

THOMAS K. MACOMBER  
ATTORNEY AT LAW

3877 TWELFTH STREET  
RIVERSIDE, CA 92501

MACOMBER@MACOMBERLEGAL.COM

951-314-3745  
STATE BAR #118744

August 7, 2014

Frank A. McGuire, Clerk  
Supreme Court of the State of California  
350 McAllister Street  
San Francisco, CA 94102-4797

SUPREME COURT  
FILED

AUG 11 2014

Re: *People v. Victoria Cook*, Case no. S215927  
(Fourth Appellant District, Division Two Case No. E054307)  
Appellant's Supplemental Letter Brief pursuant to July 23, 2014 order Frank A. McGuire Clerk

Dear Mr. McGuire,

Deputy

On July 23, 2014, this Court directed appellant to file a supplemental letter brief on or before August 7, 2014, addressing the question of whether any great bodily injury enhancement was proper.

As is argued below, Penal Code<sup>1</sup> section 12022.7, subdivision (g) limits the crimes to which the enhancement may attach. The section is written in terms of crimes, not victims. By its plain language, the enhancement cannot attach to the crime of manslaughter. In this regard, *People v. Verlinde* (2002) 100 Cal.App.4th 1146 (*Verlinde*), and *People v. Julian* (2011) 198 Cal.App.4th 1524, 1530 (*Julian*) were wrongly decided and should be reversed.

Section 12022.7, subdivision (a)<sup>2</sup> 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." Section 12022.7, subdivision (g)<sup>3</sup> provides: "This section shall not apply to murder or manslaughter or a violation of Section 451 [arson] or 452 [unlawfully causing a fire]. Subdivisions (a), (b), (c), and (d) shall not apply if infliction of great bodily injury is an element of the offense."

Under subdivision (a), the number of great bodily injury enhancements that might attach to a charge depends upon how many people the defendant inflicted injury upon in the course of committing the underlying offense. Under subdivision (g), a charging limitation is imposed – it does not matter how many people the defendant might have inflicted injury upon in the course of the offense, the enhancement does not attach if the underlying offense is manslaughter.

Because an enhancement has no viability apart from the count to which it is attached, an express statutory provision limiting the counts to which an enhancement may be attached must be respected.

<sup>1</sup>All further references are to the Penal Code

<sup>2</sup> Hereinafter, "subdivision (a)."

<sup>3</sup> Hereinafter, "subdivision (g)."

For instance, if the count to which a conduct enhancement is attached is stayed, the enhancement must also be stayed. (*People v. Cole* (1985) 165 Cal.App.3d 41, 53; *People v. Guilford* (1984) 151 Cal.App.3d 406, 411-412.) “Failure to stay an enhancement, where the base term to which it is added is stayed, and requiring that time be served only for the enhancement has the effect of elevating the enhancement to the status of an offense. Enhancements are not offenses, they are punishments. [Citation.]” (*People v. Guilford, supra*, 151 Cal.App.3d at 412.) In addition, if the sentence on the count to which a conduct enhancement is attached is a concurrent sentence, the enhancement must also be concurrent. “The procedure for sentencing a person convicted of two or more felonies does not contemplate imposing an enhancement separately from the underlying crime.” (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310.)

By its terms, section 12022.7 operates only when the defendant “personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony.” (Subd. (a).) Thus, section 12022.7 depends for its viability on the count to which it is attached. But also by its terms, section 12022.7 limits its application: “This section shall not apply to . . . manslaughter . . .” (Subd. (g).) The plain meaning of subdivision (g) is that, when great bodily injury is inflicted in the commission of manslaughter or any other felony specified in subdivision (g), the enhancement is not available.

To the extent *Verlinde* found to the contrary, *Verlinde* was in error.

In *Verlinde*, the defendant argued on appeal that imposition of the great bodily injury enhancements was an unauthorized sentence because section 12022.7 does not “apply to murder or manslaughter . . .” (§ 12022.7, subd. (g).) (*Verlinde, supra*, 100 Cal.App.4th at p. 1166.) The court held that the argument was without merit. (*Id.* at pp. 1168-1169.)

The *Verlinde* court first observed, “The language of section 12022.7, subdivision (g) does not limit application of the statute to this vehicular manslaughter case where, in addition to the homicide victim, two other victims suffered great bodily injury.” (*Verlinde, supra*, 100 Cal.App.4th at p. 1168.) This was simply wrong. Not only does section 12022.7 say nothing about multiple manslaughter victims, but subdivision (g) prohibits application of section 12022.7 to manslaughter at all. (*People v. Lewis* (1993) 21 Cal.App.4th 243, 247 [“Excluded from the operation of this section [is] . . . manslaughter . . .”].)

The *Verlinde* court next observed, “The 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.) This observation was correct. The purpose of subdivision (g) is to bar application of the enhancement for injuries inflicted on a manslaughter victim, and the statute clearly states its purpose. However, the court’s holding, that the injuries sustained by a non-manslaughter victim were not barred by subdivision (g) (see *id.* at pp. 1168-1169), was incorrect and in violation of plain meaning of subdivision (g). From the wording of section 12022.7, it appears the Legislature may not have foreseen the situation at issue where a vehicular

manslaughter offense involves multiple victims, some of whom are the victims of manslaughter and some of whom are not. However, it is not the court's duty to rewrite the statute with a solution that is directly contrary to its plain language. (*Hale v. Superior Court* (2014) 225 Cal.App.4th 268, 274 [court may not rewrite the statutory scheme given the express exclusion in section 12022.7, subdivision (g)].)

Further, subdivision (g) does not lead to the "absurd consequences which the Legislature did not intend" as stated by the court in *Verlinde*. (*Verlinde, supra*, 100 Cal.App.4th at p. 1169.) Although there is no affirmative indication that the drafters of subdivision (g) were aware that the situation at issue might arise, there is similarly no indication that they were not so aware. (See *In re Jeanice D.* (1980) 28 Cal.3d 210, 218 ["Although there may be no affirmative indication that the drafters of the provision specifically had this consequence in mind, by the same token there is similarly no indication that the drafters intended to preclude the normal application of [the] section [ ]"].) It may be that the Legislature believed the punishment for murder, manslaughter, arson, and crimes in which great bodily injury is an element of the offense is great enough to punish for additional victims. It may also be that the Legislature believed there are other ways to punish the defendant for injuries inflicted upon other victims. In any event, "In the absence of statutory ambiguity or other constitutional infirmity, we cannot disregard the plain language of these statutes." (*People v. Ladanio* (1989) 211 Cal. App.3d 1114, 1119, overruled on other grounds in *People v. King* (1993) 5 Cal.4th 59, 67.)

In addition, *Verlinde* does not address the fact that a conduct enhancement such as section 12022.7 depends for its viability on the count to which it is attached (see argument at pp. 1-2, *ante*). As was previously noted, because an enhancement has no viability apart from the count to which it is attached, an express statutory provision limiting the counts to which an enhancement may be attached must be respected.

*Verlinde* (and *Verlinde* as extended in *Julian, supra*, 198 Cal.App.4th at p. 1530 [two victims named in manslaughter counts could also have their injuries enhanced under section 12022.7]), relies on its own view of the defendant's culpability and its own sense that not applying the great bodily injury enhancement in respect of injuries inflicted on persons other than the manslaughter victim would be an "absurd consequence." (*Verlinde, supra*, 100 Cal.App. at p. at 1169; accord, *Julian, supra*, 198 Cal.App.4th at pp. 1531-1532; but see *Unzueta v. Ocean View School District* (1992) 6 Cal.App.4th 1689, 1698 ["Absurdity, like beauty, is in the eye of the beholder"].) But, given the plain language of subdivision (g), these assessments appear to be little more than disagreement with the legislative prerogative to define crimes and set punishments for crimes. (*People v. Albritton* (1998) 67 Cal.App.4th 647, 660.) To the extent a remedy may be necessary, such a decision is best left to the Legislature. (*Hale v. Superior Court, supra*, 225 Cal.App.4th at p. 274; *Unzueta v. Ocean View School District, supra*, 6 Cal.App.4th at p. 1697 [if a statute's operation results in inequality or hardship in some cases, the remedy therefore lies with the legislative authority].)

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For the foregoing reasons, this Court should find that pursuant to subdivision (g), no section 12022.7 enhancement could be added to count 1, which alleged a violation of vehicular manslaughter pursuant to section 192 , subdivision (c)(1).

Respectfully submitted,

Thomas K. Macomber  
Attorney for defendant and 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 August 7, 2014, I electronically served a true and correct PDF copy of the attached **SUPPLEMENTAL LETTER BRIEF** from my notification address of [macomber@macomberlegal.com](mailto:macomber@macomberlegal.com) to the following recipients and electronic notification addresses:

1. Office of the Attorney General: [ADIEService@doj.ca.gov](mailto:ADIEService@doj.ca.gov)
2. Appellate Defender's Inc: [eservice-criminal@adi-sandiego.com](mailto: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 August 7, 2014, I served the attached **SUPPLEMENTAL LETTER BRIEF** 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  
3960 Orange Street  
Riverside, CA 92501

Office of the Public Defender  
4200 Orange St.  
Riverside, CA 92501

Superior Court Clerk  
4100 Main Street  
Riverside, CA 92501

Fourth District Court of Appeal  
Division 2  
3389 Twelfth Street  
Riverside, CA 92501

Victoria Cook  
CDC #WE2534  
PO Box 1508  
Chowchilla, CA 93204

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

August 7, 2014

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Thomas K. Macomber