Filed 12/24/25 P. v. Antuna CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ANTUNA, Defendant and Appellant.	H051094 (Santa Clara County Super. Ct. No. C1084548) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

It is ordered that the opinion filed on November 24, 2025 be modified as follows, without change in judgment:

The following sentences are deleted from page 15:

"We observe that if the trial court exercises its discretion to dismiss the gang enhancements, the prosecution will be entitled to the same remedy as the defense (i.e., withdrawal from the plea agreement) and the trial court may withdraw its approval of the plea agreement as well. (*People v. Stamps* (2020) 9 Cal.5th 685, 707-708; *People v. Superior Court (Garcia)* (1982) 131 Cal.App.3d 256.) In that event, the trial court must restore the parties to the status quo ante, including permitting the prosecution to request to reopen the preliminary hearing and present evidence on the new elements of the gang allegations or to proceed without those charges. (See *Mendoza v. Superior Court* (2023) 91 Cal.App.5th 42, 58.)"

The deleted text is replaced with the following:

"We observe that if defendant elects and is permitted to withdraw from the plea agreement, the trial court must restore the parties to the status quo ante, including permitting the prosecution to request to reopen the preliminary hearing and present evidence on the new elements of the gang allegations or to proceed without those charges. (See *Mendoza v. Superior Court* (2023) 91 Cal.App.5th 42, 58.) In light of our remand for consideration of defendant's arguments under section 186.22, we do not reach defendant's alternative argument that a remand on a direct appeal from an original judgment is a postconviction proceeding subject to new section 1171 (Stats. 2024, Ch. 964, sec. 2 (Assembly Bill No. 2483), eff. Jan. 1, 2025)."

The petition for rehearing is denied.

Grover, J.

Greenwood, P. J.

Lie, J.

Filed 11/24/25 P. v. Antuna CA6 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ANTUNA, Defendant and Appellant.	H051094 (Santa Clara County Super. Ct. No. C1084548)

Defendant Joseph Antuna pleaded guilty to murder (Pen. Code, §§ 187, 189; count 1) and two counts of attempted murder (Pen. Code, §§ 187, 664, subd. (a); counts 2 and 3), all with gang and firearm allegations. In exchange, defendant received a total term of 50 years to life for the murder and associated firearm enhancement (Pen. Code, § 12022.53, subd. (d)) and concurrent sentences on the remaining two counts and enhancements.

This court reversed judgment in 2020 and remanded to permit defendant to request relief under amended Penal Code section 12022.53, subdivision (h), which eliminated mandatory firearm enhancements and granted trial courts discretion to strike or dismiss a firearm enhancement in the interest of justice under section 1385. (*People v. Antuna* (Dec. 18, 2020, H042678) [nonpub. opn.].)[1]

[1] The original opinion was filed in July 2019; the California Supreme Court granted review and later issued an order transferring the matter to this court with directions to reconsider the cause in light of *People v. Stamps* (2020) 9 Cal.5th 685. This court vacated the original opinion pursuant to the transfer order. (S257744).

Defendant now challenges the trial court's denial of his motion to dismiss or strike the firearm enhancements. Defendant also seeks another remand to make further requests to (1) dismiss the gang enhancements under recently amended Penal Code section 186.22, subdivision (g) (now requiring more than reputational benefit to a gang); and (2) set aside his plea agreement and permit him to renegotiate it under newly enacted Penal Code section 1016.7 (now requiring prosecutors during plea negotiations to consider in support of a mitigated sentence whether defendant has experienced psychological, physical or childhood trauma or was a youth at the time of the offense). Last, defendant contends the firearm enhancements associated with counts 2 and 3 are invalid because the trial court cited the incorrect statute when defendant admitted the underlying allegations.

We reject defendant's argument that Penal Code section 1016.7 is ameliorative legislation with retroactive application. We also reject his challenge to the firearm enhancements' validity. We will, however, reverse the judgment and remand the matter for the trial court to rule on defendant's motion to dismiss the gang enhancements, and to reconsider its determination declining to dismiss the firearm enhancements under section 1385 under the standard more recently articulated by the Supreme Court in *People v. Walker* (2024) 16 Cal.5th 1024.

I. BACKGROUND

A. FACTS

Only a brief factual summary is necessary for our analysis. According to defendant's sentencing statement and those portions of the probation report and preliminary hearing transcript contained in the record, [2] he was at a house party with the

[2] On our own motion, we take judicial notice of case No. H042678 and the record on appeal under Evidence Code section 459 and California Rules of Court, rule 8.252(a). Neither the record in this appeal nor in case No. H042678 contains the complete probation report or preliminary hearing transcript and exhibits.

victims on the night of the shooting. Defendant and the victims were members of different Norteño-affiliated street gangs. Defendant briefly left the party, then returned with a gun and another armed member of his gang. According to defendant, after the victims asked whether defendant's friend had stabbed a member of the victims' gang, he opened fire to protect his friend. Three people were shot, one fatally.

B. PROCEDURAL HISTORY

1. Charges and Plea Agreement

We derive the following procedural history from the opinion in defendant's first appeal. (Unspecified statutory references are to the Penal Code.) A first amended information charged defendant and two codefendants in 2010 with the first degree murder of Cristobal Lopez (§ 187; count 1) and the attempted first degree murders of Iverson Cardona and Cody Chavez. (§§ 187, 664, subd. (a); counts 2 & 3). It alleged that all of the charged offenses were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C) (10 year enhancement) and that the attempted murders charged in counts 2 and 3 were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(5) (15-year minimum parole eligibility term). As to counts 1 and 3, the information alleged that defendant personally and intentionally discharged a firearm and proximately caused great bodily injury or death within the meaning of section 12022.53, subdivision (d) (consecutive 25-year-to-life enhancement). As to count 2, the information alleged that defendant was a principal actor who had intentionally and personally discharged a firearm and proximately caused great bodily injury within the meaning of section 12022.53, subdivisions (d) and (e)(1) (consecutive 25-year-to-life enhancement).

As part of a negotiated disposition, defendant agreed to plead guilty to all charges and admit all associated allegations. The prosecutor recited that the total sentence on count 1 would be 50 years to life (including a 25-year-to-life term for first degree murder

and a 25-year-to-life term for the firearm enhancement), and the sentences on counts 2 and 3 would run concurrently.

Defendant pleaded guilty to murder (count 1) and admitted the associated gang allegation (§ 186.22, subd. (b)(1)(C) [10-year enhancement]) and firearm enhancement allegation (§ 12022.53, subdivision (d)). He pleaded guilty to two counts of attempted murder (counts 2 and 3) (§§ 187, 664, subd. (a)), and as to those counts he admitted that the offenses were willful, deliberate, and premeditated (see §§ 189, 664, subd. (a)), and he admitted the gang and firearm allegations. When the trial court asked defendant if he admitted the firearm allegations relating to counts 2 and 3, the court incorrectly cited section 12022.5 rather than section 12022.53, as alleged in the information.

The trial court imposed the agreed-upon sentence of 50 years to life, reflecting a term of 25 years to life for murder (§ 190, subd. (a)) plus a consecutive 25-year-to-life firearm enhancement (§ 12022.53, subd. (d)). On both counts 2 and 3, the court imposed concurrent terms of 40 years to life, reflecting 15 years to life for attempted murder plus a 25-year-to-life firearm enhancement. The court struck the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) and "additional punishment" (§ 186.22, subd. (b)(5)), pursuant to section 186.22, subdivision (g).

2. Previous Appeal and Remand Proceedings

In defendant's first appeal, the judgment was reversed to permit the trial court to exercise its new discretion to strike or dismiss the firearm enhancements under amended section 12022.53, subdivision (h).[3] On remand, defendant asked the trial court either to

[3] When defendant was convicted, a sentence enhancement was mandatory under section 12022.53, subdivision (h). Senate Bill No. 620 (2017–2018 Reg. Sess.) (Stats. 2017, ch. 682 § 2) (Sen. Bill No. 620) amended section 12022.53, subdivision (h) effective January 1, 2018 to allow the court "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 amendment stated further that "[t]he authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

strike the firearm enhancement or to impose a lesser enhancement based on mitigating factors such as defendant's childhood trauma, undiagnosed mental illness (post-traumatic stress disorder), and the absence of danger to public safety. Defendant noted that section 1385, subdivision (c)(3)(B) required multiple enhancements in a single case to be reduced to one enhancement and that section 1385, subdivision (c)(3)(C) required enhancements producing a sentence of more than 20 years to be dismissed.[4]

Defendant sought to dismiss the section 186.22 gang allegations on all counts pursuant to sections 1385 and 186.22, subdivision (g), which now requires more than only reputational benefits to a defendant's gang. Defendant argued the prosecution's gang expert had opined at the preliminary hearing that the crime had only benefitted his gang reputationally. Defendant also asked the trial court to rescind the previous plea agreement so that he could renegotiate the agreement to take advantage of section 1016.7, which requires prosecutors to consider a defendant's youth and/or childhood trauma during plea negotiations.

The trial court declined to strike the firearm enhancements, finding the statutory factor of whether "[t]he application of an enhancement could result in a sentence of over 20 years" (§ 1385, subd. (c)(2)(C)) inapplicable because the murder charge "in and of itself presents the defendant with a sentence that exceeds 20 years." The trial court observed that interpreting section 1385, subdivision (c)(2)(C) to require dismissal under these circumstances would lead to an absurd result where an enhancement "that imposes a term of greater than 25 years could then never be imposed under Section 1385 because by definition it would require a sentence of more than 20 years. ¶ … That seems to me to not be consistent with legislative intent or common sense." The trial court also found section 1385, subdivision (c)(2)(B) (limiting multiple enhancements) inapplicable here

[4] Section 1385, subdivisions (c)(3)(B) and (C) were renumbered by Assembly Bill No. 200 (2021–2022 Reg. Sess.) and now appear as subdivisions (c)(2)(B) and (C). (Stats. 2022, ch. 58, § 15.)

because the enhancements were not imposed on a single count but included multiple counts and multiple victims.

The trial court stated it gave "great weight" to whether defendant's actions were connected to mental illness, prior victimization or childhood trauma under section 1385, subdivision (c)(2)(E), but found there was not "substantial evidence that [defendant's] crimes were connected to and sufficiently in a causal way motivated by those concerns as opposed to the other more criminal related concerns and motivations that seemed to be presented by the evidence in the case." The trial court ultimately ruled that striking the firearm enhancements would not further justice given the "extreme violence" of the crimes and the "significant and severe" harm that was caused. The court concluded by noting that the interests of justice had been served by the negotiated sentence in which much of defendant's punishment was stayed, struck or run concurrently.

As to defendant's request to strike the gang enhancements and to renegotiate the plea bargain, the trial court determined it lacked jurisdiction under the remittitur to fully resentence defendant, and it had not disturbed the imposed sentence.

II. DISCUSSION

A. THE TRIAL COURT MUST RECONSIDER WHETHER TO DISMISS THE FIREARM ENHANCMENTS IN LIGHT OF *PEOPLE V. WALKER*

Section 1385, subdivision (c)(1) provides that "Notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so, except if dismissal of that enhancement is prohibited by any initiative statute." Section 1385, subdivision (c)(2) provides in pertinent part, " 'In exercising its discretion under this subdivision, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in subparagraphs (A) to (I) are present. Proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety.' " We review for abuse of discretion the

trial court's exercise of discretion under section 1385, subdivision (c). (*People v. Walker* (2024) 16 Cal.5th 1024, 1033 (*Walker*).) We review associated questions of statutory construction de novo. (*People v. Burke* (2023) 89 Cal.App.5th 237, 242.)

In *Walker*, our Supreme Court articulated the scope of a trial court's discretion under section 1385, subdivision (c): "Specifically, absent a finding that dismissal would endanger public safety, a court retains the discretion to impose or dismiss enhancements provided that it assigns significant value to the enumerated mitigating circumstances, when they are present. [Citation.] In other words, if the court does not find that dismissal would endanger public safety, the presence of an enumerated mitigating circumstance will generally result in the dismissal of an enhancement unless the sentencing court finds substantial, credible evidence of countervailing factors that 'may nonetheless neutralize even the great weight of the mitigating circumstance, such that dismissal of the enhancement is not in furtherance of justice.' " (*Walker, supra,* 16 Cal.5th at p. 1029.)

The trial court decided defendant's motion before *Walker* clarified how to exercise its authority. Without the benefit of *Walker's* guidance, the trial court did not determine whether dismissal of defendant's firearm enhancements would endanger public safety (i.e., present "a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others"). (§ 1385, subd. (c)(2).) Accordingly, we will remand the matter to allow the trial court to determine that question and, if decided in the negative, to further determine whether there is substantial, credible evidence of countervailing factors sufficient to neutralize the great weight of the recognized mitigating circumstances asserted by defendant (including mental illness, prior victimization, and childhood trauma). (§ 1385, subds. (c)(2)(D), (E).) *Walker* explains that "notwithstanding the presence of a mitigating circumstance, trial courts retain their discretion to impose an enhancement based on circumstances 'long deemed essential to the "furtherance of justice" inquiry.' " (*Walker, supra,* 16 Cal.5th at p. 1033.) "[I]f the

court does not conclude that dismissal would endanger public safety, then mitigating circumstances strongly favor dismissing the enhancement. But ultimately, the court must determine whether dismissal is in furtherance of justice." (*Id*. at p. 1036.) We express no opinion regarding how the trial court should rule on defendant's motion.

B. SECTION 1016.7 IS NOT RETROACTIVE

Assembly Bill No. 124 (Stats. 2021, ch. 695, § 4, eff. Jan. 1, 2022) (A.B. 124) added section 1016.7, subdivision (a), providing that in the "interest of justice" and "to reach a just resolution during plea negotiations," the prosecutor "shall" consider whether the defendant has experienced "psychological, physical, or childhood trauma," whether the defendant is or was a "youth at the time of the commission of the offense," and whether any of those considerations contributed to the commission of an alleged offense. (§ 1016.7, subd. (a)(1)–(2).) The statute defines "youth" as any person under 26 years of age on the date of the offense. (§ 1016.7, subd. (b).) The statute is silent regarding retroactivity.

Defendant argues section 1016.7 provides an ameliorative benefit to a certain class of defendants (those who have suffered trauma and those who were youths at the time of an alleged offense) by requiring prosecutors to consider those factors as mitigation during plea negotiations. Defendant asserts he should be permitted to withdraw his plea because it is reasonably likely that he would not have agreed to the same plea bargain if section 1016.7 had been in effect in 2015.

Whether a statute applies retroactively is a question of statutory construction we review de novo. (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*).) Where a statute is silent regarding retroactivity, we "employ the ordinary presumptions and rules of statutory construction" to discern the Legislature's intent. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 230.) "Ordinarily, statutes are presumed to apply only prospectively, unless the Legislature expressly declares otherwise." (*People v. Burgos* (2024) 16 Cal.5th 1, 7 (*Burgos*).) In *In re Estrada* (1965)

63 Cal.2d 740 (*Estrada*), however, the California Supreme Court "held that an amendment to a statute that lessened punishment for a crime gave rise to an inference of contrary legislative intent; that is, that the Legislature must have intended that the amendment mitigating punishment would apply retroactively to every case to which it constitutionally could apply. (*Id*. at p. 745.)" (*Burgos,* at p. 8.) The *Estrada* rule rests on an inference that the Legislature intends an amendment reducing punishment under a criminal statute to apply as broadly as possible, " 'distinguishing only as necessary between sentences that are final and sentences that are not.' " (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.)

The Supreme Court has "applied *Estrada's* inference of retroactivity to legislation that created an affirmative defense, contracted a criminal offense, or otherwise lessened punishment in some meaningful manner. These laws have included statutes addressing penalty enhancements as well as statutes concerned with substantive offenses." (*Burgos, supra,* 16 Cal.5th at p. 13 [collecting cases].) The inference of retroactivity has also applied "to statutes that, while not limited to reducing punishment for a particular crime, created a concrete avenue for certain individuals charged with a criminal offense to be treated more leniently or avoid punishment altogether." (*Ibid*.) Conversely, *Estrada* has been found "inapplicable to statutes that, although arguably lessening punishment in some sense, did not implicate the central rationale behind the *Estrada* inference." (*Burgos,* at p. 14.) Both the Supreme Court's case law and decisions by the Courts of Appeal "have declined to apply the *Estrada* presumption to new legislation that modified aspects of how criminal cases are investigated or tried." (*Ibid*.)

We conclude section 1016.7 is not intended to apply retroactively. Section 1016.7 does not reduce punishment for a criminal offense, create discretion to reduce punishment, narrow the scope of criminal liability, or create "a concrete avenue for certain individuals charged with a criminal offense to be treated more leniently or avoid punishment altogether." (*Burgos, supra,* 16 Cal.5th at p. 13.) Section 1016.7 neither

mandates more lenient treatment from prosecutors, nor does it restrict prosecutorial discretion in determining whether to prosecute qualifying individuals or what charges to bring against them. Rather, it requires prosecutors to consider—among other factors—whether youth or prior trauma contributed to a defendant's commission of the charged offenses. Prosecutors have always possessed discretion to consider those circumstances. (*People v. Brooks* (2020) 58 Cal.App.5th 1099, 1108 [prosecutors possess "broad latitude in taking into account whatever mitigating factors the defense might wish to advocate in plea bargain negotiations."]; see also Cal. Rules of Court, rule 4.423(c) [broadly defining potentially mitigating circumstances with respect to sentencing, including "[a]ny other factors ... that reasonably relate to the defendant or the circumstances under which the crime was committed"].) And unlike the ameliorative statutes defendant cites from *People v. Frahs* (2020) 9 Cal.5th 618, 624 (*Frahs*)) and *People v. Francis* (1969) 71 Cal.2d 66 (*Francis*), section 1016.7 simply emphasizes the potential significance of certain factors with respect to culpability and punishment.

Frahs involved the creation of pretrial diversion under section 1001.36 for certain defendants with mental health disorders. (*Frahs*, *supra*, 9 Cal.5th at p. 624.) As the Supreme Court explained in *Burgos*, the "crux" of that statute "and what mattered for the purposes of [the Supreme Court's] analysis, was the path to reduced punishment based on a legislative judgment that the punishments prescribed by law for certain offenses are frequently inappropriate for certain classes of persons who bear reduced culpability for their crimes." (*Burgos*, *supra*, 16 Cal.5th at p. 23.) Unlike the statute at issue in *Frahs*, section 1016.7 does not create a concrete path to reduced punishment.

In *Francis*, the Supreme Court found an amendment to section 11530 (providing lesser sentences for first time marijuana possession) to be retroactive based on an inference that "the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*Francis*, *supra*,

71 Cal.2d at pp. 75-76.) No such inference is apparent here, where section 1016.7 merely requires particular circumstances to be considered in the exercise of broad prosecutorial discretion. The statute does so without purporting to restrict that discretion or necessarily requiring that prosecutors charge qualifying defendants with lesser offenses or seek a lesser sentence. Because we conclude section 1016.7 is not retroactive, we need not address defendant's derivative arguments that the trial court had jurisdiction to consider section 1016.7 on remand or that its failure to do so was prejudicial error.

C. THE FIREARM ENHANCEMENTS ARE VALID

Defendant asserts the firearm enhancements associated with counts 2 and 3 are unauthorized because he never admitted to the allegations under section 12022.53, subdivision (d). At the change of plea hearing the trial court asked defendant if he admitted the count 2 firearm allegation under section 12022.5 and the count 3 firearm allegation under section 12022.5, subdivisions (b) and (d).[5] Defendant contends that because he never admitted to violating section 12022.53, subdivision (d), the trial court was not authorized to impose the 25-year-to-life firearm enhancements for counts 2 and 3.

The Attorney General acknowledges the trial court incorrectly cited section 12022.5 (rather than section 12022.53), but argues the mistake was essentially an inadvertent clerical error that does not invalidate the judgment. The Attorney General contends the rest of the record clearly shows defendant intended and agreed to admit the

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[5] Sections 12022.5 and 12022.53 provide distinct sentencing enhancements for a defendant found to have "personally use[d] a firearm" during the commission of a felony. Section 12022.5, subdivision (a), provides for a sentence enhancement of 3, 4, or 10 years for personal use of a firearm during the commission of any felony. (§ 12022.5, subd. (a).) If the firearm is an assault weapon, the enhancement is 5, 6 or 10 years. (§ 12022.5, subd. (b).) Section 12022.53 provides for a 10 year enhancement for personal use of a firearm during enumerated felonies (§ 12022.53, subd. (b)), 20 years for the personal and intentional discharge of a firearm (§ 12022.53, subd. (c)), and 25 years to life for the personal and intentional discharge of a firearm causing great bodily injury or death (§ 12022.53, subd. (d)).

firearm allegations as to count 2 under section 12022.53, subdivision (d) and (e)(1), and as to count 3 under section 12022.53, subdivision (d), as those sections were correctly alleged in the information and substantively described by the trial court at the time it took defendant's plea.

Defendant disputes the trial court's mistake is evident from the record. He argues there was no written plea agreement detailing the charges and special allegations to which defendant would plead guilty, nor did the prosecutor refer specifically to section 12022.53 in reciting the plea agreement in court.[6] Defendant also argues that although the information refers to section 12022.53, defendants are permitted to admit an offense other than as charged so long as it is reasonably related to the charged conduct. He describes the section 12022.5 enhancement as "a logical result" in the context of the plea bargain as to counts two and three, "since that provision is a lesser included enhancement to section 12022.53."

We have carefully reviewed the record and conclude the judgment is not invalidated by the trial court's mistake in inadvertently referring to section 12022.5 rather than the applicable section 12022.53. When the court asked defendant whether he admitted the firearm allegations associated with counts 2 and 3, the colloquy tracked the actual language of section 12022.53, subdivision (d), not section 12022.5.[7]

The court imposed the following sentence: "As to Count 2, the sentence is 15 years to life, plus an enhancement of 25 years to life pursuant to Penal Code 12022.53(d)

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[6] The prosecutor described on the record that defendant agreed to plead guilty "to all of the charges that are alleged on the First Amended Information as they apply to him as well as admitting all the enhancements and allegations that apply to him. [¶] In the end, his sentence would be 50 years to life on count one. That's first-degree murder with 25 years to life, and 12022.53, personal use of a firearm causing death, and counts two and three will run concurrent." Counts 2 and 3 of the First Amended Information reference section 12022.53, subdivisions (d), (e)(1), (c) and (b).

[7] The court's error was corrected in the clerk's minute order, which reflects defendant's admission to firearm allegations under section 12022.53, subdivision (d).

for a total of 40 years to life. That will run concurrent to Count 1." The court imposed the same sentence as to count 3. The clerk's minute order shows section 12022.53, subdivision (d) as the enhancement imposed for counts 2 and 3. Neither defendant nor the prosecutor questioned the trial court's imposition of a 25-year-to-life enhancement under section 12022.53, subdivision (d) for counts 2 and 3, as would have been expected if they had agreed to the lesser enhancement under section 12022.5.[8]

Defendant's authorities do not compel a different result. In *People v. Zackery* (2007) 147 Cal.App.4th 380, 386, the parties agreed that the sentence imposed for one of three counts was unauthorized because defendant had never changed his not guilty plea or been otherwise convicted on that count. In *People v. Torres* (2011) 198 Cal.App.4th 1131, 1148-1149, the appellate court found a four-year upper term sentence was unauthorized where the trial court had bifurcated the element of force or threat for a separate trial, but then forgot the element, which "disappeared from the case" and was not resolved by any later factfinding. And in *People v. Lopez* (2012) 208 Cal.App.4th 1049, 1064-1065, the appellate court likewise found that "the trial court erred in imposing a sentence of seven years to life pursuant to section 186.22, subdivision (b)(4)(C) because the section did not apply to the crime of which Lopez was convicted and because the sentence was based on a fact not found true by the jury." Those sentences were unauthorized because they involved crimes to which the defendant had neither pleaded guilty to nor been convicted, not a situation where the trial court inadvertently cited the incorrect statute when defendant admitted the elements.

D. THE TRIAL COURT MAY CONSIDER STRIKING THE GANG ENHANCEMENT

In 2021, the Legislature enacted Assembly Bill No. 333 ((2021–2022 Reg. Sess.) (Stats. 2021, ch. 699, § 3, eff. Jan. 1, 2022) (Assembly Bill No. 333), which in relevant part amended section 186.22, subdivision (g) to redefine the phrase "benefit, promote,

[8] The abstract of judgment similarly reflects that the section 12022.53, subdivision (d) allegations were charged and found to be true.

further, or assist" a criminal street gang for the purposes of section 186.22, subdivisions (a), (b), and (d). The phrase now "means to provide a common benefit to members of a gang where the common benefit is more than reputational." (§ 186.22, subds. (e)(1), (g).) Those elemental changes apply retroactively to all nonfinal cases such as this one. (*People v. Tran* (2022) 13 Cal.5th 1169, 1207; *Estrada, supra,* 63 Cal.2d at p. 745.) The California Supreme Court has clarified "[t]he scope of the superior court's jurisdiction as defined by a remittitur does not prevent the retroactive application of ameliorative laws." (*People v. Lopez* (2025) 17 Cal.5th 388, 396.)

Although the Attorney General concedes that the trial court has jurisdiction to consider defendant's motion to dismiss gang enhancements, the parties disagree on the proper remedy. Defendant asks us to dismiss the enhancements and instruct the trial court to permit him to withdraw his guilty plea so he can renegotiate the plea agreement. He argues the gang enhancements must be dismissed because the prosecution's preliminary hearing evidence relied entirely on a now impermissible "reputational" theory of benefit to his gang. He contends the preliminary hearing evidence shows only that the victims were seeking revenge against defendant's friend, whom they believed had stabbed one of their friends. The Attorney General cites the prosecutor's argument that defendant did not merely shoot the victims in defense of a fellow gang member, but rather as premeditated retaliation in an ongoing feud within the broader Norteño gang structure. The Attorney General urges that the trial court should resolve this question in the first instance and also consider whether defendant would have pleaded guilty after Assembly Bill No. 333.

Because the trial court determined it had no jurisdiction to consider defendant's motion to dismiss the gang enhancements, it did not reach the parties' substantive arguments. Given the lack of a full record on appeal regarding the issues (including the absence of the complete preliminary hearing transcript and evidence), the appropriate course is to permit the trial court to assess, after full consideration of the issue on a proper

record, whether changes to section 186.22 require dismissal of the gang enhancements. We express no opinion regarding how the trial court should rule on defendant's motion. (In light of our remand for consideration of defendant's arguments under section 186.22, we do not reach defendant's alternative argument that resentencing is called for under new section 1171 (Stats. 2024, Ch. 964, sec. 2 (Assembly Bill No. 2483), eff. Jan. 1, 2025).) We observe that if the trial court exercises its discretion to dismiss the gang enhancements, the prosecution will be entitled to the same remedy as the defense (i.e., withdrawal from the plea agreement) and the trial court may withdraw its approval of the plea agreement as well. (*People v. Stamps* (2020) 9 Cal.5th 685, 707-708; *People v. Superior Court (Garcia)* (1982) 131 Cal.App.3d 256.) In that event, the trial court must restore the parties to the status quo ante, including permitting the prosecution to request to reopen the preliminary hearing and present evidence on the new elements of the gang allegations or to proceed without those charges. (See *Mendoza v. Superior Court* (2023) 91 Cal.App.5th 42, 58.)

III. DISPOSITION

The judgment is reversed. On remand, the trial court shall consider defendant's motion for relief under section 186.22 and reconsider defendant's motion to dismiss the firearm enhancements under section 1385 in light of *People v. Walker* (2024) 16 Cal.5th 1024. If such relief is granted, defendant shall be entitled to full resentencing.

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Grover, J.

WE CONCUR:

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Greenwood, P. J.

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Lie, J.