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Sample argument that *Estrada* retroactivity applies to SB 620

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THE ENACTMENT OF SENATE BILL 620 REQUIRES REMAND TO THE TRIAL COURT SO IT MAY 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.[1] This legislation ends the statutory prohibition on a court's ability to strike a firearm enhancement allegation or finding under Penal Code sections 12022.5 and 12022.53. Effective January 1, 2018, sections 12022.5, subdivision (c), and 12022.53, subdivision (h), are amended to allow a court to exercise its discretion under 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

[1] http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB620

> 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.

(Pen. Code, §§ 12022.5, subd. (c), 12022.53, subd. (h).)

Appellant's sentence includes an enhancement term of *[specify]* years under section [12022.5/12022.53]. (*Cite to record.*) As explained in section B below, SB 620 applies to all cases not yet final as of January 1, 2018. Accordingly, appellant's case should be remanded to the trial court for resentencing to allow it to exercise its discretion to strike or dismiss the firearm enhancement under section [12022.5/12022.53].

B. *In re Estrada* (1965) 63 Cal.2d 740 requires retroactive application of the amended firearm enhancement statutes to cases not yet final, allowing a court to strike or dismiss such enhancements under Penal Code section 1385.

The ameliorative, punishment-lessening provisions of Senate Bill 620 apply to all affected cases not final as of the new law's effective date, January 1, 2018.

"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 [Penal Code] 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.)

In the case of Senate Bill 620, the Legislature made its intent clear through the text of the amended statutes, which presuppose retroactive application. Both amended sections 12022.5, subdivision (c) and 12022.53, subdivision (h) expressly state: "The authority provided by this subdivision applies to *any resentencing* that may occur pursuant to any other law." (Italics added.) The legislature's express declaration that the amended statutes apply to resentencing, and not just sentencing in the first instance, demonstrates an intent that they apply retroactively.

In addition to the Legislature's manifest intent, the rationale on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) mandates retroactive application of the statutes to cases not yet final as of their effective date, January 1, 2018. *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.) Under *Estrada*, a court must assume 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 is demonstrated in the language of the new law or its legislative history. (*Estrada*, *supra*, 63 Cal.2d at p. 742.) The "consideration . . . of paramount importance" is whether the amendment lessens punishment. Doing so leads to:

> . . . an inevitable inference that the 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. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.

(*Estrada*, *supra*, 63 Cal.2d at p. 745.) The *Estrada* presumption of retroactivity applies to voter-enacted amendments, as well as those passed through the Legislature. (See, e.g., *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1545, cited with approval in *People v. Wright* (2006) 40 Cal.4th 81, 93-95.)

Although the amended statutes here do not *guarantee* a reduced sentence, the *Estrada* rule applies to SB 620, as demonstrated in *People v. Francis* (1969) 71 Cal.2d 66 (*Francis*). In *Francis*, the Supreme Court held that the *Estrada* presumption applied to an amended statute that provided a court with increased discretion to impose a lesser sentence. Defendant Francis was convicted of possession of marijuana under former Health and Safety Code section 11530, punishable by 1 to 10 years in prison. (*Francis*, *supra*, at p. 75.)[2] While the case was pending on appeal, the Legislature

[2] Alternatively, the court could have granted probation under section 1203, including up to one year in jail as a condition of probation. (*Ibid*.)

amended the punishment by designating the crime a felony-misdemeanor "wobbler" with two alternate dispositions: the felony sentence (1 to 10 years in prison), and the newly added misdemeanor sentence of not more than one year in county jail. (*Ibid*.) The Supreme Court found that the possibility of an alternative, lesser punishment triggered the *Estrada* presumption, requiring remand to the sentencing court to use its discretion and reconsider the newly-available sentencing options. (*Ibid*.)

The *Francis* court acknowledged that "the amendment does not revoke one penalty and provide 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." (*People v. Francis*, *supra*, 71 Cal.2d at p. 76.) Nonetheless, *Francis* found *Estrada's* "inevitable inference" that the Legislature intended the amended statute to apply to every case to which it constitutionally could applied in this situation "because the Legislature has determined that the former penalty provisions may have been too severe in some cases and the sentencing judges should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*Ibid*.)

Arguing against retroactive application of the amended statute, the Attorney General contended Francis was "not deprived of the 'proper sentence' as was the case in *Estrada*" because the trial court denied Francis's request for probation. (*People v. Francis, supra* at 71 Cal.2d at p.

76.) Rejecting this argument, the *Francis* court noted that circumstance did not necessarily apply to all defendants who might be otherwise eligible for retroactive application, and concluded, "[w]hether or not the Legislature intended the amendment to be retroactive to cases not final before the effective date for the amendment obviously cannot be decided on the basis of the particular facts of this or any other individual case." (*Id*. at pp. 76-77.) Further, the mere fact that the Legislature re-classified the offense from a felony to a felony-misdemeanor might cause a trial court to impose a lesser sentence. (*Id*. at p. 77.) Thus, the court applied the *Estrada* presumption, even though the appellant in *Francis* would not inevitably benefit from the alternative lesser punishment adopted in the amended statute.

The statutory amendment at issue in *Francis* was a modest change. Here, by contrast, the case for retroactive application is much stronger because the ameliorative benefit of the amended legislation is more clear cut: before SB 620, there was an explicit statutory prohibition on exercising section 1385 discretion to strike firearm enhancements; after SB 620, a court is expressly empowered with that discretion to strike such enhancements. (Pen. Code, §§ 12022.5, subd. (c), 12022.53, subd. (h).)

The statutes amended by SB 620 do not involve any of the countervailing circumstances that have been found to take amended laws

outside of the *Estrada* presumption of retroactivity. 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, given the existence of the recall petition provisions of section 1170.126. In other words, the *Estrada* presumption did not apply because voters provided a way for defendants already sentenced to receive the ameliorative benefit of the new by enacting a separate statute setting forth specific procedures. In the case of SB 620, on the other hand, the Legislature explicitly extended the ameliorative reach of the statutory changes not just to sentencing but also "to any resentencing that may occur pursuant to any other law." (Pen. Code, §§ 12022.5, subd. (c), 12022.53, subd. (h).)

Further, the statutes amended by SB 620 do not include the *Estrada*-countervailing circumstances found by the Supreme Court in a revision of former section 4019 that increased the days of credit inmates could receive for good conduct. (*People v. Brown*, *supra*, 54 Cal.4th 314.) In *People v. Brown*, the court held that *Estrada* did not require retroactive application of "a statute increasing the rate at which prisoners may earn credit for good behavior." (*Id*. at p. 325.) The court reasoned that the amended 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*.) By contrast, SB 620 represents a judgment of the Legislature that in some cases the firearm enhancements under section 12022.5 and 12022.53 can be too severe, and a trial court should have discretion to strike them in the interest of justice under section 1385.

Although the statutes amended by SB 620 do not guarantee a reduced sentence, as in *Francis*, *supra*, the possibility of a reduced punishment, through exercise of discretion under section 1385, triggers the *Estrada* presumption that the ameliorative effects apply to all cases not yet final on appeal.

[The following conclusion, calling for remand for the trial court to exercise discretion under the new law, applies when the sentence was pronounced before SB 620 was signed and without apparent awareness of the pending law. In other situations, contact staff attorney Art Martin or Lynelle Hee for arguments and authorities.]

C. The newly-created discretion to strike a firearm enhancement under Senate Bill 620 requires a fact-based analysis in the trial court, necessitating remand for a new sentencing hearing.

Appellant's case should be remanded to the trial court for resentencing under amended section [12022.5/12022.53]. The amended statute gives the trial court discretion under section 1385 to dismiss the enhancement in furtherance of justice. This use of discretion is necessarily

based on the facts of the particular case. The need to balance case-specific, fact-based factors requires remand to the trial court. (*People v. Francis*, *supra*, 71 Cal.2d 66, 79.)