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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO HERNANDEZ,

Defendant and Appellant.

B286469

(Los Angeles County  
Super. Ct. No. BA285268)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Reversed and remanded with directions.

Richard D. Miggins, 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, Senior Assistant Attorney General, Noah P. Hill and Shezad H. Thakor, Deputy Attorneys General, for Plaintiff and Respondent.

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## FACTUAL AND PROCEDURAL BACKGROUND

In 2007 a jury convicted Ricardo Hernandez of first degree murder. The jury also found true the allegations Hernandez and his codefendant committed the murder for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of Penal Code section 186.22, subdivision (b)(1),<sup>1</sup> and a principal personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivisions (d) and (e). The trial court sentenced Hernandez to a prison term of 25 years to life for the murder conviction, plus 25 years to life for the firearm enhancement. We affirmed the judgment in *People v. Hernandez* (Aug. 28, 2008, B199067) [nonpub. opn.].

On May 19, 2017 Hernandez filed a petition for writ of habeas corpus in the trial court. He asked the trial court to vacate his conviction for first degree murder under the Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155, which held "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine." (*Id.* at pp. 158-159.) The People conceded Hernandez was entitled to relief under *People v. Chiu*.

On October 13, 2017 the court held a hearing on the petition. The court indicated it was prepared to enter an order granting the relief requested in the petition and reducing Hernandez's murder conviction from first degree to second

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

degree. Counsel for Hernandez asked the court to continue the resentencing hearing to January 2018, which would have been after the effective date of amendments to section 12022.53 that now give the trial court discretion to strike a firearm enhancement. The People objected, and the trial court denied the request to continue the sentencing hearing. The court stated: “The problem is the Legislature could have made it emergency legislation effective immediately. So it seems to me that that’s not really a basis to put it over until January. I mean, this isn’t a case where the court has to do some legal research, or there is something that would affect what the court is going to do. It would just be engaging in some kind of a subterfuge to bring it within the law, in my opinion.” The court stated that, had the Legislature “not decided to draw a line, it seems to me the court would then really be exercising some kind of meaningful discretion.” The court then resentenced Hernandez to 15 years to life for second degree murder, plus 25 years to life for the firearm enhancement. Hernandez filed a notice of appeal from the trial court’s October 13, 2017 “judgment of conviction and sentence.”<sup>2</sup>

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<sup>2</sup> An order denying a request for a continuance (here, moments) before judgment is reviewable on appeal from the judgment. (*People v. Besold* (1908) 154 Cal. 363, 364; *People v. Buck* (1907) 151 Cal. 667, 668; *People v. Peters* (1961) 191 Cal.App.2d 581, 583; 6 Witkin, Cal. Criminal Law (4th ed. 2012) Criminal Appeal, § 71(a).)

## DISCUSSION

“The Legislature amended section 12022.5, subdivision (c), and section 12022.53, subdivision (h), effective January 1, 2018, to give the trial court discretion to strike, in the interest of justice, a firearm enhancement imposed under those two statutes.” (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080; see *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.) The People concede section 12022.53, subdivision (h), as amended, applies to Hernandez. (See *People v. Chavez* (2018) 22 Cal.App.5th 663, 712.)

Hernandez argues, the People concede, and we agree the case should be remanded for a new sentencing hearing under section 12022.53. As the People acknowledge, Hernandez “should be given a new sentencing hearing at which the trial court can consider whether to strike the firearm enhancement pursuant to the discretion conferred by” the amendments to section 12022.53. (See *People v. Billingsley*, *supra*, 22 Cal.App.5th at pp. 1081-1082; *People v. Chavez*, *supra*, 22 Cal.App.5th at pp. 712-714.)

Hernandez also argues the trial court erred in failing to recalculate his custody credit to account for the time he spent in custody between the date the court originally sentenced him and the date the court resentenced him. Again, the People agree. So do we. (See *People v. Buckhalter* (2001) 26 Cal.4th 20, 37 [“the trial court, having modified defendant’s sentence on remand, was obliged, in its new abstract of judgment, to credit him with all actual days he had spent in custody, whether in jail or prison, up to that time”]; *People v. Garner* (2016) 244 Cal.App.4th 1113, 1118 [“judgment must include a custody credit award that includes time spent in prison prior to the resentencing hearing”].)

## DISPOSITION

The judgment is reversed. The trial court is directed to hold a new sentencing hearing to exercise its discretion under section 12022.53, subdivision (h), and to recalculate Hernandez's custody credit.

SEGAL, J.

We concur:

PERLUSS, P. J.

WILEY, J.\*

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\*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.