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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. FREDDY MORENO, Defendant and Appellant.	B285783 (Los Angeles County Super. Ct. No. NA091859)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Affirmed in part and remanded with directions.

Joy A. Maulitz, 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, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Nineteen-year-old gang member Freddy Moreno shot into a crowd at a party, wounding three people. A jury convicted him of three counts of attempted premeditated murder as charged (Pen. Code, §§ 187, 664)[1] and one count of attempted voluntary manslaughter as a lesser included offense of attempted murder (§§ 192, 664). It found firearm use and gang enhancements to be true. (§§ 186.22, subd. (b); 12022.5; 12022.53, subds. (b)–(d).) After Moreno admitted he had suffered a strike for a prior juvenile robbery adjudication when he was 16 years old, the trial court sentenced him to 165 years to life. Had the trial court stricken the prior juvenile adjudication as Moreno requested pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*), he theoretically would have been sentenced to 120 years to life.

Moreno contends that both his age at the time of his current crimes (19) and his age at the time of his prior strike adjudication (16) render his sentence cruel and unusual punishment pursuant to recent cases and statutory changes concerning lengthy sentences for juvenile offenders. He also contends his sentence violates due process and his right to a jury trial by enhancing his adult sentence with a juvenile adjudication. Finally, he contends the trial court abused its discretion in denying his *Romero* motion to strike his juvenile prior. We reject his contentions. We correct aspects of his sentence and remand for resentencing pursuant to newly enacted sections 12022.5, subdivision (c) and 12022.53, subdivision (h), which grant the trial court discretion to strike firearm enhancements. In all other respects, we affirm.

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[1] All undesignated statutory citations refer to the Penal Code.

FACTUAL BACKGROUND

Moreno was a self-admitted Rancho San Pedro (RSP) gang member. On March 18, 2012, he attended a house party in Los Angeles County. He was asked to leave, and he exited the house with his friends. A verbal confrontation broke out between him and Nestor Reyes. Moreno pulled a handgun. He shot twice in the air, and then at a group of people. Bullets struck Eddie Olmos, Bryant Gomez, and Michael Sena. Olmos was hit in the cheek, Gomez was hit in the back of his thigh, and Sena was hit in both thighs, one of which entered through the back of his thigh.

The party was held in RSP territory, and before firing, appellant asked Reyes what gang he was from. Based on a hypothetical tracking the facts of the case, the prosecution's gang expert testified that the shooting was gang-related.

Moreno testified in his defense. He admitted joining RSP in 2005 when he was 12 years old and admitted he had committed a robbery as a juvenile at some time before the current crimes.

He brought a loaded gun to the party because he was "trying to get there safe," although he had never "handled" a gun before and did not like guns. He went to the party to see friends who were hosting it. He was only there about 10 minutes when someone wearing a shirt reading "security" directed him to leave and refused to allow him to speak to his friends. The man was holding something that looked like a black metal baton. Moreno agreed to leave and exited the party, using profanity on the way out.

An intoxicated man reacted angrily and approached Moreno as if he wanted to fight. The intoxicated man, the man in the security shirt, and a few others followed Moreno out of the house. People started changing "fight, fight," and Moreno was scared he was going to get "jumped." As he walked on the sidewalk, he saw a group of eight to 12 men coming up behind him. Moreno displayed the gun and fired two warning shots into the air. The men continued to approach him, and the intoxicated man started swinging at him, so he fired around ten times. He hit Olmos, Gomez, and Sena (twice), but missed the intoxicated man and the man in the security shirt.

Moreno claimed that he aimed at the ground, and he called the shooting an "accident." He was scared and did not mean to shoot the victims. He ran away and threw the gun in a sewer so it would not be found.

Crystal Cardona testified that the party was for her 18th birthday. She grew up with Moreno and considered him to be like a brother. She said he was at the party for maybe an hour. She remembered Eduardo Gomez (victim Bryant Gomez's brother) was wearing a security shirt and had a flashlight, and she remembered a man being drunk.

Crystal's brother Victor Cardona also attended the party. He had invited Moreno and considered Moreno to be like a brother. Although Victor was familiar with RSP, he did not know at the time that Moreno was a gang member. Victor also testified Moreno was at the party for hours before the shooting. Victor testified that Eduardo was wearing a shirt with the word "security" on it and was carrying a flashlight.

In the People's rebuttal, Eduardo Gomez testified that he was not wearing a shirt with the word "security" on it, even

though Crystal identified him as wearing it. He saw Moreno at the party but denied telling him to leave, and Eduardo did not get involved in the argument between Moreno and Reyes. Eduardo acknowledged that at one point during the party he borrowed a small flashlight to help look for a lost wallet. He also testified that Moreno was with a group of men who were "kind of like gangster looking."

An officer testified that, to his knowledge, no one reported seeing a large flashlight or seeing anyone other than Reyes arguing with Moreno.

DISCUSSION

I. Moreno's Sentence Was Constitutional

A. Procedural Background

Moreno was sentenced to 165 years to life, consisting of three consecutive terms of 55 years to life on each of the three attempted murder counts: three base terms of 15 years to life, doubled to 30 years due to his prior juvenile strike, plus consecutive terms of 25 years to life on each count for his personal discharge of a firearm causing great bodily injury pursuant to section 12022.53 subdivision (d). He was sentenced to 21 years on the attempted voluntary manslaughter count to run concurrently.[2]

Moreno received his prior juvenile strike adjudication for robbery in 2009 (§ 211), when he was 16 years old, after he robbed an individual on the street and issued a gang-related challenge. He had other juvenile adjudications, including a gang-related assault with a deadly weapon in 2008 (§ 245, subd. (a)(1)),

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[2] As we will explain, the term of 21 years for count 4 was statutorily unauthorized and resentencing is necessary on that count.

minor in possession of an alcoholic beverage in 2009 (Bus. & Prof. Code, § 25662, subd. (a)), and gang-related exhibiting an imitation firearm and resisting an officer in 2010 (§§ 417.4; 148, subd. (a)(1)).

At the sentencing hearing, defense counsel requested that the trial court strike the prior juvenile robbery adjudication pursuant to *Romero*. He cited Moreno's age of 16 at the time of the prior offense, the lengthy sentence Moreno would face without the strike, and the fact that the jury found Moreno guilty of the lesser offense of voluntary manslaughter on one count. Defense counsel added, "The other consideration, which is not a traditional factor but because of changes in the law since Prop 57, is that one of the things that youthful offenders can participate in state prison based on their ultimate sentence is what kind of programming and rehabilitative programs Mr. Moreno might avail himself to." He added, "I'm hoping that based on the lesser sentence that Mr. Moreno might avail himself to certain rehabilitative programs that are available in the Department of Corrections. And I think that striking the strike makes him available for some of those programs, if not all of those programs."

The prosecutor opposed the request based on Moreno's criminal history and the nature of the instant crimes. With regard to Moreno's age, the prosecutor argued, "I know counsel has referred to the youth of Mr. Moreno. But I think at this point California law has built in protections and considerations that allow for Mr. Moreno to have those considerations be taken into account, that's been built in in the last few years based on the changes in California law."

The court denied the request to strike the prior pursuant to *Romero*. It explained: "The juvenile prior for robbery, it was in 2009 and this crime occurred in 2012, that's a very, very short period of time. These are serious charges, there were serious injuries, it's gang-related. I don't really think that based upon the facts and circumstances of this case that the defendant is entitled to any particular consideration for leniency."

B. Moreno's Sentence Does Not Violate the Eighth Amendment or the California Constitution

Moreno argues his sentence of 165 years to life violates the state and federal constitutional bans on cruel and/or unusual punishments due to his age at the time of the prior adjudication and his current crimes.[3] Respondent contends Moreno forfeited this challenge by failing to object on this ground in the trial court. It is true that "[a] claim that a sentence is cruel or unusual usually requires a 'fact specific' inquiry and is forfeited if not raised below." (*People v. Baker* (2018) 20 Cal.App.5th 711, 720 (*Baker*).) Moreno contends he preserved the issue by moving to strike his prior juvenile adjudication pursuant to *Romero* and, alternatively, we should exercise our discretion to decide the issue. We need not address these contentions because he also argues that, if the contention is forfeited, his counsel was ineffective for failing to object in the trial court. We must therefore address the merits in any event " 'to show counsel was not constitutionally ineffective by failing to make a futile or meritless objection.' " (*Baker, supra,* at p. 720.)

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[3] Moreno does not separately argue his state constitutional claim, so we will resolve it in the same way we resolve his federal constitutional claim.

In recent years, the United States Supreme Court has circumscribed the range of possible sentences for juvenile offenders under the Eighth Amendment prohibition against cruel and unusual punishments. Under these cases, "(1) no individual may be executed for an offense committed when he or she was a juvenile (*Roper*[*v. Simmons* (2005) 543 U.S. 551, 578 (*Roper*)]); (2) no juvenile who commits a nonhomicide offense may be sentenced to [life without parole] (*Graham*[*v. Florida* (2010) 560 U.S. 48, 74 (*Graham*)]; and (3) no juvenile who commits a homicide offense may be automatically sentenced to [life without parole] (*Miller*[*v. Alabama* (2012) 567 U.S. 460, 476–477 (*Miller*)]." (*People v. Franklin* (2016) 63 Cal.4th 261, 273–274 (*Franklin*).) These cases were based on the observation that "children are 'constitutionally different . . . for purposes of sentencing.' " (*Id.* at p. 274.)

The California Supreme Court has extended these cases to lengthy juvenile sentences, including sentences that are the functional equivalent of life without parole. (See *People v. Contreras* (2018) 4 Cal.5th 349, 367 (*Contreras*) [50-years-to-life and 58-years-to-life sentences for juvenile non-homicide offenders unconstitutional under *Graham*]; *Franklin, supra,* 63 Cal.4th at p. 276 [*Miller* applies to functional equivalent of life without parole for juvenile homicide offender]; *People v. Caballero* (2012) 55 Cal.4th 262, 268–269 (*Caballero*) [110-years-to-life sentence for juvenile non-homicide offender violated *Graham*].)

We reject Moreno's suggestion that this reasoning applies to his current offenses, which he committed when he was 19 years old. A line has been drawn at the age of 18 to separate juveniles from adults for Eighth Amendment purposes. (See *Graham, supra,* 560 U.S. at pp. 74–75 [drawing line at age of

18 for life without parole for nonhomicide crimes]; *Roper, supra*, 543 U.S. at p. 574 ["The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."]; see also *Contreras, supra,* 4 Cal.5th at p. 371 [*Graham* drew "clear line" at age 18 for juvenile and adult offenders]; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1380 (*Gutierrez*) [U.S. Supreme Court has drawn line at 18 years old in Eighth Amendment jurisprudence].) We decline to redraw that line to encompass Moreno's current crimes. (See *People v. Windfield* (2016) 3 Cal.App.5th 739, 766 [refusing to extend *Miller* to defendant who was 18 years old at time of crime], rev. granted S238073 (Jan. 11, 2017); *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482 [refusing to apply *Graham*, *Miller*, and *Caballero* to defendant who was 18 years and five months old at time of crime].)

Moreno goes a step further to argue that his sentence was unconstitutional under this line of cases because it was enhanced by a prior juvenile offense committed when he was 16 years old. At first glance, his argument appears to have no practical impact on his sentence. With the prior juvenile strike, his 165-years-to-life sentence extended beyond his natural life expectancy and was unquestionably the functional equivalent of life without parole. (See *Caballero, supra,* 55 Cal.4th at pp. 268–269.) Without the strike, he could have been sentenced to 120 years to life, which was still the functional equivalent of life without parole. (*Ibid.*)

However, without the strike, he would be eligible for parole consideration after serving 25 years pursuant to newly enacted statutory provisions providing parole eligibility for offenders who committed their crimes at the age of 25 or younger. (§ 3051,

subd. (b)(3) ["A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions."].) He would also be eligible for parole under the recently enacted Elderly Parole Program when he is 60 years old and has served at least 25 years of continuous incarceration. (§ 3055, subd. (a).) Defendants like Moreno with prior strikes, however, are statutorily excluded from these parole provisions. (§ 3051, subd. (h); § 3055, subd. (g).)

Moreno argues that the reasoning in *Graham* should apply to his adult sentence enhanced by his juvenile strike. *Graham* held that "the Eighth Amendment requires the state to afford the juvenile offender a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,' and that '[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.' (*Graham, supra,* 560 U.S. at p. [73, 130 S.Ct. at pp. 2029–2030].) The court observed that a life without parole sentence is particularly harsh for a juvenile offender who 'will on average serve more years and a greater percentage of his life in prison than an adult offender.' (*Id.* at p. [70, 130 S.Ct. at p. 2028].) *Graham* likened a life without parole sentence for nonhomicide offenders to the death penalty itself, given their youth and the prospect that, as the years progress, juveniles can reform their deficiencies and become contributing members of society. (*Ibid.*)" (*Caballero, supra,* 55 Cal.4th at p. 266.)

Stated differently, "[w]hat emerges from *Graham* is not a constitutional prohibition on harsh sentences for juveniles who commit serious crimes. (*Graham, supra,* 560 U.S. at p. 71, ['Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense.'].) Nor does *Graham* 'require the State to release [a juvenile nonhomicide] offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives.' (*Id.* at p. 75.) But *Graham* 'does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.' (*Ibid.*) 'What the state must do . . . is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' (*Ibid.*)" (*Contreras, supra,* 4 Cal.5th at p. 367.)

The U.S. Supreme Court in *Miller* reiterated these concerns in finding mandatory sentences of life without parole for juvenile homicide offenders constituted cruel and unusual punishment. The court explained: "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.' [Citation.] Those cases relied on three significant gaps between juveniles and adults. First, children have a ' "lack of maturity and an underdeveloped sense of responsibility," ' leading to recklessness, impulsivity, and heedless risk-taking. [Citation.] Second, children 'are more vulnerable . . . to negative influences and

outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. [Citation.] And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to 'evidence of irretrievabl[e] deprav[ity].' [Citation.]

"Our decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well. [Citation.] In *Roper*, we cited studies showing that ' "[o]nly a relatively small portion of adolescents" ' who engage in illegal activity ' "develop entrenched patterns of problem behavior." ' [Citation.] And in *Graham*, we noted that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.' [Citation.] We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his ' "deficiencies will be reformed." ' [Citation.]

"*Roper* and *Graham* emphasized that the distinctive attributes of youth diminished the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because ' "[t]he heart of the retribution rationale" ' related to offender's blameworthiness, ' "the case for retribution is not as strong with a minor as with an adult." ' [Citations.] Nor can deterrence do the work in this context, because ' "the same characteristics that render juveniles less culpable than adults" '—their immaturity, recklessness, and impetuosity—make them less likely to consider potential

punishment. [Citation.] Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but ' "incorrigibility is inconsistent with youth." ' [Citation.] And for the same reason, rehabilitation could not justify that sentence. Life without parole 'forswears altogether the rehabilitative ideal.' [Citation.] It reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change. [Citation.]" (*Miller, supra,* 567 U.S. at pp. 471–473, fn. omitted.)

Moreno's sentence as an *adult* recidivist does not implicate these concerns related to the characteristics of youth. Unlike in *Graham* and *Miller*, Moreno does not contend he was improperly punished for the crime he *actually* committed as a juvenile, that is, the robbery when he was 16 years old. Indeed, his juvenile adjudication was consistent with *Graham* and other cases, given the primary goal was rehabilitation. (Cf. *In re Julian R.* (2009) 47 Cal.4th 487, 496 (*Julian R.*) ["Juvenile proceedings continue to be primarily rehabilitative, disallowing punishment in the form of retribution."].) When Moreno continued his criminal activity into adulthood, he showed that rehabilitation failed and he did not change in order to reenter society as a law-abiding citizen. In other words, his juvenile prior "demonstrate[d] that [he] did not respond to the state's attempt at early intervention to prevent a descent into further criminality." (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1024 (*Nguyen*).)

Graham, *Miller*, *Caballero*, and *Contreras* all rest on the assumption that the deficiencies of juvenile offenders are not fixed and their punishment must allow for a chance to show they

have changed their criminal ways. Moreno had that chance, and he reoffended as an adult. He was therefore "punished not just for [his] current offense but for [his] recidivism. Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823–824.) His adult sentence therefore falls outside the concerns about juvenile offenders expressed in *Graham*, *Miller*, and other cases, so his enhanced sentence as an adult repeat offender was not cruel and unusual under the Eighth Amendment.

C. Moreno's Sentence Does Not Violate Due Process or His Right to a Jury Trial

Moreno contends the trial court's use of a prior juvenile strike to enhance his sentence violates due process and his right to a jury trial under the Sixth Amendment. The California Supreme Court has rejected this claim. (*Nguyen, supra,* 46 Cal.4th at p. 1024.) We are bound by that decision and likewise reject his argument.

II. The Trial Court Did Not Abuse Its Discretion in Denying Moreno's *Romero* Motion and Defense Counsel Was Not Ineffective

In deciding whether to strike a prior conviction, a trial court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998)

17 Cal.4th 148, 161.) We review the court's decision for abuse of discretion. (*Id.* at p. 162.)

Moreno has not shown the trial court abused its discretion in refusing to strike his juvenile prior. Moreno committed a string of gang-related crimes, including his juvenile robbery adjudication, culminating in the shooting at issue here. He brought a loaded gun to a party and opened fire on a crowd, wounding three unarmed people. He shot one victim in the face and the other two victims in the *backs* of their legs, suggesting they were running away from him. It is frankly remarkable that no one was killed. Moreno's criminal history and the circumstances of the crime adequately supported the trial court's decision not to strike his juvenile prior conviction.

Moreno contends his trial counsel performed deficiently in arguing the *Romero* motion because he "should have known" that striking the juvenile prior would have made Moreno eligible for parole after 25 years pursuant to section 3051, subdivision (b)(3) or at age 60 pursuant to section 3055, subdivision (a). Moreno also contends, "[i]f trial counsel had been familiar with" the parole statute, he could have responded to the prosecutor's "inaccurate" assertion in response to his *Romero* motion that "at this point California law has built in protections and considerations that allow for Mr. Moreno to have those considerations be taken into account, that's been built in in the last few years based on the changes in California law."

Whether or not his counsel performed deficiently in these respects, Moreno has not established that he suffered any prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 692, 697.) There is nothing in the record to show the trial court misunderstood the law or would have stricken Moreno's juvenile

prior if defense counsel has explicitly pointed out his eligibility for parole. "Absent evidence to the contrary, we presume that the trial court knew and applied the governing law." (*Gutierrez, supra,* 58 Cal.4th at p. 1390; see *Julian R., supra,* 47 Cal.4th at p. 499.) We therefore presume the trial court was aware of Moreno's potential parole eligibility without the strike but concluded his criminal history and the violent circumstances of his current crimes justified his enhanced sentence under the three strikes law. The presumption is not undermined by the prosecutor's ambiguous comment that Moreno enjoyed unidentified "built in protections" under the law. Moreno therefore suffered no prejudice from any alleged deficiencies in his counsel's performance.

III. Moreno Must Be Resentenced on the Attempted Voluntary Manslaughter Count

For count 4, Moreno was convicted of attempted voluntary manslaughter in violation of section 192, subdivision (a), and section 664. The jury also found true a firearm enhancement pursuant to section 12022.5 and a gang enhancement pursuant to section 186.22, subdivision (b)(1)(c). The court orally sentenced him to a concurrent term of 21 years, comprised of a base term of six years, doubled to 12 years due to his strike, plus four years for the firearm enhancement and five years for the gang enhancement.

The parties agree that the trial court incorrectly imposed the base term for voluntary manslaughter, not *attempted* voluntary manslaughter, which is one-half of the statutory term for the completed offense. (§ 664, subd. (a).) The sentencing triad for voluntary manslaughter is three, six, and 11 years (§ 193, subd. (a)), so the applicable triad for attempted voluntary

manslaughter is 18 months, three years, and five years six months. Moreno suggests we simply correct the sentence to 15 years by imposing the middle term of three years as the base term. Respondent suggests we remand for resentencing since we are already remanding for resentencing on the firearm enhancements, as discussed below. We will follow respondent's suggestion and remand for resentencing so the court may reconsider Moreno's sentence on count 4 within the proper statutory framework for attempted voluntary manslaughter.

Furthermore, the abstract of judgment incorrectly states that Moreno was convicted in count 4 for "PC 664/187 ATTEMPTED WILLFUL DELIBERATE AND PREMED MURDER," when he was convicted of attempted voluntary manslaughter. We will order the abstract of judgment corrected accordingly.

IV. Moreno's Case Must Be Remanded for Resentencing on the Firearm Enhancements

Moreno seeks remand for resentencing in light of Senate Bill 620, effective January 1, 2018, which amended sections 12022.5, subdivision (c) and 12022.53, subdivision (h) to give the trial court discretion whether to strike previously mandatory firearm enhancements. (§ 12022.5, subd. (c) ["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."]; § 12022.53, subd. (h) [same].)

The discretion to strike a firearm enhancement may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63

Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) Because Moreno's conviction was not final when Senate Bill No. 620 went into effect, respondent agrees that remand is proper, as do we. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 ["[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired"]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["[t]he rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)

On remand, the court may exercise its discretion under section 12022.53, subdivision (h), to strike all of the firearm enhancements under that provision or impose any one of the enhancements. If the court chooses to impose a firearm enhancement, it must strike any enhancement(s) providing a longer term of imprisonment, and impose and stay any enhancement(s) providing a lesser term. (§ 12022.53, subds. (f) & (h).) For example, the court may choose to impose the 25-year-to-life enhancement under section 12022.53, subdivision (d). If so, it should impose and stay the enhancements under section 12022.53, subdivisions (c) and (b). If the court imposes the 20-year enhancement under section 12022.53, subdivision (c), it must then strike the 25-year-to-life enhancement under section 12022.53, subdivision (d), and impose and stay the 10-year enhancement under subdivision (b). Moreover, any enhancement imposed under section 12022.53 must be imposed consecutively rather than concurrently.

In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subdivision (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1446.) "In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428(b).)

DISPOSITION

The matter is remanded for resentencing on the attempted voluntary manslaughter count and for the trial court to consider striking the firearm enhancements. (§§ 12022.5, subd. (c); 12022.53, subd. (h).) Following resentencing, the court shall issue an amended abstract of judgment that corrects the offense in count 4 as attempted voluntary manslaughter. (§§ 192, 664.) The court shall forward the amended and corrected abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

BIGELOW, P.J.

I concur:

GRIMES, J.

***People v. Moreno* - B285783**
Rubin, J., concurring and dissenting.

I concur with the majority's rationale, but would remand for resentencing in the entirety, specifically, to allow defendant to pursue a renewed motion pursuant to *People v Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*) to strike his prior juvenile adjudication within the meaning of the Three Strikes law.

At issue in this case is the potential applicability of Penal Code section 3051, which provides for youth offender parole hearings for offenders who were 25 years of age or younger at the time of their offenses. Pursuant to the statute, the eligibility date for a parole hearing depends on the longest term of imprisonment imposed for an offense or enhancement. As currently sentenced, defendant's longest term of imprisonment is the 25-years-to-life firearm enhancement (Pen. Code, § 12022.53, subd. (d)), which would enable defendant to be considered for parole during his 25th year of incarceration. (Pen. Code, § 3051, subd. (b)(3)). However, as defendant was sentenced pursuant to the Three Strikes law for his prior juvenile adjudication, he is not eligible for any youthful parole eligibility hearing. (Pen. Code, § 3051, subd. (h).)

Neither counsel truly focused argument on this issue during argument on the *Romero* motion. Defendant's counsel suggested that if the motion were granted, defendant might be eligible for certain rehabilitative programming in prison, which would be unavailable to him if the strike remained, but did not specifically call attention to the possibility of a youth offender parole hearing. The prosecutor, in response, did not specifically

address Penal Code section 3051 either, but did state, with respect to defendant's youth, "I think at this point California law has built-in protections and considerations that allow for [defendant] to have those considerations be taken into account, that's been built in in the last few years based on the changes in California law." To the extent this statement was meant to refer to youth offender parole hearings, it left the incorrect impression that "protections and considerations" would apply even if the *Romero* motion were denied – which is, in fact, not the case.

I agree with the majority that defendant's attorney's failure to properly respond to the prosecutor's statement does not constitute reversible ineffective assistance. I also agree that we presume the court was aware of the contours and applicability of the statute – particularly when the trial court was as experienced and knowledgeable about criminal matters as the court was in this case. I simply believe that, as we are remanding for the court to consider whether to exercise its new discretion to strike the firearm enhancements, and to resentence on the attempted voluntary manslaughter count, the better practice would be to allow the court to also reconsider the *Romero* motion, expressly in light of the importance of the motion to defendant's future parole eligibility and the limited presentations of counsel.

RUBIN, J.*

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.