Filed 12/21/04 Opinion on remand from Supreme Court

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL SHARAD SHABAZZ, Defendant and Appellant.	B160417 (Los Angeles County Super. Ct. No. BA 203410)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Affirmed with modifications.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, William T. Harter and Linda C. Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Following the filing of our prior published opinion in this case, the Supreme Court granted respondent's petition for review and transferred the case to us with directions to reconsider our decision in light of *People v. Chiu* (2003) 113 Cal.App.4th 1260. The Supreme Court's order directs us to consider whether subdivision (j) of Penal Code section 12022.53 bars imposition of a 25-years-to-life enhancement under subdivision (d) when the underlying sentence is life without the possibility of parole.

Our previous opinion, filed on May 27, 2004, B160417, as modified on June 25, 2004, states the facts of the case, and resolves the contentions advanced by appellant. Pursuant to the direction of the Supreme Court, we have reexamined the conclusion reached in part 4 of our previous opinion. Part 4 of the instant opinion reflects the conclusion that we reached following the transfer of this case to us by the Supreme Court.

We respectfully disagree with the conclusion, and the reasoning, of the court in *People v. Chiu*, that the 25 years to life enhancement under section 12022.53, subdivision (d) (hereafter section 12022.53(d)) may be imposed when the underlying sentence is life without the possibility of parole. We conclude that subdivision (j) of section 12022.53 precludes the imposition of the section 12022.53(d) enhancement where, as here, the underlying sentence is life without the possibility of parole.

INTRODUCTION

Appellant Samuel Sharad Shabazz was convicted of first degree murder and sentenced to life imprisonment without the possibility of parole based on the criminal street gang special circumstance of Penal Code section 190.2, subdivision (a)(22).[1] We reject his contention that the photographic lineup which the police showed to witnesses was impermissibly suggestive. We hold that the special circumstance finding was appropriate, even though the person appellant killed was not the person he intended to kill. On the record before us, we reject appellant's argument that the proliferation of special circumstances means the California death penalty law violates the Eighth Amendment's prohibition against cruel and unusual punishment.

---

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

We agree with appellant that one firearm enhancement must be stricken and two others must be stayed. In all other respects, the judgment is affirmed.

BACKGROUND AND PROCEDURAL HISTORY

On May 28, 2000, Lori Gonzalez waited for an opening in traffic to drive her car out of the parking lot of a Popeye's Chicken restaurant. Appellant walked up to the passenger side of her car. Ernest G., who was seated in the passenger seat of Gonzalez's car, ducked when he saw a gun in appellant's hand. Appellant fired at the car repeatedly, fatally injuring Gonzalez. Ernest G. and appellant were members of opposing criminal street gangs. Appellant shot at Ernest G. to retaliate for a drive-by shooting earlier that day.

Appellant was charged with murdering Gonzalez and attempting to murder Ernest G. He was also charged with eight attempted murders stemming from four separate incidents on two dates in December 1998.[2]

The jury convicted appellant of first degree murder and found, as a special circumstance, that he intentionally killed Gonzalez while an active participant in a criminal street gang, and the murder was carried out to further the activities of the gang. (§ 190.2, subd. (a)(22).) The jury further found that in committing the murder, appellant personally and intentionally discharged a firearm causing Gonzalez's death. (§ 12022.53(d).) It also convicted appellant of eight counts of attempted murder and found that each attempt was willful, deliberate, and premeditated. It found that in five of the attempted murders appellant personally and intentionally discharged a firearm, and that in three of these five, he personally and intentionally discharged a firearm, and caused great bodily injury. The jury acquitted appellant of one count of attempted murder. The court sentenced appellant to life in prison without the possibility of parole, plus 25 years to life, for Gonzalez's murder. It imposed eight consecutive life terms, plus 90 years for the attempted murder counts.

---

[2] Because appellant does not challenge his convictions based upon any of these incidents, we omit any discussion of their facts.

DISCUSSION

1. The photographic lineup

A. The record

Before trial, Sandy A. and Ernest G. identified appellant from an array of six photographs as the person who shot at Gonzalez and Ernest G. Appellant moved to exclude evidence of these pretrial identifications and to preclude Sandy A. and Ernest G. from identifying him at trial. Appellant argued that his photograph stood out in the array because his skin color was much darker than that of any of the other five men included in the array. The court denied the motion, saying that no particular photograph "leaps out at me."

Sandy A., who was 11 years old at the time of the crime, testified that she and her cousin J.M. were in an alley located next to Popeye's and behind the apartment building in which J.M. lived. A Black man walked through the alley and passed them. He then walked toward a car in the drive-through at Popeye's and began shooting. After he stopped shooting, he walked back past Sandy A. and J.M., who had taken cover behind a car. At trial, Sandy A. identified appellant as the shooter.

On cross-examination, Sandy A. testified she saw one side of the man's face and his back when he initially walked past her, and saw the other side of his face and his back again when he walked past her following the shooting. She told the police that the man had "dark skin" and a noticeable bump on the top of his head. She described it as the type of bump that might result from being hit on the head. She had an idea of the shape of his head before the police showed her the photographs. She selected photograph No. 3, which was appellant's photograph. On cross-examination, defense counsel asked her, "Who is the Blackest man on that six-pack, who is the darkest picture?" She responded that it was No. 3. He then asked her, "And is that why you picked out that picture, because he was so dark?" Sandy A. said, "Yeah, and he looked -- I guess he looked like him." On further questioning, she agreed with defense counsel's assertions that she selected appellant's photograph because of the shape of his head and the darkness of his skin, and that she "really didn't know the face."

Ernest G. testified he saw the shooter as he walked toward Gonzalez's car. However, Ernest G. was unable to identify anyone at trial. When asked to describe the shooter, Ernest G. said, "[d]ark-skinned person." When asked if the shooter was African-American, Ernest G. replied, "He was dark-skinned. Dark complexion." Asked the same question again, he said, "Could have been." On cross-examination, Ernest G. testified he selected photograph No. 3 in the photographic array and wrote that "this looks very much like the man from the shooting at Popeye's." When asked why he wrote that, Ernest G. said, "Because of the reason of dark skin and not really even knowing." He then said he picked photograph No. 3 "[b]ecause of dark skin." Counsel asked whether No. 3 was "the only truly dark-skinned Black male" among the photographs, and Ernest G. replied, "He's the darkest." He agreed with defense counsel's assertion that was the only reason he selected photograph No. 3.

In rebuttal, the officer who prepared the photographic lineup testified that he looked through several hundred photographs and tried to select the pictures which most resembled appellant.

B. Analysis

Appellant contends the photographic array was impermissibly suggestive because he "was by far the blackest African-American" in it. He argues that admission of evidence that Sandy A. and Ernest G. selected his photograph from the array was therefore impermissible and that Sandy A.'s identification of him at trial was necessarily tainted by her prior identification from the photographic array. He argues that admission of these trial and pretrial identifications violated due process.

A pretrial identification procedure violates a defendant's due process rights if it is so impermissibly suggestive that it creates a very substantial likelihood of irreparable misidentification, that is, it "'suggests in advance of identification by the witness the identity of the person suspected by the police.'" (*People v. Hunt* (1977) 19 Cal.3d 888, 894, quoting *People v. Slutts* (1968) 259 Cal.App.2d 886, 891; *People v. Sanders* (1990) 51 Cal.3d 471, 508.) The defendant bears the burden of proving unfairness as a demonstrable reality, not just speculation. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

On appeal, we review the totality of the circumstances in determining whether an identification procedure was unconstitutionally suggestive. We must resolve all evidentiary conflicts in favor of the trial court's finding and uphold that finding if substantial evidence supports it. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 788.) "'It is unsettled whether suggestiveness is a question of fact (or a predominantly factual mixed question) and, as such, subject to deferential review on appeal, or a question of law (or a predominantly legal mixed question) and, as such, subject to review de novo.'" (*People v. DeSantis*, *supra*, 2 Cal.4th at p. 1222.)

We have examined the photographic array in question (People's exh. No. 16). It contains color photocopies of six photographs of African-American men. Appellant's contention that his skin color is the darkest among the six men in the photographs is correct. However, the photographs clearly indicate they were taken in different lighting conditions, with differences in exposure and reflected light. The printed admonition signed by the witnesses advises of such variations by noting that "photographs may not always depict the true complexion of a person -- it may be lighter or darker than shown in the photo."

Apart from differing skin tones, many of the men in the photographs share certain characteristics with appellant. All of the men except No. 2 have prominent ears, as does appellant. All of the men have large lips. All of the men except No. 1 have prominent eyebrows. Numbers 1, 4, 5 and 6 have heads that are somewhat pointed on top, though not as prominently as appellant's. The man in photograph No. 6 has a long, oval face that is very similar to the shape of appellant's face. All of the men appear to be similar in age. They all have short hair worn in similar styles. Four of the men, including appellant, have a light beard. Five of them, including appellant, have light mustaches. All of the men are dressed in casual clothing.

Viewing all aspects of the photographs in the array, including the skin tone, and exercising independent review, we conclude the array did not suggest in advance the identity of the person suspected by the police. The police did not need to surround appellant's photograph with photographs of men who were nearly identical in appearance. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) The men in the photo array were similar enough

to appellant in various aspects that appellant's photograph did not stand out in a fashion that suggested he was the person suspected by the police. The witnesses were admonished that the group of photographs might not contain a picture of the person who committed the crime and that the photographs might not depict the actual complexion of the persons photographed. Accordingly, we reach the same conclusion as the trial court: showing the witnesses the photographic array was not an unduly suggestive identification procedure.

Furthermore, defense counsel clearly presented the issues of the accuracy of Ernest G.'s and Sandy A.'s identifications of appellant and the possibility that they selected his photograph because it displayed the darkest skin tone of all the photographs in the array. Counsel skillfully cross-examined Sandy A. and Ernest G., and succeeded in getting each to cite the darkness of skin in appellant's photograph as one of the primary reasons for the selection of the photograph. Counsel also brought the claimed suggestiveness and potential flaws in the identifications to the jury's attention through argument. The jury was therefore alerted to the possibility that Sandy A. and Ernest G. erroneously identified appellant due to unfair suggestiveness in the photographic array. This properly placed the issue into the context of the credibility of the witnesses and the reliability of their identifications, instead of taking the extreme and unwarranted step of excluding the identification evidence on constitutional grounds.

Even if we were to conclude the photo array was impermissibly suggestive and the People could not prove that the identifications were nonetheless reliable (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242, overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787), an error in admitting Sandy A.'s and Ernest G.'s identifications would be subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1119, fn. 22.) On the record before us, we would necessarily conclude that the admission of the identification testimony was harmless beyond a reasonable doubt. Darrell M., who knew appellant and belonged to a Crips gang allied with the Crips gang to which appellant belonged, testified under a grant of immunity. Darrell M. testified that several hours before Gonzalez was shot, he saw Ernest G., whom he knew to be a member of a rival Bloods gang set, riding with another man in a blue Caprice.

Darrell M. subsequently heard from some of his fellow Crips that Ernest G. and the other man in the blue Caprice had shot at some Crips gang members. Darrell M. testified that he drove appellant to the alley adjacent to Popeye's where the blue Caprice had been sighted. Appellant and another gang member got out of Darrell M.'s car, and Darrell M. saw appellant shooting at the blue Caprice. The next day, Darrell M. spoke to appellant by phone and criticized him for shooting Gonzalez, who was the granddaughter of the police chief. Appellant said she should not have been there.

Appellant argues that Darrell M.'s testimony had no credibility because he was an accomplice who had been granted immunity from prosecution in this case. He had entered into an agreement with the prosecution under which the prosecutor would recommend that he receive time served for several unrelated felonies, instead of 25 to 30 years in prison, and his family would be relocated. Darrell M. admitted all of these matters during his testimony at trial, and the jury was free to consider their potential effect upon his credibility. Counter-balancing the substantial inducements, however, was the extreme jeopardy in which Darrell M. placed himself and his family by testifying against appellant. Testimony against gang members, especially by a fellow gang member, is extraordinarily rare because the risk of retaliation is extremely high. Given the counterbalancing credibility factors and the highly incriminating nature of Darrell M.'s testimony, no probability exists that the jury would have entertained a reasonable doubt that appellant was the person who murdered Gonzalez and attempted to murder Ernest G. if the challenged identification testimony had not been admitted. Accordingly, error, if any, was harmless beyond a reasonable doubt.

2. The section 190.2, subdivision (a)(22) special circumstance

Section 190.2, subdivision (a) provides: "The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true . . . ." Appellant was charged with and convicted of the special circumstance of section 190.2, subdivision (a)(22) (hereafter section 190.2(a)(22)), which states: "The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of

Section 186.22, and the murder was carried out to further the activities of the criminal street gang." Section 186.22, subdivision (f) defines a "criminal street gang" as a group of three or more persons which has specified criminal acts as a primary activity; a common name, identifying sign or symbol; and members who are involved in a pattern of criminal gang activity.[3]

Appellant contends that section 190.2(a)(22) cannot apply to him because it requires that he "intentionally killed the victim," and he intended to kill Ernest G. but not the actual murder victim, Gonzalez.

Simply stated, the legal issue can be summarized this way: Defendant intended to kill A, but missed, and killed B. Did he intentionally kill B, within the meaning of section 190.2(a)(22)'s language that he "intentionally killed the victim"?

If appellant's interpretation is correct, he would receive a lesser penalty for killing Gonzalez than he would have received if had he succeeded in his goal of killing Ernest G. That result would contravene the ultimate goal of statutory construction, which is to select the interpretation of statutory language which promotes the general purpose of the statute and avoids absurd consequences. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901 (*Robert L.*); *People v. Jenkins* (1995) 10 Cal.4th 234, 246.) Analysis of the statutory intent which underlies section 190.2(a)(22), as well as the use of the word "victim" elsewhere in section 190.2, shows why the section 190.2(a)(22) special circumstance was appropriate in this case.

A. Statutory intent

Section 190.2(a)(22) was added as part of Proposition 21, the Gang Violence and Junveile Crime Prevention Act of 1998, which was approved by the voters on March 7,

---

[3] Section 186.22, subdivision (f) states: "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

2000. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 574.) The intent of the electorate in enacting Proposition 21 was discussed in detail in Justice Moreno's opinion in *Robert L.*, *supra*, 30 Cal.4th 894.

As *Robert L.* explained, "'In interpreting a voter initiative . . . , we apply the same principles that govern statutory construction. . . . Thus, [1] "we turn first to the language of the statute, giving the words their ordinary meaning." . . . [2] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. . . . [3] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." . . .'" (*Robert L.*, *supra*, 30 Cal.4th at pp. 900-901, citations omitted.)

Robert L. involved another provision of Proposition 21, section 186.22, subdivision (d), which provides penalties upon conviction of "a public offense punishable as a felony or a misdemeanor" which is committed for the benefit of a criminal street gang and with the specific intent of promoting its criminal conduct.[4] The issue was whether the quoted language meant the statute's penalties applied only to "wobblers" (public offenses which are punishable as either a misdemeanor or felony) or to any public offense which is a misdemeanor or a felony. (*Robert L.*, *supra*, 30 Cal.4th at p. 900.)

Robert L. first concluded that "the average voter . . . would have understood the plain language of section 186.22(d) to encompass all misdemeanors and all felonies." (*Robert L.*, *supra*, 30 Cal.4th at p. 902, fn. omitted.) That result was further justified by harmonization of section 186.22, subdivision (d) with subdivision (g) of that section and with Proposition 21 as a whole. (*Robert L.*, *supra*, at p. 903.)

---

[4] Section 186.22, subdivision (d) provides a minimum county jail sentence of 180 days, or a prison term of one, two, or three years, for "[a]ny person who is convicted of a public offense punishable as a felony or a misdemeanor, which 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 . . . ."

Assuming that the statutory language was susceptible of two interpretations and therefore ambiguous, *Robert L.* found it appropriate to refer to the analyses and arguments in the proposition's ballot pamphlet. (*Robert L.*, *supra*, 30 Cal.4th at pp. 903-904.)

The "'FINDINGS AND DECLARATIONS'" section of Proposition 21 showed that it "was enacted to combat gang crime." (*Robert L.*, *supra*, 30 Cal.4th at p. 905.) Among the language *Robert L.* quoted from those findings and declarations is the following passage, which relates directly to the section 190.2(a)(22) special circumstance: "'Gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity. Gang-related felonies should result in severe penalties. Life without the possibility of parole or death should be available to murderers who kill as part of any gang-related activity.' (Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (h), p. 119.)" (*Robert L.*, *supra*, 30 Cal.4th at p. 905.)

Robert L. next discussed the ballot argument by the proponents of Proposition 21 and the legislative analysis of the measure. Those documents further showed that the electorate's intent was "to tackle, in 'dramatic' fashion, the onerous problem of gang violence and gang crime." (*Robert L.*, *supra*, 30 Cal.4th at p. 906.)

In the present case, as in *Robert L.*, it is appropriate to consider the intent of the electorate in enacting Proposition 21, as the words "intentionally killed the victim" are reasonably susceptible to two interpretations, and are therefore ambiguous.

Appellant attempts to narrowly construe the words, so that they apply only to the murder of the person the defendant intended to kill. That interpretation would be consistent with the common meaning of "victim," which is "one that is injured . . . ." (Merriam-Webster's Collegiate Dict. (10th ed. 1998) p. 1316.)

The word "victim," however, has a specialized legal meaning, through the doctrine of transferred intent. "Under the classic formulation of California's common law doctrine of transferred intent, a defendant who shoots with the intent to kill a certain person and hits a bystander instead is subject to the same criminal liability that would have been imposed had '"the fatal blow reached the person for whom intended."'" (*People v. Scott* (1996) 14 Cal.4th 544, 546, quoting *People v. Suesser* (1904) 142 Cal. 354, 366; see *People v. Bland*

(2002) 28 Cal.4th 313, 317; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 13, pp. 215-216.) Based on this theory, the jury was given CALJIC No. 8.65, which states: "When one attempts to kill a certain person but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed had been killed."

In deciding which meaning of "victim" should prevail, we take guidance from the principle that "[l]iteral construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *Bodell Construction Co. v. Trustees of Cal. State University* (1998) 62 Cal.App.4th 1508, 1516.)

As indicated, the stated findings and declarations of Proposition 21 are that "[l]ife without the possibility parole or death should be available for murderers who kill as part of any gang-related activity." (Ballot Pamp., Primary Elec., *supra*, text of Prop. 21, § 2, subd. (h), p. 119; *Robert L.*, *supra*, 30 Cal.4th at p. 905.) Appellant is a murderer who killed as part of a gang-related activity. The intent of the electorate is furthered if the section 190.2(a)(22) special circumstance is applied to him, even though he murdered Gonzalez and not Ernest G.

B. Use of the term "victim" elsewhere in section 190.2

Our conclusion on the applicability of the section 190.2(a)(22) special circumstance is further supported by the manner in which the term "victim" is used in other portions of section 190.2. "'Statutory language should not be interpreted in isolation, but must be construed in the context of the entire statute of which it is a part, in order to achieve harmony among the parts.'" (*Robert L.*, *supra*, 30 Cal.4th at p. 903, quoting *People v. Morris* (1988) 46 Cal.3d 1, 16.)

There are other special circumstances, predating section 190.2(a)(22), in which the word "victim" appears, and where appellant's interpretation of the term would defy logic.

The special circumstance of subdivision (a)(15) of section 190.2 applies where the "defendant intentionally killed the victim by means of lying in wait." If the doctrine of

transferred intent does not apply to "the victim," a defendant would not have special circumstance liability if he lay in wait, intended to kill a person, shot at that person, missed, and accidentally killed somebody else.

The special circumstance of subdivision (a)(19) of section 190.2 applies where the defendant "intentionally killed the victim by the administration of poison." If transferred intent were inapplicable, this special circumstance would not apply if the defendant put a lethal dose of poison into the intended victim's soup, the waiter accidentally served it to somebody else, and an unintended victim ate the soup and died. This would predicate liability for a special circumstance on accident or poor marksmanship, rather than the defendant's culpability.

It is true that the word "victim" in the section 190.2(a)(22) special circumstance must mean something. It is a reasonable interpretation of the word "victim" in this subdivision, and in the special circumstances mentioned above with similar language, that "victim" is a generic term. For these special circumstances, the victim can be anybody.

In contrast, there are other special circumstances in section 190.2, subdivision (a) which specify particular classes of victims: "(7) The victim was a peace officer," "(8) The victim was a federal law enforcement officer or agent," "(9) The victim was a firefighter," "(10) The victim was a witness to a crime," "(11) The victim was a prosecutor," "(12) The victim was a judge," "(13) The victim was an elected or appointed official," or "(20) The victim was a juror."

The use of the word "victim" in the other special circumstances supports the conclusion that it is used generically in the section 190.2(a)(22) special circumstance and not, as appellant would read it, to limit the killing to the specific person whom the defendant intended to kill. A defendant qualifies for the additional punishment of this special circumstance not because of whom he killed, but because he possessed the intent to kill, was an active participant in a criminal street gang, and carried out the murder in furtherance of the gang's activities.

C. Conclusion

Based on the intent of the electorate and the use of the word "victim" in other parts of section 190.2, we hold that the section 190.2(a)(22) special circumstance requires that the defendant (1) possessed the intent to kill, (2) was an active participant in a criminal street gang, and (3) carried out the murder in furtherance of the gang's activities. There is no requirement that the person who was murdered be the person whom the defendant intended to kill. The special circumstance finding was therefore appropriate in this case.

3. Cruel and unusual punishment

The Eighth Amendment requires that a state's capital punishment scheme "afford some objective basis for distinguishing a case in which the death penalty has been imposed from the many cases in which it has not." (*People v. Crittenden* (1994) 9 Cal.4th 83, 154; *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.) In California, the special circumstances serve the purpose of guiding the jury's discretion, by confining the class of offenders who are eligible for the death penalty. (*People v. Crittenden*, *supra*, at p. 155.)

Appellant maintains that, with the addition of the section 190.2(a)(22) special circumstance to the list of preexisting special circumstances, so many murders now qualify for a special circumstance that the California death penalty law does not provide a meaningful basis for narrowing the class of persons who are eligible for the death penalty. According to appellant, "the overwhelming majority of intentional first degree murderers [are] death eligible."

Respondent complains that appellant is repeating the argument which our Supreme Court rejected in *People v. Koontz* (2002) 27 Cal.4th 1041, 1095, and *People v. Boyette* (2002) 29 Cal.4th 381, 439-440. However, *Koontz* and *Boyette* both involved crimes which occurred in 1992. (*People v. Koontz*, *supra*, at p. 1055; *People v. Boyette*, *supra*, at p. 403.) The special circumstance of section 190.2(a)(22) was added in 2000. Although it was in existence, it played no part in the *Koontz* and *Boyette* decisions. The fact the Supreme Court has repeatedly rejected this issue in the past does not mean it has considered it in the context of the extended list of special circumstances which applies to this case.

Another problem is whether appellant has standing to raise the Eighth Amendment issue, as he has not been sentenced to death. Fairness supports allowing him to attack the constitutionality of California's special circumstance scheme, since it is because of a special circumstance that he is subject to life imprisonment without the possibility of parole, the second most severe of our possible penalties. He argues that "he is permitted to argue as a matter of statutory construction that the special circumstance would violate the Eighth Amendment if applied in a death penalty case, since the construction of the special circumstance in his case must be consistent with its construction in a capital case." However, the cases he cites do not support his position.

People v. Anderson (1987) 43 Cal.3d 1104, 1138-1146, involved a defendant who was sentenced to the death penalty.

Owen v. Superior Court (1979) 88 Cal.App.3d 757, 762, struck the special circumstance allegations from an indictment for conspiracy to commit first degree murder, on the ground that no death had occurred. (*Id.* at p. 760.) It treated the issue as if the death penalty were being sought, even though the People were not contending that the death penalty would apply, because "[a]nyone vulnerable to a sentence of life without possibility of parole is also vulnerable to a death sentence." (*Id.* at p. 759.) Here, in contrast, appellant has already received the penalty of life imprisonment without the possibility of parole, and is not vulnerable to the death penalty.

People v. Estrada (1995) 11 Cal.4th 568, 575-576, is the closest of appellant's cases, in that it involved a defendant who was sentenced to life imprisonment without the possibility of parole. The holding of *Estrada* is that trial courts have no sua sponte duty to instruct on the meaning of the term "reckless indifference to human life," which is the requisite mental state for the accomplice felony-murder special circumstance of section 190.2, subdivision (d). (*People v. Estrada*, *supra*, at p. 572.) In reaching that conclusion, *Estrada* looked to *Tison v. Arizona* (1987) 481 U.S. 137 for the meaning of the phrase "reckless indifference to human life," as *Tison* was the source of the language of the special circumstance. However, *Estrada* also recognized that the principles of the Eighth and Fourteenth Amendments might not be applicable where the penalty is life imprisonment

without the possibility of parole, rather than death. (*People v*. *Estrada*, *supra*, at pp. 575-576.)

Assuming arguendo that appellant has standing, he has not provided us with a record which shows that his claims are empirically accurate. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 155.) He gives no factual or legal authority to support his claim that, with the addition of the section 190.2(a)(22) special circumstance, "almost every first degree murderer is death eligible based on the charging decision of the prosecutor." On this record, we must reject appellant's Eighth Amendment argument.

4. The 25-year firearm enhancement on the murder count

On count 1, the jury found appellant guilty of first degree murder, found the section 190.2(a)(22) special circumstance to be true, and found true an allegation that he caused Gonzalez's death by personally discharging a handgun, within the meaning of section 12022.53(d). He was sentenced on count 1 to life imprisonment without the possibility of parole, plus 25 years to life for the section 12022.53(d) enhancement. Appellant maintains that the additional 25-year enhancement imposed under section 12022.53(d) was forbidden by the language of section 12022.53, subdivision (j) (hereafter subdivision (j).) We agree.

Subdivision (j) provides: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, *unless another provision of law provides for a greater penalty or a longer term of imprisonment.*" (Italics added.)

We are "guided by the rule of statutory construction which directs us, when determining legislative intent, to look first to the words themselves for the answer." (*Owen v. Superior Court*, *supra*, 88 Cal.App.3d at p. 762.) There is no ambiguity in the statute. (*Robert L.*, *supra*, 30 Cal.4th at p. 901.) The express language of *subdivision (j)* shows that the *section 12022.53(d)* enhancement here is erroneous, because the trial court imposed a

"longer term of imprisonment," life without the possibility of parole, pursuant to *section 190.2(a)(22)*.

In *People v. Chiu*, *supra*, 113 Cal.App.4th 1260, the court concluded that the above-italicized portion of subdivision (j) refers to a penalty, or a term of imprisonment, for the use or discharge of a firearm during the commission of certain enumerated felonies, and not to the punishment for the underlying offense. The court found that the subject of the last sentence of subdivision (j) is the "enhancement specified in this section," i.e. one of the three applicable enhancements for firearm use or discharge specified in subdivisions (b) through (d) of section 12022.53. The court concluded: "When one of those three enhancements for firearm use or discharge has been properly charged and found true, the court shall impose the applicable punishment under subdivision (b), (c), or (d), unless another provision of law provides for a greater penalty or a longer term of imprisonment *for that firearm use or discharge*, in line with that subject. The 'greater penalty' part of subdivision (j) ensures that the '[n]otwithstanding any other provision of law' language in subdivisions (b) through (d) does not inadvertently supersede a law that would impose an even *greater* punishment on a defendant for employing a firearm in committing one of the enumerated crimes." (*People v. Chiu*, *supra*, 113 Cal.App.4th at p. 1264.)

The principal difficulty with the interpretation given to the second sentence of subdivision (j) by the court in *Chiu* is that it effectively requires an amendment of that subdivision. This is shown by the court's addition of the phrase "*for that firearm use or discharge*," that the court italicizes for emphasis. As amended by the court in *Chiu*, the second sentence of subdivision (j) reads: "When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment *for that firearm use or discharge*." We do not think that such an amendment can be fairly, or logically, imposed on subdivision (j). "A court may not insert qualifying provisions not included, and may not rewrite a statute to conform to an assumed intention which does not

appear from its language." (*International Federation of Professional & Technical Engineers v. City and County of San Francisco* (1999) 76 Cal.App.4th 213, 225.)

If the Legislature intended to limit the second sentence of subdivision (j) to enhancements, it could have easily done so. Rather than refer in the second sentence to "another provision of the law," reference could have been made to enhancements. The sentence would have read: "When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another *enhancement* provides for a greater penalty or a longer term of imprisonment." Subdivision (f) of section 12022.53 specifically addresses a number of enhancements, and sets forth their relationship to enhancements under section 12022.53.[5] Thus, when the Legislature intended to refer to enhancements in section 12022.53, it did so expressly. However, the reference in the second sentence of subdivision (j) is to "another provision of law," and not to enhancements.

"Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning." (*Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 497.) "When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73.) When the Legislature has carefully employed a

---

5 Subdivision (f) provides: "Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d)."

term in one place and has excluded it in another, it should not be implied where excluded. (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 507.)

The choice of the phrase "another provision of law," rather than the word "enhancement," in the second sentence of subdivision (j) indicates that the Legislature did not intend to limit this provision to enhancements. This choice appears to have had cases in mind such as the one at bar, where the punishment for the offense exceeds the 25 years to life enhancement of section 12022.53(d). This choice appears to be reasonable, since one cannot "enhance" a life sentence without the possibility of parole, if the premise of a criminal sentence, whether for an offense or an enhancement, is that the offender can serve the sentence. However, a person cannot serve an enhancement that is to take effect only upon his or her death, i.e., upon the expiration of a life sentence without the possibility of parole.

There is another reason why the second sentence of subdivision (j) should not be limited to enhancements.

Subdivision (f) of section 12022.53 regulates the relationship between other enhancements for the personal use of a firearm and section 12022.53 by subordinating them to section 12022.53. The Legislature has dealt with the relationship of firearm enhancements in subdivision (f), clearly giving section 12022.53 enhancements priority.

Since section 12022.53, subdivision (f) regulates cases where the offender is eligible for more than one enhancement for firearm use, it appears that the second sentence of subdivision (j) is intended to address cases where the punishment for the underlying offense exceeds the section 12022.53 enhancement. This is not to exclude the possibility that, at some future time, as noted by the court in *People v. Chiu*, *supra*, 113 Cal.App.4th at page 1264, there might not be an enhancement that is more severe than those set forth in section 12022.53. For the present, however, there are no enhancements for firearm use more severe than those set forth in section 12022.53, particularly in section 12022.53(d). Accordingly, it must be that the Legislature intended in subdivision (j) to address problems it did not address in subdivision (f), i.e., cases where the punishment for the offense exceeds the enhancements set forth in section 12022.53. The construction set forth in *People v. Chiu,*

supra, 113 Cal.App.4th at page 1264, that limits the second sentence of subdivision (j) to enhancements, addresses a situation that does not exist. An interpretation of the statute that makes it meaningless, or null and void, is to be avoided. (*Kane v. Superior Court* (1995) 37 Cal.App.4th 1577, 1587.)

We agree with the observation of the court in *People v. Chiu*, *supra*, 113 Cal.App.4th at page 1265, that the various provisions of section 12022.53 show that the Legislature is serious about applying the enhancements set forth in this section.[6] However, this does not mean that the Legislature intended to have enhancements imposed when, as here, it is simply impossible that the offender will serve even one day of the enhancement.

Finally, if the Legislature desired to avoid the illogical result of enhancing a sentence that cannot be enhanced because the defendant cannot serve the enhancement, subdivision (j) serves that purpose. As noted, subdivision (f) of section 12022.53 subordinates other use of firearm enhancements to section 12022.53 enhancements. The question therefore is to what "penalty" or "term of imprisonment" the Legislature intended to refer in the phrase "unless another provision of law provides for a greater penalty or longer term of imprisonment." Only a life sentence without the possibility of parole, or death, is "another provision of law [that] provides for a greater penalty or longer term of imprisonment" than the 25 years to life enhancement of section 12022.53(d). Therefore, it appears that the case at bar is precisely the kind of a case that is intended to be covered by subdivision (j).

---

6 We note in this connection that the least enhancement of 10 years under section 12022.53, subdivision (b) exceeds the term for most of the felonies listed in section 12022.53, subdivision (a). Thus, we do not think that our interpretation of subdivision (j) will lead to situations where, as the court notes in *People v. Chiu*, *supra*, 113 Cal.App.4th at page 1264, enhancements under section 12022.53 will be routinely set aside because the punishment for the underlying offense is greater than the section 12022.53 enhancement. However, when the term of an offense listed in section 12022.53, subdivision (a) exceeds 10 years, it is a term for life, which is a greater penalty, or a longer term of imprisonment, than the 10-year enhancement. Therefore, under subdivision (j), the life term displaces the 10-year section 12022.53, subdivision (b) enhancement. This result squares with not imposing an enhancement that is impossible to serve.

We conclude that the section 12022.53(d) enhancement must therefore be stricken from the judgment.

5. Correction of the abstract of judgment

The abstract of judgment shows that 20-year enhancements were imposed on counts 6 and 7, pursuant to section 12022.53, subdivision (c). However, the trial court stayed those enhancements, as it had already imposed 25-year enhancements on those counts pursuant to section 12022.53(d). The parties agree that the abstract of judgment is erroneous as to the section 12022.53, subdivision (c) enhancements on these two counts. We order the appropriate correction to the abstract of judgment.

DISPOSITION

In accordance with the views expressed herein, the judgment is hereby modified to strike the 25-year enhancement which was imposed on count 1 pursuant to section 12022.53(d), and the abstract of judgment is corrected to show the stay the trial court imposed on the 20-year enhancements which were imposed on counts 6 and 7 pursuant to section 12022.53, subdivision (c). The superior court is directed to send a corrected abstract reflecting these changes to the Department of Corrections. In all other respects, the judgment is affirmed.

CERTIFIED FOR PUBLICATION

FLIER, J.

We concur:

RUBIN, Acting P.J.

BOLAND, J.