Supreme Court of California
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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHNNY MORALES, Defendant and Appellant.	**Capital Case** No. S137307 (San Bernardino Co. Superior Court No. FVA 015456)

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

HONORABLE INGRID A. UHLER

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THE CASE MUST BE REMANDED TO THE TRIAL COURT TO EXERCISE ITS DISCRETION OVER WHETHER TO STRIKE THE FIREARM ENHANCEMENTS UNDER PENAL CODE SECTIONS 12022.5 AND 12022.53, PURSUANT TO THE RETROACTIVE EFFECT OF THE AMENDEMENTS TO THOSE STATUTES GRANTING THE COURT THAT POWER

A. Introduction

On September 24, 2004, a jury found true: (1) two allegations that Mr. Morales personally used and discharged a firearm (a rifle) causing great bodily injury and death in the commission of the first-degree murder charged in counts one and two, within the meaning of Penal Code section 12022.53, subdivisions (c) and (d); and (2) five allegations that Mr. Morales personally used a firearm in the commission of the murder, robberies and burglaries charged in counts one through five. [1] (3CT 664-667; 27CT 7756-7773, 7784-7785.)[2]

On August 12, 2005, in addition to imposing a death sentence on Mr. Morales, the trial court imposed: (1) a consecutive term of 25 years to life on count one pursuant to section 12022.53, subdivision (d) (2SCT 466); and (2) a consecutive term of four years on count four pursuant to section 12022.5, subdivision (a)(1) (2SCT 467). (See also 29CT 8276-8277.) The court also imposed a term of four years on

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[1] All statutory references are to the Penal Code unless otherwise noted.

[2] "CT" refers to the originally filed Clerk's Transcript on Appeal, preceded by volume number and followed by page number. "SCT" refers to the first supplemental Clerk's Transcript filed on appeal, utilizing the same citation format.

count five pursuant to section 12022.5, subdivision (a)(1), to run concurrent to the principal term imposed on count four. (2SCT 467; 29CT 8276.) Finally, the court imposed but stayed pursuant to Penal Code section 654 the following: (1) 20 years on count one pursuant to section 12022.53, subdivision (c); (2) four years on count one pursuant to section 12022.5, subdivision (a)(1); (3) six years, eight months on count two pursuant to section 12022.53, subdivision (c); (4) one year, four months on count two pursuant to section 12022.5, subdivision(a)(1); and (5) four years on count three pursuant to section 12022.5, subdivision (a)(1). (2SCT 467; 29CT 8276-8277.)

At the time the trial court imposed sentence on the firearm enhancements in this case, trial courts had no discretion to strike them. (See *People v. Thomas* (1992) 4 Cal.4th 206, 208, 212; former Penal Code section 12022.53, subdivision (h) [expressly prohibiting courts from striking enhancements under that statute].) However, the law has since changed. In 2017, the Legislature passed Senate Bill No. 620 (2016–2017 Reg. Sess.), which amended sections 12022.5, subdivision (c) and 12022.53, subdivision (h) to grant trial courts the power to strike firearm enhancements under those statutes in their discretion. On October 11, 2017, the Governor signed Senate Bill No. 620 into law, and it became effective on January 1, 2018. (*People v. Watts* (2018) 22 Cal.App.5th 102, 119; see Stats. 2017, ch. 682, § 2.) As discussed below, because the amendments apply retroactively to all cases pending on appeal, they apply here and the Court should remand the case for resentencing.

B. Senate Bill No. 620 and Amended Penal Code Sections 12022.5 and 12022.53 Apply Retroactively to the Firearm Sentencing Enhancements Imposed on Mr. Morales and Require that the Case be Remanded for Resentencing

Senate Bill No. 620 does not contain an express provision concerning whether it should be applied retroactively. The application of well-settled rules of statutory interpretation, however, compel the conclusion that it should apply here, as this case was pending on appeal when the law was passed.

"Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear with respect to a particular statute, the Legislature's generally applicable declaration in [Penal Code] section 3 provides the default rule: 'No part of [the Penal Code] is retroactive, unless expressly so declared.'" (*People v. Brown* (2012) 54 Cal.4th 314, 319.) However, in *In re Estrada* (1965) 63 Cal.2d 740, 748, this Court articulated an exception to this general rule: "[W]here the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." The rationale for that exception is straightforward. If the Legislature passes a law mitigating punishment, then it must have concluded that the old punishment was too severe. (*In re Estrada, supra*, at p. 745.) If the old punishment was too severe, the more appropriate punishment should apply to as many defendants as

possible. Thus, when a statute lowers a punishment for a crime, it indicates an intent for retroactive application to all cases not yet final on appeal. (*Ibid.*) The same is true of statutory amendments, like those here, that give the trial court discretion to impose a lesser punishment rather than automatically mitigating the greater sentence.

In *People v. Francis* (1969) 71 Cal.2d 66, 75-77, this Court held that the rule set forth in *In re Estrada, supra*, 63 Cal.2d at p. 748, also applies to such amendatory statutes. Specifically, *Francis* held that *Estrada*'s reasoning applied to a statute that changed a felony to a wobbler. (71 Cal.2d at pp. 75-77.) This change granted discretion to the trial court to mitigate punishment. (*Id.* at p. 77.) This Court held that *Estrada* applies to such a change because the Legislature must have determined that "the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*Id.* at p. 76.) Thus, the statute, and the new discretion to reduce the punishment, should apply to all cases that were not yet final on appeal. (*Id.* at p. 77.) Following this logic, the Courts of Appeal have held that the amendments of Senate Bill No. 620 apply retroactively to all cases that were on appeal when the statutory change granted discretion to the court to strike firearm enhancements. (See, e.g., *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080; *People v. Watts, supra*, 22 Cal.App.5th at p. 119; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.)

Because Mr. Morales's convictions are not yet final on appeal, Senate Bill No. 620 and the amended versions of sections 12022.5, subdivision (c) and 12022.53, subdivision (h), apply retroactively to this case. Remand is the appropriate remedy when a law passes while an appeal is pending that gives the trial court discretion to lessen punishment. (*People v. Francis, supra*, 71 Cal.2d at pp. 77-79.) While remand may be unnecessary if the trial court "clearly indicated that it would not . . . have exercised its discretion to strike the allegations" even if it had discretion (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530, fn. 13), the trial court made no such indication in this case. This Court should vacate the sentence and remand the case to the trial court to exercise its discretion to consider striking the firearm enhancements imposed under sections 12022.5 and 12022.53. Because imposing and staying an enhancement is legally distinct from striking it (see, e.g., *People v. Calhoun* (1983) 141 Cal.App.3d 117, 124-126), the trial court must exercise that discretion as to all of the firearm enhancements it imposed, including those it imposed but ordered stayed.

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CONCLUSION

For all of the foregoing reasons, the trial court should vacate the sentence and remand to the trial court for an exercise of its discretion.

Dated: August 10, 2020

Respectfully Submitted,

MARY K. MCCOMB
State Public Defender

/s/ C. Delaine Renard
C. DELAINE RENARD
Supervising Deputy State Public Defender

Attorneys for Appellant

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

I, C. Delaine Renard, am the Supervising Deputy State Public Defender assigned to represent appellant, Johnny Morales, 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 1,252 words in length excluding the tables and this certificate.

Dated: August 10, 2020 Respectfully Submitted,

/s/ C. Delaine Renard
C. DELAINE RENARD
Supervising Deputy State Public Defender

Attorney for Appellant

DECLARATION OF SERVICE

Re: PEOPLE v. JOHNNY MORALES Supreme Court No. S137307
(Superior Court No. FVA015456)

I, Kecia Bailey, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; I served a true copy of the attached:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

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4-EY-31
CSP-SQ
San Quentin, CA 94974

CLERK OF THE COURT
San Bernardino County Superior Court
247 West 3rd Street
San Bernardino, CA 92415-0063

Each said envelope was then, on, August 10, 2020 sealed and deposited in the United States mail at Sacramento, California, with the postage thereon fully prepaid.

ELECTRONIC SERVICE
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I declare under penalty of perjury that the foregoing is true and correct.

Signed on this August 10, 2020 at Sacramento, California.

/s/ Kecia Bailey
Kecia Bailey

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Jorge E. Navarrete, Clerk and Executive Officer of the Court
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STATE OF CALIFORNIA
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Case Name: **PEOPLE v. MORALES (JOHNNY)**
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8/10/2020
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/s/Kecia Bailey
Signature

Renard, C. Delaine (169893)
Last Name, First Name (PNum)