IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **JOSE GUADALUPE TIRADO,** Defendant and Appellant.	**S257658**

Fifth Appellate District No. F076836
Kern County Superior Court No. BF163811A
Honorable John Oglesby, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I. UNDER PENAL CODE SECTIONS 12022.53 AND 1385, A TRIAL COURT HAS DISCRETION TO STRIKE ELEMENTS OF THE SECTION 12022.53, SUBDIVISION (D) ENHANCEMENT FOR THE PURPOSE OF IMPOSING A REDUCED SENTENCE UNDER SECTION 12022.53, SUBDIVISION (B) OR (C)

Section[1] 12022.53, subdivision (h) provides that a section 12022.53 enhancement may be stricken or dismissed pursuant to section 1385, which in turn grants the power to strike or dismiss an action or any part thereof. Appellant maintains that a court may strike an element of an enhancement in the interest of justice in order to reduce the defendant's sentence. This interpretation is consistent with the powers included in section 1385 and best effectuates the purpose of Senate Bill 620, which is

[1] Unless otherwise stated, references to statutes are to the Penal Code.

to avoid unjust sentences by allowing the trial court to fit the punishment to the offender.

A. The People's Narrow Interpretation of the Scope of Section 12022.53, Subdivision (h) Must be Rejected Because it Fails to Account for the Unenumerated Powers Contained in Section 1385

The main premise of the People's argument is that a court does not have the power under section 1385 to strike an element of a section 12022.53 enhancement because that power is not explicitly set forth in section 12022.53, subdivision (h), which provides that a court may "strike or dismiss an enhancement" but does not reference "elements" of an enhancement. (ABM 15-18.)[2]

Appellant agrees that subdivision (h) does not expressly reference "elements," but this is not the end of the inquiry. Because subdivision (h) makes the court's power to strike or dismiss an enhancement "pursuant to section 1385," the power granted under subdivision (h) incorporates the power granted in section 1385. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 522-523 (*Romero*) [use of phrase "pursuant to section 1385" incorporated that section without limitation].) Thus, the scope of subdivision (h) is necessarily governed by the scope of section 1385.[3]

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[2] "ABM" refers to respondent's Answer Brief on the Merits. "OBM" refers to appellant's Opening Brief on the Merits.

[3] The People appear to agree with this premise, as the People do not dispute that in addition to striking a section 12022.53 enhancement, the court also has the power to strike just the additional punishment for the enhancement – a power which is not expressly set forth in section 12022.53, subdivision (h) but is included in section 1385, subdivision (b)(1).

The People's position assumes that all powers granted in section 12022.53, subdivision (h) must be specifically delineated in subdivision (h) or section 1385 itself, or they do not exist. But it is clear from case law that section 1385 includes a number of "lesser" powers not expressly provided for in the text of section 1385 or other related statutes. The most obvious example is section 1385, subdivision (a): although the express language provides that a court may dismiss "an action," section 1385 has been construed to permit the court to strike or dismiss *part* of an action. (*People v. Burke* (1956) 47 Cal.2d 45, 51 (*Burke*).) If this court had adhered in *Burke* to the narrow, literal interpretation now urged by the People, then section 1385 would have been construed to permit dismissal of an entire criminal action but not part of an action (because if, as the People assert, "enhancement" does not mean "element of an enhancement" (ABM 16), then "action" does not mean "part of an action"). If the People's interpretation were correct, *Burke* would have to be invalidated, because it construes section 1385 to allow for partial dismissal of an action even though this power is not expressly stated in the text of section 1385.

Other examples of powers included in section 1385 but not enumerated in the statute abound. Section 1385 has been construed to allow a court to strike a strike allegation as to one count while retaining it as to other counts (*People v. Garcia* (1999) 20 Cal.4th 490, 492-493), even though the ability to selectively strike allegations for one purpose but not another is not spelled out in section 1385 nor set forth in the relevant

portion of the three strikes statute (§ 667, subd. (f)(2)). And, although section 1385 now explicitly provides that instead of dismissing an enhancement the court may strike just the additional punishment for the enhancement (§ 1385, subd. (b)(1), formerly subd. (c)(1)), trial courts had this authority even before section 1385 was amended to expressly provide for it. (*People v. Fuentes* (2016) 1 Cal.5th 218, 228-229 ["trial courts *already* had the authority to strike just the punishment of a sentencing enhancement, even before [former] section 1385(c)(1) was added in 2000"], original italics.)

Moreover, in *Romero*, this court explicitly rejected the argument that a statute must "exhaustively enumerate" all of the court's powers with respect to striking or dismissing an allegation. (*Romero*, *supra*, 13 Cal.4th at pp. 522-524.) Rather, where a statute makes the court's power to act "pursuant to section 1385," this is sufficient to incorporate all of the powers included in section 1385. (*Ibid.*)

Thus, the People's suggestion that section 12022.53, subdivision (h) does not include the power to strike an element of an enhancement – simply because the term "element" or other equivalent language is not used in subdivision (h) – must be rejected. Subdivision (h) makes the court's power to strike an enhancement "pursuant to section 1385," and section 1385 includes the power to strike part of an enhancement, such as an element, in order to reduce a defendant's sentence. Accordingly,

there is no need for subdivision (h) to expressly provide for the power to strike an element of an enhancement.[4]

B. Section 1385 Includes the Authority to Dismiss an Element of an Enhancement

1. As an Allegation That Forms Part of the Criminal Action, an Element of an Enhancement is Subject to Dismissal Under Section 1385

The People contend that a trial court's broad discretion under section 1385 does not include the authority to strike an element of an enhancement because section 1385 is limited to dismissal of "actions," and "there are as many 'actions' as there are counts or charges" because different counts may be tried separately. (ABM 19.) To the extent the People mean to suggest that dismissal authority under section 1385 is limited to individual charges or counts because each count is an "action" in itself, this is incorrect. An "action" refers to *all* of the charges and allegations in the accusatory pleading. (*People v. Hernandez* (2000) 22 Cal.4th 512, 521 (*Hernandez*), citing §§ 683-684 [an "action" is a criminal proceeding by which a party is accused and brought to trial and punishment; it "consists of *all* charges and allegations prosecuted . . . against the person charged with the offense"], emphasis added.) Thus, regardless of whether different

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[4] To the extent the People suggest that by granting the power to strike an "enhancement," as opposed to a "finding" or "allegation," the Legislature intended to prevent courts from striking elements of an enhancement (ABM 16-17), this argument should be rejected for the reasons set forth in Argument I.C.

counts could be tried separately, when they are charged together they form a single criminal action. [5]

In any event, section 1385 is not limited to entire "actions," as it is well established that section 1385 allows a court to dismiss a part of a criminal action. (*Burke*, *supra*, 47 Cal.2d at p. 51.) An element of an enhancement – such as the allegation that defendant caused great bodily injury or death within the meaning of section 12022.53 – is clearly a part of the criminal action because it must be alleged in the information (§ 12022.53, subd. (j)), making it subject to dismissal under section 1385. (BOM 24-25; *Varnell*, *supra*, 30 Cal.4th at pp. 1138-1139 [only facts required to be alleged in the accusatory pleading can be dismissed under § 1385 because in the absence of a charge or allegation, there is nothing for the court to dismiss]; *People v. Lara* (2012) 54 Cal.4th 896, 900-901 (*Lara*) [accord].)

The People acknowledge that *Burke* allows a court to strike a part of a criminal action under section 1385, but assert that this does not apply to elements of an enhancement because an element of an enhancement "is not an action, a count, or a charge,

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[5] *In re Varnell* (2003) 30 Cal.4th 1132, 1137 (*Varnell*), cited by the People (ABM 19), is not to the contrary. Although *Varnell* cites *Hernandez* for the proposition that an action means the "individual charges and allegations in a criminal action," this does not mean that each charge is an "action" or that only whole charges may be dismissed. Rather, it simply recognizes that section 1385 only applies to the contents of the accusatory pleading. (*Hernandez*, *supra*, 22 Cal.4th at pp. 521-522 [explaining that under *Burke*, section 1385 allows for dismissal of "some or all of the *criminal charges or allegations* against the defendant in the indictment or information"], original italics.)

as it does not constitute a distinct offense that a defendant has committed." (ABM 19-20.) However, an enhancement is also not a distinct offense that a defendant has committed (*People v. Strickland* (1974) 11 Cal.3d 946, 961 (*Strickland*) [enhancements do not define a crime or offense but relate to the penalty to be imposed]), yet the court's section 1385 dismissal authority clearly applies to enhancements. (*People v. Thomas* (1992) 4 Cal.4th 206, 209-210 (*Thomas*) [collecting cases].) And, under the governing principle established in *Burke* that the power to dismiss the whole includes the power to strike out a part (*Burke*, *supra*, 47 Cal.2d at p. 51), the authority to dismiss an enhancement necessarily includes the power to strike a part of that enhancement, such as an element. To the extent *Burke* did not specifically consider whether section 1385 allows a court to strike part of an enhancement, this does not mean the rule from *Burke* cannot be applied to new situations, as this court has done in numerous other cases. (See, e.g., *People v. Williams* (1981) 30 Cal.3d 470 (*Williams*); *Romero*, *supra*, 13 Cal.4th 497.)

In addition, this court has repeatedly recognized that section 1385 can be used to dismiss "factual allegations related to sentencing," which increase the punishment for alleged criminal conduct. (OBM 20-21; *Romero*, *supra*, 13 Cal.4th at p. 504; *People v. Tanner* (1979) 24 Cal.3d 514, 518; *Lara*, *supra*, 54 Cal.4th at p. 900-901.) The great bodily injury element of section 12022.53, subdivision (d) is exactly this type of allegation, because it elevates the punishment for firearm use under section 12022.53 from 20 years under subdivision (c) to 25 years to life

under subdivision (d). Thus, while a great bodily injury allegation may not be "an action, a count, or a charge," as a factual allegation relevant to sentencing it is still the type of allegation that can be stricken under section 1385.

2. *People v. Marsh*

In the opening brief, appellant explained at length how *People v. Marsh* (1984) 36 Cal.3d 134 (*Marsh*) supports appellant's argument that section 1385 includes the power to strike an element of an enhancement for the purpose of imposing a reduced sentence. (BOM 25-31.) *Marsh* involved a substantive offense: kidnapping for ransom with bodily harm, in violation of section 209, subdivision (a). (*Id*. at p. 137.) In *Marsh*, this court approved of the trial court using section 1385 to reduce the defendant's sentence by striking ransom and bodily harm allegations from the section 209 offense. This was permissible even though these allegations were *not* separately or individually alleged but were included in the aggravated kidnapping offense. (*Id*. at pp. 143-144.) Thus, *Marsh* stands for the proposition that allegations that increase punishment – such as elements of an offense – can be stricken under section 1385 even when they are included within another charge. Appellant's argument is that this same rationale should apply in the context of an enhancement, such as section 12022.53.

The People contend *Marsh* does not support appellant's position because the ransom and bodily harm allegations are more analogous to section 12022.53 enhancements than to elements of the kidnapping offense. (ABM 20-21.) It is true the

ransom and bodily harm allegations are "similar *in effect*" to a weapons use enhancement in that they require an increased sentence.[6] (*Marsh*, *supra*, 36 Cal.3d at p. 143, emphasis added.) However, as *Marsh* acknowledged, they are not identical, as ransom and bodily harm are not "individual" or "separate" allegations but are contained within the section 209 offense. (*Ibid*.) In other words, ransom and bodily harm are not enhancements to section 209, subdivision (a) but part of the offense. Ransom must be an element of section 209, subdivision (a), as kidnapping for ransom (§ 209, subd. (a)) without the ransom element is just simple kidnapping. (See *People v. Rayford* (1994) 9 Cal.4th 1, 11 [observing that kidnapping for purposes of robbery and ransom (§§ 209, subd. (a), (b)) "are clearly separate crimes from, not enhancements to, simple kidnapping"].) Thus, by allowing the trial court to strike the ransom allegation, *Marsh* allowed the trial court to strike an element of the substantive aggravated kidnapping offense in order to reduce the defendant's sentence. Applying this rule in the context of an enhancement, section 1385 likewise allows a court to reduce a defendant's sentence by striking an element of an enhancement.

The logic of *Marsh* is particularly applicable to section 12022.53, as the elements of section 12022.53 are nested in the

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[6] The ransom element elevates simple kidnapping (§ 207) to aggravated kidnapping (§ 209, subd. (a)), whereas the bodily harm element elevates the punishment for kidnapping for ransom from life with the possibility of parole to life without the possibility of parole (§ 209, subd. (a)).

same manner as the kidnapping statutes, in that removal of an element results in a corresponding decrease in punishment. As noted above, the penalty for kidnapping for ransom with bodily harm (§ 209, subd. (a)) is life without the possibility of parole. If the bodily harm element is removed, the penalty is reduced to life with the possibility of parole. (§ 209, subd. (a).) If the ransom element is also removed, the penalty is reduced from life to a determinate term. (§ 207.) Section 12022.53 operates in a similar fashion. The penalty for personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)) is 25 years to life. If the bodily injury element is removed, the penalty is reduced to 20 years. (§ 12022.53, subd. (c).) If the discharge element is also removed, the penalty is reduced from 20 years to 10 years. (§ 12022.53, subd. (b).) Just as in *Marsh* section 1385 permitted the trial court to achieve a more favorable disposition by striking two aggravating elements of the substantive section 209 offense, section 1385 likewise permits a court to strike aggravating elements of a section 12022.53 enhancement, where individualized consideration of the offense and the offender calls for a reduced sentence.

The People next assert that *Marsh* did not "consider or approve of striking an element of an enhancement so as to reduce an enhancement to a lesser included but uncharged enhancement." (ABM 21-22.) But *Marsh* necessarily considered and approved of a reduction to an uncharged lesser included offense, albeit in the context of a substantive offense and not an enhancement. This conclusion is inescapable, because if the

ransom and bodily harm allegations are removed from the section 209, subdivision (a) offense, the resulting offense is simple kidnapping (§ 207). Simple kidnapping is both different and less serious than kidnapping for ransom with bodily harm. Thus, by allowing the trial court to strike both the ransom and bodily harm allegations in order to reduce the defendant's sentence to one that allowed for a Youth Authority commitment, the court necessarily approved of sentencing the defendant on the uncharged but lesser included offense of simple kidnapping.

If the court can strike an element of a substantive offense – such as the ransom element of kidnapping for ransom under section 209, subdivision (a) – then the court should also be able to strike an element of an enhancement – such as a great bodily injury allegation under section 12022.53, subdivision (d). There is no principled reason why this same rule should not apply in the context of enhancements. Enhancements are for the most part concerned with penalties (*Fuentes*, *supra*, 1 Cal.5th at p. 225), and the whole point of section 1385 is to relieve a defendant of adverse sentencing consequences – i.e. by lessening the penalty – when a shorter sentence would further the interest of justice. (*Burke*, *supra*, 47 Cal.2d at pp. 50-51; *Williams*, *supra*, 30 Cal.3d at p. 482; *People v. Dorsey* (1972) 28 Cal.App.3d 15, 17-18.)

The People further assert that the rule of *Marsh* should not apply because section 12022.53, subdivision (h) contains a "specific statutory prohibition" limiting the court's section 1385 power to strike elements of an enhancement. (ABM 22.) Not so. Subdivision (h) grants the power to strike or dismiss a section

12022.53 enhancement. Nothing about this language *granting* section 1385 dismissal authority can reasonably be construed as a limitation on the court's section 1385 discretion. (See *infra*, Arg. I.C.)

Finally, the People assert that *Marsh* should be limited to its facts because it is inconsistent with a case decided over fifty years earlier, *People v. Superior Court* (*Prudencio*) (1927) 202 Cal. 165. (ABM 22.) In *Prudencio*, the defendant was convicted of first degree murder. (*Id*. at p. 167.) However, when pronouncing judgment, the court assumed the defendant had been convicted of second degree murder and pronounced judgment on this basis, stating it found the evidence did not sustain a verdict of first degree murder. (*Id*. at pp. 168-169.) The defendant argued in the Supreme Court that section 1385 authorized the trial court's decision. This court rejected the argument, stating: "This procedural section manifestly does not give the court the right to disregard the verdict of a jury and pronounce a sentence that does not respond to the verdict as rendered. The chapter under which said section is found shows that it has no relevancy to the question of the court's refusal to act upon the verdict in the manner provided in the code. *The dismissal of an action or indictment goes to the indictment as a whole*, which may include a number of degrees of the crime pleaded." (*Id*. at p. 173, emphasis added.)

Although this court has never explicitly overruled *Prudencio* on this point, the reasoning in *Prudencio* is not consistent with later Supreme Court cases. *Prudencio's*

conclusion that a court could not dismiss one degree of murder while retaining jurisdiction over the other degrees was based on the rule at the time that section 1385 could only apply to dismissal of the accusatory pleading as a whole. (*Prudencio*, *supra*, 202 Cal. at p. 173.) However, this is no longer the rule. In *Burke*, *supra*, 47 Cal.2d at p. 51, this court determined that the "authority to dismiss the whole includes, of course, the power to dismiss or 'strike out' a part." When making this statement, this court cited *Prudencio*, prefacing that citation with "Cf." (*Burke*, *supra*, Cal.2d at p. 51.) This abbreviation is short for the Latin confer/conferatur, both meaning "compare." It is used to refer the reader to other material to make a comparison with the topic being discussed. In *Burke*, it appears to have been used to announce that the law had changed.

By the time *Marsh* was decided in 1984, the new rule that section 1385 authorizes dismissal of an action or part of an action was well established. As a result, there was no need for *Marsh* to address *Prudencio*, as *Prudencio's* rationale was necessarily overruled by *Burke*. Further, although the People contend *Marsh* did not provide authority for how a court could retain jurisdiction over a lesser charge while dismissing part of the greater charge, this is not the case. Among other authority, *Marsh* relied on *Burke*, and applied *Burke's* principle that the power to dismiss the whole includes the power to strike out a part, meaning a court could dismiss part of the section 209, subdivision (a) offense while retaining jurisdiction over the remaining charge. (*Marsh*, *supra*, 36 Cal.3d at pp. 143-144.)

Thus, although the People and appellant agree that *Marsh* and *Prudencio* are inconsistent, the remedy is not to limit *Marsh*. Rather, this court should instead take this opportunity to explicitly overrule *Prudencio*, insofar as it is inconsistent with *Burke* and out of step with current case law interpreting the scope of section 1385.

C. Neither Section 12022.53, Subdivision (h) Nor the Legislative History of Senate Bill 620 Support the People's Argument That Subdivision (h) Was Intended to Limit Section 1385 Discretion

1. The Grant of Authority in Subdivision (h) Is Not a Limitation on Section 1385 Discretion

A trial court's discretion under section 1385 is "absolute except where the Legislature has specifically curtailed it." (*People v. Superior Court* (*Howard*) (1968) 69 Cal.2d 491, 502.)

Here, the People assert that section 12022.53, subdivision (h) is inconsistent with section 1385 and, as the more specific statute, should control to the exclusion of section 1385. (ABM 24-25.)

Certainly, the Legislature has the power to restrict section 1385 discretion, and if it had done so in section 12022.53, subdivision (h), such a limitation would prevail. However, there is no inconsistency between section 12022.53, subdivision (h) and section 1385. Section 1385 grants the court broad authority to dismiss an action, which includes the power to strike enhancements and their corresponding penalties. (§§ 1385, subd. (a)-(b).) Section 12022.53 provides for a number of firearm enhancements and subdivision (h) authorizes a court to strike a

section 12022.53 enhancement under section 1385. Subdivision (h) simply makes clear that a firearm enhancement under section 12022.53 may be dismissed or stricken under section 1385.

The People's argument that subdivision (h) restricts section 1385 discretion because its grants narrow authority to strike an enhancement, while section 1385 grants broad authority to dismiss an action, is similar to the argument considered and rejected in *Fuentes*, *supra*, 1 Cal.5th 218. *Fuentes* addressed a provision of the gang statute expressly granting the power to strike the additional punishment for a gang enhancement (§ 186.22, subd. (g)). (*Id*. at pp. 227-229.) The People argued that because the power granted in section 186.22, subdivision (g) was more narrow than the power granted under section 1385 (which permits a court to dismiss the enhancement itself *or* the additional punishment), section 1385 was "necessarily inconsistent" with and should yield to section 186.22, subdivision (g), meaning that a court could dismiss the additional punishment for a gang enhancement but not the enhancement itself. This court disagreed, concluding that the overlap in the power granted in section 1385 and 186.22, subdivision (g) was not "clear" evidence the Legislature intended for section 186.22, subdivision (g) to restrict section 1385 discretion. (*Id*. at pp. 229-231.)

Similarly, in *Romero*, *supra*, 13 Cal.4th 504, this court considered a grant of discretion set forth in the three strikes statute, which provides: "The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the

furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation." (§ 667, subd. (f)(2).) The People argued that by expressly authorizing a trial court to strike a prior conviction for insufficient evidence, this provision simultaneously eliminated the court's power to strike prior conviction allegations sua sponte under section 1385. (*Id*. at p. 522.) This court disagreed, reasoning the statute did not have to "exhaustively enumerate" all of the court's powers with respect to striking prior convictions. Rather, inclusion of the phrase "pursuant to section 1385" showed the court's section 1385 power was in full effect. (*Id*. at pp. 522-524.) Thus, the trial court retained its section 1385 discretion to strike prior convictions on its own motion. (*Id*. at pp. 529-530.)

As is evident from *Fuentes* and *Romero*, this court has been careful not to read a *grant* of dismissal authority as an implicit limitation on section 1385 discretion. This court should exercise that same caution here.

2. There Is No Clear Evidence the Term "Enhancement" in Subdivision (h) Was Intended to Prevent Trial Courts From Striking Elements of an Enhancement

Relying on the legislative history of Senate Bill 620, the People assert that use of the term "enhancement" in section 12022.53, subdivision (h), instead of "finding" or "allegation," is evidence the Legislature intended to prohibit courts from striking elements of an enhancement. (ABM 16-18, 24-26.)

There are several problems with this argument. First, this court has generally refused to interpret statutes dealing with punishment as *implicitly* restricting section 1385 authority. (OBM 36-37; *Romero*, *supra*, 13 Cal.4th at p. 518.) Rather, to restrict section 1385 discretion, the Legislature must act with "unmistakable clarity." (*Williams*, *supra*, 30 Cal.3d at pp. 480-481.)

It is far from clear that the language in section 12022.53, subdivision (h) *granting* authority to strike or dismiss an "enhancement" was actually intended to *limit* section 1385 discretion. The Legislature was well aware of the need to give clear guidance to courts if it wanted to limit or eliminate section 1385 discretion (OBM 42), and it has repeatedly demonstrated that it knows how to do so. (See, e.g., former § 1385, subd. (b)(1) ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667."]; § 1385, subd. (b)(2) ["This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a)."].) If the Legislature intended to withhold the power to strike part of an enhancement (while at the same time granting authority to strike the entire enhancement), it would have understood the need to say so in a clear and specific manner.

Second, the notion that the Legislature selected the term "enhancement" in section 12022.53, subdivision (h) – as opposed to "finding" or "allegation" – in order to *limit* the court's section

1385 discretion is speculative at best, and is not supported by other analogous statutes or the legislative history of Senate Bill 620. Rather, it appears the Legislature often uses the terms "finding," "allegation," or "enhancement" interchangeably, or uses one term without the other but does not intend the choice of a particular term to limit or restrict discretion.

For example, the express language of section 667, subdivision (f)(2) provides for dismissal of a prior serious or violent felony conviction "allegation" in the interest of justice under section 1385, but does not include the term "finding." Under the People's interpretation, the wording of section 667, subdivision (f)(2) would mean that a prior conviction *allegation* (i.e. the allegation in the accusatory pleading) could be stricken or dismissed, but a *finding* that the prior conviction allegation is true could not. Of course, this plainly is not the case, as a court can strike both a prior strike allegation as well as a finding that the strike allegation is true. (*Romero*, *supra*, 13 Cal.4th at p. 524, fn. 11 [rejecting the argument that a court cannot dismiss a prior conviction allegation after it has been pled and proved].) Thus, this court should be careful not to read too much into the Legislature's use of the terms "finding," "allegation," or "enhancement," as these terms have not consistently been used with the degree of precision suggested by the People.[7]

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[7] Although there is no consistent pattern, it appears statutes *prohibiting* an exercise of discretion often refer to "findings" or "allegations," while statutes *authorizing* discretion use more varied terminology. (See, e.g., § 192.5, subd. (e) ["The court shall not strike a finding that brings a person within the provisions of

Nor does the legislative history of Senate Bill 620 show that the Legislature was clearly distinguishing between "findings and allegations" and "enhancements" in the manner the People suggest. (ABM 16-17, 26-27.) As the People note, the committee analysis described former section 12022.53, subdivision (h) as prohibiting a court from striking a "finding" or "allegation." (Sen. Com. on Public Safety, Analysis of Senate Bill 620 (2017-2018 Reg. Sess.), as amended March 28, 2017, p. 3. (hereafter "Sen. Pub. Safety Analysis").) However, this is not particularly significant, as it is merely a restatement of the language of subdivision (h) in effect at that time.

Further, other portions of the legislative history describe then-existing law as "includ[ing] a provision forbidding the court from dismissing an *enhancement* imposed under [section 12022.53]." (Sen. Pub. Safety Analysis, p. 7, emphasis added.) Thus, it appears the Legislature was using the term "enhancement" as interchangeable with, or as shorthand for, "finding or allegation." [8]

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this subdivision or an allegation made pursuant to this subdivision."]; Veh. Code, § 20001, subd. (c) [same]; § 667.71, subd. (d) [prohibiting a court from striking "any allegation, admission, or finding of any prior conviction specified in subdivision (c)"]; § 186.22, subd. (g) [granting discretion to strike the punishment for an "enhancement"]; § 1385, subd. (b)(1) [same]; § 1170.12 (d)(2) [granting discretion to strike a prior conviction "allegation"]; Veh. Code, § 23558 [granting discretion to strike "enhancements"].)

[8] Appellant also notes that the Assembly Public Safety Analysis refers to the three strikes statute as an example of an "enhancement" that can be dismissed. (Assem. Com. on Public Safety, Analysis of Sen. Bill 620 (2017-2018 Reg. Sess.) as

It is also noteworthy that the language of section 12022.53, subdivision (h) granting courts authority to "strike or dismiss an enhancement" mirrors the language of section 1385, subdivision (b)(1), which provides that if the court has authority to "strike or dismiss an enhancement," it can instead strike the additional punishment for that enhancement. Thus, it is likely that in using this same phrasing in section 12022.53, subdivision (h), the Legislature simply intended to grant full section 1385 discretion to dismiss section 12022.53 enhancements.[9]

In any event, the People's interpretation would require this court to find that section 12022.53, subdivision (h) *implicitly* restricts the court's section 1385 discretion. Because section 1385 cannot be implicitly restricted (*Romero*, *supra*, 13 Cal.4th at p. 518), and because neither section 12022.53, subdivision (h) nor Senate Bill 620 demonstrates "clear legislative direction" to restrict section 1385 discretion, the People's argument that subdivision (h) eliminated the ability to strike elements of an enhancement must be rejected.

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amended Mar. 28, 2017, p. 5.) Given that the three strikes law is generally considered an alternate sentencing scheme, not an "enhancement" (see, e.g., *People v. Cressy* (1996) 47 Cal.App.4th 981, 991), this is just another example of the flexibility with which the Legislature uses the term "enhancement."

[9] If the Legislature was truly distinguishing between findings and allegations and enhancements, then it would also seem odd that the Legislature did not use the broader term (i.e. "enhancement") in former section 12022.53, subdivision (h), which was clearly intended to completely prohibit exercise of section 1385 discretion in the context of section 12022.53 enhancements.

D. The Court's Power to Impose a Lesser Included Enhancement After Striking a Greater Enhancement in the Interest of Justice Remains in Full Effect

A trial court should be able to impose a lesser included enhancement after striking an element of the greater enhancement in the interest of justice, just as the court can impose a lesser included enhancement when the greater enhancement cannot be imposed due to legal inapplicability or insufficient evidence. (OBM 36-42; e.g., *People v. Fialho* (2014) 229 Cal.App.4th 1389 (*Fialho*).)

The People contend this line of authority is not applicable because the statutory source of the power to impose a lesser uncharged offense is section 1181, subdivision (6), which limits modification of a charge to situations where "the verdict or finding is contrary to law or evidence," and here no defect exists. (ABM 23-24.)

However, none of the cases used to support appellant's argument rely on or even cite to section 1181, subdivision (6). (See *Strickland*, *supra*, 11 Cal.3d at p. 961; *Fialho*, *supra*, 229 Cal.App.4th at pp. 1395-1399; *People v. Allen* (1985) 165 Cal.App.3d 616, 627; *People v. Lucas* (1997) 55 Cal.App.4th 721, 743; *People v. Dixon* (2007) 153 Cal.App.4th 985, 1001-1002.) Rather, these cases demonstrate that courts have separate judicially recognized authority to impose uncharged lesser included enhancements when a greater enhancement is stricken or set aside. (*Ibid.*; see also *People v. Valles* (2020) 49 Cal.App.5th 156, 171, review granted 7/22/20 (S262757/E071361) (conc. opn. of Menetrez, J.) (*Valles*) [case law establishes the

court's power to impose uncharged lesser included enhancements]; *People v. Garcia* (2020) 46 Cal.App.5th 786, 793, review granted 6/10/2020 (S261772/B293491) [acknowledging that the ability to impose an uncharged lesser included enhancement when a greater enhancement cannot be imposed is an "inherent power of courts"].)

Although the People argue that the power to impose a lesser included enhancement should be limited to situations where the greater enhancement is legally inapplicable or defective, and should not apply when an enhancement is stricken under section 1385, there appears to be no valid reason why this power should exist in one context but not the other. In both situations, the court determines that the greater enhancement cannot be imposed for some reason but that a lesser enhancement (which is both wholly included in the greater charge and supported by the evidence) should be. Whether the reason the greater enhancement cannot be imposed is because it is unsupported by sufficient evidence, or because it would make the sentence longer than the interest of justice permits, the court's power to impose a lesser enhancement should remain the same.

As explained by Justice Menetrez in a concurring opinion in *Valles*, "[p]rior case law uniformly holds that the court does have the power to impose an uncharged lesser included enhancement when a greater enhancement is stricken. [Citations.] . . . If a sentencing court has a long-established power to impose an uncharged lesser included enhancement after striking a greater enhancement that is legally inapplicable, why

would that power disappear when the greater enhancement is stricken in the interest of justice under amended section 12022.53?" (*Valles*, *supra*, 49 Cal.App.5th at p. 171.) Thus, the relevant "question is whether, having exercised its power under [amended section 12022.53, subdivision (h)] to strike a greater enhancement, *the court still has its previously recognized power to impose an uncharged lesser*." (*Ibid*., original italics.)

Nothing in section 12022.53 or section 1385 would bar a court that strikes a greater enhancement in the interest of justice from exercising its previously recognized power to impose a lesser included enhancement. That power is not derived from section 12022.53 or section 1385, but is judicially recognized authority established in case law. (E.g., *Strickland*, *supra*, 11 Cal.3d at p. 961; *Fialho*, *supra*, 229 Cal.App.4th at pp. 1395-1399.) Because neither 12022.53 nor section 1385 purport to limit the court's otherwise valid legal authority to impose uncharged lesser included enhancements, courts necessarily retain and should be permitted to exercise this power after striking a section 12022.53 enhancement under section 1385.

This court has repeatedly counseled that trial courts "should be afforded maximum leeway in fitting the punishment to the offender." (*Williams*, *supra*, 30 Cal.3d at p. 482.) Allowing a trial court to strike a section 12022.53, subdivision (d) enhancement and impose an uncharged lesser included enhancement under subdivision (b) or (c) when justice so requires provides that leeway and advances the purpose of section 1385.

E. Appellant's Interpretation of Section 12022.53, Subdivision (h) Furthers the Purpose of Senate Bill 620 and Section 1385, While the People's Interpretation Frustrates It

"The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." (*Thomas*, *supra*, 4 Cal.4th at p. 210.) The literal language of a statute should not prevail if it is contrary to legislative intent; rather, "'[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*Ibid*; *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1126 (*Gonzalez*).)

The purpose of Senate Bill 620 is to allow trial courts to use judicial discretion to fit the sentence to the individual culpability of the offender, so that defendants will not serve unnecessarily long sentences. (Sen. Pub. Safety Analysis, pp. 7-8; Assem. Com. on Public Safety, Analysis of Sen. Bill 620 (2017-2018 Reg. Sess.) as amended Mar. 28, 2017, at pp. 3-7.) This amendment was necessary because the Legislature determined that mandatory firearm enhancements had resulted in lengthy sentences that did not deter crime or improve public safety, and at the same time disproportionately affected minorities, resulted in prison overcrowding, and caused financial burdens to taxpayers. (Sen. Pub. Safety Analysis, pp. 3-7.)

To effectuate the purpose of Senate Bill 620, section 12022.53, subdivision (h) should be interpreted in the manner which affords the trial court the most discretion to tailor the sentence to the individual defendant. Thus, if a court determines that for a particular defendant it would not be just to strike the

entire section 12022.53, subdivision (d) enhancement or to impose the full enhancement, but it would be just to strike part of the punishment, it should be free to so act. For example, if a court determines a 10-year enhancement (§ 12022.53, subd. (b)) would serve the interest of justice, it should be permitted to use its section 1385 discretion to reduce the 25-year-to-life penalty to 10 years.

If the People's contrary position were accepted and the court were limited to striking the 25-year-to-life enhancement entirely or imposing it in full, the court would be required to choose between two options it believes are unjust, and in all likelihood would impose the full enhancement to avoid a windfall to the defendant. In this scenario, the defendant ends up with a 25-year-to-life enhancement even though the court determined he only deserves a 10-year enhancement. This result frustrates the purpose of both Senate Bill 620 and section 1385, because it means the court imposed a sentence that it determined was unjust and unnecessarily long in relation to the defendant's culpability. In this situation, the harms Senate Bill 620 was intended to rectify remain in full effect: the defendant's excessive sentence does not deter crime, does not serve the interest of justice, and does not improve public safety.

The People's interpretation should be rejected because it arbitrarily limits a trial court's ability to fit the sentence to the offender. It is clear from the amendment to section 12022.53, subdivision (h) that the Legislature believed that in some cases striking an entire sentence of 25 years to life might be just. It is

absurd to think the Legislature wanted to prevent a court from striking less than that, even where the court has determined that doing so is the only outcome that furthers the interest of justice.

F. Reducing a Defendant's Sentence by Striking Part of an Enhancement at Sentencing Does Not Violate Separation of Powers

The People assert that in order to allay separation of powers concerns, a court's options at sentencing must be limited to the enhancements that were specifically pled in the information and found true by the jury. (ABM 24, 29-32.) These concerns are unfounded. First, it is well established that lesser included offenses need not be formally charged in separate counts of the accusatory pleading. (*People v. Lopez* (2020) 9 Cal.5th 254, 272.) Thus, when the prosecutor charges a section 12022.53, subdivision (d) enhancement, the failure to expressly plead the lesser subdivision (b) and (c) enhancements is no bar to their imposition. (See *People v. Anderson* (2020) 9 Cal.5th 946, 957 [rigid code pleading is not required, and failure to plead the specific numerical subdivision of an enhancement does not render the information inadequate].) Further, when a jury returns a true finding on a section 12022.53, subdivision (d) enhancement, it necessarily finds the subdivision (b) and (c) enhancements true. If this were not the case, a court would not be able to impose an uncharged lesser included enhancement when a greater enhancement is determined to be legally inapplicable or factually unsupported by the evidence. (E.g., *Strickland*, *supra*, 11 Cal.3d at p. 961; *Fialho*, *supra*, 229 Cal.App.4th at pp. 1395-1399.)

The People agree that no separation of powers concern arises when a court, unable to impose a greater enhancement because it is legally inapplicable or factually unsupported by the evidence, instead imposes an uncharged lesser included enhancement. At the same time, the People urge that the prosecutor's charging authority *is* infringed when a court imposes an uncharged lesser included enhancement after striking the greater enhancement in the interest of justice.

The inconsistency in the People's position is impossible to accept. In both situations, the prosecutor expressly charged only the greater enhancement and only the greater charge was submitted to the jury. It is difficult to see how imposing an uncharged lesser enhancement preserves the prosecutor's charging discretion in the former situation while thwarting it in the latter. If the trial court were truly limited by the prosecutor's initial charging decision and the jury's verdict in the way the People suggest, then imposition of an uncharged enhancement *in either situation* would infringe the prosecutor's executive function and violate separation of powers, because the court would be imposing a charge the prosecutor did not explicitly choose. The People's position must be rejected, as it amounts to an assertion that it is permissible to depart from the prosecutor's initial charging decision when it benefits the prosecutor but not when it benefits the defense. (See *Valles*, *supra*, 49 Cal.App.5th at p. 172 (conc. opn. of Menetrez, J.).)

The better view is that a lesser included enhancement, although "uncharged," is nevertheless a charge selected by the

prosecutor. (*People v. Birks* (1998) 19 Cal.4th 108, 119; *People v. Hicks* (2017) 4 Cal.5th 203, 211 [lesser included offenses are necessarily included within explicitly charged offenses].) Accordingly, when a court imposes a lesser included enhancement after striking the greater enhancement in the interest of justice, the court is still imposing a charge the prosecutor chose.[10]

To the extent this allows a court to strike part of an enhancement that the jury found true, this is simply not a concern in the context of section 1385. Section 1385, by its nature, allows a court to completely strike a charge or enhancement that has been pled and proven. If striking an enhancement *in its entirety* and imposing no punishment does not infringe the prosecutor's charging authority, then neither does striking part of an enhancement or part of the punishment. Accordingly, the People's concern that allowing a court to strike *part* of an enhancement or its punishment will lead to rejection of jury findings or allow courts to disregard sentencing mandates (ABM 28-29) is not well taken, as section 1385 already allows for this on a much broader scale.

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[10] In contrast, section 1385 would not allow a court to impose an uncharged lesser *related* offense without the prosecutor's consent, because a lesser related offense is not wholly included in the charge the prosecutor chose. (See *People v. Smith* (1975) 53 Cal.App.3d 655, 659-660 [section 1385 did not permit a trial court to accept a plea to an uncharged but nonincluded lesser related offense over the prosecutor's objection], referenced at ABM 19.)

G. Appellant's Position Does Not Conflict With the Rules Governing Lesser Enhancements

1. *People v. Gonzalez*

The People rely on *Gonzalez*, *supra*, 43 Cal.4th 1118, for the proposition that after a greater enhancement is stricken, there are no remaining enhancements left to impose; thus, a court cannot impose a section 12022.53, subdivision (b) or (c) enhancement after striking the subdivision (d) enhancement, where only the subdivision (d) enhancement was pled and proved. (ABM 32-33.)

Gonzalez does not bear on the issue presented in this case. In *Gonzalez*, *supra*, 43 Cal.4th at pp. 1122-1123, the defendant was charged with enhancements under section 12022.53, subdivisions (b), (c), and (d), and the jury found them true. The question before the court was whether the subdivision (b) and (c) enhancements should be stricken or stayed when the court imposed the subdivision (d) enhancement. (*Ibid*.) At the time, (now-former) subdivision (h) prohibited the court from striking a section 12022.53 enhancement, but subdivision (f) prohibited the court from imposing more than one enhancement. To resolve the seeming contradiction between the two subdivisions,[11] the court concluded proper course was to impose and stay, rather than strike, the (b) and (c) enhancements. (*Id*. at pp. 1126-1129.) In so holding, the court made a practical observation:

> [S]taying rather than striking the prohibited firearm enhancements serves the legislative goals of section 12022.53 by making the prohibited enhancements

[11] This contradiction no longer exists in light the amendment to section 12022.53, subdivision (h) via Senate Bill 620.

> readily available should the section 12022.53 enhancement with the longest term be found invalid on appeal and by making "the trial court's intention clear—it is staying part of the sentence only because it thinks it must. If, on the other hand, the trial court were to strike or dismiss the prohibited portion of the sentence, it might be misunderstood as exercising its discretionary power under Penal Code section 1385."
>
> (*Id*. at p. 1129.)

Thus, the concern in *Gonzalez* was that if the subdivision (d) enhancement were later invalidated on appeal, it would be unclear if the lesser enhancements were still available for use because the trial court *had already stricken them*. *Gonzalez* says nothing about the situation presented here, where the trial court would be striking a greater enhancement without having previously acted on the uncharged lesser included enhancements.

Further, the People's suggestion that in the absence of a separate true finding on the lesser enhancements there is no remaining enhancement to impose, can be quickly dismissed. If this were true, the court would not be able to impose a lesser uncharged enhancement where only the greater enhancement is submitted to the jury and found true, but is later set aside as legally inapplicable or unsupported by the evidence. (E.g., *Strickland*, *supra*, 11 Cal.3d at p, 961; *Fialho*, *supra*, 229 Cal.App.4th at pp. 1395-1399.)

2. A Jury Instruction on a Lesser Included Enhancement Should Not be Required for a Reduction in Punishment at Sentencing

The People suggest that a trial court should not be permitted to reduce a section 12022.53, subdivision (d) enhancement to a lesser included uncharged enhancement at

sentencing unless the defendant could have secured a jury instruction on the lesser included enhancement. (ABM 33-34.) This argument must be rejected as it conflates the jury's fact-finding role with the trial court's judicial function at sentencing.

The purpose of an instruction on a lesser included offense is to protect the jury's "truth-ascertainment function." (*People v. Breverman* (1998) 19 Cal.4th 142, 155.) Although not required in the context of enhancements (*People v. Majors* (1998) 18 Cal.4th 385, 410-411), a trial court has a sua sponte duty to instruct on all lesser included offenses supported by the evidence. (*Breverman*, *supra*, 19 Cal.4th at p. 154.) This aids the fact-finding process by eliminating the risk that when presented with an all or nothing choice between guilt and innocence, the jury will convict simply to avoid setting the defendant free. (*Majors*, *supra*, 18 Cal.4th at p. 410, citing *Schad v. Arizona* (1991) 501 U.S. 624, 646-647.) Thus, when it is clear the evidence will show the defendant committed the greater act, there may be no reason for the court to consider giving instructions on lesser included offenses or enhancements. In the context of section 12022.53, for example, a defendant who knows the evidence will show he fired a gun and caused great bodily injury or death has little reason to ask for an instruction on the lesser enhancements set forth in subdivisions (b) or (c).

At sentencing, however, different interests are at stake, as the fact-finding process is complete. After the verdict, the trial court has discretion to strike a section 12022.53, subdivision (d) enhancement in the interest of justice even if it has been found

true and even if the true finding is supported by substantial evidence. Because the question of whether the defendant's sentence should be reduced under section 1385 "involves a balancing of many factors" (*Howard*, *supra*, 69 Cal.2d at p. 505), a trial court could properly find that a particular defendant does not deserve to have his sentence enhanced by a term of 25 years to life, even though the facts supporting the section 12022.53, subdivision (d) enhancement were found true. In light of these differences, the trial court's ability to reduce a defendant's punishment at sentencing is a separate question from and should not depend on whether an instruction on a lesser included enhancement was given. Thus, the rules governing lesser enhancements do not support the People's position.

CONCLUSION

For the above reasons, appellant respectfully requests that the matter be remanded for a new sentencing hearing on whether to reduce the section 12022.53, subdivision (d) firearm use enhancement by striking either the injury-related element or the discharge element.

Dated: August 27, 2020

Respectfully submitted,

/s/ Theresa Schriever
THERESA SCHRIEVER
Attorney for Appellant

CERTIFICATE OF APPELLATE COUNSEL PURSUANT TO RULE 8.204(C)(1) AND RULE 8.360(B) OF THE CALIFORNIA RULES OF COURT

I, Theresa Schriever, appointed counsel for appellant, certify pursuant to rule 8.204 of the California Rules of Court, that I prepared this Reply Brief on the Merits on behalf of my client, and that the word count for this brief is 8,164 words.

I certify that I prepared this document in Microsoft Word and that this is the word count generated for this document.

Dated: August 27, 2020

Respectfully submitted,

/s/ Theresa Schriever
THERESA SCHRIEVER
Attorney for Appellant

Re: *The People v. Tirado,* Case No. S257658

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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. Executed on **August 27, 2020**, at Sacramento, California.

/s/ *Sebastion Lowe*
Sebastion Lowe

STATE OF CALIFORNIA
Supreme Court of California

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