degree murder prosecution.

The jury in the present case was instructed it could find Martinez guilty of no more than second degree murder if it found he aided/abetted an assault with a firearm committed by Hernandez, where the commission of second degree murder was the natural and probable consequence of the assault with a firearm. The instructions did not run afoul of *Chiu*, which only invalidated instructions permitting a jury to find a defendant guilty of *first degree* murder under a natural and probable consequences theory. (See *Chiu, supra*, 59 Cal.4th at p. 167.)

Here, Martinez’s counsel participated in the discussions of the jury instructions and requested that the aider/abettor/natural and probable consequences instruction be clarified by adding at the end of the natural and probable consequences instruction language that the jury must determine that Martinez aided/abetted an assault with a firearm for the theory to apply. The court agreed and delegated the task of drafting the instruction to Martinez’s counsel. The court later gave the requested instruction.

The instructions given on aider/abettor liability did not permit the jury to find Martinez guilty of anything more than second degree murder, which is consistent with the holding of *Chiu*: “punishment for second degree murder is commensurate with a defendant’s culpability for aiding and abetting a target crime that would naturally,

probably, and foreseeably result in a murder under the natural and probable consequences doctrine.” (*Chiu, supra*, 59 Cal.4th at p. 166.)

Aside from the argument that *Chiu* and Senate Bill 1437 proscribe any instruction that a defendant can be convicted of any specie of murder under the natural and probable consequences doctrine, Martinez points to no defect in the specific instructions given. Nor could he: his attorney participated in the drafting of the instruction, thereby inviting any alleged error. There was no instructional error.

iii) *Martinez Must Petition the Superior Court Pursuant to Section 1170.95 to Vacate His Murder Conviction.*

Finally, Martinez seeks to vacate his murder conviction arguing he could not have been convicted of second degree murder under a natural and probable consequences theory because recently enacted legislation eliminated all murder liability under that theory. We disagree.

Effective January 2019, the Legislature enacted Senate Bill 1437, amending the provisions of sections 188 and 189. Section 188, which defines express and implied malice, was amended to add to subdivision (3) the following language: “(3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.”

Senate Bill 1437 also added subdivision (e) to section 189, in response to *Chiu, supra*. That subsection now provides, “(e) A participant in the perpetration or attempted

perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.”

In adopting this amendment, the Legislature indicated its purpose: “This bill would require a principal in a crime to act with malice aforethought to be convicted of murder except when the person was a participant in the perpetration or attempted perpetration of a specified felony in which a death occurred and the person was the actual killer, was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree, or the person was a major participant in the underlying felony and acted with reckless indifference to human life.” (Sen. Bill No. 1437, Stats. 2018, ch. 1015, p. 6673.) It only intended to prohibit murder convictions where the participant was not the actual killer or a direct aider or abettor of the murderer. (*Ibid.*)

The same legislation added section 1170.95, which allows those “convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner’s murder

conviction vacated and to be resentenced on any remaining counts.” (§ 1170.95, subd. (a); *People v. Martinez* (2019) 31 Cal.App.5th 719, 723 (*Martinez*)).

The People argue that this appeal is not the appropriate vehicle to seek relief, pointing to the statutory remedy of filing a petition pursuant to section 1170.95 as a means of obtaining retroactive relief. (See *Martinez, supra*, 31 Cal.App.5th at p. 728 [holding that the statutory remedy is the exclusive remedy]; see also, *People v. Bell* (2020) 48 Cal.App.5th 1, 10-11 [agreeing with *Martinez*].) Another panel of our division has also agreed with *Martinez*, as well as decisions by other districts that followed the holding. (See *People v. Cervantes* (2020) 46 Cal.App.5th 213, 220-221, and cases cited therein.) The rationale of these cases is that an amendatory provision does not apply to cases not yet final where “the enacting body “clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent” [citations].” (*Martinez, supra*, 31 Cal.App.5th at pp. 724–725.)

We agree that this is the proper approach and decline to reach the issue. As the court observed in *Martinez*, defendants may seek relief pursuant to section 1170.95 immediately, by staying the appeal, rather than await the full exhaustion of their rights to directly appeal their conviction. (*Martinez, supra*, 31 Cal.App.5th at p. 729; see also, *People v. Cervantes, supra*, 46 Cal.App.5th at p. 226.) Defendant *Martinez* is not precluded from filing a petition pursuant to section 1170.95 after the appeal is final.

iv) *Whether the Court Abused Its Discretion In Refusing to Strike Martinez's Juvenile Strike Prior*

In the trial court, Martinez invited the court to exercise its discretion to strike his juvenile Strike prior, alleged pursuant to section 667, subdivision (e)(i), as provided in *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497. The motion (or, more accurately, invitation) was denied. On appeal, defendant claims the lower court abused its discretion, specifically respecting the mitigating factor relating to his youth. We disagree.

Romero acknowledged that a sentencing court retains discretion to strike or dismiss a Strike allegation ““in the furtherance of justice.”” (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-530.) In ruling whether to strike a prior serious and/or violent felony conviction finding under the Three Strikes law pursuant to section 1385, or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The superior court’s order is reviewed for abuse of discretion, which is deferential. (*People v. Williams*, *supra*, 17 Cal.4th at p. 162.) This standard requires us to determine whether the ruling in question “falls outside the bounds of reason” under the applicable

law and the relevant facts. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226; see *People v. Jackson* (1992) 10 Cal.App.4th 13, 22).

The record demonstrates the trial court properly exercised discretion. Defense counsel presented in support of the request numerous letters of support, and argued factors relating to Martinez's youth and troubled background. In response, the People noted that Martinez's juvenile history of adjudications began when he was 14 years old and that he continued committing crimes till reached adulthood. The People also pointed to the nature of the Strike offense, a violation of section 246.3 (discharge of a firearm or BB gun with gross negligence), which involved the use of a firearm, and that in the current offense, he was the instigator. The People also reminded the court that Martinez was on probation for the Strike offense when he committed the current offense.

The court acknowledged the above points, highlighting that the circumstances of the offense involved Martinez being the instigator of the violent episode, when he feigned a proffered handshake in order to pull Fabian to the ground and commence beating the victim. Then, after Hernandez joined the fray and the two defendants dragged Fabian into the street, Martinez held what is believed to have been a screwdriver to Fabian's neck. Regarding Martinez's prior record, the court noted that one was quite recent, and that Martinez's criminal history showed the current offense was committed while he was on juvenile probation; further, he had incurred multiple violations of probation.

The court concluded that Martinez was a danger to the public in denying the request to strike the finding under the Strikes law allegation. While the resulting

sentence is long, Martinez will be eligible for parole in his 25th year. (§ 3051, subd.

(b)(3).) The court properly exercised its discretion.

v) *Whether the Matter Should Be Remanded to Give the Court the Opportunity to Exercise Discretion to Strike Martinez’s Serious Felony Prior Pursuant to the Amendment to Section 1385*

Defendant also argues that his case should be remanded to give the trial court an opportunity to exercise its discretion under section 1385 to strike or dismiss Martinez’s “nickel prior,” the five-year enhancement imposed pursuant to section 667, subdivision (a). The People agree, as do we.

Prior to the enactment of Senate Bill 1393, which amended section 1385, a trial court’s authority to strike prior convictions of serious felonies when imposing an enhancement imposed by section 667, subdivision (a), commonly referred to as a “nickel prior,” was restricted. (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045.) This was the state of the law at the time the trial court imposed sentence in the present case.

Senate Bill 1393 became effective in January 2019, after the imposition of sentence in the present case, and lifted that restriction. In *People v. Garcia* (2018) 28 Cal.App.5th 961, another panel of this court held that the legislation was ameliorative and therefore entitled to retroactive application to all cases not final on appeal. (*Id.*, at pp. 972-973.) We agree.

At the time of sentencing, a trial court could not consider striking the enhancement. We therefore remand to permit the trial court to exercise its discretion as to whether or not to strike or dismiss the prior serious felony enhancement.

3. *Both Defendants: Whether Defendants Are Entitled to Resentencing Pursuant to People v. Franklin.*

Martinez claims, and Hernandez joins, that he is entitled to a new sentencing hearing pursuant to the California Supreme Court holding in *People v. Franklin* (2016) 63 Cal.4th 261, to make a record of “mitigating evidence tied to his youth.” In the trial court, Martinez’s trial attorney requested leave to submit a written youthful offender statement within 60 days, but apparently did not file anything. Hernandez’s counsel did not file any statement other than a sentencing memorandum, setting forth mitigation. Hernandez was 18 and Martinez was 19 at the time of the murder, and their respective probation reports include their social history.

Because both defendants were over the age of 18 at the time of the offenses, they were not juveniles. Thus, under the factors articulated in *Miller v. Alabama* (2012) 567 U.S. 460 [183 L.Ed.2d 407, 132 S.Ct. 2455], and adopted in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1380, at pages 1388–1390, their respective sentences of 40 years to life and 36 years to life do not categorically violate the Eighth Amendment prohibition against cruel and unusual punishment. (*People v. Gutierrez, supra*, 58 Cal.4th at p. 1380; see also *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482.)

Regarding the sentencing for offenders who were over 18 but younger than 25 at the time of their crimes, we are guided in part by *People v. Perez* (2016) 3 Cal.App.5th 612. In *Perez*, the court concluded that defendant, who was 20 years old at the time of his offenses, was not a juvenile, so the factors articulated in *Miller v. Alabama, supra*, 562 U.S. 460, subsequently adopted in *Gutierrez, supra*, 58 Cal.4th at pages 1388–1390, did not render unconstitutional Perez’s 86-year-to-life sentence as cruel and unusual punishment. However, the court went on to observe that the Legislature had responded to the evolving case law and enacted section 3051, which entitles a prisoner serving a term of 25 years to life to a Youth Offender Parole hearing in the twenty-fifth year of his incarceration, if the offender was under the age of 23 at the time of his offense. (§ 3051, subd. (b)(3).)

The reviewing court recognized that such a youth offender parole hearing would not be meaningful if the defendant did not have an opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing.⁸ Therefore, it concluded he was entitled to a limited remand at which

⁸ Section 3051 currently provides, in pertinent part: “ A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of the controlling offense,” and “(b)(3) A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole . . . at a youth offender parole hearing . . . during the persons 25th year of incarceration. The youth parole eligible date for a person eligible for a youth offender parole hearing under this paragraph shall be the first day of the person’s 25th year of incarceration.”

hearing both parties could make an accurate record of the defendant's characteristics and circumstances at the time of the offense so that the Board of Parole Hearings, years later, could discharge its duties and give proper weight to the youth-related factors. (*People v. Perez, supra*, 3 Cal.App.5th at p. 619.) Significantly, at the time of Perez's sentence, the decision in *Franklin* had not been issued. Thus, at the time of the defendant's sentence he was deprived of the opportunity to present such mitigating information. (*Perez, supra*, at p. 619.)

For cases appealed post-*Franklin* but before Senate Bill No. 260 (Senate Bill 260) enacted the youth offender parole hearing process, remand has been ordered for an opportunity to supplement the record with information relevant to that parole hearing. (*People v. Rodriguez* (2018) 4 Cal.5th 1123, 1131.) In *Rodriguez*, the California Supreme Court reasoned that although a defendant sentenced before the enactment of Senate Bill 260 could have introduced such evidence through existing sentencing procedures, he or she would not have had reason to know that the subsequently enacted legislation would make such evidence particularly relevant in the parole process. (*Ibid.*)

Subsequently, the Supreme Court extended this policy to cases that had become final in *In re Cook* (2019) 7 Cal.5th 439, 451. Again, the key factor was whether the defendant had an adequate opportunity to make a record of youth related factors to be considered at a future youth offender parole hearing.

Nevertheless, in *Cook*, the Supreme Court held that section 1203.01 provided an adequate remedy at law precluding review on habeas corpus. (*In re Cook, supra*, 7

Cal.5th at p. 452.) Specifically, the court pointed to section 1203.01, subdivision (a), which permits counsel for the defendant, the People, and the probation officer to file statements of their views respecting the defendant and the crime of which he or she was convicted. (*Cook, supra*, at p. 453.)

More recently, it has been held that the availability of the section 1203.01, subdivision (a) procedure satisfies the goals of *Franklin*, which is not to influence the trial court's discretionary sentencing decisions but to preserve information relevant to the defendant's eventual youth offender parole hearing. (*People v. Sepulveda* (2020) 47 Cal.App.5th 291, 300, citing *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1132; *Franklin, supra*, 63 Cal.4th at pp. 283–284.)

Here, both defendants were sentenced in 2018, approximately two years after *Franklin* was decided. Both defendants submitted sentencing memoranda and Martinez submitted numerous letters of support. Martinez's counsel requested and obtained permission to submit a statement of his youthful circumstances, but ultimately did not, demonstrating familiarity with *Franklin*. That option is still available to both defendants, in the event there is additional information that would be relevant to their future youth offender parole hearings. The factors compelling a limited remand in *Franklin* and *Perez* are not present here where the defendants as well as the probation department submitted relevant evidence.

As for defendants' alternative claim that their trial counsel were ineffective for failing to put mitigating factors relating to their youth on the record, they have failed to

demonstrate prejudice, in which circumstance we may reject the claim without determining the deficiency or sufficiency of counsel’s performance. (*People v. Carrasco* (2014) 59 Cal.4th 924, 982; *People v. Mendoza* (2000) 24 Cal.4th 130, 164; *People v. Kipp* (1998) 18 Cal.4th 349, 366, 368.) Neither defendant indicates that the availability of the procedure for submitting information pursuant to section 1203.01 is inadequate. Remand to make such a record is unnecessary.

DISPOSITION

The convictions are affirmed. We remand Hernandez’s sentence in order to give the trial court an opportunity to exercise its discretion under section 1385 to strike or dismiss the section 12022.53, subdivision (d) enhancement and to resentence him if the court strikes or dismisses the enhancement. Similarly, we remand Martinez’s sentence to give the trial court an opportunity to exercise its discretion under section 1385 to strike or dismiss the enhancement alleged pursuant to section 667, subdivision (a), and to resentence the defendant in the event the court decides to strike the enhancement. In all other respects, the sentences are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.