

No. D083151

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION ONE

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THE PEOPLE OF THE STATE OF  
CALIFORNIA,

*Plaintiff and Respondent,*

v.

WILLIAM GATES,

*Defendant and Appellant.*

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San Diego County Superior Court, Case No. SCD274056  
The Honorable Melinda J. Lasater, Judge

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**RESPONDENT'S BRIEF**

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## TABLE OF CONTENTS

	<b>Page</b>
Introduction.....	7
Statement of the case .....	8
Statement of facts .....	10
Argument.....	11
The trial court was not required to dismiss one of appellant’s two sentence enhancements, and it acted within its discretion in declining to do so.....	11
A. Legal principles .....	11
1. Penal Code section 1385, as amended by Senate Bill No. 81 .....	11
2. Standards of review .....	12
B. Procedural background.....	13
C. Appellant’s claims are forfeited .....	20
D. Appellant’s claims are meritless .....	22
1. The trial court was not required to dismiss all but one of appellant’s enhancements because “shall” does not mean “must” under Penal Code section 1385, subdivision (c)(2)(B) .....	22
2. The trial court acted within its discretion in declining to dismiss an enhancement based on a reasonable finding that doing so would endanger public safety.....	25
Conclusion .....	28

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>In re Caden C.</i> (2021) 11 Cal.5th 614.....	25
<i>In re Sheena K.</i> (2007) 40 Cal.4th 875.....	20
<i>People v. Anderson</i> (2023) 88 Cal.App.5th 233.....	22, 23
<i>People v. Boyce</i> (2014) 59 Cal.4th 672.....	20
<i>People v. Burke</i> (2023) 89 Cal.App.5th 237.....	24
<i>People v. Carmony</i> (2004) 33 Cal.4th 367.....	27
<i>People v. Cota</i> (2023) 97 Cal.App.5th 318.....	22
<i>People v. Gates</i> (June 18, 2019, D074792) [nonpub. opn.] .....	8, 9
<i>People v. Gates</i> (Oct. 18, 2021, D077631) [nonpub. opn.] .....	9, 10
<i>People v. Hammer</i> (2003) 30 Cal.4th 756.....	23
<i>People v. Johnson</i> (2022) 12 Cal.5th 544.....	25
<i>People v. Knoller</i> (2007) 41 Cal.4th 139.....	25
<i>People v. Lara</i> (2010) 48 Cal.4th 216.....	23

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>People v. Lipscomb</i> (2022) 87 Cal.App.5th 9.....	22
<i>People v. Mazur</i> (2023) 97 Cal.App.5th 438.....	22, 23
<i>People v. Mendoza</i> (2023) 88 Cal.App.5th 287.....	<i>passim</i>
<i>People v. Nazir</i> (2022) 79 Cal.App.5th 478.....	12
<i>People v. Ortiz</i> (2023) 87 Cal.App.5th 1087.....	22, 23
<i>People v. Polk</i> (2010) 190 Cal.App.4th 1183.....	22
<i>People v. Ponder</i> (2023) 96 Cal.App.5th 1042.....	22, 23
<i>People v. Renteria</i> (2023) 96 Cal.App.5th 1276.....	22
<i>People v. Scott</i> (1994) 9 Cal.4th 331.....	20
<i>People v. Strother</i> (2021) 72 Cal.App.5th 563.....	13
<i>People v. Superior Court (Romero)</i> (1996) 13 Cal.4th 497.....	14
<i>People v. Tilley</i> (2023) 92 Cal.App.5th 772.....	14
<i>People v. Trujillo</i> (2015) 60 Cal.4th 850.....	20

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>People v. Walker</i> (2022) 86 Cal.App.5th 386 .....	22, 23
<i>People v. Wall</i> (2017) 3 Cal.5th 1048.....	20
 <b>STATUTES</b>	
Business and Professions Code	
§ 25620.....	16
Health & Safety Code	
§ 11359.....	16
§ 11360, subd. (a) .....	16
§ 11550.....	15
§ 11550, subd. (b) .....	16

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<b>Penal Code</b>	
§ 69.....	16
§ 148.....	16
§ 148.9.....	15
§ 211.....	16
§ 242.....	16
§ 243, subd. (d) .....	8
§ 243.9, subd. (a) .....	8
§ 245, subd. (a)(4).....	8
§ 415.....	16
§ 419.....	16
§ 422.....	16
§ 459.....	15, 16
§ 484.....	15
§ 654.....	8
§ 664.....	15, 16
§ 667, subd. (a)(1).....	8
§ 667, subds. (b)–(i) .....	8
§ 667.5, subd. (b) .....	8
§ 1385.....	<i>passim</i>
§ 1385, subd. (c).....	14, 22, 23
§ 1385, subd. (c)(1) .....	11
§ 1385, subd. (c)(2) .....	12, 24, 25, 26
§ 1385, subd. (c)(2)(B) .....	<i>passim</i>
§ 12022.7, subd. (a) .....	8
<b>San Diego Municipal Code</b>	
§ 56.54, subd. (b) .....	16
Stats. 2021, ch. 721 .....	23
<b>OTHER AUTHORITIES</b>	
<b>Senate Bill</b>	
No. 81 (2021–2022 Reg. Sess.) .....	11, 21
No. 1393 (2017–2018 Reg. Sess.) .....	9

## INTRODUCTION

In 2017, without any provocation, appellant “sucker punched” and severely injured Andrew B., a complete stranger, while the two men waited in line for dinner at a homeless shelter. After appellant was transported to jail, he spat in the face of Officer John G. Appellant was convicted of assault with force likely to produce great bodily injury, battery with serious bodily injury, and gassing a peace officer. The trial court found true sentence enhancement allegations that appellant personally inflicted great bodily injury and that he had previously sustained a conviction for a serious felony. The trial court ultimately sentenced him to 15 years in state prison.

On appeal from a second resentencing, appellant contends that the “shall” language in Penal Code<sup>1</sup> section 1385, subdivision (c)(2)(B) mandated the dismissal of one of his two enhancements. Appellant further argues that to the extent the trial court retained the discretionary power to impose both enhancements, it abused its discretion by applying an overly broad public safety standard. Appellant forfeited both claims by failing to assert them below. In any event, they fail on the merits. The first claim has been rejected by every court to consider it, including this one. The second claim fails because appellant has not identified any irrational or arbitrary action by the trial court.

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

## STATEMENT OF THE CASE

On August 13, 2018, at a bench trial, the trial court found appellant guilty of assault with force likely to produce great bodily injury (force likely assault) (§ 245, subd. (a)(4); count 1); battery with serious bodily injury (§ 243, subd. (d); count 2); and battery by gassing a peace officer (§ 243.9, subd. (a); count 3). (D074792 CT 193.)<sup>2</sup> As to count 1 (force likely assault), the trial court found true the allegation that appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)). (*People v. Gates* (June 18, 2019, D074792) [2019 WL 2510713, at \*1] [nonpub. opn.] (*Gates I*.) Additionally, the trial court found true two prison prior allegations (§ 667.5, subd. (b)), one serious felony prior allegation (§ 667, subd. (a)(1)), and one strike prior allegation (§ 667, subds. (b)–(i)). (*Gates I*, at \*1.)

On October 3, 2018, the trial court sentenced appellant to prison for 17 years, calculated as follows:

- for count 1 (force likely assault), the middle term of three years, doubled to six years due to the strike prior, plus the statutorily defined additional and consecutive term of three years for the great bodily injury enhancement attached to count 1;
- for count 2 (battery with serious bodily injury), sentence stayed under section 654;
- for count 3 (battery by gassing a peace officer), one-third the middle term of three years (one year), doubled to two years due to the strike prior, run

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<sup>2</sup> On March 13, 2024, this court granted appellant’s request for judicial notice of the records in case Nos. D074792 and D077631. Citations to those records are prefaced with the case number.

consecutively;

- for the serious felony prior enhancement, the statutorily defined additional and consecutive term of five years;
- for one of the two prison prior enhancements, the statutorily defined additional and consecutive term of one year; and
- for the other prison prior enhancement, punishment struck.

(*Gates I, supra*, 2019 WL 2510713, at \*1; *People v. Gates* (Oct. 18, 2021, D077631) [2021 WL 4839223, at \*2] [nonpub. opn.] (*Gates II*); D074792 CT 158–159.)

On June 18, 2019, in *Gates I, supra*, 2019 WL 2510713, at \*1–\*2, this court remanded to the trial court so it could exercise its newly granted discretion to consider dismissing appellant’s serious felony prior enhancement under section 1385, as amended by Senate Bill No. 1393 (2017–2018 Reg. Sess.), and otherwise affirmed the judgment.

On June 11, 2020, at a resentencing hearing, the trial court declined to strike the serious felony prior enhancement but struck the punishment for the remaining prison prior enhancement, resulting in a new aggregate sentence of 16 years. (*Gates II, supra*, 2021 WL 4839223, at \*3; D077631 CT 66–67.)

On October 18, 2021, in *Gates II, supra*, 2021 WL 4839223, at \*3, this court remanded for another resentencing because, inter alia, the trial court had resentedenced appellant in absentia without a waiver of his personal presence.

On November 9, 2023, at the latest resentencing, the trial court imposed a total sentence of 15 years, calculated identically to appellant's initial sentence, with the exception of not doubling the one-year term for count 3 (battery by gassing a peace officer) and completely striking both prison prior enhancements. (CT 35–36, 55, 64–65; 3 RT 147.)

On the same day, appellant filed a notice of appeal. (CT 57.)

### STATEMENT OF FACTS

This court previously found the facts underlying appellant's offenses to be as follows:

On October 4, 2017, Andrew B. was in line for dinner at the St. Vincent De Paul homeless shelter in San Diego when Gates sucker punched him in the face. Andrew momentarily lost consciousness as a result of the upper cut to his face. He suffered two black eyes and whiplash, became dizzy and bled profusely.

Andrew identified Gates as the assailant.

Two security officers witnessed the incident. Joshua P[.] saw Gates run at Andrew before striking. [Joshua] recognized Gates, who had been a resident for about five months and did not have privileges to eat dinner there that day. Normally Gates was well mannered, but that day Gates seemed to be under the influence. After he struck Andrew, Gates delivered a roundhouse kick, during which time [Joshua] grabbed Gate[s]'s leg to take him to the ground.

After Gates was cleared by medical personnel and transported to jail, he spat in the face of Corporal John G. while being fingerprinted, and police placed a spit rag on him to prevent further spitting.

(*Gates II, supra*, 2021 WL 4839223, at \*1.)

## ARGUMENT

### **THE TRIAL COURT WAS NOT REQUIRED TO DISMISS ONE OF APPELLANT’S TWO SENTENCE ENHANCEMENTS, AND IT ACTED WITHIN ITS DISCRETION IN DECLINING TO DO SO**

Appellant asserts that the trial court was required to dismiss all but one of his enhancements under section 1385, as amended by Senate Bill No. 81 (2021–2022 Reg. Sess.) (SB 81). (AOB 10–29.) Appellant alternatively argues that if section 1385 did not mandate dismissal, the trial court abused its discretion by applying an overly broad public safety standard in declining to dismiss his serious felony prior enhancement or his great bodily injury enhancement. (AOB 18, 21–29.)

Appellant forfeited these claims by failing to raise them below. At any rate, the Courts of Appeal have repeatedly rejected appellant’s primary claim, and he offers no persuasive reason to depart from those decisions. Appellant’s secondary claim fails for lack of any irrational or arbitrary action by the trial court.

#### **A. Legal principles**

##### **1. Penal Code section 1385, as amended by Senate Bill No. 81**

Section 1385, as amended by SB 81, provides that “the court shall dismiss an enhancement *if it is in the furtherance of justice to do so*, except if dismissal of that enhancement is prohibited by any initiative statute.” (§ 1385, subd. (c)(1), emphasis added.) “In exercising its discretion” under this subdivision, the court is directed to “consider and afford great weight” to evidence of any of several mitigating circumstances, proof of which “weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public

safety.” (§ 1385, subd. (c)(2).) “‘Endanger public safety’ means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others.”

(*Ibid.*)

Section 1385, subdivision (c)(2) lists nine mitigating circumstances that weigh in favor of dismissing an enhancement, including, as pertinent here, whether “[m]ultiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.” (§ 1385, subd. (c)(2)(B).)

## 2. Standards of review

Appellant’s primary claim presents a question of law, which this court reviews independently. (See AOB 17; *People v. Mendoza* (2023) 88 Cal.App.5th 287, 294 (*Mendoza*) [“We independently review questions of statutory interpretation”].)

Appellant’s secondary claim is reviewed for abuse of discretion. (See AOB 17–18; *People v. Nazir* (2022) 79 Cal.App.5th 478, 490 [“We review a trial court’s order denying a motion to dismiss a sentence enhancement under section 1385 for abuse of discretion”]; *Mendoza, supra*, 88 Cal.App.5th at p. 298 [“we conclude that abuse of discretion is the proper standard of review for the trial court’s determination that dismissal of *Mendoza*’s firearm enhancement would endanger public safety”].)

“In reviewing for abuse of discretion, [appellate courts] are guided by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the

absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citations.] Second, a “decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.”” [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Strother* (2021) 72 Cal.App.5th 563, 571, citing *People v. Carmony* (2004) 33 Cal.4th 367, 376–377 (*Carmony*)).

### **B. Procedural background**

On October 31, 2023, defense counsel filed a sentencing memorandum. (CT 28–34.) Treating appellant’s strike as an enhancement, she argued, “Consistent with the dictates of Section 1385, this Court should dismiss, all but one” enhancement. (CT 33.)

On November 7, 2023, the prosecutor also filed a sentencing memorandum. (CT 35–49.) He responded that neither the serious felony prior enhancement nor the great bodily injury enhancement should be dismissed, as doing so would endanger public safety. (CT 43.) He said, “Although both subdivisions (c)(2)(B) and (c)(2)(C) [of section 1385] contain language that the enhancement ‘shall be dismissed,’ case law is clear that the trial court retains discretion [not] to do so when dismissing the enhancement would ‘endanger public safety.’” (CT 43.)

Additionally, the prosecutor cited case law for the proposition that a strike is not an enhancement subject to section 1385, subdivision (c), but rather an alternative sentencing scheme. (CT 44, citing *People v. Burke* (2023) 89 Cal.App.5th 237 (*Burke*); accord, *People v. Tilley* (2023) 92 Cal.App.5th 772, 776, fn. 2.)

On November 9, 2023, defense counsel filed a motion to dismiss the strike allegation under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). (CT 50–54.) Without disclaiming her position that a strike is an enhancement, she pointed out that, regardless, the trial court “may exercise its discretion to dismiss a strike prior ‘in furtherance of justice.’” (CT 52, capitalization and boldface omitted; 3 RT 128.)

On the same day, the trial court held appellant’s third sentencing hearing. (See CT 64; 3 RT 127.) The trial court stated that it read the sentencing memoranda and the *Romero* motion. (3 RT 127.) Both parties and the trial court agreed that current sentencing law governed and that the trial court should consider how appellant has been doing in prison. (3 RT 129, 132–133.)

Defense counsel said: “So in 1385 under the new sentencing law, there is a discussion about all -- when there are multiple enhancements alleged in a single case, all but one should be dismissed. The caveat to that is unless the Court can find that the individual would be a danger to public safety.” (3 RT 130.) “It’s Your Honor’s discretion as to whether Mr. Gates poses a public safety risk.” (3 RT 132.)

Defense counsel argued that appellant would not be a danger to public safety because he has been in Fire Camp without incident, he has committed to staying off drugs, dismissing an enhancement would not result in his immediate release, the robbery underlying his strike/serious felony prior happened over 36 years ago when he was 24 years old, and most of his crimes since then were misdemeanors. (3 RT 131–137, 143.)

The prosecutor acknowledged that appellant’s robbery conviction was remote in time and that he committed no offense while in prison. (3 RT 137–139.) Nevertheless, the prosecutor urged the trial court to find that striking an enhancement would endanger public safety because appellant’s lengthy criminal history is filled with assaultive and violent conduct, including criminal threats, batteries, attacking a stranger with a 30-inch metal pole, and spitting in an officer’s face, as well as, in the present case, sucker punching a stranger so hard that he lost consciousness and again spitting in an officer’s face. (3 RT 140–141.)

The probation report outlines appellant’s criminal history as follows: “a 1981 conviction for petty theft (§ 484); a 1982 conviction for burglary (§ 459); a 1983 misdemeanor conviction for being under the influence of a controlled substance (Health & Saf. Code, § 11550); a 1984 conviction for attempted burglary (§§ 459, 664); two 1985 misdemeanor convictions and one 1986 misdemeanor conviction for providing false identification to police (§ 148.9); a 1985 misdemeanor conviction for obstructing/resisting

arrest (§ 148) and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (b)); a 1985 misdemeanor petty theft conviction (§§ 484, 488); the 1987 strike prior/serious felony prior conviction, for robbery (§ 211); a 1998 infraction and a 2000 misdemeanor for disturbing the peace (§ 415); a 2002 misdemeanor for a consuming alcohol from an open container (San Diego Mun. Code, § 56.54, subd. (b); Bus. & Prof. Code, § 25620); a 2002 misdemeanor criminal threats conviction (§ 422); a 2003 misdemeanor conviction for repossessing land after being removed (§ 419); a 2005 conviction for possessing and selling marijuana (Health & Saf. Code, §§ 11360, subd. (a), 11359); one 2011 and one 2017 misdemeanor battery conviction (§ 242); and a 2013 conviction for resisting an executive officer (§ 69).” (AOB 13, citing D074792 CT 89–93.)

A supplemental probation report also describes an interview with appellant, during which he denied any involvement in the instant offenses and claimed that “the District Attorney and others have conspired to ‘frame’ him.” (D074792 CT 133.)

After hearing both parties’ arguments, the trial court stated:

Okay. So I think, number one, that Mr. Gates should be commended to have gotten himself into Fire Camp and to have been able to maintain himself there. But I believe -- I’m just going to go right to the heart of it -- that he is a danger to public safety, and I’m going to try to explain why.

A lot of it is related to his prior history, but a lot of it is also -- I watched him testify.<sup>[3]</sup> And after over 36

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<sup>3</sup> Appellant testified during his bench trial. (D074792 6 RT 982–996.)

years of doing this, I've heard a lot of people testify. And I've seen a lot of different scenarios. And his complete denial about his involvement in both offenses was pretty mind boggling, I think, in the sense that he -- his perceptions of things -- it's like if he says it often enough, then it becomes real that he wasn't there, meaning the part at St. Vincent, or he didn't spit. It wasn't him. It was all a set-up. It's rationalization.

Now, could some of that be related to his drug issues? Absolutely. And I've given that part a lot of thought. And part of the reason why I want to make sure we're clear on his record is that he was sentenced to 8 years.<sup>[4]</sup> Now, I understand that people can get drugs or substances that will be mind altering in prison. So just because somebody is in prison doesn't mean that they're not using.

But I -- I think it's also significant that on his several trips to state prison -- so there was the one in 1982, one in 1984, one in 1987, the one that involved two charges but the same case, basically, in 2005. And then his trip to state prison, the most recent one prior to this particular incident was 2013.

You know, there were no other offenses that occurred while he was in state prison. So I do think it is significant that when he is in prison, he is managed. And while he's in prison, I don't believe he's a danger to public safety. But when I look at his conduct when he gets out of prison and the frequency and then combining it with what I heard and saw when he testified, I have no confidence at all that he will be able to hold it together.

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<sup>4</sup> Appellant was sentenced to eight years for robbery in 1987. (CT 42.)

I do not know if there is some mental health issue there that is where -- he is self medicating.<sup>[5]</sup> But when he's in Fire Camp, I don't know when he's in Fire Camp if he's being medicated at all through the system. But even if he was, it wouldn't necessarily change the situation.

Interestingly -- and the People have mentioned a good portion of the factors I'm considering. The chart is very helpful.<sup>[6]</sup> I agree in terms of his history. But if you look, he had a battery in May of 2017. And that was what, four months, five months before this particular instant offense.

He, by his conduct is -- he hits these irrational moments where he can just lash out at anybody. So it's unpredictable. And his reaction in terms of the spitting, again, is connected to that irrational behavior at least having to do with the PC69.

The way in his -- his rationalization when he testified and continued to say the same thing to the probation officer really does not bode well for someone rehabilitating. Now, is it always possible? Yes. Having said that, he did an 8-year commitment, which is probably -- for our discussion I'll make it a 4-year time in state prison, which is not too dissimilar from where he is, I suppose, now.

But when he got out, he goes back to committing the same types of violent activities. And it's not -- doesn't have to be felony violence to make him a danger to the community, and it does tend to escalate.

I mean his -- his sucker punch, as one keeps being called at St. Vincent de Paul, could have been a simple

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<sup>5</sup> Appellant was evaluated for incompetency to stand trial, but was ultimately deemed competent. (D074792 CT 133–134.)

<sup>6</sup> The People's sentencing memorandum contains a chart of appellant's 24 convictions. (CT 42.)

battery except for the way it occurred and then the damage that was done. And so it's a continuation of repeated behavior over an extended period of time.

I just believe strongly that he is a danger to public safety. And because of that, obviously, I would deny a *Romero* motion. So I'm going to formally deny that. And then the request to strike it under the new sentencing law is denied because I believe that he is a danger.

I'm not even going to rule as to whether a strike is an enhancement. I think that's going to be decided later on down the road, and the result would be the same whether it's an enhancement or not. And I'm trying to -- trying to add some finality to this. Because if I thought it was only one way, I would make that ruling. But I would rule the same way because I do believe he is -- he endangers the public safety by his conduct and his attitude about things. Attitude means his rationalization.

He can be really quite a nice person, and so I'm not -- when I say attitude, I don't want to convey something different except that when he gets angry, he explodes. And when he feels that need to hit out, he doesn't hesitate. He just hits out. And so hence my ruling. And I do think that when he's released, the odds are, I would say beyond a reasonable doubt, we're using our customary standard, that he is again going to end up back in the same pattern again, sadly.

And so I would hope that he is going to take advantage of the opportunities he has. It looks like he is. That this time might be the right combination of things where -- to make a change. For his sake, I hope it does.

But I am going to, at this point, go through the stages that I need to for purposes of the actual computation. And bluntly, I am going to be using what

the People outlined for the clerk’s purpose so that she can follow along that way.

So the total term will be 15 years.

(3 RT 143–147.)

**C. Appellant’s claims are forfeited**

““[N]o procedural principle is more familiar . . . than that a constitutional right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.”” (*In re Sheena K.* (2007) 40 Cal.4th 875, 880–881.)

With respect to sentencing specifically, “a defendant forfeits on appeal any ‘claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices’ in the absence of objection below.” (*People v. Wall* (2017) 3 Cal.5th 1048, 1075; accord, *People v. Trujillo* (2015) 60 Cal.4th 850, 856; *People v. Boyce* (2014) 59 Cal.4th 672, 730–731; *People v. Scott* (1994) 9 Cal.4th 331, 356.)

On appeal, appellant avers that section 1385, subdivision (c)(2)(B) “required dismissal of all but one enhancement” and, in the alternative, that remarks by the trial court reveal an abuse of discretion in applying “an overly broad public safety exception.” (AOB 18, 21–23, 27–28.) However, defense counsel never asserted (neither in her briefs nor at appellant’s third sentencing hearing) that section 1385, subdivision (c)(2)(B) mandated the dismissal of all but one enhancement. (See CT 28–34, 50–54; 3 RT 127–155.) Nor did she object to any of the trial court’s

statements that appellant belatedly finds objectionable. (See 3 RT 127–155.)

Appellant represents that “[a]mong the arguments raised pursuant to SB 81, the defense asserted that amended section 1385, subdivision (c)(2)(B) demanded the court strike all but one enhancement.” (AOB 11, citing CT 33.) But here is what defense counsel actually said:

Here, this Court is empowered to dismiss or strike the true found enhancements – and the circumstances of this case dictate that the Court must do so.

1. Multiple enhancements are alleged in a single case, all but one *should* be dismissed.

The number of true found enhancements is a listed circumstance that a court must consider. (Pen. Code, § 1385, subd. (c)(2)(B).) Where there is evidence of this circumstance it weighs heavily in favor of dismissal and, “all enhancements beyond a single enhancement shall be dismissed.” (*Ibid.*)

The prosecutor alleged, and this Court, sitting as the finder of fact, found true 7 enhancements. Consistent with the dictates of Section 1385, this Court *should* dismiss, all but one.

(CT 33, emphasis added.)

Defense counsel’s vague assertion that the circumstances of this case dictated that the trial court must dismiss *the true found enhancements* were not enough to preserve a claim that *all but one* of the enhancements had to be dismissed under section 1385, subdivision (c)(2)(B), especially given her position that the trial court *should* dismiss all but one enhancement under section 1385, subdivision (c)(2)(B), unless it found that appellant would

be a danger to public safety. (See CT 33; 3 RT 130; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1194 [“If a defendant fails to make a timely objection on the precise ground asserted on appeal, the error is not cognizable on appeal”].)

**D. Appellant’s claims are meritless**

**1. The trial court was not required to dismiss all but one of appellant’s enhancements because “shall” does not mean “must” under Penal Code section 1385, subdivision (c)(2)(B)**

Appellant argues that the “shall” language in section 1385, subdivision (c)(2)(B) mandated the dismissal of his serious felony prior enhancement or his great bodily injury enhancement. (AOB 18–20.) Yet, every court to consider whether “shall” means “must” under section 1385, subdivision (c) has concluded it does not. (See *People v. Mazur* (2023) 97 Cal.App.5th 438, 444–445 (*Mazur*) [this court], review granted Feb. 14, 2024, S283229; *Mendoza, supra*, 88 Cal.App.5th at p. 297 [Division Two of this court]; *People v. Cota* (2023) 97 Cal.App.5th 318, 337; *People v. Ponder* (2023) 96 Cal.App.5th 1042, 1052 (*Ponder*), review granted Jan. 10, 2024, S282925; *People v. Renteria* (2023) 96 Cal.App.5th 1276, 1289–1290; *People v. Anderson* (2023) 88 Cal.App.5th 233, 239–241 (*Anderson*), review granted Apr. 19, 2023, S278786; *People v. Ortiz* (2023) 87 Cal.App.5th 1087, 1096–1098 (*Ortiz*), review granted Apr. 12, 2023, S278894; *People v. Lipscomb* (2022) 87 Cal.App.5th 9, 17–21; *People v. Walker* (2022)

86 Cal.App.5th 386, 396–398 (*Walker*), review granted Mar. 22, 2023, S278309.)<sup>7</sup>

Appellant contends that those decisions should not be followed because the “clear and unambiguous language requires trial courts to select one enhancement to apply, and one only.” (AOB 19.) Appellant further argues that “[a]ny other interpretation of section 1385 renders the ‘shall be dismissed’ language [citation] completely superfluous and would create no meaningful difference between the circumstances that plainly *require* the trial court to dismiss an enhancement versus the circumstances that merely constrict a trial court’s discretion . . . .” (AOB 19, emphasis by appellant.)

However, “[w]ith regard to [appellant’s] reliance on the use of the word ‘shall,’ it should not be assumed that every statute that uses that term is mandatory.” (*People v. Lara* (2010) 48 Cal.4th 216, 227.) “Neither the word “may,” nor the word “shall,” is dispositive.” (*Ibid.*) “The context of the language . . . must be considered.” (*Ibid.*; see also *People v. Hammer* (2003) 30 Cal.4th

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<sup>7</sup> In *Walker, supra*, 86 Cal.App.5th 386, the California Supreme Court granted review on this issue: “Does the amendment to Penal Code section 1385, subdivision (c) that requires trial courts to ‘afford great weight’ to enumerated mitigating circumstances (Stats. 2021, ch. 721) create a rebuttable presumption in favor of dismissing an enhancement unless the trial court finds dismissal would endanger public safety?” In *Mazur, supra*, 97 Cal.App.5th 438, *Ponder, supra*, 96 Cal.App.5th 1042, *Anderson, supra*, 88 Cal.App.5th 233, and *Ortiz, supra*, 87 Cal.App.5th 1087, the California Supreme Court granted review but deferred further action pending disposition of the issue in *Walker*.

756, 762–763 [courts ““must harmonize ‘the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole’”].)

Although section 1385, subdivision (c)(2)(B) states that “all enhancements beyond a single enhancement shall be dismissed,” the opening clause of that subdivision unambiguously preserves the court’s discretion to dismiss an enhancement. (See § 1385, subd. (c)(2) [“In exercising its discretion under this subdivision . . .”].) Appellant essentially ignores the opening clause of subdivision (c)(2) and jumps to the statute’s use of the word “shall” in subdivision (c)(2)(B). (See AOB 18–20.) It is, therefore, he who would render statutory language surplusage.

Appellant likens his case to *Burke, supra*, 89 Cal.App.5th 237 (AOB 18–19), but it is distinguishable. In *Burke*, the court held that the term “enhancement” as used in section 1385 cannot be extended to include strikes, because the plain language of the statute unambiguously applies only to enhancements and it is well established that the Three Strikes law is not an enhancement. (*Burke*, at pp. 242–244.) Here, by contrast and as just shown, it is well established that “shall” does not always mean “must.” Context matters, hence the rejection of this claim by every court to consider it, including this one.

Consequently, the trial court retained the discretion to impose both of appellant’s enhancements.

**2. The trial court acted within its discretion in declining to dismiss an enhancement based on a reasonable finding that doing so would endanger public safety**

Appellant contends that should this court reject his primary claim, the trial court nonetheless “abused its discretion by applying an overly broad public safety exception . . . .” (AOB 7.) He relies on *People v. Knoller* (2007) 41 Cal.4th 139, 156 for the proposition that applying an incorrect legal standard alone qualifies as an abuse of discretion. (AOB 18, 21.)

However, the California Supreme Court has since clarified: “To establish an abuse of discretion, defendants must demonstrate that the trial court’s decision was so erroneous that it “falls outside the bounds of reason.” [Citations.] A merely debatable ruling cannot be deemed an abuse of discretion.” (*People v. Johnson* (2022) 12 Cal.5th 544, 605, emphasis added.)

Moreover, “section 1385(c)(2) does not require the trial court to consider any particular factors in determining whether ‘there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others.’” (*Mendoza, supra*, 88 Cal.App.5th at p. 299.) The trial court just had to make this determination reasonably. (See *In re Caden C.* (2021) 11 Cal.5th 614, 641 [“A court abuses its discretion only when ““the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination””].)

Here, the trial court reasonably determined that dismissing an enhancement would endanger public safety, meaning there

was “a likelihood that dismissal of the enhancement would result in physical injury or other serious danger to others.” (See § 1385, subd. (c)(2).) The trial court read the briefing by both parties, heard their arguments, and engaged with them. (See 3 RT 127–143.) The trial court acknowledged appellant’s progress in prison, but astutely observed that he poses no danger only when in that controlled environment. (See 3 RT 143–144.) When outside of prison, he “explodes,” does not hesitate to “hit out,” and “goes back to committing the same types of violent activities.” (3 RT 145–146.) In light of appellant’s convictions for resisting arrest in 1985, robbery in 1987, disturbing the peace in 2000, criminal threats in 2002, battery in 2011, resisting an executive officer in 2013, battery in 2017, and force likely assault/battery with serious bodily injury, as well as battery by gassing a peace officer, in 2018 (AOB 13; CT 14, 18–20, 42), there was nothing arbitrary, capricious, or patently absurd about the trial court’s decision.

Appellant attempts to distinguish *Mendoza, supra*, 88 Cal.App.5th 287, a case with an arguably more violent offense, a prospect of immediate release should an enhancement be dismissed, and thus a greater justification not to dismiss it for fear of endangering public safety. (See AOB 23–28.) But as *Mendoza* itself recognizes, “[t]he abuse of discretion standard is highly deferential. When, “as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or

patently absurd manner that resulted in a manifest miscarriage of justice.”” (Mendoza, at p. 298, italics omitted, citing *People v. Jefferson* (2016) 1 Cal.App.5th 235, 242–243 & *Carmony*, supra, 33 Cal.4th at pp. 376–377.) Regardless of how factually different appellant’s case is to *Mendoza*, he has made no such showing.

The remainder of appellant’s argument amounts to plucking the trial court’s remarks out of context and casting them as a finding of a mere likelihood that appellant would commit further misdemeanors, such as spitting on people. (See AOB 23, 27.) For instance, appellant points to the “trial court finding” that “the fact the predicted conduct may not rise to a felony level offense irrelevant, because Mr. Gates’[s] record indicates he has a tendency to lose his temper and ‘lash out’ by, for example[,] ‘spitting.’” (AOB 23.) That is not what the trial court found. The trial court mentioned appellant’s battery in 2017 and his force likely assault in 2018 and then concluded: “I just believe strongly that he is a danger to public safety.” (3 RT 145–146.) “I do think that when he’s released, the odds are, I would say beyond a reasonable doubt . . . that he is again going to end up back in the same pattern again, sadly.” (3 RT 146.) Spitting and lashing out were simply additional examples of appellant losing control. (See 3 RT 145.)

Accordingly, the trial court acted within its discretion in declining to dismiss an enhancement.

## CONCLUSION

Based on the foregoing, respondent respectfully requests that the judgment be affirmed.

Respectfully submitted,

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July 30, 2024

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<sup>8</sup> Counsel for respondent wishes to acknowledge the substantial contribution of Certified Legal Intern Alexandra C. Harten in the preparation of this brief.

## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Century Schoolbook font and contains 5,485 words.

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