FIRST DISTRICT APPELLATE PROJECT
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NEW SENTENCING REFORM LEGISLATION ON FIREARM USE AND DRUG ENHANCEMENTS.

Seeking Relief on Pending and Non-Yet-Final Appeals

October 2017

As part of a historic criminal justice reform package[1], the governor has signed two important laws, curtailing firearm use and drug enhancements: (1) *Senate Bill 620*, eliminates the statutory prohibition on striking a firearm enhancement; and (2) *Senate Bill 180*, all but eliminates three-year drug enhancements under Health and Safety Code section 11370.2, limiting that enhancement to priors for use of a minor in a drug offense.

A. Senate Bill 620 – New Discretion to Strike Firearm Use Enhancements

Existing law prohibits a court from striking firearm enhancements under Penal Code sections 12022.5 and 12022.53. **Effective January 1, 2018, Penal Code sections 12022.5(c) and 12022.53(h) are amended**, allowing a court to exercise its discretion under Penal Code section 1385 to strike or dismiss such an enhancement at the time of sentencing or resentencing. The amended law will provide potential relief to thousands of people serving enhancement sentences up to 25 years to life. Review the new law here.

A strong argument can be made that the discretionary sentencing provisions of Senate Bill 620, sections 12022.5(c) and 12022.53(h), must apply retroactively to all cases not yet final, for two reasons: that the legislature so intended, and under the rationale of *In re Estrada* (1965) 63 Cal.2d 740. A brief sample argument is detailed at the end of this note.

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[1] In the coming days, FDAP will provide information about the implications of SB 394 (providing a Youth Offender Parole Hearing for persons serving LWOP sentences who were under 18 at the time of the offense) and AB 1308 (extending Youth Offender Parole to persons through age 25).

B. Senate Bill 180 – Repeal of Recidivist Drug Offense Enhancements as to Most Previously-Qualifying Priors.

Health & Safety Code § 11370.2 establishes recidivist enhancements for drug trafficking offenses. A defendant convicted of a current drug trafficking offense is subject to consecutive three-year enhancements for each prior conviction of specified drug offenses. Under the current version of § 11370.2, a prior conviction under any of a wide range of drug trafficking offenses will qualify for the enhancement – including sale, possession for sale, transportation, etc. **Effective January 1, 2018, Health and Safety Code section 11370.2 is amended**, limiting the application of the three-year consecutive enhancement for a prior conviction related to the sale or possession for sale of a specified controlled substance to convictions of, or convictions of conspiracy to violate, a controlled substance offense where a minor was used or employed in the commission of the offense under Health and Safety Code section 11380. This is a significant change, because the amended law abolishes all other previously qualifying prior convictions under Health and Safety Code sections 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380.5, and 11383. Review the new law here.

Here, an even stronger argument under the *Estrada* rule can be made that SB 180 must be applied retroactively to all cases not yet final. While SB 620 confers discretion to strike gun use enhancements, SB 180's curtailment of drug offense enhancements is more dramatic. SB effectively repeals Health and Safety Code section 11370.2 enhancements as to most prior drug offenses that formerly qualified (with the exception of prior convictions for using a minor in drug offense).

C. Retroactivity Deadlines and Mechanisms for Raising SB 620 and SB 180 Claims

For all not-yet-final cases in which the sentence included either a firearm use enhancement or a recidivist drug offense enhancement, counsel will need to consider asking the appropriate court to order resentencing to afford the defendant the benefit of the new laws: (1) In a case involving a firearm use enhancement, counsel should seek a remand to permit the sentencing court to exercise its discretion to strike the enhancement, pursuant to SB 620; (2) In a case involving imposition of a drug enhancement under Health and Safety Code section 11370.2, the case should be remanded with instructions to strike that

enhancement (pursuant to SB 180) and to resentence accordingly. (However, as noted above, the new legislation does not affect any § 11370.2 enhancement predicated on a prior conviction under Health and Safety Code section 11380.)

A judgment is final for purposes of retroactivity analysis when all direct appeals have been exhausted and a petition for writ of certiorari in the United States Supreme Court has been denied or the time for filing such a petition has expired. (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306.) Any case where the certiorari deadline is still pending as of January 1, 2018 (the date amended provisions of Penal Code sections 12022.5(c), 12022.53(h), and Health and Safety Code section 11370.2 become law) is not yet final for retroactivity purposes. Consequently, if the *Estrada* theory is found valid, the legislation should apply to any case in which the direct appeal was still pending in the Court of Appeal or California Supreme Court as of January 1, 2018, and any case in which a certiorari petition was pending or the certiorari deadline had not yet expired as of that date. **That means any case in which a petition for review was denied on or after October 4, 2017, is potentially eligible for relief.** The appropriate mechanism to seek relief will depend on the posture of the case.

1. **Opening brief not yet filed**: raise issue in the opening brief.

2. **Opening brief and/or reply brief filed; opinion not yet issued**: raise issue in a supplemental opening brief.

3. **Opinion filed within 30 days and not yet final in the court of appeal** (Cal. Rules of Ct, rule 8.366(b)): Panel attorneys should check with FDAP as to options. It may be possible to raise issue in petition for rehearing, but also by means of a state habeas petition.

4. **If petition for review is already on file or petition for review was denied October 4, 2017, or later**: Here again, panel attorneys should check with FDAP as to options. Though the appeal itself will not provide a mechanism to seek resentencing, it should still be possible to do so via a state habeas petition. *Estrada* itself illustrates that habeas is a permissible vehicle for raising a retroactivity claim.

Sample Argument

IN LIGHT OF SENATE BILL 620, APPELLANT'S CASE MUST BE REMANDED TO THE SUPERIOR COURT TO PERMIT THE COURT TO EXERCISE ITS DISCRETION TO STRIKE THE FIREARM ENHANCEMENT IMPOSED IN THIS CASE

A. Introduction and Background

On October 11, 2017, the Governor signed Senate Bill 620, ending the statutory prohibition on a court's ability to strike a firearm enhancement allegation or finding. Effective January 1, 2018, Penal Code sections 12022.5(c) and 12022.53(h) are amended to allow a court to exercise its discretion under Penal Code section 1385 to strike or dismiss such an enhancement at the time of sentencing or resentencing:

> 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.
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> (§§ 12022.5(c), 12022.53(h).)

This newly minted legislation applies retroactively to all cases, not yet final, in which a firearm enhancement was imposed at sentencing, including appellant's case. Here, the sentencing court imposed a consecutive term of *[EXAMPLE: 10 years for personal use of a firearm pursuant to section 12022.5(a)] [EXAMPLE: 25 years to life for personal and intentional discharge of a firearm and causing great bodily injury or death under section 12022.5(d)]*. As explained immediately below, amended section *[12022.5(c)] [12022.53(h)],* which now allows a court to exercise its discretion to strike a firearm enhancement, requires retroactive application to appellant's case which is not yet final. Accordingly, this court should remand appellant's case for resentencing.

B. The *Estrada* Rule Requires Retroactive Application of the Amended Firearm Enhancement Statutes Allowing a Court to Exercise its Discretion under Penal Code Section 1385 to Strike or Dismiss a Firearm Enhancement at Sentencing or Resentencing

"Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent. When the Legislature has not made its intent on the matter clear with respect to a particular statute, the Legislature's generally applicable declaration in section 3 provides the default rule: 'No part of [the Penal Code] is retroactive, unless expressly so declared'" (*People v. Brown* (2012) 54 Cal.4th 314, 319.)

Here, the Legislature has made its intent clear through the text of the amended statutes, which presuppose retroactive application. Both amended sections 12022.5(c) and 12022.53(h) expressly state: "The authority provided by this subdivision applies to *any resentencing* that may occur pursuant to any other law." (Emphasis added.) The Legislature's express declaration that the amended statutes are to apply to resentencing, and not merely sentencing, evinces an intent that they apply retroactively.

Regardless of that statutory intent, the rationale of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) mandates retroactive application of the amended statutes. *Estrada* constitutes "an important contextually specific qualification to the ordinary presumption that statutes operate prospectively..." (*People v. Brown, supra,* 54 Cal.4th at p. 323.) The *Estrada* rule posits that a court must assume that the Legislature intended the sentence ameliorating legislation to apply to all defendants whose judgments are not yet final on the statute's operative date unless a contrary legislative intent can be gleaned from the language of the enactment or its legislative history. (*In re Estrada, supra,* 63 Cal.2d at p. 742.) The "consideration . . . of paramount importance" is *whether the amendment lessens punishment*. If it does, that leads to the "inevitable inference that the Legislature *must have intended* that the new statute" controls. (*Estrada, supra,* p. 745, emphasis added.)

> It is an inevitable inference that Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply . . . This intent seems obvious, because to hold otherwise would be to conclude that the Legislature [or electorate] was

> motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.
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> (*Estrada*, at p. 745.)

Although, the amended statutes here do not guarantee a reduced sentence, the *Estrada* rule applies nonetheless. Authority since the time of *Estrada* bears this out.

Our Supreme Court decided *In re Griffin* (1965) 63 Cal.2d 757 the same day it decided *Estrada*. In *Griffin*, the Court considered the effect of the *Estrada* rule on a statute that altered the minimum term of imprisonment but increased the fixed minimum term of parole. (*Griffin, supra,* at p. 760.) *Griffin* was convicted of selling marijuana in violation of then-Penal Code section 11531, and was sentenced to 10 years to life–the correct sentence for that offense at the time. (*Griffin* at p. 757.) Before his conviction was final, the legislature amended the minimum sentence for the offense from 10 years to life to five years to life. (*Griffin* at p. 759.) Although there was no guarantee that Griffin would be released on parole within five years, or that this amended statute would directly impact his overall sentence, the Supreme Court held the *Estrada* rule applied. (*Ibid*.) The mere possibility of a reduced sentence was sufficient. *Griffin* is important because it confirms that the *Estrada* rule applies even if there is no guarantee that the statutory change would actually lessen the punishment. The fact that a lesser punishment could be imposed triggers application of the rule.

Several years later, in *People v. Francis* (1969) 71 Cal.2d 66, the Supreme Court determined that the *Estrada* rule applied to an amended statute although it did not actually lessen the minimum penalty, but, instead, provided a greater opportunity for discretionary imposition of a lesser penalty. Francis was convicted of a violation of possession of marijuana under former Health and Safety Code section 11530, punishable by a sentence of 1-10 years in state prison, or probation and one year of county jail. (*Francis*, at p. 76.) While the case was pending on appeal, the legislature amended the punishment for a violation of the statute to include an alternative sentence of imprisonment in the county jail for not more than one year or imprisonment from 1-10 years in the state prison, in addition to the previous option of probation and county jail. (*Ibid*.) Despite the fact that the trial court did not initially grant Francis a probationary sentence, and that the amended statute did not guarantee Francis any lesser sentence, the

Francis court found that the possibility of an alternative punishment triggered the *Estrada* rule, requiring a remand to the sentencing court for reconsideration of sentencing. (*Francis*, at p. 75.)

Francis observed that "the amendment does not revoke one penalty and provide for a lesser one but rather vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty." (*Francis*, at p. 76.) *Francis* found the existence of *Estrada*'s "inevitable inference" that the Legislature intended the amendment to apply to every case to which it could constitutionally apply "because 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*." (*Ibid., emphasis added*.)

Significant to appellant's case, *Francis* found: "... the mere fact that the Legislature changed the offense from a felony to a felony-misdemeanor conceivably might cause a trial court to impose a county jail term or grant probation in a case where before the amendment the court denied probation to a defendant eligible therefor and sentenced the defendant to prison." (*Francis*, at p. 77.)

Although the benefit to Francis was far from certain given the judge did not choose a probationary sentence at the outset, the *Francis* court applied the *Estrada* rule nonetheless. The amendments in Francis constituted a modest change. Here, by contrast, the case for retroactive application is much stronger than in *Francis* (and *Griffin*). The ameliorative benefit of the amended legislation here is more clear cut: before SB 620 there was a flat statutory prohibition on exercising section 1385 discretion to strike firearm enhancements; after SB 620, a court is expressly empowered with section 1385 discretion to strike such an enhancement. (§§ 12022.5(c), 12022.53(h).) [*For cases involving imposition of extremely lengthy enhancements terms (20 years or 25 to life) imposed under section 12022.53(c) or (d)*: "The severity of the enchantment term here, and the fact that it is [often] greater than the underlying offense, makes it even more important that a resentencing opportunity occur, to permit section 1385 discretion."]

The statutes amended by SB 620 do not involve any of the countervailing circumstances which have rendered other types of provisions non-retroactive under the *Estrada* rule. In *People v. Conley* (2016) 63 Cal. 4th 646, 661-662, the

Supreme Court found the Three Strikes Reform Act of 2012 (Proposition 36) not retroactive where there was no voter intent for automatic resentencing, in light of the existence of recall provisions of section 1170.126. Here, however, the Legislature expressly extends the ameliorative reach of the statutory changes, providing that section 1385 discretion to strike firearm enhancements is not limited to sentencing, but also "applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5(c), 12022.53(h).) Likewise, the amended statutes here do not suffer from any of the countervailing circumstances found in *People v. Brown* (2012) 54 Cal. 4th 314. There, the Supreme Court held that the *Estrada* rule did not require retroactive application of "a statute increasing the rate at which prisoners may earn credit for good behavior … ." (*Id*. at p. 325.) It reasoned that this statute "does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent. … Instead of addressing punishment for past criminal conduct, the statute addresses *future conduct* in a custodial setting by providing increased incentives for good behavior." (*Ibid*.)

Here, as in *Francis* and *Griffin*, although the amended statutes do not guarantee a reduced sentence, the possibility of a reduced punishment, through the exercise of section 1385 discretion, triggers the *Estrada* rule, requiring a remand to the sentencing court for resentencing.

Accordingly, appellant's case must be remanded to the trial court for resentencing under amended section [12022.5(c)] [12022.53(h)].