No._____

IN THE SUPREME COURT OF THE UNITED STATES

DEANGELO WILLIAMS,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

---

PETITION FOR WRIT OF CERTIORARI

JONATHAN SOGLIN
Executive Director
NATHANIEL MILLER
Counsel of Record
Bar. No. 310808
Associate Staff Attorney
First District Appellate Project
475 14th Street, Suite 650
Oakland, CA 94612
Telephone: (415) 495-3119
Email: nat_miller@fdap.org

Attorneys for Petitioner

QUESTION PRESENTED

1. Whether a state appellate court's arbitrary denial of a defendant's request for the retroactive application of a new state law constitutes a violation of the defendant's rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

APPENDICES

APPENDIX A: Opinion of the California Court of Appeal in Case No. A155340, filed June 7, 2019, denying Petitioner's request for remand for resentencing under California State Senate Bill 1393

APPENDIX B: Order of the California Court of Appeal in Case No. A155340, filed July 3, 2019, modifying the opinion filed June 7, 2019, with no change in the judgment

APPENDIX C: Order of the California Supreme Court in Case No. S256932, filed August 21, 2019, denying Petitioner's petition for review

APPENDIX D: Petitioner's petition for review, filed July 17, 2019

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES

STATE RULES AND STATUTES

OTHER AUTHORITIES

No._____

IN THE SUPREME COURT OF THE UNITED STATES

DEANGELO WILLIAMS,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

---

PETITION FOR WRIT OF CERTIORARI

Petitioner DeAngelo Williams hereby respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, Division Four, which affirmed the judgment of the Superior Court of California, County of San Mateo, in California Court of Appeal Case No. A155340.

OPINIONS AND ORDERS BELOW

The California Court of Appeal, the highest state court to review the merits in this case, issued an initial unpublished

opinion on June 7, 2019. This opinion is attached as Appendix A and is reported at *People v. Williams*, 2019 Cal. App. Unpub. LEXIS 3910 (June 7, 2019, No. A155340).

Following a petition for rehearing filed by Petitioner, the California Court of Appeal issued an unpublished order modifying its initial opinion, with no change in the judgment, and denying the request for rehearing. This order is attached as Appendix B and is reported at *People v. Williams*, 2019 Cal. App. Unpub. LEXIS 4539 (July 3, 2019, No. A155340).

The California Supreme Court summarily denied Petitioner's timely petition for review on August 21, 2019. The order denying the petition for review is attached as Appendix C and is reported at *People v. Williams*, 2019 Cal. LEXIS 6301 (Aug. 21, 2019, No. S256932).

JURISDICTION

The California Court of Appeal entered its judgment on June 7, 2019. A copy of the California Court of Appeal's opinion is attached as Appendix A.

The California Supreme Court summarily denied Petitioner's timely petition for review on August 21, 2019. A copy of the order denying review is attached as Appendix C.

This petition for writ of certiorari is filed within 90 days of the California Supreme Court's order denying Petitioner's timely petition for review.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a) on the ground that the California Court of Appeal's denial of Petitioner's request for relief constituted a violation of Petitioner's rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES

A. The Fourteenth Amendment to the United States Constitution

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 1.

B. California Penal Code Sections 667(a)(1) and 1385(b)

At the time of Petitioner's sentencing in July 2018, California Penal Code Section 667(a)(1) provided as follows:

> *In compliance with subdivision (b) of Section 1385*, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the

> elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

Cal. Pen. Code § 667(a)(1) (version effective until Jan. 1, 2019) (emphasis added). California Penal Code Section 1385 provided as follows:

> (a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.
>
> *(b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.*
>
> (c)
>
> (1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may

> instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).
>
> (2) This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a).

Cal. Pen. Code § 1385 (version effective until Jan. 1, 2019) (emphasis added).

Pursuant to California State Senate Bill 1393, enacted on September 30, 2018 and effective as of January 1, 2019, California Penal Code Sections 667(a) and 1385 were amended to delete the portions italicized above. *See* Cal. Stats. 2018, Ch. 1013, §§ 1-2; *People v. Garcia*, 28 Cal. App. 5th 961, 971 (2018). California Penal Code Section 667(a)(1) now provides:

> Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

Cal. Pen. Code § 667(a)(1). California Penal Code Section 1385 now provides:

> (a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.
>
> (b)
>
> (1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).
>
> (2) This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a).

Cal. Pen. Code § 1385.

STATEMENT OF THE CASE

On January 2, 2018, the San Mateo County District

Attorney filed an information charging Petitioner with one count of vehicular manslaughter in violation of California Penal Code Section 192(c)(1) (count one), and two counts of reckless driving causing injury in violation of California Vehicle Code Section 23105(a) (counts two and three).[1] Clerk's Transcript at 6-7. The information alleged that count one was a serious felony and a third-strike offense under California's three strikes law, Sections 667 and 1170.12. Clerk's Transcript at 7, 9. The information further alleged, among other sentence enhancements, a 5-year prior-serious-felony enhancement under Section 667(a)(1) and a 1-year prior-prison-term enhancement under Section 667.5(b). Clerk's Transcript at 8-9.

On April 23, 2018, Petitioner entered a plea agreement whereby he pled no contest to count one, and also admitted the following: one strike prior under Sections 667 and 1170.12, the prior-serious-felony enhancement under Section 667(a)(1), and the prior-prison-term enhancement under Section 667.5(b). Reporter's Transcript at 6-7. Petitioner entered a waiver under

[1] All further statutory references are to the California Penal Code unless otherwise indicated.

People v. Harvey (1979) 25 Cal.3d 754 regarding restitution, and the prosecution dismissed counts two and three. Reporter's Transcript at 9-10. The maximum prison term allowed under the plea agreement was 14 years. Reporter's Transcript at 6-7.

Before sentencing, Petitioner filed a motion asking the trial court to strike the strike prior and to sentence him to the low term of 2 years for count one plus 5 years for the prior-serious-felony enhancement, for a total of 7 years. Clerk's Transcript at 34-40. The motion did not ask the trial court to strike the prior-prison-term enhancement. Clerk's Transcript at 34-40.

At the sentencing hearing on July 19, 2018, the trial court did not address Petitioner's request to strike the strike prior, but it sentenced Petitioner to 8 years on count one (the midterm of 4 years, doubled pursuant to the strike prior), plus 5 years consecutive for the prior-serious-felony enhancement and 1 year consecutive for the prior-prison-term enhancement, for a total of 14 years. Reporter's Transcript at 32-33. Before pronouncing the sentence, the trial court heard from the deceased victim's spouse and from Petitioner, and then made the following comments:

> In reading the report what I kept thinking over and over again was still water with a rock just being dropped

dropping away and all those ripples that just keep happening. I mean, that is just in my mind what had kept happening over and over again because not only have you essentially wiped out a family and all of their relatives, but you have wiped out your family. I mean, that is what happens. It is not just one person that is affected by all of this. It's many, many, many people.

My heart breaks for the Diaz family in reading the report. Five children now live their life without a father and I can't even imagine that. You know, it is just a terrible, terrible thing. And, you know, you keep saying that you were a changed person after your last prison stay, Mr. Williams, but – and you never tried to hurt somebody. And I don't believe that you wanted to hurt somebody this day. I don't believe that you intentionally drove into somebody like you wanted to kill someone, but I don't see the huge change that you proclaim to have. And the reason I say that is because you were on parole at the time of this offense. And when you say "I want to change and I want to be better," why didn't you have that thought when you are driving down the road at 2:50 in the afternoon at 70 miles an hour in a 25-mile-an-hour zone, running two red lights? Like why didn't you have that thought in your head prior to doing what you did?

I mean, I am not asking you to respond. I am just saying that. Because to be honest with you, it is like you didn't just ruin one person's life. You ruined your own life. You are where you are today before

me because of the choices that you have made throughout your life, and that is it. I mean, your choices have brought you to this point.

So the bottom line is, you know, when I look back at your history you have two prior serious felonies both of with handguns. You have a [Section] 422 conviction in 2008 with the use of a handgun or a rifle. And then in 2011, you committed a robbery at 7-11 with a gun and ordered two employees to the ground all for 150 bucks and 60 bucks worth of cigars.

And then on this fateful day, you are on parole, and for some reason, you have an absolute disregard for human life. This is foreseeable. That is the thing that bothers me about this case. Although you didn't intend to hurt anybody, and I don't believe you intended to kill Mr. Diaz, it was foreseeable like that something like this was going to happen.

How do you go down a road where it is 25 miles an hour at 70 miles an hour running red lights thinking that you are invincible, that your car is invisible, that you are just not going to affect other people. It is mind-numbing to think that, you know, either you honestly believed that or you didn't see, or you didn't care what the consequences were going to be for you, but only for you for other people. You had somebody in your car that was injured.

I see Ms. Diaz walking up here today. She is severely disabled. She – she walks

with a limp. I think it is important to state that Mr. Diaz had a crushed skull, a broken chest cage, and a broken pelvis and died immediately on the scene. The victim, Miranda, had a lung contusion and a fractured skull and a fractured spine. And Kiana Dixon suffered compression fractures of two of her vertebrae.

[. . .]

I mean, that picture of that water with the rock hitting it and all those waves, I mean all these children without a father now who have no hope for a future because they feel like what is the point? Their dad is dead. And a mother left with her five children to raise when she is got horrible injuries and obviously PTSD from this whole incident. It is just – it's the saddest thing in the world because it was preventable. And Mr. Diaz didn't have to die that day.

And when you said your history makes you look like a bad person and you made mistakes and poor choices, that is true. It doesn't make you look like a bad person. You were a bad person for having two serious and violent felonies armed with weapons and being on parole for one host armed robbery for $150 at 7-11 and then plowing into someone. You are not a changed person, Mr. Williams, not yet.

I think while you were getting your barber license, and that is a good thing, you still go back to this lack of total regard for anybody else but what you want.

> I mean, driving at 70 miles an hour, was it going to get you there ten seconds faster? Was it worth killing someone and hurting other people? Is just – it boggles my mind.

Reporter's Transcript at 29-32.

The trial court subsequently granted Petitioner's request for a certificate of probable cause, and Petitioner filed a timely notice of appeal. Clerk's Transcript at 63-64.

Approximately two months after the sentencing hearing, the California Governor signed California State Senate Bill 1393, which, effective January 1, 2019, amended Sections 667(a)(1) and 1385(b) to authorize trial courts to strike prior-serious-felony enhancements under Section 667(a)(1), which had been mandatory. *See* Cal. Stats. 2018, Ch. 1013, §§ 1-2; *Garcia*, 28 Cal. App. 5th at 971. On appeal, Petitioner argued, in relevant part, that Senate Bill 1393 was an ameliorative change in the law retroactively applicable to non-final judgments under the rule of *In re Estrada* (1965) 63 Cal.2d 740, and that his case should be remanded to allow the trial court an opportunity to exercise the discretion granted to it under the Bill. Appellant's Opening Brief at 8-15.

On June 7, 2019, the California Court of Appeal, First Appellate District, Division Four issued an unpublished opinion rejecting Petitioner's argument. Opinion at 2-4 (Appendix A). The Court of Appeal agreed that Senate Bill 1393 applied retroactively to non-final judgments but found that remand was unnecessary because the record "clearly indicated" that the trial court would not have stricken the prior-serious-felony enhancement even if it could have. Opinion at 3-4.

In so ruling, the Court of Appeal relied principally on the fact that the trial court did not grant Petitioner's request to strike the strike prior. Opinion at 4. The Court of Appeal reasoned that striking the strike prior would have resulted in Petitioner's sentence being "reduced by *four years*," and that the trial court's refusal to reduce Petitioner's sentence by *four years* by striking the strike prior clearly indicated that the trial court would not have reduced the sentence by *five years* by striking the prior-serious-felony enhancement. Opinion at 4 (emphasis in original). The Court of Appeal also relied on the trial court's imposition of the maximum prison term allowed under the plea agreement, and on its comments at the sentencing hearing, in particular its comment to Petitioner, "'You were a bad person for

having two serious and violent felonies armed with weapons and being on parole for one . . . armed robbery for $150 at 7-[Eleven] and then plowing into someone. You are not a changed person, Mr. Williams, not yet.'" Opinion at 4 (quoting Reporter's Transcript at 32).

On June 21, 2019, Petitioner filed a petition for rehearing. The petition for rehearing pointed out that, contrary to the Court of Appeal's reasoning, striking the strike prior would have resulted in a *greater* reduction in Petitioner's sentence than striking the prior-serious-felony enhancement. Petition for Rehearing at 5-8. Taking into account conduct credits, striking the strike prior would have resulted in a reduction of approximately 6 years and 1 month, while striking the prior-serious-felony enhancement would have resulted in a reduction of only approximately 4 years. Petition for Rehearing at 5-8.

The petition for rehearing also noted that the trial court's comment to Petitioner about having "'two serious and violent felonies,'" Opinion at 4 (quoting Reporter's Transcript at 32), was factually incorrect, and that immediately after the trial court made this comment, the prosecutor pointed out that one of the "serious and violent felonies" was a misdemeanor, not a felony.

Petition for Rehearing at 11 (citing Reporter's Transcript at 32 and Clerk's Transcript at 53-54.)

On June 25, 2019, the Court of Appeal requested an answer from the Attorney General regarding the petition for rehearing. Memorandum to Counsel, filed June 25, 2019. In its answer, the Attorney General conceded that striking the strike prior would have resulted in a greater reduction in Petitioner's sentence than striking the prior-serious-felony enhancement, and that the trial court's "two serious and violent felonies" comment was factually incorrect. Answer to Petition for Rehearing at 4, 6 n.3. The Attorney General argued, however, that the Court of Appeal's decision was nevertheless correct and that rehearing should be denied. Answer to Petition for Rehearing at 6.

On July 3, 2019, the Court of Appeal issued an order modifying its opinion, with no change in the judgment, and denying rehearing. Order Modifying Opinion at 1-2 (Appendix B). The Court of Appeal modified the opinion in two ways. First, it replaced the paragraph reasoning that striking the strike prior would have resulted in Petitioner's sentence being reduced by 4 years with the following paragraph:

> In the circumstances of this case, we likewise conclude there is no need to remand for resentencing. Defendant asked the trial court to dismiss the strike prior in the interest of justice, arguing that the five-year enhancement under section 667, subdivision (a)(1) adequately accounted for his previous criminal behavior. He asked for a total term of seven years: the low term of two years for vehicular manslaughter, and five years under section 667, subdivision (a)(1). At the sentencing hearing, the prosecutor agreed that the court had "wide discretion" to sentence defendant to anything between seven and 14 years. Nevertheless, the court sentenced defendant to the maximum term allowed under the plea agreement: the midterm of four years, doubled for the strike prior, an additional year for the prior prison term, and five years under section 667, subdivision (a)(1), for a total of 14 years. The fact that the court declined to limit defendant's sentence in any other way is a clear indication that it was of the view the maximum sentence under the plea agreement was appropriate and that it would not have stricken the five-year enhancement if it had discretion to do so.

Order Modifying Opinion at 1-2. Second, it added the following sentence to its discussion of the trial court's "two serious and violent felonies" comment: "The prosecutor pointed out that one of these two prior convictions was a misdemeanor, but that did

not affect the court's sentencing decision." Order Modifying Opinion at 2.

Petitioner filed a timely petition for review with the California Supreme Court on July 17, 2019. The petition for review argued, in relevant part, that the Court of Appeal's denial of Petitioner's request for remand for resentencing under Senate Bill 1393 amounted to a violation of Petitioner's rights under the equal protection clause of the United States Constitution given the arbitrary nature of the denial, in particular in light of *People v. Vickers*, 2019 Cal. App. Unpub. LEXIS 4438 (June 28, 2019, No. A153103), a decision by the same Division of the California Court of Appeal in which the Division ordered remand for resentencing under Senate Bill 1393 in circumstances substantially identical to Petitioner's. Petition for Review at 25-26 (Appendix D). The California Supreme Court summarily denied the petition for review on August 21, 2019. Order Denying Petition for Review at 1 (Appendix C).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER A STATE APPELLATE COURT'S ARBITRARY DENIAL OF A DEFENDANT'S REQUEST FOR THE RETROACTIVE APPLICATION OF A NEW STATE LAW CONSTITUTES A VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court should grant the writ to decide whether a state appellate court's arbitrary denial of a defendant's request for the retroactive application of a new state law constitutes a violation of the defendant's rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

In *Myers v. Ylst*, 897 F.2d 417 (9th Cir. 1990), the United States Court of Appeals for the Ninth Circuit held that the California Supreme Court violated the equal protection clause by declining to retroactively apply a decision regarding the right to an impartial jury in the defendant's case, where the California Supreme Court *had* retroactively applied the decision in an essentially identical case. The Ninth Circuit explained that the equal protection clause prohibits both "explicit" and "de facto" unequal treatment, and that the clause thus requires that once a state establishes a rule, the rule "must be applied even-

handedly." *Id.* at 421 (quotation marks omitted). The equal protection clause thus "prohibits a state from affording one person . . . the retroactive benefit of a ruling on . . . [the] right to an impartial jury while denying it to another," unless the state "has some rational basis, announced with reasonable precision, for doing so." *Ibid.* (quotation marks omitted).

In so holding, the Ninth Circuit relied on two of its prior decisions, *Johnson v. Arizona*, 462 F.2d 1352 (9th Cir. 1972), and *La Rue v. McCarthy*, 833 F.2d 140 (9th Cir. 1987). In *Johnson*, the Ninth Circuit held that the State of Arizona could not retroactively apply a state court decision in some cases while declining to retroactively apply it in others, without providing some clear indication of the basis for the disparate treatment. The Ninth Circuit explained,

> Decisions involving changes in the law may be applied completely retroactively, limitedly retroactively, or purely prospectively. However, if the application chosen does not have some rational basis, announced with reasonable precision, so that the rule may be generally known and its results forecast, it will offend the equal protection clause of the Fourteenth Amendment. Justice must be even-handed.

Id. at 1354 (citations omitted). In *La Rue*, the Ninth Circuit cited *Johnson* favorably for the proposition – also stated in *Myers* – that once a state establishes a rule, the rule "must be applied even-handedly." 833 F.2d at 142; *see also Myers*, 897 F.2d at 421.

Under the equal protection principles reflected in *Myers*, *Johnson*, and *La Rue*, the Court of Appeal's denial of Petitioner's request for remand for resentencing under Senate Bill 1393 amounted to a violation of Petitioner's equal protection rights. Senate Bill 1393 is one of a number of ameliorative enactments passed by the California Legislature in recent years. California State Senate Bill 620 – which, like Senate Bill 1393, authorized trial courts to strike certain sentencing enhancements – is another.[2] *See Garcia*, 28 Cal.App.5th at 971-73 (discussing Senate Bill 1393); *People v. McDaniels*, 22 Cal.App.5th 420, 424-25 (2018) (discussing Senate Bill 620). In the past approximately two years, California has seen a surge of appeals seeking remand for resentencing under these two bills. The appeals generally raise two issues: (1) whether the bills are retroactive; and (2) if

[2] Senate Bill 620 authorized trial courts to strike firearm enhancements imposed under Sections 12022.5 and 12022.53. *See People v. Billingsley*, 22 Cal.App.5th 1076, 1079-80 (2018).

so, whether remand for resentencing under the bills is required. With respect to the first issue, California courts, including the Court of Appeal in this case, have uniformly held that both Senate Bill 1393 and Senate Bill 620 apply retroactively to non-final judgments. With respect to the second issue, California courts, including the Court of Appeal in this case, have applied a "clear indication" standard to decide whether remand for resentencing is required; under this standard, "[r]emand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so." (*People v. Almanza*, 24 Cal.App.5th 1104, 1110 (2018); *accord, e.g., People v. Franks*, 35 Cal.App.5th 883, 892 (2019); *People v. Jones*, 32 Cal.App.5th 267, 272-73 (2019); *Garcia*, 28 Cal. App. 5th at 9713 n.3; *People v. McVey*, 24 Cal.App.5th 405, 419 (2018); *Billingsley*, 22 Cal.App.5th at 1081; *People v. Chavez*, 22 Cal.App.5th 663, 713 (2018); *McDaniels*, 22 Cal.App.5th at 425-28.

In this case, however, while the Court of Appeal recited the appropriate standard for determining whether remand for resentencing under Senate Bill 1393 was required, the Court of Appeal applied that standard in a manner that diverged sharply

from other decisions on the issue, including from at least one decision by the same Division of the California Court of Appeal that decided Petitioner's case. *See Vickers*, 2019 Cal. App. Unpub. LEXIS 4438.[3]

Although there had been dozens, if not hundreds, of decisions addressing requests for remand for resentencing under Senate Bills 1393 and 620 by the time of the Court of Appeal's denial of Petitioner's request for remand, there had been only three published decisions denying such requests: *People v. Franks*, 35 Cal.App.5th 883; *People v. Jones*, 32 Cal.App.5th 267; and *People v. McVey*, 24 Cal.App.5th 405. In each of these cases, the trial court imposed the maximum or near-maximum allowable sentence, and, crucially, took the extraordinary step of making an explicit statement on the record either that it would not strike the relevant enhancement even if it could, or that it was categorically unwilling to reduce the defendant's sentence in

[3] Petitioner cites *People v. Vickers*, 2019 Cal. App. Unpub. LEXIS 4438, and the other unpublished opinions cited herein not as legal precedent that should be followed, but as evidence of the arbitrary nature of the Court of Appeal's denial of Petitioner's request for remand for resentencing under Senate Bill 1393. The citations to the unpublished opinions therefore do not violate the prohibition on citing unpublished authority stated in Rule 8.1115(a) of the California Rules of Court.

any way. *See Franks*, 35 Cal.App.5th at 888, 893 (trial court stated that it would not strike the prior-serious-felony enhancement even if it could); *Jones*, 32 Cal.App.5th at 271, 273-75 (trial court sentenced the defendant to 14 years to life plus a consecutive term of 22 years and stated that it "took great satisfaction" in imposing the "very lengthy sentence"); *McVey*, 24 Cal.App.5th at 409, 419 (trial court sentenced the defendant to the high term of 10 years on the firearm enhancement and stated that the high term was "the only appropriate sentence on the enhancement").

Petitioner's case was plainly distinguishable. Although the trial court in Petitioner's case did impose the maximum sentence allowed under the plea agreement, the trial court did not make any explicit statement to the effect that it would not strike the prior-serious-felony enhancement even if it could, or that it was categorically unwilling to reduce the sentence in any way. *See* Reporter's Transcript at 29-32. The trial court was critical of Petitioner and cognizant of the tragic consequences of the offense, but none of the trial court's comments were comparable to those underlying the decisions in *Franks*, *Jones*, and *McVey*. *See* Reporter's Transcript at 29-32. Even the comment highlighted by

the Court of Appeal – i.e., the factually incorrect "'two serious and violent felonies'" comment, Opinion at 4, quoting Reporter's Transcript at 32 – was a far cry from an explicit statement of unwillingness to strike the prior-serious-felony enhancement or to reduce the sentence.

It is true that the Court of Appeal relied not only on the trial court's comments, but also on its imposition of the maximum sentence allowed under the plea agreement. (*See* Order Modifying Opinion at 1-2; Opinion at 4.) But absent an explicit statement of the sort found in *Franks*, *Jones*, and *McVey*, there was no California authority holding that the mere imposition of the maximum allowable sentence satisfied the "clear indication" standard. To the contrary, numerous decisions, both published and unpublished, had ordered remand for resentencing under Senate Bills 1393 and 620 in cases where the trial court showed no meaningful leniency and imposed the maximum or near-maximum sentence. *See*, *e.g., People v. Johnson* (2019) 32 Cal.App.5th 26; *Almanza*, 24 Cal.App.5th 1104; *Vickers*, 2019 Cal. App. Unpub. LEXIS 4438; *People v. Zapata*, 2019 Cal. App. Unpub. LEXIS 4354 (June 27, 2019, No. F075687); *People v. Torres*, 2019 Cal. App. Unpub. LEXIS 3635 (May 29, 2019, No.

D073866); *People v. Greenhill*, 2019 Cal. App. Unpub. LEXIS 1796 (Mar. 14, 2019, No. F076968).

The Court of Appeal also relied on the fact that the trial court did not grant Petitioner's request to strike the strike prior. *See* Order Modifying Opinion at 1-2; Opinion at 4. Again, however, numerous decisions had ordered remand for resentencing under Senate Bills 1393 and 620 in cases where the defendant was sentenced pursuant to a strike prior. *See, e.g., Johnson, supra*, 32 Cal.App.5th 26; *People v. Zamora*, 35 Cal.App.5th 200 (2019); *People v. Dearborne*, 34 Cal.App.5th 250 (2019); *People v. Jimenez*, 32 Cal.App.5th 409 (2019); *People v. Rocha*, 32 Cal.App.5th 352 (2019); *Garcia, supra*, 28 Cal.App.5th 961. Indeed, several unpublished decisions had specifically addressed and rejected the argument that a trial court's failure to strike a strike prior provides a clear indication that the trial court would not have stricken a prior-serious-felony enhancement. *See, e.g., Vickers, supra,* 2019 Cal. App. Unpub. LEXIS 4438, at *22-24; *People v. Lopez*, 2019 Cal. App. Unpub. LEXIS 3888 at *13 (June 6, 2019, No. E070621); *People v. Dean*, 2019 Cal. App. Unpub. LEXIS 2242 at *8 (Mar. 29, 2019, No. B290348); *Greenhill, supra,* 2019 Cal. App. Unpub. LEXIS 1796

at *16. And relying on a trial court's failure to strike a strike prior is particularly unreasonable where, as was the case here, striking the strike prior would have resulted in a *greater* reduction in the defendant's sentence than striking the prior-serious-felony enhancement.

The best evidence of the arbitrary nature of the Court of Appeal's denial of Petitioner's request for remand for resentencing under Senate Bill 1393 is *People v. Vickers*, 2019 Cal. App. Unpub. LEXIS 4438, a decision by the same Division of the California Court of Appeal that decided Petitioner's case, i.e., Division Four of the First Appellate District. Division Four issued *Vickers* on June 28, 2019, less than a week before it issued the order modifying the opinion in this case. The defendant in *Vickers* was convicted of second degree murder and was found to have personally used a firearm. *Vickers*, 2019 Cal. App. Unpub. LEXIS 4438 at *12. The trial court denied the defendant's request to strike the strike prior, stating that the defendant's case fell "within the spirit and letter of the three strikes law," and adding that "there's nothing about the defendant or his history that would make me . . . inclined to think that he should be given that leniency." *Id.* at *23. The trial court sentenced the defendant to

30 years to life for the second degree murder conviction (15 years to life doubled pursuant to the strike prior), a consecutive 25 years to life for the firearm enhancement, and a consecutive 5 years for a prior-serious-felony enhancement under Section 667(a), for an aggregate sentence of 60 years to life. *Id.* at *12.

On appeal, Division Four held that remand under Senate Bill 620 was appropriate. *Id.* at *23. Division Four then noted that remand under Senate Bill 1393 "present[ed] a closer question" in light of the trial court's denial of the request to strike the strike prior and the trial court's comments in denying the request. *Ibid.* Nevertheless, Division Four concluded that remand *was* appropriate, reasoning that "[a]lthough th[e] [trial court's] comments would appear [to] suggest that the trial court would not have dismissed the prior serious felony enhancement, upon full consideration, and given that remand is necessary with regard to the firearm enhancement, . . . justice will best be served if the trial court is afforded an opportunity to decide whether to exercise its discretion to strike [the] prior serious felony enhancement." *Id.* at *23-24.

Both in this case and in *Vickers*, the trial court denied a request to strike the defendant's strike prior, imposed the

maximum allowable sentence, and made critical comments regarding the defendant. Yet the same Division of the California Court of Appeal denied remand in this case and ordered it in *Vickers*. This disparate treatment amounted to a violation of Petitioner's equal protection rights. Under the equal protection principles reflected in *Myers*, *Johnson*, and *La Rue*, once a state decides to apply a new rule retroactively for some defendants, it may not arbitrarily withhold retroactive application of the new rule from other defendants. *See Myers*, 897 F.2d at 421; *Johnson*, 462 F.2d at 1354; *La Rue*, 833 F.2d at 142. That, however, is effectively what happened here. The reasoning in *Vickers* suggests that the different outcome in that case is attributable to the trial court also ordering remand under Senate Bill 620. *See* Vickers, 2019 Cal. App. Unpub. LEXIS 4438 at *23-24 (ordering remand under Senate Bill 1393 "upon full consideration, and *given that remand is necessary with regard to the firearm enhancement*") (emphasis added). That is not a rational basis to distinguish between cases that will be granted the retroactive benefit of Senate Bill 1393, and those that will not. Accordingly, the disparate treatment of Petitioner's request for remand for resentencing under Senate Bill 1393 amounted not only to a

misapplication of the "clear indication" standard, but to a violation of Petitioner's rights under the equal protection clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to grant this petition for writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, Division Four affirming the judgment of the Superior Court of California, County of San Mateo, in California Court of Appeal Case No. A155340. Under the equal protection clause of the Fourteenth Amendment, the judgment must be reversed, and the matter must be remanded to the trial court for resentencing under Senate Bill 1393.

Dated: November 19, 2019

Respectfully submitted,

JONATHAN SOGLIN
Executive Director

/s/ Nathaniel Miller

NATHANIEL MILLER
Counsel of Record
Associate Staff Attorney
First District Appellate Project

Attorneys for Petitioner

APPENDIX A

Opinion of the California Court of Appeal in Case No. A155340, filed June 7, 2019, denying Petitioner's request for remand for resentencing under California State Senate Bill 1393

Filed 6/7/19 P. v. Williams CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DEANGELO PANTALION WILLIAMS, Defendant and Appellant.	A155340 (San Mateo County Super. Ct. No. 17SF009209)

Defendant Deangelo Pantalion Williams appeals a judgment entered upon his plea of no contest to vehicular manslaughter. He asks us to remand the matter for resentencing to allow the trial court to exercise its new discretion to strike a prior serious felony conviction enhancement imposed under Penal Code section 667, subdivision (a)(1).[1] He also contends the trial court erred in designating him a habitual traffic offender. We shall reverse the habitual traffic offender designation and otherwise affirm the judgment.

I. BACKGROUND

On the afternoon of June 16, 2017, defendant was driving his car at approximately 65 to 70 miles an hour in a 25-mile-per-hour zone. He drove through two red lights and collided with another vehicle, killing the driver and seriously injuring the passenger in the other vehicle. The passenger in defendant's vehicle was also injured. Defendant showed no signs of intoxication.

[1] All undesignated statutory references are to the Penal Code.

Defendant was charged with vehicular manslaughter (§ 192, subd. (c)(1); count 1), and two counts of reckless driving causing injury (Veh. Code, § 23105, subd. (a); counts 2 & 3). The information alleged count 1 was a serious felony and a third strike offense (§§ 667, subds. (b)–(j), 1170.12, subd. (c)(2), 1192.7, subd. (c), 1192.8, subd. (a)), and included a number of prior conviction and enhancement allegations.

Pursuant to a negotiated disposition, defendant pled no contest to count 1 and admitted it was a serious felony (§§ 1192.7, subd. (c) & 1192.8, subd. (a)), that he had suffered a prior "strike" conviction for a serious or violent felony (§ 1170.12, subd. (c)(1)), that he had suffered a prior conviction of a violent felony, i.e., robbery (§ 667, subd. (a)(1)); that he had served a prior prison term and failed to remain free of custody for five years (§ 667.5, subd. (b)); and that he committed the current offense while on parole (§ 1203.085, subd. (b)). The maximum indicated sentence was 14 years. The remaining counts were dismissed.

Before sentencing, defendant made a *Romero* motion, asking the court to dismiss his strike prior and sentence him instead to the low term of two years, with a five-year enhancement under section 667, subdivision (a)(1), for a total prison term of seven years. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*); 1170.12, subd. (c)(1).) He argued the five-year enhancement adequately accounted for his criminal history.

The trial court sentenced defendant to eight years for vehicular manslaughter—the four-year midterm, doubled for the strike prior (§ 1170.12, subd. (c))—an additional five years for the serious felony prior (§ 667, subd. (a)(1)), and an additional year for the prior prison term (§ 667.5, subd. (b)), for a total prison term of 14 years. The court also deemed defendant a habitual traffic offender. (Veh. Code, § 23546, subd. (b).)

II. DISCUSSION

A. Senate Bill 1393

Defendant asks us to remand the matter to the trial court for resentencing pursuant to Senate Bill No. 1393 (Stats. 2018, ch. 1013, § 1), which amended sections 667, subdivision (a), and 1385, subdivision (b), effective January 1, 2019, to allow a trial court

to exercise its discretion to dismiss a prior serious felony sentence enhancement imposed under section 667. At the time defendant was sentenced, the trial court did not have this authority. (Former § 1385, subd. (b).) Defendant contends, and the Attorney General concedes, these amendments apply retroactively to judgments that are not yet final. We agree. (*People v. Zamora* (2019) 35 Cal.App.5th 200, 208; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973 (*Garcia*).)

In such a case, we remand the matter to the trial court unless the record clearly indicates the court would not have dismissed or stricken the prior serious felony conviction if it had discretion to do so at the time of sentencing. (*Garcia*, *supra*, 28 Cal.App.5th at p. 973, fn. 3; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110–1111.) This rule has been applied in analogous contexts. For instance, in 2018, trial courts were given authority to strike certain previously-mandatory firearm enhancements. (Senate Bill No. 620 (Stats. 2017, ch. 682, § 2).) In *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428, our colleagues in Division One of this court concluded the record contained no clear indication of how the trial court would have ruled if it had had discretion at the time of sentencing to strike the firearm enhancements; the court noted that, although the trial court imposed a substantial sentence, it did not impose the maximum sentence for one of the counts, it ran that term concurrently with another, and it struck prior convictions in the interest of justice. Similarly, in *People v. Chavez* (2018) 22 Cal.App.5th 663, remand to allow the trial court to consider striking a firearm enhancement was found appropriate where the trial court had not imposed the maximum sentence at the original sentence and had not made any statement indicating that it would have imposed the firearm enhancement if it had discretion to do otherwise.

On different facts, the court in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, reached a different result. After the original sentencing hearing in *Gutierrez*, our high court ruled that a trial court could dismiss strike priors in the interest of justice. (*Ibid*., citing *Romero*, *supra*, 13 Cal.4th 497.) The appellate court found it unnecessary to remand to allow the trial court to exercise this discretion, where the trial court had stated that it was appropriate to impose the maximum sentence, and it increased the defendant's

sentence beyond what it believed was required under the three strikes law by imposing the high term for one count and imposing two additional discretionary enhancements. In those circumstances, the appellate court concluded no purpose would be served by a remand for resentencing. (*Gutierrez*, at p. 1896.)

In the circumstances of this case, we likewise conclude there is no need to remand for resentencing. Defendant asked the trial court to dismiss the strike prior in the interest of justice; if the court had granted this request, his sentence would have been reduced by *four years*. In his motion, he expressly argued that the five-year enhancement under section 667, subdivision (a)(1) adequately accounted for his previous criminal behavior. The court declined to strike the prior, instead sentencing defendant to the maximum available term under his plea agreement. This sentencing decision is a clear indication the court would not have stricken a *five-year* enhancement.

The trial court's colloquy during sentencing reinforces this conclusion. The court emphasized the heartbreaking nature of the case—which left the manslaughter victim dead, his wife seriously injured and still disabled, his five children fatherless, and defendant's own passenger injured—as well as defendant's serious criminal history, including an armed robbery, his poor performance on parole, his extreme recklessness in driving 70 miles an hour in a 25-mile-per-hour zone, and the foreseeability that his action would lead to injury or death. Although the court acknowledged it was a "good thing" that defendant had gotten a barber's license, it told him, "You were a bad person for having two serious and violent felonies armed with weapons and being on parole for one . . . armed robbery for $150 at 7-[Eleven] and then plowing into someone. You are not a changed person, Mr. Williams, not yet."

In light of the court's words, its refusal to strike the strike prior, and its imposition of the maximum available sentence, we see no possibility it would have stricken the five-year serious felony enhancement if it had had discretion to do so at the time of sentencing. Remand is unnecessary.

B. Habitual Traffic Offender

At the sentencing hearing, the trial court deemed defendant a habitual traffic offender under Vehicle Code section 23546, subdivision (b), and the minute order reflects that designation. That statute provides that if a person is convicted of driving under the influence (Veh. Code, § 23152) and the offense occurred within ten years of two separate violations of specified other statutes, that person is designated a habitual traffic offender. Defendant was convicted of vehicular manslaughter (§ 192), not driving under the influence (Veh. Code, § 23152). By its terms, section 23546 does not apply to him.

Defendant contends the trial court erred in designating him a habitual traffic offender, and the Attorney General concedes the error. We shall reverse this finding. As the Attorney General notes, however, the traffic offender designation is not included in the abstract of judgment, and there is therefore no need to have an amended abstract of judgment forwarded to the California Department of Corrections and Rehabilitation. The record does not reveal whether the court has notified any other governmental agencies of the erroneous designation. If it has done so, it should take any action that is necessary to ensure those agencies are aware the designation has been reversed.

III. DISPOSITION

The finding that defendant is a habitual traffic offender is reversed. The court shall take any necessary action to ensure that defendant is not treated as a habitual traffic offender based on this erroneous designation. In all other respects, the judgment is affirmed.

_____
TUCHER, J.

WE CONCUR:

_____
POLLAK, P. J.

_____
STREETER, J.

APPENDIX B

Order of the California Court of Appeal in Case No. A155340, filed July 3, 2019, modifying the opinion filed June 7, 2019, with no change in the judgment

Filed 7/3/19 P. v. Williams CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,
v.
DEANGELO PANTALION WILLIAMS,
Defendant and Appellant.

A155340

(San Mateo County
Super. Ct. No. 17SF009209)

ORDER MODIFYING OPINION; AND DENYING REQUEST FOR REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed June 7, 2019, be modified as follows:

1. The first full paragraph on page 4 of the opinion is hereby deleted and replaced with the following:

> In the circumstances of this case, we likewise conclude there is no need to remand for resentencing. Defendant asked the trial court to dismiss the strike prior in the interest of justice, arguing that the five-year enhancement under section 667, subdivision (a)(1) adequately accounted for his previous criminal behavior. He asked for a total term of seven years: the low term of two years for vehicular manslaughter, and five years under section 667, subdivision (a)(1). At the sentencing hearing, the prosecutor agreed that the court had "wide discretion" to sentence defendant to anything between seven and 14 years. Nevertheless, the court sentenced defendant to the maximum term allowed under the plea agreement: the midterm of four years, doubled for the strike prior, an additional year for the prior prison term, and five years under section 667, subdivision (a)(1), for a total of 14 years. The fact that the court declined to limit defendant's sentence in any other way is a clear indication that it was of the view the

maximum sentence under the plea agreement was appropriate and that it would not have stricken the five-year enhancement if it had discretion to do so.

2. At the end of the next paragraph on page 4 that ends with "You are not a changed person, Mr. Williams, not yet." The following sentence is added:

The prosecutor pointed out that one of these two prior convictions was a misdemeanor, but that did not affect the court's sentencing decision.

3. The petition for rehearing filed by appellant on June 21, 2019, is hereby DENIED.

The modifications and orders contained herein effect no change in the judgment.

Dated: _____

_____
POLLAK, P. J.

Filed 6/7/19 P. v. Williams CA1/4 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DEANGELO PANTALION WILLIAMS, Defendant and Appellant.	A155340 (San Mateo County Super. Ct. No. 17SF009209)

Defendant Deangelo Pantalion Williams appeals a judgment entered upon his plea of no contest to vehicular manslaughter. He asks us to remand the matter for resentencing to allow the trial court to exercise its new discretion to strike a prior serious felony conviction enhancement imposed under Penal Code section 667, subdivision (a)(1).[1] He also contends the trial court erred in designating him a habitual traffic offender. We shall reverse the habitual traffic offender designation and otherwise affirm the judgment.

I. BACKGROUND

On the afternoon of June 16, 2017, defendant was driving his car at approximately 65 to 70 miles an hour in a 25-mile-per-hour zone. He drove through two red lights and collided with another vehicle, killing the driver and seriously injuring the passenger in the other vehicle. The passenger in defendant's vehicle was also injured. Defendant showed no signs of intoxication.

[1] All undesignated statutory references are to the Penal Code.

Defendant was charged with vehicular manslaughter (§ 192, subd. (c)(1); count 1), and two counts of reckless driving causing injury (Veh. Code, § 23105, subd. (a); counts 2 & 3). The information alleged count 1 was a serious felony and a third strike offense (§§ 667, subds. (b)–(j), 1170.12, subd. (c)(2), 1192.7, subd. (c), 1192.8, subd. (a)), and included a number of prior conviction and enhancement allegations.

Pursuant to a negotiated disposition, defendant pled no contest to count 1 and admitted it was a serious felony (§§ 1192.7, subd. (c) & 1192.8, subd. (a)), that he had suffered a prior "strike" conviction for a serious or violent felony (§ 1170.12, subd. (c)(1)), that he had suffered a prior conviction of a violent felony, i.e., robbery (§ 667, subd. (a)(1)); that he had served a prior prison term and failed to remain free of custody for five years (§ 667.5, subd. (b)); and that he committed the current offense while on parole (§ 1203.085, subd. (b)). The maximum indicated sentence was 14 years. The remaining counts were dismissed.

Before sentencing, defendant made a *Romero* motion, asking the court to dismiss his strike prior and sentence him instead to the low term of two years, with a five-year enhancement under section 667, subdivision (a)(1), for a total prison term of seven years. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*); 1170.12, subd. (c)(1).) He argued the five-year enhancement adequately accounted for his criminal history.

The trial court sentenced defendant to eight years for vehicular manslaughter—the four-year midterm, doubled for the strike prior (§ 1170.12, subd. (c))—an additional five years for the serious felony prior (§ 667, subd. (a)(1)), and an additional year for the prior prison term (§ 667.5, subd. (b)), for a total prison term of 14 years. The court also deemed defendant a habitual traffic offender. (Veh. Code, § 23546, subd. (b).)

II. DISCUSSION

A. Senate Bill 1393

Defendant asks us to remand the matter to the trial court for resentencing pursuant to Senate Bill No. 1393 (Stats. 2018, ch. 1013, § 1), which amended sections 667, subdivision (a), and 1385, subdivision (b), effective January 1, 2019, to allow a trial court

to exercise its discretion to dismiss a prior serious felony sentence enhancement imposed under section 667. At the time defendant was sentenced, the trial court did not have this authority. (Former § 1385, subd. (b).) Defendant contends, and the Attorney General concedes, these amendments apply retroactively to judgments that are not yet final. We agree. (*People v. Zamora* (2019) 35 Cal.App.5th 200, 208; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973 (*Garcia*).)

In such a case, we remand the matter to the trial court unless the record clearly indicates the court would not have dismissed or stricken the prior serious felony conviction if it had discretion to do so at the time of sentencing. (*Garcia*, *supra*, 28 Cal.App.5th at p. 973, fn. 3; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110–1111.) This rule has been applied in analogous contexts. For instance, in 2018, trial courts were given authority to strike certain previously-mandatory firearm enhancements. (Senate Bill No. 620 (Stats. 2017, ch. 682, § 2).) In *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428, our colleagues in Division One of this court concluded the record contained no clear indication of how the trial court would have ruled if it had had discretion at the time of sentencing to strike the firearm enhancements; the court noted that, although the trial court imposed a substantial sentence, it did not impose the maximum sentence for one of the counts, it ran that term concurrently with another, and it struck prior convictions in the interest of justice. Similarly, in *People v. Chavez* (2018) 22 Cal.App.5th 663, remand to allow the trial court to consider striking a firearm enhancement was found appropriate where the trial court had not imposed the maximum sentence at the original sentence and had not made any statement indicating that it would have imposed the firearm enhancement if it had discretion to do otherwise.

On different facts, the court in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, reached a different result. After the original sentencing hearing in *Gutierrez*, our high court ruled that a trial court could dismiss strike priors in the interest of justice. (*Ibid*., citing *Romero*, *supra*, 13 Cal.4th 497.) The appellate court found it unnecessary to remand to allow the trial court to exercise this discretion, where the trial court had stated that it was appropriate to impose the maximum sentence, and it increased the defendant's

sentence beyond what it believed was required under the three strikes law by imposing the high term for one count and imposing two additional discretionary enhancements. In those circumstances, the appellate court concluded no purpose would be served by a remand for resentencing. (*Gutierrez*, at p. 1896.)

In the circumstances of this case, we likewise conclude there is no need to remand for resentencing. Defendant asked the trial court to dismiss the strike prior in the interest of justice; if the court had granted this request, his sentence would have been reduced by *four years*. In his motion, he expressly argued that the five-year enhancement under section 667, subdivision (a)(1) adequately accounted for his previous criminal behavior. The court declined to strike the prior, instead sentencing defendant to the maximum available term under his plea agreement. This sentencing decision is a clear indication the court would not have stricken a *five-year* enhancement.

The trial court's colloquy during sentencing reinforces this conclusion. The court emphasized the heartbreaking nature of the case—which left the manslaughter victim dead, his wife seriously injured and still disabled, his five children fatherless, and defendant's own passenger injured—as well as defendant's serious criminal history, including an armed robbery, his poor performance on parole, his extreme recklessness in driving 70 miles an hour in a 25-mile-per-hour zone, and the foreseeability that his action would lead to injury or death. Although the court acknowledged it was a "good thing" that defendant had gotten a barber's license, it told him, "You were a bad person for having two serious and violent felonies armed with weapons and being on parole for one . . . armed robbery for $150 at 7-[Eleven] and then plowing into someone. You are not a changed person, Mr. Williams, not yet."

In light of the court's words, its refusal to strike the strike prior, and its imposition of the maximum available sentence, we see no possibility it would have stricken the five-year serious felony enhancement if it had had discretion to do so at the time of sentencing. Remand is unnecessary.

B. Habitual Traffic Offender

At the sentencing hearing, the trial court deemed defendant a habitual traffic offender under Vehicle Code section 23546, subdivision (b), and the minute order reflects that designation. That statute provides that if a person is convicted of driving under the influence (Veh. Code, § 23152) and the offense occurred within ten years of two separate violations of specified other statutes, that person is designated a habitual traffic offender. Defendant was convicted of vehicular manslaughter (§ 192), not driving under the influence (Veh. Code, § 23152). By its terms, section 23546 does not apply to him.

Defendant contends the trial court erred in designating him a habitual traffic offender, and the Attorney General concedes the error. We shall reverse this finding. As the Attorney General notes, however, the traffic offender designation is not included in the abstract of judgment, and there is therefore no need to have an amended abstract of judgment forwarded to the California Department of Corrections and Rehabilitation. The record does not reveal whether the court has notified any other governmental agencies of the erroneous designation. If it has done so, it should take any action that is necessary to ensure those agencies are aware the designation has been reversed.

III. DISPOSITION

The finding that defendant is a habitual traffic offender is reversed. The court shall take any necessary action to ensure that defendant is not treated as a habitual traffic offender based on this erroneous designation. In all other respects, the judgment is affirmed.

_____
TUCHER, J.

WE CONCUR:

_____
POLLAK, P. J.

_____
STREETER, J.

APPENDIX C

Order of the California Supreme Court in Case No. S256932, filed August 21, 2019, denying Petitioner's petition for review

Court of Appeal, First Appellate District, Division Four - No. A155340

S256932

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DeANGELO PANTALION WILLIAMS, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX D

Petitioner's petition for review, filed July 17, 2019

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DEANGELO WILLIAMS,** **Defendant and Appellant.**	**S_____** **First District Court of Appeal No. A155340** **San Mateo County Superior Court No. 17SF009209**

PETITION FOR REVIEW

After Decision by the Court of Appeal
First Appellate District, Division Four
Filed on June 7, 2019
Modified on July 3, 2019

JONATHAN SOGLIN
Executive Director

NATHANIEL MILLER
State Bar No. 304972
Associate Staff Attorney
First District Appellate Project
475 Fourteenth Street, Suite 650
Oakland, CA 94612
Telephone: (415) 495-3119
Email: nat_miller@fdap.org

Counsel for DeAngelo Williams

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

STATE RULES AND STATUTES

California Rules of Court

Penal Code

Vehicle Code

OTHER AUTHORITIES

Legislation

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DEANGELO WILLIAMS,** **Defendant and Appellant.**	**S_____** **First District Court of Appeal No. A155340** **San Mateo County Superior Court No. 17SF009209**

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Appellant DeAngelo Williams hereby petitions this Court for review following the unpublished opinion of the Court of Appeal, First Appellate District, Division Four, filed on June 7, 2019 and modified on July 3, 2019, denying Mr. Williams's request that his case be remanded to the trial court for resentencing in accordance with Senate Bill No. 1393. A copy of the Court of Appeal's unpublished opinion is attached to this petition as Exhibit A.

ISSUE PRESENTED FOR REVIEW

When a newly enacted statute expands the scope of a trial court's sentencing discretion and is found to be retroactive under the rule of *In re Estrada* (1965) 63 Cal.2d 740, is remand for the exercise of such discretion required where the trial court imposed the maximum allowable sentence

under a plea agreement but did not explicitly indicate that it was unwilling to reduce the defendant's sentence?

BACKGROUND

On the afternoon of June 16, 2017, at approximately 2:50 p.m., Mr. Williams was driving his car at approximately 65 to 70 miles-per-hour in a 25 miles-per-hour-zone when he passed through two red lights and collided into another car, killing the driver and seriously injuring the passenger. (CT 49-50.)[1] The passenger in Mr. Williams's car was also injured. (CT 50.) There was no indication that Mr. Williams was under the influence at the time of the incident.

On January 2, 2018, the San Mateo County District Attorney filed an information charging Mr. Williams with one count of vehicular manslaughter (§ 192, subd. (c)(1)) (count one) and two counts of reckless driving causing injury (Veh. Code, § 23105, subd. (a)) (counts two and three). (CT 6-7.) The information alleged that count one was a serious felony and a third-strike offense (§§ 667, 1170.12, 1203, subd. (e)(4)). (CT 7, 9.) The information further alleged that Mr. Williams had a prior serious felony and a prior prison term (§§ 667, subd. (a), 667.5, subd. (b)), and that he committed count one while on parole (§ 1203.85, subd. (b)). (CT 8-9.)

On April 23, 2018, Mr. Williams entered a plea agreement whereby

[1] As there was no trial in this case, the facts regarding the underlying incident are taken from the probation report filed on July 25, 2018. (CT 47-58.)

he pled no contest to count one, and also admitted one strike prior (§§ 667, 1170.12), the prior-serious-felony enhancement (§ 667, subd. (a)), the prior-prison-term enhancement (667.5, subd. (b)), and that he had committed count one while on parole (§ 1203.85, subd. (b)). (RT 6-7.) Mr. Williams entered a waiver under *People v. Harvey* (1979) 25 Cal.3d 754 regarding restitution, and the prosecution dismissed counts 2 and 3. (RT 9-10.) The maximum prison term allowed under the plea agreement was 14 years. (RT 6-7.)

Before sentencing, Mr. Williams filed a motion asking the trial court to strike the strike prior and to sentence him to the low term of 2 years for count one plus five years for the prior-serious-felony enhancement, for a total of 7 years. (CT 34-40.) The motion did not ask the trial court to strike the prior-prison-term enhancement. (CT 34-40.)

At the sentencing hearing on July 19, 2018, the trial court did not explicitly address Mr. Williams's request to strike the strike prior, but it sentenced Mr. Williams to 8 years on count one (the midterm of 4 years doubled pursuant to the strike prior), plus 5 years consecutive for the prior-serious-felony enhancement and 1 year consecutive for the prior-prison-term enhancement, for a total of 14 years. (RT 32-33.) Before pronouncing the sentence, the trial court heard from the deceased victim's spouse and from Mr. Williams, and then made the following comments:

In reading the report what I kept thinking over and over again was still water with a rock just being dropped dropping away and all those ripples that just keep happening. I mean, that is just in my mind what had kept happening over and over again because not only have you essentially wiped out a family and all of their relatives, but you have wiped out your family. I mean, that is what happens. It is not just one person that is affected by all of this. It's many, many, many people.

My heart breaks for the Diaz family in reading the report. Five children now live their life without a father and I can't even imagine that. You know, it is just a terrible, terrible thing. And, you know, you keep saying that you were a changed person after your last prison stay, Mr. Williams, but – and you never tried to hurt somebody. And I don't believe that you wanted to hurt somebody this day. I don't believe that you intentionally drove into somebody like you wanted to kill someone, but I don't see the huge change that you proclaim to have. And the reason I say that is because you were on parole at the time of this offense. And when you say "I want to change and I want to be better," why didn't you have that thought when you are driving down the road at 2:50 in the afternoon at 70 miles an hour in a 25-mile-an-hour zone, running two red lights? Like why didn't you have that thought in your head prior to doing what you did?

I mean, I am not asking you to respond. I am just saying that. Because to be honest with you, it is like you didn't just ruin one person's life. You ruined your own life. You are where you are today before me because of the choices that you have made throughout your life, and that is it. I mean, your choices have brought you to this point.

So the bottom line is, you know, when I look back at your history you have two prior serious felonies both of with handguns. You have a 422 conviction in 2008 with the use of a handgun or a rifle. And then in 2011, you committed a robbery at 7-11 with a gun and ordered two employees to the ground all for 150 bucks and 60 bucks worth of cigars.

And then on this fateful day, you are on parole, and for some reason, you have an absolute disregard for human life. This is foreseeable. That is the thing that bothers me about this case. Although you didn't intend to hurt anybody, and I don't believe you intended to kill Mr. Diaz, it was foreseeable like that something like this was going to happen.

How do you go down a road where it is 25 miles an hour at 70 miles an hour running red lights thinking that you are invincible, that your car is invisible, that you are just not going to affect other people. It is mind-numbing to think that, you know, either you honestly believed that or you didn't see, or you didn't care what the consequences were going to be for you, but only for you for other people. You had somebody in your car that was injured.

I see Ms. Diaz walking up here today. She is severely disabled. She – she walks with a limp. I think it is important to state that Mr. Diaz had a crushed skull, a broken chest cage, and a broken pelvis and died immediately on the scene. The victim, Miranda, had a lung contusion and a fractured skull and a fractured spine. And Kiana Dixon suffered compression fractures of two of her vertebrae.

[. . .]

I mean, that picture of that water with the rock hitting it and all those waves, I mean all these

> children without a father now who have no hope for a future because they feel like what is the point? Their dad is dead. And a mother left with her five children to raise when she is got horrible injuries and obviously PTSD from this whole incident. It is just – it's the saddest thing in the world because it was preventable. And Mr. Diaz didn't have to die that day.
>
> And when you said your history makes you look like a bad person and you made mistakes and poor choices, that is true. It doesn't make you look like a bad person. You were a bad person for having two serious and violent felonies armed with weapons and being on parole for one host armed robbery for $150 at 7-11 and then plowing into someone. You are not a changed person, Mr. Williams, not yet.
>
> I think while you were getting your barber license, and that is a good thing, you still go back to this lack of total regard for anybody else but what you want.
>
> I mean, driving at 70 miles an hour, was it going to get you there ten seconds faster? Was it worth killing someone and hurting other people? Is just – it boggles my mind.

(RT 29-32.) The trial court subsequently granted Mr. Williams's request for a certificate of probable cause, and Mr. Williams filed a timely notice of appeal. (CT 63-64.)

Approximately two months after the sentencing hearing, the Governor signed Senate Bill No. 1393, which, effective January 1, 2019, amended Sections 667(a) and 1385(b) to authorize trial courts to strike prior-serious-felony enhancements, which had previously been mandatory.

(*People v. Garcia* (2018) 28 Cal. App. 5th 961, 971; Stats. 2018, Ch. 1013, §§ 1-2.) On appeal, Mr. Williams argued, in relevant part, that Senate Bill 1393 was an ameliorative change in the law retroactively applicable to non-final judgments under the rule of *In re Estrada, supra,* 63 Cal.2d 740, and that his case should be remanded to allow the trial court to exercise the discretion granted to it under the Bill. (AOB 8-15.)

On June 7, 2019, the Court of Appeal issued an unpublished opinion rejecting this argument. (Opn. at 2-4.) The Court of Appeal agreed that Senate Bill 1393 was retroactive under the *Estrada* rule but found that remand was unnecessary because the record "clearly indicated" that the trial court would not have stricken the prior-serious-felony enhancement even if it could have. (Opn. at 3-4.) The Court of Appeal relied principally on the fact that the trial court did not grant Mr. Williams's request to strike the strike prior. (Opn. at 4.) Applying an analysis that was not raised in the respondent's brief (*see* RB 6-10), the Court of Appeal reasoned that striking the strike prior would have resulted in Mr. Williams's sentence being "reduced by *four years*," and that the trial court's refusal to reduce Mr. Williams's sentence by four years by striking the strike prior clearly indicated that the trial court would not have reduced the sentence by five years by striking the prior-serious-felony enhancement. (Opn. at 4, emphasis in original.) The Court of Appeal also relied on the trial court's imposition of the maximum prison term allowed under the plea agreement

and on its comments at the sentencing hearing, in particular its comment to Mr. Williams, "'You were a bad person for having two serious and violent felonies armed with weapons and being on parole for one . . . armed robbery for $150 at 7-[Eleven] and then plowing into someone. You are not a changed person, Mr. Williams, not yet.'" (Opn. at 4, quoting RT 32.)

On June 21, 2019, Mr. Williams filed a petition for rehearing. The petition pointed out that, contrary to the Court of Appeal's reasoning, striking the strike prior would have resulted in a greater reduction in Mr. Williams's sentence than striking the prior-serious-felony enhancement. (Pet. for Rhg. at 5-8.) Taking into account conduct credits, striking the strike prior would have resulted in a reduction of approximately 6 years and 1 month, while striking the prior-serious-felony enhancement would have resulted in a reduction of only approximately 4 years. (Pet. for Rhg. at 5-8.)

In addition, the petition argued that the determination of whether to strike a strike prior requires a different analysis than the determination of whether to strike a prior-serious-felony enhancement, and that, therefore, a trial court's refusal to strike a strike prior does not necessarily indicate that the trial court would not have stricken a prior-serious-felony enhancement, in particular where the defendant did not have an opportunity to present reasons for striking the prior-serious-felony enhancement. (Pet. for Rhg. at 8-10.) The petition further argued that the trial court's imposition of the maximum term allowed under the plea agreement resulted in large part

from the trial court's selection of the middle term for count one, and that the factors involved in deciding whether to depart from the middle term are not identical to those involved in deciding whether to strike a prior-serious-felony enhancement. (Pet. for Rhg. at 10.) Finally, the petition noted that the trial court's comment to Mr. Williams about having "'two serious and violent felonies'" (Opn. at 4, quoting RT 32) was factually incorrect, and that immediately after the trial court made this comment, the prosecutor pointed out that one of the "serious and violent felonies" was a misdemeanor, not a felony. (Pet. for Rhg. at 11, citing RT 32, CT 53-54.)

On June 25, 2019, the Court of Appeal requested an answer from the Attorney General regarding the petition for rehearing. (Memo. to Counsel, Jun. 25, 2019.) In its answer, the Attorney General conceded that striking the strike prior would have resulted in a greater reduction in Mr. Williams's sentence than striking the prior-serious-felony enhancement, and that the trial court's "two serious and violent felonies" comment was factually incorrect. (Ans. to Pet. for Rhg. at 4, 6 n.3.) The Attorney General argued, however, that the Court of Appeal's decision was nevertheless correct and that rehearing should be denied. (Ans. to Pet. for Rhg. at 6.)

On July 3, 2019, the Court of Appeal issued an order modifying its opinion, with no change in the judgment, and denying rehearing. (Order Modifying Opn. at 1-2.) The Court of Appeal modified the opinion in two ways. First, it replaced the paragraph reasoning that striking the strike prior

would have resulted in Mr. Williams's sentence being reduced by four years with the following paragraph:

> In the circumstances of this case, we likewise conclude there is no need to remand for resentencing. Defendant asked the trial court to dismiss the strike prior in the interest of justice, arguing that the five-year enhancement under section 667, subdivision (a)(1) adequately accounted for his previous criminal behavior. He asked for a total term of seven years: the low term of two years for vehicular manslaughter, and five years under section 667, subdivision (a)(1). At the sentencing hearing, the prosecutor agreed that the court had "wide discretion" to sentence defendant to anything between seven and 14 years. Nevertheless, the court sentenced defendant to the maximum term allowed under the plea agreement: the midterm of four years, doubled for the strike prior, an additional year for the prior prison term, and five years under section 667, subdivision (a)(1), for a total of 14 years. The fact that the court declined to limit defendant's sentence in any other way is a clear indication that it was of the view the maximum sentence under the plea agreement was appropriate and that it would not have stricken the five-year enhancement if it had discretion to do so.

(Order Modifying Opn. at 1-2.) Second, it added the following sentence to its discussion of the trial court's "two serious and violent felonies" comment: "The prosecutor pointed out that one of these two prior convictions was a misdemeanor, but that did not affect the court's sentencing decision." (Order Modifying Opn. at 2.)

WHY REVIEW SHOULD BE GRANTED

The resolution of the issue presented in this petition is "necessary to secure uniformity of decision [and] to settle an important question of law." (Cal. Rules of Court, Rule 8.500, subd. (b)(1).) In recent years, the Legislature has passed a significant number of ameliorative enactments, among them Senate Bills 620 and 1393, both of which authorized trial courts to strike certain previously mandatory sentencing enhancements.[2] (*See Garcia, supra*, 28 Cal.App.5th at 971-73 [discussing Senate Bill 1393]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-25 [discussing Senate Bill 620].) Courts have seen a surge of appeals seeking remand for resentencing under the two bills.[3] These appeals generally raise two issues:

---

[2] Senate Bill 620 authorized trial courts to strike firearm enhancements imposed under Sections 12022.5 and 12022.53. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-80.) As stated above in the background section, Senate Bill 1393 amended Sections 667(a) and 1385(b) to authorize trial courts to strike prior-serious-felony enhancements. (*Garcia, supra*, 28 Cal. App. 5th at 971; Stats. 2018, Ch. 1013, §§ 1-2.)

[3] Indeed, one of the issues currently pending before this Court concerns a pair of cases addressing whether a certificate of probable cause is required to raise a Senate Bill 1393 challenge to a negotiated sentence. (*People v. Kelly*, S255145; *People v. Stamps*, S255843.) Another three of the issues currently pending before the Court concern cases addressing requests for remand for resentencing (or for consideration of diversion) under other recently passed, ameliorative enactments. (*People v. Barton*, S255214 [whether an appeal waiver bars an appeal based on newly enacted, retroactive legislation]; *People v. Frahs*, S252220 [whether Section 1001.35, the mental health diversion statute, is retroactive]; *People v. McKenzie*, S251333 [when a judgment is "final" for retroactivity purposes when imposition of sentence was suspended].)

(1) whether the bills are retroactive; and (2) if so, whether remand for resentencing is required. The former issue has been settled, with courts uniformly holding that both Senate Bill 620 and Senate Bill 1393 apply retroactively to non-final judgments under the rule of *Estrada, supra*, 63 Cal.2d 740. As exemplified by this case, however, the issue of when remand for resentencing is required continues to be the subject of frequent dispute, and the Court of Appeal's opinion here diverges sharply from other decisions on the issue, including from at least one unpublished decision by the very same Division of the First District that decided this case.[4] (*See People v. Vickers* (June 28, 2019, No. A153103) 2019 Cal. App. Unpub. LEXIS 4438.) Accordingly, to provide guidance on when remand is required, and to correct the Court of Appeal's erroneous analysis, this petition for review should be granted.

To be clear, courts have been fairly consistent in how they *describe* the standard for when remand is required. Courts, including the Court of Appeal here, have generally described it as a "clear indication" standard, stating that "[r]emand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at

[4] The unpublished decisions cited in this petition are cited not as legal precedent that should be followed, but as evidence of the unsettled nature of the issue of when remand is required under Senate Bills 620 and 1393. Accordingly, the citations to the unpublished decisions do not violate the prohibition on citing unpublished authority stated in Rule 8.1115(a) of the California Rules of Court.

the time of sentencing it had the discretion to do so." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; *accord, e.g., People v. Franks* (2019) 35 Cal.App.5th 883, 892; *People v. Jones* (2019) 32 Cal.App.5th 267, 272-73; *Garcia, supra,* 28 Cal. App. 5th at 9713 n.3; *People v. McVey* (2018) 24 Cal.App.5th 405, 419; *Billingsley, supra*, 22 Cal.App.5th at 1081; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713; *McDaniels, supra,* 22 Cal.App.5th at 425-28.) This articulation of the standard is in line with *People v. Gutierrez* (2014) 58 Cal.4th 1354, in which this Court clarified how trial courts should exercise their discretion under Section 190.5(b) in deciding whether to sentence juveniles convicted of special circumstance murder to life without parole, and remanded the two cases at issue for resentencing. (*Id.* at 1360-61.) The Court explained that "[d]efendants are entitled to sentencing decisions made in the exercise of the informed discretion of the sentencing court," and that "[a] court which is unaware of the scope of its discretionary powers can no more exercise that informed discretion than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*Id.* at 1391, quotation marks omitted.) Thus, where a trial court unaware of the scope of its discretionary powers sentences a defendant, "the appropriate remedy is to remand for resentencing unless the record clearly indicates that the trial court would have reached the same conclusion even . . . had [it] been aware

of the full scope of [its] discretion." (*Ibid.*, quotation marks and alterations omitted.)

Where there has been more dispute, and where the Court of Appeal's analysis diverges from other decisions on the issue, is in applying the "clear indication" standard. Although there have been dozens, if not hundreds, of decisions addressing requests for remand under Senate Bills 620 and 1393, there are only three published decisions denying such requests: *People v. Franks, supra*, 35 Cal.App.5th 883, *People v. Jones, supra*, 32 Cal.App.5th 267, and *People v. McVey, supra*, 24 Cal.App.5th 405. In each of these cases, the trial court imposed the maximum or near-maximum allowable sentence, and, crucially, took the extraordinary step of making an explicit statement on the record either that it would not strike the relevant enhancement even if it could, or that it was categorically unwilling to reduce the defendant's sentence in any way. (*See Franks, supra*, 35 Cal.App.5th at 888, 893 [trial court stated that it would not strike the prior-serious-felony enhancement even if it could]; *Jones, supra*, 32 Cal.App.5th at 271, 273-75 [trial court sentenced the defendant to 14 years to life plus a consecutive term of 22 years and stated that it "took great satisfaction" in imposing the "very lengthy sentence"]; *McVey, supra*, 24 Cal.App.5th at 409, 419 [trial court sentenced the defendant to the high term term of 10 years on the firearm enhancement and stated that the high term was "the only appropriate sentence on the enhancement"]; *see also People v.*

Gutierrez (1996) 48 Cal.App.4th 1894, 1896 [declining to remand for resentencing in light of *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 where the trial court stated that the defendant was "the kind of individual the law was intended to keep off the street as long as possible"].)

This case is plainly distinguishable. Although the trial court here did impose the maximum sentence allowed under the plea agreement, the trial court did not make any explicit statements to the effect that it would not strike the prior-serious-felony enhancement even if it could, or that it was categorically unwilling to reduce the sentence in any way. (*See* 2 RT 29-32.) The trial court was critical of Mr. Williams and cognizant of the tragic consequences of the offense, but none of the trial court's comments were comparable to those underlying the decisions in *Franks*, *Jones*, and *McVey*. (*See* 2 RT 29-32.) Even the comment highlighted by the Court of Appeal – i.e., the factually incorrect "'two serious and violent felonies'" comment (Opn. at 4, quoting RT 32) – was a far cry from an explicit statement of unwillingness to strike the prior-serious-felony enhancement or to reduce the sentence. Moreover, the trial court also made comments at the sentencing hearing that were favorable to Mr. Williams. The trial court acknowledged that the offense was unintentional, stating to Mr. Williams, "I don't believe that you wanted to hurt somebody this day. I don't believe that you intentionally drove into somebody like you wanted to kill someone." (RT 29.) The trial court further noted that Mr. Williams was

"getting [his] barber license," and that this was a "good thing." (RT 32.) The nature of the trial court's comments, and in particular the absence of any statements explicitly and categorically ruling out the possibility of a favorable exercise of discretion, plainly distinguishes this case from the published decisions denying requests for remand under Senate Bills 620 and 1393.

Moreover, at least one published decision has held that even explicit statements of the sort found in *Franks*, *Jones*, and *McVey* are insufficient to make remand under Senate Bills 620 and 1393 unnecessary. In *People v. Johnson* (2019) 32 Cal.App.5th 26, the court *granted* the defendants' requests for remand under Senate Bills 620 and 1393 despite the trial court's imposition of the maximum allowable sentence for each defendant, its denial of the defendants' requests to strike their strike priors, and its explicit statements that the firearm enhancement was "entirely appropriate" and that it would not strike the prior-serious-felony enhancement even if it could. (*Id.* at 39, 69.) The court reasoned that, although the trial court was "not sympathetic" to the defendants, Senate Bills 620 and 1393 "greatly modif[ied] the [trial court's] sentencing authority," and neither of the defendants' attorneys had yet had an "opportunity to argue the issues" under the new laws. (*Id*. at 69.) The contrasting outcomes in *Johnson*, on the one hand, and in *Franks*, *Jones*, and *McVey*, on the other, highlight both the lack of agreement among courts on how to apply the "clear indication"

standard, and the error of the Court of Appeal's opinion here. Whether under *Johnson*, *Franks*, *Jones*, or *McVey*, the trial court's comments in this case did not rise to the level of satisfying the "clear indication" standard.

It is true that the Court of Appeal here relied not only on the trial court's comments, but also on its imposition of the maximum sentence allowed under the plea agreement. (*See* Order Modifying Opn. at 1-2; Opn. at 4.) But absent an explicit statement of the sort found in *Franks*, *Jones*, and *McVey*, there is no authority holding that the mere imposition of the maximum allowable sentence satisfies the "clear indication" standard. To the contrary, numerous decisions, both published and unpublished, have ordered remand for resentencing under Senate Bills 620 and 1393 in cases where the trial court showed no meaningful leniency and imposed the maximum or near-maximum sentence. (*See, e.g.*, *Johnson, supra*, 32 Cal.App.5th 26; *Almanza, supra*, 24 Cal.App.5th 1104; *People v. Vickers* (June 28, 2019, No. A153103) 2019 Cal. App. Unpub. LEXIS 4438; *People v. Zapata* (June 27, 2019, No. F075687) 2019 Cal. App. Unpub. LEXIS 4354; *People v. Torres* (May 29, 2019, No. D073866) 2019 Cal. App. Unpub. LEXIS 3635; *People v. Greenhill* (Mar. 14, 2019, No. F076968) 2019 Cal. App. Unpub. LEXIS 1796.)

The Court of Appeal also relied on the fact that the trial court did not grant Mr. Williams's request to strike the strike prior. (*See* Order Modifying Opn. at 1-2; Opn. at 4.) Again, however, numerous decisions

have ordered remand for resentencing under Senate Bills 620 and 1393 in cases where the defendant was sentenced pursuant to a strike prior. (*See, e.g., Johnson, supra*, 32 Cal.App.5th 26; *People v. Zamora* (2019) 35 Cal.App.5th 200; *People v. Dearborne* (2019) 34 Cal.App.5th 250; *People v. Jimenez* (2019) 32 Cal.App.5th 409; *People v. Rocha* (2019) 32 Cal.App.5th 352; *Garcia, supra*, 28 Cal.App.5th 961.) Indeed, several unpublished decisions have specifically addressed and rejected the argument that a trial court's failure to strike a strike prior provides a clear indication that the trial court would not have stricken a prior-serious-felony enhancement. (*See, e.g., Vickers, supra,* 2019 Cal. App. Unpub. LEXIS 4438, at *22-24; *People v. Lopez* (June 6, 2019, No. E070621) 2019 Cal. App. Unpub. LEXIS 3888, at *13; *People v. Dean* (Mar. 29, 2019, No. B290348) 2019 Cal. App. Unpub. LEXIS 2242, at *8; *Greenhill, supra,* 2019 Cal. App. Unpub. LEXIS 1796, at *16.) As discussed in the petition for rehearing (Pet. for Rhg. At 5-8), relying on a trial court's failure to strike a strike prior is particularly unreasonable where, as here, striking the strike prior would have resulted in a *greater* reduction in the defendant's sentence than striking the prior-serious-felony enhancement.

Perhaps the best example of the lack of clarity on when remand is required, and of how this case diverges from other decisions on the issue, is *People v. Vickers, supra*, 2019 Cal. App. Unpub. LEXIS 4438, an unpublished decision by the same Division of the First District that decided

this case, issued less than a week before the Division issued the order modifying the opinion here. The defendant in *Vickers* was convicted of second degree murder and was found to have personally used a firearm. (*Vickers, supra,* 2019 Cal. App. Unpub. LEXIS 4438 at *12.) The trial court denied the defendant's request to strike the strike prior, stating that the defendant's case fell "within the spirit and letter of the three strikes law," and adding that "there's nothing about the defendant or his history that would make me . . . inclined to think that he should be given that leniency." (*Id.* at *23.) The trial court sentenced the defendant to 30 years to life for the second degree murder conviction (15 years to life doubled pursuant to the strike prior), a consecutive 25 years to life for the firearm enhancement, and a consecutive 5 years for a prior-serious-felony enhancement, for an aggregate sentence of 60 years to life. (*Id.* at *12.)

On appeal, the court held that remand under Senate Bill 620 was appropriate. (*Id.* at *23.) The court then noted that remand under Senate Bill 1393 "present[ed] a closer question" in light of the trial court's denial of the request to strike the strike prior and its comments in denying the request. (*Ibid.*) Nevertheless, the court concluded that remand was appropriate, reasoning that "[a]lthough th[e] [trial court's] comments would appear [to] suggest that the trial court would not have dismissed the prior serious felony enhancement, upon full consideration, and given that remand is necessary with regard to the firearm enhancement, . . . justice will best be

served if the trial court is afforded an opportunity to decide whether to exercise its discretion to strike [the] prior serious felony enhancement." (*Id.* at *23-24.)

Both here and in *Vickers*, the trial court denied a request to strike the defendant's strike prior, imposed the maximum allowable sentence, and made critical comments regarding the defendant. Yet the same Division of the First District denied remand here and ordered it in *Vickers*. This disparate treatment – like the contrasting outcomes in *Johnson* versus in *Franks*, *Jones*, and *McVey* – highlights both the unsettled nature of the "clear indication" standard and the fundamental unfairness of the Court of Appeal's decision in this case.

It also highlights that the Court of Appeal's erroneous denial of Mr. Williams's request for remand amounted to a violation of Mr. Williams's rights under the equal protection clause of the United States Constitution. "[T]he equal protection clause prohibits de facto as well as explicit, or open, unequal and arbitrary treatment." (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) Under this basic principle, once a state decides to apply a new rule retroactively for some defendants, it may not arbitrarily withhold retroactive application of the new rule from other defendants. (*Ibid.*) That, however, is effectively what happened here. The reasoning in *Vickers* suggests that the different outcome in that case is attributable to the trial court also ordering remand under Senate Bill 620. (*See Vickers, supra,*

2019 Cal. App. Unpub. LEXIS 4438 at *23-24, emphasis added [ordering remand under Senate Bill 1393 "upon full consideration, and *given that remand is necessary with regard to the firearm enhancement*"].) That is not a rational basis to distinguish between cases that will be granted the retroactive benefit of Senate Bill 1393, and those will not. Accordingly, the disparate treatment of Mr. Williams's request for remand was not only a misapplication of the "clear indication" standard, but a violation of the equal protection clause.

CONCLUSION

For the foregoing reasons, the Court of Appeal's denial of Mr. Williams's request for remand under Senate Bill 1393 was both erroneous and reflective of a general uncertainty over how to apply the "clear indication" standard. Accordingly, Mr. Williams respectfully asks this Court to grant review, reverse the Court of Appeal's opinion, and remand the case so that the trial court may exercise the discretion granted to it under Senate Bill 1393.

Dated: July 17, 2019

Respectfully submitted,

JONATHAN SOGLIN
Executive Director

/s/ Nathaniel Miller
NATHANIEL MILLER
Associate Staff Attorney
First District Appellate Project

Counsel for DeAngelo Williams

CERTIFICATE OF WORD COUNT

I, Nathaniel Miller, counsel for Appellant DeAngelo Williams in this matter, hereby certify that this brief contains 6,030 words according to the "Word Count" function on Microsoft Word, less than the 8,400 words permitted by Rule 8.504(d)(1) of the California Rules of Court.

Dated: July 17, 2019

/s/ Nathaniel Miller
NATHANIEL MILLER
Associate Staff Attorney
First District Appellate Project

Counsel for DeAngelo Williams

Exhibit A

Unpublished Decision of the Court of Appeal,
First Appellate District, Division Four,
Filed on June 7, 2019 and Modified on July 3, 2019

Filed 7/3/19 P. v. Williams CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,
v.
DEANGELO PANTALION WILLIAMS,
Defendant and Appellant.

A155340

(San Mateo County
Super. Ct. No. 17SF009209)

ORDER MODIFYING OPINION; AND DENYING REQUEST FOR REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed June 7, 2019, be modified as follows:

1. The first full paragraph on page 4 of the opinion is hereby deleted and replaced with the following:

> In the circumstances of this case, we likewise conclude there is no need to remand for resentencing. Defendant asked the trial court to dismiss the strike prior in the interest of justice, arguing that the five-year enhancement under section 667, subdivision (a)(1) adequately accounted for his previous criminal behavior. He asked for a total term of seven years: the low term of two years for vehicular manslaughter, and five years under section 667, subdivision (a)(1). At the sentencing hearing, the prosecutor agreed that the court had "wide discretion" to sentence defendant to anything between seven and 14 years. Nevertheless, the court sentenced defendant to the maximum term allowed under the plea agreement: the midterm of four years, doubled for the strike prior, an additional year for the prior prison term, and five years under section 667, subdivision (a)(1), for a total of 14 years. The fact that the court declined to limit defendant's sentence in any other way is a clear indication that it was of the view the

maximum sentence under the plea agreement was appropriate and that it would not have stricken the five-year enhancement if it had discretion to do so.

2. At the end of the next paragraph on page 4 that ends with "You are not a changed person, Mr. Williams, not yet." The following sentence is added:

The prosecutor pointed out that one of these two prior convictions was a misdemeanor, but that did not affect the court's sentencing decision.

3. The petition for rehearing filed by appellant on June 21, 2019, is hereby DENIED.

The modifications and orders contained herein effect no change in the judgment.

Dated: _____

_____
POLLAK, P. J.

Filed 6/7/19 P. v. Williams CA1/4 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DEANGELO PANTALION WILLIAMS, Defendant and Appellant.	A155340 (San Mateo County Super. Ct. No. 17SF009209)

Defendant Deangelo Pantalion Williams appeals a judgment entered upon his plea of no contest to vehicular manslaughter. He asks us to remand the matter for resentencing to allow the trial court to exercise its new discretion to strike a prior serious felony conviction enhancement imposed under Penal Code section 667, subdivision (a)(1).[1] He also contends the trial court erred in designating him a habitual traffic offender. We shall reverse the habitual traffic offender designation and otherwise affirm the judgment.

I. BACKGROUND

On the afternoon of June 16, 2017, defendant was driving his car at approximately 65 to 70 miles an hour in a 25-mile-per-hour zone. He drove through two red lights and collided with another vehicle, killing the driver and seriously injuring the passenger in the other vehicle. The passenger in defendant's vehicle was also injured. Defendant showed no signs of intoxication.

[1] All undesignated statutory references are to the Penal Code.

Defendant was charged with vehicular manslaughter (§ 192, subd. (c)(1); count 1), and two counts of reckless driving causing injury (Veh. Code, § 23105, subd. (a); counts 2 & 3). The information alleged count 1 was a serious felony and a third strike offense (§§ 667, subds. (b)–(j), 1170.12, subd. (c)(2), 1192.7, subd. (c), 1192.8, subd. (a)), and included a number of prior conviction and enhancement allegations.

Pursuant to a negotiated disposition, defendant pled no contest to count 1 and admitted it was a serious felony (§§ 1192.7, subd. (c) & 1192.8, subd. (a)), that he had suffered a prior "strike" conviction for a serious or violent felony (§ 1170.12, subd. (c)(1)), that he had suffered a prior conviction of a violent felony, i.e., robbery (§ 667, subd. (a)(1)); that he had served a prior prison term and failed to remain free of custody for five years (§ 667.5, subd. (b)); and that he committed the current offense while on parole (§ 1203.085, subd. (b)). The maximum indicated sentence was 14 years. The remaining counts were dismissed.

Before sentencing, defendant made a *Romero* motion, asking the court to dismiss his strike prior and sentence him instead to the low term of two years, with a five-year enhancement under section 667, subdivision (a)(1), for a total prison term of seven years. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*); 1170.12, subd. (c)(1).) He argued the five-year enhancement adequately accounted for his criminal history.

The trial court sentenced defendant to eight years for vehicular manslaughter—the four-year midterm, doubled for the strike prior (§ 1170.12, subd. (c))—an additional five years for the serious felony prior (§ 667, subd. (a)(1)), and an additional year for the prior prison term (§ 667.5, subd. (b)), for a total prison term of 14 years. The court also deemed defendant a habitual traffic offender. (Veh. Code, § 23546, subd. (b).)

II. DISCUSSION

A. Senate Bill 1393

Defendant asks us to remand the matter to the trial court for resentencing pursuant to Senate Bill No. 1393 (Stats. 2018, ch. 1013, § 1), which amended sections 667, subdivision (a), and 1385, subdivision (b), effective January 1, 2019, to allow a trial court

to exercise its discretion to dismiss a prior serious felony sentence enhancement imposed under section 667. At the time defendant was sentenced, the trial court did not have this authority. (Former § 1385, subd. (b).) Defendant contends, and the Attorney General concedes, these amendments apply retroactively to judgments that are not yet final. We agree. (*People v. Zamora* (2019) 35 Cal.App.5th 200, 208; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973 (*Garcia*).)

In such a case, we remand the matter to the trial court unless the record clearly indicates the court would not have dismissed or stricken the prior serious felony conviction if it had discretion to do so at the time of sentencing. (*Garcia*, *supra*, 28 Cal.App.5th at p. 973, fn. 3; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110–1111.) This rule has been applied in analogous contexts. For instance, in 2018, trial courts were given authority to strike certain previously-mandatory firearm enhancements. (Senate Bill No. 620 (Stats. 2017, ch. 682, § 2).) In *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428, our colleagues in Division One of this court concluded the record contained no clear indication of how the trial court would have ruled if it had had discretion at the time of sentencing to strike the firearm enhancements; the court noted that, although the trial court imposed a substantial sentence, it did not impose the maximum sentence for one of the counts, it ran that term concurrently with another, and it struck prior convictions in the interest of justice. Similarly, in *People v. Chavez* (2018) 22 Cal.App.5th 663, remand to allow the trial court to consider striking a firearm enhancement was found appropriate where the trial court had not imposed the maximum sentence at the original sentence and had not made any statement indicating that it would have imposed the firearm enhancement if it had discretion to do otherwise.

On different facts, the court in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, reached a different result. After the original sentencing hearing in *Gutierrez*, our high court ruled that a trial court could dismiss strike priors in the interest of justice. (*Ibid*., citing *Romero*, *supra*, 13 Cal.4th 497.) The appellate court found it unnecessary to remand to allow the trial court to exercise this discretion, where the trial court had stated that it was appropriate to impose the maximum sentence, and it increased the defendant's

sentence beyond what it believed was required under the three strikes law by imposing the high term for one count and imposing two additional discretionary enhancements. In those circumstances, the appellate court concluded no purpose would be served by a remand for resentencing. (*Gutierrez*, at p. 1896.)

In the circumstances of this case, we likewise conclude there is no need to remand for resentencing. Defendant asked the trial court to dismiss the strike prior in the interest of justice; if the court had granted this request, his sentence would have been reduced by *four years*. In his motion, he expressly argued that the five-year enhancement under section 667, subdivision (a)(1) adequately accounted for his previous criminal behavior. The court declined to strike the prior, instead sentencing defendant to the maximum available term under his plea agreement. This sentencing decision is a clear indication the court would not have stricken a *five-year* enhancement.

The trial court's colloquy during sentencing reinforces this conclusion. The court emphasized the heartbreaking nature of the case—which left the manslaughter victim dead, his wife seriously injured and still disabled, his five children fatherless, and defendant's own passenger injured—as well as defendant's serious criminal history, including an armed robbery, his poor performance on parole, his extreme recklessness in driving 70 miles an hour in a 25-mile-per-hour zone, and the foreseeability that his action would lead to injury or death. Although the court acknowledged it was a "good thing" that defendant had gotten a barber's license, it told him, "You were a bad person for having two serious and violent felonies armed with weapons and being on parole for one . . . armed robbery for $150 at 7-[Eleven] and then plowing into someone. You are not a changed person, Mr. Williams, not yet."

In light of the court's words, its refusal to strike the strike prior, and its imposition of the maximum available sentence, we see no possibility it would have stricken the five-year serious felony enhancement if it had had discretion to do so at the time of sentencing. Remand is unnecessary.

B. Habitual Traffic Offender

At the sentencing hearing, the trial court deemed defendant a habitual traffic offender under Vehicle Code section 23546, subdivision (b), and the minute order reflects that designation. That statute provides that if a person is convicted of driving under the influence (Veh. Code, § 23152) and the offense occurred within ten years of two separate violations of specified other statutes, that person is designated a habitual traffic offender. Defendant was convicted of vehicular manslaughter (§ 192), not driving under the influence (Veh. Code, § 23152). By its terms, section 23546 does not apply to him.

Defendant contends the trial court erred in designating him a habitual traffic offender, and the Attorney General concedes the error. We shall reverse this finding. As the Attorney General notes, however, the traffic offender designation is not included in the abstract of judgment, and there is therefore no need to have an amended abstract of judgment forwarded to the California Department of Corrections and Rehabilitation. The record does not reveal whether the court has notified any other governmental agencies of the erroneous designation. If it has done so, it should take any action that is necessary to ensure those agencies are aware the designation has been reversed.

III. DISPOSITION

The finding that defendant is a habitual traffic offender is reversed. The court shall take any necessary action to ensure that defendant is not treated as a habitual traffic offender based on this erroneous designation. In all other respects, the judgment is affirmed.

_____
TUCHER, J.

WE CONCUR:

_____
POLLAK, P. J.

_____
STREETER, J.

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE BY TRUEFILING

Re: *People v. DeAngelo Williams* **Case No.:_____**

Related Court of Appeal Case No.: A155340

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of Alameda, State of California. My business address is 475 Fourteenth Street, Suite 650, Oakland, CA 94612. My electronic service address is eservice@fdap.org. On July 17, 2019, I served a true copy of the attached **Petition for Review** on each of the following, by placing same in an envelope(s) addressed as follows:

San Mateo County Superior Court
400 County Center
Attn: Hon. Stephanie Garratt, Judge
Redwood City, CA 94063

Robert D. Byers
Law Office of Robert D. Byers
420 3rd Street, Suite 250
Oakland, CA 94607

DeAngelo Williams
(Petitioner)

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in Oakland, California, on that same day in the ordinary course of business.

On July 17, 2019, I transmitted a PDF version of this document by TrueFiling to the following:

Xavier Becerra, Attorney General
Office of the Attorney General
(sfagdocketing@doj.ca.gov)
(Respondent)

Court of Appeal, First Appellate District

San Mateo County District Attorney
(smda@smcgov.org)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 17, 2019, at Oakland, California.

/s/ Elizabeth Wilkie

Elizabeth Wilkie, Declarant