In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

AMIR A. AHMED,

Defendant and Appellant.

Case No. S191020

Appellate District Division Two, Case No. RIF145548
Riverside County Superior Court, Case No. E049932
The Honorable Sharon J. Waters, Judge

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

ISSUES PRESENTED

1. Does the multiple punishment bar of Penal Code section 654 apply to sentence enhancements generally?[1]

2. Even if section 654 does apply to sentence enhancements, does section 1170.1 evidence the legislative intent that section 654 not prohibit imposition of sentence enhancements for both personal use of a firearm and for infliction of great bodily injury?

INTRODUCTION

Appellant was arguing with his girlfriend, Larin Romo, inside his apartment. The argument ended when appellant shot Romo in the stomach. The gunshot caused Romo severe injuries. She underwent emergency surgery to safe her life, and remained in the hospital for three weeks.

The jury convicted appellant as charged of assault with a firearm, as well as enhancements for personally using a firearm and causing great bodily injury. The trial court sentenced appellant to four years for the assault, four years for the great bodily injury enhancement, and three years for the gun use enhancement. The appellate court ordered the three year gun use enhancement stayed, finding that its imposition violated the multiple punishment proscription of section 654.

The appellate court erred in so doing because section 654 is not applicable to sentence enhancements, including conduct enhancements. The purpose of section 654 is to ensure a defendant's punishment is commensurate with his or her culpability. The court's application of 654 here does just the opposite, essentially giving appellant the same sentence as a defendant who shoots at his victim and misses; shoots at his victim and

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

does not cause great bodily injury; or causes great bodily injury by some force other than a firearm. This does not comport with the purpose of section 654. Moreover, application of section 654 to enhancements renders other narrowly tailored statutes superfluous.

Assuming, arguendo, that this Court decides 654 generally applies to conduct enhancements, it nevertheless does not apply in this case because the plain language of section 1170.1, subdivisions (f) and (g) make it clear that gun use and great bodily injury enhancements shall be imposed notwithstanding section 654. Moreover, the legislative history of both sections comports with this interpretation of the statute.

STATEMENT OF CASE

A Riverside County jury found appellant guilty of assault with a firearm, in violation of section 245, subdivision (a). (1 CT 172.) The jury also found it true that appellant personally used a firearm, within the meaning of section 12022.5, subdivision (a), and that appellant personally inflicted great bodily injury under circumstances involving domestic violence, within the meaning of section 12022.7, subdivision (e). Appellant admitted two prior prison terms within the meaning of section 667.5, subdivision (b). (1 CT 173-174.)

The court sentenced appellant to a 13-year prison term, consisting of the upper term of four years for the substantive crime; three years for the gun use enhancement; four years for the great bodily injury enhancement; and two years for the two prior prison terms. (1 CT 211.)

The Court of Appeal found no error affecting the conviction. It held, however, in the published portion of its opinion, that the imposition of separate and unstayed sentences on the firearm use enhancement and the great bodily injury enhancement violated section 654. In so holding, the Court reasoned that section 654 can apply to an enhancement, at least under some circumstances. The Court of Appeal also rejected the People's

argument that section 1170.1, subdivisions (f) and (g) permit imposition of both enhancements notwithstanding section 654. (*People v. Ahmed*, Slip Opinion at pp. 17-19.) Consequently, the Court of Appeal directed the trial court to modify the judgment with respect to the sentence by staying execution of the consecutive three-year term imposed on the personal firearm use enhancement.

On March 2, 2011, respondent filed a petition for review in this Court. On April 20, 2011, the Court granted review.

STATEMENT OF FACTS

Appellant and his girlfriend, Larin Romo, were arguing inside his apartment. (1RT 62.) Romo was sitting on the floor in appellant's kitchen looking through some items she had purchased during the day, and appellant was sitting at the kitchen table. Romo did not believe the argument to be very serious, and she was shocked when appellant unexpectedly shot her in the abdomen. She could not believe that she had been shot, and she did not see it coming. (1RT 47.)

When Romo realized what happened, she begged appellant to call 911. (1RT 55.) She was scared and found it difficult to breathe. (1RT 55.) Romo believed appellant was more afraid of getting into trouble than he was of her dying, so she told him that she would not tell the police what had happened. (1RT 55-56.) Appellant picked Romo up, put her on his bed, and called 911. (1RT 56.)

Paramedics transported Romo to the hospital where she underwent emergency life-saving surgery. The bullet penetrated Romo's abdomen and fractured her pelvis. It left seven separate holes in Romo's small bowel and two holes in her colon. She remained in the hospital for about three weeks. (1RT 54-55, 57, 135-136.)

When the police arrived, Romo said she had been standing on the balcony, smoking a cigarette, when she was shot. (1 RT 56, 147.) A search

of the balcony and the area beneath it uncovered nothing of evidentiary value. (1 RT 147-149.) The police did find a pistol magazine hidden in a box of staples in appellant's room. (1 RT 173-174.)

The police searched appellant's apartment again the next day. (1 RT 246.) They found a live .380-caliber bullet hidden under a piece of cardboard in a jewelry box. (1 RT 252, 2 RT 336.) Later that day, Riverside Police Detective Wheeler spoke to Romo at the hospital. (1 RT 242.) She maintained that she did not know who shot her. (1 RT 59.)

Detective Wheeler spoke to Romo again. After he confronted her with inconsistencies in her story, she admitted it was appellant who shot her. (1RT 59, 243.) She testified that she lied about appellant being the shooter because she was afraid for her safety. (1RT 64.)

ARGUMENT

I. SECTION 654 DOES NOT APPLY TO SENTENCE ENHANCEMENTS

The multiple punishment bar of section 654 does not apply to enhancements because its application would circumvent the very purpose of section 654, which is to ensure that a defendant's punishment is commensurate with his or her culpability. Further, as this Court's reasoning in prior cases demonstrates, application of section 654 to enhancements would render other code sections superfluous. This is true of both status and conduct enhancements alike. Moreover, principles of statutory interpretation and legislative intent are in accord with this interpretation.

A. Principles of statutory construction

The principles governing statutory construction are well established. As this Court has observed, "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate

the purpose of the law." (*People v. Pieters* (1991) 52 Cal.3d 894, 898; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 621.) In approaching this task, a court "must first look at the plain and common sense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose." (*People v. Cochran* (2002) 28 Cal.4th 396, 400; see also *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724, 727-728 [in adopting legislation, the Legislature is presumed to have had knowledge of existing domestic judicial decisions an to have enacted and amended statutes in the light of such decisions as have a direct bearing on them].)

If there is "no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said," and it is not necessary "to resort to legislative history to determine the statute's true meaning." (*People v. Cochran, supra*, 28 Cal.4th at pp. 400-401.) However, "'[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*People v. Pieters, supra*, 52 Cal.3d at p. 899.) Courts do not construe statutes in isolation, but rather "read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*Ibid.*) Namely, the words must be considered "'"in context, keeping in mind the nature and obvious purpose of the statute. . . ." [Citation.]'" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) A court must take the language of a statute "as it was passed into law, and must, if possible without doing violence to the language and spirit of the law, interpret it so as to harmonize and give effect to all its provisions." (*People v. Garcia* (1999) 21 Cal.4th 1, 14.)

Courts will not construe an ambiguity in favor of the accused if such a construction is contrary to the public interest, sound sense, and wise policy. (*People v. Douglas* (1979) 24 Cal.3d 428, 434-435; *In re Ramon A.* (1995) 40 Cal.App.4th 935, 941.) Rather, the major consideration in interpreting a

criminal statute is the legislative purpose. The statute is read in light of the evils which prompted its enactment and the method of control which the Legislature chose. (*In re Ramon A., supra*, 40 Cal.App.4th at p. 941.)

Further, "[w]here statutes are in conflict, it is well settled that ' " 'a general [statutory] provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.' " ' [Citations.]" (*People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1045–1046, quoting *People v. Superior Court* (2002) 28 Cal.4th 798, 808.)

1. Application of section 654 to sentence enhancements is contrary to the purpose of the statute

Penal Code section 654, subdivision (a), states:

An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

Section 654 has been extended to preclude multiple punishments for "a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction." (*People v. Perez* (1979) 23 Cal.3d 545, 550, 551.) However, where a defendant entertains multiple and independent criminal objectives, separate punishments are permitted for violations of law which would otherwise constitute an indivisible course of conduct. (*Ibid.*) As such, section 654 ensures a defendant's punishment is commensurate with his or her culpability. (*People v. Latimer* (1993) 5

Cal.4th 1203, 1211; *People v. Perez, supra*, 23 Cal.3d at pp. 550-551; *Neal v. State of California* (1960) 55 Cal.2d 11, 20.)

There are two different categories of sentence enhancements: status enhancements, which go to the nature of the offender, such as recidivist enhancements; and conduct enhancements, which go to the nature of the offense, such as a firearm enhancement. (*People v. Coronado* (1995) 12 Cal.4th 145, 156.) (*Coronado*). In Coronado, this Court held that section 654 does not apply to status enhancements because they "'relate to the status of the recidivist offender engaging in criminal conduct, not to the conduct itself.'" (Id. at p. 157.) This Court concluded that it was unnecessary to resolve the issue regarding conduct enhancements. (*Ibid.*)

Appellate courts disagree about the application of section 654 to conduct enhancements. (See *People v. Boerner* (1981) 120 Cal.App.3d 506, 511 [section 654 is "inapplicable to enhancements, because they individually do not define a crime or offense but relate to the penalty to be imposed under certain circumstances."] [internal citations omitting and citing cases in accord]; but see *People v. Moringlane* (1982) 127 Cal.App.3d 811, 817; *People v. Dobson* (1988) 205 Cal.App.3d 496, 501[section 654 applies regardless if those violations are defined as offenses or enhancements] [and citing cases in accord].)

While recognizing this disagreement, this Court has repeatedly declined to decide the issue, finding these cases dispositive on other grounds. (See, *e.g., People v. Rodriguez* (2009) 47 Cal.4th 501, 507-508; *People v. Palacios* (2007) 41 Cal.4th 720, 727-728; *People v. Oates* (2004) 32 Cal.4th at 1048, 1066, fn. 7; *People v. Coronado, supra*, 12 Cal.4th at p. 157; *People v. Jones* (1993) 5 Cal.4th 1142, 1152; *People v. King* (1993) 5 Cal.4th 59, 78.)

Application of 654 to conduct enhancements would circumvent the purpose of section 654 and the purpose of individual enhancements

themselves. Because the purpose of section 654 is to ensure a defendant's punishment is commensurate with his culpability, courts must have discretion to impose enhancements notwithstanding section 654. As in this case, if enhancements are subject to section 654, a defendant who shoots his victim, requiring her to undergo emergency life saving surgery and hospitalization lasting three weeks, would receive the same sentence as a defendant shoots at his victim and misses her, or shoots and grazes her arm, leaving only an abrasion. This result gives the defendant here a "free" enhancement, and is directly contrary to the purpose of section 654.

Moreover, applying section 654 to enhancements contradicts the purpose of individual enhancements themselves. Enhancements "focus on an element of the commission of the crime or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves. That is one of the very purposes of an enhancement's existence." (*People v. Rayford* (1994) 9 Cal.4th 1, 9, quoting *People v. Hernandez* (1988) 46 Cal.3d 194, 207-208.) (See *People v. Boerner*, *supra*, 120 Cal.App.3d at p. 511 [section 654 does not apply to sentencing enhancements "because they individually do not define a crime or offense but relate to the penalty to be imposed under certain circumstances.].) As this Court has recently observed, section 654 "applies only to offenses punishable in different ways[.]" (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1124, fn. 5, emphasis added.)

The legislative intent with regard to the enhancement provisions here supports this interpretation. As to section 12022.5, subdivision (a), the Legislature's intent "is to deter persons from creating a potential for death or injury resulting from the very presence of a firearm at the scene of a crime, and to deter the use of firearms in the commission of violent crimes by prescribing additional punishment for each use." (*In re Tameka C.*

(2000) 22 Cal.4th 190, 196, internal citations omitted; see also *People v. Ledesma* (1997) 16 Cal.4th 90, 101 ["the obvious purpose of section 12022.5 is to deter the use of firearms in the commission of violent crimes by prescribing additional punishment for each use."].) Similarly, "[s]ection 12022.7 is a legislative attempt to punish more severely those crimes that actually result in great bodily injury." (*People v. Guzman* (2000) 77 Cal.App.4th 761, 765.)

If section 654's proscription against multiple punishment is applicable to conduct enhancements, in every case where a defendant shoots his victim causing serious injury, or a variety of other such scenarios, the defendant will get a "free" enhancement, and the legislative intent in enacting the enhancement statutes will be thwarted. The purpose of enhancements is to impose a harsher penalty on crimes that justify a higher penalty. Therefore, this interpretation of section 654 is incorrect.

2. Application of section 654 to enhancements renders other code sections superfluous

This Court's reasoning in *Coronado* supports the conclusion that section 654 does not apply to conduct enhancements, because doing so would render more narrowly tailored conflicting code sections superfluous. In concluding that section 654 does not apply to status enhancements, Coronado relied in large part on *People v. Rodriguez* (2008) 206 Cal.App.3d 517, quoting the following portion of that decision:

> To hold that section 654 applies to enhancements to forbid the dual use of any fact [such as a prior conviction or prison term] as well as to forbid multiple punishment for any act would render provisions of Penal Code section 1170, subdivision (b) superfluous and negate an amendment thereto. Section 1170, subdivision (b) presently provides in pertinent part that '[t]he court may not impose the upper term by using the fact of any enhancement upon which sentence is imposed under section 667.5 . . . or under any other section of law.' If section 654 prohibited all dual uses

> of facts, this section . . . would be superfluous. [¶] When section 1170, subdivision (b) was enacted in 1976, it also provided: 'In no event shall any fact be used twice to determine, aggravate, or enhance a sentence.' Immediately prior to the effective date of this legislation, this provision of section 1170, subdivision (b) was deleted. [¶] This provision would have prohibited the sentences here as the same conviction and prison term is used to 'determine' the sentence as a felony and to enhance the sentence. It would be anomalous to apply this rule enacted in 1976 and repealed in 1977 before becoming effective under the guise of interpretation of section 654 which has been in existence since 1872.

(*People v. Coronado, supra*, 12 Cal.4th at pp. 157-158, quoting *People v. Rodriguez, supra*, 206 Cal.App.3d at pp. 519-520, fn. omitted.)

In *Coronado*, this Court applied the reasoning in *Rodriguez* to hold the same prior conviction could be used to elevate a driving under the influence conviction to a felony and enhance the sentence under section 667.5, subdivision (b). (*People v. Coronado, supra*, 12 Cal.4th at p. 159.) This Court concluded: "Because the repeat offender (recidivist) enhancement imposed here does not implicate multiple punishment of an act or omission, section 654 is inapplicable." (*Id.* at p. 158.) This Court did not decide whether section 654 applied to the second category of enhancements which go to the nature of the offense. (See *People v. Coronado, supra*, 12 Cal.4th at p. 157.) Nevertheless, this Court found "the reasoning of *Rodriguez* persuasive." (*Id.* at p. 158.)

Respondent submits the reasoning of *Rodriguez* applies equally to the second category of enhancements, namely, those going to the nature of the offense. The deleted language of former section 1170, subdivision (b) prohibited the dual use of facts not only to "determine" a sentence, but to "aggravate" or "enhance" it as well. As in *Rodriguez*, it would be anomalous to apply the repealed portions of section 1170 under the guise of

interpretation of section 654. As noted in *Rodriguez*, section 654 has been in existence since 1872. If such a limitation on multiple use of enhancements were already included within that provision, it would not have been necessary for the Legislature to enact the limitations on the use of such sentence enhancements in the 1976 amendments to section 1170, subdivision (b) – amendments the Legislature repealed in any event the very next year.

Indeed, the *Rodriguez* court also noted that application of section 654 to enhancements would render sections 12022, subdivisions (a) and (b), and 12022.5, subdivisions (a) and (b), superfluous. (See *People v. Rodriguez, supra*, 206 Cal.App.3d at p. 519.) Those provisions state that firearm enhancements can be imposed only when the arming or use of the firearm is not an element of the underlying offense, prohibiting dual use of facts that would otherwise be barred under section 654. Once again, these provisions would not have been necessary if section 654 already included such a bar.

In a similar fashion, the Legislature has also limited the number of enhancements which may be imposed under other sections. Section 12022.53, subdivision (f), is one such provision, limiting those firearm or great bodily injury enhancements which may be added in addition to an enhancement under section 12022.53.

However, at least two appellate decisions have interpreted *Coronado* to apply section 654 to conduct-based enhancements. (See *People v.* Reeves (2001) 91 Cal.App.4th 14, 56 [great bodily injury enhancements]; *People v. Arndt* (1999) 76 Cal.App.4th 387 [same].) In *People v. Arndt, supra,* 76 Cal.App.4th at page 395 the court concluded that section 654 applied to the imposition of both the great bodily injury enhancements under section 12022.7 and Vehicle Code section 23182. (*Id.* at pp. 395-396.) *Arndt* held that is was error to impose both enhancements based on

the same injury. (*Id.* at p. 397.) Arndt cited *People v. Moringlane* (1982) 127 Cal.App.3d 811, as the lead case for the proposition that section 654 applies to enhancements. However, "in construing section 654, Moringlane relied heavily on" *In re Culbreth* (1976) 17 Cal.3d 330 which "'was not based on . . . section 654.'" (*People v. Oates, supra*, 32 Cal.4th at p. 1067, quoting *People v. King, supra*, 5 Cal.4th at p. 78, and disapproving *Moringlane*.) Accordingly, *Moringlane's* section 654 analysis is faulty.[2]

In *People v. Reeves* (2001) 91 Cal.App.4th 14, the court held that section 654 applied to preclude imposition of two great bodily injury enhancements based on the same injury for two different counts of burglary and assault, reasoning that "[m]ultiple enhancements for the same criminal conduct run directly counter to section 654's rule against multiple punishment in a way offender-status-based enhancements do not." (*Id.* at pp. 55-56.)

In relying on the reasoning of *Coronado*, both *Arndt* and *Reeves* disregarded this Court's admonition that it did not intend to decide whether section 654 applied to conduct enhancements. (*People v. Coronado, supra*, 12 Cal.4th at p. 157.) Indeed, in *People v. Masbruch* (1996) 13 Cal.4th

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[2] *Armdt* correctly concluded that the trial court erred in imposing a great bodily injury enhancement pursuant to section 12022.7, and a great bodily injury enhancement pursuant to Vehicle Code section 23182. However, *Arndt* incorrectly based its conclusion on the application of section 654 to enhancements, citing to *People v. Moringlane, supra*, 127 Cal.App.3d at p. 817. (*People v. Arndt, supra,* 76 Cal.App.4th at p. 397.) As explained below, section 1170.1, subdivision (g) prohibits the imposition of two injury-related enhancements to a single injury suffered by one victim. Hence, the Penal Code already provides adequate protection against multiple punishment for the same harm, and it is unnecessary to extend section 654's multiple punishment ban to conduct based enhancements.

1001, this Court expressly rejected any notion that *Coronado* was meant to decide the fate of such conduct based enhancements:

> [C]ontrary to defendant's implication, and language in *People v. Funtanilla* [(1991)] 1 Cal.App.4th [326, 331], we have never held that section 654 applies to weapon enhancements. [Citations.]

(*People v. Masbruch, supra*, 13 Cal.4th at p. 1013.) Of course, weapon enhancements are conduct-based enhancements.

Thus, both *Arndt* and *Reeves* are premised on faulty logic: simply because this Court has previously held that section 654 does not apply to status enhancements, it does not follow that the multiple punishment bar applies to conduct enhancements. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57 ["An opinion is not authority for a point not raised, considered, or resolved therein"].)

Taken to its logical conclusion, application of section 654 to conduct enhancements would largely preclude these enhancements from ever being imposed. This is so because such enhancements are generally based on the same act or omission as the underlying offense. Thus, for example, a gang member who commits a drive-by shooting with the intent to commit murder, and who in fact murders a victim, could never have his murder conviction enhanced by section 12022.55 for discharging a firearm from a vehicle during the commission of a felony. This simply cannot be the law. To refrain from imposing a section 12022.55 enhancement under these circumstances would contradict the terms of section 12022.55 and would preclude imposition of the enhancement to crimes such as murder and mayhem, the most vicious consequences of discharging a weapon from a motor vehicle. (*People v. Myers* (1997) 59 Cal.App.4th 1523, 1533; see also *People v. Ross* (1994) 28 Cal.App.4th 1151, 1158-1159 [rejecting

argument that section 12022.5 enhancement could not apply to murder committed by handgun].)

Moreover, there is simply no need to apply section 654 to enhancements. For situations where multiple enhancements are attached to the same offense, the Legislature has addressed the problem of dual use without resort to section 654. For example, section 1170.1, subdivision (f), states that where more than one weapon or firearm enhancement may apply to "a single offense," only the greatest enhancement may be imposed. Subdivision (g) of section 1170.1 provides a similar mandate for great bodily injury enhancements "on the same victim in the commission of a single offense. . . ." Similarly, section 12022.53, subdivision (f), limits the number of firearm and great bodily injury enhancements to one additional term of imprisonment "per person for each crime."

In cases involving multiple offenses, "an enhancement must necessarily be stayed where the sentence on the count to which it is added is required to be stayed [under section 654].'" (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 711, quoting *People v. Guilford* (1984) 151 Cal.App.3d 406, 411.) To do otherwise would improperly elevate the enhancement from a punishment provision to the status of an offense. (Ibid.) A firearm enhancement "is dependent upon and necessarily attached to its underlying felony." (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311.) Hence, an enhancement attached to a crime which must be stayed pursuant to section 654 is stayed by virtue of the fact that it cannot be punished separately from the offense to which it attaches. There is no need to apply section 654 specifically to the enhancement in such a situation.

As it did here, the application of section 654's proscription against multiple punishment to enhancements nullifies a gun use enhancement in every case where the gun use causes great bodily injury. In order to harmonize, and not render superfluous, the statutes and principles of law

discussed above, section 654 should be held inapplicable to offense-based enhancements.

At the very least, section 654's proscription against multiple punishment should not be applied to conduct enhancements that address multiple harms. For example, here, the trial court's imposition of sentence for the gun-use enhancement punished appellant for the harm of gun use in accordance with the legislative intent in prescribing additional punishment for crimes involving guns, and in deterring the use of firearms in the commission of crimes. (See *In re Tameka C., supra*, 22 Cal.4th at p. 196; *People v. Ledesma, supra*, 16 Cal.4th at p. 101.) The trial court's imposition of sentence for the great-bodily-injury enhancement punished appellant for a separate harm, the infliction of great bodily injury. Appellant's sentence in this regard is also in accordance with the legislative intent in punishing more severely those crimes that actually result in great bodily injury. (See *People v. Guzman, supra*, 77 Cal.App.4th at p. 765.) Such an interpretation comports with the purpose of section 654, because it punishes more harshly the individual harms in conformity with what are deemed by the Legislature to be more serious offenses.

II. ASSUMING ARGUEMDO THAT SECTION 654 APPLIES TO SENTENCE ENHANCEMENTS, THE COURT OF APPEAL ERRED BY APPLYING IT TO PRECLUDE IMPOSITION OF THE GUN USE ENHANCEMENT AND INFLICTION OF GREAT BODILY INJURY ENHANCEMENT

Even if section 654 applies as a general matter to sentence enhancements, it does not apply in this case because the plain language of section 1170.1, subsections (f) and (g), make it clear that the gun use and great bodily injury enhancements apply notwithstanding section 654. Even if the language of section 1170.1 could be deemed ambiguous, the

legislative history is clear that both enhancements are intended to be imposed notwithstanding section 654.

Section 1170.1 is a narrowly crafted sentencing provision. As is pertinent here, section 1170.1 prescribes:

> (f) When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury.
>
> (g) When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for being armed with or using a dangerous or deadly weapon or firearm.

(Pen. Code, § 1170.1, subds. (f) and (g).)

The plain language of section 1170.1, subdivision (f), that "[t]his subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury" reflects the Legislature did not intend for section 654 to prohibit the imposition of any other enhancement that is applicable to the underlying offense, including an enhancement for the infliction of great bodily injury. Likewise, the plain language of section 1170.1, subdivision (g), "[t]his subdivision shall not limit the imposition of any other enhancements applicable to that offense, including [gun use] enhancement" establishes that the Legislature did not intend for section 654 to prohibit the imposition of any other enhancement that is applicable to the underlying offense, including an enhancement for being armed with or using a

dangerous or deadly weapon or firearm. According to this plain laguage, section 654 does not bar the imposition of both a deadly-weapon-use enhancement under section 12022, subdivision (b)(1), and an infliction-of-great-bodily-injury enhancement under section 12022.7, subdivision (a), in the instant case.

The Court of Appeal rejected this plain, commonsense reading of the statute, holding that section 1170.1, subdivision (h), is the only subdivision in section 1170.1 that is not subject to section 654.

Section 1170.1, subdivision (h) provides:

> For any violation of an offense specified in Section 667.6, the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term.

By "negative implication," held the Court of Appeal, "section 654 does limit the enhancements that may be imposed on a defendant convicted of any other offense." (Slip opn. pp. 18-19.)

The Court of Appeal found no conflict between sections 654 and section 1170.1, subdivisions (f) and (g), because both of the latter provisions state, " 'This subdivision shall not limit the imposition of any other enhancements applicable to that offense,' " including the enhancement for firearm use and for the infliction of great bodily injury. (Slip Opn. at pp. 17-18.) According to the Court of Appeal, the italicized language served to leave open the potential for other statutes, including section 654, to "limit the imposition of other enhancements." (*Ibid.*) However, such a reading is inconsistent with the

> well-established rule ... that the Legislature may create an express exception to section 654's general rule against double punishment by stating a specific legislative intent to impose additional punishment. [Citations.] A statute which

> provides that a defendant shall receive a sentence enhancement in addition to any other authorized punishment constitutes an express exception to section 654.

(*People v. Ramirez* (1995) 33 Cal.App.4th 559, 572–573; see also *Palacios*, *supra*, 41 Cal.4th at p. 730 ["courts have repeatedly upheld the Legislature's power to override section 654 by enactments that do not expressly mention the statute"].)

Further, that the Legislature intended to permit imposition of sentence for both the firearm use and great bodily injury enhancements in sections 1170.1, subdivisions (f) and (g), notwithstanding section 654, cannot be mistaken where the Legislature specifically and expressly rendered another subdivision of section 1170.1 subject to section 654. Section 1170.1, subdivision (a), prescribes in pertinent part:

> (a) Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. . . .

While the Legislature made clear that the terms of subdivision (a) are subject to the prohibition against double punishment, the Legislature specified that subdivisions (f) and (g) "shall not limit the imposition of any other enhancements that are applicable to [the] offense." Had the Legislature wanted to impose an additional limit to the imposition of such enhancements, it could have easily done so. (Cf. *People v. Oates, supra*, 32 Cal.4th 1048, 1056-1057 [finding section 12022.53 was intended to permit multiple enhancements where "the Legislature expressly included in section 12022.53 specific limitations on imposing multiple enhancements, but did

not limit imposition of subdivision (d) enhancements based on the number of qualifying injuries."]) Indeed, it could have referenced section 654 in subdivisions (f) and (g), as it had done in subdivision (a).

Moreover, as discussed above, "in construing a statute a court seeks to avoid an interpretation that renders a statute or ordinance 'superfluous in whole or in part.' " (*Vanderpol v. Starr* (2011) 194 Cal. App.4th 385, 395; *Brewer v. Patel* (1993) 20 Cal.App.4th 1017, 1021.) The immediate effect of the Court of Appeal's opinion here is to largely render the gun use enhancement statute superfluous. This is because in the case where a defendant inflicts great bodily injury by use of a firearm, the defendant would never be subject to the gun use enhancement. This interpretation directly contrasts section 654's purpose of imposing harsher penalties for more serious crimes, and cannot be the proper interpretation of the statute.

Furthermore, the legislative history of section 1170.1, subdivisions (f) and (g), directly comports with this interpretation of the statute. The 1997 amendment to section 1170.1 created what are now subdivisions (f) and (g) by substituting what is now subdivision (f) for the former subdivision which read:[3]

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[3] The amendment created what is now subdivision (g) by substituting former subdivision (g) as well. Former subdivision (g) is not pertinent to the issue at hand. However, for the sake of clarity and to avoid confusion, it is set forth as follows:

> The term of imprisonment shall not exceed twice the number of years imposed by the trial court as the base term pursuant to subdivision (b) of Section 1170, 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 (b) or (c) of this section, or an enhancement is imposed pursuant to subdivision (c) of Section 186.10 or Section 667, 667.15, 667.5, 667.8, 667.83, 667.85, 12022, 12022.2, 12022.4, 12022.5, 12022.55, 12022.6, 12022.7, 12022.75, or 12022.9 of this code, or an enhancement is being

(continued...)

> When two or more enhancements under Sections 12022, 12022.4, 12022.5, 12022.55, 12022.7, and 12022.9 may be imposed for any single offense, only the greatest enhancement shall apply. However, in cases of lewd or lascivious acts upon or with a child under the age of 14 years accomplished by means of force or fear, as described in Section 288, kidnapping, as defined in Section 207, sexual battery, as defined in Section 243.4, spousal rape, as defined in Section 262, penetration of a genital or anal opening by a foreign object, as defined in Section 289, oral copulation, sodomy, robbery, carjacking, rape or burglary, or attempted lewd or lascivious acts upon or with a child under the age of 14 years accomplished by means of force or fear, kidnapping, sexual battery, spousal rape, penetration of a genital or anal opening by a foreign object, oral copulation, sodomy, robbery, carjacking, rape, murder, or burglary the court may impose both (1) one enhancement for weapons as provided in either Section 12022, 12022.4, or subdivision (a) of, or paragraph (2) of subdivision (b) of, Section 12022.5 and (2) one enhancement for great bodily injury as provided in either Section 12022.7 or 12022.9.

A bill analysis of the Senate Committee on Rules explained the reasons for amending former subdivision (f) as follows:

> The bill would provide that a court must impose all applicable sentence enhancements to any felony determinate sentence imposed. It would remove the cap on the number of years a defendant may receive for various applicable enhancements.

(...continued)

imposed pursuant to Section 11370.2, 11370.4, or 11379.8 of the Health and Safety Code, or the defendant stands convicted of felony escape from an institution in which he or she is lawfully confined.

(Sen. Com. on Rules, Analysis of Senate Bill 721 (1997-98 Reg. Sess.) as amended September 5, 1997, p. 2, italics added.) [4]

Further, it explained the "expressed purpose of the bill" as follows:

> The proposed changes in this bill would correct some of the injustices in our present law, which would result in at least some sentences being increased. The bill would do away with certain "free" crimes and "free" enhancements. It would stop rewarding some defendants for their greater criminal ambition and criminal activity. Instead, it would allow such defendants to be more appropriately punished for the full range of their criminal conduct, in the discretion of the court.

(*Id.*, at p. 4.)

Additionally, as the analysis of the Senate Committee on Public Safety explained:

> Only one sentencing enhancement may be imposed under existing law when both a weapon and an injury are involved. . . . This bill would eliminate the "double enhancement" limitation and its many exceptions.

(Sen. Com. on Public Safety, Analysis of Senate Bill 721 (1997-98 Reg. Sess.) as introduced April 15, 1997, pp. 3-4.)

And finally, the analysis of the Assembly Committee on Public Safety explained that the 1997 amendment:

> Eliminates the rule that states if a defendant is charged with at least two enhancements for infliction of great bodily injury (GBI) and/or use of a specified weapon, the court may only sentence the defendant to the greatest of those enhancements (except in special circumstances). [The bill] provides that if a defendant is charged with at least two enhancements for infliction of GBI, the court may only sentence the defendant to the greatest of those enhancements. [The bill] provides that if a defendant is

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[4] By separate motion, respondent has requested that this Court take judicial notice of the legislative analyses referenced in this brief.

> charged with at least two enhancements for use of a weapon, the court may only sentence the defendant to the greatest of those enhancements.

(Assemb. Com. On Public Safety, Analysis of Senate Bill 721 (1997-98 Reg. Sess.) as amended July 10, 1997, p. 1.)

Thus, the legislative history is unambiguous that subdivision (e) was amended to expand the number of enhancements that could be imposed.

As this legislative history suggests, application of section 654 to the enhancements in this case would frustrate "[t]he purpose of the protection against multiple punishment [which] is to insure that the defendant's punishment will be commensurate with his criminal liability." (*Neal v. State of California* (1960) 55 Cal.2d 11, 20.) Section 12022.5 serves to punish gun use while section 12022.7 serves to punish infliction of great bodily injury. Imposing punishment for enhancements under both of the statutes fulfills the clear legislative purpose of punishing more severely those crimes which involve gun use, as well as those crimes that inflict great bodily injury. Applying section 654 to prohibit punishment under both statutes thus undermines legislative intent. Because the purpose of section 654 is to ensure that a defendant's punishment will be commensurate with his culpability, the distinct legislative purposes of section 1170.1, subdivisions (f) and (g), clearly show that the Legislature did not intend to exempt a defendant from punishment when enhancements under the two statutes are pled and proven.

As previously discussed, a defendant who shoots a victim, thereby causing great bodily injury, is more culpable than one who either fired and missed, or used some other type of weapon. Notably, under the Court of Appeal's opinion, a defendant who shoots and misses would have no incentive not to continue shooting until he strikes the victim. Such a defendant would not be subject to any additional punishment if he

continues shooting at the victim until he inflicts great bodily injury than a defendant who stops shooting after the first shot. Allowing a defendant this "free" enhancement for more egregious behavior is contrary to the intent of section 654, section 1170.1, and section 12022.5, and it is the exact situation the amendment to section 11701.1, subdivisions (f) and (g) sought to remedy.

In sum, the Legislature has provided in clear and unambiguous language in section 1170.1, subdivisions (f) and (g), that a sentencing court may impose enhancements for both personal deadly weapon or firearm use and personal infliction of great bodily injury for the same course of conduct. The language of section 1170.1, subdivision (f), reflects the Legislature did not intend for section 654 to prohibit the imposition of any other enhancement that is applicable to the underlying offense, including an enhancement for the infliction of great bodily injury. Likewise, the language of section 1170.1, subdivision (g), establishes that the Legislature did not intend for section 654 to prohibit the imposition of any other enhancement that is applicable to the underlying offense, including an enhancement for being armed with or using a dangerous or deadly weapon or firearm. The Court of Appeal's rejection of the People's argument in this regard contravenes the intent of the Legislature.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: June 2, 2011

Respectfully submitted,

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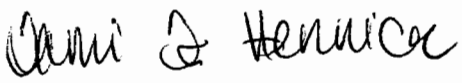

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CERTIFICATE OF COMPLIANCE

I certify that the attached **BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 6,957 words.

Dated: June 2, 2011

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Amir Ahmed**
No.: **S191020**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 2, 2011, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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The Honorable Paul E. Zellerbach
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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on June 2, 2011 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 2, 2011, at San Diego, California.

Arlene M. Ryan
Declarant

Arlene M. Ryan
Signature

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