IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, -vs - AMIR A. AHMED, Defendant and Respondent,	Case No. S191020

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

APPELLANT'S ANSWER TO OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, -vs - AMIR A. AHMED, Defendant and Appellant,	Case No. S191020

ISSUES PRESENTED

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

2. If section 654 does apply to sentence enhancements, does section 654 prohibit imposition of sentence enhancements for both personal use of firearm and for infliction of great bodily injury?

STATEMENT OF THE CASE

A jury convicted appellant of assault with a firearm in violation of Penal Code section 245, subdivision (a)(2) (count 2). [1] The jury acquitted appellant of attempted murder and attempted voluntary manslaughter (count 1). The jury further found that in the commission of the offense (count 2), appellant personally

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

used a firearm within the meaning of section 12022.5, subdivision (a) and personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (e). (CT 170-174, 184; RT 568-571.)

Following waiver of trial by jury, appellant admitted that he had been convicted of two prior felony convictions for which he had served prison terms and for which he had not remained free of prison custody and did commit an offense resulting in a felony conviction within five years of the conclusion of said terms within the meaning of section 667.5, subdivision (b). Pursuant to the motion of the People, the court struck another section 667.5, subdivision (b) allegation. (CT 131, 134; RT 488-489.)

For assault with a firearm in violation of section 245, subdivision (a)(2), the court sentenced appellant to the high term of four years. The court enhanced appellant's sentence four years for the great bodily injury enhancement pursuant to section 12022.7, subdivision (e) and three years for the personal use of a firearm enhancement pursuant to section 12022.5, subdivision (a). For the personal use of a firearm, the court imposed 2 one-year sections 667.5, subdivision (b) enhancements. Appellant's total term came to 13 years in state prison. (CT 211, 213; RT 575-577.) Appellant filed a timely notice of appeal. (CT 216.)

On appeal, the Court of Appeal found that the issue of whether section 654 applied to both the weapon use and the infliction of great bodily injury was a

matter of statutory interpretation. The court held that section 654 applies to sentence enhancements and applied that section to both the personal use of a firearm enhancement and the infliction of great bodily injury enhancement. (Slip - Opn. at p. 18, 19.)

Respondent filed a petition for review and the California Supreme Court granted its petition.

STATEMENT OF THE FACTS

Ahmed and Romo

Appellant is the father of Larin Romo's four-year-old child. Romo first met appellant around 2001 and they lived together off and on since then, including part of 2006. (RT 34, 35.) Their relationship was never on solid footing and they fought all the time. (RT 35.)

In August 2006, appellant lived in University Village student housing at 3500 Iowa Avenue, Apartment 308, Riverside. (RT 36.) Because of the rocky nature of their relationship, Romo often stayed at her friend Amber's apartment. (RT 37.)

Early on August 8, 2006, appellant called Romo and asked her to come over to his apartment. (RT 95.) Romo first went to K-Mart where she made some purchases. (RT 79.)

Later, Romo and two friends, Christina and Mike, arrived at appellant's apartment on Iowa Avenue where Romo took a shower and changed her clothes. They then went to La Cadena. (RT 105.)

Mike and Christina drove Romo and appellant back to the University Towers apartment, arriving there around 1:00 a.m. (RT 105.) Romo then sat down on the kitchen floor and began putting her purchases away, while Christina helped. (RT 47, 99, 105.)

When appellant entered the apartment, he sat down at a table in the living room and he and Romo began bickering. (RT 105.) Appellant wanted Romo to come back to the relationship but she was not listening. (RT 47.) Romo was tired and wanted to go to sleep. Appellant was angry at Romo because she was not readily coming back to the relationship. Romo and appellant continued to bicker back and forth. (RT 48, 49.)

After about 15 minutes, Mike and Christina left. (RT 108.)

Romo began calling appellant names which might have included "Sand - nigger," obviously not a term of endearment. (RT 107.) Romo thought that she heard appellant say something like "Bitch, I'll shoot you," but was not certain. (RT 111.)

As they bickered, Romo noticed that appellant appeared to put a gun into a bag. (RT 105.)

Suddenly, something knocked the wind out of Romo. She felt as if someone had shot a bean bag into her stomach. Even then, Romo did not understand that she had been shot by a bullet. (RT 447.)

Romo looked down and saw a little hole in her stomach and a small amount of blood trickling out of it. (RT 113.) Romo told appellant that it was hard to breath and promised that if he called the police, she would not tell them he had shot her. Romo made this promise because she did not think appellant would get

her help since he was more worried about getting in trouble than about her dying. (RT 55, 56.)

Appellant became upset and started crying. (RT 113.) Appellant picked Romo up and carried her into the bedroom. He then called 911. (RT 56, 113, 114.)

Police Response

Around 1:30 a.m., Riverside police officer Erich Feimer arrived at appellant's apartment at 3500 Iowa Avenue. Other officers quickly followed. Feimer knocked on the door, appellant open it and the officers entered the apartment. (RT 141, 142.) When Feimer entered the apartment, he did not smell anything consistent with gun powder. (RT 158.)

Feimer saw lying on a bed in the bedroom. She was lying on her side and holding her left hip area. (RT 142.) When the officers finished their security sweep, they allowed the paramedics into the apartment. (RT 143.)

Officer Feimer spoke with Romo who said that she had been shot in the open balcony area. (RT 146.) After speaking with Romo, Officer Feimer searched the balcony area but found nothing of significance that related to the shooting. (RT 147.) He also did not see any sign of blood in the balcony breezeway. (RT 151-153.) Feimer also searched the planter area directly below the balcony but found

nothing of significance to his investigation and no evidence of a shooting. (RT 148.)

Riverside Police Officer Trinidad Lomeli and his partner also arrived at appellant's apartment and participated in the search. There was a desk in the bedroom and inside a drawer officer Lomeli found a .22 caliber magazine inside a box of staples. (RT 174.) The magazine can be inserted into a handgun which can then fire off the bullets. (RT 174, 175.)

Lomeli looked for bullet holes in the apartment, including the kitchen but found none. (RT 180.) The .22 magazine was the only item of evidence connected to a firearm that Lomeli found. The officers did not find either a gun or shell casings. (RT 181.)

The paramedics arrived and transported Romo to the hospital. (RT 57.)

The Investigation

On August 9, 2006, city of Riverside police Detective Richard Wheeler was assigned as the lead investigator into the Romo shooting. Wheeler had received specialized training in domestic violence cases. (RT 235-238.) As a detective working in domestic violence, he had investigated over 500 cases and had personally qualified as an expert in court on domestic violence issues. (RT 239, 240.) Wheeler had testified about intimate partner battery syndrome which refers to a relationship between two people in a sexual relationship and how the dynamics

of power and control are used by one partner to manipulate the other partner which frequently results in violence such as sexual assault. (RT 240.) It is not uncommon for victims in domestic violence cases to lie, minimize and recant their previous statements. (RT 241.) One reason for victims of domestic violence to lie or recant is fear of physical retaliation or economic loss. (RT 241, 242.)

On August 9, Detective Richard Wheeler went to appellant's apartment where other police officers were conducting a search. The officers had seized some evidence including a dark blue jewelry box. Inside the box was an unexpended .380 bullet. There was also a yellow metal ring with a red stone in the center. (RT 252.)

Detective Wheeler then went to the Riverside Community Hospital where he spoke to Larin Romo and recorded the conversation. (RT 254.) In the interview, Romo said she was smoking a cigarette in the balcony breezeway when she heard a noise and felt "like someone had shot her with a bean bag." Romo could not breathe and did not know that she had been shot until she went back inside the apartment and her boyfriend lifted up her shirt. (CT 37.)

Wheeler asked Romo to tell him about the couple who had been in the apartment and left before the shooting. The woman was Christina Solarez, who lived downtown. Romo did not know Mike's last name. (CT 43.)

When Wheeler asked if appellant had shot her, Romo said that "he didn't shoot me." (CT 43.) Also, Romo denied that Mike had shot her. (RT 43.)

On August 15, 2006, Detective Wheeler went back to the hospital and spoke again to Romo. (RT 254.) Romo was in a lot of pain from the gunshot and was upset and frightened. (RT 284.) At the beginning of the interview, Romo admitted that appellant had shot her. (CT 116, 117.) Romo said that she was sitting on the kitchen floor putting away packages of items that they had just bought for the apartment. "He was mad at me and he just shot me, like nonchalantly, like whatever." (CT 117.) Romo said that the shooting took place after "everyone had left." (CT 117.)

Mike and Christina had been there while Romo and appellant were arguing and that is the reason why they left. (CT 118.) Christina had stayed to help Romo put away the packages but she and Mike had left when Romo and appellant began arguing. (CT 120.)

Sometime after Mike and Christina had left, Romo suddenly felt a pain and thought that she had been hit by a bean bag. (RT 120.) Romo unbuttoned her pants and saw blood and realized that she had been shot. (CT 121.) Romo asked appellant to call the police. Appellant said he did not want any trouble and told her to tell them that he did not shoot her. (CT 121.) Romo indicated she would be willing to help Detective Wheeler and the District Attorney. (CT 123, 124.)

Romo did not know when she would be released from the hospital because the staff had to take out part of her intestines and the recovery process was slow and painful. (CT 242.)

In May 2007, Detective Richard Wheeler spoke again with Romo at the Family Justice Center in downtown Riverside about exactly how she was shot in appellant's apartment. The conversation was not recorded. (RT 257-258.)

Romo told Wheeler that she had been in appellant's apartment, they had been arguing while Romo was putting away items in the cupboards and that appellant shot her "out of nowhere." (RT 259.)

During the argument, Romo had called appellant a "Sand-nigger." Sometime after, Romo was shot. She felt immense pain, and begged appellant to call 911 for help. (RT 259.) Romo agreed that she would not tell the police he had shot her so that he would not get into trouble. (RT 260.)

While appellant was in custody, Detective Wheeler listened to a number of his telephone conversations. In one conversation, appellant telephoned an unknown woman. During their conversation, appellant told the woman that "what she [Larin Romo] told you is on, is all on … tape. He recorded it. He came in here and played it back to me." "Fucking old girl [Larin Romo] spilled the beans, and I heard it. He played it back to me and trust me, girl, it was drama. I tried to get it out of his hands and everything." (CT 81, 84; RT 434.)

Riverside Police Officer Jerry Post, who had been assigned to assist Detective Wheeler, went to appellant's apartment to search it. Inside appellant's bedroom, Post found a standard ring box and opened it. Inside was a yellow metal ring set inside a piece of cardboard. Post lifted up the cardboard and saw a live .380 bullet at the base of the box. (RT 335-336.)

I

SECTION 654 APPLIES TO ENHANCEMENTS IN GENERAL

A. Introduction

The Court of Appeal held that section 654 applies to enhancements in general and applied it to both the weapon use and great bodily injury enhancements under sections 12022.5 and 12022.7. The court found that the issue is one of statutory interpretation. (Slip. Opn. 18, 19.)

In terms of the application of section 654, the Court of Appeal concluded

> This is, at bottom, an issue of statutory interpretation. Therefore, we begin with the wording of section 654. Defendant both personally used a firearm under Penal Code section 12022.5 (section 12022.5) and personally inflicted great bodily injury during domestic violence under Penal Code section 12022.7 (section 12022.7) by a single "act" – pulling the trigger. Moreover, this act is made "punishable" by these two different statutes (at least when performed in the course of the commission of an underlying offense). Hence, it would seem that section 654 would apply. (Slip Opn. at p. 16.) ¶ Having so concluded, we can find no exception or other reason why section 654 would *not* apply. Under *Coronado*, these enhancements, unlike a prior prison term enhancement, are based on the defendant's conduct, not on his or her status. (*People v. Coronado, supra*, 12 Cal.4th at p. 157). Unlike in *Palacios*, section 12022.5 and section 12022.7 do not purport to apply notwithstanding any other law. And unlike in *Chaffer*, applying section 654 here would not nullify either section 12022.5 or section 12022.7. ¶ Finally, the multiple victim exception to section 654 (see generally *People v. Oates* (2004) 32 Cal.4th 1048, 1063) does not apply here, because defendant had only a single victim. (Slip Opn. at p. 16.)

B. **Statutory Construction**

This appeal raises an issue of statutory construction. " '[T]he court's construction of a statute is purely a question of law and is subject to de novo review on appeal.' [Citation.]" (*Reis v. Biggs Unified School Dist.* (2005) 126 Cal.App.4th 809, 816; see also *People ex. Rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal. 4th 415, 432.) "The rule governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.]" (*People v. Flores* (2003) Cal. 4th 1059, 1063; see also *People v. Coronado* (1995) 12 Cal. 4th 145, 151; *Graham v. State Bd. Of Control* (1995) 33 Cal.App.4th 253, 259-260.) To determine legislative intent, we first examine the words of the statute, applying " 'their usual, ordinary, and common sense meaning based upon the language … used and the evidence purpose for which the statute was adopted.'" (*People v. Granderson* (1998) 67 Cal.App.4th 703, 707, quoting *In re Rojas* (1979) 23 Cal.3d 152, 155; see also *Flores*, at p. 1063 ["[t]o determine legislative intent, we turn first [ ] to the words of the statute, giving them their usual and ordinary meaning"].) "… 'If there is no ambiguity in the language of the statute, "then the legislature is presumed to have meant what it said, and the plain meaning of the language governs." [Citation.] "Where the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not exist.'

[Citation.]"' [Citation.]" (*Coronado*, at p. 151.) If the words of the statute are ambiguous, a court may resort to "extrinsic sources, including the ostensible objects to be achieved and the legislative history." (*Ibid.*) Applying these rules of statutory interpretation, a court " 'must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*Ibid.*)

In construing a statute, courts do not consider statutory language in isolation; rather, courts look to the statute as a whole, taking into account each clause and section in context and harmonizing the provisions relating to the same subject matter. (*People v. Andrade* (2002) 100 Cal.App.4th 351, 356.)

C. **Section 654**

Here, the imposition of both the firearm use enhancement (§ 12022.5(a)) and the great bodily injury enhancement (§ 12022.7(e)) violates section 654's rule against multiple punishment because both enhancements arose from the same act or course of conduct, i.e., the shooting of Larin Romo in appellant's apartment.

Section 654, subdivision (a) provides, in pertinent part, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one

provision." Section 654 is intended "to insure that a defendant's punishment is commensurate with his [or her] culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 552.)

Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. (§ 654; *People v. Miller* (1977) 18 Cal.3d 873, 885.) If, for example, a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed. (*People v. Miller, supra*, 18 Cal.3d at p. 886.) Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences. (*In re Wright* (1967) 65 Cal.2d 650, 652-655, [trial court erred in imposing concurrent sentences for two convictions for which section 654 prohibited multiple punishment].)

D. **Section 654 Applies to Enhancements**

Whether section 654 generally applies to enhancements has not been resolved by the California Supreme Court. (See *People v. Palacios* (2007) 41 Cal.4th 720, 728; *People v. Oates* (2004) 32 Cal.4th 1048, 1066, fn. 7; *People v. Coronado* (1995) 12 Cal.4th 145, 157.) The California Supreme Court has addressed the issue by analyzing the language of the specific enhancement statute (*People v. Palacios, supra*, 41 Cal.4th 720) or by examining the nature of the particular enhancement (*People v. Coronado, supra*, 12 Cal.4th 145). *Palacios*

held three section 12022.53 firearm enhancements should be imposed, despite section 654, because section 12022.53 expressly states the enhancement shall be applied as an additional and consecutive term of imprisonment *notwithstanding any other provision of law*. (*Id.* at pp. 726-728.) *Palacios* reasoned this language demonstrated a legislative intent to override section 654. (*Id.* at pp. 728-730.)

In *Coronado*, the court held that section 654 did not bar use of a prior conviction to elevate an offense to a felony and use of the prison term resulting from the prior conviction to enhance the sentence. (*People v. Coronado, supra*, 12 Cal.4th at p. 159.) The *Coronado* court based its holding on the distinction between enhancements that pertain to the nature of the offense and enhancements that pertain to the nature of the offender. (*Id.* at pp. 156-158.) The court concluded that a prior prison term enhancement, which was "attributable to the defendant's status as a repeat offender," did not constitute punishment for an "act or omission" within the meaning of section 654. (*Coronado, supra*, at p. 158.)

In all other contexts, however, our high court has yet to reach the issue and provide the courts with guidance. (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1218-1219.) Whether section 654 applies to enhancements as a general proposition, the appellate courts are split. (*People v. Arndt* (1999) 76 Cal.App.4th 387, 294-395 (*Arndt*); *Wynn, supra*, at p. 1219, fn. 8.)

In the past, some courts held that section 654 is inapplicable to enhancements because they do not define a crime or offense but relate to the penalty imposed. (*People v. Boerner* (1981) 120 Cal.App.3d 506, 511 (*Boerner*) [section 654 does not apply to great bodily injury enhancements]; *People v. Parrish* (1985) 170 Cal.App.3d 336, 344 [same]; *People v. Warinner* (1988) 200 Cal.App.3d 1352, 1355 [section 654 does not apply to enhancements for committing an offense while released from custody related to a previous offense].) But as to conduct enhancements, the recent trend is otherwise. (*People v. Reeves* (2001) 91 Cal.App.4th 14, 56 [applying section 654 to enhancements for causing great bodily injury]; *Arndt, supra*, 76 Cal.App.4th at p. 395 [same].) As early as 1992, the *Boerner* court acknowledged that " 'it is now well-accepted that section 654 applies to enhancements. [Citations.]' [Citation.]" (*People v. Price* (1992) 4 Cal.App.4th 1272, 1277.) It was the *Boerner* court that decided *Wynn* and held that if the factual basis for an enhancement is an act or omission, then "the enhancement falls within the scope of section 654." (*Wynn, supra*, 184 Cal.App.4th at p. 1220 [applying section 654 to an enhancement for personally using a deadly weapon during the commission of a burglary].)

One court recently concluded that section 654 was inapplicable to an enhancement imposed under section 12022.7. "[S]ection 12022.7 is a specific provision that operates as an exception to the more general statute, section 654."

(*People v. Chaffer* (2003) 111 Cal.App.4th 1037 at p. 1044-1045.) The court further explained: "Section 12022.7 is a narrowly crafted statute intended to apply to a specific category of conduct. It represents 'a legislative attempt to punish more severely those crimes that actually result in great bodily injury.' [Citations.]" (*Id.* at p. 1045.) "If we were to apply the general provisions of section 654 to the more specific GBI enhancement, it would nullify section 12022.7" whenever the enhancement and underlying offense involved the same act. (*Ibid.*) "This cannot be what the Legislature intended …." (*Ibid.*)

Other appellate courts have applied section 654 where multiple enhancements were imposed for a single criminal act. (See *People v. Arndt, supra*, 76 Cal.App.4th at p. 397; and see *People v. Chaffer, supra*, 111 Cal.App.4th at p. 1045 [collecting cases].)

Our Supreme Court has acknowledged the split of authority, but so far has declined to resolve it. (*People v. Palacios, supra,* 41 Cal.4th 720, 728 (*Palacios*) ["[W]e need not address the People's argument that section 654 generally does not apply to enhancements. We leave that question for another day"].) It was unnecessary for the court to reach the issue in *Palacios* because the particular enhancement provision involved there, i.e., section 12022.53, contained express language that it applied "[n]otwithstanding ay other provision of law" as an

additional and consecutive term of imprisonment. (*Palacios, supra,* at pp. 725-726., italics omitted.)

Recently in *People v. Rodriguez* (2009) 47 Cal.4th 501, our Supreme Court noted that in *Coronado* it had "concluded that section 654's prohibition against multiple punishment for a single "act or omission" *does not* apply to enhancements based on the nature of the offender. (*Coronado*, supra, at p. 158.)" (*Rodriguez* at p. 507.)

Further in *Rodriguez*, the court stated that it "need not, however, decide whether section 654 applies to sentence enhancements that are based on the nature of the offense, because of our conclusion that the additional punishments imposed under the two enhancement provisions in this case violated subdivision (f) of section 1170.1." (*Rodriguez* at p. 507.)

The court in *Reeves* observed that although the Supreme Court had declined to decide the applicability of section 654 to enhancements in general, it had "distinguished between 'two types of sentence enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense [Citation.]'" (*Reeves, supra*, 91 Cal.App.4th at p. 56, quoting *Coronado, supra*, 12 Cal.4th at p. 156.) As the court observed in *Coronado*, "enhancements such as section 667.5 'are attributable to the defendant's status as a repeat offender [ ]' ..., [while] 'the second category of enhancements, which are exemplified by those

authorized under sections 12022.5 [use of firearm] and 12022.7 [great bodily injury], arise from the circumstances of the crime and typically focus on what the defendant did when the current offense was committed. [Citation.]'" (*Reeves*, at p. 56, quoting *Coronado*, at p. 157, italics omitted.) The *Reeves* court found the distinction drawn by *Coronado* between types of enhancements to be significant, because "[m]ultiple enhancements for the same criminal conduct run directly counter to section 654's rule against multiple punishment in a way offender-status-based enhancements do not." (*Reeves, supra*, 91 Cal.App.4th at p. 56.)

Similarly, the court in *Arndt*, which had previously followed *Boerner*, found support for applying section 654 to enhancements in *Coronado's* conclusion that prior prison term enhancements are an exception to section 654, because they do not implicate multiple punishment for the underlying criminal conduct, but rather, for the defendant's status as a repeat offender. (See *Arndt, supra*, 76 Cal.App.4th at pp. 394-396, *Coronado, supra*, 12 Cal.4th at p. 158, § 667.5, subd. (b).) Thus, 654 applies to enhancements " 'which go to the nature of the offense'" and punish acts " 'the defendant did when the current offense was committed.'" (*Reeves, supra*, 91 Cal.App.4th at p. 56, quoting *Coronado, supra*, 12 Cal.4th at pp. 156, 157.) In this context, there is no " 'meaningful distinction'" between bodily injury and firearm enhancements. (*People v. Oates, supra,* 32 Cal.4th 1048 at p. 1067, quoting *Moringlane, supra*, 127 Cal.App.3d at p. 819.)

In *Coronado*, the enhancements at issue in the case were based on prior offenses and were status enhancements to which section 654 does not apply. The court explained that the status enhancements like these

> "are not imposed for 'acts or omissions' within the meaning of the statute ...." (*People v. Coronado, supra*, 12 Cal.4th at p. 157.)

With regard to status enhancements, the *Coronado* court noted that they

> "are attributable to the defendant's status as a repeat offender [citations]; they are not attributable to the underlying criminal conduct which gave rise to the defendant's prior and current convictions." Therefore, "[b]ecause the repeat offender (recidivist) enhancement imposed here does not implicate multiple punishment of an act or omission, section 654 is inapplicable." (*Id.* at p. 158.)

In *Coronado*, the court identified Penal Code section 12022.5 as an example of an enhancement in the second category. (*People v. Coronado, supra,* 12 Cal.4th at p. 157.) Penal Code section 12022.5, subdivision (a), provides:

> "[A]ny person who personally uses a firearm 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 3, 4 or 10 years, unless use of a firearm is an element of that offense."

The court expressed no opinion about whether section 654 applies to the second category, enhancements based on conduct rather than status. (*Coronado, supra,* 12 Cal.4th at p. 157.) The court's reasoning, however, strongly implies that section 654 does apply to those enhancements. In the court's view, section 654

does not apply to status enhancements because, by its terms, section 654 only prohibits double punishment for a single criminal "act or omission." (Pen.Code, § 654.) A prior conviction enhancement, for instance, imposes punishment for the status of having priors or being a recidivist, not for an act or omission. A conduct or nature-of-the-offense enhancement, by contrast, does impose punishment for an act or omission, "typically … what the defendant did when the current offense was committed." (*People v. Coronado, supra,* 12 Cal.4th at p. 157.) It is only a short logical step to the conclusion that section 654 applies to conduct enhancements.

The Fourth District Court of appeal took that step in *People v. Arndt, supra*, 76 Cal.App.4th 387. There the defendant was convicted of driving under the influence. Three victims were injured in the accident the defendant caused. The defendant received a total of five sentence enhancements (three under Pen.Code, § 12022.7 and two under Veh.Code, § 23182) for causing bodily injury to the three victims. (*People v. Arndt, supra*, at pp. 391-392.) Holding that the bodily injury enhancements " 'focus[ed] on what the defendant did when the current offense was committed'" within the meaning of the Supreme Court's opinion in *Coronado*, the court held that section 654 applied and ordered two of the enhancements stayed. (*People v. Arndt, supra*, at pp. 395, 397, 399.)

There is no reason not to take the same approach in this case. The enhancements are both within the second category of enhancements. The Supreme

Court defined in *Coronado*, those that pertain to what defendant did when the current offense was committed.

In the instant matter, this court should conclude that section 654 applies to conduct enhancements. Both section 12022.7(e) and 12022.5(a) involve conduct. The circumstances under which these enhancements arose go "to the nature of the offense" and create an enhancement arising "from the circumstances of the crime." (*Coronado, supra*, 12 Cal.4th at pp. 156-157.) Both section 12022.7, subdivision (e) and 12022.5, subdivision (a) are conduct enhancements. Section 654 therefore prohibits the imposition of both enhancements and only the one with the longer term should apply. Since the great bodily injury enhancement has the longer term, this court should strike the firearm use enhancement.

This conclusion is certainly in accord with those cases which have found section 654 applicable to enhancements and is both reasonable and appropriate under the circumstances. The Court of Appeal's conclusion is as reasonable and appropriate as those suggested by respondent and under the interpretative device known as the rule of lenity – i.e. "when as here, the "language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." (*People v. Ralph* (1944) 24 Cal.2d 575, 581 ["[I]t is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true

interpretation of words or the construction of language used in a statute [citations]".]; see 1 Witkin, Cal.Criminal Law (3d ed 2000) § 24, p. 51; *People v. Avery* (2002) 27 Cal.4th 49, 58 [the rule is inapplicable " 'unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguity in a convincing manner is impracticable'"].)

II

THE COURT OF APPEAL PROPERLY APPLIED SECTION 654 TO PRECLUDE IMPOSITION OF BOTH THE GUN USE ENHANCEMENT AND INFLICTION OF GREAT BODILY INJURY ENHANCEMENT

The *Ahmed* court found no conflict between sections 654 and section 1170.1, subdivision (f) and (g) because both of the latter provisions stated, " '*This subdivision shall not limit the imposition of any other enhancements applicable to that offense*, ...'" including the enhancement for firearm use and for the infliction of great bodily injury. According to the Court of Appeal, the italicized language served to leave open the potential for other statutes, including section 654, to "limit the imposition of other enhancements." (Slip Opn. at pp. 17-19.)

Respondent contends that assuming arguendo section 654 applies to sentence enhancements, the Court of Appeal erred by applying it to a preclude imposition of the gun use enhancement and infliction of great bodily injury enhancement. (OBM 15-21.)[2] Here, the Court of Appeal concluded that appellant's sentence which included the imposition of both the firearm and

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[2] OBM refers to plaintiff-respondent's opening brief on the merits.

infliction of great bodily injury enhancements violated section 654 and ordered that the lesser of the two enhancements stayed. Respondent contends that this was error.

In determining whether the court properly ruled that section 654 applied, "[w]e begin with the fundamental rule that our primary task in construing a statute is to determine the Legislature's intent. [Citation.]" (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724.) " 'The court turns first to the words themselves for the answer.' [Citation.]" (*Ibid.*) When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. (*People v. Overstreet* (1986) 42 Cal.3d 891, 895.) The plain language of the statute establishes what was intended by the Legislature. (See *People v. Ramirez* (1995) 33 Cal.App.4th 559, 566 [it is unnecessary to look beyond the plain words of the statute to determine intent].) The meaning of a statute may not be determined from a single word or sentence and the words must be construed in context. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) If the statutory language is clear and unambiguous there is no need for a statutory construction or to look to the intent of the Legislature. (*People v. Ramirez, supra,* 33 Cal.App.4th 559, 566.) However, if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed. (*Metropolitan Water Dist. V. Adams* (1948) 32 Cal.2d 620, 630-631.)

Section 1170.1, subdivisions (f) and (g) provide

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

Arguing that the plain language of section 1170.1, subdivisions (f) and (g) do not bar the imposition of both section 654 does not bar the imposition of both a deadly-weapon-use enhancement under section 12022, subdivision (b)(1), and an infliction-of-great-bodily-injury enhancement under section 12022.7, subdivision (a), in the instant case. (OBM 16, 17.)

Respondent argues that the court rejected a plain-common sense reading of the statute. (OBM 17.) Respondent notes that the Court of Appeal did not find any conflict between section 654 and section 1170.1, subdivisions (f) and (g) that the court's interpretation of the statute is inconsistent with a

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

> additional punishment. [Citations.] A statute which provides that a defendant shall receive a sentence enhancement in addition to any other authorized punishment constitutes an express exception to section 654. ¶ (*People v. Ramirez* (1995) 33 Cal.App.4th 559, 572-573; see also *Palacios, supra,* 41 Cal.4th at p. 730 ["courts have repeatedly upheld the Legislature's power to override section 654 by enactments that do not expressly mention the statute"].) (OBM 17-18.)

However, respondent overlooks the fact the language in neither subdivision (f) or (g) appears to state "that a defendant shall receive a sentence enhancement *in addition* to any authorized punishment." Nor does the language of either subdivision contain language authorizing multiple punishment.

In *People v. Benson* (1998) 18 Cal.4th 24, 32-33, the California Supreme Court noted that appellate courts have repeatedly upheld the Legislature's power to override section 654 by enactments that do not expressly mention the statute.

In *People v. Lee* (2006) 136 Cal.App.4th 925, the court held that the ban on multiple punishments under section 654 applies to restitution fines imposed under section 1202.4 because those fines are a form of punishment. (*Lee, supra*, at p. 933.)

In *Lee*, the court noted that

> The language of section 1170.12, subdivision (b)(1) *deemed to override section 654* includes an express provision that a strike for purposes of the Three Strikes law " 'shall be defined'" as set forth in subdivision (b) " '*[n]otwithstanding any other provision of law* ....'" (*Ibid.*, original italics.) Additionally, section 1170.12, subdivision (b)(1)(B), "provides explicitly that a stayed or suspended sentence is not exempt from

> qualifying as a strike." (*Ibid.*) (*Lee, supra*, 136 Cal.App.4th at p. 934.)

In *Benson* our Supreme Court also noted cases which had ruled that an express reference to section 654 is not necessary in order for a statute to create an exception to the section 654 ban on multiple punishments and that these cases included

> *People v. Hicks* (1993) 6 Cal.4th 784, 791-792 [Legislature not required to cite section 654 in section 667.6]; *People v. Ramirez* (1995) 33 Cal.App.4th 559, 573 [section 667, subd. (e)'s provision of a sentence enhancement in addition to any other authorized punishment constitutes an exception to section 654]; *People v. Powell* (1991) 230 Cal.App.3d 438, 441 [provision of Health and Safety Code section 11370.2 authorizing double punishment in addition to any other authorized punishment prevails over section 654]. (*Lee*, at p. 152.)

The *Lee* court found that on reviewing the language of section 1202.4, subdivision (b)(2) that

> [T]here is no explicit language similar to the statutory language construed in the above decisions [*Benson, Hicks, Ramirez, Powell*] to constitute an *override* of section 654. Section 1202.4, subdivision (b)(2), does not provide that restitution fines are to be imposed in addition to any other authorized punishment or notwithstanding any other provision of law, or without regard to whether the sentence on a felony count is stayed. (*Lee* at p. 152.)

Similarly here, there is no explicit language similar to the statutory language construed in *Hicks, Ramirez* and *Powell* that could constitute an *override of section 654*. Section 1170.1, subdivisions (f) and (g) do not provide nor appear to state

"that a defendant shall receive a sentence enhancement in addition to any authorized punishment" and therefore do not constitute an exception to section 654. (*People v. Lee* (2006) 136 Cal.App.4th 925.)

Respondent also overlooks the rule against repeal by implication. In *People v. Siko* (1988) 45 Cal.3d 820, 824, the People contended that the Legislature, by adopting subdivision (c) of section 667.5, "impliedly repealed the prohibition in section 654 on multiple punishment for violations based on the 'same act or omission' insofar as that prohibition might otherwise apply to the sex offenses listed in the subdivision." The California Supreme Court rejected this contention:

> "The People's theory would lead to the remarkable conclusion that the legislature creates exceptions to a specific code section merely by failing to mention it. The normal rules of statutory construction, however, dictate a contrary presumption: *section 654, like any other statute, is presumed to govern every case to which it applies by its terms – unless some other statute creates an express exception.* We have invoked section 654 to ban multiple punishment in many contexts, and we have never held that it applies only if the Legislature expressly makes the other statute subject to it. [Citations.]" (*People v. Siko, supra,* 45 Cal.3d at pp. 824-825.)

The *Siko* court stated: "As a general rule of statutory construction, of course, repeal by implication is disfavored. [Citation.] Such repeal is particularly disfavored when, as there, the statute allegedly repealed expresses a legal principle that has been a part of our penal jurisprudence for over a century. [Citation.]" (*People v. Siko, supra,* 45 Cal.3d at p. 824.) The court concluded: "Had the

Legislature intended to override the century-old ban of section 654 on multiple punishment of violations based on the 'same act or omission,' it would have made that purpose explicit. (*People v. Greer* (1947) 30 Cal.2d 589, 603.)" (*People v. Siko, supra,* 45 Cal.3d at p. 824.) Here, there is no clear intent expressed in the language of subdivision (f) or subdivision (g) indicating an intent to overrule this century-old ban.

Although a statute need not expressly refer to section 654 in order to override the prohibition against multiple punishment (see *People v. Benson, supra,* 18 Cal.4th 24 at pp. 31-33), section 1170.1, subdivisions (f) and (g) do not contain affirmative language authorizing additional punishment in the way that *Ramirez* found section 667, subd. (b) through (i) authorized doubling of the sentence for a new felony " 'in addition to any other enhancement or punishment provisions which may apply.'" (*Ramirez, supra*, 33 Cal.App.4th at p. 566, italics omitted.) Thus, the *Ramirez* court held that a single felony conviction could be used to double the term and impose a five-year enhancement. (*Ramirez*, at p. 573.)

The language in subdivision (f), as well as subdivision (g), does not affirmatively provide for the imposition of any other enhancement "applicable to that offense in addition to any authorized punishment" and thus does not create an express exception to section 654. These subdivisions do not affirmatively authorize additional punishment in the manner of section 667. Also, there is no

explicit language in section 1170.1 subdivisions (f) and (g) suggesting that the Legislature intended an exception to section 654.

"It is assumed that the legislature has in mind existing laws when it passes a statute. [Citations.]" (*Estate of McDill* (1975) 14 Cal.3d 831, 837.) In adopting legislation, the legislature is presumed to know of existing judicial decisions and to have enacted and amended statutes in the light of decisions bearing directly upon those enactments. (*Id.* at p. 839.) Therefore, it is presumed that the Legislature in enacting the 1997 amendment to section 1170.1, subdivisions (f) and (g) was familiar with *Benson, Hicks, Ramirez* and *Powell* and knew that some legislative language was necessary to override section 654's proscription against multiple punishment. Accordingly, section 654 prohibits the imposition of both enhancements and only the one with the longer term should apply. Since the great bodily injury enhancement has a longer term, this court should strike the prior use enhancement.

Respondent contends that the Legislative history to section 1170.1, subdivisions (f) and (g) support its interpretation of the statute. (OBM 19-23.)

Nevertheless, the statutory language is generally the most reliable indicator of Legislative intent. (*People v. Robles* (2000) 23 Cal.4th 1106, 1111.) Here, in its interpretation of subdivisions (f) and (g), the Court of Appeal stated

> "When two or more enhancements may be imposed when 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.) Similarly, section 1170.1, subdivision (g) provides: "When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. *This subdivision shall not limit the imposition of any other enhancements applicable to that offense*, including an enhancement for being armed with or using a dangerous or deadly weapon or a firearm." (Italics added.) Thus, it is only "[t]h[ese] subdivision[s]" that do not limit the imposition of other enhancements. Other statutes – including section 654 – may still limit the imposition of other enhancements. (Slip – Opn. pp. 17-18.)

Here, in interpreting section 1170.1, subdivisions (f) and (g), the court found that the language of the statute allowed that "other statutes – including sections 654 – may still limit the imposition of other enhancements as they might apply to the statute. The Court of Appeal implicitly found from the language of the section 1170.1, subdivisions (f) and (g) that when the Legislature enacted the 1997 amendment that it intended that other statutes – including section 654 – may still limit the imposition of other enhancements.

Had the Legislature intended to preclude application of section 654 to section 1170.1, subdivisions (f) and (g), it could have easily done so. "We must assume that the legislature knew how to create an exception if it wished to do so

...." (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 902.) However, it did not do so.

More specifically, a court may not "under the guise of interpretation insert qualifying provisions not included in the statute." (*Estate of Griswold* (2001) 25 Cal.4th 904, 917.) "In the construction of a statute ... the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted ...." (*Manufacturers Life Ins. Company v. Superior Court* (1995) 10 Cal.4th 257, 274.) Thus, a court may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used. Under the terms used it is apparent that the Legislature did not intend to preclude the application of section 654 to the operation of the statute. As a corollary principle, it would be improper to insert into section 1170.1, subdivisions (f) and (g) words that would prohibit the application of section 654 to section 1170.1, subdivisions (f) and (g).

Finally, it must be kept in mind ' "[t]he defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute."' [Citations.]" (*People v. Craft* (1986) 41 Cal.3d 554, 559-56.)

CONCLUSION

Accordingly, it should be concluded from the language of section 1170.1, subdivisions (f) and (g) that when the Legislature enacted the 1997 amendment to the statute that it intended that other statutes – including section 654 – may still limit the imposition of other enhancements. Thus, section 654 prohibits the imposition of both enhancements and only the one with the longer term should apply. Since the great bodily injury enhancement has a longer term, this court should strike the firearm use enhancement.

Dated: June 15, 2011

Respectfully submitted

By: _____

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Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 7,684 words.

DATED: June , 2011

Respectfully submitted,

By: _____
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Re: PEOPLE v. AHMED
Case No.: E049932

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. My business address is P.O. Box 57768, Sherman Oaks, CA 91413-7768.

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On JUNE 15, 2011, I served the following document known as **APPELLANT'S ANSWER TO OPENING BRIEF ON THE MERITS** on the interested parties in this action by placing a true and correct copy thereof in a sealed envelope with postage thereon fully prepaid in the United States Mail address as follows:

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

Executed this 15th day of June, 2011, at Sherman Oaks, California.

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