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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL CERVANTES  
VALENCIA,

Defendant and Appellant.

B288982

Los Angeles County  
Super. Ct. No. KA095355

APPEAL from an order of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Sentence vacated; remanded with directions.

Elana Goldstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Gabriel Cervantes Valencia contends his case should be remanded for the trial court to exercise its discretion under Senate Bill No. 620 to strike, or to decline to strike, the firearm enhancement imposed at his sentencing. The Attorney General agrees. Accordingly, we vacate Cervantes Valencia's sentence and remand the case to the trial court.

### **BACKGROUND**

In 2011 the People charged Cervantes Valencia with robbery, dissuading a witness, and possession of a firearm with a prior felony conviction. The People alleged that a principal personally used a firearm in the commission of the robbery under Penal Code section 12022.53, subdivisions (b) and (e)(1)<sup>1</sup>, that Cervantes Valencia committed the crimes for the benefit of a gang, and that he was on bail at the time. The People also alleged Cervantes Valencia had a prior strike conviction. The jury convicted Cervantes Valencia on all counts. All of the special allegations were found true.<sup>2</sup>

The trial court sentenced Cervantes Valencia to 28 years and four months in the state prison. The court selected the upper term of five years for the robbery and doubled it because of the strike prior. The court added ten years for the gun use and five

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<sup>1</sup> Statutory references are to the Penal Code.

<sup>2</sup> Because this appeal arises from a later resentencing, we do not have a complete record of the trial court proceedings in 2011 and 2012. It appears the jury found the gun and gang allegations true, and the court found the strike prior and out-on-bail allegations true.

years for the serious felony prior under section 667, subdivision (a)(1). On the witness dissuasion and felon-with-firearm counts, the court imposed one-third the midterm (one year and eight months, respectively), doubled because of the strike prior, for an additional three years and four months to run consecutively to the robbery count. The court struck the gang allegation. On January 29, 2014, this court affirmed Cervantes Valencia's conviction and sentence (awarding him additional precommitment credits).

Nearly four years later, the California Department of Corrections and Rehabilitation (CDCR) sent a letter to the trial court pointing out a sentencing error. CDCR noted the law required the court to impose the full middle term of two years (doubled)—not one-third the midterm (doubled)—for the witness dissuasion count. The trial court then ordered Cervantes Valencia brought from state prison to court for resentencing.

On March 22, 2018, the trial court conducted the resentencing hearing. The court resentenced Cervantes Valencia on the witness dissuasion count to four years, consecutive to the robbery count. That resentencing added two years to Cervantes Valencia's sentence. Cervantes Valencia asked the court about "any new laws that have passed that may be able to benefit [him]." The court responded, "I don't see any laws that affect your convictions, but again, I don't know what laws you might be relying on." Defense counsel stated she "agree[d] with the court." Cervantes Valencia said, "I was just thinking about the 620 law that just passed." The court stated, "The what?" The court then concluded the resentencing hearing without further inquiry or discussion.

## DISCUSSION

Senate Bill No. 620 became effective on January 1, 2018. It gives trial courts discretion to strike firearm enhancements under section 12022.53, subdivision (h), “in the interest of justice . . . at the time of sentencing.” The statute provides, “The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Pen. Code, § 12022.53, subd. (h).)

Accordingly, the amendment to section 12022.53, subdivision (h), by its express terms, applies to Cervantes Valencia’s resentencing. Moreover, courts have held Senate Bill No. 620 applies retroactively to cases not yet final as of January 1, 2018. (See, e.g., *People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The Attorney General agrees a remand is necessary here for the trial court to exercise its discretion whether to strike Cervantes Valencia’s firearm enhancement. The parties have submitted a stipulation to us to that effect and accordingly we dispose of this appeal summarily.

### **DISPOSITION**

We vacate Gabriel Cervantes Valencia's sentence, as corrected on March 22, 2018, and we remand the case for the trial court to exercise its discretion with respect to the firearm enhancement under Penal Code section 12022.53, subdivision (h).

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.