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CALIFORNIA SUPREME COURT UPDATE– NEW LEGISLATION ISSUES ON REVIEW

By J. Bradley O’Connell

Over the last several weeks, the California Supreme Court has taken up several recurring issues surrounding recently-enacted legislation:

1. A.B. 333 (Stats. 2021, ch. 699) – amendments of gang enhancement

As discussed in previous posts, A.B. 333 made both substantive and procedural changes that significantly affect the litigation of gang enhancement allegations (Pen. Code, § 186.22). Substantively, the legislation narrows the definitions of several elements of the enhancement, thus imposing further requirements on what the prosecution must prove to sustain a gang enhancement. The legislation also mandates bifurcation of gang enhancements from other charges, if the defense so requests. (Newly-added Pen. Code, § 1109.)

Applicability of substantive amendments to non-final cases

People v. Tran (2022) 13 Cal.5th 1169

In its opinion in this already-pending capital appeal, the Supreme Court confirmed (as appellate cases had already held) that A.B. 333’s substantive amendments of the elements of the gang enhancement apply to all cases not yet final as of the legislation’s effective date, Jan. 1, 2022.

Bifurcation of gang enhancement

People v. Burgos (2022) 77 Cal.App.5th 550, briefing ordered, Oct. 12, 2022, S274743

While there was consensus that A.B. 333’s substantive amendments applied retroactively to non-final cases, there has been a split of authority regarding whether the same is true of its bifurcation provision. The Supreme Court apparently expected to resolve that issue in *People v. Tran*, and granted-and-

held several cases on that subject. But the Court ultimately did not decide the bifurcation/retroactivity issue in *Tran* because it found that any error in failing to bifurcate the gang enhancement from the underlying counts was harmless.

The Court has subsequently ordered briefing of the bifurcation/retroactivity issue in one of the grant-and-hold cases, *People v. Burgos*: “Does the provision of Penal Code section 1109 governing the bifurcation at trial of gang enhancements from the substantive offense or offenses apply retroactively to cases that are not yet final?”

Construction of the substantive amendments of gang enhancement

People v. Clark (2022) 81 Cal.App.5th 133, review gr., Oct. 19 2022, S275756

Formerly, a gang enhancement could rest on proof that members “individually or collectively” engaged in a “pattern of criminal gang activity.” However, A.B. 333 narrows that element by requiring that members “collectively” engaged in the requisite “pattern of criminal gang activity.” (Amended Pen. Code, § 186.22, subd. (f).) In *Clark*, the Court has formulated the following question of construction and application of the revised provision: “Can the People meet their burden of establishing a ‘pattern of criminal gang activity’ under Penal Code section 186.22 as amended by Assembly Bill No. 333 (Stats. 2021, ch. 699) by presenting evidence of individual gang members committing separate predicate offenses, or must the People provide evidence of two or more gang members working in concert with each other during each predicate offense?”

Constitutionality of application of amended enhancement to gang special circumstance

People v. Rojas (2022) 80 Cal.App.5th 542, review gr., Oct. 19, 2022, S275835

The gang special circumstance authorizes the death penalty or LWOP for an intentional killing by an active gang member “to further the activities of the criminal street gang.” (Pen. Code, § 190.2, subd. (a)(22).) The special circumstance incorporates section 186.22, subdivision (f)’s definition of a “criminal street gang.” However, because the gang special circumstance was adopted by initiative, the apparent applicability of A.B. 333’s substantive amendments in also limiting the scope of the gang special circumstance presents a further question, as defined by the Supreme Court’s review order

in *Rojas*: “Does Assembly Bill No. 333 (Stats. 2021, ch. 699) unconstitutionally amend Proposition 21, if applied to the gang-murder special circumstance (Pen. Code, § 190.2, subd. (a)(22))?”

2. S.B. 567 (Stats. 2021, ch. 731) – choice of determinate sentence term

Standard of review for presumption of lower term

People v. Salazar (2022) 80 Cal.App.5th 453, review gr. Oct 12, 2022, S275788

In addition to other sentencing revisions, S.B. 567 establishes a presumption in favor of the lower term upon a finding of certain mitigating circumstances, such as “psychological, physical, or childhood trauma” that was a contributing factor in the offense. The Supreme Court has granted review on the proper standard of review for sentences imposed prior to that revision: “Did the Court of Appeal err by finding the record clearly indicates the trial court would not have imposed a low term sentence if it had been fully aware of its discretion under newly-added subdivision (b)(6) of Penal Code section 1170? (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)” *Salazar* presents the converse of the issues already pending before the Supreme Court on a previously-granted case, as described below.

Standard of review for limitations on imposition of upper term

People v. Lynch, 2022 WL 1702283, review gr., Aug. 10, 2022, S274942/C094174

While *Salazar* involves the standard of review for sentences implicated by S.B. 567’s presumption of a lower term under certain circumstances, *Lynch* poses similar issues regarding S.B. 567’s substantive and procedural limitations on imposition of an upper term. The question in *Lynch* is the proper prejudice standard where the aggravating factors on which the sentencing court based its choice of an upper term were not submitted to the jury and determined by proof beyond a reasonable doubt, as required by S.B. 567.

3. A.B. 1950 (Stats. 2020, ch. 328) – reduction of probation term and jurisdiction to order restitution

People v. McCune (2022) 81 Cal.App.5th 648, review gr., Oct. 26, 2022, S276303

A.B. 1950 (eff. Jan. 1, 2021) reduced the maximum felony probation term for certain offenses from 5 years to 2 years. As stated in the petition for review, *McCune* poses the question “whether the trial court retained jurisdiction to determine and award victim restitution under Penal Code sections 1202.4 and 1202.46 after it had terminated probation,” as required by A.B. 1950’s reduction of the maximum probation term.