IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

MARTIN MANZO,
Defendant and Appellant.

Case No. S191400

Fourth Appellate District, Division One, Case No. D055671
San Diego County Superior Court, Case No. SCS212840
The Honorable Timothy R. Walsh, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

RULES OF COURT

OTHER

ISSUE PRESENTED

Could defendant be convicted of discharging a firearm at an occupied motor vehicle in violation of Penal Code section 246, if he was outside the vehicle at the time he discharged his firearm but the firearm itself was inside the vehicle?

INTRODUCTION

As found by the jury, appellant Martin Manzo stood in the open driver's door of his truck and shot Jose Valadez, who was sitting in the passenger seat. The jury found appellant guilty of discharging a firearm at an occupied motor vehicle in violation of Penal Code section 246. On appeal, appellant contended the conviction must be reversed because the evidence tended to prove the gun was inside the truck, even though appellant stood outside the threshold, and therefore he did not fire the gun "at an occupied vehicle" within the meaning of the law. The Court of Appeal agreed, reversing the conviction. The Attorney General did not petition for review, but the California Supreme Court ordered review on its own motion to determine whether the location of the firearm inside the vehicle when it was discharged precludes conviction under section 246.

STATEMENT OF THE CASE AND FACTS

As relevant to the issue on review, a jury convicted appellant Martin Manzo of violating Penal Code section 246 for discharging a firearm at an occupied vehicle. (2CT 565-566 [verdict form]; 558-559, 570 [minutes].)

The evidence credited by the jury showed appellant stood in the open driver-side door of his truck, held up a gun, and shot Jose Valadez, who was sitting in the passenger seat. (9RT 1496-1498, 1510.) The lack of soot or stippling on Valadez indicated the barrel of the gun was one to three feet away when the fatal shot was fired. (8RT 1286-1288.) A law enforcement reconstruction of the crime indicated the gun would have been inside the threshold of the truck at the time it was fired. (9RT 1452-1461.)

On appeal, a panel of the Fourth District Court of Appeal, Division One, reversed the conviction under section 246 for lack of evidence appellant fired "at" an occupied vehicle within the meaning of the statute. The Court of Appeal reasoned that the legislative intent behind the word "at" was ambiguous and the rule of lenity required interpreting the ambiguity in a defendant's favor. This Court ordered review on its own motion to decide whether a person standing outside a vehicle who holds a gun inside an occupied vehicle and fires it can be culpable for discharging a weapon at an occupied vehicle under section 246.

ARGUMENT

I.

FIRING A GUN HELD INSIDE THE THRESHOLD OF A CAR IS NOT DISCHARGING A FIREARM "AT" AN OCCUPIED VEHICLE WITHIN THE MEANING OF PENAL CODE SECTION 246.

Appellant Martin Manzo was charged with and convicted of shooting at an occupied vehicle under Penal Code section 246. As relevant to this case, section 246 states that "Any person who shall maliciously and willfully discharge a firearm at an . . . occupied motor vehicle . . . is guilty of a felony. . . ."

The evidence at trial showed the shooter stood in the open driver-side door of appellant's truck, extended an arm holding a gun, and shot Jose Valadez who was sitting in the passenger seat. The evidence tended to prove the gun used to shoot Valadez was held within the threshold of appellant's truck at the time it was fired. Applying the rules of statutory construction leads to the conclusion that this act of shooting at a person sitting in a truck, using a gun that is also within the truck when it is fired, does not qualify as "discharging a firearm at an occupied vehicle" within the meaning of section 246. Accordingly, the Court of Appeal's reversal of the conviction should be affirmed.

A. The courts have a well-established process to determine the meaning of a law.

Courts are often called upon to determine the meaning of a law. The objective of such statutory interpretation "is to ascertain and effectuate legislative intent." (*People v. Flores* (2003) 30 Cal.4th 1059, 1063; see also *People v. Trevino* (2001) 26 Cal.4th 237, 240.) In other words, the meaning of a law depends on what the people who passed the law intended it to mean. Accordingly, the first step in statutory construction is to examine the the actual words of the statute, giving them their usual and ordinary meaning. (*People v. Trevino*, *supra*, 26 Cal.4th at p. 241.) If the language of a statute is clear, there is no need for construction; the Legislature is determined to have intended the unambiguous meaning, which a court can apply to particular cases. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.)

"However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*People v. Flores*, *supra*, 30 Cal.4th at p. 1063.)

Finally, the rule of lenity provides that "[w]hen language which is

susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute." (*People v. Overstreet* (1986) 42 Cal.3d 891, 896 ; see also *People v. Woodhead, supra*, 43 Cal.3d 1002, 1011; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631 ["[i]t is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit"]; *People v. Stepney* (1981) 120 Cal.App.3d 1016, 1019.)

B. Statutory construction of Penal Code section 246 shows it does not apply to the discharge of a weapon that is inside an occupied vehicle.

Applying the rules of statutory construction to section 246's criminalization of the willful and malicious discharge of a firearm at an occupied vehicle shows the statute does not apply to the act of discharging a firearm that is inside the occupied vehicle, whether or not the shooter is inside or outside the vehicle. Other laws would apply to ensure such a shooting could be prosecuted and punished, but section 246 does not.

1. *The language of section 246.*

Section 246, as relevant here, makes it a crime to "maliciously and willfully discharge a firearm at an . . . occupied motor vehicle. . . ." (Pen. Code, § 246.)[1] In other words, the crime defined in that clause of section 246 is shooting *at a vehicle* that has people inside. "At" is an interesting word, the commonality of which masks a surprising complexity. The American Heritage Dictionary lists 13 separate definitions. While this complexity might in itself make section 246 ambiguous, it seems clear the relevant definition of "at" is "To or toward the direction or location of, especially for a specific purpose." (American Heritage Dict. (3rd ed. 1992) p. 115.) This definition, emphasizing a direction, a pointing toward, contrasts with definitions concerned with location ("the book is at the

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1 The complete statute reads:

> Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, as defined in Section 362 of the Vehicle Code, or inhabited camper, as defined in Section 243 of the Vehicle Code, is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year.
>
> As used in this section, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

(Pen. Code, § 246.)

library"), temporality ("the show starts at 8"), and activity ("she is good at math"), among others. Respondent's attempt to focus on the location-oriented meaning of "at" related to "nearness or proximity" is misguided (Respondent's Opening Brief on the Merits [hereafter ROBM], p. 21); that definition would only apply if section 246 criminalized the discharge of a weapon by a person who is located "at" a building or vehicle. As far as appellant can discern, no one thinks that is the way to read the statute.

Adopting the relevant, directional definition of "at" makes the act criminalized by the vehicle clause of section 246 the willful and malicious discharge of a firearm "toward the direction or location of" an occupied vehicle. This language would encompass an act of shooting at a car that has people in it, say shooting at one of the tires of a passing car, as well as shooting at a person who is in a car, such as a sniper attempting to kill a car's driver. Although in the latter example, the sniper would be shooting at a person, he would necessarily be shooting toward the direction or location of an occupied vehicle at the same time. But this definition of "at" does not encompass the act of reaching a gun inside the threshold of a car and shooting at someone. Once the gun crosses the threshold, the act of shooting is no longer "toward the direction or location of" a *vehicle*; rather, it is shooting at a person who happens to be in a vehicle. The act is

obviously punishable as a crime, just not the crime defined by section 246.

The "no ambiguity" position advocated here was taken by the appellant in *People v. Stepney*, *supra*, 120 Cal.App.3d 1016, 1019, who was convicted of discharging a firearm at an occupied dwelling house after he climbed into an occupied building through a window and fired a bullet into a television set while he was in the living room. (*Id.* at p. 1018.) The Court of Appeal did not reject the appellant's position, but noted that "'at' is a word of many meanings" and that "[a]n argument can be made that once can shoot *at* a building or automobile from within as well as from without." (*Id.* at p. 1019.) "Nevertheless," the *Stepney* court concluded, "*even if* section 246 is ambiguous and reasonably susceptible to both the narrow reading urged by appellant and the broader reading urged by the People, the court must construe that ambiguity in favor of appellant, unless to do so would result in an absurdity which the Legislature should not be presumed to have intended." (*Ibid.*, citing *People v. Malcolm* (1975) 47 Cal.App.3d 217, 222, italics added.)

In other words, the *Stepney* court did not agree section 246 was ambiguous, but ruled that *even if it was*, the rules of statutory construction – ultimately the rule of lenity, as the Legislative history itself was insufficiently specific to illuminate the point – precluded section's 246

application to the act of discharging a firearm *inside* an occupied dwelling. (*People v. Stepney, supra*, 120 Cal.App.3d at pp. 1019-1021.)

The holding of *Stepney* was applied without ambiguity in *People v. Morales* (2008) 168 Cal.App.4th 1075, 1079-1082, where the court noted that if a shooter has already committed a burglary, having entered a building with a felonious intent, then a subsequent shooting would necessarily be shooting *within* rather than *at* the building, and the shooting would not fall within the acts proscribed by section 246. (*Id.* at pp. 1080-1082.) Under *People v. Valencia* (2002) 28 Cal.4th 1, 10-11, any penetration of a building's outer boundary, even putting one's hand in an open window, is an entry of the building within the meaning of the burglary statute. Thus, if a defendant remains standing outside a building, but sticks his hand in a window holding a gun and fires a shot, he is within the building and not culpable for shooting *at the building* within the meaning of section 246. This means that for a conviction under section 246, a prosecutor must prove the gun was outside the dwelling (or vehicle) at the time it was discharged.

Finally, the holding in *People v. Jischke* (1996) 51 Cal.App.4th 552, is in accord with these principles. In that case, a defendant in one apartment fired a gun at the floor, which was the ceiling of the apartment below. (*Id.* at pp. 553-554.) The defendant was properly convicted of

shooting at an occupied dwelling, but it was not the one he was in, it was the separate adjoining dwelling. (*Id.* at p. 556.) A similarly proper conviction would result from the following, somewhat fanciful example: a person drives a car into the cargo hold area of a large transport plane; a second person in the cargo hold shoots at the car. The shooter would be culpable under section 246 for shooting at the occupied vehicle parked inside the plane, but would not be guilty for shooting at the occupied aircraft within which the shooting occurred.

Although appellant urges the Court to adopt the reasonable, unambiguous, directional definition of "at," he acknowledges that cases brought by the government under section 246 have led courts to address some potential ambiguity in the statute. However, even if it is appropriate to look at the history and purpose of the statute, the result is the same: holding a gun inside the threshold of a car and shooting at someone sitting in the car is not the kind of criminal act section 246 was intended to reach.

2. *The legislative history and object to be achieved by the 1976 addition to section 246.*

The legislative history of the 1976 addition of "occupied vehicle" to section 246 makes clear the discharge of a firearm within the threshold of a vehicle was not a criminal action the statute was intended to address.

The Attorney General's analysis of the legislative history at issue in

this case is fatally flawed. In their Opening Brief on the Merits, respondent extensively addresses the legislative history of the original section 246, enacted in 1949, but only briefly acknowledges the separate history of the 1976 addition of "occupied vehicle" to the statute, and that separate, most relevant history plays no role in respondent's analysis of the issue. (ROBM, pp. 8-10, 17-26.)

There are two significant problems with respondent's construction of the legislative history: (1) the reliance on the word "into," which is not in section 246, as a replacement for "at"; and (2) the failure to address the legislative history and intent of the 1976 addition of "occupied vehicle" as one of the proscribed targets in section 246.

a. "At" and "into" are not synonyms; respondent's analysis of section 246 is undermined by its replacement of the word "at," which is in the statute, with word "into," which is not.

First, much of respondent's analysis turns on a word – "into" – that is not in the statute. As respondent notes (ROBM, pp. 8-9), the title of the original Assembly Bill leading to section 246 was "An act to add Section 246 to the Penal Code, relating to the discharging of firearms or throwing of missiles into dwelling houses or occupied buildings." (Assem. Bill No. 414 (1949 Reg. Sess.) as introduced Jan. 12, 1949, § 1.) Again, as respondent notes, the word "into" in the title did not appear in the language of the

actual law being proposed, and the very first amendment of the bill changed the "into" in the title to "at," in accord with the proposed language of the statute. (ROBM, p. 9.) Then, when respondent turns to arguing the proper interpretation of section 246, it proceeds as if the key word in the statute was not "at," but rather "into."

In this way, respondent recapitulates the mistaken path taken by the court in *People v. Jones* (2010) 187 Cal.App.4th 266. In *Jones*, a woman was accused of standing outside a car and shooting at a person sitting within the car. (*Id.* at p. 269.) A jury note asked if the defendant could be convicted under section 246 if she was outside the car but the gun was inside. (*Id.* at pp. 270-271.) The trial court answered, "YES." (*Ibid.*) The Court of Appeal agreed with the trial court and affirmed the conviction. (*Id.* at pp. 274-275.)

In reaching that conclusion, the *Jones* court recognized the lack of direct authority on the issue and then based its analysis on the purported synonymy of the word "at" in section 246 and the word "into": "the prohibition against discharging a firearm 'at' the structures listed in section 246 must include a prohibition against discharging a firearm 'into' those same structures. . . . [I]t seems clear that one who stands outside an occupied vehicle and sticks her hand and/or a firearm into the vehicle and

shoots is firing into the occupied vehicle." (*People v. Jones*, *supra*, at p. 274.)

The problem with this analysis is that "at" and "into" are not synonyms. "At" typically refers to either a location ("Alice is at work") or, as in section 246, a direction ("Betty is pointing at her house"). "Into," on the other hand, is beyond direction, it is a process, a getting somewhere ("Carl drove the car into the garage"). Understood in this way, the concept of "into" has no relevance to section 246; section 246 is about the direction of, not the follow-through on, a discharge of a weapon. Section 246 criminalizes discharging a weapon toward a specified target; what happens to the bullet – where it goes – may result in criminal culpability under other statutes, as it did in this case, but is beyond the scope of section 246. Therefore, the equation of "at" with "into" in *People v. Jones*, *supra*, and respondent's brief in the instant case results in an erroneous interpretation of the statute. If someone shoots into a car or building from a distance, he will simultaneously be shooting at the car or building; but if the gun is across the threshold when discharged, the shooting is into the car or building, but not at the car or building. Thus, if a gun is across the threshold when maliciously and willfully discharged, some crime has occurred, but not the one defined in section 246.

b. The legislative history of the 1976 addition of "occupied vehicle" to the proscribed targets in section 246 shows the concern was to avoid having to prove someone who shot at a car intended great bodily harm to people in the car.

The other flaw in respondent's position is that it fails to address the relevant legislative history. Although section 246 was enacted in 1949, the language at issue here, adding "occupied vehicle" to the list of proscribed targets was added in 1976. This amendment has its own legislative history, a history that does not support respondent's proposed interpretation of the statute. Appellant discussed the history of the 1976 addition of the "occupied vehicle" clause in his Opening Brief in the Court of Appeal, a brief respondent presumably read. This suggests that respondent's failure to incorporate that history into its analysis here, in the Supreme Court, is not an oversight, but a strategy to avoid the most relevant evidence of legislative intent since it does not support respondent's position.

The language criminalizing shooting at an occupied motor vehicle was added to section 246 in 1976 after the passage of Assembly Bill 3303, introduced by Assemblyman Terry Goggin at the request of the San Bernardino County District Attorney. (See Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3303 (1975-76 Reg. Sess.), p. 1, indicating the source of bill [attached as part (a) of Appendix, under Cal. Rules of Court,

rule 8.520(h)].) At the time, shooting at a vehicle was criminalized by Vehicle Code section 23110, but was a felony only if the prosecution proved the shooter intended to do great bodily harm. (Appendix, part (a), p. 1.) The comment of the Senate Judiciary Committee on Assembly Bill 3303 noted that, "According to the proponents, the requirement that the prosecution prove that the defendant intended great bodily harm has hampered efforts to obtain convictions in serious cases. They contend that the act of discharging a firearm at an occupied vehicle is serious enough to warrant a felony punishment." (Appendix, part (a), p. 2.)

The San Bernardino County District Attorney was the source of the proposed law. (Appendix, part (a), p. 1.) A letter from the District Attorney, James Cramer, to Assemblyman Goggin explained why the law was needed:

> A serious gap exists in the law concerning the shooting of a firearm at a vehicle which ought to be corrected. Under present law if a person shoots at an occupied vehicle intending to cause damage or to disable the vehicle, it is a minor misdemeanor covered by California Vehicle Code Section 23110(a). To elevate the offense to a felony, proof must exist to show the shooter intended great bodily injury.

(San Bernardino County District Attorney James M. Cramer, letter to Assemblyman Terry Goggin, Feb. 25, 1976, p. 1 [Appendix, part (b)].)

District Attorney Cramer then described three recent cases where defendants fired at occupied vehicles but denied any intent to harm the vehicle's occupants.

> 1) After two competing scavengers of the desert missile range met, one of them fired an armor piercing 30-30 bullet at the fleeing competitor, which went through the tailgate, the cab, and the driver's leg, and the rim of the front tire. Serious injury resulted. The shooter claimed he wanted merely to shoot the rear tire to disable the vehicle, but missed. He was acquitted by a jury.
>
> 2) After two men had an argument, one of them tried to drive the only vehicle away from the campsite in a desolate location. Using an M-1 carbine, the companion fired twenty-six rounds into the truck, hitting the itres, hood, cab, and the windows, pretty much destroying the truck. By a miracle no one was injured. The shooter said he intended no bodily harm, he just wanted to prevent the companion from leaving with the only transportation.
>
> 3) After a gang of young men found their adversaries sitting in an automobile, they demolished the car, worth less than $1000.00, by shooting out the windows with .38 caliber bullets and beating on the car with crow bars. The occupants were terribly frightened, but not harmed. The aggressors are chargeable with misdemeanor malicious mischief and misdemeanor firing of a loaded weapon on a highway.

(Appendix, part (b), p. 1.)

District Attorney Cramer then explained

> [t]he most unusual incidents relate to a person shooting at a fleeing vehicle to stop it. Because the consequences of shooting at an occupied vehicle can be so severe, the conduct ought to be punishable as a felony, whether the shooter intends great bodily harm or not. The likelihood of bodily

> injury is greater in an occupied vehicle than in an occupied dwelling, since the total area is more confined, giving exposure to flying bullets, glass and steel. . . . Much consideration has been made of trying to use the crime of assault with a deadly weapon, Penal Code section 245[,] as a means of prosecuting those instances where occupants of a vehicle are in fact injured by gun shots. Because the crime of assault requires an attempt to commit a violent injury on the person of another, an issue is thus presented to the trier of fact which can be confusing in the cases involving motor vehicles.

(Appendix, part (b), p. 2.)

Thus, the originator of the addition of "occupied vehicle" to section 246 was specifically concerned with the ability to prove felony conduct when a person shoots at a vehicle but the prosecution could not prove the shooter intended to cause great bodily injury. In the situations Cramer cited as requiring the new statutory language, application of section 245 was not a viable way to get to a felony because its requirement of "an attempt to commit a violent injury on the person of another . . . can be confusing in the cases involving motor vehicles." But such confusion does not arise when the shooter holds the gun inside the threshold of the car, whether or not some of his body remains outside the car. A factual scenario where a person holds a gun inside a car with people in it and fires is not implicated in the intent underlying the addition of "occupied vehicle" to section 246. Accordingly, if a gun is held inside the threshold of car and fires it, the shooter is not discharging a weapon "at" an occupied vehicle and the

shooter is culpable under some statutes, such as section 245, but not under section 246.

Finally, respondent repeatedly asserts the purpose of section 246 is "to protect people in and around structures . . . to protect the occupants inside of the vehicle . . . to protect the occupants of the vehicle (or other enumerated structure) . . . to protect people . . ."; "The Legislature's intent in enacting section 246 was to protect the people sitting in the vehicles from shooters outside the vehicle." (ROBM, pp. 18, 20, 21, 23.)

Notably, none of these assertions contain citations to the legislative history of section 246. Protecting people sitting in cars would be a worthy goal of the 1976 addition of "occupied vehicle" to section 246, but, as respondent's lack of citations indicates, that "purpose" is not invoked in the legislative history of the amendment to section 246. It is as if the Attorney General's desire for that purpose to be part of the history is a sufficient basis upon which to build an argument. To remove any lack of clarity, here is the "Purpose of Legislation" of Assembly Bill No. 3303, adding "occupied vehicle" to section 246, as described by the Judiciary Policy Committee:

> Under existing law, it is a felony punishable by imprisonment for not less than one year or more than five years in state prison to maliciously and willfully throw or project specified matter at, or discharge a firearm at, a vehicle

> or any occupant thereof on a highway with intent to do great bodily injury. It is also an alternative felony-misdemeanor for any person to maliciously and willfully discharge a firearm at an inhabited dwelling or occupied building with the felony punishable by imprisonment in the state prison for not less than one [or] more than five years.
>
> This bill [AB 3303] would make it an alternative felony-misdemeanor to maliciously and willfully discharge a firearm at an occupied motor vehicle and would delete the specified minimum and maximum periods of imprisonment in state prison.

(Appendix, part (a), p. 3.) In other words, the purpose of adding the occupied vehicle clause to section 246 was to enable felony prosecution of people who fired guns at cars with people in them, whether or not the prosecutor could prove the shooter intended to cause great bodily injury to anyone in the vehicle. This makes clear that the facts of the case presented here, where a defendant sticks a gun inside a car and shoots at someone, were not implicated in the purpose of the added statutory language. The law was amended in 1976 to capture certain criminal behavior, but not the criminal behavior proved in this case.

Although respondent asserts that "the legislative intent of section 246 is clear," in fact nothing in the legislative history of the 1976 addition to section 246 supports respondent's position. On the other hand, some of that history does support appellant's position, including the three specific criminal instances the San Bernardino County District Attorney cited as

necessitating the change in section 246. But even if the fact that there are competing arguments creates sufficient ambiguity to find the Legislature's intent is not clear, or, to put it another way,

> [w]hen language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute.

(*People v. Overstreet*, *supra*, 42 Cal.3d 891, 896; see also *People v. Woodhead*, *supra*, 43 Cal.3d 1002, 1011; *Keeler v. Superior Court*, *supra*, 2 Cal.3d 619, 631 ["[i]t is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit"]; *People v. Stepney*, *supra*, 120 Cal.App.3d 1016, 1019.) Notably, this is exactly what the Court of Appeal did in the instant case. (Slip opn. at pp. 39-42.) It found ambiguity in the statutory language (specifically the word "at"), it found nothing in the legislative history shedding light on the intent with regard to the ambiguous language, and it therefore applied the established "policy of this state . . . to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit." (Slip opn. at pp. 39-42, citing *People v. Overstreet*, *supra*, at p. 896.)

3. *Policy considerations in the interpretation of section 246.*

Respondent purports to win the argument based on the legislative intent, but most of her argument is about policy. (See ROBM, pp. 18-25.) Specifically, the respondent brief repeatedly asserts the purpose of the statute is to protect people inside occupied dwellings or cars, and that purpose is advanced by stretching section 246 to cover situations where the firearm is held within the threshold of a vehicle as it it discharged. (See ROBM, pp. 18-26.) As noted above, this asserted purpose does not actually appear in the legislative history, although it could be a generic policy consideration.

Relatedly, respondent asserts that if its interpretation of section 246 is not adopted, defendants would get a "gratuitous windfall" and possibly "escap[e] liability for these attacks." (ROBM, pp. 24, 20.) The resort to such a red herring argument shows the weakness of respondent's argument. If a person holds a gun inside a car that has people in it, and fires the gun, that person's arrest and successful prosecution does not depend on the applicability of section 246. The person has obviously committed a violation of section 245, subdivision (a)(2) – assault with a firearm. In many such cases, the prosecutor could reasonably prove attempted murder or manslaughter assuming no victim dies, and completed murder or

manslaughter if the victim does, as happened in the instant case. Additionally, an intentionally discharged firearm enables the government to prosecute the shooter for a firearm use enhancement under section 12022.5, subdivision (a), in the case of assault or manslaughter, or section 12022.53, in the case of murder or attempted murder.

To be clear, appellant's argument is not that a person who holds a gun within the threshold of an occupied vehicle and fires it is not chargeable or punishable with a crime. Appellant's argument is that the statutory language and legislative intent behind section 246's proscription of discharging a firearm "at" an occupied vehicle, with the rule of lenity as a fall-back position if any ambiguity remains, do not reach the act in question. The crime committed must be prosecuted under other statutes that properly apply to such acts.

A clear, "bright line" rule is one policy courts may consider: "The rule we adopt should thus serve to preserve scarce judicial resources. It should draw a bright line and be of certain application." (*Kowis v. Howard* (1992) 3 Cal.4th 888, 898.) The policy of a clear line works against respondent in this case. Respondent proposes the crucial question is whether the shooter is inside or outside the vehicle; appellant asserts the issue is the location of the point of discharge – the tip of the barrel of the

gun. Appellant's position establishes the desired bright line – the tip of the gun is either inside the car when discharged or outside. That factual issue determines the applicability of section 246 to the criminal act.

Respondent's position, on the other hand, leaves a line as blurry as the size of the shooter: how much of the shooter has to be outside the vehicle? Would a person with one foot on the ground and the rest of his body in a car when he fires a gun be culpable under respondent's reading of section 246? Such a construction is not found in the legislative intent. A better, more clear rule looks at the point of discharge, not some percentage of the body of the shooter, to determine whether the discharge is "at" the occupied vehicle.

Ultimately, the issue under section 246 is not whether the shooter is inside or outside the victim-vehicle, but whether the discharge is inside or outside; only if the discharge is outside the vehicle is the discharge "at" the vehicle as the statute requires. Respondent confuses the issue with its comparison to section 12022.55 (ROBM, pp. 18-19), which adds an enhanced penalty to a defendant who "discharg[es] a firearm from a motor vehicle." (§ 12022.55.) Respondent's confusion arises from its erroneous understanding of the words "from" and "at" and the different acts the different statutes are addressing. Section 12022.55 punishes a specific act

of shooting based on the location of the shooter – in (or possibly on) a car. Section 246, by contrast, punishes the shooter based on the *direction* of the shooting, not the location of the shooter. What matters under section 246 is what the shooting is "at," a determination that depends on the location of the discharge (the tip of the gun), not the location of the shooter.

The interpretation of section 246 urged by the government would lead to absurd results the Legislature did not intend. Relying on ambiguous language in a decision from Division Two of the Fourth District Court of Appeal, *People v. Overman* (2005) 126 Cal.App.4th 1344, respondent writes that "section 246 is violated when a person intentionally discharges a firearm either directly at a proscribed target (e.g., an occupied building or vehicle), or in close proximity to the target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it." (ROBM, p. 17.) If the government's position here became law, section 246 would necessarily apply to a person standing with his back to the front door of a house who shoots at people in the front yard. Such a person would be firing the gun "in close proximity" to a dwelling house under circumstances showing a conscious disregard for the probability that one or more bullets will strike persons "around" the dwelling house. Thus, the interpretation urged by respondent, based on its

multifaceted stretching of the word "at" to fit its desired result, would produce the kind of absurdity that the Legislature should not be presumed to have intended, specifically that shooting in a direction away from a building could also be shooting "at" it.

The government concludes its argument asserting the rule of lenity does not apply in this case because the legislative history is not ambiguous. (ROBM, pp. 24-26.) But, as detailed above, the government's asserted certainty that "the legislative intent of section 246 is clear" (ROBM, p. 25) is undermined by the lack of clear, citable sources for their position. At best, the legislative intent regarding what constitutes shooting "at" an occupied vehicle is unclear. When the legislative intent is unclear, courts properly avoid imputing an intent and apply the rule of lenity. (See *People v. Overstreet*, *supra*, 42 Cal.3d 891, 896; *People v. Stepney*, *supra*, 120 Cal.App.3d 1016, 1019.) "[E]xcept in the most extreme cases where legislative intent and the underlying purpose are at odds with the plain language of the statute, an appellate court should exercise judicial restraint, stay its hand, and refrain from rewriting a statute to find an intent not expressed by the Legislature." (*Unzueta v. Ocean View School District* (1992) 6 Cal.App.4th 1689, 1700.)

C. The evidence in this case – that the shooter was standing outside the truck and held the gun inside the truck as he discharged it – does not support a conviction under section 246.

A conviction under section 246 requires proof the firearm was discharged outside the targeted occupied vehicle. If the gun is inside the vehicle, across the vehicle's threshold, it is not being discharged "at" the vehicle. In this case, where the prosecutor's evidence was that appellant stood in the open driver-side door of his parked truck, held up a gun inside the threshold of the truck, and shot Jose Valadez who was sitting in the passenger seat, section 246 is not applicable.

Since the evidence did not prove appellant was shooting at an occupied vehicle within the meaning of section 246, due process requires the conviction be reversed. (U.S. Const., Amends. 5 & 14; Cal. Const, Art. 1, sec. 15; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

///

CONCLUSION

Based on the reasons and argument presented above, appellant respectfully requests the Court of Appeal's reversal of his conviction under section 246 be affirmed.

Dated: September ____, 2011 Respectfully submitted,

_____

Arthur Martin

Attorney for Defendant and Appellant
Martin Manzo

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1))

Appellate counsel certifies that, in accord with California Rules of Court, rule 8.520(c)(1), and based on the word count of the word processing program used to prepare this document, there are 6,237 words in this opening brief, excluding the tables and the case caption.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Klamath Falls, Oregon.

Dated: September ____, 2011

_____
Arthur Martin

APPENDIX:

Portions of the legislative history of
the 1976 amendment of Penal Code section 246
adding "occupied motor vehicle"
as a proscribed target.

(Attached per Cal. Rules of Court, rule 8.520(h))

Part (a): Senate Committee on Judiciary, Analysis of Assembly Bill No. 3303 (1975-76 Reg. Sess.). [3 pages]

Part (b): San Bernardino County District Attorney James M. Cramer, letter to Assemblyman Terry Goggin, Feb. 25, 1976. [2 pages]

SENATE COMMITTEE ON JUDICIARY 1975-76 REGULAR SESSION

AB 3303 (Goggin)
As amended May 5
Penal/Vehicle Codes

FILE COPY

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FIREARMS
-VEHICLES-

HISTORY

Source: San Bernardino County District Attorney

Prior Legislation: None

Support: Calif. District Attorneys Ass'n., Calif. Peace Officers Ass'n., City of Los Angeles

Opposition: No Known

DIGEST

Makes it a felony to maliciously and willfully discharge a firearm at an occupied motor vehicle (Sec. 246, Pen. C.).

Makes conforming changes (Sec. 23110, Veh. C.).

PURPOSE

Strengthen the law prohibiting the discharge of a firearm at a motor vehicle.

COMMENT

1. Under existing law, any person who maliciously and willfully discharges a firearm at a motor vehicle or at an occupant is guilty of a felony if he intends to do great bodily harm (Sec. 23110, Veh. C.).

(More)

This bill eliminates the requirement that the defendant intend to do great bodily harm.

2. According to the proponents, the requirement that the prosecution prove that the defendant intended great bodily harm has hampered efforts to obtain convictions in serious cases. They contend that the act of discharging a firearm at an occupied vehicle is serious enough to warrant a felony punishment.

3. Under existing law, it is a felony to maliciously and willfully discharge a firearm at an inhabited dwelling house or occupied building. (Sec. 246, Pen. C.).

****

SENATE DEMOCRATIC CAUCUS

SENATOR JOHN F. DUNLAP, *Chairman*

Bill No. AB 3303

Author: Goggin (D)

Subject: Crimes: Dwellings, buildings, vehicles; penalties

Revenue & Taxation Committee: Be placed on Second Reading.

Version of Bill: May 5, 1976

Policy Committee: Judiciary

Version of Bill: May 5, 1976

Ayes (7) Carpenter, Deukmejian, Grunsky, Presley, Rains, Roberti, Petris

Noes (0)

Purpose of Legislation:

Under existing law, it is a felony punishable by imprisonment for not less than one year or more than five years in state prison to maliciously and willfully throw or project specified matter at, or discharge a firearm at, a vehicle or any occupant thereof on a highway with intent to do great bodily injury. It is also an alternative felony-misdemeanor for any person to maliciously and willfully discharge a firearm at an inhabited dwelling or occupied building with the felony punishable by imprisonment in the state prison for not less than one year of more than five years.

This bill would make it an alternative felony-misdemeanor to maliciously and willfully discharge a firearm at an occupied motor vehicle and would delete the specified minimum and maximum periods of imprisonment in state prison.

Most Recent Amendments:

August 19, 1976 amendments reflected in Purpose of Legislation (above).

Proponents:

California Highway Patrol
California District Attorneys' Association
California Peace Officers' Association
City of Los Angeles

Opponents:

Arguments in Support:

The requirement that the prosecution prove that the defendant intended great bodily harm has hampered efforts to obtain convictions in serious cases. They contend that the act of discharging a firearm at an occupied vehicle is serious enough to warrant a felony punishment.

Arguments in Opposition:

8/20/76 rs:RL

JAMES M. CRAMER
District Attorney

A. REX VICTOR
Assistant District Attorney

COUNTY OF
SAN BERNARDINO

Room 204, Courthouse
351 North Arrowhead Avenue
San Bernardino, CA 92415
(714) 383-2481

OFFICE OF THE DISTRICT ATTORNEY

February 25, 1976

Assemblyman Terry Goggin
56th District
State Capitol Office
Room 2176
Sacramento, California 95814

Dear Assemblyman Goggin:

A serious gap exists in the law concerning the shooting of a firearm at a vehicle which ought to be corrected. Under present law if a person shoots at an occupied vehicle intending to cause damage or to disable the vehicle, it is a minor misdemeanor covered by California Vehicle Code Section 23110(a). To elevate the offense to a felony, proof must exist to show the shooter intended great bodily injury.

Over the past couple of years, I have seen the following actual cases:

1) After two competing scavengers of the desert missile range met, one of them fired an armor piercing 30-30 bullet at the fleeing competitor, which went through the tail gate, the cab, and the driver's leg, and the rim of the left front tire. Serious injury resulted. The shooter claimed he wanted merely to shoot the rear tire to disable the vehicle, but missed. He was acquitted by a jury.

2) After two men had an argument, one of them tried to drive the only vehicle away from the campsite in a desolate location. Using a M-1 carbine, the companion fired twenty-six rounds into the truck, hitting the tires, hood, cab, and the windows, pretty much destroying the truck. By a miracle no one was injured. The shooter said he intended no bodily harm, he just wanted to prevent the companion from leaving with the only transportation.

3) After a gang of young men found their adversaries sitting in an automobile, they demolished the car, worth less than $1000.00, by shooting out the windows with .38 caliber bullets and beating on the car with crow bars. The occupants were terribly frightened, but not harmed. The aggressors are chargeable with misdemeanor malicious mischief and misdemeanor firing of a loaded weapon on a highway.

The most unusual incidents relate to a person shooting at a fleeing vehicle to stop it. Because the consequences of shooting at an occupied vehicle can be so severe, the conduct ought to be punishable as a felony, whether the shooter intends great bodily harm or not. The likelihood of bodily injury is greater in an occupied vehicle than in an occupied dwelling, since the total area is more confined, giving exposure to flying bullets, glass and steel. Shooting at or into an occupied dwelling house is treated as an alternate felony/misdemeanor under Penal Code Section 246. Much consideration has been made of trying to use the crime of assault with a deadly weapon, Penal Code Section 245 as a means of prosecuting those instances where occupants of vehicle are in fact injured by gun shots. Because the crime of assault requires an attempt to commit a violent injury on the person of another, an issue is thus presented to the trier of fact which can be confusing in the cases involving motor vehicles.

I respectfully recommend a bill be introduced to amend Penal Code Section 246 to read as follows:

Any person who shall maliciously and wilfully discharge a firearm at an inhabited dwelling house, or occupied building, or occupied motor vehicle is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for not less than one or more than five years or by imprisonment in the county jail not exceeding one year.

Your assistance in this matter will be greatly appreciated.

Sincerely,

James M Cramer

District Attorney

st

DECLARATION OF SERVICE

Case Name: PEOPLE V. MARTIN MANZO No. S191400

I declare:

I am employed in the County of Klamath, Oregon. I am over 18 years of age and not a party to the within entitled cause; my business address is P.O. Box 5084, Klamath Falls, OR 97601.

On September _____, 2011, I served the attached

APPELLANT'S ANSWER BRIEF ON THE MERITS

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Attorney General 110 W. "A" St., Ste. 1100 P.O. Box 85266 San Diego, CA 92186-5266	Appellate Defenders, Inc. 555 West Beech Street #300 San Diego CA 92101
California Court of Appeal Fourth District, Division One 750 B Street, Suite 300 San Diego, California 92101	Judge Timothy Walsh Superior Court of San Diego County P.O. Box 122724 San Diego, CA 92112-2724
Martin Manzo, #E70354 Ironwood State Prison P.O. Box 2199 Blythe, CA 92226-2199	

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Klamath Falls, Oregon, on September _____, 2011.

I declare under penalty of perjury of the law of California that the foregoing is true and correct, and this declaration was executed at Klamath Falls, Oregon, on September _____, 2011.

ARTHUR MARTIN _____

(Name) (Signature)