

No. S138052

**IN THE SUPREME COURT OF CALIFORNIA**

THE PEOPLE,

Plaintiff and Respondent,

v.

TUPOUTOE MATAELE,

Defendant and Appellant.

Orange County Superior Court

Case No. 00NF1347

Hon. James A. Stotler, Judge

On Automatic Appeal From A  
Judgment and Sentence of Death

CAPITAL CASE

**Appellant's Supplemental Opening Brief**

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## Argument

- 1. The Court should order a limited sentencing remand so the trial court may be given an opportunity to exercise its new discretion to strike the five-year prior serious felony enhancement (Pen. Code, § 667, subd. (a)(1)) and the four-year firearm enhancement (Pen. Code, § 12022.5, subd. (a)) imposed in counts 2 and 3.**

### **A. Introduction.**

Appellant's sentence on each of counts 2 (conspiracy to commit murder) and 3 (attempted premeditated murder) included the midterm of four years for the firearm enhancement (Pen. Code, § 12022.5, subd. (a)) and five years for the prior serious felony enhancement (Pen. Code, § 667, subd. (a)(1)). (RT 42:9426-9431.)<sup>1</sup>

When appellant was sentenced in 2005, the court had no discretion to strike the firearm or prior serious felony enhancements. Subsequent legislation, which applies retroactively to non-final judgments, gives the court discretion to strike these enhancements for purposes of sentencing. (*Post*, pts. 1.C. & 1.D.)

A limited sentencing remand is warranted so the court may be given an opportunity to exercise its new discretion to strike the enhancements for purposes of sentencing because the court was not aware of the full scope of the discretion

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<sup>1</sup> "RT" designates the Reporter's Transcript. "CT" designates the Clerk's Transcript of Jury Trial. Volume and page references are in the format "volume:page."

it now has and because the record contains no clear indication that the trial court would refuse to exercise its discretion. (*Post*, pt. 1.E.)

**B. The sentencing hearing.**

Appellant was sentenced on October 7, 2005, as follows: (1) death on count 1 (first-degree murder of Danell Johnson); (2) 59-years-to-life on count 2 (conspiracy to commit murder), calculated as 25-years-to-life doubled under the Three Strikes law (Pen. Code, § 1170.12, subd. (c)(2)) plus consecutive terms of four years for the firearm use enhancement (Pen. Code, § 12022.5, subd. (a)) and five years for the prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)), stayed pursuant to Penal Code section 654; and (3) life with the possibility of parole with a minimum of 14 years before parole eligibility on count 3 (attempted premeditated murder of John Masubayashi) plus consecutive terms of four years for the firearm use enhancement (Pen. Code, § 12022.5, subd. (a)) and five years for the prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)), consecutive to count 1. (RT 42:9405-9408 [tentative sentence], 9426-9431 [pronouncement of sentence].)

The court announced the tentative sentence, stating that it would impose five years for the prior serious felony conviction and the midterm of four years for the firearm enhancement on each of counts 2 and 3. (RT 42:9405-9406.) The court further stated:

And as to count 3, my tentative is to impose a life sentence plus a determinate term. and I think I have this right, I am now just starting to cogitate on this, I am not sure I can give another five years on that serious felony prior, So, Mr. Murray [i.e., the prosecutor], you might want to proffer some instruction on that. [¶]

And I also think since I have stayed the sentence on count 2, I think if I have stayed the sentence on count 2, I can impose four years plus five. So my tentative would be to impose a life term on count 3, with an additional term of four years for the weapons use, and five years for the serious felony prior.

And that sentence would be consecutive to any other sentence as the life term on count 3. And the reason, of course, for the consecutive sentence is due to the egregious nature of the circumstances of this case.

And there are two separate victims, we have Danell Johnson, the subject of count 1, the victim of count 1, and we have John Masubayashi, the victim of count 3. So we have separate victims. separate shots fired. multiple attempts to kill Masubayashi. [RT 42:9406-9407.]

The prosecutor then stated that “with regard to the invited comment on the 667(a) on count 3, I do think that’s appropriate, particularly where you have multiple counts, and it has been imposed on say count 1 or count 2 with one victim, and you have a completely different and separate victim on count 3, I do think it is appropriate to impose it on both counts.” (RT 42:9407.) The court responded: “All right. And since I am staying count 2 altogether pursuant to 654 of the Penal Code, then I think we can impose the four plus the five on count 3. That would be a life sentence with a – that is a determinate term of nine years consecutive, and that’s my intent.” (RT 42:9407-9408.)

The court pronounced sentence consistent with the tentative (RT 42:9421-9431) and concluded by stating:

The court's intention is to make the sentence on count 3 consecutive to any term on count 1, because I don't know ultimately what is going to happen on this case in the near distant future.

And if perchance the first count is reversed in total, then it is the court's intention to have count 3 be consecutive to the term in count 2.

The court finds, by the way, that the felonies alleged in counts 1 and 3 are serious felonies within the meaning of Penal Code section 1190.7(c)(1). The court makes that finding beyond a reasonable doubt. [RT 42:9429.]

**C. Senate Bill No. 1393 (discretion to strike the five-year prior serious felony enhancement).**

When appellant was sentenced, former Penal Code section 667, subdivision (a) required a court to impose, in addition and consecutive to the term imposed for a serious felony, a five-year enhancement for each prior serious felony conviction. Former section 667, subdivision (b) contained a restriction preventing a judge from striking any prior serious felony conviction supporting a five-year enhancement under Penal Code section 667. (*People v. Alexander* (2020) 45 Cal.App.5th 341, 344.)

Senate Bill No. 1393, which became effective January 1, 2019, removed the prohibition on striking such enhancements by deleting the following provision of former section 1385, subdivision (b), which stated: "This section

does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) ch. 1013, § 2.) Section 1385, subdivision (b)(1), now provides that “[i]f the court has the authority ... to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice ... .”

Senate Bill No. 1393 applies retroactively to appellant because his case is not yet final. (See *People v. Stamps* (2020) 9 Cal.5th 685, 699; *In re Spencer* (1965) 63 Cal.2d 400, 405 [a conviction becomes final when “courts can no longer provide a remedy to a defendant on direct review”].)

**D. Senate Bill No. 620 (discretion to strike the firearm enhancement).**

When appellant was sentenced, former Penal Code section 12022.5 required a court to impose, in addition and consecutive to the term imposed for the underlying felony offense, a term of 3, 4, or 10 years for personal use of a firearm. (See former Pen. Code, § 12022.5, subs. (a), (c); *People v. Zamora* (2019) 35 Cal.App.5th 200, 206-207.)

Senate Bill No. 620, which became effective January 1, 2018, gave trial courts previously unavailable discretion to strike or dismiss firearm enhancements that section 12022.5 otherwise require courts to impose. (Pen. Code, § 12022.5, subd. (c), as amended by Stats. 2017, ch. 682, § 1.) The statute

provides that “[t]he 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.” (Pen. Code, § 12022.5, subd. (c).)

Senate Bill No. 620 applies retroactively to appellant because his case is not yet final. (See *People v. Baltazar* (2020) 57 Cal.App.5th 334, 337.)

**E. Remand is warranted because the court was not aware of the full scope of the discretion it now has under the amended statutes and because the record contains no clear indication that the trial court would refuse to exercise its discretion.**

The trial court made no statements showing a clear intent to impose either the firearm enhancement or the prior serious felony enhancement even if it had the authority to strike those enhancements. (RT 42:9405-9408, 9426-9431.)

The court also imposed the midterm of four years on the firearm enhancement as to counts 2 and 3 (RT 42:9426-9428), demonstrating sentencing leniency as only one aggravating factor would have been sufficient to support an upper term sentencing choice of 10 years. (See *People v. Steele* (2000) 83 Cal.App.4th 212, 226; see *People v. Hall* (1994) 8 Cal.4th 950, 954 [the Legislature increased the upper term on the firearm enhancement from five to ten years; Stats. 1994, First Ex. Sess. 1994, ch. 31, § 3].)

Nor does imposition of the death judgment on count 1 and consecutive sentencing on count 3 obviate the need for remand. A trial court's initial choice to impose a less lenient sentencing option does not obviate the need for remand when a new sentencing scheme creates the possibility of a lesser alternative punishment. (*People v. Francis* (1969) 71 Cal.2d 66, 75, 77.) Indeed, "the mere fact" that the Legislature has now authorized a more lenient sentencing choice "conceivably might cause a trial court to impose a [lower enhancement] term or [dismiss it altogether] in a case where before the amendment the court [imposed a higher enhancement term when] sentenc[ing] the defendant to prison." (*Ibid.*)

With respect to Senate Bill No. 620, appellate courts have held that remand "is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant *that it would not in any event* have stricken a firearm enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 (*McDaniels*), italics added; see also *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 (*Almanza*) [adopting *McDaniels* approach after initially rejecting it].) Under this approach, remand is necessary where "the record contains no clear indication that the trial court will not exercise its discretion to reduce [the defendant]'s sentence." (*McDaniels* at p. 423.)

That approach is equally appropriate with respect to Senate Bill No. 1393. Where, as here, the record contains no indication, clear or otherwise, of what the

court would have done if it had the discretion to strike the prior felony and avoid imposing the five-year enhancement at the time it originally sentenced appellant, remand for resentencing is not futile. (*People v. Garcia* (2018) 28 Cal. App.5th 961, 973, fn. 3, citing *Almanza, supra*, 24 Cal.App.5th at p. 1110.)

Remand is warranted in view of the bedrock due process principle that all

... [d]efendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court. (See *United States v. Tucker* (1972) 404 U.S. 443, 447 [30 L.Ed.2d 592, 596, 92 S.Ct. 589]; *Townsend v. Burke* (1948) 334 U.S. 736, 741 [92 L.Ed. 1690, 1693, 68 S.Ct. 1252].) A court which is unaware of the scope of its discretionary powers can no more exercise that ‘informed discretion’ than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.

(*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8; see *People v. Ruiz* (1975) 14 Cal.3d 163, 168; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081; *People v. Carmony* (2004) 33 Cal.4th 367, 378; U.S. Const., 5th & 14th Amends.)

Because the trial court did not make a statement establishing that it would have imposed the firearm enhancement or the prior serious felony enhancement as a matter of discretion even if the statutes had not been mandatory, it cannot be said with certainty that a remand is a futile act. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) This fact alone is enough to warrant a remand. (*People v. Valenzuela* (2018) 23 Cal.App.5th 82, 88.)

## **Conclusion**

There can be no question that the trial court proceeded on the assumption that it lacked the discretion that it now has. Only remand will allow it to exercise that discretion. A limited remand to consider the newly conferred exercise of discretion is appropriate.

Respectfully submitted,

s/Stephen M. Lathrop  
Stephen M. Lathrop

Attorney for Defendant/Appellant  
Tupoutoe Mataele

## **Certificate of Compliance**

I certify that this brief contains 2,048 words.

s/Stephen M. Lathrop  
Stephen M. Lathrop

## Proof of Service

I, Stephen M. Lathrop, declare, that I am over the age of 18 years, not a party to the case, and am a member of the California State Bar. My electronic service address is lathrop126813@gmail.com. My business address is 904 Silver Spur Road #430, Rolling Hills Estates, CA 90274. I am familiar with the business practice for collecting and processing electronic and physical correspondence.

On February 25, 2022, I mailed or electronically served a copy of **Appellant's Supplemental Opening Brief** by (1) mailing a copy thereof to the physical addresses set forth below and (2) electronically serving a copy thereof to the e-mail addresses set forth below, as follows:

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I am a resident of or employed in the county where the mailing occurred. The document was served from Rolling Hills Estates, California. I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 25, 2022, at Rolling Hills Estates, California.

s/Stephen M. Lathrop  
Declarant