

No. S257631

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
HEATHER ROSE BROWN,
Defendant and Appellant.

Third Appellate District, Case No. C085998
Shasta County Superior Court, Case No. 15F2440
The Honorable Stephen H. Baker, Judge

RESPONSE TO MOTION TO EXPAND THE SCOPE OF REVIEW

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August 29, 2022

Pursuant to this Court’s order on August 16, 2022, the People submit this response to appellant’s Motion to Expand the Scope of Review (AMESR). The People agree that Assembly Bill No. 518 (2021-2022 Reg. Sess.) and Senate Bill No. 567 (2021-2022 Reg. Sess.)¹ are retroactive to nonfinal judgments pending on appeal, including this case. The appropriate remedy is to remand to the Court of Appeal with instructions to remand to the trial court for resentencing after this Court decides the instructional-error issue on which it granted review.

Dated: August 29, 2022

Respectfully submitted,

/s/ Cameron M. Goodman
CAMERON M. GOODMAN
Deputy Attorney General

¹ Appellant refers to the legislation as Assembly Bill No. 124 (2021-2022 Reg. Sess). Assembly Bill No. 124 (Stats. 2021, ch. 695, § 5), Assembly Bill No. 1540 (Stats. 2021, ch. 719, § 2), and Senate Bill No. 567 (Stats. 2021, ch. 731, § 1.3) all amended Penal Code section 1170 in various ways, were passed by the Legislature in September 2021, and were signed by the Governor and filed with the Secretary of State on October 8, 2021. Senate Bill No. 567 bears the highest chapter number and presumably was the last approved by the Governor. (Gov. Code, § 9510.) Therefore, Senate Bill No. 567 takes precedence over Assembly Bill No. 124. (Gov. Code, § 9605, subd. (b); *In re Thierry S.* (1977) 19 Cal.3d 727, 738-739.) The People accordingly refer to the legislation as Senate Bill No. 567.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BOTH ASSEMBLY BILL NO. 518 AND SENATE BILL NO. 567 APPLY RETROACTIVELY TO THIS NONFINAL JUDGMENT

Appellant asserts that both Assembly Bill No. 518 and Senate Bill No. 567 apply retroactively to the nonfinal judgment in this case. (AMESR 4-5.) The People agree.

A. Appellant's sentencing

Appellant was sentenced on November 13, 2017. (3CT 747-749; 2RT 1048-1067.) As to the first degree murder (Pen. Code,² §§ 187, subd. (a)) in count 1, the trial court imposed an indeterminate term of 25 years to life. (3CT 748; 2RT 1061.) As to the child abuse (§ 273a, subd. (a)) in count 2, the trial court imposed a middle term of four years and stayed the term pursuant to section 654. (3CT 747; 2RT 1061.) For the possession of heroin for sale (Health & Saf. Code, § 11351) in count 3, the trial court imposed a consecutive middle term of three years. (3CT 747; 2RT 1061.) The trial court imposed a concurrent term of 180 days for the misdemeanor marijuana possession for sale (Health & Saf. Code, § 11359, subd. (b)) in count 4. (3CT 748; 2RT 1061.) Hence, appellant's total prison term amounted to 3 years plus 25 years to life. (3CT 748.)

One week later, the trial court clarified that a four-year enhancement for harm or injury resulting in the death of a child (§ 12022.95) attached to the child abuse in count 2. (2RT 1068.)

² Undesignated statutory references are to the Penal Code.

The cumulative eight-year term on count 2 remained stayed pursuant to section 654. (3CT 751-753; 2RT 1068.) In all other respects, the original sentence remained undisturbed. (3CT 751-753.)

B. Assembly Bill No. 518 changed existing law regarding the trial court’s discretion to stay a sentence under section 654

“Section 654 precludes multiple punishments for a single act or indivisible course of conduct.” (*People v. Hester* (2000) 22 Cal.4th 290, 294.) Under the law applicable at the time of appellant’s sentencing, an act or omission that was punishable in different ways by different laws had to be punished under the law that provided for the longest possible term of imprisonment. (Former § 654, subd. (a).)

Assembly Bill No. 518 amended section 654 by removing the requirement that a defendant shall be punished under the provision providing for the longest term of imprisonment and granting the trial court discretion to impose punishment under any of the applicable provisions. (See Stats. 2021, ch. 441, § 1.) In appellant’s case, the trial court would have had discretion to impose an eight-year sentence on count 2 in lieu of the indeterminate term of 25 years to life imposed on count 1. (See 3CT 747-749, 751-753.)

Because Assembly Bill No. 518 was adopted as non-urgency legislation, it became effective on January 1, 2022. (Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600, subd. (a); *People v. Camba* (1996) 50 Cal.App.4th 857, 865.)

C. Senate Bill No. 567 amended section 1170, subdivision (b), to presume the lower term when specified conditions exist

As pertinent here, effective January 1, 2022, section 1170 was amended to make the lower term the presumptive sentence for a term of imprisonment when certain conditions exist. (Stats. 2021, ch. 731, § 1.3, adding § 1170, subd. (b)(6); see also Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600, subd. (a); *People v. Camba, supra*, 50 Cal.App.4th at p. 865.)

Specifically, newly added subdivision (b)(6) of section 1170 provides:

Notwithstanding paragraph (1), and unless the court finds that the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice, the court shall order imposition of the lower term if any of the following was a contributing factor in the commission of the offense:

(A) The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence.

(B) The person is a youth, or was a youth as defined under subdivision (b) of Section 1016.7 at the time of the commission of the offense.

(C) Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.

Section 1016.7 was also added to the Penal Code, and subdivision (b) of that section provides that “[a] ‘youth’ for purposes of this section includes any person under 26 years of age

on the date the offense was committed.” (Stats. 2021, ch. 695, § 4.) When the offenses occurred in November 2014, appellant was 21 years old. (See 3CT 754, 756 [abstract of judgment stating date of birth].) Hence, appellant was a “youth” within the meaning of section 1016.7. Appellant also received middle terms on counts 2 and 3. (See 3CT 747-749, 751-753.) Therefore, under Senate Bill No. 567, the trial court would have considered whether appellant’s “youth” was a “contributing factor” in the commission of counts 2 and 3, such that a lower-term presumption would have applied.

D. The legislative changes apply retroactively to appellant

As a general rule, no part of the Penal Code “is retroactive, unless expressly so declared.” (§ 3.) However, in *In re Estrada* (1965) 63 Cal.2d 740, this Court held that, absent evidence of legislative intent to the contrary, the Legislature intends ameliorative changes in the law to apply retroactively to all nonfinal convictions on appeal. (See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 306-308 [discussing *Estrada*]; *People v. Brown* (2012) 54 Cal.4th 314, 323 [same].)

Here, Assembly Bill No. 518 applies retroactively to nonfinal judgments because section 654, as amended by the legislation, no longer requires punishment under the longest possible term of imprisonment when multiple offenses are based on the same act or omission. (*People v. Mani* (2022) 74 Cal.App.5th 343, 379 [concluding that Assembly Bill No. 518 applies retroactively]; accord, *People v. Sek* (2022) 74 Cal.App.5th 657, 673 [same].) Likewise, by presuming imposition of a lower term under certain

conditions, recently enacted section 1170, subdivision (b)(6) operates to reduce punishment and applies retroactively to nonfinal judgments. (*People v. Flores* (2022) 73 Cal.App.5th 1032, 1039.) Therefore, appellant’s nonfinal judgment is entitled to the retroactive benefit of Assembly Bill No. 518 and Senate Bill No. 567.

II. THIS COURT SHOULD DECIDE THE INSTRUCTIONAL-ERROR ISSUE ON WHICH IT GRANTED REVIEW BEFORE IT REMANDS FOR RESENTENCING

Appellant offers two possible remedies: “(1) expand the scope of review to consider remanding the case to the trial court for resentencing in light of AB124 and AB518, or (2) remand to the Court of Appeal for it to consider the applicability of AB124 and AB518 to this case.” (AMESR 5-6.) This Court should decide the instructional-error issue on which it granted review prior to remanding for resentencing under the ameliorative legislation.

No dispute exists that the legislation retroactively applies to nonfinal judgments, such as the instant case. Hence, there is no role for the Court of Appeal to play. An immediate remand to the Court of Appeal would unnecessarily prolong this proceeding.

Rather, this Court should first decide the instructional-error issue on which it granted review in November 2019. Then, it should remand to the Court of Appeal with instructions to remand to the trial court for resentencing under the ameliorative legislation. A decision on the instructional-error issue will clarify whether the count 1 conviction should remain a first degree

murder with a punishment of 25 years to life or be reduced to a second degree murder with a punishment of 15 years to life.³ If this Court finds prejudicial instructional error, then the Shasta County District Attorney may also elect to retry appellant for first degree murder. Once this Court has clarified the legality of the count 1 conviction, then the trial court can exercise its resentencing authority under the ameliorative legislation, knowing the length of the count 1 sentence. Until this Court resolves the instructional-error issue, remand is premature.

³ Based on the limited grant of review as to whether “the trial court err[ed] in instructing the jury on the elements of *first degree murder by poison*” (italics added), the People foresee no scenario where count 1 could be anything less than second degree murder.

CONCLUSION

For the foregoing reasons, the People agree that Assembly Bill No. 518 and Senate Bill No. 567 retroactively apply to the nonfinal judgment in the instant case. The People respectfully request that this Court decide the instructional-error issue on which it granted review before it remands to the Court of Appeal with instructions to remand to the trial court for resentencing under the ameliorative legislation.

Respectfully submitted,

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August 29, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONSE TO MOTION TO EXPAND THE SCOPE OF REVIEW uses a 13-point Century Schoolbook font and contains 1,680 words.

ROB BONTA
Attorney General of California

/s/ Cameron M. Goodman

CAMERON M. GOODMAN
Deputy Attorney General
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August 29, 2022

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**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S.
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No.: **S257631**

I declare:

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

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The Honorable Stephanie A.
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Court of Appeal
Third Appellate District
Via TrueFiling

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 29, 2022, at Sacramento, California.

/s/ D. Boggess

Declarant

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. BROWN**
Case Number: **S257631**
Lower Court Case Number: **C085998**

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Date

/s/Diane Boggess

Signature

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