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 OPENING BRIEF ON THE MERITS

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QUESTION PRESENTED

Can the trial court impose an enhancement under Penal Code section 12022.53, subdivision (b), for personal use of a firearm, or under section 12022.53, subdivision (c), for personal and intentional discharge of a firearm, as part of its authority under section 1385 and subdivision (h) of section 12022.53 to strike an enhancement under subdivision (d) for personal and intentional discharge of a firearm resulting in death or great bodily injury, even if the lesser enhancements were not charged in the information or indictment and were not submitted to the jury?

SUMMARY OF ARGUMENT

Under Penal Code[1] section 1385, a trial court's power to strike the whole section 12022.53, subdivision (d) enhancement necessarily includes the power to strike an element of the

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

enhancement for the purpose of imposing a just sentence. This rule furthers the legislative purpose of amended section 12022.53, subdivision (h), is consistent with this court's precedent interpreting section 1385, and avoids leaving the trial court with a rigid and incongruous all-or-nothing choice between completely striking a lifetime enhancement or imposing it in full.

Enacted in 1997, section 12022.53 created mandatory sentencing enhancements for escalating levels of gun use during specified felonies: 10 years for personal use of a firearm (§ 12022.53, subd. (b)); 20 years if the firearm was intentionally discharged (§ 12022.53, subd. (c)); and 25 years to life if the discharge proximately caused great bodily injury or death (§ 12022.53, subd. (d)). The goal of this legislation was to deter violent crime by creating lengthy sentences that a judge had no choice but to impose. (Stats. 1997, ch. 503, § 1 (Assem. Bill 4).)

In 2017, the Legislature determined these mandatory firearm enhancements were not deterring crime and were instead causing problems by both increasing the overall prison population and exacerbating racial disparities in sentencing. Thus, the Legislature passed Senate Bill 620 (2017–2018 Reg. Sess.), which amended section 12022.53, subdivision (h) to expressly grant trial courts discretion to strike firearm enhancements in the interest of justice pursuant to section 1385. (Stats. 2017, ch. 682, § 2.) The goal of this legislation was to allow trial courts to use judicial discretion to tailor the sentence to the individual case and to the culpability of the particular offender.

It is clear that trial courts now have discretion to dismiss a section 12022.53, subdivision (d) enhancement, or to strike the corresponding 25-year-to-life punishment entirely, if this result would serve the interest of justice. The question presented here is whether the authority to dismiss the whole subdivision (d) enhancement includes the power to strike a part of it, so as to impose a reduced sentence under section 12022.53, subdivision (b) or (c). In other words, when a jury returns a true finding on a section 12022.53, subdivision (d) enhancement, can the trial court strike the allegation that the defendant caused "great bodily injury or death," in order to impose a sentence of 20 years under subdivision (c), which does not include the injury element? Alternatively, can the trial court strike both the "injury" and "discharge of a firearm" elements in order to impose a sentence of 10 years under subdivision (b), which lacks both the injury and discharge elements? To give effect to the plain language of section 12022.53, subdivision (h), which empowers the court to strike or dismiss "pursuant to section 1385," and to further the purpose of section 1385 and Senate Bill 620, the answer must be yes.

The scope of the court's power to strike or dismiss under section 12022.53, subdivision (h) is defined by the scope of section 1385. Although section 1385 literally provides for dismissal of an entire criminal action, meaning all the charges and allegations in the accusatory pleading, it has been construed to allow courts to dismiss or "strike" parts of an action. (*People v. Burke* (1956) 47

Cal.2d 45, 51 (*Burke*) [the power to dismiss the whole includes the power to strike out a part].)

The allegations in the accusatory pleading that a defendant "intentionally discharged a firearm" and "proximately caused great bodily injury or death" within the meaning of section 12022.53, subdivision (d) form a part of the criminal action. As allegations that increase punishment, they are also the type of allegations this court has recognized can be dismissed under section 1385. Further, the power to strike the whole subdivision (d) enhancement necessarily includes the power to strike out a part of it, such as the injury and discharge elements.

This conclusion is confirmed by *People v. Marsh* (1984) 36 Cal.3d 134, 142-143 (*Marsh*), where this court recognized that a trial court may reduce a defendant's sentence by striking an element or elements of an offense and imposing sentence on the remaining charges. Applying this procedure in the context of an enhancement, section 1385 permits a trial court to strike the "great bodily injury" element of the section 12022.53, subdivision (d) enhancement, in order to impose a reduced sentence of 20 years under section 12022.53, subdivision (c). It also permits the court to strike both the "great bodily injury" element and the "discharge" element, and impose a reduced sentence of 10 years under subdivision (b).

This procedure is consistent with the purpose of section 1385, and the line of authority recognizing that when a greater enhancement cannot be imposed for some reason, the court may impose a lesser uncharged enhancement. It also respects the rule

of statutory construction providing that section 1385 allows dismissal "in any situation" where the Legislature has not evidenced a contrary intent, as well as this court's history of interpreting section 1385 as broadly as necessary to achieve a just result.

The Court of Appeal concluded that when only the greater subdivision (d) enhancement is charged, the trial court is limited to striking the enhancement completely or imposing it in full. (*People v. Tirado* (2019) 38 Cal.App.5th 637, 643.) This conclusion must be rejected. It fails to consider controlling case authority and is inconsistent with the manner in which section 1385 has historically been interpreted. There is no indication the Legislature intended to grant the broad power to strike a lifetime enhancement, while withholding the narrower power to strike a portion of that enhancement. By unnecessarily restricting the trial court's discretionary options at sentencing, the Court of Appeal's interpretation frustrates the shared purpose of section 1385 and Senate Bill 620 by limiting the court's ability to tailor the punishment to fit the individual culpability of the offender.

STATEMENT OF THE CASE

The amended information filed August 2, 2017 charged appellant Jose Tirado with attempted murder (§§ 664/187) (count one); second degree robbery (§ 212.5, subd. (c)) (count two); misdemeanor driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)) (count five); and assault with a semi-automatic

firearm (§ 245, subd. (b)) (count six).[2] As to counts one and two, the information alleged appellant personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). As to count six, the information alleged appellant personally used a firearm (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)). The information also alleged gang enhancements (§ 186.22, subd. (b)(1)) as to counts one, two, and six. (1CT 184-190.)

The jury convicted appellant of second degree robbery (count two), driving under the influence (count five), and assault with a semi-automatic firearm (count six). As to the robbery count, the jury found true the allegation that appellant personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). As to count six, the jury found true the personal firearm use and great bodily injury allegations (§§ 12022.5, subd. (a); 12022.7, subd. (a)). (4RT 610-612; 2CT 338-345.) The jury was unable to reach a verdict on attempted murder and the gang enhancements, so the court declared a mistrial as to those charges and allegations. (4RT 613-616; 2CT 348.)

On January 3, 2018, appellant filed a motion to strike the 25-year-to-life punishment for the section 12022.53, subdivision (d) firearm use enhancement in the interest of justice. (2CT 351-365.)

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[2] Count three (§ 186.22, subd. (a)) and count 4 (§ 25852, subd. (c)(3)) were dismissed before trial. (1CT 184-190, 240-241; 3ART 192.)

On January 8, 2018, the trial court heard argument and denied appellant's request, but commented the decision was "difficult." (5RT 633-635, 639.) The court imposed the midterm of three years in state prison for the robbery count, plus a consecutive 25 years to life for the section 12022.53, subdivision (d) enhancement. As to the assault with a firearm conviction, the court imposed a concurrent term of six years, enhanced by four years for personal use of a firearm and three years for the great bodily injury enhancement. As to count five (driving under the influence), the court imposed a concurrent term of 90 days in jail. (5RT 635-638; 2CT 367-370.)

Appellant filed a timely notice of appeal. (2CT 375.) On August 12, 2019, the Court of Appeal issued its published opinion affirming the conviction.

STATEMENT OF FACTS

Because this case presents a pure question of law, the facts are set forth in a limited manner:

On April 10, 2016, Brian P.[3] was inside a convenience store when Anthony Aldaco entered the store and attempted to take a case of beer without paying. As Aldaco moved towards the door, Brian tried to stop him; they went to the ground. (2RT 48-53, 57-59, 124, 130.) Appellant walked behind Brian and shot him in the lower back.[4] (2RT 52, 60-61, 66-67.) Police located appellant, who smelled of alcohol, and arrested him. (2RT 75-78.) Brian

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[3] Appellant uses Brian's first name for privacy. No disrespect is intended.

[4] The surveillance video of the incident was played for the jury at trial.

had surgery to remove the bullet; afterwards, he continued to have pain and neuropathy in his foot. (2RT 53-56.)

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)

A. Legal and Statutory Background

1. Standard of Review

This case presents a pure question of law subject to de novo review. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

2. Penal Code Section 12022.53

Enacted in 1997 as part of the "10-20-life" bill (1997-1998 Reg. Sess. (Assem. Bill 4)), section 12022.53 provides that a defendant who commits any of the 18 offenses listed in subdivision (a) of that section shall receive one of three firearm enhancements, depending on the severity of the conduct in which the defendant engaged. The statute provides for a 10-year enhancement for personal use of a firearm, even if the firearm is not operable or loaded (§ 12022.53, subd. (b)); a 20-year enhancement for personal and intentional discharge of a firearm (§ 12022.53, subd. (c)); and a 25-year-to-life enhancement for personal and intentional discharge of a firearm causing great

bodily injury or death (§ 12022.53, subd. (d)).[5] For a penalty under this section to apply, the requisite facts supporting the enhancement must be alleged in the accusatory pleading, and the defendant must admit those facts or the trier of fact must find them to be true. (§ 12022.53, subd. (j); *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1124-1125.)

Prior to January 1, 2018, imposition of an enhancement under section 12022.53 was mandatory. Former section 12022.53, subdivision (h) provided: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Stats. 2010, ch. 711, § 5.)

On October 11, 2017, Governor Brown signed Senate Bill 620 (2017–2018 Reg. Sess.), which amended section 12022.53 to remove the prohibition against striking a firearm allegation or finding. (Stats. 2017, ch. 682, § 2.) Effective January 1, 2018, amended section 12022.53, subdivision (h) provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an 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."

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[5] Pursuant to section 12022.53, subdivision (f), the court may impose only one additional term of imprisonment under this section per person per crime.

3. Penal Code Section 1385

As noted above, the express language of section 12022.53, subdivision (h) provides that the court's power to strike or dismiss an enhancement is "pursuant to section 1385."

Enacted in 1872, section 1385 currently provides:

> (a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.
>
> (b) (1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).
>
> (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).

The express language of section 1385 refers to dismissal of an "action," which is a criminal proceeding by which a party charged with a public offense is accused and brought to trial and punishment. (*People v. Hernandez* (2000) 22 Cal.4th 512, 521.) An action "consists of all charges and allegations prosecuted in the name of the People of the State of California, as a party, against the person charged with the offense." (*Ibid.*)

Although section 1385 literally authorizes a court to dismiss only an entire criminal action, it has been construed to permit dismissal of parts of an action. (*Burke*, *supra*, 47 Cal.2d at p. 51.) This includes: (1) a single count of a multiple-count accusatory pleading (*People v. Polk* (1964) 61 Cal.2d 217, 225-228; (2) a prior conviction allegation or finding (*Burke*, *supra*, 47 Cal.2d at pp. 50-51; (3) a special circumstance allegation (*People v. Williams* (1981) 30 Cal.3d 470, 477-490 (*Williams*)); (4) a strike allegation (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529-530 (*Romero*)); (5) a weapon or firearm use allegation or finding (*People v. Price* (l984) 151 Cal.App.3d 803, 818-819 [weapon]; *People v. Dorsey* (1972) 28 Cal.App.3d 15, 17-18 [firearm]); and (6) elements of an offense that elevate its nature, thereby causing the punishment to be increased (*Marsh*, *supra*, 36 Cal.3d at pp. 142-143 [offense]; *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*) [enhancement]).

The purpose of section 1385 is "the avoidance of unjust sentences," a goal which is achieved by allowing the trial court maximum discretion to tailor the sentence to the individual defendant's case and culpability. (*People v. Garcia* (1999) 20 Cal.4th 490, 500 (*Garcia*); *Williams*, *supra*, 30 Cal.3d at pp. 482, 489-490.) To further this purpose, application of section 1385 is broad: "Section 1385 permits dismissals in the interest of justice in any situation where the Legislature has not clearly evidenced a contrary intent." (*Williams*, *supra*, 30 Cal.3d at p. 482.)

4. The Split of Authority

Appellate courts disagree as to whether the trial court's authority under section 12022.53, subdivision (h) and section

1385 includes the power to reduce the section 12022.53, subdivision (d) enhancement in the interest of justice. In appellant's case, the Fifth District Court of Appeal held that the trial court is limited to the binary choice of dismissing the 25-year-to-life enhancement entirely, or imposing it in full.[6] (*Tirado*, *supra*, 38 Cal.App.5th at p. 643.) In so holding, the court found it relevant that the statutes use the terms "strike" or "dismiss" but not change, substitute, or modify. The court also found it significant that the prosecutor did not charge the subdivision (b) and (c) enhancements, and that the true finding on the subdivision (d) enhancement was supported by sufficient evidence. The court expressly disagreed with *Morrison*, which came to the opposite conclusion. (*Id.* at p. 644.)

In *Morrison*, *supra*, 34 Cal.App.5th 217, 223, Division Five of the First District Court of Appeal held that the trial court has "discretion to impose an enhancement under section 12022.53, subdivision (b) or (c) as a middle ground to a lifetime enhancement under subdivision (d), if such an outcome was found to be in the interest of justice under section 1385." The court observed that existing case law permits a court to impose a lesser uncharged enhancement when the greater enhancement is defective in some respect, and determined section 1385 can be used to achieve this same result.[7] (*Id.* at pp. 222-223.) The

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[6] *People v. Yanez* (2020) 44 Cal.App.5th 452, review granted April 22, 2020, S260819, and *People v. Garcia* (2020) 46 Cal.App.5th 786 reached similar conclusions.

[7] The majority and dissent in *People v. Ramirez* (2019) 40 Cal.App.5th 305, 312, 317 fn. 3, agreed with this conclusion.

Morrison court found further support in *Marsh*, *supra*, 36 Cal.3d at pp. 143-144, which held a court could use section 1385 to strike allegations of ransom and bodily harm in order to make the defendant eligible for a Youth Authority commitment. (*Morrison*, *supra*, 34 Cal.App.5th at p. 223.) Thus, the *Morrison* court remanded for the trial court to consider whether a reduction of the subdivision (d) enhancement was warranted. (*Id*. at pp. 223-225.)

For the reasons set forth below, appellant asks this court to adopt the rule of *Morrison* and hold that under section 12022.53, subdivision (h) and section 1385, the court's authority to dismiss the whole section 12022.53, subdivision (d) enhancement includes the power to strike out a part of it for the purpose of imposing a reduced sentence under subdivision (b) or (c).

B. The Broad Scope of Section 1385 Includes the Power to Strike Allegations that Increase Punishment and Impose Sentence on the Remaining Charge

In the present case, the Court of Appeal concluded that because section 12022.53, subdivision (h) uses the terms "strike" or "dismiss," the court is limited to the binary choice of striking the enhancement or imposing it in full. (*Tirado*, *supra*, 38 Cal.App.5th at p. 643.) However, because the statute provides that the court's power to strike or dismiss is "pursuant to section 1385," the question of whether a court may reduce an enhancement under section 12022.53, subdivision (d) is necessarily governed by the scope of section 1385. (*Garcia*, *supra*, 20 Cal.4th at p. 499 [reference to § 1385 incorporates case authority interpreting that section]; *Romero*, *supra*, 13 Cal.4th at

pp. 522-523 [reference to § 1385 incorporated that section without limitation].) If section 1385 includes the authority to reduce an enhancement, then such a reduction is permissible under section 12022.53, subdivision (h), unless the Legislature acted with "unmistakable clarity" to take this power away. (*Williams*, *supra*, 30 Cal.3d at pp. 480-481 [to restrict section 1385 discretion, Legislature must act with "unmistakable clarity"].)

As appellant will show, section 1385 includes the ability to reduce a defendant's punishment by "striking" an element of an enhancement and imposing sentence on the remaining allegations. Further, the Legislature has not acted at all, let alone with the requisite clarity necessary to withhold this power.

1. <u>*Burke* and its Progeny</u>

(i) The Authority to Dismiss the Whole Includes the Power to Strike Out a Part

The seminal case interpreting the scope of the court's dismissal authority under section 1385 is *People v. Burke*, *supra*, 47 Cal.2d 45, where this court recognized that the power to dismiss the whole criminal action includes the power to dismiss or "strike out" parts of that action. In *Burke*, the defendant admitted a prior conviction that made him ineligible for a county jail term and also increased his sentence. The trial court struck the prior conviction in the interest of justice and sentenced the defendant to the county jail. (*Id.* at pp. 49-51.) This court upheld the trial court's ruling, finding the power to strike or dismiss a prior conviction is "within" the power referred to in section 1385, which provides that a court may order an action dismissed. This conclusion was based on the principle that "[t]he authority to

dismiss the whole includes, of course, the power to dismiss or strike out a part." (*Id*. at p. 51.)

In upholding the court's power to strike a part of an action, this court clarified that the striking or dismissal of a prior conviction is not the equivalent of a determination that the defendant did not suffer that conviction. (*Burke*, *supra*, 47 Cal.2d at pp. 50-51.) Rather, it is a judicial action taken for the purpose of sentencing only, which reflects a determination by the trial court that in the interest of justice the defendant "should not be required to undergo a statutorily increased penalty which would follow from judicial determination of that fact." (*Ibid*.)

Burke laid the foundation for subsequent cases holding that section 1385 includes the authority to dismiss various "parts" of a criminal action. The governing principle in *Burke* – that the authority to dismiss the whole includes the power to strike out a part – underlies virtually every decision interpreting section 1385 to permit the court to strike or dismiss anything short of an entire criminal action. It is the reason a court can strike a prior strike allegation (*Romero*, *supra*, 13 Cal.4th at pp. 529-530), an individual charge, or a weapon use enhancement (*Dorsey*, *supra*, 28 Cal.App.3d at pp. 17-18). Again, these charges and enhancements are only subject to dismissal because they are part of a criminal action, and the authority to dismiss the whole includes the power to strike out a part.

Burke's rationale bears directly on the issue presented in appellant's case. Courts now have the authority to strike or dismiss a section 12022.53, subdivision (d) enhancement in the

interest of justice pursuant to section 1385. (§ 12022.53, subd. (h); *People v. Woods* (2018) 19 Cal.App.5th 1080, 1091.) Under the foundational principle established in *Burke*, the authority to dismiss the whole subdivision (d) enhancement necessarily includes the power to strike out a part of it. (*Burke*, *supra*, 47 Cal.2d at p. 51.) Accordingly, *Burke* supports the proposition that section 1385 permits a court to strike elements of an enhancement as part of its greater authority to dismiss the whole enhancement. Specifically, the court can strike the part of the 12022.53, subdivision (d) enhancement that alleges the defendant "caused great bodily injury or death." It can also strike the part of the section 12022.53, subdivision (d) enhancement that alleges the defendant "intentionally discharged a firearm."

A contrary interpretation would be inconsistent with *Burke*. It would mean that although the court has the broad authority to dismiss a section 12022.53, subdivision (d) enhancement under section 1385, it lacks the "lesser power" to strike out a part of it. In the absence of a clear legislative directive supporting this limitation, there is no basis to restrict the court's power in this way. (*People v. Superior Court* (*Howard*) (1968) 69 Cal.2d 491, 502 (*Howard*) [trial court's discretion under § 1385 is "absolute except where the Legislature has specifically curtailed it"].)

(ii) Section 1385 Includes the Power to Strike Factual Allegations that Increase Punishment

Case law confirms that the "injury" and "discharge" elements of the section 12022.53, subdivision (d) enhancement

are the type of allegations that are subject to dismissal under section 1385.

Expounding upon *Burke*, this court has repeatedly construed section 1385 to include the power to strike factual allegations related to sentencing, which increase the penalty for alleged criminal conduct. (See, e.g., *Romero*, *supra*, 13 Cal.4th at p. 504, ["the power to dismiss an action includes the lesser power to strike factual allegations relevant to sentencing"]; *People v. Tanner* (1979) 24 Cal.3d 514, 518 [§ 1385 includes the power to dismiss or strike "allegations which, if proven, would enhance the punishment for alleged criminal conduct"]; *Williams*, *supra,* 30 Cal.3d at p. 483 [accord]; *People v. Lara* (2012) 54 Cal.4th 896, 900-901 (*Lara*) [§ 1385 permits a court to strike "factual allegations relevant to sentencing, such as those that expose the defendant to an increased sentence"].) Notably, this construction allows for the dismissal of elements, since elements are facts that increase the punishment for a crime. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, fn. 19 [120 S.Ct. 2348; 147 L.Ed.2d 35] (*Apprendi*); *People v. Seel* (2004) 34 Cal.4th 535, 539 ["any fact other than a prior conviction that increases punishment beyond the prescribed statutory maximum is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict"], internal quotations and citations omitted.)

In the context of section 12022.53, the allegation that the defendant "intentionally discharged a firearm" is a factual allegation that increases the punishment for firearm use from 10

years under subdivision (b) to 20 years under subdivision (c). Similarly, the allegation that a defendant "caused great bodily injury or death" is a factual allegation that increases the punishment for firearm use from 20 years under subdivision (c) to 25 years to life under subdivision (d). (See *People v. Palacios* (2007) 41 Cal.4th 720, 733 [explaining § 12022.53 sets forth firearm "use" enhancements but subdivision (d) "incorporates an injury element"].) These factual allegations, which elevate the punishment for criminal conduct under section 12022.53, are therefore the type of allegations that can be stricken under section 1385.

This is significant because not all "facts" are subject to dismissal under section 1385. This point was clarified in *In re Varnell* (2003) 30 Cal.4th 1132 (*Varnell*), where this court held that section 1385 includes the power to dismiss sentencing allegations but not "sentencing factors," such as a defendant's criminal history.[8] Unlike sentencing allegations, sentencing factors are not required to be charged in the indictment or information. (*Id.* at pp. 1135, 1137-1143.) As a result, they cannot be "dismissed" under section 1385 because in the absence of a charge or an allegation, there is nothing for a court to dismiss. (*Id.* at pp. 1139, 1143.) (See also *Lara, supra*, 54 Cal.4th at pp. 900-901 [historical facts that limit a defendant's ability to earn conduct credits do not form part of the charges and

[8] A "sentencing factor" is a circumstance that supports a specific sentence within the range authorized by the jury's finding of guilt as to a particular offense. (*Varnell*, *supra*, 30 Cal.4th at p. 1135, fn. 3.)

allegations in a criminal action, and thus cannot be dismissed under § 1385]; *People v. VonWahlde* (2016) 3 Cal.App.5th 1187, 1197 [a parole term cannot be dismissed under § 1385 because it "is not an action, a criminal count, or a factual allegation"].)

Here, the allegation that a defendant's discharge of a firearm caused great bodily injury or death within the meaning of section 12022.53, subdivision (d) is required to be charged in the information. (§ 12022.53, subd. (j) ["the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading"].) As part of the criminal action, it is subject to dismissal under section 1385. The same is true of the allegation that a defendant intentionally discharged a firearm. Because it is a factual allegation that must be charged in the information, it can be dismissed under section 1385, pursuant to the reasoning of *Varnell*.

Moreover, this court has held that allegations requiring an increased sentence may be stricken under section 1385, even where they are included within another charge. (*Marsh*, *supra*, 36 Cal.3d 134.)

2. *People v. Marsh*

People v. Marsh fully supports appellant's position. In *Marsh*, *supra*, 36 Cal.3d 134, this court recognized that allegations that increase punishment can be stricken under section 1385 regardless of whether they are separately alleged or are included within another charge. In *Marsh*, the defendant pleaded no contest to a number of charges, including one count of

kidnapping for ransom with bodily harm (§ 209).[9] (*Id*. at p. 137.) At sentencing, the defendant asked the superior court to strike the allegations of ransom and bodily harm from the aggravated kidnapping charge in order to make him eligible for a commitment to the Youth Authority.[10] (*Id*. at pp. 138-139.) The superior court denied the request and sentenced the defendant to life imprisonment without the possibility of parole, with the sentence for the remaining offenses to be served concurrently. (*Id*. at pp. 137-138.)

This court remanded the case for resentencing. (*Marsh*, *supra*, 36 Cal.3d at pp. 142-145.) It held that under section 1385, a court could strike the ransom and bodily harm allegations in order to reduce the kidnapping offense to one with a sentence that allows for a Youth Authority commitment. (*Id*. at p. 143). In so holding, this court observed there was no statutory provision prohibiting this result. Further, this court found the ransom and bodily harm allegations, although not separately alleged, were similar in effect to prior conviction or weapon use allegations in that they require an enhanced sentence. (*Id*. at pp. 142-143.) The court also pointed out that on remand, the trial court would have a "broad range of sentencing options" available through section 1385 and would not be limited to the "extremes"

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[9] Pursuant to the plea bargain, a simple kidnapping charge was dismissed.

[10] The sentence for kidnapping for ransom with bodily harm (§ 209) was life imprisonment, and a person with a life sentence was not eligible for a Youth Authority commitment (Welf. & Inst. Code, § 1731.5, subd. (a)).

of imposing a life without parole sentence or a Youth Authority commitment. (*Id*. at p. 144.)

Although *Marsh* did not specifically hold that a court can reduce an enhancement to a less serious enhancement, it recognizes that section 1385 can be used to strike elements of an offense in order to reduce the defendant's sentence. In other words, when the trial court determines a reduction in punishment is warranted, it can achieve this reduction by striking parts of an offense on an element-by-element basis and sentencing the defendant on the remaining charge.

To the extent this allows the defendant to be sentenced on an offense that is less than the one the defendant was found to have committed, *Marsh* shows this result is permissible. The effect of the court's holding in *Marsh* was to reduce the offense the defendant was found to have committed to one that had not been charged. Specifically, the defendant in *Marsh* pled guilty to kidnapping for ransom with bodily harm, in violation of section 209, subdivision (a). (*Marsh*, *supra*, 36 Cal.3d at p. 137.) If the trial court struck the bodily harm element, the remaining offense would be kidnapping for ransom. (*Id*. at p. 144 [indicating that removal of the bodily harm allegation would allow for a life with the possibility of parole sentence, i.e. the punishment for kidnapping for ransom.) If both the ransom and bodily harm elements were stricken, the remaining offense would be simple kidnapping, in violation of section 207. (*Id*. at p. 143 [indicating that removal of the ransom and bodily harm allegations reduce the crime to "the basic kidnaping offense"].)

Thus, in holding that the trial court could "strike the ransom and bodily harm allegations to reduce the required sentence for the kidnaping charge" (*Marsh*, *supra*, 36 Cal.3d at p. 143), *Marsh* permitted the trial court to sentence the defendant on either kidnapping for ransom or simple kidnapping. Both of these offenses were uncharged in *Marsh*, and are different and less serious than the offense to which the defendant pled guilty (i.e. kidnapping for ransom with bodily harm). Nevertheless, this court held the reduction was permissible. (*Id*. at pp. 143-144.) Accordingly, *Marsh* provides direct authority for the proposition that a court can use section 1385 to reduce a defendant's sentence by imposing a lesser uncharged offense with a shorter punishment. This reduction is achieved by striking an element or elements of the offense and imposing sentence on the remaining charge.

Under the rationale of *Marsh*, section 1385 can be used to strike an element of the section 12022.53, subdivision (d) enhancement in order to impose a reduced sentence under section 12022.53, subdivision (b) or (c). This reduction occurs in the following manner. Section 12022.53, subdivision (d) applies where the defendant personally and intentionally discharged a firearm, causing great bodily injury or death. If the court strikes the "great bodily injury or death" element from the subdivision (d) enhancement, that leaves an enhancement under subdivision (c) for personal and intentional discharge of a firearm. If the court also strikes the "intentional discharge of a firearm" element, that leaves an enhancement under subdivision (b) for

personal use of a firearm. Both of these options are squarely in line with *Marsh's* holding that the trial court can strike the ransom and bodily harm elements of the aggravated kidnapping conviction in order to reduce the defendant's sentence.

In light of *Marsh*, the Court of Appeal erred in concluding that there was no authority interpreting section 1385 to include the power to reduce a charge. *Marsh* interprets section 1385 to allow a court to strike an element of an offense to reduce punishment, and appellant's argument simply applies this rule in the context of an enhancement.

To this end, it should be noted that one appellate court has disagreed with the above interpretation of *Marsh* in the context of the issue presented in this case. In *People v. Garcia* (2020) 46 Cal.App.5th 786, 794, the court concluded *Marsh* "says nothing about whether the court also has the power to substitute lesser included enhancements." This conclusion was based on the court's belief that the ransom and bodily harm allegations at issue in *Marsh* were "individually charged and proven" sentencing enhancements and were not part of the charged offense. (*Id.* at pp. 793-794.)

Garcia misinterpreted *Marsh*. The opinion in *Marsh* makes clear that the ransom and bodily harm allegations were not separately alleged sentencing enhancements, and instead formed part of the offense to which the defendant pled guilty. *Marsh* describes the offense the defendant pled guilty to as "kidnaping for ransom with bodily harm (Pen. Code, § 209)." (*Id.* at p. 137.) As is evident from the statutory text quoted in

footnote 7 in *Marsh*, the ransom and bodily harm allegations are part of the offense set forth in section 209, subdivision (a). (*Id*. at p. 143, fn. 7 [quoting section 209].) To the extent the court referred to the ransom and bodily harm allegations as "enhancing allegations," this simply reflects the fact that the ransom and bodily harm elements elevate the offense from a violation of section 207 (simple or "basic" kidnapping) to a violation of section 209, subdivision (a) (kidnapping for ransom with bodily harm). (See *Apprendi*, *supra*, 530 U.S. at p. 494, fn. 19 [indicating a fact that increases the punishment for a crime is the functional equivalent of an element of the greater offense].)

Further, *Marsh* specifically addresses the fact that the ransom and bodily harm allegations were *not* individually or separately alleged:

> The ransom and bodily harm findings are similar in effect to prior conviction and weapon use findings in that they require an enhanced sentence. They differ from special circumstances only in that they *are not stated separately* from the substantive charge. It would be anomalous if this variation called for a different result since all that is missing is the placement of the enhancing allegations in a separate paragraph rather than in the one which describes the basic kidnaping offense.

(*Marsh*, *supra*, 36 Cal.3d at p. 143 [emphasis added].)

This language demonstrates that in permitting the court to strike the ransom and bodily harm allegations, *Marsh* allowed the court to strike allegations that were part of, or included within, the greater section 209 offense. Thus, *Garcia's* conclusion that *Marsh* says nothing about whether a lesser included enhancement may be imposed is wrong. Under the rationale of

Marsh, section 1385 permits a court to impose a lesser uncharged enhancement. This result is achieved by striking an element of the enhancement that increases punishment, and sentencing the defendant on the remaining allegations.

C. Appellant's Interpretation Furthers the Policy of Granting Trial Courts Maximum Discretion to Avoid Unjust Sentences

Interpreting section 1385 to permit a trial court to strike elements of an enhancement in order to impose a sentence that is in line with the defendant's individual culpability furthers the purpose of the statute and is consistent with this court's precedent recognizing the trial court's dismissal authority is most broad at sentencing.

The purpose of the trial court's dismissal power under section 1385 is to avoid unjust sentences. (*Garcia*, *supra*, 20 Cal.4th at p. 500.) This end is achieved by allowing the trial court broad discretion to tailor the sentence to the individual defendant's case and culpability. (*Williams*, *supra*, 30 Cal.3d at pp. 482, 489-490.)

The tailoring function is facilitated by the court's ability to strike or dismiss an action or part thereof in "furtherance of justice" – an "amorphous" standard requiring consideration of the constitutional rights of the defendant, as well as the interests of society. (*Romero*, *supra*, 13 Cal.4th at p. 530.) The reason for the dismissal must be that which would motivate a reasonable judge, and it is subject to review for abuse of discretion. (*Id.* at pp. 530-531.) Relevant factors include the defendant's background, the nature of the offense, and other individualized considerations.

(*Id*. at p. 531.) Thus, "the purpose of the power is to allow the sentencing court some discretion to reduce the sentence that would otherwise be imposed to a level that is consistent with the defendant's individual culpability and society's interest in punishing and deterring criminal behavior." (*People v. Casper* (2004) 33 Cal.4th 38, 46 [dis. opn. of Kennard, J.], citing *People v. Williams* (1998) 17 Cal.4th 148, 160-161.)

The trial court's ability to strike or dismiss an allegation does not depend on whether the alleged fact has been proved. In fact, the trial court's authority to dismiss in furtherance of justice is most broad at sentencing, *after* the jury returns its verdict. This is because after the verdict, the trial court has heard the evidence related to the defendant's culpability and can make a more informed decision about whether dismissal would serve the interests of justice. (*Howard*, *supra*, 69 Cal.2d at p. 502 ["[A] court should have broader discretion to dismiss in furtherance of justice after the verdict than it should have during trial. After the verdict, the judge has heard the evidence of the prosecution; whereas prior to the conclusion of the trial there is always the possibility that in the absence of dismissal more evidence may be received."]; *Romero*, *supra*, 13 Cal.4th at pp. 524-525, fn. 11 [Striking a "sentencing allegation after trial may in some cases be preferable to striking before trial, because the court after trial has heard the evidence relevant to the defendant's culpability and, thus, is better prepared to decide whether the interests of justice make it advisable to exercise the power to strike under section 1385."].)

The policy served by this procedure was recognized in *Williams*:

> Mandatory, arbitrary or rigid sentencing procedures invariably lead to unjust results. Society receives maximum protection when the penalty, treatment or disposition of the offender is tailored to the individual case. Only the trial judge has the knowledge, ability and tools at hand to properly individualize the treatment of the offender. Subject always to legislative control and appellate review, trial courts should be afforded maximum leeway in fitting the punishment to the offender.

(*Williams*, *supra*, 30 Cal.3d at p. 482, quoting *Dorsey*, *supra*, 28 Cal.3d at p. 18.) It is for this reason that this court developed the broad rule of statutory construction providing a trial court's section 1385 discretion is absolute except where the Legislature has specifically curtailed it. (*Id.* at pp. 480-481.)

In adherence to this rule, courts have adopted a flexible approach, construing section 1385 as broadly as necessary to achieve a just result. For example, in *Howard* this court held that section 1385 permits a court to dismiss for "insufficient evidence" after a jury verdict of guilty, even where sufficient evidence of guilt exists. (*Howard*, *supra*, 69 Cal.2d at pp. 502-505.) This construction was proper because (1) it was not prohibited by statute, (2) the court's discretion is most broad after the verdict, and (3) a flexible rather than rigid interpretation best furthered the standard of justice. (*Ibid.*)

People v. Garcia, *supra*, 20 Cal.4th 490 is also instructive in terms of the selectivity with which section 1385 has been applied in order to avoid injustice. *Garcia* held that a strike alleged once as to all counts may be stricken selectively as to individual

counts. (*Id*. at pp. 492-493, 502.) *Garcia* relied on language in *Burke* indicating that striking a prior conviction does not "prevent it from being considered in connection with later convictions." (*Id*. at p. 499.) Despite the reference to "later" convictions, this court found "no reason for applying *Burke* differently simply because the two convictions are part of a single proceeding rather than two different proceedings. Such a distinction finds no support in logic, the language of section 1385, or any decision interpreting that section." (*Ibid*.) Although this meant the same strike could be treated differently within the same proceeding, this court concluded the law does not require "perfect symmetry if symmetrical treatment would result in an unjust sentence." (*Id*. at p. 500.)

Here, the interest of justice would best be served by interpreting section 1385 to include the authority to selectively strike elements of an enhancement in order to reduce the defendant's sentence to one that the trial court believes is in line with the defendant's culpability. It is particularly appropriate for the court to have this power in the context of section 12022.53, where the subdivision (d) enhancement carries a severe punishment and, after striking an element or elements, lesser enhancements with shorter punishments are available for use.

If the trial court, after hearing the evidence and weighing any mitigating factors related to the offense or offender, determines that the 25-year-to-life enhancement is too severe, the trial court should be able to strike an element of the enhancement in order to reduce the punishment and avoid

imposing an unjust sentence. "Trial courts will exercise this power in a careful and thoughtful manner. The wise use of this power will promote the administration of justice by ensuring that persons are sentenced based on the particular facts of the offense and all the circumstances. It enables the punishment to fit the crime as well as the perpetrator." (*Williams*, *supra*, 30 Cal.3d at p. 489.)

A contrary interpretation would be inconsistent with the purpose of section 1385. Limiting a trial court to the binary choice of imposing a lifetime enhancement, or striking it completely, unnecessarily restricts the court's ability to tailor the sentence to fit the circumstances of the case and the defendant. Once the court determines the defendant does not deserve to have the enhancement stricken completely, the court's hands are tied – it must impose the enhancement in full, even if it feels that a lifetime enhancement is too severe for the particular offender. Forcing the trial court to make this type of all-or-nothing choice "will invariably lead to unjust results," because in some cases the court will end up imposing a sentence that is longer than the sentencing court believes fairness requires it to be for a particular defendant. This result interferes with the tailoring function and frustrates the statutory purpose of avoiding unjust sentences. To comply with the spirit of section 1385 and to effectuate its purpose, the law should not prevent trial courts from reducing an enhancement where failure to do so will result in an unjust sentence.

D. When a Greater Enhancement Cannot Be Imposed Due to a Defect, the Court May Impose a Lesser Included Enhancement

As discussed, this court's decision in *Marsh* shows that section 1385 includes the ability to strike an element of an offense for the purpose of imposing a reduced sentence, where justice so requires. The holding of *Marsh* demonstrates that after a court strikes an element of an offense, the remaining allegations remain available for use. This conclusion is further supported by a line of authority holding that when a greater enhancement cannot be imposed for some reason, the court may impose a lesser enhancement that is factually supported by the evidence.

In *People v. Strickland* (1974) 11 Cal.3d 946 (*Strickland*), the defendant was charged with murder but found guilty of the lesser included offense of voluntary manslaughter. The jury found true a firearm use enhancement under section 12022.5, subdivision (a), which at the time was not applicable to manslaughter. This court found that although the trial court erred in imposing the section 12022.5 enhancement, the defendant was nevertheless subject to an arming enhancement under former section 12022. (*Id.* at p. 961.) The firearm use allegations gave the defendant notice that his conduct could also be in violation of section 12022, and the true finding on the firearm use allegations showed the jury made the requisite factual findings to support the arming enhancement. Thus, although uncharged, the arming enhancement could be imposed

because section 12022 "would be applicable in any case in which 12022.5 applies."[11] (*Ibid.*)

In *People v. Fialho* (2014) 229 Cal.App.4th 1389 (*Fialho*), the court applied the rule from *Strickland* in the context of section 12022.53. In *Fialho*, the 12022.53, subdivision (d) enhancement was found true but could not be imposed because it did not apply to the defendant's crime, so the trial court imposed a lesser firearm use enhancement under section 12022.5, subdivision (a). (*Id.* at pp. 1393-1394.)

On appeal, the defendant challenged the section 12022.5 enhancement as not pled or proved, although he conceded it was included in the section 12022.53, subdivision (d) enhancement charged in the information and found true by the jury. (*Fialho*, *supra*, 229 Cal.App.4th at pp. 1392, 1394-1395.) The court found imposition of the lesser enhancement was proper under *Strickland*, which "expressly permitted substitution of a charged enhancement with an uncharged enhancement that 'would be applicable in any case' in which the charged enhancement applies." (*Id.* at pp. 1395-1396, citing *Strickland*, *supra*, 11 Cal.3d at p. 961.)

Although the enhancements at issue in *Strickland* and *Fialho* could not be imposed because they were legally inapplicable, this rule has also been applied where the charged enhancement was unsupported by the evidence or deficient in

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[11] Although *Strickland* did not use the term "lesser included enhancement," it has been used in subsequent cases. (See, e.g., *People v. Majors* (1998) 18 Cal.4th 385, 410-411.)

some other respect. (*People v. Allen* (1985) 165 Cal.App.3d 616, 627 [appellate court reduced gun use enhancement (§ 12022.5, subd. (a)) to arming enhancement (former § 12022, subd. (a)) based on insufficient evidence]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 743 [trial court properly reduced firearm use enhancement (§ 12022.5) to simple arming (§ 12022) after prosecutor conceded insufficient evidence of "use"]; *People v. Dixon* (2007) 153 Cal.App.4th 985, 1001-1002 [trial court properly reduced firearm use enhancement (§ 12022.53, subd. (b)) to deadly weapon use enhancement (§ 12022, subd. (b)) based on finding that weapon was a BB gun, not a firearm].)

As the Court of Appeal recognized in *Morrison*, *supra*, 34 Cal.App.5th at p. 222, the above cases show that when a charged enhancement cannot be imposed because it is "unsupported by substantial evidence or [is] defective or legally inapplicable in some other respect," the remedy is to impose a lesser enhancement that does not require the defective element. In the context of section 12022.53, section 1385 can lead to the same result. (*Id.* at pp. 222-223; see also *Ramirez*, *supra*, 40 Cal.App.5th at pp. 312, 317 fn. 3 [recognizing trial court's discretion under *Strickland* to impose a lesser uncharged enhancement in lieu of the § 12022.53, subd. (d) enhancement].)

The firearm use enhancements set forth in section 12022.53 are structured in an escalating manner such that the subdivision (b) and (c) enhancements are included within the subdivision (d) enhancement. If the defendant discharges a firearm causing great bodily injury or death under subdivision (d), he necessarily

discharges the firearm under subdivision (c) and uses the firearm under subdivision (b). Accordingly, if the trial court determines that the section 12022.53, subdivision (d) enhancement is defective or cannot be imposed for some reason, it should be permitted to use section 1385 to remove the defective element and impose a lesser included enhancement.

Because the purpose of section 1385 is to avoid unjust sentences, an enhancement can be considered defective with respect to section 1385 if its imposition would make the defendant's sentence unjust, meaning longer than necessary for that particular defendant. (See, e.g., *Garcia*, *supra*, 20 Cal.4th at p. 500 [length of sentence can make the sentence unjust]; *Dorsey*, *supra*, 28 Cal.App.4th at p. 19 [enhancement can be stricken where additional punishment "is neither necessary nor desirable in the handling of that particular offender"]; *Howard*, *supra*, 69 Cal.2d at p. 505 ["When the balance falls clearly in favor of the defendant, a trial court not only may but should exercise the powers granted to him by the Legislature and grant a dismissal in the interest of justice"].) In the context of section 12022.53, an enhancement under subdivision (d) can be considered defective under section 1385 where there is insufficient evidence of the defendant's culpability or blameworthiness as to the corresponding 25-year-to-life punishment.

Thus, if a trial court determines that the defendant is not sufficiently culpable to warrant imposition of the lifetime enhancement under 12022.53, subdivision (d), but is not deserving of the complete striking of the enhancement, the trial

court should be able to remove the defective great bodily injury element – i.e. the element that causes the increase in punishment – and impose a lesser enhancement under subdivision (c), which does not include the injury element. If the court determines the 20-year enhancement under subdivision (c) is still too severe, the court should be permitted to remove the "discharge of a firearm" element and impose a reduced sentence of 10 years under subdivision (b), which lacks the injury and discharge elements.

This interpretation furthers the purpose of section 1385 by allowing the court "maximum leeway" to tailor the punishment to the offense and the offender. (*Williams*, *supra*, 30 Cal.3d at p. 482.) It accounts for the very real possibility that in terms of culpability, an individual may fall somewhere between two extremes, i.e. deserving of some relief but not deserving enough to warrant striking the enhancement in full.

It is also consistent with the established *effect* of a dismissal under section 1385, which is not to wipe out proven facts but to alleviate adverse sentencing consequences. (*Romero*, *supra*, 13 Cal.4th at p. 525, fn. 11 ["The very purpose of striking a sentencing allegation under section 1385 is to effectuate the decision that in the interest of justice defendant should not be required to undergo a statutorily increased penalty which would follow from judicial determination of that fact"], internal quotations omitted; *Burke*, *supra*, 47 Cal.2d at p. 51 [striking a prior conviction under 1385 is not a determination the conviction was not proved].) In the above example, the great bodily injury element is defective not because it was not proved, but because it

elevates the punishment from 20 years under 12022.53, subdivision (c) to 25 years to life under 12022.53, subdivision (d), and the trial court has determined the 25-year-to-life enhancement is too severe for that particular defendant and should not be imposed but a lesser enhancement should be.

The Court of Appeal concluded that the above line of authority does not apply because the section 12022.53, subdivision (d) enhancement in appellant's case was neither legally inapplicable nor supported by insufficient evidence. (*Tirado*, *supra*, 38 Cal.App.5th at p. 644.) However, the circumstance that *Fialho* and *Strickland* involved enhancements that were legally inapplicable, while other cases discussed in *Fialho* involved insufficient evidence, does not mean that this line of authority is limited to those two specific situations. The principle underlying *Fialho* is broad: "[T]he California Supreme Court has expressly permitted substitution of a charged enhancement with an uncharged enhancement that 'would be applicable in any case' in which the charged enhancement applies." (*Fialho*, *supra*, 229 Cal.App.4th at pp. 1395-1396, citing *Strickland*, *supra*, 11 Cal.3d at p. 961.)

Further, to the extent insufficient evidence or legal inapplicability is required to impose a lesser enhancement under *Fialho* and *Strickland*, it would not necessarily be required to reduce an enhancement pursuant to section 1385. Section 1385 permits a court to strike or dismiss based on insufficient evidence. (*People v. Hatch* (2000) 22 Cal.4th 260, 268-270 (*Hatch*).) In *Howard*, this court held that under section 1385 a

trial court can dismiss for insufficient evidence even where sufficient evidence of guilt existed, because this broad interpretation best furthers the standard of justice. (*Howard*, *supra*, 69 Cal.2d at pp. 504-505.) "In our opinion, the standard of furtherance of justice will best be served if we recognize discretion in the trial judge, who viewed the witnesses and heard the conflicting testimony, to dismiss on the basis of the reasons he has set forth rather than severely limit such discretion to cases where the evidence is insufficient as a matter of law." (*Id.* at p. 505.)

Thus, under section 1385, there is no need to limit discretion to reduce an enhancement to cases where the charged enhancement is legally inapplicable or supported by insufficient evidence as a matter of law. As in *Howard*, this court should adopt the interpretation that best serves the standard of furtherance of justice, which would include cases where there is insufficient evidence of the defendant's culpability as to the charged enhancement. In other words, the trial court should have discretion to impose a lesser enhancement where imposition of the greater enhancement would make the defendant's sentence too long. While this criterion may seem simplistic, it captures the heart of section 1385. When it comes to striking an allegation under section 1385, the length of the defendant's sentence is the "overarching consideration" because the underlying purpose of section 1385 is the avoidance of unjust sentences. (*Garcia*, *supra*, 20 Cal.4th at p. 500.)

E. The Court of Appeal's Analysis Is Inconsistent with the Historical Interpretation of Section 1385 and Frustrates the Purpose of Senate Bill 620

1. A Statute May Not Implicitly Restrict Section 1385 Discretion

As noted above, section 1385 is subject to a clear rule of statutory construction: "Section 1385 permits dismissal in the interest of justice in any situation where the Legislature has not evidenced a contrary intent." (*Williams*, *supra*, 30 Cal.3d at p. 482.) This rule serves the policy of avoiding unjust sentences by allowing trial courts maximum leeway to fit the punishment to the individual offender. (*Ibid*.)

Accordingly, this court has refused to interpret penal statutes "as implicitly eliminating" the trial court's power to impose a lesser punishment by striking or dismissing allegations under section 1385. (*Romero*, *supra*, 13 Cal.4th at p. 518.) "This is because the statutory power to dismiss in furtherance of justice has always coexisted with statutes defining punishment and must be reconciled with the latter." (*Ibid*.) Thus, when the Legislature seeks to curtail the court's section 1385 discretion, it must do so with "unmistakable clarity." (*Williams*, *supra*, 30 Cal.3d at pp. 480-481; *Romero*, *supra*, 13 Cal.4th at p. 518 ["[W]e will not interpret a statute as eliminating courts' power under section 1385 'absent a clear legislative direction to the contrary.'"].) "This clear expression of legislative intent may be found in the relevant statutory language or in the statute's legislative or initiative history." (*People v. Fuentes* (2016) 1 Cal.5th 218, 227 (*Fuentes*).)

Here, the Court of Appeal concluded that because other statutes use the terms "modify" and "reduce," the omission of these terms in section 12022.53, subdivision (h) and section 1385 indicates the Legislature did not intend to permit reductions or modifications of section 12022.53 enhancements. (*Tirado*, *supra*, 38 Cal.App.5th at p. 643 [referencing §§ 1181 and 1260].) In reaching this conclusion, the court relied on the maxim "[w]here a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent." (*Ibid*.)

However, statutory maxims, "while helpful in ascertaining legislative intent in most cases," have "limited utility" in the context of section 1385 because they cannot take the place of the clear legislative direction that is required to divest a court of its section 1385 discretion. (*Fuentes*, *supra*, 1 Cal.5th at p. 229.) Thus, in *Fuentes*, this court rejected the argument that a provision of the gang statute granting the court the specific power to "strike the additional punishment for the enhancement" (§ 186.22, subd. (g)), was evidence the Legislature intended to limit the court's discretion over all gang enhancements. (*Ibid*.) Because the Legislature was aware of authority requiring "clear direction" to abrogate section 1385 discretion and did not provide it, this court held that the specific provision at issue did not implicitly limit the trial court's authority to strike gang enhancements. (*Id*. at p. 231.)

For the reasons discussed in *Fuentes*, the Court of Appeal's reliance on the language of sections 1181 and 1260 to find an implicit limitation on the court's section 1385 discretion is not helpful because it "falls short of the requisite clear direction" needed to restrict a court's section 1385 authority. (*Fuentes*, *supra*, 1 Cal.5th at p. 229.)

Further, because section 1385 "coexists" with other statutes, the fact that sections 1181 and 1260 allow for modification or reduction does not mean section 1385 cannot be used to achieve the same result. For example, a court can dismiss for insufficient evidence under section 1385 even though section 1118.1 provides for a similar result. (*Hatch*, *supra*, 22 Cal.4th at pp. 267-269.) In *Hatch*, the People argued that enactment of section 1118.1 – which "mandates an acquittal before submission of a case to the jury if the court determines there is insufficient evidence to support a conviction as matter of law" – eliminated the court's section 1385 power to dismiss for insufficient evidence after a case is submitted to the jury. (*Id.* at p. 268.) This court disagreed, adhering to the rule that a court's power under section 1385 will not be abrogated absent a clear legislative direction to do so, and finding no such intent. (*Id.* at p. 269.)

In the same way, the circumstance that section 1181, subdivision (6) allows a court to reduce a conviction instead of granting a motion for a new trial does not restrict the trial court's separate and distinct authority to use section 1385 to reduce punishment by striking an element of an offense at sentencing.

Accordingly, the text of section 12022.53, subdivision (h) does not show "clear legislative direction" to curtail the trial court's dismissal authority under section 1385.

2. Senate Bill 620 Did Not Restrict the Trial Court's Authority to Reduce an Enhancement in Order to Achieve a Just Sentence

Nothing in the legislative history of Senate Bill 620 shows the Legislature intended to restrict the court's ability to strike a part of the subdivision (d) enhancement, while expressly granting discretion to strike the whole subdivision (d) enhancement; such a conclusion would be contrary to the purpose of the amendment.

Under former section 12022.53, subdivision (h), firearm use enhancements could not be stricken. The purpose of this legislation, known as "use a gun and you're done" or the "10-20-life" law, was to deter violent crime by keeping convicted criminals in prison. (Assem. Com. on Public Safety, Analysis of Sen. Bill 620 (2017-2018 Reg. Sess.) as amended Mar. 28, 2017, pp. 3-4 [describing history of § 12022.53] (hereafter "Assem. Public Safety Analysis").)

However, over time research showed that these lengthy and inflexible enhancements, which prevented trial courts from tailoring punishment to fit the individual culpability of the offender, were resulting in severe and unjust sentences:

> While most sentencing enhancements . . . can be declined if the judge believes they are unjust in a specific case, gun enhancements [under section 12022.53] are mandatory. Judges are thus forbidden from tailoring these sentences to an individual's case and culpability. These mandatory terms have resulted in a rigid and arbitrary system that has meted out punishments that are disproportionate to

> the offense and do not serve the interest of justice or public safety.
>
> (Assem. Public Safety Analysis, pp. 6-7; see *id*. at pp. 3-4.)

To remedy this problem, the Legislature sought to give trial courts discretion to account for individual considerations, such as the severity of the crime or the individual culpability of the defendant, in order to impose sentences that fit the offense and offender:

> SB 620 allows a court to use judicial discretion and take into account the nature and severity of the crime and other mitigating and aggravating factors during sentencing. Consequently, SB 620 provides judges the ability to impose sentences that fit the severity of the offense.
>
> (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill 620 (2017-2018 Reg. Sess.) as amended June 15, 2017, p. 6 (hereafter "Sen. Floor Analysis").)

The Legislature contemplated that as a result of this newfound discretion, "relief would be available to a deserving defendant:"

> This bill provides the court with discretion to strike a firearm enhancement in any case in which that would be in the interest of justice to do so. By doing this, relief would be available to a deserving defendant, while a defendant who merited additional punishment for the use of a firearm in the commission of a felony would receive it.
>
> (Sen. Floor Analysis, p. 4.)

And, it was the opinion of the Legislature that granting the trial court discretion to tailor the sentence to the culpability of the offender would help to ensure that defendants do not serve unnecessarily long sentences:

> SB 620 allows a judge to take into account the nature and severity of the crime, as well as the individual's culpability, during sentencing. Consequently, SB 620 provides judges the ability to impose sentences that fit the severity of the offense, helping to ensure that incarcerated Californians do not serve unnecessarily long sentences.
>
> (Assem. Public Safety Analysis, p. 7; see *id*. at pp. 3-6.)

The legislative history of Senate Bill 620 makes clear that in amending section 12022.53, subdivision (h), the Legislature sought to give trial courts the ability to tailor the sentence to the particular facts of the case and individual culpability of the defendant, and intended for defendants to be able to obtain this relief, when appropriate.

Nowhere in the legislative history is there any indication that when granting trial courts broad discretion to strike section 12022.53 enhancements in order to avoid "rigid" and "disproportionate" sentences, the Legislature also intended to withhold the more narrow power to strike a portion of an enhancement for the purpose of reducing the defendant's sentence. Indeed, withholding the lesser power to reduce an enhancement would be inconsistent with the goal of allowing trial courts to fit the punishment to the offender, as it would mean that there could be no middle ground in terms of culpability. It would also be anomalous to enact a statute to *avoid* sentencing rigidity, by binding trial courts to the rigid remedy of an all-or-nothing choice between striking a 25-year-to-life enhancement completely or imposing it in full, rather than allowing use of a flexible remedy that permits the court to impose the fairest sentence possible.

Under the Court of Appeal's interpretation, a defendant like appellant, who committed a severe offense but had mitigating characteristics, may receive a sentence that is disproportionate to his culpability, because the trial court is presented with two extremes: strike the 25-year-to-life enhancement entirely, or impose it in full. This interpretation, which limits the trial court's ability to give a defendant the relief he deserves, frustrates the purpose of Senate Bill 620 and must be rejected.

Moreover, to restrict the trial court's discretion under section 1385, the Legislature must do so with "unmistakable clarity." That clarity is lacking here. Instead, it appears the Legislature sought to avoid unjust sentences by granting trial courts broad discretion to make individualized sentencing decisions, which is consistent with the appellant's interpretation of the court's power, i.e. that courts may strike elements of an enhancement in order to impose a just sentence.

Further, the legislative history confirms the Legislature was aware that section 1385 allows a court to dismiss "any part" of a criminal action, and that any limitations on the court's discretion would need to be explicit:

> Existing law includes Penal Code Section 1385, which grants a court the power and discretion to dismiss an action *or any part of an action* in the interest of justice. The Legislature can limit or prohibit the court's exercise of discretion under section 1385 for any particular crime or enhancement. However, any limits on section 1385 must be clearly and specifically stated. (*People v. Superior Court* (*Romero*), *supra*, 13 Cal.3d 497.)

(Sen. Floor Analysis, p. 4 [emphasis added].)

Yet the Legislature took no such limiting action. Instead, the Legislature amended the statutory language of section 12022.53, subdivision (h) to expressly include the phrase "pursuant to section 1385," which had not been included in earlier versions of the bill.[12] This had the effect of broadening the court's power to strike or dismiss by tying the court's authority to the "long history in this state of dismissals in furtherance of justice, which have been authorized since 1850 [citation] and discussed prominently in case law." (*Romero*, *supra*, 13 Cal.4th at p. 520.)

Under these circumstances, the conclusion that courts retain the ability to use section 1385 to strike parts of an enhancement is effectively compelled by the rule that the trial court's discretion is "absolute except where the Legislature has specifically curtailed it." (*Howard*, *supra*, 69 Cal.2d at p. 502; *Williams*, *supra*, 30 Cal.3d at p. 482 ["Section 1385 permits dismissals in the interest of justice in any situation where the Legislature has not evidenced a contrary intent."].) No contrary intent has been expressed here.

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[12] Senate Bill 620 initially amended subdivision (h) of section 12022.53 to permit the court to strike "in the interest of justice," but did not reference section 1385. (Compare Sen. Amend. to Sen. Bill 620 (2017-2018 Reg. Sess.), as amended Mar. 28, 2017, with Assem. Amend. to Sen. Bill 620 (2017-2018 Reg. Sess.), as amended June 15, 2017.)

F. Reducing a Defendant's Sentence by Striking an Element of an Enhancement at Sentencing Does Not Infringe the Prosecutor's Charging Authority

The Court of Appeal was concerned that because the prosecutor charged only the section 12022.53, subdivision (d) enhancement, allowing the trial court to reduce the enhancement to one under subdivision (b) or (c) would infringe the prosecutor's ability to determine what charges to file. (*Tirado*, *supra*, 28 Cal.App.5th at p. 644.) These concerns are misplaced. If they were valid, they would override every application of section 1385 because this section, by its nature, makes changes to the charges or allegations that the prosecutor has filed. Moreover, the trial court's treatment of an enhancement at sentencing has no effect on the prosecutor's charging decisions. Further, in the context of section 12022.53, imposition of an enhancement under subdivision (b) or (c) does not implicate separation of powers concerns because subdivisions (b) and (c) are lesser included enhancements subsumed within the subdivision (d) enhancement that the prosecutor chose to charge.

1. Dismissal of an Allegation at Sentencing Does Not Impact the Prosecutor's Ability to Determine What Charges to File

"[P]rosecuting authorities, exercising executive functions, ordinarily have sole discretion to determine whom to charge with public offenses and what charges to bring." (*People v. Birks* (1998) 19 Cal.4th 108, 134 (*Birks*).) This authority is founded on the principle of separation of powers and is generally not subject to judicial review. (*Ibid.*)

Although the prosecutor determines what charges to bring, the disposition of those charges, as well as matters related to sentencing, are judicial functions. "When the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility." (*Romero*, *supra*, 13 Cal.4th at p. 517.)

Dismissal, in particular, is a "judicial, rather than a prosecutorial or executive, function." (*Romero*, *supra*, 13 Cal.4th at pp. 512, 515.) A dismissal does not impact the prosecutor's charging discretion because "[a]ny decision to dismiss is necessarily made after the prosecutor has already invoked the court's jurisdiction by filing criminal charges." (*Id*. at p. 514.) "[O]nce the state is ready to present its case in a judicial setting, the prosecutorial die has long since been cast." (*Ibid*., internal quotations and citations omitted.)

Thus, in *Romero,* this court rejected the People's argument that section 1385 could be construed as "dealing with charging discretion, rather than with the court's disposition of pending charges." (*Romero*, *supra*, 13 Cal.4th at p. 514.) "When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature." (*Id*. at p. 511, quoting *People v. Tenorio* (1970) 3 Cal.3d 89, 94.) Further, a dismissal under section 1385 is necessarily a judicial function because only the court can order an action dismissed. (*Id*. at p. 515 [prosecutor can "invite judicial exercise" of the power to dismiss, but cannot "exercise" that power].)

Here, the prosecutor exercised his or her discretion to bring charges against appellant and to allege a firearm use enhancement under section 12022.53, subdivision (d). Once this enhancement was charged and the court's jurisdiction invoked, the ultimate disposition of the enhancement became a judicial responsibility. (See *Romero*, *supra*, 13 Cal.4th at p. 517.) Thus, whether the trial court exercised its section 1385 discretion to (1) dismiss the enhancement entirely, (2) impose the enhancement but strike the punishment in full, or (3) strike an element of the enhancement in order to impose a reduced punishment, none of these actions impact the prosecutor's charging authority, which had already been exercised at the beginning of the case.

2. A Lesser Included Enhancement is a Charge "Chosen" by the Prosecutor

A prosecutor implicitly charges the enhancements under section 12022.53, subdivision (b) or (c) when the subdivision (d) enhancement is charged. As a result, imposition of either lesser included enhancement does not offend the prosecutor's authority to determine the charges.

"Like most jurisdictions, California recognizes that an offense expressly alleged in an accusatory pleading may necessarily include one or more lesser offenses." (*Birks*, *supra*, 19 Cal.4th at p. 117; *People v. Eid* (2014) 59 Cal.4th 650, 656 ["A charged offense may include more than one lesser offense."].) "Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the

greater cannot be committed without also committing the lesser." (*Birks*, *supra*, 19 Cal.4th at pp. 117-118.)

The prosecutor is not required to charge lesser included offenses in the accusatory pleading. This is because the prosecutor "implicitly" charges offenses that are "necessarily included within explicitly charged offenses." (*People v. Hicks* (2017) 4 Cal.5th 203, 211 (*Hicks*).) Accordingly, "[a] defendant may be found guilty 'of any offense, the commission of which is necessarily included in that with which he is charged.'" (*Ibid.*; § 1159; *People v. Reed* (2006) 38 Cal.4th 1224, 1227 [accord].) This is fair because "by definition, the stated charge gives notice to both [the prosecution and the defense] that all the elements of any such offense are at issue." (*Birks*, *supra*, 19 Cal.4th at p. 112.)

Because a lesser included offense is considered to be "within the charge chosen by the prosecution" (*Birks*, *supra*, 19 Cal.4th at p. 119), the prosecutor's charging authority is not infringed when a defendant is convicted of a lesser included offense that is not explicitly charged in the information. "[T]he prosecution understands that when it chooses to charge the greater offense, it is by definition charging the elements of every lesser offense necessarily included therein." (*Id.* at p. 135, fn. 18.) This is why jury instructions on lesser included offenses, "even when given over the prosecution's objection, cannot undermine the prosecutor's authority to determine the charges." (*Id.* at p. 112.)

The lesser included offense doctrine has been applied in the context of enhancements. (See, e.g., *Dixon*, *supra*, 153 Cal.App.4th at pp. 1001-1002.) Although enhancements cannot be considered lesser included "offenses" because they do not define a crime or offense but relate to the penalty to be imposed, the same rationale applies: an uncharged lesser enhancement may be imposed if that lesser enhancement "would be applicable in any case in which the [charged enhancement] applies." (*Strickland*, *supra*, 11 Cal.3d at p. 961.) This is consistent with the rationale of the lesser included offense doctrine. As with lesser included offenses, an enhancement explicitly alleged in the information gives the defendant notice of the prosecution's intent to prove all the elements of any lesser included enhancement. (*Id*. at p. 961; see *Birks*, *supra*, 19 Cal.4th at p. 118.) Further, a true finding on the charged enhancement shows the jury made the requisite factual findings to support the lesser included enhancement. (*Strickland*, *supra*, 11 Cal.3d at p. 961 [true finding on § 12022.5 firearm use enhancement demonstrated jury found defendant was armed with a gun within the meaning of former § 12022].)

Here, the enhancements set forth in section 12022.53, subdivision (b) and (c) are necessarily included within the subdivision (d) enhancement. One cannot personally and intentionally discharge a firearm causing great bodily injury or death under subdivision (d) without also "discharging" the firearm under subdivision (c) and "using" the firearm under subdivision (b). (*Palacios*, *supra*, 41 Cal.4th at p. 726 [true

finding on § 12022.53, subd. (d) enhancement showed "the jury necessarily determined that defendant fired the gun"]; *Fialho*, *supra*, 229 Cal.App.4th at pp. 1395-1399 [§ 12022.53, subd. (d) allegation satisfied pleading and proof requirements for personal firearm "use" under former § 12022.5].) In other words, the subdivision (b) and (c) enhancements "would be applicable in any case in which" the subdivision (d) enhancement applies. (*Strickland*, *supra*, 11 Cal.3d at p. 961.)

Accordingly, these lesser included enhancements were implicitly charged in the information when the prosecution alleged the subdivision (d) enhancement. (See *Hicks*, *supra*, 4 Cal.5th at p. 211; *Birks*, *supra*, 19 Cal.4th at p. 119.) And, the jury necessarily made the requisite factual findings to support the subdivision (b) and (c) enhancements when it returned the true finding on the subdivision (d) enhancement. Under these circumstances, imposition of either the (b) or (c) enhancements would not infringe the prosecutor's charging authority, because both are considered to be "within" the subdivision (d) enhancement that the prosecutor chose. (See *Birks*, *supra*, 19 Cal.4th at p. 119.)

3. Failure to Explicitly Plead a Specific Lesser Included Enhancement Should Not Deprive a Deserving Defendant of the Opportunity for a Reduction in Punishment

The Court of Appeal acknowledged that if the prosecutor had alleged the subdivision (b) and (c) enhancements, the jury would presumably have found them true, and the trial court would then have had the option of imposing a lesser enhancement. However, the court concluded that because only

the subdivision (d) enhancement was alleged, the court was limited to striking that enhancement or imposing it in full. (*Tirado*, *supra*, 28 Cal.App.5th at p. 644.) But under this interpretation, the only circumstance preventing the court from imposing a lesser enhancement is that the specific code sections for the (b) and (c) enhancements were not explicitly pled in the information and separately submitted to the jury.

This result is untenable, particularly in light of the fact that the failure to include these code sections deprived the trial court of the opportunity to reduce appellant's sentence by 5 to 15 years or more. It ignores the reality that (1) the subdivision (b) and (c) enhancements were implicitly charged in the information when the subdivision (d) enhancement was charged; (2) the specific facts supporting the (b) and (c) enhancements were alleged in the information, as required under section 12022.53, subdivision (j); and (3) the facts supporting the (b) and (c) enhancements were necessarily found true when the jury returned the true finding on the subdivision (d) enhancement.

"To require that a specific lesser included enhancement code section be pleaded before a lesser included enhancement can be imposed under such circumstances would 'improperly elevate form over substance.'" (*Fialho*, *supra*, 229 Cal.App.4th at p. 1398.) This conclusion applies with heightened force in the context of section 1385, the very purpose of which is to avoid unjust sentences by giving trial courts maximum leeway to fit the punishment to the offender.

Further, to the extent the subdivision (b) and (c) enhancements were not explicitly pled or separately proved, that alone should not prevent the trial court from reducing a defendant's sentence, since pleading and proof requirements exist to protect the defendant (see, e.g., *People v. Mancebo* (2002) 27 Cal.4th 735, 745-746, 749 [inadequate pleading of sentence enhancement allegations violated defendant's due process right to notice of the charges against him]), not to prevent a reduction at sentencing.

In sum, because a prosecutor's charging authority is not affected when a court strikes an entire 12022.53, subdivision (d) enhancement in the interest of justice, it follows that this charging discretion is similarly unaffected if a court strikes only part of an enhancement. To the extent this leaves a lesser enhancement under the same code section, this result is consistent with the principle of separation of powers because this type of lesser included enhancement, even when not explicitly alleged, is considered to be a charge that the prosecutor chose. Thus, if the sentencing court determines it is appropriate to strike an element of the subdivision (d) enhancement in order to impose a reduced punishment under subdivision (b) or (c), neither party can claim surprise. At the same time, the outcome is a result the court has determined is fair. This interpretation furthers the purpose of section 1385: it allows the court to impose a sentence the court believes is just, rather than requiring the court to use one of two options the court has determined is unjust.

II. REMAND FOR RESENTENCING IS REQUIRED

Mr. Tirado was sentenced one week after Senate Bill 620 went into effect, at a time when there was no published authority holding that section 1385 permits a court to reduce an enhancement under section 12022.53, subdivision (d) to one under subdivision (b) or (c). Although the above discussion shows the court has this authority, nothing in the record shows the court was aware of this option. Instead, the record shows the court proceeded as if it faced an all-or-nothing choice between striking the 25-year-to-life enhancement or imposing it in full.

Defendants are entitled to the exercise of the "informed discretion of the sentencing court," and a court "unaware of the scope of its discretionary powers" cannot exercise its informed discretion. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) Where the record shows the trial court "may not have properly understood the scope of its sentencing discretion," the appropriate remedy is to remand the case for resentencing. (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1007.) *Lua* is instructive here because it involved the scope of the trial court's discretion under section 1385. In *Lua*, the defendant argued the trial court did not understand its discretion to strike certain sentencing enhancements. The Court of Appeal found the record was ambiguous but, based on the trial court's comments, contained enough support for the defendant's claim to warrant remand. (*Id*. at pp. 1020-1021.) Under *Lua*, an abuse of discretion occurs where the trial court is not aware of the scope of its discretion to dismiss under section 1385. (*Ibid*., *People v. Carmony* (2004) 33 Cal.4th 367, 378 [accord].)

Here, nothing in the record shows the trial court was aware of its discretion to reduce the section 12022.53, subdivision (d) enhancement. Appellant requested the court strike the 25-year-to-life punishment, while the prosecutor urged the court to impose both the enhancement and the punishment. (5RT 631-635; 2CT 354-355.) At no point did the parties or the court reference the possibility of imposing a lesser enhancement. Indeed, defense counsel raised the possibility of imposing a sentence "well over 10 years," but only if the 25-year-to-life punishment was stricken. (CT 354-355.)

At the same time, the tenor of the discussion shows the court clearly wrestled with what it viewed as an all-or-nothing choice. The court discussed at length the circumstances of the case and the mitigating factors identified by defense counsel, including appellant's history of gainful employment, his extended familial relationships, his lack of serious criminal history, and the role alcohol may have played in his conduct; ultimately, the court concluded a "serious" punishment was still warranted based on the severity of the offense and the injury to the victim. (5RT 630-635; 2CT 351-365.) Yet the court lamented, "[t]hese cases are, I think, are usually the more challenging because; one, you have a very high punishment on someone who doesn't have a bad – particularly bad record, but has a very serious offense before the court." (5RT 634-635.) The court ultimately denied appellant's request, but stated: "In many cases some sentences are more difficult than others and this certainly was." (5RT 639.)

The extent to which the court struggled shows it was not aware of the full scope of its sentencing discretion. It would not have been such a "difficult" sentencing decision if the court had been aware that instead of striking the lifetime enhancement completely it could have imposed a sentence of 20 years under subdivision (c), for a "serious" but less drastic punishment. Thus, the record does not show "it is clear that the trial court recognized" the range of discretionary options available under section 1385. (See *Lua*, *supra*, 10 Cal.App.5th at p. 1021.) Further, because the amendment to section 12022.53, subdivision (h) was new, the rule that a court is presumed to have correctly applied the law should not be applied. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 945.)

Under these circumstances, it is appropriate to remand for a new sentencing hearing for the trial court to consider whether to reduce the subdivision (d) enhancement to one under subdivision (b) or (c).

Remand in this case would not be futile. Because the trial court showed leniency to appellant by imposing less than the maximum sentence, the record does not "clearly indicate" the court would have imposed the 25-year-to-life enhancement had it been aware of its discretion to reduce the punishment to 10 or 20 years instead of striking it completely. (See *Gutierrez*, *supra*, 58 Cal.4th at p. 1391; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428 [remand for resentencing under Senate Bill 620 where trial court imposed less than maximum sentence].) Remand is required.

III. THE ISSUE IS NOT FORFEITED

Trial counsel did not ask the court to reduce the section 12022.53, subdivision (d) enhancement and impose sentence under subdivision (b) or subdivision (c). The Court of Appeal did not consider forfeiture, but chose to address the issue on the merits. Because of the nature of his claim and the timing of his sentencing hearing, appellant's claim has not been forfeited. (*Morrison*, *supra*, 34 Cal.App.5th at pp. 224-225 [sentencing issue not raised at trial nonetheless remanded for resentencing where trial court was unaware of its discretion to reduce § 12022.53, subd. (d) enhancement].) Even assuming the issue could be deemed forfeited, this court should nevertheless exercise its discretion to entertain the claim in the interest of justice. (*Fuhrman*, *supra*, 16 Cal.4th at p. 945 [declining to deem issue forfeited where at the time of sentencing there was no controlling authority]; *Williams*, *supra*, 17 Cal.4th at p. 161, fn. 6 ["An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party."].)

CONCLUSION

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: May 8, 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 Opening Brief on the Merits on behalf of my client, and that the word count for this brief is 13,991 words.

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

Dated: May 8, 2020

Respectfully submitted,

/s/ Theresa Schriever
THERESA SCHRIEVER
Attorney for Appellant

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

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY PLACEMENT AT PLACE OF BUSINESS FOR COLLECTION AND DEPOSIT IN MAIL

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On **May 8, 2020**, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of **APPELLANT'S OPENING BRIEF ON THE MERITS** by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. Transmission occurred at approximately **10:00 a.m.** For those marked "Served by Mail," I enclosed a copy of the document identified above in an envelope or envelopes, addressed as provided below, and placed the envelope(s) for collection and mailing on the date and at the place shown below, following the Central California Appellate Program's ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in sealed envelope(s) with postage fully prepaid.

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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 **May 8, 2020**, at Sacramento, California.

/s/ *Sebastion Lowe*
Sebastion Lowe

STATE OF CALIFORNIA
Supreme Court of California

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