In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

AMIR A. AHMED,

Defendant and Appellant.

Case No. S191020

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

As respondent has demonstrated in its opening brief on the merits, Penal Code section 654 does not apply to sentence enhancements.[1] This is because the purpose of section 654 is to ensure a defendant's punishment is commensurate with his or her culpability. To apply section 654 to enhancements ensures just the opposite, essentially allowing a defendant to go unpunished for more egregious conduct in a variety of instances, including in cases such as this one. The Court of Appeal's opinion here gives appellant, who shot his girlfriend in the stomach at close range, inflicting great bodily injury, virtually the same sentence as a defendant who shoots at a victim and does not cause great bodily injury, or who shoots at a victim and misses.

In its opening brief respondent argued that section 654 does not apply to enhancements for this reason, and because doing so would render other code sections superfluous. Respondent further argued that even if this Court should hold that section 654 applies generally to enhancements, it does not apply in this case because the plain language of sections 1170.1, subdivisions (f) and (g), make it clear that gun use and great bodily injury enhancements should be imposed notwithstanding section 654. Even if the statute is considered ambiguous, its legislative history is clear that both enhancements should be imposed, notwithstanding section 654.

In his answer brief on the merits appellant argues that the rule of lenity requires this Court to resolve the issue of whether section 654 applies to enhancements in appellant's favor. He further contends that because the language of section 1170.1, subdivisions (f) and (g), do not contain an

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

express exception to section 654, the gun use and great bodily injury enhancements are subject to the multiple punishment bar of section 654.

Because application of the multiple punishment bar contradicts the purpose of the statute and renders other code sections superfluous, and because interpreting section 654 does not require this Court to resort to the rule of lenity, appellant's argument fails. Additionally, section 1170.1, subdivisions (f) and (g), need not contain express language to create an exception to section 654, and as appellant does not dispute, the legislative history supports respondent's interpretation of the statute.

I. SECTION 654 DOES NOT APPLY TO SENTENCE ENHANCEMENTS

In its opening brief respondent argued that the multiple punishment bar of Penal Code section 654 does not apply to conduct enhancements because its application would circumvent the purpose to section 654, which is to ensure that a defendant's punishment is commensurate with his or her culpability. Respondent further argued that application of section 654 to such enhancements would render other code sections superfluous, and finally, that principles of statutory interpretation and legislative intent are in accord with this interpretation. (OBM 4-15.)

In his answer appellant contends only that the Court of Appeal's conclusion that section 654's multiple punishment bar applies to conduct enhancements is as reasonable as respondent's argument that it does not apply, thus under the rule of lenity this Court should adopt the position that section 654 applies to conduct enhancements. (AOBM 12-24.)

Appellant bases his argument that section 654 applies to conduct enhancements on the reasoning in *People v. Coronado* (1995) 12 Cal.4th 145, which he contends "strongly implies" that section 654 applies to conduct enhancements, and on cases that have relied on *Coronado* to reach that conclusion. (AOBM 21.) However, the *Coronado* Court specifically

declined to address this issue, but instead analyzed only whether section 654 applies to status enhancements. Simply because this Court has previously held that section 654 does not apply to status enhancements, it does not follow that the multiple punishment bar applies to conduct enhancements. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57 ["An opinion is not authority for a point not raised, considered, or resolved therein"].) As respondent argued in its opening brief on the merits, the reasoning of *Coronado* supports its position. (OBM 10-11.)

Appellant argues that pursuant to *Coronado*, and because conduct enhancements go "to the nature of the offense" and create an enhancement arising "from the circumstances of the crime" section 654 "prohibits the imposition of both enhancements and only the one with the longer term should apply." (AOBM 23, citing *People v. Coronado, supra*, 12 Cal.4th at pp. 156-157.) This is so, he contends, because "the Court of Appeal's conclusion is as reasonable and appropriate as those suggested by respondent," and under the "rule of lenity" this Court should adopt the interpretation more favorable to appellant. (AOBM 23-24.)

The rule of lenity does not compel this result. "The rule [of lenity] applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule." (*People v. Avery* (2002) 27 Cal.4th 49, 58, citing 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53.) This rule "is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable." (*People v. Avery, supra,* 27 Cal.4th at p. 58, citing *People v. Jones* (1988) 46 Cal.3d 585, 599.) The rule of lenity is "a tie-breaking principle" that has no application where "a court can fairly discern a contrary legislative intent." (*Lexin v. Superior Court* (2010) 47 Cal. 4th

1050, 1102, fn. 30, internal citations omitted.) For the reasons explained in respondent's opening brief and here, whether the multiple punishment ban of section 654 applies to conduct enhancements does not present an interpretive problem so close that this Court must resort to the rule.

As set forth in detail in respondent's opening brief, application of section 654 to conduct enhancements is contrary to the purpose of the statute – to ensure a defendant's punishment is commensurate with his or her liability. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) Further, application of section 654 to enhancements contradicts the purpose of the enhancements themselves. Enhancements "focus on an element of the commission of the crime or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies a higher penalty than that proscribed for the offenses themselves. That is one of the very purposes of an enhancement's existence." (*People v. Rayford* (1994) 9 Cal.4th 1, 9, quoting *People v. Hernandez* (1988) 46 Cal.3d 194, 207-208.) (OBM 6-9.) Appellant does not dispute this interpretation.

In addition, as set forth in respondent's opening brief, application of section 654 to enhancements renders other code sections superfluous. (OBM 9-15.) Appellant does not contend otherwise. As respondent illustrated, application of section 654 to conduct enhancements would largely preclude these enhancements from ever being imposed. This is so because such enhancements are generally based on the same act or omission as the underlying offense. (OBM 13-14.) "A statute should not be given a construction that results in rendering one of its provisions nugatory." (*People v. Craft* (1986) 41 Cal.3d 554, 560, citations omitted.) "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." (*People v. Hicks* (1993) 6 Cal.4th 784, 795, citations omitted.)

Finally, the rule of lenity need not be applied here because this Court "can fairly discern a contrary legislative intent" in section 1170.1, subdivision (a). (See *Lexin v. Superior Court, supra,* 47 Cal. 4th at p. 1102, fn. 30.) Section 1170.1, subdivision (a), which contains an express reference to section 654 provides:

> Except as otherwise provided by law, and *subject to Section 654*, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.

(Cal Pen Code § 1170.1, subdivision (a), italics added.)

"Section 1170.1 describes the computation of principal and subordinate terms when consecutive sentences are imposed." (*People v. Palacios* (2007) 41 Cal.4th 720, 730, fn. 5.) The reference to section 654 in section 1170.1 "ensures that consecutive sentences for subordinate terms do not result in multiple punishment." (*Ibid.*) In contrast, section 1170.1, subdivisions (f) and (g), which describe the manner of imposing enhancements for firearm use and for infliction of great bodily injury, contain no reference specifying they are subject to section 654. The reference to section 654 in section subdivision (a), and the omission of section 654 in subdivisions (f) and (g), is indicative of the legislative intent that section 654 not apply to conduct enhancements. This is because when

"one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning. (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73; *People v. Gardeley* (1996) 14 Cal. 4th 605, 621-622.) For this reason, and the reasons explained in respondent's opening brief, section 654 should be interpreted to not apply to conduct enhancements.

II. ASSUMING ARGUENDO THAT SECTION 654 APPLIES TO SENTENCE ENHANCEMENTS, THE COURT OF APPEAL ERRED BY APPLYING IT TO PRECLUDE IMPOSITION OF THE GUN USE ENHANCEMENT AND INFLICTION OF GREAT BODILY INJURY ENHANCEMENT

In its opening brief, respondent argued that should this Court conclude section 654 applies to conduct enhancements, section 654 still should not apply in this case because the language of section 1170.1, subdivisions (f) and (g) makes it clear that the gun use and great bodily injury enhancements apply notwithstanding section 654. Further, even if the language of section 1170.1 can be deemed ambiguous, the legislative history is clear that both enhancements are intended to be imposed notwithstanding section 654. (OBM 15-23.)

In response, appellant contends that the plain language of section 1170.1 is not so clear. He argues that section 1170.1, subdivisions (f) and (g), do not "appear[] to state" that a defendant shall receive a sentence enhancement in addition to any authorized punishment, and therefore the sections do not constitute an exception to section 654. (AOBM 28-30.) However, the most reasonable interpretation of the language in 1170.1, subdivisions (f) and (g), is that they are not subject to section 654.

As set for in respondent's opening brief, section 1170.1 prescribes:

(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.

(Pen. Code, § 1170.1, subds. (f) and (g), italics added.)

The language in both subdivisions that *"[t]his subdivision shall not limit the imposition of any other enhancements applicable to that offense,"* is most reasonably interpreted to permit imposition of at least one gun use enhancement and one great bodily injury enhancement, based upon the same conduct, notwithstanding section 654.

In *People v. Hicks* (1993) 6 Cal.4th 784, 791, this Court found that the language in section 667.6, subdivision (c), authorizing full term consecutive sentences "whether or not the crimes were committed during a single transaction," created an exception to section 654's prohibition against multiple punishment for separate offenses committed during an indivisible course of conduct.

In *People v. Ramirez* (1995) 33 Cal.App.4th 559, 573, the court held that, with regard to section 667, subdivision (e), "[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."

The language *"shall not limit"* language in section 1170.1, subdivisions (f) and (g), while perhaps not as explicit as the language in *Ramirez* and *Hicks*, is comparable to the statutory language construed in the above decisions to be most reasonably construed as an exception to section

654. This is especially so given that each subdivision specifically identifies an additional enhancement to be imposed, "*including an enhancement for being armed with or using a dangerous or deadly weapon or firearm*," and "*including an enhancement for the infliction of great bodily injury*." (Pen. Code, § 1170.1, subds. (f) and (g), italics added.)

Moreover, appellant does not argue that subdivisions (f) and (g) clearly and unambiguously state anything thus, at best, appellant apparently concedes that the language of the statute is ambiguous. If the words of a statute are ambiguous, a court may resort to "extrinsic sources, including the ostensible objects to be achieved and the legislative history." (*People v. Coronado, supra,* 12 Cal.4th at p. 151.) As fully explained in respondent's opening brief, the legislative history of sections 1170.1, subdivisions (f) and (g), clearly indicates that these sections' gun use and great bodily injury enhancements are to be applied notwithstanding section 654. (OBM 19-22.) Appellant does not dispute this conclusion. (ABOM 32.)

Furthermore, section 1170.1, subdivision (f) and (g), cannot be examined in isolation. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) As explained above, in contrast to section 1170.1, subdivision (a), subdivisions (f) and (g) do not contain any reference to section 654. Had the Legislature wanted to impose an additional limit to the imposition of such enhancements, it could have easily done so. (Cf. *People v. Oates* (2004) 32 Cal.4th 1048, 1056-1057 [finding section 12022.53 was intended to permit multiple enhancements and applying maxim of statutory construction, *expression unius est exclusion alterius*, where "the Legislature expressly included in section 12022.53 specific limitations on imposing multiple enhancements, but did not limit imposition of subdivision (d) enhancements based on number of qualifying injuries."].)

Appellant additionally argues that respondent overlooks "the rule against repeal by implication," citing *People v. Siko* (1988) 45 Cal.3d 820

824. He contends that there "there is no clear intent expressed in the language of subdivision (f) or subdivision (g) indicating an intent to overrule" section 654's multiple punishment ban. (AOBM 30-31.) However, as appellant acknowledges (AOBM 28), "[t]o create an exception [to section 654], the other statute need not refer to section 654 explicitly." (*People v. Benson* (1998) 18 Cal.4th 24, 31; *People v. Hicks* (1993) 6 Cal.4th 794, 791-792; *People v. Ramirez* (1995) 33 Cal.App.4th 559, 573.)

Moreover, *Siko* addressed the question of whether by adopting subdivision (c) of section 667.6, the Legislature intended to repeal section 654's prohibition against multiple punishment for multiple Penal Code violations based on "the same act or omission" insofar as the serious sex offenses enumerated in subdivision (c) are concerned. (*Id.*, at p. 822.) *Siko* noted that that "[667.6] subdivision (c) nowhere expresses a legislative intent to repeal the prohibition of double punishment for violations based on the "same act or omission" found in section 654." (*People v. Siko*, supra, 45 Cal. 3d at p. 824.) *Siko* explained that "as a general rule of statutory construction, of course, repeal by implication is disfavored. Such repeal is particularly disfavored when, as here, the statute allegedly repealed expresses a legal principle that has been a part of our penal jurisprudence for over a century." (*Ibid.*)

The situation here is entirely different from *Siko*, because this Court has never concluded that the multiple punishment bar in section 654 applies to conduct enhancements. Thus, it is unnecessary to find a "clear intent" to "overrule" section 654 in order to conclude that section 1170.1, subdivision (f) and (g) are exceptions to section 654.

CONCLUSION

For these reasons, and the reasons explained in respondent's opening brief, respondent respectfully requests the judgment of the Court of Appeal be reversed.

Dated: June 30, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3280 words.

Dated: June 30, 2011

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Amir Ahmed**
No.: **S191020**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 1, 2011, I served the attached RESPONDENT'S REPLY BRIEF ON THE MERITS by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 1, 2011, at San Diego, California.

Renee Stein
Declarant

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