STRIKING FIREARMS ENHANCEMENTS UNDER PENAL CODE SECTIONS 12022.5 AND 12022.53

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I. INTRODUCTION

Penal Code section 12022.5[1] provides a sentence enhancement of 3, 4, or 10 years for the commission or attempted commission of any felony with the defendant's personal use of a firearm. (§ 12022.5, subd. (a).) If the firearm is an assault weapon, the enhancement is 5, 6, or 10 years. (§ 12022.5, subd. (b).) Section 12022.53 provides a sentence enhancement for the commission or attempted commission of designated felonies of 10 years for the personal use of a firearm (§ 12022.53, subd. (b)), 20 years for the personal and intentional discharge of a firearm (§ 12022.53, subd. (c)), and a term of 25 years to life for the personal and intentional discharge of a firearm causing great bodily injury or death (§ 12022.53, subd. (d)). The enhancement also applies to a person who is a principal in the commission of a gang offense under section 186.22, subdivision (b), and commits an act listed in section 12022.53, subdivisions (b), (c) or (d). (§ 12022.53, subd. (e).)

Prior to the amendment of sections 12022.5 and 12022.53, they specified that "[n]otwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (§§ 12022.5, subd. (c), and 12022.53, subd. (h).) Effective January 1, 2018, as a result of the enactment of SB 620, these sections now provide that "[t]he 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. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c), and 12022.53, subd. (h).)

II. APPLICABLE CONVICTIONS

It is clear that the court's authority to strike firearms enhancements will apply to crimes committed on or after January 1, 2018, the effective date of SB 620. The more difficult question is whether such authority exists for crimes committed prior to that date. Resolution of this issue depends upon application of the seminal case of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). *Estrada* stands for the principle that: "When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323, citing *Estrada*, at pp. 742-748.) "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Estrada*, at p. 76.) "The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses." (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) *Estrada* has also been applied to circumstances where there is no *actual* reduction of a penalty, but only the *possibility* of such a reduction. (See, *e.g*., *People v. Francis* (1969) 71 Cal.2d 66 [crime changed from straight felony to a "wobbler"; possibility of a lesser sentence triggered *Estrada* (*Francis*, at p. 75)]; *People v. Superior Court (Lara)*(2018) 4 Cal.5th 299 [Proposition 57 for juvenile cases creates a potential of less punishment, making *Estrada* applicable].)

People v. Robbins (2018) 19 Cal.App.5th 660; *People v. Woods* (2018) 19 Cal.App.5th 1080; and *People v. Chavez* (2018) 21 Cal.App.5th 971, conclude *Estrada* applies to the potential reduction of the firearm enhancements. For a discussion of whether a case must be remanded to the trial court for consideration of a motion to strike the gun enhancement, see section IV, *infra*.

In *People v. Harris* (2018) 22 Cal.App.5th 657 (*Harris*), the court rejected defendant's request to recall a remittitur issued in her case to permit consideration of the amendments to sections 12022.5 and 12022.53. The defendant had appealed her conviction, the conviction was affirmed, and the appellate court issued its remittitur nearly a year prior to the effective date of the new legislation. The defendant sought relief pursuant to *People v. Mutch* (1971) 4 Cal.3d 389 (*Mutch*). As observed in *Harris*: "A remittitur may only be recalled for 'good cause' (Cal. Rules of Court, rule 8.272(c)(2).) Other than to correct clerical errors, 'good cause' generally exists only when a judgment was secured by fraud, mistake or inadvertence. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 165, 188 Cal.Rptr. 104, 655 P.2d 306.) ' " This remedy [recalling the remittitur], though described in procedural terms, is actually an exercise of an extraordinary substantive power ... ; its significant function is to permit the court to set aside an erroneous judgment on appeal obtained by improper means.' " ' (*In re Richardson* (2011) 196 Cal.App.4th 647, 663, 126 Cal.Rptr.3d 720.) [¶] Defendant makes no claim of fraud, mistake or inadvertence. She further makes no claim of clerical error or that the judgment was obtained by improper means. She instead solely relies on the principle espoused by our Supreme Court in *Mutch* that, while error of law generally does not authorize the recalling of a remittitur, an exception exists when 'the error is of such dimensions as to entitle the defendant to a writ of habeas corpus.' (*People v. Mutch*, *supra*, 4 Cal.3d at p. 396, 93 Cal.Rptr. 721, 482 P.2d 633.) This exception is known as the 'excess of jurisdiction' exception. (*People v. Boyd* (1979) 24 Cal.3d 285, 291, 155 Cal.Rptr. 367, 594 P.2d 484; *In re Miller* (2017) 14 Cal.App.5th 960, 979, 222 Cal.Rptr.3d 691.) Defendant's reliance on *Mutch* is misplaced. (*Harris*, at p. 660.) "Our Supreme Court has repeatedly cited *Mutch* as an example of a case *not* involving application of new law. (See *People v. Guerra* (1984) 37 Cal.3d 385, 399, fn. 13, 208 Cal.Rptr. 162, 690 P.2d 635; *Woosley v. State of California* (1992) 3 Cal.4th 758, 794, 13 Cal.Rptr.2d 30, 838 P.2d 758.) Our Supreme Court has also 'emphasize[d] the narrowness of [the excess of jurisdiction] exception,' limiting it to cases involving application of law to undisputed facts. (*In re Harris* (1993) 5 Cal.4th 813, 840, 21 Cal.Rptr.2d 373, 855 P.2d 391.) The excess of jurisdiction exception applied in *Mutch* only applies when legal error occurred in the trial court, and the appellate court determines, based on the undisputed facts, the defendant

suffered a conviction for conduct that did not amount to a crime under the relevant penal statute. (See *In re Walker* (1974) 10 Cal.3d 764, 787, 112 Cal.Rptr. 177, 518 P.2d 1129; *In re Brown* (1973) 9 Cal.3d 612, 624-625, 108 Cal.Rptr. 465, 510 P.2d 1017.) The exception does not apply here. Defendant does not claim the court erred when it imposed her sentence because the amendment took effect only after her case was final." (*Harris*, at pp. 660-661; emphasis in original; footnote omitted.)

People v. Baltazar (2020) 57 Cal.App.5th 334 (*Baltazar*), holds the statutory amendment has no application to a case that is final when the new law went into effect. (*Id*. at pp. 339-340.)

In *People v. Humphrey* (2020) 44 Cal.App.5th 371, the defendant's conviction became final prior to the request to consider a motion for resentencing to strike a firearms allegation. The finality of the sentence was not effected by the trial court correcting a clerical error in the abstract of judgment.

For a further discussion of cases on appeal, see the discussion, *infra*.

Juvenile adjudications

The authority to strike firearms allegations extends to juvenile adjudications. "The Legislature expressly extended the authority of a trial court to strike or dismiss a section 12022.53 enhancement 'to any resentencing that may occur pursuant to *any* other law.' (§ 12022.53, subd. (h), italics added.)6 Although ' "[t]here is no 'sentence,' per se, in juvenile court," ' the dispositional hearing conducted in that court is equivalent to a sentencing hearing in criminal (adult) court. ([*People v. Superior Court (Lara)*(2018) 4 Cal.5th 299,] 306, 228 Cal.Rptr.3d 394, 410 P.3d 22.) This being the case, we believe the Legislature intended to extend Senate Bill No. 620's reach so as to afford juvenile courts the discretion whether to strike or dismiss firearm enhancements." (*People v. Hargis* (2019) 33 Cal.App.5th 199, 210.)

Convictions based on plea agreements

The ability of the court to strike a firearms enhancement in a non-final conviction applies in circumstances where the original conviction and sentence was the result of a plea agreement. "While the analysis in [*People v. Superior Court (Lara)*(2018) 4 Cal.5th 299], unlike that in [*People v. Harris* (2016) 1 Cal.5th 984,] did not depend on express indications of the electorate's intent, but rather was premised on the implication that the electorate had incorporated the 'inference of retroactivity' by not expressly indicating otherwise, the result in both cases was that the change in the law was deemed to be retroactive. We can see no reason why this distinction should alter the impact on plea agreements. If the electorate or the Legislature expressly or implicitly contemplated that a change in the law related to the consequences of criminal offenses would apply retroactively to all nonfinal cases, those changes logically must apply to preexisting plea agreements, since most criminal cases are resolved by plea agreements." (*People v. Baldivia* (2019) 28 Cal.App.5th 1071, 1079.)

III. EXERCISE OF DISCRETION

A. Timing of exercise of discretion

Unless otherwise specified, the authority of the court to grant relief under section 1385 may be exercised at any stage of the proceedings. "A court may properly exercise its discretion under section 1385 to dismiss a charge in the furtherance of justice at any time before, during, and after trial, even after the return of a jury verdict of guilty. (*People v. Orin* (1975)13 Cal. 3d 937, 946.)" (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 94.)

Sections 12022.5, subdivision (c), and 12022.53, subdivision (h), however, specify the authority under section 1385 is to be exercised "at the time of sentencing" or at the time of "any resentencing that may occur pursuant to any other law." Although there is nothing in the legislative history that explains this limitation of the court's authority, the plain meaning of the statutory language limits the exercise of discretion to sentencing or resentencing proceedings. As observed in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 524, fn. 11: "Indeed, to strike a sentencing allegation after trial may in some cases be preferable to striking before trial, because the court after trial has heard the evidence relevant to the defendant's culpability and, thus, is better prepared to decide whether the interests of justice make it advisable to exercise the power to strike under section 1385."

Accordingly, proceedings where the court will have the ability to grant relief will include the original sentencing, sentencing following the revocation of probation, remand for resentencing as a result of an appeal or writ proceeding, and resentencing under such circumstances as are authorized by Proposition 36 for strike offenses (§ 1170.126) and Proposition 47 for drug and theft offenses (§ 1170.18). Because sections 12022.5, subdivision (c), and 12022.53, subdivision (h), reference the authority to dismiss the firearms enhancements at "*any resentencing* that may occur pursuant to any other law," there will be the ability to dismiss the enhancements at any resentencing proceeding where the defendant's previous sentence is put at issue, even though the specific reason for the resentencing is unrelated to the firearms enhancements or their base terms. (Emphasis added.)

In any event, the authority under section 1385, unless otherwise indicated, ends with the pronouncement of judgment. "Although the discretion of a trial judge to dismiss a criminal action under . . . section 1385 in the interests of justice 'may be exercised at any time during the trial, including after a jury verdict of guilty' [citation], this statute has never been held to authorize a dismissal of an action after the imposition of sentence and rendition of judgment." (*People v. Barraza* (1994) 30 Cal.App.4th 114, 121, fn. 8, citing *People v. Benjamin* (1957) 154 Cal.App.2d 164, 173; in accord is *People v. Orabuena*, *supra* at p. 97.) Of course, the ability of the court to exercise section 1385 discretion at any resentencing proceeding is an exception to this rule.

B. Factors the court may consider in exercising discretion.

The principles governing the exercise of discretion under section 1385 have been well established by case law, primarily in connection with the exercise of discretion to dismiss a strike allegation under the Three Strikes law. (For a full discussion of the exercise of discretion under section 1385 in the context of the Three Strikes law, see Couzens and Bigelow, "California Three Strikes Sentencing," Chapter 10, The Rutter Group, 2017.") Guidance for the court's exercise of discretion in firearms crimes may be found in these cases. The standard may be briefly summarized.

In the seminal case of *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), the Supreme Court held a trial court should exercise its discretion to dismiss prior convictions in a manner to reflect both the rights of the defendant and the interests of society; in any event, the reasons to dismiss must be such as would motivate a "reasonable judge."

In a subsequent case, *People v. Carmony* (2004) 33 Cal.4th 367, 377–378, the court discussed the proper approach to a request to dismiss a strike: '' '[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts' discretion in sentencing repeat offenders.' [Citation.] To achieve this end, 'the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme."' [Citation.] ¶ "Consistent with the language of and the legislative intent behind the three strikes law, we have established stringent standards that sentencing courts must follow in order to find such an exception. '[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385[, subdivision] (a), 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.' [Citation.] [¶] . . . [¶] ". . . For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce[] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case."

People v. Pearson (2019) 38 Cal.App.5h 112 (*Pearson*), discussed the factors that may be considered by the court in determining whether to exercise its discretion to strike a firearms enhancement. "In addition to the factors expressly listed for determining whether to strike enhancements listed in California Rules of Court, rule 4.428(b), the trial court is also to consider the factors listed in California Rules of Court, rule 4.410 (listing general objectives in sentencing), as well as circumstances in aggravation and mitigation under rules 4.421 and 4.423. '[U]nless the record affirmatively reflects otherwise,' the trial court is deemed to have considered the factors enumerated in the California Rules of Court. (Cal. Rules of Court, rule 4.409.) Among other factors the court may have considered were that '[t]he crime involved great violence ... threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness,' that the 'defendant was armed with or used a weapon at the time of the commission of the crime,' and that the 'victim was particularly vulnerable.' (Cal. Rules of Court, rule 4.421(a)(1)-(3).) Indeed, the record reflects that the trial court *did* consider these factors. When the trial court referred to the victim as a 'special needs individual,' it expressly considered that '[t]he victim was particularly vulnerable.' (Cal. Rules of Court, rule 4.421(a)(3).) When the trial court referred to the defendant and McMiller 'execut[ing the victim] in cold blood,' it expressly considered whether '[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness' and that '[t]he defendant has engaged in violent conduct that indicates a serious danger to society.' (Cal. Rules of Court, rule 4.421(a)(1), (b)(1).) When the trial court referred to there being sufficient evidence with regard to the gun allegation, it expressly considered whether '[t]he defendant was armed with or used a weapon at the time of the commission of the crime.' (Cal. Rules of Court, rule 4.421(a)(2).)" (*Pearson*, at p. 117; emphasis in original.)

People v. Yanaga (2020) 58 Cal.App.5th 619 (*Yanaga*), also discussed the factors the court may consider in determining whether to strike a gun enhancement. As observed by Yanaga: " '[I]t is well settled that when a case is remanded for resentencing after an appeal, the defendant is entitled to "all the normal rights and procedures available at his original sentencing" [citations], including consideration of any pertinent circumstances which have arisen since the prior sentence was imposed [citation].' [Citations.] ['[W]here a sentence has been vacated and the issue remanded to the trial court for resentencing, the trial court must consider information concerning defendant's postoriginal sentencing behavior contained in a supplemental probation or corrections report']; [citation] ['we hold that upon remand for resentencing, *even when the defendant is ineligible for probation*, if the resentencing court has discretion to alter the length of the defendant's imprisonment, it must obtain a new, updated probation report, *including information regarding the defendant's behavior while incarcerated during the pendency of any appeal*, before proceeding with the resentencing' (italics added)] [Citations.] ['Consideration of postconviction behavior is not an act of mercy, grace or forgiveness .... Rather, consideration of such evidence merely strengthens the court's ability to fit the punishment to the crime *and* the particular defendant'].)" (*Yanaga*, *supra*, 58 Cal.App.5th at pp. 625-626.)

People v. Parra Martinez (2022) 78 Cal.App.5th 317 (*Parra Martinez*), affirmed the trial court's denial of a motion to dismiss the gun enhancements. "Here, the record demonstrates the trial court considered the appropriate circumstances and exercised its discretion in a reasonable manner when it declined to strike the firearm enhancements imposed at the time of defendant's sentencing. At the outset of the remand hearing, the court announced it had given an 'indicated ruling' alerting the parties it was not going to strike the enhancements based on factors considered at the time of sentencing, which it had again considered for the remand hearing. The factors noted at the time of sentencing included the mitigating circumstance that defendant had no significant prior criminal history and the aggravating facts that he had made threats of great bodily injury and/or death, and that he was armed with and used a weapon at the time of the offense. [¶] At the remand hearing, the court 'appreciate[d]' defendant was apologetic but recalled he had not taken the opportunity to express remorse when he was sentenced but had instead denied using a gun and kept trying to place the blame on the victims. The court noted defendant did not merely have passive control over the firearm. Rather, he held a loaded gun to a person's head and threatened to kill them, conduct the court deemed 'very serious.' The court also found defendant had taken advantage of a position of trust based on the girlfriend's previous dating relationship with him. It described the girlfriend as a particularly vulnerable victim, and recounted the facts that defendant had taken her to a remote location where he forced her out of the car at gun point, then actually held the gun to her head while asking if he should kill her or her father." (*Parra Martinez*, *supra*, 78 Cal.App.5th at pp. 322-323.)

Nazir v. Superior Court (2022) 79 Cal.App.5th 478 (*Nazir*), reversed the denial of the trial court's order denying a motion to dismiss gun enhancements under section 1385. The specific error to the trial court was its refusal to consider the new policy of the Los Angeles District Attorney to dismiss all sentence enhancements for any pending cases. The reasons for the policy were relevant in determining whether the enhancements should be dismissed. The court also observed, however, that it is exclusively within the court's discretion to grant the request for dismissal. "Contrary to the position of the district attorney, however, a prosecutor's motion to dismiss an enhancement under section 1385 is not 'a constitutionally protected exercise of prosecutorial discretion,' and the trial court may deny such a motion. As discussed, once a district attorney files charges and invokes the court's jurisdiction, only the court, not the district attorney, can dismiss an action or enhancement under section 1385. [Citations.] The district attorney's argument the trial court 'lack[s] the power to deny' a prosecutor's motion under section 1385 is contrary to the Legislature's decision in 1872 to abolish nolle prosequi." (*Nazir*, *supra*, 79 Cal.App.5th at pp. 499-500.)

C. The extent of the exercise of discretion under section 1385

Section 1385, subdivision (a), grants the court authority to dismiss "an action" in the interests of justice. The authority to dismiss also applies to enhancements. (*People v. Bradley* (1998) 64 Cal.App.4th 386.) The authority to dismiss an enhancement includes dismissal of the entire enhancement or only the punishment based on the enhancement. Section 1385, subdivision (c)(1), specifies that "[i]f the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a)."

D. Effect of striking a firearms enhancement on length of custody, eligibility for probation, and custody credits

Whether the court strikes the entire enhancement or only its punishment may have a significant impact on the defendant's status. Much will depend on the timing of the court's exercise of discretion under section 1385, and the extent of the relief granted.

If the court grants relief by striking the entire enhancement prior to conviction by verdict or plea, there is little doubt that the defendant will be relieved from all penalties and disabilities normally attendant the enhancement – simply put, the defendant will stand as though never convicted of the enhancement. The defendant will receive the normal punishment for the base term, and will receive normal custody credits and will be eligible for probation determined according to the base term. As noted above, however, in the context of sections 12022.5 and 12022.53, the authority under section 1385 only may be exercised at sentencing or a resentencing proceeding. Because "sentencing" contemplates a "conviction," there is at least a question whether the court can ever dismiss the firearm allegations prior to conviction.

If after the defendant's conviction by plea or verdict, the court strikes the entire enhancement or only the punishment, it is clear the defendant will not be required to serve the enhanced custody time on the conviction. It is not entirely clear, however, whether the defendant still will suffer additional penalties and restrictions based on the fact of the enhancement.

Even if the court strikes the entire firearm enhancement *after* conviction, the crime still will qualify as a *prior* serious or violent felony under sections 667.5, subdivision (c)(8) and 1192.7(c)(8) for a *subsequent* proceeding. *People v. Shirley* (1993) 18 Cal.App.4th 40, 47-48, discussed this general circumstance: "The striking of the enhancement for sentencing purposes in the earlier case does not negate the conviction or enhancement nor change the nature of the original offense and its accompanying enhancement. 'The striking or dismissal of a charge of prior conviction (regardless of whether it has or has not been admitted or established by the evidence) is not the equivalent of a determination that defendant did not in fact suffer the conviction...; such judicial action is taken, in the words of defendant's counsel, "for the purpose of sentencing" only and "any dismissal of charges of prior convictions ... does not wipe out such prior convictions

or prevent them from being considered in connection with later convictions." ' (*People v. Burke* (1956) 47 Cal.2d 45, 51, citations omitted; see also *Agresti v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 599, 604-606.) Though a court may strike an enhancement allegation in the interests of justice at sentencing when authorized to do so, the enhancement is not nullified by lenient acts of the sentencing court. [¶] Moreover, even when the court imposes no sentence, the validity of the prior conviction stands for purposes of enhancement statutes. 'For purposes of a "prior conviction" statute, defendant suffers such a conviction when he pleads guilty.' (*People v. Balderas* (1985) 41 Cal.3d 144, 203.) [¶] Had defendant not violated his probation, his plea to the assault and admission of great bodily injury would have been considered a conviction of a serious felony for purposes of section 667. To hold that striking an admitted enhancement for sentencing purposes negates the seriousness of the felony for which defendant was convicted would lead an absurd result rewarding him for violation of his probation. [¶] For all of these reasons, we hold that defendant had previously been convicted of a serious felony when he pled guilty to aggravated assault under section 245 and admitted the great bodily injury enhancement under section 12022.7 and that status was not changed for purposes of subsequent proceedings when the court struck the enhancement for sentencing purposes in the earlier case." (See also *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1525-1532.)

If the court strikes the *entire* firearm enhancement, it is unlikely that the defendant will suffer any additional consequences of the enhancement in the *current* proceeding. Section 12022.53, subdivision (i), specifies "[t]he total amount of credits awarded pursuant to Article 2.5 . . . or pursuant to Section 4019 or any other provision of law shall not exceed 15 percent of the total term of imprisonment imposed on a defendant *upon whom a sentence is imposed* pursuant to this section." (Emphasis added.) Accordingly, for the purposes of custody credits under section 2933.1 or eligibility for probation under section 12022.53, subdivision (g), sentencing will be determined as if the defendant was convicted only of the base term. However, if the court strikes only the *punishment* for the enhancement, sentencing will be determined with the existence of the enhancement in play – the defendant will remain subject to the restriction on probation under section 12022.53, subdivision (g), and the 15 percent conduct credit limitations of section 2933.1.

Care must be exercised in applying the foregoing concepts to the custody credit limitations under section 2933.1 when the enhancement is pursuant to section 12022.53. Even if the court strikes the entire firearm enhancement, certain crimes listed in section 12022.53, subdivision (a), will remain a violent felony under section 667.5, subdivision (c). For example, all murders, robberies and kidnappings are violent felonies whether or not committed with a firearm. In other circumstances, whether a crime listed in section 12022.53, subdivision (a), remains a violent felony after dismissal of the entire firearm enhancement will depend on the precise nature of the crime. For example, while any rape under sections 261 or 262 is subject to the firearm enhancement under section 12022.53, only rapes under section 261, subdivisions (a)(2)

or (6), or section 262, subdivisions (a)(1) or (4), will remain a violent felony without the firearm enhancement. (§ 667.5, subd. (c)(3).)

The court may strike the enhancement that is part of the conviction and impose a lesser included enhancement. In *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*), defendant was convicted to murder with the discharge of a firearm causing death or great bodily injury under section 12022.53, subdivision (d). The court has the discretion to impose the lesser included enhancements under section 12022.53, subdivisions (b) or (c), even though the lesser included enhancement was not charged or found true by the trier of fact. "The court had the discretion to impose an enhancement under section 12022.53, subdivision (b) or (c) as a middle ground to a lifetime enhancement under section 12022.53, subdivision (d), if such an outcome was found to be in the interests of justice under section 1385." (*Morrison*, at p. 223.) "The question of whether the court may elect to impose uncharged lesser firearm enhancements as part of its discretion under Senate Bill 620 and the amended version of section 12022.53, subdivision (h) only arises in cases where those enhancements have not been charged in the alternative and found true, making remands on this ground considerably less 'cumbersome and costly' than the wholesale remand of silent record Three Strikes cases considered in *Fuhrman*. (*Id.* at p. 946, 67 Cal.Rptr.2d 1, 941 P.2d 1189.) And after the publication of our decision today, the usual presumption that a sentencing court correctly applied the law will apply and will ordinarily prevent remand where the record is silent as to the scope of a court's discretion. (See *Fuhrman*, *supra*, 16 Cal.4th at p. 945, 67 Cal.Rptr.2d 1, 941 P.2d 1189.) Additionally, the 'lesser firearm enhancement' issue only arises when the court has been asked to strike a greater enhancement under section 12022.53, making it unreasonable to infer, as in *Fuhrman*, that in many cases the issue was not mentioned simply because the parties thought an exercise of discretion unlikely. (Cf. *Fuhrman*, *supra*, 16 Cal.4th at pp. 945–946, 67 Cal.Rptr.2d 1, 941 P.2d 1189.) Assuming *Fuhrman* would be decided the same way today, it presents different circumstances than the case before us." (*Morrison*, at pp. 224-225.)

In *People v. Tirado* (2019) 38 Cal.App.5th 633 (*Tirado*), the court held if the defendant is charged with and convicted only of an enhancement under section 12022.53, subdivision (d), the court has the authority to dismiss the enhancement under section 12022.53, subdivision (h), but does not have the authority to substitute enhancements under section 12022.53, subdivisions (b) or (c). If, however, the prosecution has charged and the jury has found true enhancements under section 12022.53, subdivisions (b), (c) and (d), the court may dismiss the enhancement under subdivision (d) and impose one of the other two enhancements, or dismiss them under subdivision (h). *Tirado* has been granted review by the Supreme Court.

E. Presence of the defendant

No published case has addressed whether the defendant must be personally present for any resentencing proceeding when the court considers whether to strike a firearms enhancement. A similar issue was addressed in *People v. Cutting* (2019) 42 Cal.App.5th 344 (Cutting), in the context of striking a prior narcotics conviction under Health and Safety Code section 11370.2, subdivision (a). Cutting held the defendant has a constitutional right to be present; his absence without a valid waver was prejudicial.

IV. CASES ON APPEAL

As discussed above, *Estrada* has been held applicable to the amendment of sections 12022.5 and 12022.53 as to cases not final as of January 1, 2018. (See *People v. Robbins* (2018) 19 Cal.App.5th 660, *People v. Woods* (2018) 19 Cal.App.5th 1080, and *People v. Chavez* (2018) 21 Cal.App.5th 971.) The following material discusses a number of issues related to the potential remand of these cases to the trial court.

A. Whether remand is necessary in every non-final case

Although it is not a perfect analogy, reference to the cases following the *Romero* decision offer some guidance on the question of whether all cases not yet final, regardless of circumstances, should be returned to the trial court to determine whether section 1385 relief should be granted.

Before the Supreme Court's decision in *Romero*, appellate courts were divided as to whether a trial court had the discretion to dismiss a strike pursuant to section 1385. *Romero* concluded the courts did have such discretion. In *People v. Fuhrman* (1997) 16 Cal.4th 930, 944, the Supreme Court described *Romero* as establishing " 'that where the record affirmatively discloses that the trial court misunderstood the scope of its discretion [to dismiss prior convictions], remand to the trial court is required to permit that court to impose sentence with full awareness of its discretion as clarified by *Romero.*' "

With respect to SB 620, the issue is not the trial court misunderstanding the scope of its discretion. Instead, it is clear that the court had no discretion to dismiss a firearm enhancement before the amendment was enacted and, on and after January 1, 2018, the court does have such discretion. Remand will be necessary to allow the trial court to exercise this discretion. (See *e.g.*, *People v. Francis* (1969) 71 Cal.2d 66, 79 [amendment to Health and Safety Code section 11530 providing trial court discretion to impose alternative sentences was retroactive; remand for resentencing was required].)

B. Silent record issue

Following *Romero*, there was a split among the appellate courts regarding whether remand for resentencing was necessary when the record was silent as to the trial court's understanding of the scope of its discretion. The *Fuhrman* court concluded that "in the absence of any affirmative indication in the record that the trial court committed error or would have exercised discretion under section 1385 to strike the prior conviction if it believed it had such discretion," the appellate court should deny a request for remand, without prejudice to the defendant's seeking relief in a petition for writ of habeas corpus. (*Fuhrman*, at pp. 944-945.)

It is not clear, however, that this reasoning would apply to SB 620. Prior to SB 620, trial courts did not have discretion to dismiss the firearm enhancements. Thus, a "silent" record is less ambiguous. It is not that the trial court misunderstood its discretion; the court had no discretion. In that context, it would seem that either where the sentencing court expressly indicated it had no discretion to strike or dismiss a firearm enhancement, or where the record is silent, the case must be remanded to give the sentencing court an opportunity to exercise its discretion in cases where the appeal is not yet final.

People v. Winfield (2021) 59 Cal.App.5th 496, held remand was required because the record did not indicate whether the court would grant or deny the request to strike the firearms allegation.

C. Record affirmatively discloses that trial court would not have exercised its discretion to dismiss enhancement

There may be a few cases where the record *affirmatively discloses* that, even if it had the discretion to dismiss the enhancement, the trial court would not have exercised that discretion. This is a circumstance similar to the conclusion in *Romero* that "remand is not required where the trial court's comments indicate that even if it had authority to strike a prior felony conviction allegation, it would decline to do so." (*Fuhrman, supra,* 16 Cal.4th at p. 944., citing *Romero, supra,* 13 Cal.4th at p. 530, fn. 13; see *e.g.*, *People Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [no remand where court indicated it would not have exercised its discretion to lessen sentence].) Thus, if the trial court fortuitously indicated that it would not dismiss the enhancement even if it had the discretion to do so, no remand is required.

Most of the appellate courts follow the rule as expressed in *Gutierrez* in determining whether a case should be remanded to the trial court for consideration of a motion to strike the firearm enhancement. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"]; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 [remand required unless record "clearly indicates" court would not consider striking the enhancement]; and *People v. McVey* (2018) 24 Cal.App.5th 405 [statement by the trial

court that the "high term of 10 years on the enhancement is the only appropriate sentence on the enhancement"].) The Supreme Court referenced the *McDaniels* decision as stating the appropriate measure of whether a case should be returned to the trial to consider striking a weapons enhancements. (See *People v. Mataele* (2022) 13 Cal.5th 372, 437.)

In *People v. Johnson* (2019) 32 Cal.App.5th 26, 69, the court ordered remand notwithstanding some fairly strong statements by the trial court, where such a remand should be made "in an abundance of caution:" "We need not remand the instant matter if the record shows that the superior court 'would not ... have exercised its discretion to lessen the sentence.' (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, 56 Cal.Rptr.2d 529.) The People contend the sentences imposed by the trial court below combined with the court's comments at sentencing show the court would not have exercised its discretion to strike the firearm enhancement applied to Johnson or the serious prior felony enhancement applied to Guthrie. With respect to Johnson, the Attorney General points out that the trial court stated that the enhancement, which was mandatory at that time, 'appears to me to be entirely appropriate.' With respect to Guthrie, the Attorney General points to the court's statement that it 'ha[d] no discretion to strike' the serious prior and 'wouldn't strike if [it] did have discretion.' The People also point out that in concluding dismissal of the defendants' prior strikes was not appropriate, the court noted the murder was a sophisticated, planned execution, that the men committed the crime despite having no personal motive to kill Canady, and that they were both previously convicted of murder. [¶] Although the trial court was not sympathetic to either Johnson or Guthrie, it is undisputed that the court had no discretion, at that time, to strike the firearm use enhancement or the serious prior felony enhancement, and neither defendants' trial counsel had the opportunity to argue the issues. The subsequently enacted laws provided the court with that discretion, greatly modifying the court's sentencing authority. Thus, even with the court's statements during sentencing, out of an abundance of caution, we remand this matter for resentencing to allow the superior court to consider whether Johnson's firearm enhancement and Guthrie's serious prior felony enhancement should be stricken."

The standard for remand was succinctly stated in *People v. Almonza* (2018) 24 Casl.App.5th 1104, 1110: "The *McDaniels* court and now we agree on what is the appropriate standard to adopt when a trial court is unaware it has the discretion to reduce a sentence. Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. (See *People v. Gutierrez*, *supra*, 48 Cal.App.4th 1894, 56 Cal.Rptr.2d 529.) Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." Generally in accord with *Almonza* is *People v. Allison* (2019) 39 Cal.App.5th 688.

D. When it would be an abuse of discretion to dismiss the enhancement

A few pre-*Fuhrman* cases applied an implicit prejudicial error analysis to determine remand was unnecessary in post-*Romero* cases. In *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, 1054, the record was silent as to whether the court believed it had discretion to dismiss alleged prior convictions. However, the record established it would have been a manifest abuse of discretion for the court to strike the priors. As a result, the appellant suffered no prejudice and remand was unnecessary. (See also *People v. Askey* (1996) 49 Cal.App.4th 381, 389, fn. 3 [striking prior convictions would have been an abuse of discretion so remand would be an idle act].) Presumably similar reasoning could apply in the context of SB 620. If the record establishes it would have been a manifest abuse of discretion to strike or dismiss a firearm enhancement, remand is unnecessary. (But see *People v. Banks* (1997) 59 Cal.App.4th 20, 23-24 [rejecting the argument that remand is unnecessary because dismissing strikes would be an abuse of discretion; reviewing court had little to review as trial court did not consider whether dismissal would be in furtherance of justice].)

There may be some question as to whether, or to what extent, the prejudicial error analysis in *DeGuzman, Askey*, or similar cases survived *Fuhrman*. These cases were "silent record" cases. *Fuhrman* did not discuss the prejudicial error analysis—it concluded that if the record was silent as to whether the court understood its discretion, the court should deny a request for a remand on appeal. The defendant's option was to pursue the issue on a writ of habeas corpus rather than on an appeal.

E. Nature of hearing on remand

If a hearing is held on remand to determine whether the court should strike the firearm enhancements, the defendant is entitled to an actual hearing to offer evidence and argument, to be represented by counsel, and to be present. (*People v. Rocha* (2019) 32 Cal.App.5th 352.)

F. Jurisdiction of court to strike firearms enhancement after case final

The authority of the court to modify a judgment once pronounced generally is limited to section 1170, subdivision (d). Once the case is final, the court has no jurisdiction to dismiss the firearms enhancements. "Defendant's motion for resentencing was not based on the trial court's limited authority to resentence under § 1170, subdivision (d). Instead, defendant argued he was entitled to resentencing under the recently enacted Senate Bill No. 620. The Legislature may give defendants whose judgments are final the benefits of newly enacted laws. (See, e.g., *Teal v. Superior Court* (2014) 60 Cal.4th 595, 600, 179 Cal.Rptr.3d 365, 336 P.3d 686 ['Section 1170.126 creates a substantial right to be resentenced and provides a remedy by way of a statutory postjudgment motion']). Senate Bill No. 620, however, does not contain language authorizing resentencing of

convictions after they became final. And absent any new authority to resentence defendant under Senate Bill No. 620, the trial court lacked jurisdiction to grant defendant's resentencing request. (See *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1725, 8 Cal.Rptr.2d 610.) Because the trial court lacked jurisdiction to modify defendant's sentence, denial of his motion to modify his sentence could not have affected his substantial rights. (*Id.* at p. 1726, 8 Cal.Rptr.2d 610.) Accordingly, the 'order denying [the] motion to modify sentence is not an appealable order,' and the appeal must be dismissed. (*Ibid.*)" (*People v. Fuimaono* (2019) 32 Cal.App.5th 132, 135.) In accord with *Fuimaono* are *People v. Johnson* (2019) 32 Cal.App.5th 938, and *People v. Hernandez* (2019) 34 Cal.App.5th 323.

G. Convictions based on plea agreements, no certificate of probable cause

The appellate courts disagree over the effect of a plea agreement on the ability of the court to later strike a firearms enhancement. *People v. Hurlic* (2018) 25 Cal.App.5th 50 (*Hurlic*) and *People v. Baldivia* (2019) 28 Cal.App.5th 1071 (Baldivia), hold the ability of the court to strike a firearms enhancement in a non-final conviction applies in circumstances where the original conviction and sentence was the result of a plea agreement. Remand may be made even though the appeal was filed without a certificate of probable cause. "As a general rule, a criminal defendant who enters a guilty or no contest plea with an agreed-upon sentence may challenge that sentence on appeal only if he or she first obtains a certificate of probable cause from the trial court. (Pen. Code, § 1237.5, subd. (a);1 *People v. Panizzon* (1996) 13 Cal.4th 68, 76, 51 Cal.Rptr.2d 851, 913 P.2d 1061 (*Panizzon*); *People v. Cuevas* (2008) 44 Cal.4th 374, 384, 79 Cal.Rptr.3d 303, 187 P.3d 30 (*Cuevas*).) Does this general rule apply when the defendant's challenge to the agreed-upon sentence is based on our Legislature's enactment of a statute that retroactively grants a trial court the discretion to waive a sentencing enhancement that was mandatory at the time it was incorporated into the agreed-upon sentence? We conclude that the answer is 'no,' and hold that a certificate of probable cause is not required in these narrow circumstances." (*Hurlic*, at p. 53.) "While the analysis in [*People v. Superior Court (Lara)*(2018) 4 Cal.5th 299], unlike that in [*People v. Harris* (2016) 1 Cal.5th 984,] did not depend on express indications of the electorate's intent, but rather was premised on the implication that the electorate had incorporated the 'inference of retroactivity' by not expressly indicating otherwise, the result in both cases was that the change in the law was deemed to be retroactive. We can see no reason why this distinction should alter the impact on plea agreements. If the electorate or the Legislature expressly or implicitly contemplated that a change in the law related to the consequences of criminal offenses would apply retroactively to all nonfinal cases, those changes logically must apply to preexisting plea agreements, since most criminal cases are resolved by plea agreements. It follows that defendant's appellate contentions were not an attack on the validity of his plea and did not require a certificate of probable cause." (*Baldivia*, at p. 1079.)

People v. Fox (2019) 34 Cal.App.5th 1124(*Fox*), on the other hand, holds a request on appeal for remand to consider striking a firearms enhancement imposed as part of a plea agreement is an attack on the validity of the plea and requires a certificate of probable cause. "We reject Fox's view of Senate Bill No. 620, and in so doing decline to adopt the analysis of *People v. Hurlic* (2018) 25 Cal.App.5th 50 (*Hurlic*) and other decisions following it. We agree that Senate Bill No. 620 applies to defendants whose judgments were not final when the law took effect, that it permits those who did not agree to serve a specific term for a firearm enhancement to seek resentencing, and that it permits those who did agree to a specific sentence to seek to withdraw from their pleas. But we perceive no legislative intent to authorize trial courts to reduce agreed-upon sentences while otherwise permitting defendants to retain the benefits of their plea agreements and avoid the likely risk of having to continue defending against the charges. Fox, who entered his plea after Senate Bill No. 620 was passed but happened to be sentenced before it took effect, is asking for an extraordinary remedy to which no defendants currently being sentenced are entitled. Since the only relief Fox could obtain under Senate Bill No. 620 would require him to challenge the validity of his plea by seeking to withdraw it, we must dismiss his appeal for failure to obtain a certificate of probable cause." (*Fox*, at p. 1127.) *Fox* has been granted review.

APPENDIX A: Penal Code sections 12022.5 and 12022.53, as amended

SECTION 1.
Section 12022.5 of the Penal Code is amended to read:

12022.5.
(a) Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense.

(b) Notwithstanding subdivision (a), any person who personally uses an assault weapon, as specified in Section 30510 or 30515, or a machinegun, as defined in Section 16880, in the commission of a felony or attempted felony, shall be punished by an additional and consecutive term of imprisonment in the state prison for 5, 6, or 10 years.

(c) The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.

(d) Notwithstanding the limitation in subdivision (a) relating to being an element of the offense, the additional term provided by this section shall be imposed for any violation of Section 245 if a firearm is used, or for murder if the killing is perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury or death.

(e) When a person is found to have personally used a firearm, an assault weapon, a machinegun, or a .50 BMG rifle, in the commission of a felony or attempted felony as provided in this section and the firearm, assault weapon, machinegun, or a .50 BMG rifle, is owned by that person, the court shall order that the firearm be deemed a nuisance and disposed of in the manner provided in Sections 18000 and 18005.

(f) For purposes of imposing an enhancement under Section 1170.1, the enhancements under this section shall count as one single enhancement.

SEC. 2.
Section 12022.53 of the Penal Code is amended to read:

12022.53.
(a) This section applies to the following felonies:
(1) Section 187 (murder).
(2) Section 203 or 205 (mayhem).
(3) Section 207, 209, or 209.5 (kidnapping).

(4) Section 211 (robbery).
(5) Section 215 (carjacking).
(6) Section 220 (assault with intent to commit a specified felony).
(7) Subdivision (d) of Section 245 (assault with a firearm on a peace officer or firefighter).
(8) Section 261 or 262 (rape).
(9) Section 264.1 (rape or sexual penetration in concert).
(10) Section 286 (sodomy).
(11) Section 288 or 288.5 (lewd act on a child).
(12) Section 288a (oral copulation).
(13) Section 289 (sexual penetration).
(14) Section 4500 (assault by a life prisoner).
(15) Section 4501 (assault by a prisoner).
(16) Section 4503 (holding a hostage by a prisoner).
(17) Any felony punishable by death or imprisonment in the state prison for life.
(18) Any attempt to commit a crime listed in this subdivision other than an assault.

(b) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply.

(c) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years.

(d) 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.

(e) (1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved:
(A) The person violated subdivision (b) of Section 186.22.
(B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).
(2) An enhancement for participation in a criminal street gang pursuant to Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense.

(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. An enhancement involving a firearm specified in Section 12021.5, 12022,

12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).

(g) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person found to come within the provisions of this section.

(h) The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.

(i) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 or pursuant to Section 4019 or any other provision of law shall not exceed 15 percent of the total term of imprisonment imposed on a defendant upon whom a sentence is imposed pursuant to this section.

(j) 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. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another enhancement provides for a greater penalty or a longer term of imprisonment.

(k) When a person is found to have used or discharged a firearm in the commission of an offense that includes an allegation pursuant to this section and the firearm is owned by that person, a coparticipant, or a coconspirator, the court shall order that the firearm be deemed a nuisance and disposed of in the manner provided in Sections 18000 and 18005.

(l) The enhancements specified in this section shall not apply to the lawful use or discharge of a firearm by a public officer, as provided in Section 196, or by any person in lawful self-defense, lawful defense of another, or lawful defense of property, as provided in Sections 197, 198, and 198.5.