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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOHNNY MORALES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S137307

San Bernardino County Superior Court
Case No. FVA015456
The Honorable Ingrid A. Uhler, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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ARGUMENT

THE CASE SHOULD NOT BE REMANDED TO THE TRIAL COURT TO EXERCISE ITS DISCRETION TO STRIKE THE FIREARM ENHANCEMENTS

The jury found true the firearm enhancement allegations (Pen. Code, §§ 12022.5, subd. (a), 12022.53, subds. (c), (d))[1] against Morales with respect to counts 1 through 5. (13RT 2778-2783.) The trial court imposed two consecutive sentences of 25 years to life for the section 12022.53, subdivision (d) enhancements on counts 1 and 2, but stayed the sentence as to count 2. (14RT 3302-3303.) The trial court also imposed two four-year sentences for the section 12022.5, subdivision (a)(1) enhancements on counts 4 and 5, with the sentence on count 5 running concurrent to count 4. (14RT 3301-3302.) The trial court imposed but stayed the remaining firearm enhancements on counts 1 through 3. (14RT 3302-3303.)

At the time of Morales's sentencing, former sections 12022.5, subdivision (c) and 12022.53, subdivision (h) prohibited the trial court from striking the firearm enhancements. However, in 2017, the Legislature passed Senate Bill No. 620, which amended both sections to provide trial courts the discretion to strike or dismiss an enhancement imposed by that section in the interest of justice. (§§ 12022.5, subd. (c), 12022.53, subd. (h)) Morales argues that remand is necessary to allow the trial court to

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

exercise its discretion to strike the enhancements under these new provisions. (SAOB 5-9.)

As an initial matter, respondent concedes that Senate Bill No. 620 applies retroactively to this case, which is not yet final on appeal. (*People v. Flores* (2020) 9 Cal.5th 371, 431.) However, a remand is not required because it would be an idle act. (*Id.* at p. 432.)

When a court is unaware of its discretion with respect to some aspect of sentencing, the appropriate remedy is to remand for resentencing unless the record "'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) Here, the record clearly demonstrates that the trial court would not exercise its discretion to strike Morales's firearm enhancements.

When denying Morales's automatic motion to modify the death verdict, the trial court described the viciousness of Morales's crime:

> The defendant was the principal participant in invading two homes to commit residential robbery. One belonging to the victim Elia Torres. He terrorized the victim and her young children, rounding them up and holding them hostage at gunpoint. He dragged the victim down the hallway[,] participated in pulling down her pants and removing her underwear, obviously, in my opinion, for the purpose of committing a sexual assault or at least that is the reasonable interpretation of that evidence. And only – and simply only for the reason that the victim recognized him, he callously in cold blood executed the victim. He then left her half-naked and dead to be later found by her small children.

(14RT 3285.)

The trial court further found, "The impact of that conduct on those left behind has been horrific." (14RT 3285.) "The life of four children will never be the same. A mother has lost a daughter, when it should be the other way around. A sister lost her sister and best friend and four children have lost their mother." (14RT 3285.)

Last, the trial court considered Morales's prior felony conviction of corporal injury to a spouse, noting that "[h]e certainly was old enough to know better and understand his conduct," and that the mitigating factors (growing up in poverty, witnessing abuse, and abandonment/attachment issues) did not garner much sympathy. (14RT 3285-3286.) After independently weighing the evidence, the trial court "determined the weight of the evidence supports the jury's verdict of death in this case." (14RT 3286.)

In *People v. Flores*, *supra*, 9 Cal.5th at p. 432, this court rejected Flores's argument that remand was required in light of Senate Bill No. 620. Based on remarks the trial court made at sentencing about how Flores was deserving of death, this court determined that remand would be an "idle act." (*Ibid.*) "Given that the trial court explicitly said it thought it 'just[ ]' for defendant to receive a death sentence—the most severe sentence available under California law—it is clear the trial court would not have exercised its discretion to eliminate the firearm enhancements 'in the interest of justice,' had such discretion been available to it at the time of sentencing. . . ." (*Ibid.*)

Similarly, here, the trial court expressed its belief that Morales was deserving of death given how atrocious the crime was and the impact it had on the victims. Additionally, while the trial court could have stayed all of the firearm enhancements pending Morales's death sentence, it did not, and instead intentionally imposed two of those sentences to run consecutively to the death sentence. Under these circumstances, there is no possibility that the trial court would exercise its discretion to strike the firearm enhancements, and a remand is not required.

CONCLUSION

For the reasons stated above and in respondent's brief, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: September 8, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Supplemental Respondent's Brief uses a 13-point Century Schoolbook font and contains 847 words.

Dated: September 8, 2020

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No.: **S137307**

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 11, 2020, at San Diego, California.

Kimberly Wickenhagen	s/ Kimberly Wickenhagen
Declarant	Signature

Supreme Court of California
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9/11/2020

Date

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Signature

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Department of Justice, Office of the Attorney General-San Diego

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