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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

KOU CHA,

Defendant and Appellant.

F069552

(Fresno Super. Ct.  
Nos. CF03900158-7 &  
CF02900756-8)

APPEAL from a judgment of the Superior Court of Fresno County. Denise L. Whitehead, Judge.

Eileen S. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Angelo S. Edralin, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

In 2003, defendant and appellant Kou Cha (defendant) was convicted of four counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)),<sup>1</sup> with enhancements for personal use of a firearm (former § 12022.5, subd. (a)(1))<sup>2</sup>, and committing the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). He was sentenced to 49 years. In doing so, the court imposed terms for both the personal use and gang enhancements. It imposed a 10-year term for the gang enhancement, and found defendant's use of a firearm elevated the underlying offense to a "violent" felony pursuant to section 186.22, subdivision (b)(1)(C).

In 2014, the Fresno County Superior Court granted defendant's petition for writ of habeas corpus, and agreed that he should be resentenced pursuant to *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*), which held that when a defendant's use of a firearm elevates the underlying offense to a "violent" felony, the defendant cannot be sentenced for both the personal use and gang enhancements under section 186.22, subdivision (b)(1)(C).

At the resentencing hearing, the court imposed an aggregate term of 36 years, and imposed the gang enhancement based on the triad provided for "other felonies" under section 186.22, subdivision (b)(1)(A).

The instant case involves cross-appeals by both defendant and the People of the court's decisions at the resentencing hearing. Defendant contends, and the People concede, the court improperly imposed certain fees.

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<sup>1</sup> All further statutory citations are to the Penal Code unless otherwise indicated.

<sup>2</sup> Since the time of defendant's trial, section 12022.5, subdivision (a)(1) was amended and redesignated as subdivision (a). For ease of reference, we will refer to the enhancement as it was at the time of defendant's convictions. (See, e.g., *People v. Le* (2015) 61 Cal.4th 416, 420, fn. 2 (*Le*).)

The People’s appeal asserts the court should have imposed the elevated term of five years for the gang enhancement because the underlying offense was statutorily defined as a serious felony, within the meaning of section 186.22, subdivision (b)(1)(B).

While this joint appeal was pending, the California Supreme Court held in *Le*, *supra*, 61 Cal.4th at pages 422–423, that a defendant’s use of a gun cannot be relied upon to impose both a personal use enhancement and the elevated five-year term for the “serious felony” gang enhancement under section 186.22, subdivision (b)(1)(B), under certain circumstances.

In supplemental briefing, defendant contends *Le* rejected the sentencing issue raised in the People’s appeal, and further argues his sentence is still unauthorized under both *Rodriguez* and *Le*. The People concede the holding in *Le* undermines the issue raised in their appeal and seeks to “withdraw” the issue.

We will review the procedural history of this case, and the application of *Rodriguez* and *Le* to defendant’s sentence. In defendant’s appeal, we strike certain fees imposed at the resentencing hearing. In the People’s appeal, we deny the requested relief. In the course of reviewing the record for the People’s appeal, however, we have determined that defendant received an unauthorized sentence at the resentencing hearing when the court imposed the gang enhancement based on section 186.22, subdivision (b)(1)(A).

We will thus remand for further appropriate proceedings.

### **FACTS**<sup>3</sup>

On December 26, 2002, nine-year-old M.V. (count II), Foua Moua (count IV), 88-year-old Chau Vue (count VI), and Chai Thao (count VIII) were leaving the Hmong New Year festivities at the Fresno Fairgrounds when they were shot.

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<sup>3</sup> The factual summary is from this court’s opinion in *People v. Kou Cha* (May 12, 2005, F043761/F043816) [nonpub.opn.], which contains a full factual statement from the trial record, and is part of the instant appellate record.

There were witnesses who reported the gunman was a man wearing a red sweater with white stripes. One witness identified defendant as the gunman and said he was firing a semiautomatic handgun. Defendant and another male were seen running through the parking lot. Defendant was apprehended as he was leaving the fairgrounds. He was wearing a red sweater with white stripes.

The police determined that cartridge cases and unspent cartridges found at the scene were from a semiautomatic weapon. The prosecution introduced evidence that defendant was a member of the Oriental Ruthless Boys criminal street gang and the crimes were committed for the benefit of the gang.

### **The charges**

On June 10, 2003, an amended information was filed in the Superior Court of Fresno County charging defendant with counts I, III, V, and VII, assault with a firearm on the four victims (§ 245, subd. (a)(2)).

In the alternative, defendant was charged with counts II, IV, VI, and VIII, assault with a semiautomatic firearm on the same four victims (§ 245, subd. (b)).

Defendant was also charged with count IX, felon in possession of a firearm (§ 12021, subd. (a)(1)).

As to counts I through VIII, it was alleged defendant personally used a firearm (§ 12022.5, subd. (a)(1)); and he personally inflicted great bodily injury on each victim (§ 12022.7, subd. (a)) causing each offense to become a serious felony (§ 1192.7, subd. (c)(8)) and a violent felony (§ 667.5, subd. (c)(8)).

As to all counts, it was further alleged pursuant to section 186.22, subdivision (b)(1) that the offenses were committed for the benefit of a criminal street gang, and the offenses were violent felonies as defined in section 667.5, subdivision (c).

### **The verdicts**

On June 19, 2003, after a jury trial, defendant was convicted as charged in counts II, IV, VI, and VIII, assault with a semiautomatic firearm on the four victims (§ 245,

subd. (b)); with enhancements for personal use of a firearm (§ 12022.5, subd. (a)(1)); and committing the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The jury did not find the great bodily injury enhancements true.

Defendant was found not guilty of counts I, III, V, and VII, the alternative lesser offenses of assault with a firearm based on the same four victims (§ 245, subd. (a)(2)).

Defendant was also convicted of count IX, felon in possession of a firearm (§ 12021, subd. (a)(1)), with a gang enhancement. The court found defendant violated probation in an unrelated case for felony receiving stolen property.

### **SENTENCING PROVISIONS**

Before we review the court's sentencing decisions, we turn to several statutory provisions which are relevant to the primary sentencing issue in this case.

#### **The personal use enhancements**

As to defendant's convictions in counts II, IV, VI, and VIII, the jury found true the allegations that defendant personally used a firearm in the commission of the offenses, in violation of section 12022.5, subdivision (a)(1). This statute states that the underlying felony offenses "shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."

#### **Serious and/or violent felonies**

Section 1192.7, subdivision (c) defines offenses which are "serious" felonies. Section 667, subdivision (c) defines which offenses are "violent" felonies.

Assault with a semiautomatic firearm in violation of section 245, subdivision (b)(2) is not itself defined as a "violent" felony. However, a felony is defined as "violent" if the defendant "uses a firearm which use has been charged and proved as provided in ... Section 12022.5..." (§ 667.5, subd. (c)(8); *Le, supra*, 61 Cal.4th at p. 423.)

Since the jury found the section 12022.5 personal use enhancements true, defendant's convictions for assault with a semiautomatic firearm are classified as violent felonies. (*Rodriguez, supra*, 47 Cal.4th at p. 509.)

Section 1192.7, subdivision (c)(31) defines the following offenses as "serious" felonies: "assault with a deadly weapon, firearm, machinegun, assault weapon, *or semiautomatic firearm* or assault on a peace officer or firefighter, in violation of Section 245." Offenses are also defined as "serious" felonies if the defendant personally used a firearm (§ 1192.7, subd. (c)(8)); or he "personally used a dangerous or deadly weapon" (§ 1192.7, subd. (c)(24)).

Defendant's convictions for assault with a semiautomatic firearm fall within these categories and are thus defined as "serious" felonies. (*Le, supra*, 61 Cal.4th at p. 423.)

### **The gang enhancement**

Section 186.22, subdivision (b)(1), the gang enhancement statute, "provides different levels of enhancement for the base felony if that felony is 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members ....' (§ 186.22, subd. (b)(1).)" (*Le, supra*, 61 Cal.4th at pp. 422–423.)

"If the base felony qualifies as *a violent felony* under the list of felony crimes contained in section 667.5, then 'the person shall be punished by an additional term of 10 years.' (§ 186.22, subd. (b)(1)(C).) If the base felony qualifies as *a serious felony* under the list of felony crimes contained in section 1192.7, then 'the person shall be punished by an additional term of five years.' (§ 186.22, subd. (b)(1)(B).) If the base felony qualifies *neither as serious or violent*, then 'the person shall be punished by an additional term of two, three, or four years at the court's discretion.' (§ 186.22, subd. (b)(1)(A).)" (*Le, supra*, 61 Cal.4th at p. 423, italics added.)

"Section 186.22, subdivision (b)(1)'s three sentence provisions ... reflect the intention to impose progressively longer sentence enhancements based on the severity of

the felony categorized across three tiers. [T]he sentence enhancements in section 186.22, subdivision (b)(1) are *mandatory* – all three provisions specify that the additional punishment ‘shall’ be imposed.” (*Le, supra*, 61 Cal.4th at p. 423, italics added; *Rodriguez, supra*, 47 Cal.4th at p. 505.)

### **Section 1170.1**

As we will explain, the court’s sentencing decisions also implicated section 1170.1, subdivision (f), which states:

“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.” (Italics added.)

“Subdivision (f) of section 1170.1 prohibits multiple enhancements of punishment as to a single offense for being armed with or using a firearm or dangerous or deadly weapon.... [T]he sentencing limitation of section 1170.1, subdivision (f), can apply, not only for enhancements involving the personal *use* of a firearm in the commission of the offense, but also if the enhancement is imposed for simply ‘being armed’ during the commission of the offense.” (*Le, supra*, 61 Cal.4th at p. 423, italics in original.)

With these provisions in mind, we turn to the sentence originally imposed in this case.

### **Sentence**

On August 14, 2003, defendant was sentenced to an aggregate term of 49 years.

The court selected count VI, assault with a semiautomatic firearm, as the principal term and imposed the upper term of nine years; with a consecutive upper term of 10 years for the section 12022.5, subdivision (a)(1) enhancement for personal use of a firearm during a felony; and a consecutive term of 10 years for the gang enhancement pursuant to section 186.22, subdivision (b)(1)(C).

As set forth above, section 186.22, subdivision (b)(1)(C) states that the court shall impose an elevated term of 10 years for the gang enhancement if defendant is convicted of a violent felony. As relevant to this appeal, the sentencing court stated that it selected “the 10-year term for the gang enhancement ... because subdivision (b)(1)(C) of ... section 186.22 provides for a 10-year enhancement when the underlying felony for the gang enhancement is *a violent felony* as set forth in ... section 667.5.” (Italics added.) The court found the underlying felony of assault with a semiautomatic firearm was “a violent felony because defendant *personally used a gun* during the commission of the assault,” within the definition of section 667.5, subdivision (c)(8). (Italics added.)

As to counts II, IV, and VIII, assault with a semiautomatic firearm on the other three victims, the court imposed consecutive terms of two years for each offense (one-third the midterms) plus one year four months (one-third the midterms) for each accompanying personal use enhancement, and three years four months (one-third of the elevated term of 10 years) for each accompanying gang enhancement. Defendant received a concurrent term of three years for count IX. Defendant also received a concurrent term of two years for receiving stolen property.

### **This court’s appellate opinion**

On May 12, 2005, this court filed the unpublished opinion in *People v. Kou Cha*, *supra*, F043761/F043816, which modified defendant’s registration requirement and otherwise affirmed defendant’s convictions and sentence.

In doing so, we rejected defendant’s argument that section 654 prohibited the sentencing court from imposing terms for both the personal use and gang enhancements for each count. Defendant had argued that section 654 applied because the same conduct – the gun use – was used to impose both enhancements and elevated the gang term to a violent felony.

“We fail to see a distinction in achieving violent felony status for purposes of the gang enhancement based on the substantive crime alone or

based on the substantive crime plus a gun use enhancement. For example, if the underlying felony, by itself, was a violent crime, there would be no question that the 10-year gang enhancement would be applicable. In that situation a defendant's activities are what would qualify the crime as a violent felony. A defendant would be subject to punishment for committing the underlying violent felony as well as additional punishment for committing the underlying violent felony for purposes of the criminal street gang. *Here, the personal use of the weapon is a factor of the underlying felony that qualifies it as a violent crime.* Defendant committed a violent felony for the benefit of a criminal street gang. The Legislature has determined that in those situations the defendant is deserving of a more severe punishment. The punishment needs to be commensurate with the criminal activities. *The fact that the crime is elevated to a violent felony via an enhancement rather than an element of the substantive crime does not alter the purpose of the legislation, to more severely punish a defendant who commits a violent felony for the benefit of a criminal street gang.* Defendant is being punished for committing a violent crime with the intent to promote, further, or assist in any criminal conduct by gang members. He is subject to punishment for the underlying violent felony (the assault plus the gun use) and for committing a violent felony for the benefit of a criminal street gang. Defendant has not argued nor has he set forth any authority to show that a gang enhancement is not proper when the underlying felony is deemed to be a violent felony.” (Italics added.)

Aside from his section 654 argument, defendant did not otherwise challenge the court's imposition of the 10-year term for the gang enhancement or argue he received an unauthorized sentence.

### **HABEAS PROCEEDINGS**

Four years after this court affirmed defendant's convictions and sentence, the California Supreme Court decided *Rodriguez, supra*, 47 Cal.4th 501, and clarified that section 1170.1, subdivision (f) prevented imposition of terms for both personal use and gang enhancements in certain cases. As a result of *Rodriguez*, defendant sought and received habeas relief.

#### **Rodriguez**

In *Rodriguez*, the defendant was convicted of three counts of assault with a firearm (§ 245, subd. (a)(2)), with enhancements for personal use of a firearm, and that the

assault was a “violent felony” committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). (*Rodriguez, supra*, 47 Cal.4th at p. 504.)

The sentencing court in *Rodriguez* found that each of the three counts of assault with a firearm “qualified as a ‘violent’ felony under section 667.5, subdivision (c), because in committing each of those offenses defendant ‘use[d] a firearm which use has been charged and proved’ under section 12022.5. (§ 667.5, subd. (c)(8).)” (*Rodriguez, supra*, 47 Cal.4th at p. 505.) For the principal term, the court imposed three years for assault, with a consecutive term of four years for personal use of a firearm, and the elevated consecutive term of 10 years for “committing a violent felony to benefit a criminal street gang” pursuant to section 186.22, subdivision (b)(1)(C). (*Rodriguez, supra*, at p. 506.)

*Rodriguez* vacated the defendant’s sentence and held there was “no question” that imposition of terms for both the personal use and gang enhancements violated section 1170.1, subdivision (f), since both terms were based on the defendant’s use of a firearm. (*Rodriguez, supra*, 47 Cal.4th at p. 508.)

“[T]he standard additional punishment for committing a felony to benefit a criminal street gang is two, three, or four years’ imprisonment. (§ 186.22, subd. (b)(1)(A).) But when the crime is a ‘violent felony, as defined in subdivision (c) of Section 667.5,’ section 186.22’s subdivision (b)(1)(C) calls for additional punishment of 10 years. Here, defendant became eligible for this 10-year punishment *only* because he ‘use[d] a firearm which use [was] charged and proved as provided in ... Section 12022.5.’ (§ 667.5, subd. (c)(8).) *Thus, defendant’s firearm use resulted in additional punishment not only under section 12022.5’s subdivision (a) (providing for additional punishment for personal use of a firearm) but also under section 186.22’s subdivision (b)(1)(C), for committing a violent felony as defined in section 667.5, subdivision (c)(8) (by personal use of firearm) to benefit a criminal street gang.* Because the firearm use was punished under two different sentence enhancement provisions, each pertaining to firearm use, section 1170.1’s subdivision (f) requires imposition of ‘only the greatest of

those enhancements’ with respect to each offense.” (*Id.* at p. 509, first italics in original, subsequent italics added.)<sup>4</sup>

*Rodriguez* held that while the defendant could only be sentenced to the greatest of the two enhancements, the proper remedy was not to strike the term imposed for the personal use enhancement but to remand the matter for resentencing to give the trial court “an opportunity to restructure its sentencing choices in light of our conclusion that the sentence imposed here violated section 1170.1’s subdivision (f).” (*Rodriguez, supra*, 47 Cal.4th at p. 509.) The California Supreme Court later explained that it remanded the matter in *Rodriguez* because the sentencing court had selected the midterm of four years for the underlying felony, and the court had the discretion to impose the upper term to compensate for the loss of one of the enhancements. (*Le, supra*, 61 Cal.4th at p. 428.)

### **Defendant’s habeas petition**

On November 4, 2013, defendant filed a petition for writ of habeas corpus in the Superior Court of Fresno County based on *Rodriguez*. Defendant argued that, as in *Rodriguez*, his sentence was similarly unauthorized under section 1170.1, subdivision (f) because he received a 10-year term for the personal use enhancement, and the elevated 10-year term for committing a violent felony for the benefit of a criminal street gang pursuant to section 186.22, subdivision (b)(1)(C). Defendant argued that his personal use of the firearm was the only reason the underlying offense of assault with a semiautomatic firearm was elevated to a violent felony, and his firearm use was thus punished under two different sentencing enhancements in violation of section 1170.1, subdivision (f). Defendant requested the gang enhancement be stricken.

The superior court issued an order to show cause. The People conceded defendant should be resentenced consistent with *Rodriguez*.

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<sup>4</sup> *Rodriguez*’s holding was based on section 1170.1, subdivision (f). It rejected defendant’s alternate argument that section 654 prohibited imposition of both enhancements. (*Rodriguez, supra*, 47 Cal.4th at p. 507.)

On March 21, 2014, the superior court granted relief and vacated defendant's sentence. The court explained: "In this case, [defendant] was convicted of a 'violent felony' and sentenced to an additional 10 years of imprisonment [for the gang enhancement] only because he 'use[d] a firearm which use has been charged and proved as provided in ... Section 12022.5' to commit the assault with a semiautomatic firearm. [Citation.] Therefore, in this case, ... section 186.22, subd. (b)(1) is also an enhancement that 'may be imposed for ... using ... a firearm in the commission of a single offense' within the meaning of Penal Code section 1170.1, subdivision (f)."

The superior court concluded that "since ... section 1170.1, subdivision (f) definitively states that, when two or more enhancements for using a firearm in the commission of a single offense can be imposed, only the enhancement with the greatest punishment can legally be imposed, the trial court violated ... section 1170.1, subdivision (f) and imposed an unauthorized sentence when it enhanced [defendant's] sentence pursuant to both ... sections 186.22, subdivision (b)(1)(C) and 12022.5, subdivision (a)(1)."

The court ordered a new sentencing hearing consistent with *Rodriguez*.<sup>5</sup>

### **The resentencing hearing**

On June 6, 2014, the superior court conducted the resentencing hearing.

The prosecutor conceded that *Rodriguez* prohibited imposition of both the personal use enhancement and the 10-year term for the gang enhancement for a violent felony under section 186.22, subdivision (b)(1)(C), since defendant's gun use elevated the underlying offense to a violent felony.

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<sup>5</sup> In his habeas petition, defendant also argued he was improperly convicted of both the greater offenses of assault with a semiautomatic firearm, and lesser offenses of assault with a firearm. The superior court rejected that contention since the jury found him not guilty of counts I, III, V, and VI, the alternative lesser charges of assault with a firearm.

However, the prosecutor asserted that section 186.22, subdivision (b)(1)(B) separately provided for imposition of an elevated five-year term for the gang enhancement if the underlying conviction was for a “serious felony.” The prosecutor argued defendant’s convictions for assault with a semiautomatic firearm were independently defined as “serious” felonies in section 1192.7, subdivision (c)(31), without regard to the section 12022.5 personal use enhancement.<sup>6</sup>

The prosecutor argued the court could impose the elevated five-year term for the gang enhancement under section 186.22, subdivision (b)(1)(B) for committing a “serious” felony for the benefit of a criminal street gang, without violating *Rodriguez* and section 1170.1, subdivision (f).

Defense counsel replied that the underlying offenses were defined as serious felonies only because of defendant’s use of a gun to commit the crimes. Counsel argued section 1170.1, subdivision (f) still prohibited imposition of both the personal use and elevated gang enhancement for serious felonies under section 186.22, subdivision (b)(1)(B), since defendant’s use of a gun was the basis for both enhancements.

### **The court’s ruling**

The court disagreed with the prosecutor’s analysis, and found defendant was convicted of assault with a semiautomatic firearm based on his use of a firearm, which raised the offense to a serious felony and also triggered the personal use enhancement. The court found that if it imposed the personal use enhancement, and the elevated five-year term for the “serious felony” gang enhancement of section 186.22, subdivision (b)(1)(B), it “would be utilizing the use of the gun twice to impose both of those

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<sup>6</sup> As noted above, section 1192.7, subdivision (c)(31) defines the following offenses as “serious” felonies: “assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245....”

enhancements,” and that would still violate section 1170.1, subdivision (f) and *Rodriguez*.

However, the court found that defendant could receive a term for the gang enhancement under section 186.22, subdivision (b)(1)(A), which applied to underlying offenses that are not serious or violent, and thus did not implicate defendant’s use of the gun. The court believed defendant’s case fell within that section, and that he could receive a gang enhancement from the statutory triad of either two, three, or four years.

The court resentenced defendant to 36 years: as to count VI, the upper term of nine years; with a consecutive term of 10 years for personal use of a firearm; and the consecutive upper term of four years for the gang enhancement under section 186.22, subdivision (b)(1)(A), the subdivision which addressed the gang enhancement for nonserious and nonviolent felonies.

As to each of counts II, IV, and VIII, the court imposed two years (one-third the midterms); with consecutive terms of one year four months (one-third the midterms) for each firearm enhancement; and one year (one-third the midterms) for each gang enhancement under section 186.22, subdivision (b)(1)(A).

The court imposed a concurrent term of three years for count IX. Defendant also received a concurrent midterm of two years for the unrelated conviction for receiving stolen property.

The court also ordered defendant to pay various fines and fees, including \$200 for the courtroom security fee (§ 1465.8); and \$150 for the criminal conviction assessment fee (Gov. Code, § 70373).

### **The current appeals**

Both defendant and the People filed timely notices of appeal from the judgment at the resentencing hearing.

Defendant argued the court improperly imposed certain fees at the resentencing hearing; he did not challenge any other aspect of his sentence.

The People argued the court should have imposed the elevated five-year term for the gang enhancement pursuant to section 186.22, subdivision (b)(1)(B), because the underlying offenses were independently defined as serious felonies without regard to the personal use enhancement. These appeals have been consolidated herein.

## **DISCUSSION**

### **I. Defendant's Appeal – Imposition of Fees**

We begin with defendant's appeal. He contends that at the resentencing hearing, the court improperly ordered him to pay a \$200 courtroom security fee (§ 1465.8); and a \$150 criminal conviction assessment fee (Gov. Code, § 70373), because the relevant statutory authorities for both fees were enacted after he committed the instant offenses. Defendant did not object to the court's imposition of these fees at the resentencing hearing, but argues we may address the issue because the court imposed an unauthorized sentence.

“[T]he ‘unauthorized sentence’ concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case.” (*Ibid.*) “An obvious legal error at sentencing that is ‘correctable without referring to factual findings in the record or remanding for further findings’ is not subject to forfeiture. [Citations.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 887; *People v. Anderson* (2010) 50 Cal.4th 19, 26.)

An unauthorized sentence may be corrected at any time, whenever it is discovered, whether or not there was an objection in the trial court. It may be corrected even when raised for the first time on appeal. (*People v. Smith* (2001) 24 Cal.4th 849, 854; *People v. Scott, supra*, 9 Cal.4th at pp. 354–355.)

The People concede the court's imposition of both fees resulted in an unauthorized sentence, and they must be stricken because defendant's offenses and convictions predate

the effective dates of the statutes. Defendant committed these offenses in 2002, and he was convicted and sentenced in 2003. The effective date of the fee authorized by Government Code section 70373 is January 1, 2009. (*People v. Davis* (2010) 185 Cal.App.4th 998, 1001.) The effective date of the initial version of section 1465.8 was August 17, 2003. (*People v. Alford* (2007) 42 Cal.4th 749, 753, fn. 2.)

We order both fees stricken.

## **II. The People's Appeal – The Gang Enhancement**

We now turn to the People's appeal from the resentencing hearing. The People originally asserted the court improperly denied the prosecutor's request at the resentencing hearing, to impose the elevated five-year serious felony term for the gang enhancement, and instead imposed the enhancements based on the triad provided for nonserious and nonviolent felonies under section 186.22, subdivision (b)(1)(A). Defendant disagreed with the People's contention and argued *Rodriguez* and section 1170.1, subdivision (f) prohibited imposition of the "serious felony" term for the gang enhancement.

In addition, in response to the People's original appellate briefing, defendant argued the court's imposition of the gang enhancement based on section 186.22, subdivision (b)(1)(A) was unauthorized because he was convicted of serious and violent felonies, and requested this court to correct the alleged unauthorized sentence.

As we will explain, the crux of this sentencing issue changed based on the parties' briefing and the California Supreme Court's subsequent opinion in *Le, supra*, 61 Cal.4th 416, which was decided while this appeal was pending. After *Le* was decided, defendant filed supplemental briefing and argued that *Le* refuted the People's appellate argument that the court herein could have imposed the five-year term for the "serious felony" gang enhancement. Defendant argued *Le* further supported his argument that his sentence was unauthorized.

The People subsequently acknowledged that *Le* rendered their original appellate issue meritless. The People requested to “withdraw” their original appellate contention. However, we are still compelled to address defendant’s assertion that the term he received at the resentencing hearing was unauthorized.

We will review the entirety of the parties’ briefing, the California Supreme Court’s recent opinion on this topic, and whether defendant’s sentence is unauthorized.

A. Initial Briefing

The People’s opening brief acknowledged that *Rodriguez* prohibited the superior court from imposing both the personal use enhancement and the elevated 10-year enhancement under section 186.22, subdivision (b)(1)(C) for commission of a violent felony for the benefit of a criminal street gang. The People also acknowledged the underlying offense of assault with a semiautomatic firearm was elevated to a violent felony based on defendant’s use of a gun, and defendant’s original sentence violated section 1170.1, subdivision (f) since both enhancements were based on that same gun use.

However, the People renewed the argument made at the resentencing hearing, that the superior court had discretion to impose the elevated five-year term for the gang enhancement because the underlying offense for assault with a semiautomatic firearm was defined as a “serious” felony under 1192.7, subdivision (c)(31) without regard to defendant’s use of the gun.

In his responsive brief, defendant argued that assault with a semiautomatic firearm was only defined as a serious felony by section 1192.7, subdivision (c)(31) because of the actor’s use of a firearm. Defendant asserted *Rodriguez* and section 1170.1, subdivision (f) still prohibited imposition of both the personal use enhancement and the elevated gang enhancement for a serious felony.

As a separate point in his responsive brief, defendant acknowledged that the superior court imposed the gang enhancements based on section 186.22, subdivision

(b)(1)(A)'s triad for nonserious and nonviolent felonies, and he did not object. However, defendant argued he received an unauthorized sentence that could still be corrected on appeal. Defendant asserted that section 186.22, subdivision (b)(1)(A) only applied if subdivision (b)(1)(B) for serious felonies, or subdivision (b)(1)(C) for violent felonies, did not apply. Defendant noted that based on the amended information and the verdicts, he was convicted of violent felonies as a matter of law, since the jury found he used "a firearm which use has been charged and proved as provided in ... Section 12022.5 ...." (§ 667.5, subd. (c)(8).)

Defendant asserted that based on the verdicts, the court was required to impose the elevated gang enhancement for violent felonies under section 186.22, subdivision (b)(1)(C), since his personal use of the firearm elevated the offense of assault with a semiautomatic firearm to a serious felony. Defendant argued that the court had to strike or stay the enhancement as directed by section 1170.1, subdivision (f) and *Rodriguez*, instead of imposing a term from the lower triad under section 186.22, subdivision (b)(1)(A) for nonserious or nonviolent felonies.<sup>7</sup>

Defendant thus argued that the court lacked legal authority to impose any term for the gang enhancements in this case. In making this argument, defendant advised this court that a similar issue was pending before the California Supreme Court.

The People filed a reply brief and asserted defendant forfeited any challenge to the court's imposition of the personal use and gang enhancements at the resentencing hearing because he failed to object. The People did not address defendant's assertion that he received an unauthorized sentence which could be corrected on appeal. The People

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<sup>7</sup> In making this argument, defendant never argued that his convictions were not violent felonies or that he never received notice that his convictions could be treated as such. Instead, defendant asserted his convictions were violent felonies based on the personal use enhancements, and the court was required to impose the gang enhancement pursuant to section 186.22, subdivision (b)(1)(C), and then stay that term pursuant to section 1170.1, subdivision (f).

acknowledged that a case was pending before the California Supreme Court as to whether both the personal use and gang enhancements could be imposed in particular cases.

Defendant filed a reply brief and again argued he did not forfeit appellate review because his sentence was legally unauthorized.

B. *Le*

After the initial briefing was completed in this joint appeal, the California Supreme Court expanded upon *Rodriguez* in *Le, supra*, 61 Cal.4th 416, the case which the parties acknowledged was pending and contained the identical issue raised in the People's appeal.

The defendant in *Le* was convicted of multiple felonies, including the same charges as defendant in this case – assault with a semiautomatic firearm (§ 245, subd. (b)), with personal use of a firearm (§ 12022.5, subd. (a)(1)) and the gang enhancement alleged and found true pursuant to section 186.22, subdivision (b)(1). In contrast to *Rodriguez*, the charging document in *Le* did not allege whether the gang enhancement should be imposed as a five-year “serious felony” under section 186.22, subdivision (b)(1)(B), or a 10-year “violent felony” under subdivision (b)(1)(C). (*Le, supra*, 61 Cal.4th at pp. 420–421.)

At the sentencing hearing in *Le*, the prosecutor asked the court to impose the upper term of nine years for assault with a semiautomatic firearm, plus the upper term of 10 years for personal use enhancement. The prosecutor “recognized that, if the section 186.22 enhancement were treated as a violent felony under section 186.22, subdivision (b)(1)(C), *Rodriguez* and section 1170.1, subdivision (f) would apply to bar an additional 10-year enhancement. Accordingly, the prosecutor asked the trial court to treat the section 186.22 enhancement simply as a ‘gang allegation’ that is ‘not for being armed’ and to impose a five-year enhancement under subdivision (b)(1)(B) of that statute [for serious felonies]. In essence, the prosecutor argued that because the complaint did not specifically allege that the section 186.22 enhancement was a violent felony under

subdivision (b)(1)(C) of that statute, it did not constitute an ‘enhanced gang allegation’ based on the use of a firearm....” (*Le, supra*, 61 Cal.4th at p. 421.)

The sentencing court in *Le* disagreed with the prosecutor’s argument, and concluded that “under *Rodriguez*, it could not impose terms for both enhancements *because the jury’s findings made defendant’s assault a violent felony under section 667.5, thereby making the applicable enhancement the same 10-year term under 186.22, subdivision (b)(1)(C) that was at issue in Rodriguez*. Accordingly, the court imposed the 10-year term for that [gang] enhancement, but *stayed* any sentence enhancement [imposed] under section 12022.5, subdivision (a)....” (*Le, supra*, 61 Cal.4th at pp. 421–422, italics added.) The sentencing court thus imposed the elevated 10-year violent felony term for the gang enhancement, and imposed and stayed the term for the personal use enhancement.

The People filed an appeal in *Le*, and again argued the court improperly stayed the personal use enhancement, and it could have imposed both the personal use enhancement and the five-year serious felony gang enhancement without violating *Rodriguez* or section 1170.1, subdivision (f). The appellate court rejected the People’s argument and affirmed the stay of the personal use enhancement, and held the personal use and gang enhancements were “both based on firearm use involving the single offense of assault with a semiautomatic weapon.” (*Le, supra*, 61 Cal.4th at p. 422.)

*Le* granted the People’s petition for review “to decide whether section 1170.1, subdivision (f) similarly precludes a sentencing court from imposing both a firearm enhancement under section 12022.5, former subdivision (a)(1), and a gang enhancement under section 186.22, subdivision (b)(1)(B), in connection with a single offense, *when the offense is a ‘serious felony’ under section 186.22, subdivision (b)(1)(B) and involved the use of a firearm.*” (*Le, supra*, 61 Cal.4th at pp. 419–420, italics added.)

*Le* rejected the People’s argument that defendant’s conviction for assault with a semiautomatic firearm was statutorily defined as a serious felony in section 1192.7, subdivision (c), without regard to the defendant’s use of the firearm.

“Section 1192.7 designates several assault-related crimes as serious felonies, but defendant’s crime is not a serious felony by virtue of any of these provisions. Rather ... defendant’s crime qualifies as a serious felony *solely because it involved a firearm*. The crime fell under subdivision (c)(8) of section 1192.7, which applies to ‘any felony in which the defendant personally uses a firearm’ [citation], or subdivision (c)(23), which applies to ‘any felony in which the defendant personally used a dangerous or deadly weapon’ [citation], *or subdivision (c)(31), which applies to ‘assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm.’* These three provisions constitute the sole bases under which the conduct described in count 4 would be a serious felony, and they all clearly implicate the use of a firearm. No other provision of section 1192.7, subdivision (c), appears applicable to qualify count 4 as a serious felony.” (*Le, supra*, 61 Cal.4th at p. 425, italics added, fn. omitted.)

*Le* held that “as was the case in *Rodriguez*,... [defendant’s] section 186.22 gang enhancement ... regardless of whether it qualified as a serious or violent felony under subdivision (b)(1)(B) or (b)(1)(C), is an enhancement ‘imposed for being armed with or using ... a firearm.’ (§ 1170.1, subd. (f).) Under section 1170.1, subdivision (f), the underlying felony, based on section 245, subdivision (b), could not be enhanced for use of a firearm both under section 12022.5, subdivision (a), and section 186.22, subdivision (b)(1). Rather, section 1170.1 required that only the greater of the two enhancements – in this case, the enhancement under section 12022.5 – could be imposed.” (*Le, supra*, 61 Cal.4th at p. 425.)

*Le* concluded that, as in *Rodriguez*, “because both [the personal use and gang] enhancements again depend on defendant’s firearm use, we conclude that section 1170.1, subdivision (f) bars the imposition of both enhancements.” (*Le, supra*, 61 Cal.4th at p. 420.)

“[T]he trial court is precluded from imposing both a firearm enhancement under section 12022.5, subdivision (a)(1) and a serious felony gang enhancement under section 186.22, subdivision (b)(1)(B) *when the crime qualifies as a serious felony solely because it involved firearm use.* Because both enhancements in the present case were based solely on [defendant’s] use of a firearm in the commission of a single offense, section 1170.1, subdivision (f) requires that only the greater of the two enhancements may be imposed. This conclusion is a logical extension of the holding in *Rodriguez ....*” (*Id.* at p. 429, italics added.)

*Le* thus affirmed the sentencing court’s decision to stay the personal use enhancement. (*Le, supra*, 61 Cal.4th at p. 429.)

*Le* explained that the defendant’s conviction for assault with a semiautomatic firearm “*qualified as a violent felony* under section 667.5, subdivision (c). We need not decide whether, as defendant argues, the trial court lacked discretion to designate the gang enhancement as anything other than one for a violent felony under section 186.22, subdivision (b)(1)(C), because even if the trial court retained discretion to designate the crime as a *serious felony* for the purpose of section 186.22, subdivision (b)(1)(B), under the facts of this case, the crime would qualify as a serious felony solely because it involved firearm use.” (*Le, supra*, 61 Cal.4th at pp. 424–425, italics in original, fn. omitted.)

In reaching this holding, *Le* explained “the parties have not raised, nor do we address or decide,” whether the triad of gang enhancement terms provided for nonserious and nonviolent felonies in section 186.22, subdivision (b)(1)(A) “might be applicable here.” (*Le, supra*, 61 Cal.4th at pp. 424–425, fn. 6.)

### C. Defendant’s Further Briefing

Shortly after *Le* was decided, defendant filed a letter brief with this court, and argued *Le* had refuted the People’s appellate argument. Defendant argued his conviction for assault with a semiautomatic firearm became a serious felony only because of his use of a gun, and he could not be sentenced for both the personal use enhancement and the elevated five-year “serious felony” term for the gang enhancement under section 186.22,

subdivision (b)(1)(B) since both enhancements would have been based on his use of a gun.

Defendant again argued his sentence was unauthorized because *Le* and *Rodriguez* prohibited imposition of both the personal use enhancement and any term imposed for the gang enhancement from the triad for nonserious and nonviolent pursuant to section 186.22, subdivision (b)(1)(A), and the gang enhancement must be either stricken or stayed. Defendant acknowledged that *Le* declined “to decide the issue presented here – whether the trial court lacked discretion to designate the gang enhancement as anything other than a violent felony or if ... section 186.22, subdivision (b)(1)(A) applied,” but argued his sentence was still unauthorized under the facts of this case.

#### D. The People’s Response

We invited the People to address the impact of *Le* on the issues raised in their appeal. In response, the People reviewed the procedural history of this case and the holding in *Le*, and concluded:

“Given [*Le*’s] on-point, binding, legal precedent, [the People] respectfully withdraw the sole issue in its opening brief on this issue.”

The People did not address defendant’s renewed argument that his sentence was still unauthorized under *Le*, *Rodriguez*, and section 1170.1, subdivision (f); and that he could not be sentenced to both the personal use enhancement, and the triad for nonserious and nonviolent felonies under the section 186.22, subdivision (b)(1)(A). The People also did not request to dismiss their appeal.

#### E. The People’s Appeal is Meritless

While the People have belatedly attempted to withdraw the sentencing issue raised in their appeal, there are still several matters which must be addressed in their appeal.

First, the superior court correctly determined at the habeas proceeding that defendant’s original sentence was unauthorized by section 1170.1, subdivision (f), as explained in *Rodriguez*. Defendant’s conviction for assault with a semiautomatic firearm

was only classified as a “violent” felony under section 667.5, subdivision (c)(8), because it was a felony where defendant used “a firearm which use has been charged and proved as provided in ... Section 12022.5 ....” (*Le, supra*, 61 Cal.4th at p. 423.) As a result, defendant could not be sentenced for both the personal use enhancement, and the elevated 10-year “violent” felony gang enhancement under section 186.22, subdivision (b)(1)(C). (§ 1170.1, subd. (f).)

Second, as the People have now conceded, *Le* rejected the argument the People raised at the resentencing hearing and in this appeal – that the court could have imposed both the personal use enhancement, and the elevated five-year gang enhancement for a serious felony under section 186.22, subdivision (b)(1)(B). As *Le* explained, the defendant’s conviction for assault with a semiautomatic firearm was statutorily defined as a serious felony by section 1192.7, subdivision (c)(31) solely because of the defendant’s use of a firearm. As a result, section 1170.1, subdivision (f) again prohibited imposing sentences for multiple enhancements involving the use of a firearm.

Given the holding in *Le*, the original issue the People raised in their appeal is meritless. The court at the resentencing hearing could not have ordered defendant to serve terms for both the personal use enhancement and the elevated “serious felony” term for the gang enhancement since the underlying offenses were elevated to serious felonies solely because of defendant’s personal use of the gun, and section 1170.1, subdivision (f) would have required the court to strike or stay one of those enhancements.

### **III. Did Defendant Receive an Unauthorized Sentence?**

After requesting further briefing about *Le*, the People requested to withdraw the issue raised in their appeal – that defendant should have received a longer term for the gang enhancement. However, we still must address defendant’s recurring argument, raised in response to the People’s appeal, that he received an unauthorized sentence when the court imposed the gang enhancement based on the triad in section 186.22, subdivision (b)(1)(A) for nonserious and nonviolent felonies.

Even though defendant raised this issue in his responsive brief in the People's appeal, the People failed to directly address on the merits whether defendant's sentence was unauthorized, even in response to this court's initial issue letter about *Le*. As a result, we sent another briefing request for both parties to discuss the following issues in light of *Rodriguez* and *Le*: whether this court could address defendant's contention that his sentence was unauthorized even though he did not object or raise the issue in his own appeal; whether defendant was convicted of serious and/or violent felonies; if the superior court was mandated to impose the gang enhancements based on section 186.22, subdivision (b)(1)(B) or (b)(1)(C) for serious or violent felonies, subject to the limitations of section 1170.1, subdivision (f); and whether the court had discretion to impose the gang enhancements pursuant to section 186.22, subdivision (b)(1)(A) for nonserious and nonviolent felonies, even if defendant's convictions were for serious and/or violent felonies.

Both the People and defendant filed letter briefs in response to these questions. We will review the parties' responses and the applicable law for these issues.

A. Review of an Unauthorized Sentence

As the People concede, defendant has not forfeited appellate review of his claim that the term imposed at the resentencing hearing was unauthorized and violated section 1170.1. A legally unauthorized sentence may be corrected at any time, whether or not there was an objection in the trial court. It may be corrected even when raised for the first time on appeal. (*People v. Smith, supra*, 24 Cal.4th at p. 854; *People v. Scott, supra*, 9 Cal.4th at p. 354.) A court's alleged failure to comply with section 1170.1 raises the assertion that the sentence was legally unauthorized and subject to correction for the first time on appeal. (See, e.g., *People v. Bradley* (1998) 64 Cal.App.4th 386, 391–392.)

We thus turn to the merits of defendant's unauthorized sentence claim.

## B. Was Defendant Convicted of Serious and/or Violent Felonies?

There is merit to defendant's claim that, as a matter of law, he was improperly sentenced to the gang enhancement for nonserious and nonviolent felonies under section 186.22, subdivision (b)(1)(A). This conclusion is based on the determination that defendant was convicted of serious and/or violent felonies, regardless of the sentencing options triggered by those convictions.

### *1. Violent felonies*

As explained in the procedural history, *ante*, the amended information in this case alleged that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), making each offense a violent felony (§ 667.5, subd. (c)).

Defendant was convicted of four counts of assault with a semiautomatic firearm. As we have also explained, assault with a semiautomatic weapon is not itself defined as a "violent" felony. At the first sentencing hearing, the court correctly determined the convictions were "violent" felonies since defendant used a firearm "which use has been charged and proved as provided in ... Section 12022.5...." (§ 667.5, subd. (c)(8); *Le, supra*, 61 Cal.4th at p. 423.) In this court's previous appellate opinion, we affirmed the trial court's determination that defendant was convicted of violent felonies because "the personal use of the weapon is a factor of the underlying felony that qualifies it as a violent felony."<sup>8</sup>

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<sup>8</sup> In his most recent letter brief to this court, defendant disputes for the first time that his underlying felonies were violent, and claims his due process rights were violated because he never received notice of such allegations. Defendant argues the information only alleged the underlying offenses were violent based on the allegations that he inflicted great bodily injury on the victims, and the jury found the great bodily injury enhancements not true.

The record refutes this assertion. The information alleged both personal use and gang enhancements. The jury found the personal use enhancements true as to section 12022.5. The jury also found true the allegations in the amended information, that defendant committed the offenses for the benefit of a criminal street gang, and the charged offenses were violent felonies as defined by section 667.5, subdivision (c). In

As such, defendant's personal use of a firearm elevated the underlying offenses to violent felonies, which is why the trial court initially imposed both the personal use enhancement, and the elevated term for the gang enhancement for a violent felony under section 186.22, subdivision (b)(1)(C). As we have also explained, however, *Rodriguez* held that section 1170.1, subdivision (f) precluded imposition of both the personal use enhancement, and the elevated gang enhancement for a violent felony under section 186.22, subdivision (b)(1)(C), since both enhancements were based on defendant's firearm use.

## 2. *Serious felonies*

As we have also explained, assault with a firearm is defined as a "serious felony" based on section 1192.7, subdivision (c)(31). As in *Le*, however, the underlying offenses were elevated to serious felonies solely because of defendant's use of a firearm, and thus subject to the limitation of section 1170.1, subdivision (f).

### C. Imposition of the Gang Enhancement

At the resentencing hearing, the superior court understood the limitation explained in *Rodriguez*, and perhaps anticipated the holding in *Le* – that if it imposed the personal

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this court's previous appellate opinion, we found defendant had been convicted of violent felonies based on the jury's findings on the enhancements. When defendant filed his habeas petition, he did not challenge this court's statement about his convictions for violent felonies. When the superior court granted defendant's habeas petition, it stated that he had been convicted of violent felonies. At the subsequent resentencing hearing, defendant never challenged that finding. In his initial briefing in response to the People's appeal in this case, defendant asserted his convictions were violent felonies based on the personal use enhancements, and the court at the resentencing hearing should have imposed the gang enhancement for violent felonies pursuant to section 186.22, subdivision (b)(1)(C), and then stayed that term pursuant to section 1170.1, subdivision (f).

Defendant was well aware that his underlying convictions could be treated as violent felonies, and his due process rights have not been violated. As *Le* explained, "the jury's findings" made defendant's convictions violent felonies under section 667.5, subdivision (c). (*Le, supra*, 61 Cal.4th at pp. 421–422.)

use enhancement, and an elevated term for the gang enhancement for serious or violent felonies under section 186.22, subdivisions (b)(1)(B) or (b)(1)(C), then section 1170.1, subdivision (f) required one of those enhancements to be stayed or stricken since defendant's use of the gun elevated the offenses to serious and violent felonies.

The court instead decided to impose a term for gang enhancement from the triad defined for nonserious and nonviolent felonies, pursuant to section 186.22, subdivision (b)(1)(A). The court's decision's reflected the belief that section 1170.1, subdivision (f) would not require the section 186.22, subdivision (b)(1)(A) gang enhancement term to be stayed or stricken since the personal use enhancement was not being used to impose an elevated term for a serious or violent felony for the gang enhancement.

In making this decision, the court's attempt to avoid section 1170.1, subdivision (f) failed to account for the plain language of section 186.22, subdivision (b)(1), which states:

“(b)(1) [A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, *shall*, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, *be punished as follows*:

“(A) *Except as provided in subparagraphs (B) and (C)*, the person shall be punished by an additional term of two, three, or four years at the court's discretion.

“(B) *If the felony is a serious felony*, as defined in subdivision (c) of Section 1192.7, the person *shall* be punished by an additional term of five years.

“(C) *If the felony is a violent felony*, as defined in subdivision (c) of Section 667.5, the person *shall* be punished by an additional term of 10 years.” (Italics added.)

Section 186.22, subdivision (b)(1)(A) only applies if the underlying offense is *not* a serious or violent felony as defined in subdivisions (b)(1)(B) and (b)(1)(C). As in *Le*,

the jury's findings on the personal use enhancements elevated the defendant's convictions to both serious and violent felonies, regardless of the sentencing limitations in section 1170.1, subdivision (f). (*Le, supra*, 61 Cal.4th at pp. 421–422.)

Defendant was most certainly convicted of serious and violent felonies. As a result, the court did not have discretion to choose from among possible terms for the gang enhancement. Instead, it was statutorily required to impose the elevated term for the gang enhancements pursuant to section 186.22, subdivisions (b)(1)(B) or (b)(1)(C). “[T]he sentence enhancements in section 186.22, subdivision (b)(1) are *mandatory* – all three provisions specify that the additional punishment ‘*shall*’ be imposed. [Citation.]” (*Le, supra*, 61 Cal.4th at p. 423, italics added; *Rodriguez, supra*, 47 Cal.4th at p. 505.)

*Rodriguez* and *Le*, however, held that section 1170.1, subdivision (f) prohibited imposing both personal use and elevated terms for gang enhancements in situations identical to this case, when the personal use of the gun elevated the underlying offenses to serious and/or violent felonies. Defendant correctly posits that at the resentencing hearing, the court should have imposed the 10-year personal use enhancement and the elevated five-year term for the gang enhancement under section 186.22, subdivision (b)(1)(B) for serious felonies, and then ordered the gang enhancement either stayed or stricken as directed by *Rodriguez, Le*, and section 1170.1, subdivision (f).

In their letter brief, the People “recognize[]” that the three sentencing provisions in section 186.22, subdivision (b)(1) are “mandatory,” and that *Le* prohibits imposition of both the personal use enhancement, and the elevated gang enhancement for a serious felony, since both enhancements are based on the personal use of a gun, based on the limitations in section 1170.1, subdivision (f). (People’s Letter Brief, 8/2/2016)

However, the People assert the court was not foreclosed from imposing the gang enhancement under section 186.22, subdivision (b)(1)(A) for nonserious and nonviolent felonies, and it had discretion to select the appropriate term for the gang enhancement under the following permissive language of section 1170.1, subdivision (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.” (Italics added.)

The People argue the discretionary authority purportedly stated in section 1170.1, subdivision (f), as italicized above, permitted the superior court to impose the lower term for the gang enhancement. The People assert the information in this case “generally” alleged defendant committed the underlying offenses for the benefit of a street gang, in violation of section 186.22, subdivision (b)(1), and not in violation of the specific subdivisions defining serious or violent felonies – subdivisions (b)(1)(B) or (b)(1)(C). The People thus claim the superior court was not required to sentence defendant under the serious or violent felony provisions of the gang enhancement, and had the discretion to impose the enhancement based on section 186.22, subdivision (b)(1)(A), thus avoiding the limitation in section 1170.1, subdivision (f) that would require staying or striking one of those enhancements.

The People assert this conclusion makes sense because “[a] ruling that prohibited sentencing on both the personal use enhancement and the gang enhancement would produce perverse results, contrary to the stated intent of the S.T.E.P. Act.”

In making this argument, however, the People elevate the general sentencing limitation in section 1170.1, subdivision (f) over the mandatory sentencing requirements of section 186.22, subdivision (b)(1). Our task in construing the Street Terrorism and Enforcement Protection Act (the Act) “is to ascertain and effectuate the intended legislative purpose. [Citation.] The text of the statute is our starting point, and ‘generally provide[s] the most reliable indicator’ of the Legislature’s intended purpose. [Citation.]” (*People v. Prunty* (2015) 62 Cal.4th 59, 72.) The Act’s “ ‘express purpose was ‘to seek the eradication of criminal activity by street gangs.’ [Citation.]” (*People v. Gardeley*

(1996) 14 Cal.4th 605, 609, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665.)

While recognizing the purpose of the Act, we must also recognize the plain language of the statute. Section 186.22, subdivisions (b)(1)(B) and (b)(1)(C) mandate the court to impose elevated terms for the gang enhancement if the underlying offense is a serious or violent felony; the court does not have discretion to do otherwise. In the face of this mandatory requirement, *Rodriguez* and *Le* recognized the limitations stated in section 1170.1, subdivision (f), in cases where the defendant's use of a gun was the sole reason for elevating the underlying offense to either a serious or violent felony. In such a case, the court could impose the higher of either the personal use or the gang enhancement, but not both terms.

The People's purported "perverse" scenario is exactly what happened in *Rodriguez* and *Le*. *Rodriguez* remanded the matter for a new sentencing hearing because the superior court had some discretion to select different terms for the underlying felonies to compensate for the loss of one of the enhancements. In doing so, *Rodriguez* acknowledged that the court still could not impose terms for both the personal use and gang enhancements. (*Rodriguez, supra*, 47 Cal.4th at pp. 509–510; *Le, supra*, 61 Cal.4th at p. 428.) *Le* similarly affirmed the trial court's decision to impose the personal use enhancement and the elevated term for the serious felony gang enhancement, and then stay the term for the personal use enhancement, since both enhancements could not be imposed given that they were solely based on the defendant's use of a firearm in the commission of the offense. (*Le, supra*, 61 Cal.4th at p. 429.)

We note that *Le* expressly declined to decide whether the triad of terms for gang enhancements for nonserious and nonviolent felonies in section 186.22, subdivision (b)(1)(A) "might be applicable" in that case, because the parties did not raise the issue. (*Le, supra*, 61 Cal.4th at pp. 424–425, fn. 6.) At this time, however, the California Supreme Court has recognized and rejected the People's argument that it would be

illogical to prevent imposition of a gang enhancement under the circumstances of this case. We are bound by the court's ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

The matter is remanded for another sentencing hearing because both the personal use and gang enhancements cannot be imposed in this case. The superior court must follow the mandatory sentencing provisions in section 186.22, subdivisions (b)(1)(B) or (b)(1)(C) for serious or violent felonies, and then apply section 1170.1, subdivision (f), as explained in *Rodriguez* and *Le*.

### **DISPOSITION**

Defendant's convictions and the enhancements which were found true at defendant's 2003 trial are affirmed.

The \$200 courtroom security fee (§ 1465.8); and the \$150 criminal conviction assessment fee (Gov. Code, § 70373), imposed at the June 6, 2014, resentencing hearing are stricken.

The sentence imposed at the June 6, 2014, hearing for the convictions and enhancements is vacated and the matter is remanded for another sentencing hearing for the superior court to follow the mandatory sentencing provisions in section 186.22, subdivisions (b)(1)(B) or (b)(1)(C) for serious or violent felonies, and then apply section 1170.1, subdivision (f), as explained in *Rodriguez* and *Le*.

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POOCHIGIAN, J.

WE CONCUR:

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LEVY, Acting P.J.

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DETJEN, J.