McGeorge Law Review

Volume 23 | Issue 3 Article 12

1-1-1992

Enhancing Sentences with Prior Felony Convictions: The Limits of without Limitation

Steven M. Vartabedian
University of the Pacific; McGeorge School of Law

Follow this and additional works at: https://scholarlycommons.pacific.edu/mlr

Part of the Law Commons

Recommended Citation

Steven M. Vartabedian, *Enhancing Sentences with Prior Felony Convictions: The Limits of without Limitation*, 23 Pac. L. J. 1051 (1992).
Available at: https://scholarlycommons.pacific.edu/mlr/vol23/iss3/12

This Symposium is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Enhancing Sentences With Prior Felony Convictions: The Limits of "Without Limitation"

Steven M. Vartabedian*

I. INTRODUCTION

Parents who have disciplined their teenagers have been known to articulate an order similar to the following: "You are grounded for one week from all activities, without exception." Within moments, the disciplined youth might propose that the terms of punishment be "loosely interpreted." "Grounded," the youth would argue, really means grounded within a two-mile radius of the family home; "one week" does not include the weekend; and certain activities may be exempt from the punishment.

While the reaction may not have been quite so swift, the language of California Penal Code section 667, which enhances a serious felon's prison term by five years for each prior serious felony conviction, has been similarly challenged.[1] Since the enactment of section 667 in 1982, defense attorneys have urged that the electorate's specification that prior felony convictions shall

---

* Associate Justice, California Court of Appeal, Fifth Appellate District; B.A. 1972, California State University, Fresno; J.D. 1975, University of Santa Clara.

1. CAL. PENAL CODE § 667(a) (West Supp. 1992). Section 667 provides in pertinent part:

> 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 an 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.

Id.

be used "without limitation" for purposes of sentence enhancements[2] should not be interpreted literally. Not surprisingly, judicial interpretation of the "without limitation" language has ranged from being virtually ignored[3] to significantly impacting enhancements.[4] More recently, the depublication of a California Court of Appeal opinion leaves trial courts with some crucial questions regarding the scope of the "without limitation" clause not yet resolved by precedential authority.[5]

The discussion that follows is not intended to be an exhaustive analysis of the 1982 habitual crime statute which resulted from the passage of Proposition 8. Rather, this Article attempts to demonstrate how a popular mandate, ostensibly forthright, can undergo years of controversy among the courts and engender ultimate intervention by the state legislature.

II. THE CASES

Immediately after enactment of Proposition 8, criminal defendants began asking sentencing courts to exercise discretion pursuant to Penal Code section 1385[6] to dismiss valid five-year prior felony enhancement allegations. In response, prosecutors argued that there was no discretion to be exercised by the court in

---

2. Victims' Bill of Rights, Initiative Measure Proposition 8 (approved June 8, 1982) (codified at CAL. CONST. art. I, §§ 12, 28; CAL. PENAL CODE § 25 (West 1988), §§ 667, 1191.1, 1192.7, 3043 (West Supp. 1992); CAL. WELF. & INST. CODE §§ 1732.5, 1767, 6331 (West 1984)). *See* CAL. CONST. art. I, § 28(f).

3. *See, e.g.*, People v. Fritz, 40 Cal. 3d 227, 230-31, 707 P.2d 833, 834-35, 219 Cal. Rptr. 460, 462 (1985) (holding that a trial court may strike a sentence enhancement irrespective of the "without limitation" clause).

4. *See, e.g.*, People v. Prather, 50 Cal. 3d 428, 432-40, 787 P.2d 1012, 1014-20, 267 Cal. Rptr. 605, 607-13 (1990) (strictly applying the "without limitation" clause).

5. *See* People v. Vallejo-Lugo, 228 Cal. App. 3d 66, 278 Cal. Rptr. 713, (1991) (depublished May 16, 1991). *See also* CAL. RULE OF COURT 979(e) (West 1991) (a depublication order is not a statement of correctness nor inferentially a statement of wrongness of a result in a case).

6. 1980 Cal. Stat. ch. 938, sec. 7, at 2968 (amended by 1986 Cal. Stat. ch. 85, sec. 2, at 211). Prior to its amendment in 1986, section 1385 provided in pertinent part:

> The judge or magistrate may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action dismissed. The reason of the dismissal must be set forth in an order entered upon the minutes.

Id.

such a matter since, pursuant to section 28(f), the prior convictions were to be used *without limitation.*[7] Judges learned that the adage, "discretion is the better part of valor," had taken on new meaning. Indeed, such judges were faced with determining the more prudent approach: To exercise discretion under section 1385 and dismiss the enhancement, or to construe the "without limitation" language to mean that the enhancement was mandatory.

The appropriate interpretation of section 28(f) was resolved by the Supreme Court of California in *People v. Fritz.*[8] Justice Kaus, writing for the majority of the court, concluded that "neither section 667 nor article I, section 28(f), can be construed to abrogate a trial court's well-established statutory authority to strike a prior conviction."[9]

Both the trial court and the appellate court in *Fritz* held that the section 667 enhancement is mandatory rather than discretionary.[10] The supreme court disagreed, holding that the authority of a trial court to dismiss an action in the interest of justice includes the power to strike an admitted or proved prior conviction sentencing enhancement.[11] The court reasoned that since neither the Proposition 8 statutes nor the ballot analysis and arguments even suggested an intent to eliminate a trial court's discretionary power under section 1385, that power remained legitimate and valid.[12]

Justice Grodin concurred with the majority, but expressed some distress over the majority's discounting of the language used in Proposition 8 that prior felony convictions shall be used "without limitation."[13] Justice Grodin believed the meaning of this phrase should be afforded greater significance.[14] At a minimum, he opined, the clause means that no constitutional barrier prevents the use of prior felony convictions in sentencing enhancements.[15]

---

7. CAL. CONST. art. I, § 28(f) (emphasis added).
8. 40 Cal. 3d 227, 707 P.2d 833, 219 Cal. Rptr. 460 (1985).
9. *Id.* at 231, 707 P.2d at 835, 219 Cal. Rptr. at 462.
10. *Id.* at 229, 707 P.2d at 834, 219 Cal. Rptr. at 461.
11. *Id.* at 231, 707 P.2d at 835, 219 Cal. Rptr. at 462.
12. *Id.* at 230-31, 707 P.2d at 834-35, 219 Cal. Rptr. at 462.
13. *Id.* at 231, 707 P.2d at 835, 219 Cal. Rptr. at 462-63 (Grodin, J., concurring).
14. *Id.* at 233, 707 P.2d at 836, 219 Cal. Rptr. at 463-64 (Grodin, J., concurring).
15. *Id.* (Grodin, J., concurring).

Justice Lucas' disagreement with the majority of the *Fritz* court was much stronger. Joined in his dissent by Justice Mosk, Justice Lucas interpreted the majority opinion as "[thwarting] the obvious intent of the framers of, and voters for, Proposition 8."[16]

After the *Fritz* decision, lower appellate courts attempted to clarify the duty of a sentencing court in applying sections 667 and 1385.[17] However, with little delay, the California Legislature intervened and amended sections 667 and 1385 to eliminate a sentencing court's discretionary power to dismiss enhancements based upon prior convictions, thus abrogating *People v. Fritz*.[18]

The Supreme Court of California once again examined the "without limitation" language of Proposition 8 in *People v. Jackson*.[19] In that case, the court considered whether an aggregate sentence term, which included a section 667 enhancement, may permissibly exceed double the base term.[20] The defendant in *Jackson* argued that the term limitation provided for in Penal Code section 1170 could be exceeded only for expressly specified statutory exceptions, none of which were applicable in this case.[21] In response, the Attorney General argued that enhancements for serious felonies were excluded from the limitations of section 1170

---

16. *Id.* at 233, 707 P.2d at 837, 219 Cal. Rptr. at 464 (Lucas, J., dissenting).

17. *See, e.g.*, People v. Jackson, 187 Cal. App. 3d 499, 511-12, 231 Cal. Rptr. 889, 896-97 (1986) (holding that discretion to strike sentence enhancements should be exercised even in the absence of a section 1385 motion); People v. Courtney, 174 Cal. App. 3d 1004, 1006-07, 220 Cal. Rptr. 328, 329 (1985) (holding that a sentencing court may impose an enhancement without expressly articulating that it exercised a discretionary power).

18. CAL. PENAL CODE §§ 667, 1385 (West Supp. 1992). The legislature declared: "It is the intent of the Legislature to abrogate the holding in *People v. Fritz* . . . to restrict the authority of the trial court to strike prior convictions of serious felonies when imposing an enhancement under [section 667]." 1986 Cal. Stat. ch. 85, sec. 3, at 211-12.

19. 37 Cal. 3d 826, 694 P.2d 736, 210 Cal. Rptr. 623 (1985).

20. *Id.* at 831-39, 694 P.2d at 738-44, 210 Cal. Rptr. at 625-31. At the time the *Jackson* case was decided, Penal Code section 1170.1, subdivision (g), provided in pertinent part:

> The term of imprisonment shall not exceed twice the number of years imposed by the trial court as the base term . . . unless the defendant stands convicted of a "violent felony" as defined in subdivision (c) of section 667.5, or a consecutive sentence is being imposed pursuant to subdivision (c) of this section, or an enhancement is imposed pursuant to section 12022, 12022.5, 12022.6, or 12022.7 or the defendant stands convicted of felony escape.

1982 Cal. Stat. ch. 1551, sec. 1.5, at 6048. *Compare id. with* CAL. PENAL CODE § 1170.1 (West Supp. 1992).

21. *Jackson*, 37 Cal. 3d at 837, 694 P.2d at 742, 210 Cal. Rptr. at 629.

because such enhancements are to be applied "without limitation."[22] Additionally, the Attorney General argued that section 667 necessarily contemplates an enhancement greater than the base term because serious felonies such as burglary usually have a base term of less than five years.[23]

In light of these arguments, the Supreme Court of California held that an aggregate sentence, including a section 667 enhancement, may exceed double the base term.[24] Justice Broussard, writing for the majority, stated that the meaning of the "without limitation" provision is uncertain, but agreed that section 667 was intended to impose an enhancement unlimited by the double base term rule.[25] Section 667 was thus exempted from the provisions of section 1170.1(g).[26]

Another statutory sentencing provision that has been subject to judicial scrutiny in light of the "without limitation" language of Proposition 8 is the one-year enhancement provision provided in section 667.5(b).[27] For instance, in *People v. Maki*[28] the trial court imposed three one-year sentence enhancements for three prior prison terms that the defendant had served as a result of three prior convictions.[29] The enhancements were imposed even though they violated the five-year "washout" provision of section 667.5(b).[30]

---

22. *Id.*, 694 P.2d at 742-43, 210 Cal. Rptr. 629-30. *See* CAL. CONST. art. 1, § 28(b).
23. *Jackson*, 37 Cal. 3d at 837, 694 P.2d at 743, 210 Cal. Rptr. at 630.
24. *Id.* at 839, 694 P.2d at 744, 210 Cal. Rptr. at 631.
25. *Id.* at 838, 694 P.2d at 743, 210 Cal. Rptr. at 630.
26. *Id.* at 839, 694 P.2d at 744, 210 Cal. Rptr. at 631. In 1987, the California Legislature amended section 1170.1, subdivision (g), to expressly except section 667 from the double base term limitation. 1987 Cal. Stat. ch. 1423, sec. 3.7, at 5272-75 (amending CAL. PENAL CODE § 1170.1). *Compare id. with* CAL. PENAL CODE § 1170.1 (West Supp. 1992).
27. CAL. PENAL CODE § 667.5(b) (West Supp. 1992). Section 667.5(b) provides in pertinent part:

> [T]he court shall impose a one-year term for each prior separate prison term served for any felony; provided that additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

Id.

28. 161 Cal. App. 3d 697, 207 Cal. Rptr. 777 (1984), *disapproved by* People v. Prather, 50 Cal. 3d 428, 787 P.2d 1012, 267 Cal. Rptr. 605 (1990).
29. *Id.* at 699, 207 Cal. Rptr. at 778.
30. *Id.*

The court of appeal in *Maki* struck the enhancements, reasoning that the reference in Proposition 8 to "prior conviction" is distinguishable from the reference to "separate prison term" in section 667.5(b).[31] As a result, the use of enhancements based upon prior prison terms remained subject to the five year "washout" limitation.

In 1990, the Supreme Court of California considered the related issue of whether Proposition 8 impacted section 667.5(b). In *People v. Prather*,[32] Chief Justice Lucas, writing for the majority of the court, held that the "without limitation" language in Proposition 8 applied to section 667.5(b) sentencing enhancements.[33] The court reasoned that Proposition 8 superseded the double-base-term limitation provided in section 1170.1(g).[34]

The *Prather* majority acknowledged that the "without limitation" language is difficult to interpret and should not be taken to its literal extreme.[35] The court noted that the language does not divest the legislature of "its basic power *to define* particular enhancements and determine the appropriate period by which a sentence may be increased as a result thereof."[36] However, the court indicated that this power is not broad enough to permit the legislature to establish "general caps or ceilings on overall length of sentence," because such caps are not sufficiently conditional or definitional as, for example, is the permissible limitation to "serious felonies" provided in section 1170.[37]

The supreme court in *Prather* concluded that section 667.5(b) merely provides a special sentence enhancement for the *subset* of "prior felony convictions" that were deemed serious enough by earlier sentencing courts to warrant imprisonment.[38] Accordingly, the court held that the language in section 28(f) concerning the use

---

31. *Id.* at 700, 207 Cal. Rptr. at 779.
32. 50 Cal. 3d 428, 787 P.2d 1012, 267 Cal. Rptr. 605 (1990).
33. *Id.* at 437, 787 P.2d at 1017-18, 267 Cal. Rptr. at 610-11.
34. *Id.* at 440, 787 P.2d at 1020, 267 Cal. Rptr. at 613.
35. *Id.* at 437, 787 P.2d at 1017-18, 267 Cal. Rptr. at 610-11.
36. *Id.* at 438, 787 P.2d at 1018, 267 Cal. Rptr. at 611 (emphasis in original).
37. *Id.* at 438-39, 787 P.2d at 1019, 267 Cal. Rptr. at 612.
38. *Id.* at 440, 787 P.2d at 1020, 267 Cal. Rptr. at 613.

of prior felony convictions for sentence enhancement purposes includes the lesser category of enhancements based upon prior felony convictions for which imprisonment was imposed.[39]

The recently depublished case of *People v. Vallejo-Lugo*[40] raised two issues dealing with the effects of Proposition 8: (1) Whether trial courts continue to have the power to stay enhancements; and (2) whether *Fritz* can still be utilized by trial courts to strike or stay a one-year enhancement.[41] The trial court in *Vallejo-Lugo* had imposed three separate five-year enhancements for section 667 prior convictions, but pursuant to section 654,[42] stayed execution of sentence for two one-year enhancements for section 667.5(b) prison priors. On appeal, the defendant argued that the trial court had discretion to impose enhancements with lesser terms and stay those with greater terms.[43] However, the appellate court concluded that section 28(f) precludes trial court discretion from staying section 667 enhancements under the guise of section 654.[44] The court reasoned that section 28(f) provides that prior felony convictions shall be used "without limitation" for purposes of sentence enhancement, and staying an enhancement pursuant to section 654 amounts to an unauthorized limitation.[45] Thus, applying the reasoning of *Prather*, the court held that section 654 was inapplicable to the imposition of sentence enhancements under both sections 667 and 667.5(b) because it limited punishment, rather than defined offenses or enhancements.[46]

---

39. *Id.*

40. 228 Cal. App. 3d 66, 278 Cal. Rptr 713 (1991) (depublished May 16, 1991). *See* CAL. RULE OF COURT 979(e) (West 1991) (a depublication order is not a statement of correctness nor inferentially a statement of wrongness of a result in a case).

41. *Vallejo-Lugo*, 278 Cal. Rptr. at 714-15.

42. CAL. PENAL CODE § 654 (West 1988). Section 654 provides in pertinent part: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions but in no case can it be punished under more than one." *Id.* In *Vallejo-Lugo*, the first prior prison term enhancement was based upon the same offense supporting the first and second prior serious felony enhancements, and the second prior prison term was based on the same offense supporting the third prior conviction enhancement. *Vallejo-Lugo*, 278 Cal. Rptr. at 714.

43. *Vallejo-Lugo*, 278 Cal. Rptr. at 715-16.

44. *Id.* at 717.

45. *Id.*

46. *Id.* at 718.

The more controversial issue in *Vallejo-Lugo* was whether the enhancement terms for the two section 667.5(b) priors must be reinstated.[47] Having concluded that the terms could not be stayed, the appellate court considered whether the trial court had the discretionary power to dismiss or strike the enhancements pursuant to section 1385.[48] The court held in the affirmative, reasoning that because the supreme court in *People v. Fritz* articulated a general statement that section 1385 power survived the enactment of Proposition 8, and because the 1986 amendments to sections 1385 and 667 eliminated the power of the trial court to strike section 667 enhancements, the power to strike section 667.5(b) enhancements survived in light of Proposition 8.[49]

Depublication of the *Vallejo-Lugo* opinion, at the very least, casts doubt upon the appellate court's limited resurrection of *Fritz*. If the state legislature decides to intervene and specify that the discretionary power of trial courts to strike section 667.5(b) enhancements is also abrogated, there will be no remaining doubt as to the demise of *Fritz*.

III. A JURIST'S PERSPECTIVE

Absent legislative intervention or a definitive ruling from the California Supreme Court in a case addressing the issue of sentencing enhancements, a trial judge confronted with the issues presented in *Vallejo-Lugo* is likely to experience a deep sense of loneliness. The trial judge knows that since it was depublished, *Vallejo-Lugo* may not be cited as a binding precedent.[50] To whom or to what should the trial judge turn for guidance? Should the judge opt to be bold or circumspect?

Those of us who have served at the trial level understand that seeking shelter from appellate reversal by opting for the seemingly cautious approach can, at times, render us no less vulnerable to the

---

47. *Id.*
48. *Id.* at 718-19.
49. *Id.* at 719.
50. *See* CAL. RULE OF COURT 979(e) (West 1991) (a depublication order is not a statement of correctness nor inferentially a statement of wrongness of a result in a case).

storm. To a judge, the history of Proposition 8, as discussed above, demonstrates how difficult it is to discern what is, or is not, a safe approach when dealing with issues relating to sentence enhancements. A judge willing to eschew safety may be tempted by a defense attorney's urging of the court to exercise its power under a statute which has not yet been subjected to Proposition 8 scrutiny. For example, a judge may apply Penal Code section 1170.1(h) which provides for the striking of a sentence enhancement if the court determines the existence of "mitigating circumstances."[51] Section 1170.1(h) has never been subjected to appellate scrutiny to determine its validity in light of the "without limitation" clause of Proposition 8, yet, a trial judge willing to make regular use of this source of power would certainly be inviting appellate intervention. Trial judges facing the types of issues presented in *Vallejo-Lugo* are thus left only to make educated guesses of what circumstances, if any, allow striking or staying section 667.5(b) enhancements.

IV. CONCLUSIONS

A certain irony emerges from this brief study. The apparent effort of the drafters of Proposition 8 to be blunt and leave nothing subject to exception has instead incited a ten-year trail of controversy not yet completely resolved. Although one objective in drafting this initiative may have been to avoid intricacies that tend to be beyond the ken of the typical voter, the elements of sentencing law, even if expressed in their simplest form, cannot be understood by the public at large.[52]

While the intent of the electorate to toughen sentences of repeat offenders arose, at least in part, from a belief that the legislature

---

51. CAL. PENAL CODE § 1170.1(h) (West Supp. 1992) (providing for striking of a sentence enhancement if the court "determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment").

52. *See generally*, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. Cal. L. Rev. 733 (1988).

had failed to address the issue,[53] it is the legislature which is charged with defining applicable crimes. Although caps on lengths of sentences may no longer serve as limitations on section 667 and sections 667.5(b) sentence enhancements, the categories of present and prior crimes to which Proposition 8 applies remain subject to definition.

"Without limitation" as used in Proposition 8 is limited by statutory powers exercised by the courts and clarifying definitions expressed by the Legislature. Initiative drafters should learn from this example and take caution in using seemingly absolute terms. As the well-worn maxim appropriately states, "Never say never."

53. *See* People v. Prather, 50 Cal. 3d 428, 435-36 n.7, 787 P.2d 1012, 1016 n.7, 267 Cal. Rptr. 605, 609 n.7 (1990) (discussing the public's dissatisfaction with the legislature's failure to sufficiently punish dangerous felons).