In the Supreme Court of the State of California

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN MANZO,

Defendant and Appellant.

Case No. S191400

Fourth Appellate District, Division One, Case No. D055671
County Superior Court, Case No. SCS 212840
The Honorable Timothy R. Walsh, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

ISSUE PRESENTED

Whether a defendant can be convicted of discharging a firearm at an occupied motor vehicle in violation of Penal Code[1] section 246, if he was outside the vehicle at the time he discharged the firearm, but the firearm was itself was inside the vehicle?

INTRODUCTION

On an August afternoon in 2007, appellant drove his two passengers, Jose Valadez and Jose Estrada, to the back of his apartment complex and parked his truck. Appellant got out of the truck and pulled a gun out of his waistband. Appellant stood next to his truck. He pointed the gun towards Valadez and Estrada, and pulled the trigger. After the gun misfired once, appellant fatally shot Valadez in the left cheek. As relevant here, the jury convicted appellant of shooting at an occupied vehicle. The Court of Appeal reversed the conviction, finding the evidence insufficient to support a finding that the firearm was outside the periphery of the vehicle.

This Court should reverse the Court of Appeal's decision because it contravenes the legislative intent and purpose behind section 246, and conflicts with other California Court of Appeal decisions based on similar facts. The purpose of section 246 is to protect the vulnerable victims inside the occupied vehicle or other enumerated structures. This goal is met whether the shooter is three feet from the vehicle, or standing next to it with the firearm inside the vehicle. In both situations, the occupant of the vehicle is essentially trapped, while the shooter has the unfair advantage of being able to avoid a counter attack and to rapidly escape after committing the crime. Thus, this Court should find that a defendant may be convicted of discharging a firearm at an occupied motor vehicle in violation of section

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

246 if he was outside the vehicle at the time he discharged the firearm, but the firearm itself was inside the vehicle.

STATEMENT OF FACTS AND CASE

On the afternoon of August 3, 2007, Jose Valadez and Jose Estrada got into appellant's truck. Appellant had previously tattooed "Catalina" on Valadez's wrist, and he was going to perform some more tattoo work on Valadez. (9 RT 1480-1481, 1483, 1491-1492; 1539; 12 RT 2221; 2 CT 298-299, 304, 321, 330, 336.) The men briefly stopped at appellant's apartment in Chula Vista to retrieve appellant's tattoo gun. Appellant drove his white Ford truck to the back of his apartment complex and parked in a stall. (8 RT 1229, 1231, 1309-1310; 9 RT 1480-1481, 1483, 1491-1496.) He got out of the truck and stood next to the driver's side seat while Estrada and Valadez stayed in the truck. Appellant pulled a handgun out from his waistband. (9 RT 1496-1497, 1509-1510; 12 RT 2218; 13 RT 2261; 2 CT 299, 302, 306-308, 311, 331.) He smiled and placed the gun on the driver's seat. (9 RT 1497, 1578; 2 CT 302, 309, 311-312, 331.) Valadez, who was leaning forward replacing a shoelace, asked if he could see the gun. (9 RT 1497, 1578; 12 RT 2219; 2 CT 339-340.) Appellant picked up the gun, pointed it at Estrada and Valadez, and pulled the trigger. The gun did not fire. (9 RT 1498, 1501; 2 CT 298-299, 302, 312, 331, 339.)

Removing the magazine from the gun, appellant manually loaded the firearm. (9 RT 1501-1503; 2 CT 307-308, 332.) Appellant pointed the gun towards Estrada and Valadez and again pulled the trigger. This time, appellant shot Valadez in the left cheek. Valadez began bleeding profusely. (9 RT 1498, 1503-1504; 2 CT 298-299, 302, 309, 332.) Appellant then pointed the gun at Estrada and pulled the trigger. The gun did not fire. (9 RT 1506; 2 CT 298, 305, 339.) After ordering Estrada to push Valadez out

the passenger door, appellant got back into the truck and drove away. (9 RT 1505, 1571, 1577-1579; 12 RT 2224-2225; 13 RT 2262-2263.)

After appellant was apprehended, police found a dismantled handgun inside a cooler in the bed of the truck. (5 RT 628-629.) The slide release for the handgun was found on the driver's side floorboard of the truck, in between the floorboard and the seat. (5 RT 631-632.)

During an interview with Chula Vista Police Detective Thomas Brown, Estrada described appellant's position when he discharged the gun. After appellant parked the truck, he opened the driver's side door and got out of the truck. (2 CT 307.) Estrada said appellant's whole body was out of the car and the truck door was open. (2 CT 308-309.) Appellant took the gun out of his waistband and set it on the seat of the truck. (2 CT 311-312.) Appellant then picked up the gun, and it misfired once. After reloading the gun, appellant shot Valadez. (2 CT 312.)

At trial, Estrada demonstrated for the jury how appellant was standing while holding the gun. Appellant held the gun in his right hand at approximately shoulder height with his arm about three-quarters extended. (9 RT 1510.)

Demond Dukes, a resident at appellant's apartment complex, told Detective Brown that after he heard a "pop," he looked out of his apartment and saw the shooter standing outside the driver's door of the truck with the door open. The shooter had a gun in his left hand, pointed towards the ground. (12 RT 2113-2115.)

Dr. Steven Campman, a forensic pathologist, testified that the gunshot wound was an "atypical distance gunshot wound." (8 RT 1244-1245, 1253-1254.) This meant that the bullet was deformed before it hit the body so it caused multiple holes and some smaller tears. There was no soot or stippling on Valadez's face. (8 RT 1254-1255.) Dr. Campman opined that the shooter was at a "distant range" from the victim because there was no

soot or sheering, or stippling. (8 RT 1286.) A distant range gunshot wound could be anything from two to three feet away, or farther; far enough away so that gunpowder does not hit the skin. (8 RT 1284-1285.) Dr. Campman could not exactly determine the distance of the muzzle from the victim's skin, but knew it was far enough away to leave no stippling. (8 RT 1286-1287.) With most handguns, over 27 inches would leave no stippling. (8 RT 1288-1289.) The same weapon would need to be fired to determine the exact distance the muzzle was from the skin to see when soot or stippling would no longer be left on the skin. (8 RT 1287, 1290.)

In January 2009, three detectives from Chula Vista Police Department created a reenactment of the shooting. (9 RT 1452.) The reenactment was based on Estrada's statement to the police and forensic evidence. (9 RT 1461.) Photographs of the reenactment were shown to the jury. (Exh. Nos. 140 – 150; 9 RT 1454-1459.) Exhibit numbers 143 through 148 showed the person depicting appellant holding the gun and pointing it towards the two passengers. Exhibit numbers 149 and 150 showed a tape measure being held from the cheek of the "victim" to the muzzle of the replica firearm, and 27 inches was marked on the tape measure. (9 RT 1455-1459.)

A San Diego County jury found appellant guilty of murder (count 1; § 187, subd. (a)); shooting at an occupied vehicle (count 2; § 246); attempted murder (count 3; §§ 664/187); and unlawfully possessing ammunition (count 4; § 12316, subd. (b)(1)). The jury found true the firearm enhancements associated with counts 1 and 2 (§§ 12022.5, subd. (a) & 12022.53, subds. (b) & (d)), and count 3 (§§ 12022.5, subd. (a) & 12022.53, subd. (b)). With respect to count 2, the jury also found appellant inflicted great bodily injury (§ 12022.7, subd. (a)). (2 CT 558-570.) Appellant admitted the following prior conviction enhancements: three prison priors (§§ 667.5 & 668), two serious felony priors (§§ 667, subd.

(a)(1), 668, & 1192.7, subd. (c)), and two strike priors (§§ 667, subds. (b) – (i), 1170.12, & 668). (2 CT 571.) The trial court sentenced appellant to 150 years to life plus 5 years in state prison. (2 CT 469-470, 572-573.)

Appellant appealed, contending, among other things, that insufficient evidence supported his conviction for shooting at an occupied vehicle. On January 31, 2011, the Court of Appeal for the Fourth Appellate District, Division One, issued a published decision affirming the convictions for first degree murder, attempted murder, and unlawfully possessing ammunition, and reversing the conviction for discharging a firearm at an occupied vehicle. As pertinent here, the Court of Appeal agreed with appellant that the evidence was insufficient to establish he shot at an occupied vehicle.

On March 14, 2011, appellant filed a petition for review raising various challenges to his convictions. On May 18, 2011, this Court denied appellant's petition for review and ordered, on its own motion, review limited to the issue stated above.

ARGUMENT

I. A DEFENDANT MAY BE CONVICTED OF DISCHARGING A FIREARM AT AN OCCUPIED MOTOR VEHICLE IN VIOLATION OF PENAL CODE SECTION 246 IF HE WAS OUTSIDE THE VEHICLE AT THE TIME HE DISCHARGED HIS FIREARM BUT THE FIREARM ITSELF WAS INSIDE THE VEHICLE

In 1949, prosecutors and law enforcement groups sponsored a bill because of the increasing frequency of shootings into homes by reckless, irresponsible and malicious persons. As a result, the Legislature enacted Penal Code section 246, which prohibited malicious and willful discharge of a firearm at an inhabited dwelling house or occupied building. The purpose of this new law was to prevent injury or death to the people inside the dwelling house or building. Over the years, this statute has been amended to include an occupied motor vehicle, an inhabited house car or inhabited camper, and an occupied aircraft.

The Court of Appeal's decision in the instant matter, holding that because the firearm and appellant's hand, and possibly part of his arm, may have been inside the vehicle when he discharged the gun, the evidence was insufficient to sustain a conviction under section 246, must be reversed. The decision undermines the intent and purpose of section 246, and conflicts with other California Court of Appeal's holdings based on similar facts.

This Court should hold that when a person is standing outside a vehicle, but the firearm and/or the part of the shooter's body holding the firearm is inside that vehicle, the person is shooting "at" the vehicle for purposes of Penal Code section 246. Section 246 was originally enacted to protect individuals in their homes, and later amended to include individuals inside vehicles. A person outside a vehicle has an unfair advantage over a "sitting duck" inside the vehicle; section 246 protects the vulnerable victim inside from the possibility of injury or death. This does not change whether the shooter is three feet away, or holding the firearm inside the vehicle. Thus, one who is shooting into a vehicle is also shooting at or towards that vehicle and should be held accountable under section 246.

A. Penal Code Section 246

Penal Code section 246 provides:

> Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied air craft, inhabited house car, . . ., or inhabited camper, . . ., is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year.
>
> As used in this section, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

(Pen. Code, § 246.)

Thus, in order to be convicted of shooting at an occupied motor vehicle, the prosecutor must prove (1) the defendant willfully and maliciously shot a firearm and (2) the defendant shot the firearm at an occupied motor vehicle. (CALCRIM No. 965.)

The principles governing statutory interpretation are well established. As this Court has observed, its "'role on in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law.'" (*People v. Canty* (2004) 32 Cal.4th 1266, 1276, quoting *Curle v. Superior Court* (2001) 24 Cal.4th 1057.) In approaching this task, the court will "first go to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs." (*Curle v. Superior Court, supra,* 24 Cal.4th at p. 1063.) To the extent ambiguity exists, a reviewing court examines the context of the language, keeping in mind the nature and obvious purpose of the statute, adopting the construction that best harmonizes the statute internally and with related statutes. (See *People v. Murphy* (2001) 25 Cal.4th 136, 142; *People v. Jefferson* (1999) 21 Cal.4th 86, 94.)

> It is well settled that the proper goal of statutory construction 'is to ascertain and effectuate legislative intent, giving the words of the statute their usual and ordinary meaning. When the statutory language is clear, we need go no further. If, however, the language supports more than one reasonable interpretation, we look to a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is part, contemporaneous administrative construction, and questions of public policy. [Citation.]'

(*People v. Ramirez* (2009) 45 Cal.4th 980, 987, quoting *Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 783.)

Further, the Penal Code expressly states that "[t]he rule of the common law, that penal code statutes are to be strictly construed, has no

application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and promote justice." (Pen. Code, § 4; see *People v. Hallner* (1954) 43 Cal.2d 715, 720-721; *People v. Morrison* (2011) 191 Cal.App.4th 1551, 1556.) At the same time, it is well settled that courts may not create an offense by enlarging a statue, or by adding or deleting words, or giving false meaning to words. (*People v. Baker* (1968) 69 Cal.2d 44, 50.) While it is true the defendant is entitled to the benefit of every reasonable doubt regarding the language used in a statute, this canon "entitles the defendant only to the benefit of every realistic doubt." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1145, superseded by statute on another ground.) As this Court has observed,

> This rule of construction 'is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language.' [Citations.] Or in the words of Justice Black, writing for the court in *United States v. Raynor* (1938) 302 U.S. 540, 552, 58 S.Ct. 353, 359, 82 L.Ed. 413, the rule does not 'require[ ] that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope—nor does any rule require that the act be given the 'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent of [the legislative body].'

(*People v. Anderson, supra,* 43 Cal.3d at p. 1145.)

B. Legislative History of Penal Code Section 246

Penal Code section 246, as originally enacted in 1949, made it a crime for any person:

> [W]ho shall maliciously and willfully discharge a firearm at an inhabited dwelling house or occupied building, . . .

(Stats. 1949, ch. 698, § 1, p. 1200.)

Section 246 was introduced as Assembly Bill 414, as

> An act to add Section 246 to the Penal Code, relating to the discharging of firearms or throwing of missiles *into* dwelling houses or occupied buildings.

(See Assem. Bill No. 414 (1949 Reg. Sess.) as introduced Jan. 12, 1949, § 1, emphasis added.)

Although the word "into" was used in the title of the bill, the body of the bill used the word "at." The first amendment to the bill changed the word "into" in the title to "at," and limited the act to discharging a firearm. (See Assem. Amend. to Assem. Bill No. 414 (1949 Reg. Sess.) April 7, 1949.) In *People v. Stepney* (1981) 120 Cal.App.3d 1016, the Court of Appeal noted this change and interpreted the change to allow prosecution of those who shoot at a building but miss. (*Id.* at p. 1020.)

Section 246 has been amended six times. The amendments either augmented the punishment for the offense, or added additional types of occupied or inhabited spaces protected by the statute. (See Stats. 1976 ch. 1119 § 1; Stats. 1977 ch. 690 § 1; Stats. 1978 ch. 579 § 13; Stats. 1982 ch. 136 § 2; Stats. 1986 ch. 1430 § 1, ch. 1433 § 1; Stats. 1988 ch 911 § 1.) As relevant here, the 1976 amendment added "or occupied motor vehicle" to the statute. (Stats. 1976, ch. 1119, § 1.)

Before this amendment, the law made it a felony to discharge a firearm at a vehicle or occupant thereof with the intent to do great bodily harm. (See former Veh. Code, § 23110, subd. (b).) The proposed change made it a felony to discharge a firearm at an occupied motor vehicle, and eliminated the requirement of an intent to commit great bodily harm. It also moved the crime from the Vehicle Code to the Penal Code. (See Assem. Comm. on Crim. Jus. on Assem. Bill No. 3303 (1975-1976 Reg. Sess.) April 7, 1976 [proposed amendment].) The purpose of the amendment was to "[s]trengthen the law prohibiting the discharge of a firearm at a motor vehicle." (Sen. Comm. on Judiciary, com. on AB 3303

(1975-1976 Reg. Sess.) as amended May 5, 1976, pp. 1-2.) "The requirement that the prosecution prove that the defendant intended great bodily harm has hampered efforts to obtain convictions in serious cases." (*Ibid.*)

C. Judicial Decisions Interpreting Section 246

Several appellate courts have examined the meaning of "at" in section 246. In *People v. Chavira* (1970) 3 Cal.App.3d 988 (*Chavira*), the defendant was convicted under section 246 for shooting at a crowd of people standing around a house. (*Id.* at pp. 990-991.) The defendant challenged his conviction, claiming he was shooting at the people, not the dwelling. (*Id.* at p. 992.) The Court of Appeal affirmed the conviction, holding the jury could find the defendant was aware of the probability that some shots would hit the building, thereby endangering its inhabitants, and was consciously indifferent to the result. (*Id.* at p. 993.)

In *People v. Stepney, supra,* 120 Cal.App.3d 1016, the Court of Appeal examined whether shooting a firearm while standing inside an inhabited dwelling was a violation of section 246. There, the defendant climbed through a window of a house after an occupant of the house would not open the door. (*Id.* at p. 1018.) After the defendant found out his intended victim was not home, he said to the intended victim's roommate, "[t]his is a syndicate business and we are not playing any games." (*Ibid.*) The defendant then shot the victim's television set. (*Ibid.*) On appeal, the defendant claimed his conviction should be reversed because section 246 only prohibited shooting at the specified targets from the outside. (*Ibid.*) The Court of Appeal agreed:

> We conclude that the firing of a pistol within a dwelling house does not constitute a violation of Penal Code section 246. The most that can be said for petitioner's conduct was that he intentionally discharged a pistol within a dwelling. Because that conduct was not proscribed by the statute under which he was

> prosecuted, his conviction must be reversed. We carefully note, however, that a different question would be presented if a person fired a weapon from one apartment into an adjoining apartment, either through the common wall, or through the floor or ceiling. A different question would also be presented if an individual discharged a firearm in a hallway of a multiple family dwelling. We make these references to emphasize that our decision here is limited to the discharge of a firearm within a dwelling.

(*Stepney, supra,* at p. 1021.)

The *Stepney* court noted that the word "'at' is a word of many meanings," and that "an argument [could] be made that one can shoot at a building or automobile from within as well as from without." (*People v. Stepney, supra,* at p. 1019.) The Court of Appeal also noted there was little information regarding the legislative intent behind the statute, but as originally proposed, the statute prohibited discharging a firearm "*into*" a dwelling. Before the bill was enacted, "*into*" was changed to "*at.*" (*Id.* at p. 1020.) The Court of Appeal agreed with the defendant's interpretation that this change was made to enable the prosecution of those who discharge a firearm at a building but miss. (*Ibid.*)

In *People v. Cruz* (1995) 38 Cal.App.4th 427, the Court of Appeal relied on *Chavira* to uphold a conviction under section 246 where the defendant shot at a security guard through the glass door of a building. There, the defendant claimed the word "at" in the statute required "the intent to strike" the building. (*Id.* at p. 431.) The Court of Appeal rejected this claim, and noted that even if the statute required such intent, the evidence was sufficient because in order to shoot the security guard from outside the building, the bullet had to go through the glass door of the building before striking the victim. (*Id.* at p. 433.)

In 1996, the Court of Appeal examined one of the questions left open by the *Stepney* court, and concluded a defendant standing in his own apartment and shooting through the floor into the apartment below was

discharging the firearm "at" an inhabited dwelling within the meaning of section 246. (*People v. Jischke* (1996) 51 Cal.App.4th 552, 556.) The *Jischke* court also held that the statute did not require the defendant intend to strike the targeted structure because section 246 is a general intent crime. (*Id.* at p. 556.)

In *People v. Overman* (2005) 126 Cal.App.4th 1344, the defendant was convicted of shooting at an occupied building where he shot into the air near a wall of an open-air industrial yard that he knew was occupied by workers. (*Id.* at pp. 1351-1355.) On appeal, the defendant argued the trial court erred by failing to instruct that the intent element of section 246 required proof a defendant shot directly "at" an occupied building. (*Id.* at p. 1355.) There, after being instructed with CALJIC No. 9.03 regarding shooting at an inhabited dwelling, the jury asked, "if the term 'shooting at an occupied building' [implies] that the building has to be the actual target, or shooting in the proximity of an occupied building . . ." (*Ibid.*)

In response, the trial court instructed,

> [A]n act done with reckless disregard of probable consequences is an act done with intent to cause such result within the meaning of the words used in the instruction related to Count [5]. If you conclude that the defendant was aware of the probability that some shots would hit the building and that he was consciously indifferent to that result, that is . . . a sufficient intent to satisfy the statutory requirement.

(*Ibid.*) Division Two of the Fourth District Court of Appeal found the instruction proper:

> As we explain, section 246 is not limited to shooting directly at an inhabited or occupied target. Rather, it proscribes shooting either directly at or in close proximity to an inhabited or occupied target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons around it.

(*Id.* at pp. 1355-1356.)

Relying on *Chavira,* the *Overman* court further held that "section 246 is not limited to the act of shooting directly 'at' an inhabited or occupied target." (*People v. Overman, supra,* 126 Cal.App.4th at p. 1356.)

> Rather, the act of shooting "at" a proscribed target is also committed when the defendant shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it. The defendant's conscious indifference to the probability that a shooting will achieve a particular result is inferred from the nature and circumstances of his act.

(*Id.* at pp. 1356-1357, footnote omitted.) Additionally, the *Overman* court disagreed with the defendant's reliance on *Stepney:* "*Stepney* does not stand for the proposition that section 246 requires discharging a firearm directly 'at' an inhabited or occupied target." (*Id.* at p. 1358.)

In *People v. Morales* (2008) 168 Cal.App.4th 1075, the Court of Appeal found the defendant was improperly convicted under section 246 when he was standing in an attached garage and fired three or four shots through the kitchen door into the house. (*Id.* at pp. 1079-1081.) The *Morales* court compared the case to *Stepney,* and found that because the defendant was "within" the dwelling when he discharged the gun, he was not firing "at" as required by section 246. (*Id.* at p. 1081.)

Recently, in *People v. Jones* (2010) 187 Cal.App.4th 266, Division One of the Fourth District Court of Appeal held that a defendant was properly convicted under section 246 even if the jury believed the defendant's hand and/or the gun were inside the vehicle when she fired the weapon. In *Jones,* the defendant obtained a gun from the engine compartment of a vehicle and shot into the vehicle, hitting the victim sitting inside. (*Id.* at p. 269.) The evidence established the doors to the vehicle were closed and no windows were broken. (*Ibid.*) During jury deliberations, the jury asked whether it was a violation of section 246 if a person was outside the vehicle but her hand and/or the gun were inside the

vehicle when she discharged the firearm. (*Jones, supra,* at pp. 270-271.) Upon agreement from counsel, the trial court answered yes. (*Ibid.*)

On appeal, the defendant argued that "at" as used in section 246 did not include a situation where one discharges a firearm within the relevant structure, which would include the situation where one's hand or the gun broke the plane of the structure when the discharge occurred. (*People v. Jones, supra,* at p. 272.) The Court of Appeal disagreed, rejecting the defendant's argument that there was "no logical distinction between the conduct in *Stepney* and the conduct at issue here." (*Id.* at p. 272.)

After observing that the *Stepney* court limited its holding to the facts before it, the Court of Appeal rejected the defendant's argument that the relevant inquiry was whether the gun was "within" the structure when discharged. (*Jones, supra,* at p. 272-273.) The *Jones* court did not believe that the *Stepney* court,

> intended to suggest that the relevant question is whether the gun is within or without the structure when it is fired, but, rather, whether the person who fires the gun is within or without the structure. The facts in *Stepney* did not raise the possibility that a gun might be within a structure while the individual shooting it is outside of the structure, and the *Stepney* court appeared to assume that the gun would be discharged from the same location as the person doing the firing, vis-à-vis the structure.

(*Id.* at p. 273, fn. 4.)

The *Jones* court further stated that a person would not normally be considered to be "within" a vehicle "if only her hand, or an object that she is holding in her hand, has broken the plane of the vehicle through an open window or door." (*Jones, supra,* at pp. 273-274.) "Rather, in order to be considered to be 'within' a vehicle, a person's entire body, or a large portion of the person's body, would have to be inside the vehicle." (*People v. Jones, supra,* at pp. 273-274.) Thus, *Jones* concluded the defendant was

not "within" the vehicle when she fired the gun for purposes of section 246. (*Jones* at pp. 273-274.)

The *Jones* court further observed, "the prohibition against discharging a firearm 'at' the structures listed in section 246 must include a prohibition against discharging a firearm 'into' those same structures." (*Jones, supra,* at p. 274.) The court referred to the change from "into" to "at" when section 246 was enacted, and agreed with the *Stepney* court's conclusion that the change was meant to allow prosecution of those who shoot at a building but miss. (*Ibid.*) "Considered from this perspective, it seems clear that one who stands outside an occupied vehicle and sticks her hand and/or firearm into the vehicle and shoots is firing into the occupied vehicle." (*Ibid.*)

The *Jones* court said it would not be reasonable to assume the Legislature meant for there to be a different result if a person places his hand or the firearm, "entirely or partially, through an open door or window and fires into a vehicle while standing a foot away from the vehicle," as opposed to if the person, while standing in the same position, discharges the firearm without placing it or his hand into the vehicle. (*People v. Jones, supra,* 187 Cal.App.4th at p. 274.) "In both situations, the occupant of the vehicle is particularly vulnerable, in that the victim has minimal opportunities to escape or otherwise protect himself from the bullets." (*Ibid.*) "In addition, in both situations, the shooter has the advantage of mobility over a captive victim." (*Ibid.*)

Lastly, in the present case the Court of Appeal disagreed with the reasoning of *Jones,* and interpreted the language "at" in section 246 to require that the firearm be outside the vehicle (or dwelling) in order to violate the statute. The Court of Appeal relied on *People v. Stepney, supra,* 120 Cal.App.3d 1016 and the rule of lenity in reaching its conclusion. The Court of Appeal found that because the evidence established that appellant

was standing in the open doorway of the truck with all or part of his arm inside the truck, and the gun was inside the truck, he did not shoot "at" an occupied vehicle within the meaning of the statute.

The Court of Appeal acknowledged that in *Jones* a different panel of Division One reached a different conclusion, finding the trial court properly instructed the jury that someone who stood outside a vehicle but held the gun inside the vehicle would be guilty of violating section 246. The Court of Appeal found Jones did not address whether the rule of lenity would or should apply to the required construction of section 246, and declined to follow its holding. (Slip opn. at pp. 36-43.)

This Court has examined section 246 only twice, and neither case presented the issue here. In 1994, this Court examined section 246 to determine whether willful discharge of a firearm at an enumerated target was an inherently dangerous felony under the second degree felony-murder rule. (*People v. Hansen* (1994) 9 Cal.4th 300.) This Court concluded that it was, noting the crime, "considered in the abstract, involves a high probability that death will result and therefore is an inherently dangerous felony under the governing principles." (*Id.* at p. 309.) In so holding, this Court observed,

> The tragic death of innocent and often random victims, both young and old, as the result of the discharge of firearms, has become an alarmingly common occurrence in our society – a phenomenon of enormous concern to the public. By providing notice to persons inclined to willfully discharge a firearm at an inhabited dwelling – even to those individuals who would do so merely to frighten or intimidate the occupants, or to 'leave their calling card' – that such persons will be guilty of murder should their conduct result in the all-too-likely fatal injury of another, the felony-murder rule may sever to deter this type of reprehensible conduct, which has created a climate of fear for significant number of Californians even in the privacy of their own homes.

(*People v. Hansen, supra,* at p. 311.)

In 2009, this Court considered whether grossly negligent shooting is a necessarily included lesser offense of shooting at an inhabited dwelling. (*People v. Ramirez, supra,* 45 Cal.4th 980.) In *Ramirez,* the defendant shot through a window and walls of his own apartment into other apartments, and was convicted of multiple counts of grossly negligent shooting and three counts of shooting at an inhabited dwelling. (*Id.* at p. 983.) This Court reversed three of the counts for grossly negligent shooting after finding the crime was a lesser included offense of shooting at an inhabited dwelling. (*Id.* at pp. 985-990.) This Court observed, "[t]he high probability of human death or personal injury in section 246 is similar to, although greater than, the formulation of likelihood in section 243.3(a), which requires that injury or death 'could result'." (*Id.* at p. 990.) This Court further said the reason for harsher treatment under section 246 is because the crime requires "an inhabited dwelling or other specified object be within the defendant's firing range." (*Ibid.*)

D. A Person Standing Outside an Occupied Vehicle with the Gun and/or His or Her Hand Inside the Vehicle While Discharging a Firearm is Shooting "At" the Occupied Vehicle Within the Meaning of Penal Code Section 246

As stated above, section 246 is violated when a person intentionally discharges a firearm either directly at a proscribed target (e.g., an occupied building or vehicle), or in close proximity to the target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it. (*People v. Overman, supra,* 126 Cal.App.4th 1344, 1361.) No specific intent to strike the target, kill or injure persons, or achieve any other result beyond shooting at or in the general vicinity or range of the target is required. (*Ibid.*) "The defendant's conscious indifference to the probability that a shooting will achieve a

particular result is inferred from the nature and circumstances of his act." (*Overman, supra,* at pp. 1356-1357.)

Interpreting "discharge a firearm at . . . an occupied motor vehicle" to include discharging the firearm toward or in close proximity to the vehicle promotes the policy considerations behind section 246. A statute should be construed so as best to effect its purpose. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919.) Section 246 is intended to protect people in or around structures from attacks aimed at the structures by people outside them. As stated above, as originally drafted, what became Section 246 forbade shooting "into" a building. (*People v. Stepney, supra,* 120 Cal.App.3d at p. 1020.) The Legislature substituted "at" for "into" in order to cover the situation where the shooter misses the building. (*Ibid.*) There is no indication that by this change the Legislature intended to disapprove shooting "into" a building, or to exclude any form of shooting "into" a building.

In reaching through a vehicle window or door from the outside, one reaches into a vehicle. If one shoots at the same time, it would seem a matter of common understanding that one is not only reaching into the vehicle, but shooting towards or at it as well. The important consideration is that the shooter's body is outside the vehicle. Defining the crime based on how many feet the shooter is from the vehicle would result in absurd consequences, and contravene the Legislature's intent to protect the occupants inside of the vehicle.

By parity of reasoning, in the reverse situation, one shoots from a vehicle even if his hand is outside while the shots are fired. Penal Code section 12022.55 penalizes shooting "from" a motor vehicle. Respondent has found no indication that anyone has ever claimed, as a defense to section 12022.55, that the hand wielding the gun extended outside the vehicle window, though that must be a common occurrence. Such a

defense would make no sense, as at least part of the purpose of section 12022.55 is to address the fact that "firing a gun from a motor vehicle is an especially treacherous and cowardly crime," because it "allows the perpetrator to take the victim by surprise and make a quick escape to avoid apprehension." (*People v. Bostick* (1996) 46 Cal.App.4th 287, 292.) In shooting from a vehicle, whether the gun (and the hand bearing it) is inside or outside the vehicle is of no import; what matters is that the vehicle gives a shooter inside a vehicle an advantage over a target outside the vehicle, even if the gun is also technically "outside" the vehicle. What matters is where the shooter is.

A similar functional analysis applies to why the Legislature would want to specifically criminalize shooting into an occupied car. A vehicle occupant is an easy target because the vehicle restricts immediate movement. The occupant, often restrained by seatbelts, or pinned in place by the steering wheel, the center console, and the seats themselves, is held relatively immobile by the vehicle, and cannot quickly get out of the vehicle to seek cover. Unless the vehicle is armored, the vehicle itself will provide none. None of these considerations is negated if the shooter sticks the gun through the vehicle window; indeed, in that situation things only get worse for the trapped vehicle occupant. The salient characteristics of shooting into a vehicle are that the shooter is likely to have a tactical advantage over the vehicle occupant, an advantage that comes from having his or her body outside the vehicle while the target is trapped inside, and one that is not diminished if his or her hand extends inside to trigger the actual discharge.

Considering the fundamental nature of the crime, and recognizing the Legislature intended the statute to embrace shooting "into" an enumerated target, there is no reason to conclude that it is the placement of the gun hand, rather than the placement of the shooter, that determines whether

section 246 has been violated. The Legislature's substitution of "at" for "into" is consistent with the reason it enacted section 246 in the first place: to protect people inside buildings from indiscriminate attacks by people outside the buildings, and to prevent criminals from escaping liability for these attacks. If appellant reached inside the vehicle to fire, he shot "at" the vehicle, and violated section 246.

Finding that a defendant who is outside a vehicle with the firearm and/or his hand inside the vehicle at the time the firearm is discharged is not a violation of section 246 would unduly limit the scope of the section 246 offense. This would conflict with the underlying purpose of the statute, i.e. to protect the occupants of the vehicle (or other enumerated structure). The fact that before the 1976 amendment to section 246, the crime specifically prohibited shooting at a vehicle or occupant thereof (see former Veh. Code, § 23110, subd. (b), emphasis added), demonstrates the legislative intent to protect occupants inside the vehicle, thus prohibiting shooting into the vehicle.

From the point of view of the occupants of a vehicle, it is more important whether the shooter's body is inside or outside than whether the gun is. One who shoots from outside is often effectively blocked from the vehicle occupants. This is true whether the shooter is sticking the gun through an open door or window to the vehicle, or is firing from across the street. Thus, while there may be a reason for the law to distinguish between one who shoots from a position inside a vehicle and one who shoots from outside, there is no reason to distinguish between one who shoots from outside by reaching inside the vehicle and one who shoots from farther away.

A shooter who is fully inside a vehicle is less able to surprise the occupants and less able to hide from them than is an outside shooter, even one who reaches in. An inside shooter puts himself in reach of the

occupants more than an outside shooter. The inside shooter is committing an act of a different character than that committed by an outside shooter. Accordingly, someone outside a vehicle shooting at or in close proximity to that vehicle has a similar unfair advantage as someone who commits lying-in-wait murder. In both situations, the attacker can take advantage of the element of surprise to overcome the vulnerable victim who is essentially trapped.

As stated above, this Court has found that section 246 proscribes an inherently dangerous felony under the second degree felony-murder rule because the crime "involves a high probability that death will result and therefore is an inherently dangerous felony under the governing principles." (*People v. Hansen, supra,* 9 Cal.4th at p. 309.) In *Ramirez,* this Court again recognized, "the high probability of human death or personal injury" when someone violates section 246. (*People v. Ramirez, supra,* 45 Cal.4th at p. 990.) It follows that the goal of the statute is to protect people, not a vehicle or structure, and this goal is accomplished whether or not the firearm is inside or outside of the vehicle or structure.

As a matter of linguistics, the word "at" has several meanings. As relevant here, "at" is defined as "a function word used to indicate that which is the goal of an action or that toward which an action or motion is directed." (Webster's 3d New Internat. Dictionary (1981) p. 136.) The primary concept of the word "at" is "nearness or proximity," and it is often used as "the equivalent of near or about." (See *Jordan v. Board of Sup'rs of Tulare County* (1950) 99 Cal.App.2d 356, 360.) In Georgia, "[o]ne who, while inside of an occupied dwelling, shoots a pistol at a floor thereof, is guilty of shooting "at" or "into" such dwelling." (*English v. State* (1912) 74 S.E. 286, 286.) In Kentucky, the word "at," as used in a statute making it a crime to shoot at another person, required the shot to be "aimed,

pointed, or directed towards" that person. (*Durham v. Commonwealth* (1930) 31 S.W.2d 603, 604.)

Here, for purposes of section 246, discharging a firearm "at" an occupied vehicle is not limited to those actions where the firearm was outside the vehicle. If the shooter is standing outside of the vehicle, including standing right next to it with the firearm inside the vehicle, he is still shooting toward or in the direction of the vehicle. Although the firearm is inside of the vehicle, the goal of the shooter's action is the same as if he was three feet from the vehicle.

As stated above, prior decisions from the Court of Appeal have relied on this broad definition of "at" when interpreting section 246. Moreover, the rationale from the Court of Appeal cases demonstrates that section 246 is violated when the shooter's body is outside the vehicle but the firearm (and/or his hand) is inside the vehicle when the gun discharges. The essence of section 246 is the endangerment of people in or around a structure or vehicle by one who shoots "at" the structure or vehicle. From *Stepney,* we learned that the shooter cannot be inside the structure to be shooting "at" it.

However, as set forth above, several Court of Appeal cases demonstrate that the statute covers those situations where the shooter discharges a firearm in such close proximity to the structure or vehicle that it is likely one or more bullets will hit the object or persons in or around it. For example, in *People v. Chavira, supra,* 3 Cal.App.3d 988, the Court of Appeal affirmed a conviction under section 246 when the defendant claimed he was shooting at the people standing by the dwelling, and not shooting at the dwelling itself. (*Id.* at p. 992.) Because the defendant was aware of the probability that some shots would hit the building and possibly injury the inhabitants, that was sufficient under the statute. (Id. at p. 993.)

Similarly here, even if the firearm was inside the vehicle when appellant discharged it, there was some probability the bullet would hit the vehicle, and an even stronger likelihood it would injure, or as it did here kill, a vehicle occupant. The fact that the firearm was inside the vehicle did not make appellant any less outside the vehicle than a shooter who was standing three feet away.

Moreover, as the *Jischke* court held, because section 246 is a general intent crime, the shooter need not intend to strike the targeted structure. (*People v. Jischke, supra,* 51 Cal.App.4th at p. 556.) The *Overman* court followed this reasoning when it found that section 246 was "not limited to shooting directly at an inhabited or occupied target. . . it proscribes shooting either directly at or in close proximity to an inhabited or occupied target." (*People v. Overman, supra,* 126 Cal.App.4th at pp. 1355-1356.) The *Jones* court extended this rationale when it held that, "the prohibition against discharging a firearm 'at' the structures listed in section 246 must include a prohibition against discharging a firearm 'into' those same structures." (*People v. Jones, supra,* 187 Cal.App.4th at p. 274.) All of these cases focused on the possible danger to the inhabitants of the structures or vehicle.

Based on the rationale of these Court of Appeal cases, this Court should hold that a defendant can be convicted of discharging a firearm at an occupied motor vehicle in violation of section 246 if he was outside the vehicle when he discharged the firearm but the firearm itself was inside the vehicle. The Legislature's intent in enacting section 246 was to protect the people sitting in the vehicles from shooters outside the vehicle. This goal is met even if the firearm is inside a vehicle. As the *Jones* court aptly said, "[t]here is simply no reasonable justification" to distinguish between the situation where a person puts his hand or the firearm inside the vehicle and then discharges it, or stands in the same position and discharges the firearm

without placing his hand or the firearm inside the vehicle. (*People v. Jones, supra,* 187 Cal.App.4th at p. 274.) "In both situations, the occupant of the vehicle is particularly vulnerable, in that the victim has minimal opportunities to escape or otherwise protect himself from the bullets." (*Ibid.*)

In addition, the Court of Appeal's interpretation of section 246 would result in a gratuitous windfall to defendants. Based on the court's interpretation of the statute, a defendant who barely penetrates the inside of a vehicle with the firearm would not be guilty. Yet, given the reality of such shootings, it may be impossible for the prosecution to prove this was not the case. For example, there is often not an eyewitness who had the vantage point to determine whether the firearm broke the plane of the vehicle. Even if an eyewitness is available, other problems of proof exist such as the witness's recollection of the location of the firearm.

In this case, the exact location of the firearm was not definitely established. Estrada, the only surviving eyewitness to the shooting, did not testify that the firearm was inside the truck. The photographs from the police reenactment of the shooting placed the firearm 27 inches from the victim's face. This measurement was based solely on the minimum distance the firearm could have been without leaving soot or stippling; there was no evidence defendant's hand was actually inside the vehicle.

Lastly, the rule of lenity does not apply here because the statute is not susceptible to two reasonable interpretations. (*People v. Morrison, supra,* 191 Cal.App.4th at p. 1556; *People v. Bamberg* (2009) 175 Cal.App.4th 618, 629.) Under that doctrine, "courts must resolve doubts as to the meaning of a statute in a criminal defendant's favor." (*People v. Avery* (2002) 27 Cal.4th 49, 57.) However, the rule "does not automatically grant a defendant 'the benefit of the most restrictive interpretation given any

statute by any court' when there is a split of authority." (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1023.)

As this Court explained in *People v. Avery, supra,* 27 Cal.4th at p. 57, "[t]wo separate strands of . . . guidelines coexist" with respect to resolving competing statutory interpretations. "On the one hand, we have repeatedly stated that when a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant. [Citations.] . . . On the other hand, section 4 provides: 'The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All of its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.' Appellate courts have often invoked section 4 as a reason *not* to interpret a statute strictly in favor of a criminal defendant. [Citations.]" (*Id.* at p. 58.)

This Court reconciled the two lines of authority by explaining that only in cases of true interpretive deadlock does the rule of lenity apply. That is, "'[t]he 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.'" (*Ibid.*, quoting 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53, italics added.) The principle 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.'" (*Avery, supra,* at p. 58.) "[A]n appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*Ibid.*)

Here, because the legislative intent of section 246 is clear, the rule of lenity is inapplicable. (See, e.g., *Moskal v. United States* (1990) 498 U.S. 103, 108 [111 S.Ct. 461, 112 L.Ed.2d 449].) The persuasive reasoning of

the overwhelming weight of authority broadly defining the phrase "at" dispels any claim that the two interpretations of this phrase are in "relative equipoise." The Court of Appeal creates an ambiguity where none exists, and invokes the rule of lenity in its decision. This interpretation of section 246 should be rejected.

Based on the "objects to be achieved, the evils to be remedied, and legislative history" (*People v. Ramirez, supra,* 45 Cal.4th at p. 987), "at" as used in Penal Code section 246 includes more than shooting directly at the object. It also includes shooting in such close proximity to the object that it is likely one or more bullets will hit the object or persons in or around it. Therefore, a defendant can be convicted of discharging a firearm at an occupied motor vehicle under section 246 if he was outside the vehicle at the time he discharged the firearm, but the firearm was inside the vehicle.

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CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal and find that a person discharging a firearm while standing outside a motor vehicle, but holding the firearm inside the vehicle, is guilty of discharging a firearm at an occupied motor vehicle under Penal Code section 246.

Dated: July 11, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,541 words.

Dated: July 11, 2011

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

Case Name: **The People v. Martin Manzo**
No.: **S191400**

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 12, 2011,** I served the attached ***RESPONDENT'S OPENING 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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Additionally, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **July 12, 2011,** to **Appellate Defenders, Inc.** at its electronic address: **eservice-criminal@adi-sandiego.com.**

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 12, 2011,** at San Diego, California.

Loreen Blume
Declarant

Loreen Blume
Signature

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