

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

VALDAMIR FRED MORELOS,

Defendant and Appellant.

No. S051968

(Santa Clara Superior
Court No. SC169362)

Death Penalty Case

Appeal from the Judgment of the Superior Court
of the State of California for the County of Santa Clara

THE LATE HONORABLE DANIEL CREED, JUDGE

APPELLANT'S THIRD SUPPLEMENTAL REPLY BRIEF

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APPELLANT’S THIRD SUPPLEMENTAL REPLY BRIEF

I

A. The Parties Agree This Court Must Remand to the Trial Court to Exercise Its Discretion Regarding the Serious Felony and Firearm Enhancements and This Court Must Strike the Invalid One-Year Prior Enhancement

In his Third Supplemental Opening Brief, appellant demonstrated that remand is required to allow the trial court to exercise the discretion conferred by amendments to the firearm and serious felony enhancement statutes and that this Court must strike the now-invalid one-year prison prior enhancement. (See Appellant’s Third Supplemental Opening Brief [hereinafter “TSOB”] at pp. 5-11.) Respondent concedes that the amended firearm and serious felony enhancement statutes confer discretion that was not available to the trial court at the time it imposed them, and that remand is appropriate because “it cannot

be said with certainty that remand is a futile act.” (See Respondent’s Third Supplemental Response Brief [hereinafter “RTSRB”] at pp. 6-8, citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) Respondent also acknowledges that the invalid one-year prison prior must be stricken. (RTSRB at pp. 9-11.) The parties thus agree that this Court must strike the one-year prior and remand to the trial court to allow it to exercise its discretion with respect to the firearm and serious felony enhancements.

B. Precedent Controls and the Three-Year Prior Must Be Stricken if the Trial Court Imposes a Five-Year Serious Felony Enhancement

The only disagreement between the parties is whether – if on remand the trial court chooses to once again impose the five-year serious felony enhancement under Penal Code section 667, subdivision (a) for appellant’s prior conviction of assault with a deadly weapon – the trial court must then strike the three-year prison prior enhancement imposed pursuant to Penal Code section 667.5, subdivision (a) for the same conviction. (Compare TSOB at pp. 11-12 with RTSRB at pp. 11-13.) As appellant demonstrated in his TSOB, and respondent does not contest, this Court concluded in *People v. Jones* (1993) 5 Cal.4th 1142, 1152 (*Jones*) that, when multiple statutory enhancement provisions apply to the same prior offense and one is a serious felony enhancement under Penal Code section 667, subdivision (a), the greatest enhancement will apply and other enhancements are struck. (See TSOB at p. 12; RTSRB at pp. 12-13.) In this case,

the greatest enhancement is the five-year serious felony enhancement under Penal Code section 667, subdivision (a); if it is imposed, the three-year prior should be struck.

Respondent contends that *Jones*'s instruction should not be followed because it is purportedly inconsistent with California Rules of Court, rule 4.447 which requires that duplicative enhancements must be stayed and not struck. But rule 4.447 existed in "virtually the same" form at the time *Jones* was decided. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1128 fn. 7 (*Gonzalez*)). This Court nonetheless concluded, after analyzing the language of Penal Code section 667, that when the five-year serious felony enhancement applies to a prior conviction, other lesser enhancements based on the conviction should be struck. (*Jones, supra*, 5 Cal.4th at pp. 1151-1152 [relying on the language of Pen. Code, § 667, subd. (b)].) This Court's interpretation of Penal Code section 667, subdivision (b) prevails over court rules promulgated by the Judicial Council. (Cf. *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 532 ["Rules promulgated by the Judicial Council may not conflict with governing statutes. [Citation.] If a rule is inconsistent with a statute, the statute controls."].)

Nor are the cases cited by respondent controlling, as none turned on the interpretation of Penal Code section 667. In *Gonzalez, supra*, 43 Cal.4th at p. 1130, for example, this Court held that under Penal Code section 12022.53 the trial court had properly imposed and then stayed punishment on additional prohibited determinate terms for lesser firearm use

enhancements. But the *Gonzalez* Court emphasized that its decision was primarily based not on rule 4.447 but on the language of Penal Code section 12022.53. (See *Ibid.* [“We do not rely on rule 4.447 of the California Rules of Court as a basis for our statutory analysis of section 12022.53.”].) The Court of Appeal cases cited by respondent are similarly inapposite. (See *People v. Lopez* (2004) 119 Cal.App.4th 355, 366 [declining to strike multiple victim special circumstance under one strike law because of language in that statute stating that the “court shall not strike” any special circumstance finding]; *People v. Brewer* (2014) 225 Cal.App.4th 98, 104 [in case involving enhancements under Pen. Code, §§ 667.5, subd. (a) and 667.5, subd. (b), but no serious felony enhancement under Pen. Code, § 667, subd. (a), court relied in part on “express language of [Penal Code section] 667.5[, subd.](b)”].)

Jones has not been overruled by this Court, and it cannot be overruled by court rule. This Court should therefore instruct the trial court on remand to strike the three-year prison prior if it imposes a five-year serious felony enhancement for the same conviction.

CONCLUSION

For the reasons stated in this brief and in appellant's Third Supplemental Opening Brief, this Court should strike the one-year prior and remand to the trial court to exercise its discretion regarding the firearm and serious felony enhancements.

Dated: August 31, 2020

Respectfully submitted,

Mary K. McComb
State Public Defender

/s/ Kathleen M. Scheidel
KATHLEEN M. SCHEIDEL
Assistant Chief Counsel

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2))

I, Kathleen M. Scheidel, am the Assistant Chief Counsel assigned to represent appellant, Valdamir F. Morelos, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of the computer generated word count, I certify that this brief is 915 words in length excluding the tables and this certificate.

Dated: August 31, 2020

Respectfully submitted,

/s/ Kathleen M. Scheidel
KATHLEEN M. SCHEIDEL
Assistant Chief Counsel

Attorney for Appellant

DECLARATION OF SERVICE

Case Name: ***People v. Valdamair Fred Morelos***
Case Number: **Supreme Court Case No. S051968**
Santa Clara County Superior Court No. SC169362

I, **Lauren Emerson**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county of Alameda. My business address is 1111 Broadway, Suite 1000, Oakland, California 94607. I served a true copy of the following document:

APPELLANT'S THIRD SUPPLEMENTAL REPLY BRIEF

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **August 31, 2020**, at San Joaquin County, CA.

/s/ Lauren Emerson

LAUREN EMERSON

STATE OF CALIFORNIA
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA
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/s/Lauren Emerson

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Scheidel, Kathleen (141290)

Last Name, First Name (PNum)

Office of the State Public Defender

