Supreme Court of California
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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Supreme Court Case No. S275940

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent

v.

WELDON K. McDAVID, JR.,
Defendant and Appellant.

Court of Appeal
Fourth District
Division One
Case No. D078919

San Diego County
Superior Court
Case Number
SCN363925

APPEAL FROM THE SAN DIEGO COUNTY SUPERIOR COURT

The Honorable Sim von Kalinowski, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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Table of Contents

Table of Contents (continued)

Table of Contents (continued)

Table of Authorities

Table of Authorities (continued)

Table of Authorities (continued)

Table of Authorities (continued)

Table of Authorities (continued)

Issue Presented

Does the trial court have discretion to strike a firearm enhancement imposed pursuant to Penal Code section 12022.53 and instead impose a lesser uncharged firearm enhancement pursuant to a different statute (Pen. Code,[1] § 12022.5)?[2]

Introduction

Over the last several years, the Legislature has been making a concerted effort to reverse the effects of the failed legislative priorities that ratcheted up prison sentences through a scheme of sentencing enhancements whose unduly prejudicial impacts have come to light after further research and study. Senate Bill No. 620 ("SB 620"), which became effective January 1, 2018, is a major part of this reformation process, as it attempts to tackle some of the most severe and prolific enhancements—those that ratchet up the sentence based on firearms-related conduct. As the lawmakers observed, "[o]ften the enhancement for gun use is longer than the sentence for the crime itself." (Assem. Com. on Public Safety, Comments on SB 620, June 13, 2017, § 3.) This is fundamentally unfair to the accused and overly burdensome on the system, because the effect is to "disproportionately increase racial disparities in prison populations" and "greatly increase the population of incarcerated persons," and it's ultimately

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1 Statutory citations are to the Penal Code.

2 See California Supreme Court Case Information, Pending Issues Summary (https://supreme.courts.ca.gov/case-information/pending-issues-summary).

unjustified because "[l]onger sentences do not deter crime or protect public safety according to research on these laws." (Assem. Com. on Public Safety, SB 620, Unfinished Business.)

The Legislature's solution was to "provide[ ] judges the ability to impose sentences that fit the severity of the offense," so that the sentencing process involves an individualized assessment of the extent to which, if any, a defendant's conduct may warrant punishment over and above the sentence already imposed for the crime. (Assem. Com. on Public Safety, SB 620 (2017-2018 Reg. Sess.), June 13, 2017, Author's Statement, p. 8.) To that end, through SB 620, the Legislature equipped trial courts with discretion to "strike or dismiss" firearm-use sentencing enhancements, including the severest of such penalties under section 12022.53, "in the interest of justice pursuant to Section 1385" at the time of sentencing. After this Court's decision in *People v. Tirado* (2022) 12 Cal.5th 688 (*Tirado*), there can be no dispute that this discretion *at the least* permits a court to strike or dismiss the greatest of these enhancements arising under subdivision (d) of section 12022.53 and to impose no additional punishment at all or to substitute one of the lesser enhancements under subdivisions (b) or (c).

Numerous defendants like McDavid saddled with one or more of the enhancements under section 12022.53 still wait for resolution of the question whether this authority extends to substituting uncharged lesser enhancements within *other* sections of this statutory scheme, such as section 12022.5. An analysis of all the factors relevant to resolving this issue compels

one conclusion: when a trial court exercises its broad discretion to strike or dismiss a section 12022.53 enhancement, the Legislature has indeed authorized the imposition of any uncharged lesser enhancement supported by the facts found true or admitted in connection with the greater enhancement.

To read the statutory scheme any other way would yield anomalous results, including, for example, that courts would be left with a binary choice between imposing an additional 10 years or no punishment at all for any enhancement found true or admitted under subdivision (b) of section 12022.53. The statutory interpretation advanced by the Attorney General and adopted by the majority of the Court of Appeal in this case would do just that and therefore it must be rejected in favor of the interpretation articulated above, which effectuates the manifest purpose of the statutory scheme based on its plain language, the legislative history, the canons of construction, and *Tirado* itself.

Statement of the Case and Facts[3]

Based on an incident occurring in September of 2016, McDavid was tried and convicted by a jury in November of 2017 of conspiracy to commit murder (§182, subd. (a)(1)) and premeditated attempted murder (§§ 664/187, subd. (a), 189), with sentencing enhancement allegations that he personally and intentionally discharged a firearm causing great bodily injury or

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[3] As the Court of Appeal did for purposes of its opinion here (Slip Opn. at p. 3, fn. 4), McDavid incorporates by reference the factual summation of the evidence set forth in the opinion in the related appeal of *People v. Lovejoy* (Case No. D073477).

death (§§ 12022.53, subd. (d), 12022.7, subd. (a)). (1CT 102-104.) In January of 2018, the court sentenced McDavid to a term of 25 years to life for the conspiracy and a consecutive term of 25 years to life for the enhancement under section 12022.53, subdivision (d). (1CT 111-112.) The court imposed but stayed pursuant to section 654 a term of 25 years to life for the attempted murder, another such consecutive term for the related enhancement under section 12022.53, subdivision (d), and a three-year term for the enhancement under section 12022.7. (1CT 111-112.)

The Court of Appeal affirmed the convictions on direct appeal (Case No. D073477), but it remanded the case for re-sentencing in light of the newly enacted discretion of trial courts to strike or dismiss enhancements under section 12022.53, subdivision (h), as amended by SB 620. On April 30, 2021, the trial court declined to exercise its discretion to strike or dismiss the section 12022.53 enhancements in this case and imposed the same sentence. (1CT 121-122.) McDavid timely appealed. (1CT 100.) While the appeal was pending, the Court issued its opinion in *Tirado* concerning the scope of a court's sentencing discretion under amended subdivision (h). After a round of supplemental briefing from the parties concerning the impact of SB 620 on the resolution of the case, the Court of Appeal held, "we agree with McDavid's argument that, under the reasoning of *Tirado*, the trial court has the discretion on remand to strike the section 12022.53, subdivision (d) enhancements and instead impose lesser included uncharged enhancements including, but not limited to, section 12022.53, subdivision (b) or (c) enhancements,

if the factual elements for those lesser included enhancements were alleged in the information and found true by the jury (e.g., § 12022.5, subd. (a) enhancements)." (*People v. McDavid* (2022) 293 Cal.Rptr.3d 7, *16, previously published at 77 Cal.App.5th 763.)

The Attorney General petitioned for a rehearing, which McDavid opposed. A majority of the Court of Appeal granted the petition and vacated its prior opinion, rejecting McDavid's argument that "the trial court has discretion to strike the section 12022.53, subdivision (d) enhancements and instead impose *any* lesser included enhancements if the elements of those enhancements have been found true by the trier of fact (e.g., § 12022.5, subd. (a) enhancement or § 12022.53, subd. (b) or (c) enhancement)." (Slip Opn. at p. 3.) The majority now reasoned that the trial court's discretion was limited to "strik[ing] one or both of the section 12022.53, subdivision (d) enhancements alleged against McDavid and found true by the jury and then either: (1) not impos[ing] any section 12022.53 enhancement; or (2) impos[ing] one, or two, lesser, uncharged section 12022.53 enhancements (i.e., § 12022.53, subd. (b) or (c))." (Slip Opn. at p. 16.) The rationale for this holding was that "section 12022.53, subdivision (j) provides that if a section 12022.53 enhancement has been alleged and found true by a trier of fact, a trial court may impose only an enhancement under section 12022.53 (i.e., § 12022.53, subd. (b), (c), or (d)) and not an enhancement under any other statute (e.g., § 12022.5, subd. (a))." (*Ibid.*)

Justice Dato dissented, asserting "[n]othing has changed in the intervening three months that casts doubt on our original

conclusion," as it was still just as much the case that subdivision (j) does not "intercede[ ] to prohibit imposing any lesser included enhancement other than those in section 12022.53 itself" when the court invokes its discretion to strike or dismiss the enhancement found true or admitted under section 12022.53. (Slip Opn., dis. opn. of Dato, J. at p. 1.) Justice Dato contended that once the section 12022.53 has been stricken or dismissed pursuant to subdivision (h) as amended by SB 620, "the part of subdivision (j) that states 'the court shall impose punishment for that enhancement pursuant to this section' cannot apply" since the enhancement "no longer has any effect." (*Id.* at p. 4.)

This Court granted McDavid's petition for review.

Argument

I. The Legislature has authorized courts to strike or dismiss a section 12022.53 and either impose no additional punishment for the firearms-related conduct or to impose any factually supported uncharged lesser enhancement that "fits the severity of the crime."

As will appear, the plain-meaning construction of the statutory scheme speaks for itself in demonstrating that a trial court's discretion to impose an uncharged lesser enhancement in substitution for a greater enhancement under section 12022.53 extends to lesser enhancements within this same statutory scheme yet outside the four corners of section 12022.53. And everything else relevant to resolving this question concerning the scope of a court's authority here compels the same conclusion.

A. General sentencing powers and duties of trial courts

While "it is the prosecution that determines what charges should be brought and against whom" and that authority "includes the power to charge specific enhancements and seek the maximum available term," "once those decisions have been made and the proceedings have begun, 'the process which leads to acquittal or to sentencing is fundamentally judicial in nature.' [Citation]." (*Tirado*, *supra*, 12 Cal.5th at p. 702.) "The prosecution cannot control the court's authority to select from the *legislatively authorized* sentencing options." (*Ibid.*, italics original.) The court's selection among those options is an exercise of its discretion, and that decision is "subject to review for abuse of discretion." (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

A defendant is entitled to an exercise of "informed discretion"—i.e., the trial court must know and understand the legislatively authorized sentencing options. "A court acting while unaware of the scope of its discretion is understood to have abused it." (*Tirado*, *supra*, 12 Cal.5th at p. 694; accord *Nazir v. Superior Court* (2022) 79 Cal.App.5th 478, 490 ["a court abuses its discretion when it misunderstands the scope of that discretion"].) Thus, whether a particular sentence is within a trial court's discretionary power to impose "depends on the scope of that discretion." (*Tirado* at p. 694.) That turns on "the legal principles and policies that should [ ] guide[ ] the court's actions." (*Nazir* at p. 490.) And that is a question of statutory interpretation reviewed de novo. (*Tirado* at p. 490.)

B. General principles of statutory interpretation

"As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141, internal quotation marks omitted.) "Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and ordinary meaning and construing them in context." (*People v. Johnson* (2002) 28 Cal.4th 240, 244.) "[W]e consider the language of the entire scheme and related statutes, harmonizing the terms when possible." (*Gonzalez*, at p. 1141, internal quotation marks omitted). "If the plain language of the statute is clear and unambiguous, our inquiry ends, and we need not embark on judicial construction." (*Johnson*, at p. 244.)

However, the plain meaning rule is subject to important limitations: "[A]lthough the words used by the Legislature are the most useful guide to its intent, we do not view the language of the statute in isolation." (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1007, internal quotation marks omitted.) "We will not follow the plain meaning of the statute when to do so would frustrate[ ] the manifest purposes of the legislation as a whole or [lead] to absurd results." (*Ibid.*, internal quotation marks omitted.) "Instead, we will interpret legislation reasonably and . . . attempt to give effect to the apparent purpose of the statute." (*Ibid.*, internal quotation marks omitted.) To that end, "[i]t is incumbent upon courts to harmonize statutes based on their texts, if that can reasonably be done." (*People v. Superior Court of Riverside County* (2022) 81 Cal.App.5th 851, 863.)

Thus, "[t]he words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*People v. Valencia* (2017) 3 Cal.5th 347, 357-358, internal quotation marks omitted.) Harmonizing statutes internally and externally means that, "when reasonably possible," the court is required to "reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions; the statutes 'must be regarded as blending into each other and forming a single statute'; and 'read together and so construed as to give effect, when possible, to all the provisions' of each statute." (*Superior Court of Riverside County*, *supra*, 81 Cal.App.5th at p. 863, quoting *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955.)

"If the language is reasonably susceptible of more than one meaning, however, we may examine extrinsic aids such as the apparent purpose of the statute, the legislative history, the canons of statutory construction, and public policy." (*Tan v. Superior Court of Mateo County* (2022) 76 Cal.App.5th 130, 136.) In a similar vein, if the statutory provisions at issue cannot be harmonized because they are irreconcilably conflicting, courts may employ "specific-over-general and recent-over-earlier" rules as canons of construction (*Moreno v. Bassi* (2021) 65 Cal.App.5th 244, 256)—i.e., "'more specific provisions take precedence over more general ones'" and "'later enactments supersede earlier ones'" (*Hopkins v. Superior Court* (2016) 2 Cal.App.5th 1275,

1283, quoting *State Dept. of Public Health*, *supra*, 60 Cal.4th at pp. 960). However, "'when these two rules are in conflict, the rule that specific provisions take precedence over more general ones trumps the rule that later-enacted statutes have precedence.'" (*Hopkins* at p. 1283, quoting *State Dept. of Public Health* at p. 960.) And both of these rules are subordinate to the court's paramount duty to harmonize the statutory provisions to the greatest extent possible, because such rules "apply only when harmonization is not possible." (*Tan*, at pp. 142-143, citing *State Dept. of Public Health* at p. 960 [explaining that these rules apply only "[i]f conflicting statutes cannot be reconciled"].)

In all events, effectuating the legislative intent is the fundamental goal: "'canons of statutory construction are merely aids to ascertaining'" such intent and "are not to be 'applied so as to defeat the underlying legislative intent otherwise determined.'" (*Superior Court of Riverside County*, *supra*, 81 Cal.App.5th at p. 862, quoting *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 879.) "Thus, when the legislat[ive] history answers the question of legislative intent, or at least provides clues to legislative intent, the legislative history is a more reliable indicator of the legislative intent than inferences of intent based on canons of statutory construction." (*Id.* at p. 862.)

C. The plain-meaning construction of the statutory scheme is clear in establishing the broad discretion of trial courts under section 12022.53 to impose enhancements that fit the severity of the crime.

With this framework in mind, we turn to the question at hand—whether a trial court has discretion to strike a firearm-related enhancement imposed under section 12022.53 and substitute a lesser uncharged firearm enhancement under a different statute, such as a firearm-related enhancement under section 12022.5—and conduct this inquiry based on the language of the statutory scheme and the interpretative principles courts must apply in construing the language "to effectuate the law's purpose." (*People v. Gonzalez*, *supra*, 2 Cal.5th at p. 1141.)

We start with the language of section 12022.53, giving the words "their usual and ordinary meaning" (*Johnson*, *supra*, 28 Cal.4th at p. 244), yet viewing them in context "with the entire scheme and related statutes" (*Gonzalez*, *supra*, 2 Cal.5th at p. 1141), and harmonizing them "both internally and with each other, to the extent possible" (*Valencia*, *supra*, 3 Cal.5th at pp. 357-358), while avoiding interpretations that produce "absurd results" or "frustrate [ ] the manifest purposes of the legislation as a whole" (*Camacho*, *supra*, 32 Cal.App.5th at p. 1007).

1. The statutory scheme

Section 12022.53 falls within a statutory scheme of sentencing enhancements related to the use or possession of a firearm in connection with the commission or attempted commission of certain criminal offenses, all of which fall under

the same Part and Title of the Penal Code – Part 4, Title 2. It's clear from the face of the scheme that these sentencing enhancements are all designed to serve the same general purpose of creating aggravated penalties for the commission or attempted commission of a crime during which the perpetrator is armed with or uses a firearm, or participated while knowing another principal is armed with or uses a firearm. The various enhancements work together to essentially establish a hierarchy of penalties based on the nature of the offense.

Section 12022.53 sits atop of this hierarchy, doling out the severest schedule of penalties for firearms-related conduct in connection with the most serious forms of assaultive offenses criminalized in the Penal Code (e.g., murder, rape, robbery, kidnapping, sex offenses against children, etc.), or any attempt to commit such an offense in connection with firearms-related conduct: 10 years for the personal use of a firearm, 20 years for the personal and intentional discharge of a firearm, and 25 years to life for the personal and intentional discharge of a firearm causing great bodily injury or death. (§ 12022.53, subds. (b)-(d).)[4]

Next in order of this hierarchy is section 12022.5, which more broadly applies to the personal use of a firearm in the commission or attempted commission of a felony offense—i.e., *any* felony—generally mandating an additional and consecutive term of 3, 4, or 10 years (5, 6, or 10 years if the arm is an "assault weapon" or "machinegun"). (§ 12022.5, subds. (a) & (b).) Below

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[4] To promote consistency and simplicity where appropriate based on the context, McDavid sometimes uses the numerical form when stating the length of the prison terms in this scheme.

that in order of severity, section 12022.3 applies to a series of sex crimes—wider in scope than the sex crimes to which section 12022.53 applies—and generally mandates an enhancement of 3, 4, or 10 years for the personal use of a firearm or a deadly weapon, and 1, 2, or 5 years for being personally armed with such a weapon, during the commission of such an offense. (§ 12022.3, subds. (a) & (b).) Section 12022.4 in turn applies to the commission or attempted commission of any felony in which a person "furnishes or offers to furnish a firearm to another for the purpose of aiding, abetting, or enabling that person or any other person to commit" that felony offense, and calls for an additional consecutive term of 1, 2, or 3 years. (§ 12022.4, subd. (a).)

Last in this scheme is section 12022, which establishes the least severe schedule of penalties but casts the widest net. It applies to the commission or attempted commission of any felony during which a person is *either* personally armed with a firearm or "a principal" in the commission or attempted commission of a felony, and it applies to the commission or attempted commission of any felony in which a person is personally armed with any "deadly or dangerous weapon." (§ 12022, subds. (a)-(b).) The provision generally imposes a one-year enhancement in such cases. An increased penalty schedule of 1, 2, or 3 years applies when the perpetrator, though not personally armed, participates knowing another principal is personally armed, or when the crime involves a carjacking (§ 12022, subds. (b)(2) & (d)), and the schedule is further aggravated to 3, 4, or 5 years when the crime involves certain specified drug offenses (§ 12022, subds. (c)).

Certain provisions within this scheme grant forms of judicial discretion, which empower the sentencing judge to eliminate or reduce the impact of the enhancements that would otherwise apply. Some of those provisions have been amended over time, and some of those amendments are significant to resolving the statutory construction issues in this case.

Section 12022 provides (as it has since January 1, 2014): "Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided in subdivision (c) or (d) [the drug-related offenses] in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." (§ 12022, subd. (f).)

Up until December 31, 2017, section 12022.5 provided, by contrast: "Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Former § 12022.5, subd. (c); see Stats.2011, c. 39 (A.B. No. 117).) The Legislature amended section 12022.5 as part of Senate Bill No. 620 (SB 620), effective January 1, 2018, to remove the prior bar against striking this enhancement and provide instead: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§

12022.5, subd. (c).) The ameliorative changes under SB 620 were in effect at the time that McDavid was resentenced in April of 2021, and the statute remains in the same form today.

For its part, section 12022.53 has gone through a similar transformation. Up until December 31, 2017, it provided: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Former § 12022.5, subd. (h); see Stats.2010, c. 711 (S.B.1080), § 5.) Through SB 620, the Legislature amended section 12022.53 in the same way it amended section 12022.5, to remove the prior bar against striking this enhancement, so as to provide: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

Besides the amendment to subdivision (h), section 12022.53 has remained largely static,[5] including subdivisions (f) and (j). Subdivision (j), in its first sentence, codifies the essential due process requirements for the applicability of any enhancement under this section: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d)

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[5] Subsequent amendments to section 12022.53 have modified the list of enumerated offenses to which these enhancements apply and have made some other technical non-substantive changes. (Stats.2018, c. 423 (S.B. No. 1494), § 114, eff. Jan. 1, 2019; Stats.2021, c. 626 (A.B. No. 1171), § 65, eff. Jan. 1, 2022.)

shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." Its second sentence states the general consequence when any of these enhancements is found true or admitted: "the court shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another enhancement provides for a greater penalty or a longer term of imprisonment."

Subdivision (f) sets forth a series of additional rules when a term of imprisonment is imposed under this section: (1) "[o]nly one additional term of imprisonment under this section shall be imposed per person for each crime"; (2) "[i]f more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment"; (3) "[a]n enhancement involving a firearm specified in Section 12021.5 [repealed], 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section"; and (4) "[a]n enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d)."

2. The plain meaning of and relationship between subdivisions (j) and (h) of section 12022.53 compel McDavid's statutory interpretation.

Statutorily speaking, the key to resolving the question presented here is to define the relationship between the second

sentence of subdivision (j), concerning the length of the term the court "shall impose" on "an enhancement specified in this section [that] has been admitted or found to be true," and subdivision (h), which empowers the court to "strike or dismiss an enhancement otherwise required to be imposed by this section" "in the interest of justice pursuant to Section 1385." Viewing the relationship between these provisions contextually and holistically in light of the scheme's "manifest purpose," the plain meaning jumps off the page as a matter of common sense: when the court exercises its discretion to "strike or dismiss an enhancement otherwise required to be imposed by this section" under subdivision (h), subdivision (j)'s general rule that "the court shall impose punishment for *that enhancement* pursuant to this section rather than imposing punishment authorized under any other law" simply does and cannot apply (italics added).

Construing this aspect of subdivision (j) as applicable in any instance where the court employs subdivision (h) to *strike or dismiss* the "enhancement otherwise required to be imposed by this section" is entirely illogical. It cannot be the case that a court invoking the power to eliminate the enhancement "in the interest of justice pursuant to Section 1385" must then turn around and "impose punishment for *that enhancement* pursuant to this section." As Justice Dato said in his cogent dissent from the majority opinion in this case: "It is inconceivable that the Legislature intended to grant judicial discretion in subdivision (h), only to have it taken away by subdivision (j)." (Slip Opn., dis. opn. of Dato, J., at p. 3.) Indeed, "the language of a statute must

be given a reasonable interpretation," and "every statute as a whole must be so construed, thus, when the opportunity arises, made compatible with commonsense and the dictates of justice." (*In re Todd's Estate* (1941) 17 Cal.2d 270, 275; *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122 ["The court must apply common sense to the language at hand and interpret the statute to make it workable and reasonable"].)

It is also a matter of common sense, and basic grammar, that the language of subdivision (j) which follows the general rule concerning punishment for the enhancement found true or admitted—i.e., "the court shall impose punishment for that enhancement pursuant to this section *rather than imposing punishment authorized under any other law, unless another enhancement provides for a greater penalty or a longer term of imprisonment*" (italics added)—has no application or significance apart from the general rule itself. This language governs *how* the court is to impose sentence on an enhancement that "has been admitted or found to be true" *when* it "impose[s] punishment for that enhancement." That is, it establishes parameters on the discharge of *that* power, by regulating the punishment to be imposed for the enhancement found true or admitted during the criminal proceedings, not parameters on the independent discretionary power of the court to later strike or dismiss that enhancement under subdivision (h) "at the time of sentencing" "in the interest of justice pursuant to Section 1385."

To say otherwise, one would have to construe this language in the second sentence of subdivision (j) as creating a freestanding limitation on the exercise of the court's sentencing

discretion. This is an unreasonable interpretation when the "rather than" language is inextricably tied to the general rule concerning the imposition of punishment on the enhancement found true or admitted, as a conditional clause that relates back to and modifies only that general rule. (See Merriam-Webster Dictionary online https://www.merriam-webster.com/dictionary/rather%20than ["rather than" is "used with the infinitive form of a verb to indicate negation as a contrary choice or wish"].) This conditional language can only apply if and when the general rule itself actually applies—i.e., when the court does *not* invoke its sentencing discretion under subdivision (h) to strike or dismiss the enhancement "otherwise required to be imposed" and instead imposes punishment on the enhancement found true or admitted during the proceedings. But when a court does exercise this power, the entire second sentence of subdivision (j) necessarily no longer has any application.

3. The plain meaning and effect of section 1385 in securing this breadth of sentencing discretion also compels McDavid's interpretation.

The well settled effect of striking an enhancement pursuant to section 1385—which the Legislature expressly incorporated into section 12022.53 as the vehicle for "strik[ing] or dismiss[ing] an enhancement otherwise required to be imposed by this section"—further compels this interpretation. "[A]bsent a clear legislative direction to the contrary, a trial court retains its authority under section 1385 to strike an enhancement." (*People v. Meloney* (2003) 30 Cal.4th 1145, 1155, internal quotations

omitted.) That is, "section 1385, subdivision (a) applies unless there is 'clear language' evincing a legislative intention to deny a trial court the authority to dismiss a particular enhancement." (*People v. Thomas* (2013) 214 Cal.App.4th 636, 641, quoting *People v. Fritz* (1985) 40 Cal.3d 227, 230.)[6] Thus, before SB 620, when this statutory scheme expressly barred the striking of the firearms-related enhancements specified under sections 12022.5 and 12022.53, courts were prohibited from invoking section 1385 to strike them. (See e.g., *People v. Oates* (2004) 32 Cal.4th 1048, 1056; *Fuentes*, *supra*, 1 Cal.5th at p. 226.) Now, with the power to do so expressly engrafted into this statutory scheme, a trial court "retains its authority under section 1385."

As Justice Dato explained in his dissenting opinion here, "once a court strikes an enhancement, '[i]t is tantamount to a dismissal.'" (Slip Opn., dis. opn. of Dato, J., at p. 4, quoting *People v. Santana* (1986) 182 Cal.App.3d 185, 190.) "[A] striking is an unconditional deletion of the legal efficacy of the stricken allegation or fact for purposes of a specific proceeding." (*Santana*, at p. 190 & fn. 6 [this procedure "is commonly used in trial courts," "where the fact of the conviction has been shown but the trial court has concluded that 'in the interest of justice' defendant should not be required to undergo a statutorily increased penalty which would follow from judicial determination of that fact"]; accord *People v. Carillo* (2001) 87 Cal.App.4th 1416, 1421.) "'If a judge strikes the enhancement, it's as if the fact of the

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[6] *Fritz* was superseded by statute on other grounds as stated in *People v. Fuentes* (2016) 1 Cal.5th 218, 229, fn. 8.

enhancement never existed—it will not remain on the defendant's criminal record nor will it affect them in any potential future sentencing.' [Citation]." (*People v. Barboza* (2021) 68 Cal.App.5th 955, 965.) The dismissal "cuts off" action against the defendant as to the enhancement. (*Carillo*, at p. 1421.)

Thus, under the settled meaning of section 1385, when a court exercises its power under subdivision (h) to "strike or dismiss an enhancement otherwise required to be imposed" under section 12022.53, the enhancement no longer has any effect. (*Tirado*, *supra*, 12 Cal.5th at p. 696 ["There is no dispute that section 12022.53(h), as amended, authorizes a court to strike a section 12022.53(d) enhancement entirely and impose no additional punishment under section 12022.53"].) It follows that subdivision (j)'s provision concerning "punishment for *that* enhancement" simply does not apply. In such cases, the court is choosing *not* to sentence the defendant on the enhancement that "has been admitted or found to be true." Just the same then, the conditional clause of subdivision (j) requiring imposition of punishment on that enhancement "pursuant to this section rather than imposing punishment authorized under any other law, unless another enhancement provides for a greater penalty or a longer term of imprisonment," has no application.

Nothing about the plain language of subdivision (j) prohibits the court from substituting a lesser uncharged firearms-related enhancement under a different statute after invoking its discretion under subdivision (h) to strike or dismiss an enhancement under section 12022.53, such as a lesser

enhancement under 12022 or 12022.5. And the Legislature's express incorporation of section 1385 into the scheme can only further evince an intent to provide such flexibility given the general breadth of section 1385 discretion. (*Nazir*, *supra*, 79 Cal.App.5th at pp. 491-492, quoting *Fuentes*, *supra*, 1 Cal.5th at p. 230 ["in light of section 1385's 'prominent and contentious history' [citation], it is critical and even 'demanded,' that the legislative intent to divest a court of its section 1385 discretion be abundantly clear"].) "[I]n the context of sentencing, the Legislature has stated that the 'interests of justice' under section 1385 include ensuring defendants receive proportionate punishment." (*Id.* at p. 495; *ibid.*, quoting *People v. Stamps* (2020) 9 Cal.5th 685, 701-702 ["citing legislative history stating that 'punishments that are disproportionate to the offense [do] not serve the interests of justice, public safety, or communities'"].)

Subject to the minimal pleading and proof requirements of due process, discussed further below, this interpretation of a trial court's authority under subdivision (h) of section 12022.53 is not only consistent with section 1385 and the integral part it plays within the broader sentencing scheme, but it is entirely proper.

4. The import of subdivision (f) of section 12022.53 further illustrates the point here.

The plain-meaning construction of subdivision (f) in cases where the court exercises its sentencing discretion to strike or dismiss an enhancement otherwise required to be imposed further supports this interpretation of the statutory scheme. As noted above, subdivision (f) places its own conditions on

sentencing pursuant to section 12022.53: only one additional term of imprisonment may be imposed "under this section" for each crime; if more than one enhancement "under this section" is found true or admitted, the court must impose the one carrying the longest term of imprisonment; the defendant cannot be punished with *both* "an enhancement imposed pursuant to this section" and an enhancement involving a firearm under section 12022, 12022.3, 12022.4, 12022.5, or 12022.55; and the defendant cannot be punished with *both* "an enhancement imposed pursuant to subdivision (d)" and a great-bodily-injury enhancement under section 12022.7, 12022.8, or 12022.9.

Given the court's sentencing discretion under subdivision (h) to strike or dismiss and thereby completely eliminate the effect of *any* of the enhancements under section 12022.53, including subdivision (d) which carries the stiffest penalty, one cannot reasonably maintain that a court invoking this discretion is required to impose sentence on the enhancement "that provides for the longest term of imprisonment" whenever "more than one enhancement per person is found true under this section." (§ 12022.53, subd. (f).) Rather, as with the second sentence of subdivision (j) concerning the imposition of punishment on the enhancement found true or admitted, the plain commonsense interpretation of this language in subdivision (f) is that it simply does not apply when the court has invoked its discretion to strike or dismiss the enhancement found true or admitted.

In a similar vein, when the court strikes or dismisses the enhancement found true or admitted under section 12022.53,

subdivision (f)'s restriction against imposing an enhancement involving a firearm under section 12022, 12022.3, 12022.4, 12022.5, or 12022.55, or a great-bodily-injury enhancement under section 12022.7, 12022.8, or 12022.9, no longer applies, since that restriction only concerns imposition of such an enhancement "*in addition to* an enhancement imposed pursuant to this section." (§ 12022.53, subd. (f), italics added.) So, nothing about the plain language of subdivision (f) can be read to prohibit a sentencing court from substituting one of these enhancements as a lesser uncharged enhancement after striking or dismissing the enhancement found true or admitted under section 12022.53.

And nothing else in the scheme creates any such prohibition. Indeed, as discussed below, the arguments in support of the interpretation that the scheme does not afford trial courts such discretion are all based *solely* on the language in the second sentence of subdivision (j), which, again, has no application when a trial court invokes the power under subdivision (h).

D. The extrinsic aids all strongly support this interpretation of a trial court's broad sentencing discretion under section 12022.53.

While the plain commonsense meaning of the statutory scheme's provisions naturally harmonizes any "seeming inconsistencies in them" so as to compel the interpretation articulated above (*State Dept. of Public Health*, *supra*, 60 Cal.4th at p. 955), even if the relevant language "is reasonably susceptible of more than one meaning" (*Tan*, *supra*, 76 Cal.App.5th at p. 136), an analysis of the "extrinsic aids" erases

any lingering doubt that the discretion under subdivision (h) extends to imposing any lesser uncharged enhancement after a section 12022.53 enhancement has been stricken or dismissed "at the time of sentencing" "in the interest of justice."

1. The legislative history and intent of the statutory scheme.

Before SB 620, the then-prevailing legislative policy was "Use a Gun and You're Done." (Assem. Bill No. 4 (1997-1998 Reg. Sess.), Bill Analysis, Author's Comments ["With the 10-20-life provisions of AB 4, we are sending another clear message: If you use a gun to commit a crime, you're going to jail, and you're staying there"].) The prohibition against striking an enhancement under former section 12022.53, subdivision (h), in combination with subdivisions (f) and (j), worked to ensure the "'the harshest applicable punishment'" for the use of a firearm in connection with the enumerated felonies. (*Nazir*, *supra*, 79 Cal.App.5th at p. 490, quoting *Tirado*, *supra*, 12 Cal.5th at p. 701). Even at that time, however, lawmakers voiced reservations that they were perhaps going too far in focusing on firearm use, noting that an assault "is punished more than three times more severely" under this scheme when perpetrated with a gun than when perpetrated with another weapon, and "[t]he perpetrator's choice of weapon in an assault appears to be a dubious basis for such disparate punishment." (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 4, April 15, 1997, § 4.)

As Justice Dato explained in his dissenting opinion here, "[b]y 2017, however, the Legislature had come to recognize that

'[l]onger sentences do not deter crime or protect public safety . . . .'" (Slip Opn., dis. opn. of Dato, J., at p. 2, quoting Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 620 (2017-2018 Reg. Sess.) p. 3, as amended June 13, 2017.) "Instead, research has found that these enhancements cause problems. They disproportionately increase racial disparities in prison populations and they greatly increase the population of incarcerated persons." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of SB 620 at p. 3.) "As a result, the Legislature amended subdivision (h), flipping it 180 degrees." (Slip Opn., dis. opn. of Dato, J., at p. 2.)

The legislative history contains no indication that lawmakers intended or believed this discretion to *strike or dismiss* an enhancement found true or admitted under section 12022.53 would be subject to the limitation stated in subdivision (j) concerning "punishment for *that* enhancement" or would be otherwise constrained to the four corners of section 12022.53. Instead, the expressions of intent all indicate the 180-degree flip in legislative priorities here was intended to afford courts maximum flexibility within the bounds of the entire scheme of related enhancements in Part 4, Title 2 of the Penal Code:

> Right now these sentences are imposed as a mandate, regardless of the circumstances of a crime. If for some valid reason a court wanted to impose *a* lesser sentence they cannot.
>
> SB 620 provides the court with discretion to strike a firearm enhancement in any case in which that would be in the interests of justice to do so. A defendant who merits additional punishment for the

> use of a firearm in the commission of a felony would receive it. SB 620 allows a court to decide whether or not to *extend the sentence* if a specific case indicates that it would be appropriate to do so.
>
> SB 620 does NOT eliminate these enhancements. Instead, SB 620 allows a judge to exercise discretion on whether or not to *make a long sentence longer* if it is in the interest of justice.
>
> SB 620 allows a judge to take into account the nature and severity of the crime, as well as the individual's culpability, during sentencing. Consequently, SB 620 provides judges the ability to impose *sentences that fit the severity of the offense*, helping to ensure that incarcerated Californians do not serve unnecessarily long sentences.

(Assem. Com. on Public Safety, SB 620 (2017-2018 Reg. Sess.), June 13, 2017, Author's Statement, at pp. 3-4, 8, italics added.)

Legislative priorities designed to empower courts to impose "*a* lesser sentence" and to *extend* or make a sentence *longer*" as may be "appropriate" with the ultimate purpose of affording "the ability to impose sentences that *fit the severity of the offense*" do not comport with an interpretation of the scheme that shackles courts to the confines of section of 12022.53 and forces them to impose one of the enhancements specified in that section. Rather, the interpretation that "effectuate[s] the law's purpose" is the same one already compelled by the plain commonsense meaning of subdivisions (f), (h), and (j), individually and collectively within the whole scheme of which they are part: when a trial court exercises its discretion to strike an enhancement otherwise required to be imposed under section 12022.53, it may properly

substitute any lesser uncharged offense "at the time of sentencing" "in the interest of justice pursuant to Section 1385," so long as it is supported by the facts pled and proved (or admitted) in connection with the greater enhancement. As this Court would later put it in *Tirado*, "courts were granted the flexibility to impose lighter sentences in appropriate circumstances." (*Tirado*, *supra*, 12 Cal.5th at pp. 701-702.)

The Legislature's recent amendments of section 1385 are also notable here in further evincing an intent to align the broader statutory scheme with legislative priorities designed to empower courts with broad discretion to mitigate the potentially disparate and troublesome impacts of sentencing enhancements. Through Assembly Bill No. 81, the Legislature amended section 1385 effective January 1, 2022, to provide, "[n]otwithstanding any other law, the court *shall dismiss* an enhancement if it is in the furtherance of justice to do so, except if dismissal of that enhancement is prohibited by any initiative statute." (§ 1385, subd. (c)(1), italics added.) The statute now directs that, "[i]n exercising its discretion under this subdivision, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in subparagraphs (A) to (I) are present." (§ 1385, subd. (c)(2).)

The "mitigating circumstances" that the court must afford "great weight" are: the enhancement "would result in a discriminatory racial impact"; the enhancement would result in the imposition of multiple enhancements (in which case "all enhancements beyond a single enhancement *shall be dismissed*");

the enhancement "could result in a sentence of over 20 years (in which case "the enhancement shall be dismissed"); "[t]he current offense is connected to mental illness"; "[t]he current offense is connected to prior victimization or childhood trauma"; "[t]he current offense is not a violent felony as defined in subdivision (c) of Section 667.5"; the defendant was a juvenile at the time of "the current offense or any prior offenses"; "[t]he enhancement is based on a prior conviction that is over five years old"; and "[t]hough a firearm was used in the current offense, it was inoperable or unloaded." (§ 1385, subd. (c)(2)(A)-(H), italics added.) Further, these factors "are not exclusive and the court maintains authority to dismiss or strike an enhancement in accordance with subdivision (a)." (§ 1385, subd. (c)(4).)

Enacting these changes, lawmakers explained: "By clarifying the parameters a judge must follow, SB 81 codifies a recommendation made by the Committee on the Revision of the Penal Code to improve fairness in sentencing and help *ensure that penalties more closely reflect the circumstances of the crime*." (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 81 (2021-2022 Reg. Sess.), Mar. 16, 2021, p. 3, italics added.) This was necessary because "the law governing when judges should impose or dismiss enhancements remains an 'amorphous concept,' with discretion inconsistently exercised and *underused* because judges d[o] not have adequate guidance." (*Id.* at p. 2, italics added.) "SB 81 establishes a presumption that judges would only apply sentence enhancements when there is clear and convincing evidence that not using the enhancement would endanger the

public." (*Id.* at p. 7.) Consider too the meaning and manifest purpose of the new section 17.2, which was added to the Penal Code effective January 1, 2023, to provide: "[i]t is the intent of the Legislature that the disposition of any criminal case use the least restrictive means available," "[t]he court presiding over a criminal matter shall consider alternatives to incarceration," and "[t]he court shall have the discretion to determine the appropriate sentence according to relevant statutes and the sentencing rules of the Judicial Council." (§ 17.2, subds. (a)-(c).)

These priorities all align perfectly, and solely, with an interpretation of section 12022.53 that grants the discretion to strike or dismiss an enhancement under subdivision (b), (c), or (d) of section 12022.53 and then, if the court concludes that *some* punishment is nevertheless appropriate, to substitute any factually supported lesser enhancement in crafting a punishment that "more closely reflect the circumstances of the crime."

2. The caselaw of which the Legislature was presumably aware and adopted in enacting the sentencing discretion under section 12022.53 supports the same statutory construction.

In addition to the relevant legislative history, the relevant canons of construction compel this interpretation. First, consider the status of the caselaw at the time SB 620 was enacted. It is settled that "the courts are the ultimate arbiters of the construction of a statute." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11; *Honey Springs Homeowners Assn. v. Board of Supervisors* (1984) 157 Cal.App.3d

1122, 1137 ["it is firmly established statutory construction is a judicial function"].) "'A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'" (*Vazquez v. Jan-Pro Franchising International, Inc.* (2021) 10 Cal.5th 944, 951, quoting *Rivers v. Roadway Express, Inc.* (1994) 511 U.S. 298, 312-313.) "'This is why a judicial decision [interpreting a legislative measure] generally applies retroactively.'" (*Vazquez* at p. 951, quoting *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 474.)

"Statutes are to be interpreted by assuming that the Legislature was aware of the existing judicial decisions." (*Kusior v. Silver* (1960) 54 Cal.2d 603, 618; accord *Estate of McDill* (1975) 14 Cal.3d 831, 837-838.) Also, "[w]e presume the Legislature, in enacting a statute, 'was aware of existing related laws and intended to maintain a consistent body of rules.'" (*People v. Cervantes* (2020) 55 Cal.App.5th 927, 938, quoting *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199.) Thus, it is well-established that "[w]here a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction." (*People v. Harrison* (1989) 48 Cal.3d 321, 329.) Because "the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction," the "reenacted portions of the statute are given the same construction they received before the amendment." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d

721, 734; *Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 197 ["it is presumed that the Legislature is aware of the judicial construction and approves of it" in such instances].)

Long before both the "Use a Gun and You're Done" law of 1997 and the 180-degree flip in legislative priorities in 2018 with SB 620, this Court construed the 1974 version of the statutory scheme in *People v. Strickland* (1984) 11 Cal.3d 946. There, the defendant was convicted of voluntary manslaughter and the trial court went on to impose an enhancement under 12022.5 based on his use of a firearm in connection with the crime. (*Id.* at p. 951.) Because that particular enhancement does not apply to a manslaughter conviction, this Court held it could not stand. (*Id.* at pp. 951-952.) However, it affirmed the Court of Appeal's substitution of a section 12022 enhancement for the section 12022.5 enhancement, finding the former properly applied even though it was not alleged in the charging document, because the jury had found the defendant "used and thus was armed with a firearm, a shotgun, at the time the offense was committed," and he "was charged in the commission with the use of a firearm under section 12022.5, [and] thus had notice that his conduct [could] also be in violation of section 12022." (*Id.* at p. 961.)

Over a decade later in *People v. Allen* (1985) 165 Cal.App.3d 616, the intermediate appellate court held that although the evidence was legally insufficient to support enhancements found true against the defendants under 12022.5, it was sufficient to support lesser enhancements under section 12022, because it clearly established that they were "participants

in a murder in which a principal was armed with a firearm." (*Id.* at p. 627.) Relying on the general rule that "[w]here a reviewing court finds insufficient evidence that a defendant committed the crime of which he was convicted but finds overwhelming evidence that he committed a lesser included offense, the court is empowered to reduce the conviction to the lesser offense," the court held, "rather than strike the gun-use findings altogether, we exercise our discretion to reduce them to the lesser included violations of Penal Code section 12022, subdivision (a)." (*Ibid.*)

Fast-forward another dozen years to *People v. Lucas* (1997) 55 Cal.App.4th 721, where a different appellate court faced the issue of whether the trial court had properly reduced firearm "use" enhancements under section 12022.5 to "simple arming" enhancements under section 12022 based on insufficient evidence of the greater. (*Id.* at p. 742.) The appellate court relied on *Strickland* as "authority for the reduction." Following the rationale there, it reasoned "the evidence shows and the jury by its 'use' finding necessarily found" that "each defendant was personally armed with the gun," meaning the lesser enhancement properly applied and "neither defendant [could] complain" about "a denial of due process notice." (*Id.* at p. 743.)

A decade later, in *People v. Dixon* (2007) 153 Cal.App.4th 985, still another court reached a similar conclusion in a similar case. There, after finding insufficient evidence to support an enhancement under section 12022.53, subdivision (b), because "the prosecution had not proved the gun Dixon used was a firearm," the trial court imposed an enhancement under section

12022 as a lesser included enhancement, and the defendant complained he did not receive adequate notice of this enhancement. (*Id.* at p. 1001.) The court held that "the personal-use-of-a-deadly-weapon enhancement is a lesser-included offense of a personal-use-of-a-firearm enhancement and, as a result, notice of the charged enhancement provided notice of the lesser-included enhancement of which Dixon was convicted." (*Ibid.*) It cited *Allen* as support in reasoning that "Dixon was adequately apprised that the prosecution was seeking to prove the elements which comprise" the lesser enhancement. (*Id.* at pp. 1001-1002.)

Then, in 2014, yet another court resolved the same basic issue based on the same reasoning. In *People v. Fialho* (2014) 229 Cal.App.4th 1389, the jury had found true an enhancement allegation under section 12022.53, subdivision (b), which did not properly apply to the underlying conviction of manslaughter, and the trial court imposed a lesser included enhancement under section 12022.5. (*Id.* at p. 1394.) On appeal, the court rejected the defendant's complaint about lack of adequate notice, citing *Strickland*, *Lucas*, *Dixon*, and *Allen* for support. (*Id.* at pp. 1396-1397.) "As explained in *Strickland*, when an enhancement is alleged in the information, the defendant is put on notice 'that his [or her] conduct [could] also be in violation of' an uncharged enhancement that 'would be applicable in any case' in which the charged enhancement applies, and imposition of the uncharged enhancement is permitted." (*Id.* at p. 1397, quoting *Strickland*, *supra*, 11 Cal.3d at p. 961.) Finding itself "required to follow decisions of the California Supreme Court," the court held that

the lesser-included enhancement was properly imposed because "[f]ormer section 12022.5, subdivision (a) is an enhancement that 'would be applicable in any case' in which a section 12022.53, subdivision (d) enhancement applies." (*Id.* at pp. 1397, 1399.)

The upshot of this caselaw is that when an uncharged lesser enhancement "would be applicable," the defendant is put on notice of that through a charging document alleging the greater enhancement against him, and when the facts underlying the lesser are found true or admitted, the lesser properly applies. We must presume the Legislature was aware of this construction of the statutory scheme of sentencing enhancements in Part 4, Title 2 of the Penal Code when it enacted SB 620 in 2017 and expressly granted trial courts the power to strike or dismiss a section 12022.53 enhancement in the interest of justice. The Legislature did not include any express or implied language in any of the amendments to this scheme that evinces an intent to cut off or at all restrict this sentencing power when a trial court exercises its discretion to strike or dismiss such an enhancement. Thus, it must be presumed to have adopted or approved this judicial construction of a trial court's sentencing power—which had been on the books since 1974. And, this construction is fully consistent with the express intent of the Legislature in the legislative history of SB 620, which emphasizes the general purpose of affording trial courts maximum flexibility to craft appropriate sentences that fit the facts of the individual case.

3. The other canons of construction can only bolster McDavid's interpretation.

As outlined above, any "seeming inconsistencies" in the statutory scheme concerning the individual effect of and relationship between subdivisions (h) and (j) of section 12022.53 are fully reconcilable, and it is "incumbent upon courts" to so harmonize them because it "can reasonably be done." (*Superior Court of Riverside County*, *supra*, 81 Cal.App.5th at p. 863; see *id.* at p. 873 [while they otherwise "appear to conflict," Penal Code section 1001.95 and Vehicle Code section 23640 can be harmonized by "interpreting them together as authorizing diversion for all misdemeanor charges, except those specified as ineligible for diversion in both Penal Code section 1001.95, subdivision (e) … *and* Vehicle Code section 23640"].)

However, assuming *arguendo* any irreconcilable conflict exists here, the "specific-over-general and recent-over-earlier principles" would both apply to bolster the same statutory construction. "'If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones.'" (*Hopkins v. Superior Court*, *supra*, 2 Cal.App.5th at p. 1283, quoting *State Dept.*, *supra*, 60 Cal.4th at pp. 960-961.) That is, "when a general and [a] particular provision are inconsistent, the latter is paramount to the former," and "in the event of a conflict between two statutes, effect will be given to the more recently enacted law." (*Moreno*, *supra*, 65 Cal.App.5th at p. 256.)

As the legislative history here shows, in 2017, the Legislature modified section 12022.53 (and section 12022.5) to

expressly grant trial courts the discretion to strike or dismiss an enhancement *otherwise required* to be imposed "in the interest of justice pursuant to Section 1385" (italics added), without any change to subdivision (j). Not only must we presume that the Legislature intended to adopt the preexisting judicial construction of a trial court's sentencing discretion under this scheme, but we must also conclude that the discretionary power engrafted into subdivision (h) against this backdrop prevails over any "seeming inconsistency" in subdivision (j), since subdivision (h) is both the more recent and the more specific of the two.

And more broadly as a matter of public policy, interpreting the statutory scheme to grant trial courts the discretion to substitute any lesser uncharged enhancement supported by the facts found true or admitted is consistent with the "broader societal objectives" of the general sentencing rules. (*Nazir*, *supra*, 79 Cal.App.5th at p. 497.) Such "[c]ase-by-case assessments [ ] conform with California Rules of Court, rules 4.410, 4.421, and 4.423, which list individualized factors a court may consider in determining whether to dismiss a firearm enhancement under section 1385." (*Id.* at p. 501.) "These rules refer to circumstances specific to the crime and the defendant's criminal history," and they provide that "the trial court 'should be guided by statutory statements of policy, the criteria in [the Rules of Court], and any other facts and circumstances relevant to the case'" when exercising its sentencing discretion. (*Id.* at p. 497, quoting Cal. Rules of Court, rule 4.410(b).) Ultimately, the focus is crafting a punishment that fits the case. (Cal. Rules of Court, rule 4.410(b)

["the sentencing judge must consider which objectives are of primary importance in the particular case"].) The statutory construction articulated above would advance this general policy and the similar purposes behind SB 620 itself.

E. This construction of the statutory scheme is fully consistent with the Court's opinion in *Tirado*, the rationale of which strongly supports interpreting section 12022.53 as affording such discretion.

This Court's recent opinion in *Tirado* is entirely consistent with the statutory interpretation compelled by the plain meaning of the statutory scheme, legislative history, canons of construction, and public policy concerning section 12022.53.

The question presented in *Tirado* was narrower than that which is presented here, because it focused on the specific contention the defendant raised on appeal: when the trial court decides to strike an enhancement under *subdivision (d)*—i.e., the *greatest* in the trio of potential enhancements under section 12022.53—may it impose one of the lesser uncharged enhancements under subdivision (b) or (c)? (*Tirado*, *supra*, 12 Cal.5th at p. 692.) Specifically, the defendant "urged the court had a third choice [between the all-or-nothing binary option of 25 years to life and no sentence at all]: to strike the section 12022.53(d) enhancement and impose a lesser enhancement under either section 12022.53(b) or (c)." (*Id.* at p. 694.) Thus, "[t]he question [wa]s whether the court can strike a section 12022.53(d) enhancement and, in its place, impose a lesser enhancement under section 12022.53(b) or section 12022.53(c),

even if the lesser enhancements were not specifically charged in the information or found true by the jury." (*Id.* at pp. 694, 696.) By its nature then, the focus was whether that discretion *includes* the authority to impose one of the lesser enhancements under subdivision (b) or (c) of section 12022.53 when the greatest enhancement under subdivision (d) has been found true or admitted. (*Id.* at p. 694.) Thus, the Court was not charged with expressly resolving *the full scope* of a court's discretion under subdivision (h) to strike and make substitutions for each of the enhancements under subdivisions (b), (c), and (d).

Nonetheless, the rationale underlying the Court's holding—that "the statutory framework permits a court to strike the section 12022.53(d) enhancement found true by the jury and to impose a lesser uncharged statutory enhancement instead"—strongly supports the interpretation that the full scope of discretion under subdivision (h) includes the authority to impose any lesser enhancement supported by the facts found true or admitted in connection with the greater enhancement.

The discussion of subdivision (j) in *Tirado* arose in the context of explaining that "[t]he court's power to impose a section 12022.53 enhancement is *limited*," because the first sentence of subdivision (j) provides that "*for the penalties in section 12022.53 to apply*, the existence of any fact required by section 12022.53 (b), (c), or (d) must be alleged in the accusatory pleading and admitted or found," while subdivision (h) nevertheless "authorizes a trial court to 'strike or dismiss an enhancement otherwise required to be imposed by this section.'" (*Tirado*, *supra*,

12 Cal.5th at p. 699, quoting § 12022.53, subd. (h), italics added.) And, given the manifest purpose behind subdivision (h), *despite the requirement set forth in the second sentence of subdivision (j)*—that the court must "impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other [provision of] law, unless another enhancement provides for a greater penalty or a longer term of imprisonment"—"[t]here is no dispute that section 12022.53(h), as amended, authorizes a court to strike a section 12022.53(d) enhancement entirely and impose no additional punishment under section 12022.53." (*Tirado*, at p 696.)

In light of this language, the Court explained that the only real issue in resolving whether "section 12022.53(j) authorizes the court to impose an enhancement under section 12022.53(b) or (c) after striking a section 12022.53(d) enhancement" is "whether the existence of facts required by section 12022.53(b) and (c) were alleged and found true." (*Tirado*, *supra*, 12 Cal.5th at p. 699.) That is, the focus is one of basic due process: so long as the necessary facts are pleaded and found true or admitted in connection with the enhancement alleged against the defendant, a trial court may impose any lesser enhancement after it strikes or dismisses a greater enhancement under section 12022.53.

This focus is seen throughout the opinion. As the Court emphasized, "it is worth noting that a court is not categorically prohibited from imposing a lesser included, uncharged enhancement so long as the prosecution has charged the greater enhancement and the facts supporting imposition of the lesser enhancement have been alleged and found true." (*Tirado*, *supra*,

12 Cal.5th at p. 697.) The Court went on to discuss the general authority to impose an uncharged enhancement as a matter of due process, explaining "[w]here a lesser offense is encompassed within a greater one, the factual allegations made in charging the greater offense are sufficient to give notice of the lesser." (*Id.* at p. 698.) And based on this principle, the Court reasoned, as a general proposition, "[t]hus, when a greater offense or an enhancement is dismissed after having been found true, the lesser offense has nevertheless been charged and found true and may therefore be properly applied to the defendant." (*Ibid.*)

The Court reiterated this general proposition, saying "section 12022.53 does *not* limit a trial court to imposing the enhancement found true by the jury." (*Tirado*, *supra*, 12 Cal.5th at p. 700, fn. 13, italics added.) Rather, "[a]mended section 12022.53(h) allows a court to strike a jury's true finding under section 12022.53(d), and section 12022.53(j) allows a court to impose a lesser enhancement so long as the facts required by the relevant subdivision were alleged and found true." (*Ibid.*, emphasis added.) In support of this general proposition and holding, the Court approvingly cited the *Strickland*, *Allen*, *Lucas*, *Dixon*, and *Fialho* cases where, in fact, the courts had ultimately substituted a lesser enhancement *under a different statute* for the greater enhancement found true during the criminal proceedings. (*Id.* at pp. 696, 698.) And the Court made clear that neither the rationale nor the holdings in these cases was "conditioned on the charged and adjudicated enhancement being inapplicable" (*id.* at p. 699), even though the enhancements originally imposed there

were "legally or factually inapplicable" (*id.* at p. 697). Instead, "[u]nder those cases, imposition of an uncharged enhancement is permitted so long as the facts supporting its imposition are alleged and found true" (*id.* at p. 698, emphasis added).

This was the foundation for the Court's ultimate holding that "the Legislature has permitted courts to impose the penalties under section 12022.53(b), (c), or (d) so long as the existence of facts required by the relevant subdivision has been alleged and found true." (*Tirado*, *supra*, 12 Cal.5th at p. 702.) That foundation naturally extends to support a trial court's imposition of *any* uncharged lesser enhancement whose underlying facts have been "alleged and found true." And that is particularly true given the Court's citations to the legislative intent behind SB 620 in support of its conclusions, emphasizing that "the bill would allow judges 'to impose sentences that fit the severity of the offense'" and "granted the flexibility to impose lighter sentences in appropriate circumstances." (*Id.* at pp. 701-702, quoting Sen. Com. on Public Safety, Analysis of Sen. Bill No. 620 (2017–2018 Reg. Sess.) Mar. 28, 2017, p. 8.)

F. The unreasonableness and resulting anomalies of the statutory construction advanced by the Attorney General and adopted by the majority opinion cement the conclusion that McDavid's construction prevails.

Initially, the Court of Appeal agreed with this interpretation of the statutory scheme, holding that "a trial court is authorized to exercise its discretion under section 12022.53, subdivision (h) to strike a charged section 12022.53, subdivision

(d) enhancement and instead impose an uncharged lesser enhancement, provided that the factual elements for that lesser enhancement were alleged in the accusatory pleading and found true by the trier of fact (e.g., § 12022.53, subd. (b) or (c) enhancement or § 12022.5, subd. (a) enhancement)." (*People v. McDavid*, 293 Cal.Rptr.3d 7, 16, previously published at 77 Cal.App.5th 763, vacated on rehearing.) After the Attorney General petitioned for a rehearing on the matter, the court reversed course and reached the opposite conclusion. As Justice Dato said in his dissent, however, "[n]othing [ ] changed in the intervening three months that casts doubt on [the court's] original conclusion." (Slip Opn., dis. opn. of Dato, J., at p. 1.)

In reaching this opposite conclusion, the majority repeatedly relies on the language in the second sentence of subdivision (j) concerning "[w]hen an enhancement specified in this section has been admitted or found to be true," as if the mere fact that an enhancement under section 12022.53 has been found true or admitted triggers the condition stated in the subsequent clause that "the court shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other law, unless another enhancement provides for a greater penalty or a longer term of imprisonment." (Slip Opn. at pp. 14, 15, 16.) But if the mere fact that an "enhancement specified in this section has been admitted or found to be true" triggered this condition, then a trial court would be barred from ever striking or dismissing the enhancement because this language provides that "the court

shall impose punishment for *that* enhancement"—i.e., the one "admitted or found true" under section 12022.53. Again, as is undisputed, subdivision (h) expressly allows the court to strike or dismiss *that* enhancement, rendering it without any effect and thereby rendering the second sentence of subdivision (j) inapplicable in its entirety. And then, the plain meaning of the statutory scheme, the canons of construction, legislative history, public policy, and *Tirado* all strongly support the conclusion that the court may substitute for that enhancement any lesser uncharged enhancement supported by the established facts.

The majority "adopt[s] the People's position as set forth in its petition for rehearing." (Slip Opn. at p. 2.) The Attorney General's position in that petition is based on the same faulty rationale—"that the Legislature intended subdivision (j) to prohibit the imposition of punishment for a lesser enhancement outside of section 12022.53 *after there has been a true finding under that provision*." (Pet. Reh. at p. 9, italics added.) Again, it will *always* be the case that "an enhancement specified in this section has been admitted or found to be true" when the trial court faces the *sentencing* situation common to all the cases for which resolution of the question presented here is necessary. Given the undisputed authority under subdivision (h), the proper focus in answering that question is whether *despite* the existence of such a finding or admission, the court should exercise its discretion to strike or dismiss that enhancement "in the interest of justice pursuant to Section 1385." If it chooses to do so,

subdivision (j) simply no longer has any effect and the foundation of the Attorney General's statutory interpretation crumbles.

Indeed, the position advanced by the Attorney General and adopted by the Court of Appeal reads the second sentence of subdivision (j) in two different directions. On the one hand, *Tirado* has already settled the fundamental point that "section 12022.53(h), as amended, authorizes a court to strike a section 12022.53(d) enhancement entirely and impose no additional punishment under section 12022.53." Thus, the Attorney General does not and cannot contest that the general mandate of subdivision (j) that "the court shall impose punishment for" the enhancement found true or admitted under section 12022.53 clearly does not apply when this enhancement is stricken or dismissed pursuant to subdivision (h). On the other hand, the Attorney General turns around and says subdivision (j) *does* apply even *after* a court has stricken the "enhancement specified in this section" if it seeks to substitute a lesser uncharged enhancement under a different statute because the conditional language—"the court shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other law"—somehow kicks in here to prohibit the court from looking beyond section 12022.53.

As the Attorney General would have it, the trial court must strike the enhancement in its entirety with no intention of imposing any punishment at all in order avoid the operation of subdivision (j), because if it wants to impose *any* punishment, it must impose one of the enhancements in section 12022.53. Again,

the conditional language of subdivision (j) cannot reasonably be construed to create a freestanding principle of law operating independently of that subdivision and to the exclusion of the sentencing authority created in the other subdivisions. As a matter of basic grammar, logic, and commonsense, this language is inextricably tied to the preceding language that concerns *only* situations where the court does *not* strike or dismiss the enhancement found true or admitted and instead "impose[s] punishment for *that* enhancement pursuant to this section."

Notably, the same basic rationale underlying the Attorney General's interpretation of subdivision (j) would also pit the trial court's discretionary power under subdivision (h) against the condition in subdivision (f) that the court shall impose "the longest term of imprisonment" whenever "more than one enhancement per person is found true under this section." Yet, that can't be true either, and the Attorney General makes no attempt to reconcile its rationale with subdivision (f), much less claim that subdivision (f) supersedes subdivision (h) in this way.

Not only is this interpretation of the scheme untenable as being illogical but following it would invite absurd consequences. If a court seeking to impose *some* punishment for the stricken enhancement must impose one of the lesser enhancements in section 12022.53, as the rationale goes, then a court would never be able to impose anything less severe than the *10-year* term under the statute's sliding scale of 25-to-life (subdivision (d)), 20 years (subdivision (c)), and 10 years (subdivision (b)). Mandating a *minimum* additional, consecutive term of 10 years whenever a

greater enhancement under section 12022.53 is found true or admitted flies in the face of the legislative intent to grant courts the ability to craft sentences that fit the severity of the offense.

Such a consequence is particularly perverse in light of SB 620's purpose, given that this would effectively strip courts of *any* discretion to impose a lesser uncharged enhancement when the only enhancement pled and proved is the enhancement under subdivision (b) of section 12022.53. If the court can't reach anywhere outside the confines of section 12022.53 in crafting an appropriate sentence for the underlying conduct, then there's simply nowhere for the court to go and no effective relief for any defendant who may be deserving of *some* further punishment but whose conduct does not warrant an additional term of *10 years*.

In fact, under subdivision (b), "[t]he firearm need not be operable or loaded for this enhancement to apply," when this same factor is a "mitigating circumstance" that "the court shall consider and afford great weight" under the most recent version of section 1385, which mandates "[n]otwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so" except when dismissal is prohibited by an initiative statute. (§ 1385, subd. (c).) Again, section 1385 is expressly incorporated into section 12022.53 as the vehicle through which a court is empowered to strike or dismiss an enhancement under section 12022.53. (§ 12022.53, subd. (h) ["The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section."].)

Certainly then, a trial court could reasonably conclude that an enhancement under subdivision (b) should be stricken in an instance where the firearm was unloaded or inoperable. At the same time, it shouldn't be left with the binary choice of imposing 10 years or *no* punishment at all. A trial court put in that place may feel compelled to just leave the 10-year enhancement undisturbed simply to ensure *some* punishment, even though it may believe 10 years is too much punishment. It is unreasonable to conclude that the Legislature ever intended to strip trial courts of any discretion in such instances. Instead, everything suggests that the Legislature intended this discretion would equally extend to subdivision (b) offenders, allowing courts to select from among the multiple alternatives for imposing lesser enhancements in crafting an appropriate sentence to "fit the severity of the offense" (e.g., section 12022 and 12022.5).

The court "must 'choose a reasonable interpretation that avoids absurd consequences that could not possibly have been intended.'" (*People v. Taylor* (2021) 60 Cal.App.5th 115, 130, quoting *People v. Bullard* (2020) 9 Cal.5th 94, 106.) That is the case here with the rationale advanced by the Attorney General and adopted by the majority of the Court of Appeal. Even if this rationale were not unreasonable, the untenable consequences flowing from this interpretation alone compel its rejection as completely contrary to the plain meaning and intent of the statutory scheme. (*Valencia*, *supra*, 3 Cal.5th at p. 358 ["Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation"].)

G. The matter must be remanded with directions that the trial court reconsider the section 12022.53 enhancements based on the full scope of its discretion to impose an "appropriate" sentence that fits the severity of the individual case.

Although the Court of Appeal majority is incorrect about *the scope* of the trial court's discretion under section 12022.53, it is correct in its finding that "the record does not show that the trial court was aware" of the full scope of its discretion and thus that "the appropriate remedy is to remand the matter to the trial court for the court to conduct another resentencing hearing at which it shall exercise its discretion." (Slip Opn. at 13.) As the majority reasoned, "[a]lthough at the April 30, 2021 resentencing hearing the trial court elected not to strike the section 12022.53, subdivision (d) enhancements, noting McDavid's greater culpability than Lovejoy's and the seriousness of his offenses, the record supports an inference that the court may not necessarily have declined to exercise its discretion under *Tirado* if it had been aware of it." (*Id.* at p. 13, fn. 6.) "For example, given Lovejoy's recruitment and manipulation of McDavid to kill her estranged husband, as well as other circumstances (e.g., McDavid's lack of serious criminal history, his military history, etc.), the court might have concluded that the imposition of a total prison term for McDavid (i.e., 50 years to life) that was nearly twice the total prison term imposed on Lovejoy (i.e., 26 years to life) was not appropriate under the circumstances and exercised its discretion to strike the section 12022.53, subdivision (d) enhancements" and impose lesser enhancements. (*Ibid.*)

While the majority's remand order limits the trial court's discretion to striking the enhancements under subdivision (d) of section 12022.53 and imposing "uncharged section 12022.53 enhancements (i.e., § 12022.53, subd. (b) or (c)) pursuant to section 12022.53, subdivision (j)" (Slip Opn. at p. 16)—which, again, is wrong since subdivision (j) *does not apply* when the section 12022.53 is stricken or dismissed—the same factual analysis supports an inference that the trial court could find one of the other lesser uncharged enhancements appropriate. As outlined above, the sentencing scheme in Part 4, Title 2 of the Penal Code affords trial courts several sentencing options to impose punishments that fit the severity of the offense involving the same essential firearms-related conduct. Section 12022.5 sets a schedule of penalties up to 10 years for firearms-related conduct included within the facts necessary to establish the greater enhancements under section 12022.53—3, 4, 5, or 6 years depending on the type of weapon involved. (§ 12022.5, subds. (a) & (b).) Section 12022 sets a schedule of penalties up to five years for such conduct, but it also provides flexibility to impose lesser terms of 1, 2, 3, or 4 years, depending on the specific nature of the use and the weapon involved. (§ 12022, subds. (a)-(d).)

While the Attorney General laments the ability of trial courts to impose the lowest of the potentially applicable sentences under this construction of the statutory scheme—"a one-year term under section 12022" (Pet. Reh. at p. 11, fn. 2), it does not dispute that subdivision (h) empowers the court to strike the greater enhancement under section 12022.53 and then impose *no*

sentence at all. Clearly, a one-year term is greater than *zero*. Trial courts must be afforded the full range of flexibility that the Legislature intended the scheme to provide them, and that includes a one-year term in the "appropriate" case. This case is no exception. However the trial court may ultimately choose to exercise that discretion, the essential point is that McDavid is entitled to reconsideration of the sentence based on the court's exercise of "informed discretion"—acting with the knowledge and understanding of all the legislatively authorized sentencing options available to it. (*Tirado*, *supra*, 12 Cal.5th at p. 694.)

Conclusion

McDavid respectfully requests that the Court reverse the Court of Appeal insofar as it held that the trial court's discretion on remand is limited to deciding "whether to strike the section 12022.53, subdivision (d) enhancements and instead impose lesser section 12022.53, subdivision (b) or subdivision (c) enhancements" (Slip Opn. at 23-24), and to instead hold that this discretion extends to imposing any lesser uncharged enhancement supported by the facts found true in connection with the enhancements under section 12022.53.

Dated: March 6, 2023

Respectfully submitted,

_____

Raymond M. DiGuiseppe,
Attorney for Weldon K. McDavid, Jr.

Certificate of Compliance

I certify that this brief is prepared with 13-point Century Schoolbook font and contains 13,148 words.

Dated: March 6, 2023

Respectfully submitted,

_____
Raymond M. DiGuiseppe,
Attorney for Weldon K. McDavid, Jr.

Declaration of Service

Re: *People v. McDavid*, Case Number S275940

I, Raymond M. DiGuiseppe, declare that I am over the age of 18 and not a party to this case. My business address is: P.O. Box 10790, Southport, NC 28461.

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On March 6, 2023, I served the foregoing document on each of the parties listed below, by placing a true copy of it in a sealed addressed envelope with postage fully paid and depositing it with the United States Postal Service in Southport, North Carolina, to be delivered in the ordinary course of business:

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P.O. Box 7500
Crescent City, CA 95532

Electronic Service

I further declare that on March 6, 2023, I served the same document on each of the entities listed below through court-approved electronic process:

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Attorney General's Office
District Attorney's Office
Stephen Hinkle (Court of Appeal appellate counsel)
Ricky Crawford (trial counsel)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and was executed on March 6, 2023.

Raymond M. DiGuiseppe	*/s/ Raymond M. DiGuiseppe*
Declarant	Signature

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 3/6/2023 by Tayuan Ma, Deputy Clerk

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3/6/2023
Date

/s/Raymond DiGuiseppe

Signature

DiGuiseppe, Raymond (228457)

Last Name, First Name (PNum)

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