



SUPREME COURT
FILED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA JUL 14 2014

Frank A. McGuire Clerk

Deputy

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

vs.

VICTORIA COOK,
Defendant and Appellant.

Case No. S215927

Fourth Appellate District, Division Two, Case No. E054307
Riverside County Superior Court, Case No. SWF10000834
Honorable Dennis A. McConaghy, Judge

ANSWER BRIEF ON THE MERITS

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QUESTION PRESENTED

Does Penal Code section 12022.7, subdivision (g), which provides that the great bodily injury enhancement of this section “shall not apply to murder or manslaughter . . . ,” allow an enhancement on a manslaughter conviction for the great bodily injury inflicted on another victim who was the subject of a separate manslaughter conviction?¹

INTRODUCTION

This is a tragic case in which three people died as the result of appellant’s reckless driving while on her way after work to pick up her daughter from day-care.² After an eight day jury trial, appellant was convicted of three counts of gross vehicular manslaughter, and as to count 1, the jury found true three great bodily injury enhancements pursuant to Penal

¹The question presented recited here is verbatim as this Court accepted the issue for review on March 12, 2014; however, without explanation, petitioner has altered the issue to read as follows: “Does Penal Code section 12022.7, subdivision (g), evidence the legislative intent that a defendant receive a lesser sentence for killing two people compared to killing one person and injuring another?” (Opening Brief on the Merits (hereinafter “OBM”) at p. 1.)

²In the opening sentence of the introduction to the OBM, petitioner grossly mischaracterizes appellant’s conduct, stating appellant was “speeding and driving recklessly *during a bout of road rage*. . . .” (OBM at p. 1.) The only evidence adduced at trial of road rage pertained to the actions of victim Cedric Page, who reacted with road rage at appellant’s driving. (1RT 145-146, 158, 2RT 282, 3RT 531.)

Code³ section 12022.7, subdivision (a), one for the surviving victim, and two for the deceased victims named in counts 2 and 3. The trial court imposed sentence on counts 1, 2, and 3, and imposed the section 12022.7, subdivision (a) enhancement for the surviving victim on count 1. It struck the section 12022.7, subdivision (a) enhancements for the deceased victims pursuant to section 1385.

On appeal, the court reversed the true findings on the section 12022.7, subdivision (a) enhancements with respect to the manslaughter victims named in counts 2 and 3. It held that the statutory bar in section 12022.7, subdivision (g), prohibits application of the section 12022.7, subdivision (a) enhancement relative to any victim in a case in which the defendant has been convicted for manslaughter as to that victim. (Slip Op. at p. 11.)

The Court of Appeal's holding was correct: section 12022.7, subdivision (g) expresses the Legislature's clear intent that a defendant charged with an offense which includes infliction of death or great bodily injury to a victim may not also have that sentence enhanced with additional time for causing great bodily injury to that same victim. In order to stay true to this intent, section 12022.7, subdivision (g) precludes attaching the

³Further references to statutes are to the Penal Code unless otherwise noted.

enhancement to the count involving the dead victim, or to a count involving another dead victim.

STATEMENT OF THE CASE

On June 28, 2011, a jury convicted appellant, Victoria Cook, of three counts of gross vehicular manslaughter pursuant to section 192, subdivision (c)(1) for the respective deaths of Zaria Williams (Williams), Christine Giambra (Giambra), and Cedric Page (Page). The jury additionally found true three allegations attached to the count 1 offense (alleging the unlawful death of Williams pursuant to section 192, subdivision (c)(1)) pursuant to section 12022.7, subdivision (a) that defendant had personally inflicted great bodily injury upon Giambra, Page, and surviving victim Robert Valentine (Valentine). (1CT 259-264.)

On August 16, 2011, the court sentenced appellant to an aggregate term of incarceration of nine years, eight months, striking the punishment for the enhancements as to Giambra and Page pursuant to section 1385, but imposing a three-year consecutive term for the enhancement as to Valentine. (3RT 663, 2CT 372.)

Appellant appealed, and in an opinion issued December 12, 2013 following rehearing, the Court of Appeal agreed with appellant that the statutory bar in section 12022.7, subdivision (g), limited the application of enhancements with respect to victims Giambra and Page, victims for whom

the defendant had already been convicted of manslaughter. (Slip Op. at p. 11.) The court held, “The statutory bar in section 12022.7, subdivision (g) would appear to be limited to the imposition of an enhancement with respect to a victim for whom the defendant had already been convicted of manslaughter. It would not apply to other victims for whom the defendant had not been convicted of manslaughter or murder.” The court then reversed the true findings on the section 12022.7, subdivision (a) enhancements with respect to victims Giambra and Page. (Slip Op. at p. 21.)

In reaching this conclusion, the Court of Appeal declined to follow the contrary holding of *People v. Julian* (2011) 198 Cal.App.4th 1524 (*Julian*).

On March 12, 2014, this Court granted the government’s petition for review filed January 17, 2014.

STATEMENT OF FACTS

On June 2, 2009, Austin Welch was driving home on Highway 74, a four lane highway, when he saw a Ford Fusion, driven by appellant, pull abruptly into the fast lane, causing a silver Audi driven by Cedric Page, approaching behind it in the fast lane, to slam on the brakes. (1RT 88-93.)

Page backed off some, and appellant increased speed to that of the other traffic. (1RT 94.) Appellant changed into the slow lane behind Welch, and again changed into the fast lane without signaling, swerving hard and

cutting Page off again, causing him to slam on his brakes again. (1RT 98-100.)

Both Page and appellant then sped up to a fast speed. Page was directly behind appellant, and Welch could see no gap behind the cars, which were moving around in the lane a bit. (1RT 100-101.) The Audi was riding the Ford's bumper (1RT 145) and it looked as if the Audi was "inhabiting the same space as the Ford." (1RT 142, 145).

Appellant attempted to change into the slow lane again, this time in front of Welch, but the gap between Welch and the next vehicle was insufficient for appellant's car and it collided with Welch's car. (1RT 102-103.) This caused appellant's car to fishtail, slide across traffic and collide with Page's Audi, forcing it into oncoming traffic. (1RT 103-104.)

Page collided head-on with a Mitsubishi SUV driven the other way by Robert Valentine. (1RT 79-81.) Page and his passenger, Zaria W., were killed in the collision. (1RT 77.) Valentine's passenger, Christine Giambra, was killed in the collision and Valentine was severely injured. (1RT 76, 79-81.)

Officer Scott Parent, California Highway Patrol and part of the Multi Disciplinary Accident Investigation Team, opined that appellant caused the collision when she unsafely changed into the lane in front of Welch. (2RT 309, 350.)

ARGUMENT

I. SECTION 12022.7, SUBDIVISION (G), PRECLUDES CHARGING MANSLAUGHTER AND ALLEGING A GREAT BODILY INJURY ENHANCEMENT BASED ON THE SAME VICTIM'S DEATH

Section 12022.7, subdivision (a)⁴ provides: “Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.” However, section 12022.7, subdivision (g)⁵ provides four specific exclusions to the application of enhancements pursuant to section 12022.7: “This section shall not apply to murder or manslaughter or a violation of Section 451 or 452. Subdivisions (a), (b), (c), and (d) shall not apply if infliction of great bodily injury is an element of the offense.”

Subdivision (g) is unambiguous (*Hale v. Superior Court* (2014) 225 Cal.App.4th 268, 275 (*Hale*)), and precludes basing a great bodily injury enhancement on the injuries suffered by a vehicular manslaughter victim who is also named in a manslaughter count, because the injuries the manslaughter victim suffers are inherent in the offense that caused his or her death (*id.* at pp. 275-276).

⁴ Hereinafter, “subdivision (a).”

⁵ Hereinafter, “subdivision (g).”

However, petitioner argues that section 12022.7 “authorizes imposition of a great bodily injury enhancement for the injuries suffered by a separate victim who is also the subject of a manslaughter conviction,” and that this conclusion is consistent with principles of statutory interpretation, the purpose of section 12022.7, and is consistent with the mandate of section 654. (OBM at p. 5.)

Petitioner’s argument introduces the anomaly that subdivision (g) only applies to bar enhancements in single victim vehicular homicides (*Hale, supra*, 225 Cal.App.4th at p. 274), rendering it surplusage in any case in which there are multiple manslaughter victims (Slip Op. at pp. 16, 20 fn. 8.) Further, apart from *Julian*, which held that two victims named in manslaughter counts could also have their injuries enhanced under section 12022.7 (*Julian, supra*, 198 Cal.App.4th at p. 1530), petitioner’s argument is not supported by caselaw construing the application of subdivision (g) to section 12022.7.

For these reasons, the Court of Appeal’s opinion should be affirmed.

A. General principles of statutory interpretation

“Statutory construction begins with the plain, commonsense meaning of the words in the statute, because it is generally the most reliable indicator of legislative intent and purpose. [Citation.] When the language of a statute is clear, we need go no further. [Citation.]” (*People v. Manzo* (2012) 53 Cal.4th

880, 885 [internal quotation marks omitted].) “[I]f the statutory language is not ambiguous, then we presume the Legislature meant what it said, and the plain meaning of the language governs.” (*People v. Montes* (2003) 31 Cal.4th 350, 356.) Thus, “[o]nly when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids . . . to ascertain its meaning.” (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055.) “Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary.” (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.)

However, the meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the [statute]. . . .’ [Citation.]” (*Accord, People v. King* (1993) 5 Cal.4th 59, 69.)

In *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, this Court added: “The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in light of the statutory scheme [citation]” (*Accord, People v. King, supra*, 5 Cal.4th at p. 69.)

In addition, statutes must be construed to give effect to every word or provision, if legitimately possible. (*In re Clifford C.* (1997) 15 Cal.4th 1085, 1092; *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 114.) The courts are to construe a criminal statute as favorably to a criminal defendant as its language and the circumstances permit. (*People v. Franklin* (1999) 20 Cal.4th 249, 253; *In re Christian S.* (1994) 7 Cal.4th 768, 780.)

Finally, “ ‘The Legislature is presumed to know the existing law and have in mind its previous enactments when legislating on a particular subject. [Citation.]’ ” (*Unzueta v. Ocean View School Dist.*, (1992) 6 Cal.App.4th 1689, 1697.) “ ‘ ‘The literal meaning of the words of a statute may be disregarded to avoid absurd results. . . .’ ” [Citation.]” (*Id.* at p. 1698.) But this “exception should be used most sparingly by the judiciary and only in extreme cases else we violate the separation of powers principle of government. [Citation.] We do not sit as a ‘super-legislature.’ ” (*Ibid.*)

B. Petitioner’s argument that section 12022.7, subdivision (g) does not prohibit the allegation of an enhancement for great bodily injury for injuries suffered by a separate victim who is also the subject of a manslaughter count is contrary to the Legislature’s intent for section 12022.7, and renders subdivision (g) as surplusage

The express exclusions of subdivision (g) state the great bodily injury enhancement “shall not apply to murder or manslaughter or a violation of Section 451 or 452 [arson]. Subdivisions (a), (b), (c), and (d) shall not apply

if infliction of great bodily injury is an element of the offense.” (Subd. (g).)

Section 12022.7, subdivision (f) specifies that “[a]s used in this section, ‘great bodily injury’ means a significant or substantial physical injury.”

However, petitioner argues that despite these exclusions, the language of section 12022.7 authorizes imposition of a great bodily injury enhancement for the injuries of a separate victim who is also the subject of a manslaughter conviction. (OBM at pp. 9-10, 17.) Petitioner bases this interpretation of section 12022.7 on principles of statutory interpretation and the purpose of section 12022.7, which is to punish more severely those crimes that result in great bodily injury on any person. (OBM at p. 5, 11.) Specifically, petitioner argues that the language of subdivision (a), applying section 12022.7 to bodily injuries sustained by “any person,” read in conjunction with section 1170.1, which governs limitations on the number of enhancements to be imposed and the dual use of facts, is sufficiently broad to include the injuries of victims other than the manslaughter victim who sustain great bodily injury during the offense *and* separate victims who are also the subject of a manslaughter conviction. (OBM at pp. 8-10.) But section 1170.1, subdivision (g) applies to the use of multiple enhancements for the infliction of great bodily injury on a single victim, and gives no guidance on whether an enhancement for great bodily injury pursuant to a subdivision of section 12022.7 may be limited in application by another subdivision of that

same statute. And the argument that the holding below defeats the purpose of section 12022.7, which is to punish more severely those crimes that result in great bodily injury on any person, was rejected by the court in *Hale*.

In *Hale*, the intoxicated defendant lost control of his vehicle and struck a tree, killing his three passengers. (*Hale, supra*, 225 Cal.App.4th at p. 271.) He was charged with three counts of vehicular manslaughter while intoxicated, and each manslaughter count included two great bodily injury enhancements pursuant to section 12022.7 for each of the other two deceased victims. (*Ibid.*) The defendant filed a writ of mandate seeking to overturn the trial court's denial of his pretrial motion to set aside the great bodily injury enhancement allegations pursuant to subdivision (a) for the two deceased victims, arguing the court erred in concluding a defendant may face both a manslaughter conviction and a great bodily injury penalty enhancement for the same victim's death. (*Ibid.*) The district attorney rejected a literal reading of subdivision (g), and argued that the purpose of section 12022.7 was "to ensure greater punishment where the defendant inflicts greater harm," and that this purpose would be defeated if the great bodily injury enhancement penalties were precluded. (*Id.* at p. 275.) The Court of Appeal disagreed.

The court began, "We do not find subdivision (g) ambiguous." (*Hale, supra*, 225 Cal.App.4th at p. 275.) The court then observed that "[t]he great bodily injury enhancement in section 12022.7 applies by its terms to enhance

punishment for significant or substantial injuries a victim suffers. [Citation.] Subdivision (g) specifies it does not apply to ‘murder or manslaughter,’ and the district attorney does not suggest, nor can we envision, a scenario in which a vehicular manslaughter victim could be killed and not incur significant or substantial injuries.” (*Ibid.*) The court then explained that the “statutory purpose of the Legislature’s GBI regime is not to maximize punishment under every pleading artifice a prosecutor can devise, but instead to ‘deter[] the use of excessive force and the infliction of *additional harm beyond that inherent in the crime itself.*’ ” (*Ibid.*, quoting *People v. Wolcott* (1983) 34 Cal.3d 92, 108 [original italics].) The court held that the injuries a vehicular manslaughter victim suffers are inherent in the offense causing death, “and therefore precluded by subdivision (g) as a basis for enhancement.” (*Id.* at p. 276.)

Subdivision (g) thus unambiguously limits application of section 12022.7 to enhance punishment relative to any victim in a case in which the defendant has been convicted for the death of that victim, or the elements of the offense include infliction of great bodily injury for that victim. In contrast, petitioner’s argument would allow subdivision (a) to enhance the injuries sustained by a manslaughter victim, effectively rendering subdivision (g) as surplusage in any case in which there are two or more manslaughter victims. Because any statutory interpretation that renders a statute’s

provisions surplusage must be avoided, each section of the statute must be read in the light of the entire statute. (*Lungren v. Deukmejian, supra*, 45 Cal.3d at p. 735.) When read in context, subdivision (g) must be read to limit application of subdivisions (a) through (d) to offenses where the deceased victim is also named in a manslaughter or murder count. Any other interpretation limits subdivision (g) to prohibiting a defendant's sentence from being enhanced for injuries suffered by a victim he is already being punished for killing. *Julian*, the case cited by petitioner in support of its argument, so limits subdivision (g).

In *Julian*, the defendant was convicted of two counts of vehicular manslaughter (§ 191.5, subd. (b)), and the jury found true great bodily injury enhancements pursuant to section 12022.7, subdivision (a) and (b) attached to both manslaughter counts. (*Julian, supra*, 198 Cal.App.4th at p. 1526.) The manslaughter victim in count 1, Terri, was named as a great bodily injury victim in count 2, which alleged the death of Amanda; similarly, Amanda, was named as great bodily injury victims in count 1. Surviving victim Alexis was named as a great bodily injury victim in both counts. (*Ibid.*) As to count 1, the jury found true great bodily injury enhancements for causing the pre-death coma of Amanda, and inflicting great bodily injury on Alexis. On count 2, the jury found true attached great bodily injury enhancements as to Terri and Alexis. (*Ibid.*) The trial court sentenced

defendant to the “four-year upper term . . . for the manslaughter of Terri, a five-year enhancement for Amanda’s great bodily injury . . . and a three-year enhancement for Alexis’s great bodily injury. With respect to the manslaughter of Amanda, a four-year upper term and two three-year great bodily injury enhancements for the injuries to Terri and Alexis were imposed and stayed under section 654.” (*Ibid.*) Defendant appealed contending the trial court erred in imposing all the section 12022.7 enhancements. (*Id.* at pp. 1526-1527.)

The court in *Julian* held, “Although Terri and Amanda died as a result of their injuries and their deaths support [the defendant’s] manslaughter convictions, in this case their injuries also support enhancements under section 12022.7.” (*Julian, supra*, 198 Cal.App.4th at p. 1530.) The court observed it was continuing to narrowly construe the exception set forth in section 12022.7, subdivision (g), as it had in *People v. Verlinde* (2002) 100 Cal.App.4th 1146 (*Verlinde*), and *People v. Weaver* (2007) 149 Cal.App.4th 1301 (*Weaver*), disallowing the enhancement only where it concerned the same victim of manslaughter or murder as the substantive count to which it was attached. (*Julian*, at pp. 1529-1530.) It reasoned such an “interpretation not only avoids the absurd result of diminishing punishment when a victim dies, it also is consistent with the requirement of section 654 a defendant be sentenced under the statute which provides the longest potential term of

imprisonment.” (*Id.* at pp. 1531-1532.) “To hold Alexis’s injuries will support an enhancement but, because she died, Amanda’s injuries will not, would permit a defendant . . . to benefit to some extent from the fact one of his multiple victims died rather than survived. We of course must reject such a grotesque interpretation of the statute” (*Id.* at pp. 1530-1531.) It further concluded a contrary interpretation was unnecessary to prevent double punishment because, as did the sentencing court in its case, application of section 654 would necessarily bar such a result. (*Id.* at pp. 1531-1532.)

Thus, under *Julian*, subdivision (g)’s exclusions serve no purpose except to preclude a great bodily injury enhancement to attach to a substantive count for that same victim, because *Julian* allows the injuries sustained by a manslaughter victim whose death is the subject of a manslaughter count to attach as an enhancement for great bodily injury to a separate manslaughter victim’s count. (*Julian, supra*, 198 Cal.App.4th at pp. 1530-1531.) This effectively renders subdivision (g) as surplusage.⁶ However, the language of subdivision (g) is specific: “This section shall not apply to murder or manslaughter or a violation of section 451 or 452.

⁶ *Julian* actually goes one step further and suggests that if a manslaughter victim suffers separate and distinct injuries prior to death, such as a coma, those injuries could be the subject of a separate enhancement for great bodily injury. (*Julian, supra*, 198 Cal.App.4th at pp. 1530-1531.) As the Court of Appeal points out below, this logic would allow a manslaughter victim to be enhanced by his or her own injuries (Slip Op. at pp. 19-20 (see argument, *post*, at p. 19)), thus rendering subdivision (g) meaningless.

Subdivisions (a), (b), (c), and (d) shall not apply if infliction of great bodily injury is an element of the offense.” (Subd. (g).) Clearly, the intent of subdivision (g) is something greater than the nugatory rendering of *Julian*.

The gravamen of both statutes at issue here is the degree of harm to the victim. (*People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1375.) The substantive count, section 192, subdivision (c)(1), cannot be punished unless there is the death of a victim. The enhancement, subdivision (a), cannot be found true unless there is great bodily injury to a victim. Manslaughter necessarily involves the infliction of great bodily injury (*People v. Lewis* (1993) 21 Cal.App.4th 243, 250), but the inverse is obviously not true, great bodily injury does not necessarily involve death.

Subdivision (g) provides specific guidance on the application of subdivision (a), specifying exclusions for counts alleging death (murder and manslaughter), and counts in which infliction of great bodily injury is an element of the offense (including arson causing great bodily injury). Subdivision (g) thus takes into consideration the distinction between death and great bodily injury, and those crimes in which great bodily injury is not an element of the offense, and excludes imposition of an enhancement for the injuries inflicted on a deceased victim. (*Verlinde, supra*, 100 Cal.App.4th at p. 1168 [the statutory exemption of subdivision (g) for murder and manslaughter is intended to bar imposition of an enhancement for the injuries

inflicted on the homicide victim, who obviously has suffered great bodily injury]; accord, *Hale, supra*, 225 Cal.App.4th at p. 276; Slip Op. at pp. 17-18 [“Subdivision (g) would appear to mean what it clearly reads, i.e., the enhancement does not attach with regard to a victim of murder or manslaughter for which a conviction on the substantive count has been obtained.”].)

To the extent petitioner relies on *Julian* to support its argument, *Julian* has found an exception where one does not exist.

First, *Julian* is not supported by the two cases preceding it which upheld great bodily injury enhancements as to surviving victims of a vehicular manslaughter defendant, but did not support great bodily injury enhancements as to deceased victims who were also named in manslaughter counts.

In *Verlinde*, the court addressed the proposition in dicta, where it explained that subdivision (g)’s “statutory exemption for murder and manslaughter is intended to bar imposition of an enhancement for the injuries inflicted on the homicide victim, who obviously has suffered great bodily injury.” (*Verlinde, supra*, 100 Cal.App.4th. at p. 1168.) As *Hale* summarized this language, “Put another way, the guilty verdict on a manslaughter count necessarily includes a finding of great bodily injury, and the sentencing range the Legislature has prescribed for manslaughter necessarily includes

punishment for the injuries the defendant inflicted on the victim.” (*Hale, supra*, 225 Cal.App.4th at pp. 272-273.)

In the other case preceding *Julian, People v. Weaver*, the court criticized a prior case⁷ for summarily concluding that section 12022.7 enhancements could not apply to any vehicular manslaughter offenses regardless of injuries sustained by victims other than the deceased. It characterized the prior decision as “without any substantive reasoning.” (*Weaver, supra*, 149 Cal.App.4th at p. 1335, fn. 35.) Thus, *Weaver* “implicitly concluded that the enhancement did not apply to a victim for whom the defendant faced manslaughter charges.” (*Hale, supra*, 225 Cal.App. 4th at p. 274; accord, Slip Op. p. 17 [“*Weaver* criticized *Beltran* for holding that the enhancement could not apply to victims *other than the deceased*” [original italics].)

Second, *Julian* was not followed by the two subsequent courts examining this issue, the Court of Appeal below, and *Hale*.

As the court observed below, *Julian* renders subdivision (g) surplusage, and *Julian* leads to a result that would violate the plain meaning of subdivision (g). The court noted that *Julian*’s holding allowed a manslaughter charge as to victim A to be enhanced with the bodily injury of victim B, simultaneously enhancing the manslaughter charge of victim B to

⁷ *People v. Beltran* (2000) 82 Cal.App.4th 693.

by the bodily injury of victim A. The court observed, “The only function subdivision (g) then effectively serves is to prohibit a defendant from suffering a conviction for murder or manslaughter and an enhancement as to the victim of that same crime when she just happens to kill one individual.” (Slip Op. p. 18.) Under this analysis, subdivision (g)’s only purpose is to limit a defendant charged with a single count from having their conviction enhanced by an additional three years pursuant to subdivision (a), because every multiple count homicide defendant would have each victim enhancing each other, thus rendering subdivision (g) as surplusage.

But the court below also found that *Julian*’s logic would violate the plain meaning of subdivision (g): “[U]nder *Julian*’s logic, a broad construction of subdivision (g) might even allow a manslaughter conviction to be enhanced with an attached great bodily injury enhancement under section 12022.7, pertaining to the same victim, if that victim suffered some distinct injury. (*Julian, supra*, 198 Cal.App.4th at pp. 1530-1531 [the “separate and distinct nature” of Amanda Keller’s injuries permits them to be used as an enhancement].) Thus, in *Julian*, if Amanda had been the only victim, *Julian*’s reasoning would have allowed both the manslaughter conviction for her eventual death and an attached enhancement for her coma. We would regard such a result as violative of the plain meaning of subdivision (g).” (Slip Op. p. 18.)

The court in *Hale* reached similar conclusions. The court reviewed both *Verlinde* and *Weaver* and found no support for *Julian*'s holding that 12022.7 permits an enhancement for great bodily injury suffered by deceased victims. (*Hale, supra*, 225 Cal.App.4th at pp. 272-274.) It then found that *Julian*'s interpretation of subdivision (g) introduced its own anomaly in which the bar on great bodily injury enhancements in subdivision (g) applies only in single victim vehicular homicides. "[A]ccording to *Julian*, the bar [in subdivision (g)] is circumvented in multiple victim accidents by simply attaching a GBI enhancement for a deceased victim's injuries to a manslaughter count for another victim. Yet nothing in the statutory language suggests the Legislature intended to limit subdivision (g) to vehicular manslaughter cases involving one victim, but allow GBI enhancements in multiple victim cases." (*Hale, supra*, 225 Cal.App.4th at p. 274 [footnote omitted].) The court also explained how that anomaly would work in practice: "[W]here there is an accident with a single victim, A, and A dies, the prosecutor cannot attach a GBI enhancement to the vehicular manslaughter count for A's death. But if there is another accident victim, B, who also dies, the prosecutor under *Julian* may simply attach a GBI enhancement for B's fatal injuries to the manslaughter count alleged for A's death, and attach a GBI enhancement for A's fatal injuries to the manslaughter count for B's death. According to the district attorney, this

pleading maneuver may be multiplied ad infinitum where there are victims C, D, E, F, G. . . .” (*Id.* at p. 274, fn. 2.)

These observations from the court in *Hale* are correct. Imposition of a great bodily injury enhancement for the injuries to a separate victim who is also the subject of a manslaughter conviction is violative of the plain meaning of subdivision (g) and its taking into consideration the degree of harm to the victim in the respective substantive crimes – death and great bodily injury, and crimes in which great bodily injury is an element of the offense – and imposition of an enhancement for the injuries inflicted on a deceased victim. Further, under *Julian’s* logic, every case in which there are multiple homicide counts would see the injuries sustained by those victims enhancing each separate victim. Apart from specific exceptions (e.g., Veh. Code, § 23558 [multiple victims exception relating to Veh. Code, § 23153, and §§ 191.5 and 192.5, subd. (a)]), this is something the Legislature has not provided for in any sentencing scheme involving death.⁸

The *Hale* court concluded: “Prescribing punishment is the Legislature’s domain, and we conclude the legislative proscription in subdivision (g) means what it says. The statutory language plainly states a

⁸ Apart from *Julian’s* construing of section 12022.7, appellant is aware of no statute in which a victim’s death is also treated by the Legislature as great bodily injury for purposes of enhancing a separate death. Indeed, if the Legislature intended death to be treated the same as great bodily injury for enhancement purposes, it would be a simple enactment to make that designation.

GBI enhancement ‘*shall not apply* to murder or manslaughter. . . .’ (§ 12022.7, subd. (g), italics added.) Removing any conceivable doubt, subdivision (g) further provides a GBI enhancement ‘*shall not apply* if infliction of great bodily injury is an element of the offense’ (italics added). Great bodily injury is by definition inherent in a murder or manslaughter victim’s injuries that result in death. Consequently, great bodily injury is necessarily proven when the victim’s death is proven as an element of those offenses. By statutory command, a GBI enhancement therefore ‘shall not apply.’ (§ 12022.7, subd. (g).) We must give effect to this plain language.” (*Hale, supra*, 225 Cal.App.4th at p. 275.)

As the foregoing shows, in drafting section 12022.7 the Legislature took into consideration the distinction between death and great bodily injury, and crimes in which great bodily injury is not an element of the offense, and wrote subdivision (g) to exclude enhancing counts using the same injuries sustained by those victims. (See *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1149–1150 [“the great bodily injury enhancement alleged in this case under section 12022.7 for the death of [the victim] is inapplicable to a conviction for section 192”].) Any reading of section 12022.7 that allows enhancing counts with the injuries of victims who are themselves the subject of counts alleging death, or counts in which infliction of great bodily injury is an element, renders subdivision (g) as surplusage. In this regard, the Court of

Appeal below was correct. (Slip Op. p. 17.) As has been shown, the one exception is *Julian*, the holding of which renders subdivision (g) surplusage in any case in which there are multiple manslaughter victims – subdivision (g)’s only purpose is to limit a defendant charged with a single count from having their conviction enhanced by an additional three years pursuant to subdivision (a) for that victim. (*Hale, supra*, 225 Cal.App.4th at p. 274),

For these reasons, this Court should affirm the Court of Appeal and hold that subdivision (g) means what it says when it precludes attaching an enhancement to a victim of murder or manslaughter for which a conviction on a substantive count has been obtained, and the holding reaching the opposite conclusion in *Julian* largely renders subdivision (g), as surplusage. (Slip Op. at p. 17.)

C. If section 12022.7, subdivision (g) is ambiguous, any ambiguity should be construed in appellant’s favor under the rule of lenity

Petitioner argues that even if subdivision (g) is found to be ambiguous, the statute should be read to allow for enhancement for injuries suffered by separate deceased victims in order to effectuate the purpose of the statute, and to avoid an absurd result. (OBM at p. 18.) However, if subdivision (g) is ambiguous, any ambiguity should be construed in appellant’s favor under the rule of lenity, and the fact it may give rise to a sentencing discrepancy is for the Legislature, and not the courts, to correct.

It is the Legislature's prerogative to define crimes and set punishments for crimes. (*People v. Albritton* (1998) 67 Cal.App.4th 647, 660.)

Ambiguities in penal statutes must be resolved in favor of the defendant, because the "touchstone" of the rule of lenity "is statutory ambiguity." (*Bifulco v. United States* (1980) 447 U.S. 381, 387 [100 S. Ct. 2247, 65 L. Ed. 2d 205].)

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

[Citations.]" (*People v. Overstreet* (1986) 42 Cal.3d 891, 896.) This rule has "constitutional underpinnings." (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.) "Under the separation of powers doctrine, the rule serves to protect the legislature's exclusive authority to define crimes from judicial encroachment. As a matter of fundamental due process, the rule helps to ensure that citizens are given fair warning of conduct punishable as a crime." (*Ibid.*)

"Strict construction of penal statutes protects the individual against arbitrary discretion by officials and judges and guards against judicial usurpation of the legislative function which would result from enforcement

of penalties when the legislative branch did not clearly prescribe them. Strict construction also prevents judicial interpretation from changing the legal consequences of acts completed prior to the decision and thus aids in meeting the requirement that a defendant have fair warning of the consequences of his acts reflected in the constitutional prohibition against ex post facto laws.

[Citations.]” (*People v. Overstreet, supra*, 42 Cal.3d at p. 896.)

Petitioner argues a sentencing scenario, also mentioned in *Julian* (*Julian, supra*, 198 Cal.App. 4th at pp. 1530-1531), in which a defendant receives a possible maximum sentence of one year less for causing the deaths of two people than the possible maximum sentence for causing the death of one person and injuring another. (OBM at pp. 1, 12-15.) Petitioner argues that this disparity is an absurd consequence the Legislature did not intend. (OBM at p. 18.) But the fact there may be a sentencing disparity does not render a statute absurd.

The court in *Hale* acknowledged a similar disparity, explaining that while it was glaring and unjust, a sentencing disparity does not “necessarily render a statutory scheme absurd because it is the Legislature’s prerogative to affix punishment.” (*Hale, supra*, citing *Harmelin v. Michigan* (1991) 501 U.S. 957, 998-1001 (conc. opn. of Kennedy, J.) [noting inevitable sentencing vagaries].) “More to the point, we may not simply rewrite the statutory scheme, purporting to sit as a super-Legislature.” (*Ibid.*)

The *Hale* court was correct. “ ‘Courts must take a statute as they find it, and if its operation results in inequality or hardship in some cases, the remedy therefor lies with the legislative authority.’ ” (*Unzueta v. Ocean View School Dist.*, *supra*, 6 Cal.App.4th at p. 1697.) Further, this is not an “extreme case” requiring the court to “violate the separation of powers of government.” (*Id.* at p. 1698.) The fact the Legislature has passed a law in which the “greater” offense can receive incrementally less time than the “lesser” offense does not make that law absurd, but if the Legislature agrees the sentencing disparity is not what it intends, it can take steps to avoid it. Or as one court put it, “the judiciary ‘should not interfere . . . unless a statute prescribes a penalty “out of proportion to the offense. . . .” ’ ” (*People v. Pecci* (1999) 72 Cal.App.4th 1500, 1505; see *In re Gomez* (2009) 179 Cal.App.4th 1272, 1281, fn. 6, disapproved on other grounds in *In re Pope* (2010) 50 Cal.4th 777, 785, fn.3 [sentencing anomaly only suggested that the result might not have been that intended by those enacting the statutory scheme].) Because sentencing vagaries are inevitable, and because the one year discrepancy here is not out of proportion to the offense, any remedy should be left to the Legislature.

Further, to the extent subdivision (g) may be subject to two interpretations, leaving the remedy to the Legislature is consistent with the rule that appellant is entitled to the benefit of every reasonable doubt as to the

true interpretation of words or the construction of a statute. (*People v. Overstreet, supra*, 42 Cal.3d at p. 896.) Any other result leads to the “judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them.” (*Ibid.*)

For these reasons, this Court should affirm the Court of Appeal and hold that subdivision (g) prohibits application of the a subdivision (a) enhancement relative to any victim in a case in which the defendant has been convicted for manslaughter as to that victim.

CONCLUSION

For the foregoing reasons, appellant respectfully asks that this Court affirm the judgment of the Court of Appeal.

July 11, 2014

Respectfully submitted,

Thomas K. Macomber
Attorney for Victoria Cook

CERTIFICATION OF WORD COUNT

I, Thomas K. Macomber, hereby certify that, according to the computer program used to prepare this Appellant's Opening Brief contains 5,939 words, not including the caption and tables.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

July 11, 2014.

Thomas K. Macomber
Attorney for Appellant

DECLARATION OF SERVICE

Case Name: *People v. Victoria Cook*

Case No. **S215927**

I declare: I am employed in the County of Riverside, State of California. I am over 18 years of age and not a party to the within titled cause; my business address is 3877 Twelfth Street, Riverside, CA 92501.

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D) & 8.71(f)(1)(A)-(D).)

On July 11, 2014, I electronically served a true and correct PDF copy of the attached **ANSWER BRIEF ON THE MERITS** from my notification address of macomber@macomberlegal.com to the following recipients and electronic notification addresses:

1. Office of the Attorney General: ADIEService@doj.ca.gov
2. Appellate Defender's Inc: eservice-criminal@adi-sandiego.com
3. Supreme Court of the State of California via electronic submission at <http://www.courts.ca.gov/24590.htm>

PROOF OF SERVICE BY MAIL
(Cal. Rules of Court, rules 1.21, 8.50.)

On July 11, 2014, I served the attached **ANSWER BRIEF ON THE MERITS** by sealing a copy thereof in an envelope and placing that envelope in the United States Mail at Clear Brook, Virginia, 22624, addressed to each recipient as follows:

Office of the District Attorney
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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

July 11, 2014

Thomas K. Macomber