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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Jorge Navarrete Clerk

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff and Respondent,)
)
 vs.)
)
 JESUS MANUEL RODRIGUEZ, et al.,)
)
 Defendants and Appellants.)
)

Deputy

Supreme Court No.
S239713

STANISLAUS SUPERIOR COURT, Nos. 1085319 and 1085636
THE HONORABLE NANCY ASHLEY, JUDGE PRESIDING

REVIEW FROM THE 2016 DECISION ON DIRECT APPEAL OF THE
FIFTH APPELLATE DISTRICT, No. F065807

**JOINT REQUEST TO VACATE AND CONTINUE PRESENTLY-SCHEDULED
 MARCH 8, 2018 ORAL ARGUMENT FOR EXTRAORDINARY CAUSE
 and
 JOINT MOTION TO ALLOW SUPPLEMENTAL OPENING BRIEFS
 (Cal. Rules Ct., R. 8.200(a)(4), 8.520(d), 8.630(d))
 and
 DECLARATION OF CARA DeVITO**

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Attorney for Petitioner,
Edgar Octavio Barajas

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 Plaintiff and Respondent,)
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**JOINT REQUEST TO VACATE AND CONTINUE PRESENTLY-SCHEDULED
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MOTION TO ALLOW SUPPLEMENTAL OPENING BRIEFS**

TO THE HONORABLE CHIEF JUSTICE CANTIL-SAKAUYE:

The oral argument in this matter presently is scheduled for one week from today, on March 8, 2018 at 9:00 a.m.

Through their respective counsel, appellant-petitioners Jesus Manuel Rodriguez and Edgar Octavio Barajas jointly request that argument be vacated and continued for extraordinary cause: the necessity to file supplemental opening briefs, pursuant to California Rules of Court, rule 8.200(a)(4), 8.520(d) and 8.630(d), on matters which could not have been raised sooner.

Briefing in this case was completed on November 6, 2017. But two new cases were decided in February, 2018 (People v.

Contreras and Rodriguez, dock. no. S224564, and People v. Superior Court (Lara) dock. no. S241231), and one new law went into effect on January 1, 2018 (SB 620, ch. 682, amending Penal Code sections 12022.5, subdivision (c) and 12022.53, subdivision (h).) All this occurred after briefing was completed, yet all the issues now available to the petitioners by virtue of these new cases and new law must be raised on direct appeal.

Moreover, People v. Contreras and Rodriguez was not decided until February 26, 2018, the tenth day before the presently-scheduled argument. Thus a supplemental brief based on that case could not be filed in compliance with California Rules of Court, rule 8.520(d), absent a continuance of the scheduled argument.

Extraordinary cause therefore exists for the relief sought in this motion. (People v. Braxton (2004) 34 Cal.4th 798, 809. (“[T]he rule prohibiting parties from raising new issues in this court is not absolute.”))

Petitioner Barajas is filing this motion in an abundance of caution, as the respondent State of California already agreed there is insufficient corroborating evidence of an accomplice’s testimony to support his conviction. In the event this Court does not agree, however, he seeks leave to raise these additional issues, to protect his rights.¹

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Finally, counsel respectfully ask this Court to decide this motion as quickly as possible. Due to the early morning scheduling of the current oral argument, both counsel have to stay in San Francisco the night before argument. Attorney Klein's hotel requires her to cancel by Monday, March 5, 2018, or her room fee is nonrefundable. And unless attorney DeVito knows in advance that oral argument will be continued, she will be on a plane to San Francisco by 10:00 a.m. on Wednesday morning, March 7, 2018.

DATED: March 1, 2018

Respectfully Submitted,

S. LYNNE KLEIN
State Bar no. 114527
Attorney for Appellant-Petitioner,
Edgar Octavio Barajas

DATED: March 1, 2018

Respectfully Submitted,

CARA DeVITO (signed with
permission)
State Bar no. 105579
Attorney for Appellant-Petitioner,
Jesus Manuel Rodriguez

Both petitioners therefore move in the alternative that, if the new issues they seek to raise are not mooted by this Court's decision, this Court remand the case to the Court of Appeal after resolution of the issues on which review was granted, with instructions to permit briefing on the new issues. (California Rule of Court, rule 8.528(c) and (f).)

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DECLARATION OF CARA DeVITO

I, Cara DeVito, do declare and state as follows:

1. I am an attorney at law, duly licensed to practice before all courts of the state of California. I was appointed by this Court to represent appellant-petitioner Jesus Manuel Rodriguez on review. I thus have personal knowledge of the following facts.

2. On July 31, 2017, I filed the Opening Brief on the Merits for Mr. Rodriguez. On August 15, 2017, attorney S. Lynne Klein filed the Opening Brief on the Merits for coappellant-petitioner Edgar Octavio Barajas.

3. In the Opening Brief on the Merits for Mr. Rodriguez I noted this Court had before it a related matter, People v. Contreras and Rodriguez, dock. no. S224564. (Rodriguez OBOM, pp. 44-45 at n. 20.)

4. On October 16, 2017, the respondent State of California filed its Answer Brief on the Merits, and on November 6, 2017, both petitioners filed Reply Briefs on the Merits. Thus all briefing was completed by November 6, 2017. After that date, however, two new cases were decided, and a new statute became law, all of which affect both petitioners' cases. I therefore believe extraordinary cause exists to vacate and continue the presently-scheduled March 8, 2018 oral argument to allow the petitioners to file supplemental opening briefs on these matters, and to excuse their failures to raise these issues in the court of appeal, as normally required by California Rule of Court, rule 8.500(c)(1), on the ground that all three issues only recently became available.

5. **The Contreras-Rodriguez Issue**

On February 26, 2018, this Court decided People v. Contreras and Rodriguez, which was mentioned in Mr. Rodriguez's original Opening Brief, in a section of the brief Mr. Barajas joined. Both petitioners wish to argue beneficial aspects of that opinion, which is applicable to the second issue granted review in this case.

6. But if as party wishes to bring to this Court's attention new authorities that were not available in time to be included in that party's briefs on the merits, the party must

comply with (*inter alia*), California Rule of Court 8.520(d). Rule 8.520(d) states a supplemental brief "must be filed and served no later than 10 days before oral argument." As February 26, 2018 (the day the opinion issued), was the tenth day before the March 8, 2018 oral argument, there was no way for petitioners to file a supplemental brief complying with Rule 8.520(d). For this reason alone extraordinary cause exists to continue oral argument, to allow supplemental briefing on the impact of Contreras and Rodriguez.

7. **The Lara Issue**

On January 1, 2017, Proposition 57 took effect. It eliminated Welfare and Institutions Code section 707, subdivision (b)'s direct filing in adult court for juveniles accused of committing certain crimes (which included a statutory presumption that such juveniles were unfit for juvenile court adjudication). That statute now includes a statutory presumption that such juveniles are amenable to juvenile court adjudication unless their unfitness is proven.

8. Both petitioners had Juvenile Court fitness hearings, but both hearings were conducted under the old version of Welfare and Institutions Code section 707, subdivision (b), and its statutory presumption of unfitness. I, on behalf of petitioner Rodriguez, and attorney Klein, on behalf of

petitioner Barajas, were aware of the change wrought by Proposition 57, but we believed we could not raise that issue on direct appeal as it was unclear whether the beneficial amendment that changed the statutory presumption to one of fitness for juvenile adjudication was retroactive, and thus could be argued on behalf of our clients.

9. On February 1, 2018, however, this Court decided People v. Superior Court (Lara). That case also was decided after briefing in this case was completed. Lara held that Proposition 57 was retroactive and requires remands for "fitness hearings" for any juvenile against whom a criminal case was initiated in adult court.

10. The Lara holding now allows both petitioners to argue they are entitled to remands to juvenile court for new fitness hearings under the amended and beneficial presumption of fitness. This did not become clear to either me or Ms. Klein until yesterday, February 28, 2018, when we were preparing for oral argument. As the direct appeal in this case is not over, their request to raise this new issue via supplemental briefing must be made to the court that currently has jurisdiction over them -- this Court. Pursuant to California Rules of Court, rule 8.516(b)(2), petitioners therefore ask this Court to expand the scope of review and allow supplemental Opening Briefs on this

new issue.

11. **The SB 620 Issue**

Both petitioners were convicted of murder in which a principal personally discharged a firearm, causing death. Both petitioners' sentences include unstayed enhancements of 25 years to life imposed pursuant to Penal Code section 12022.53, subdivisions (d) and (e)(1).

12. At the time both petitioners were sentenced on September 4, 2012, the trial court had no discretion regarding the firearm enhancement; at that time it *had* to be imposed, as Penal Code section 12022.53, subdivision (h) precluded sentencing courts from exercising Penal Code section 1385 power (or any other provision of law), from striking any section 12022.53 firearm enhancement.

13. In October, 2017 SB 620 was signed into law. Effective January 1, 2018, section 12022.53, subdivision (h) was amended to read, "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss and enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (SB 620, ch. 682.)

14. Until January 1, 2018, neither petitioner had a

statutory or legal basis to challenge the firearm enhancement or to ask that it be stricken, thus, they could not have sought this relief sooner than January 1, 2018.

15. Both I, on behalf of Mr. Rodriguez, and attorney Klein, on behalf of Mr. Barajas, were aware of this change to section 12022.53, subdivision (h). Both of us discussed it with project attorneys at CCAP, and both of us concluded there were other procedural vehicles our clients could utilize rather than asking this Court to allow supplemental briefing on that issue back in January, when the right to seek relief under the amended statute first ripened. However, it is an issue that can (and therefore should), be raised on direct appeal.

16. As we already are asking this Court to allow supplemental briefing on two new cases, we now also ask this Court, pursuant to California Rules of Court, rule 8.516(b)(2), to expand the scope of review and allow supplemental Opening Briefs on the issue of a remand for new sentencing hearings, at which our clients can move the sentencing court, pursuant to section 12022.53, subdivision (h), to strike their firearm enhancements.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed on March 1, 2018, at Summerlin,

Nevada.

CARA DeVITO (signed by permission)
State Bar no. 105579

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is P.O. Box 367, Davis, CA 95617. On March 1, 2018, I served the attached JOINT REQUEST TO VACATE AND CONTINUE PRESENTLY-SCHEDULED MARCH 8, 2018 ORAL ARGUMENT FOR EXTRAORDINARY CAUSE and JOINT MOTION TO ALLOW SUPPLEMENTAL OPENING BRIEFS and DECLARATION OF CARA DeVITO placing a true copy thereof in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing the envelope in the United States Mail at Davis, California, with postage thereon fully prepaid.

Appellate Counsel for Respondent, People:

Darren K. Indermill
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Counsel for Co-Appellant Jesus Manuel Rodriguez:

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Also, on March 1, 2018, appellant counsel for respondent also was served an electronic copy to Darren K. Indermill, Deputy Attorney General at the following email address:
Darren.Indermill@doj.ca.gov

I declare under penalty of perjury that the foregoing is

true and correct.

Executed on March 1, 2018, at Davis, California.

John S. Klein