IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VERNON ANDERSON, Defendant and Appellant.	)	No. S253227
	)	Court of Appeal No. A136451
	)	San Francisco County No. SCN206013

CRC 8.25(b)

SUPREME COURT
FILED

MAY 15 2019

Jorge Navarrete Clerk

Deputy

On Appeal from a Judgment of
the Superior Court of the State of California
in and for the County of San Francisco

The Honorable Anne-Christine Massullo
Judge Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

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STATEMENT OF ISSUE ON REVIEW

"Were the enhancements imposed under Penal Code section 12022.53, subdivision (e), improperly imposed as to counts 3 through 7 because the prosecution did not specifically plead a violation of this subdivision as to those counts? (See *People v. Mancebo* (2002) 27 Cal.4th 735.)" (Order Granting Review, March 13, 2019)

STATEMENT OF THE CASE

By an amended information filed April 12, 2011, appellant was charged with ten felony counts as follows:

Count 1: Murder of Zachary Roche-Balsam. (Pen. Code[1], § 187.) It was further alleged that appellant personally used a firearm during the commission of the offense (§ 12022.5, subd. (a)(1)); that a principal in the offense personally and intentionally discharged a firearm which proximately caused death (§ 12022.53, subds. (d) & (e)); and that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Count 2: Active participation in a criminal street gang. (§ 186.22, subd. (a).)

Count 3: Second degree robbery of Bella Kizziah. (§ 212.5, subd. (c).) It was further alleged that appellant personally used a firearm in the commission of the offense (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)); and that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Count 4: Second degree robbery of Yana Peselev. (§ 212.5, subd. (c).) It was further alleged that appellant personally used a firearm in the commission of the offense (§§ 12022.5, subd. (a)(1),

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[1] Subsequent unspecified statutory references are to the Penal Code.

12022.53, subd. (b)); and that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Count 5: Attempted second degree robbery of Ryan Williams. (§§ 664/212.5, subd. (c).) It was further alleged that appellant personally used a firearm in the commission of the offense (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)); and that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Count 6: Attempted second degree robbery of Justin Marks. (§§ 664/212.5, subd. (c).) It was further alleged that appellant personally used a firearm in the commission of the offense (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)); and that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Count 7: Attempted second degree robbery of Keith Gallo. (§§ 664/212.5, subd. (c).) It was further alleged that appellant personally used a firearm in the commission of the offense (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)); and that the

offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Count 8: Conspiracy to commit second degree robbery. (§ 182, subd. (a)(1).) It was further alleged that the offense was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(B).)

Count 9: Discharging a firearm at an inhabited dwelling (351 Victoria Street, San Francisco). (§ 246.) It was further alleged that the offense was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(B).)

Count 10: Discharging a firearm at an inhabited dwelling (367 Victoria Street, San Francisco). (§ 246.) It was further alleged that the offense was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(B).)

(4 Clerk's Transcript [CT] 979-985.)

On April 12, 2011, appellant waived any irregularities in connection with the mid-trial amendment of the information,[2] was arraigned, and pleaded not guilty to all counts and denied the special allegations. (4 CT 992.)

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[2] The original information was filed on July 22, 2008. (1 CT 97-102.)

On February 16, 2011, a jury was sworn to try the case. (3 CT 642, 644.) Testimony began on February 23, 2011. (3 CT 731.)

The case was submitted to the jury on April 19, 2011. (5 CT 1291.) The jury continued deliberating on April 20, April 21, April 25, and April 26. (5 CT 1297; 6 CT 1303, 1307, 1317.)

On April 27, 2011, the jury returned verdicts of guilty as to all counts and found all of the special allegations to be true. In addition, and despite the fact it was not alleged in the information, the jury also found it to be true as to Counts 3 through 7 (the robbery and attempted robbery charges), that in the commission of those offenses a principal personally and intentionally discharged a firearm which proximately caused death (§ 12022.53, subds. (d) & (e)). (6 CT 1322-1342; 49 Reporter's Transcript [RT] 8405-8416.)

On July 10, 2012, the trial court sentenced appellant to a determinate sentence of 10 years, followed by an indeterminate sentence of 179 years to life. (56 RT 24163-24170.)[3] The indeterminate sentence included five consecutive 25-year-to-life vicarious firearm enhancements under section

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[3] Appellant received consecutive terms of 10 years on Count 9 (shooting at an inhabited dwelling), 50 years to life on Count 1 (murder), 26 years to life on Counts 3 and 4 (robbery), and 25 years 8 months on Counts 3 through 7 (attempted robbery).

12022.53, subdivisions (d) and (e), attached to Counts 3 through 7 (robbery and attempted robbery). (56 RT 24166-24170.)[4]

On August 22, 2012, appellant filed a timely notice of appeal. (6 CT 1465.)

In an unpublished opinion filed November 19, 2018, the Court of Appeal remanded the matter for re-sentencing but affirmed the judgment in all other respects.

Appellant's petition for review was granted on March 13, 2019.

STATEMENT OF FACTS

A. THE CRIMES.

The facts of the case are not relevant to the issue on which the Court has granted review, and they are summarized in the opinion of the Court of Appeal. (See Court of Appeal slip opn. at pp. 1-5.) Briefly stated, the prosecution presented evidence that, on September 16, 2006, appellant and about a half dozen fellow members of a criminal street gang attended a party in the Ingleside section of San Francisco. At some point they were asked to leave by the host. They returned with weapons and some of them,

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[4] A sixth 25-year-to-life vicarious firearm enhancement was attached to Count 1 (murder). (56 RT 24164-24165.)

including appellant, robbed or attempted to rob some of the partygoers. Shots were fired at the party-goers by gang members who were standing in the street across from the house where the party was held. One of the shots struck and killed Zachary Roche-Balsam.

B. PROCEDURAL FACTS.

Unlike the facts surrounding the crimes, the procedural facts are crucial to an understanding to the issues raised by this case.

As noted in the Statement of the Case, *ante*, as to Counts 3 through 7, the charging document alleged that in the commission of those offenses *appellant* "personally used a firearm" "within the meaning of section 12022.53(b)" and "within the meaning of . . . section 12022.5(a)(1)"; it did *not* allege that appellant or a principal personally and intentionally discharged a firearm which proximately caused death in the commission of

the offenses within the meaning of section 12022.53, subdivisions (d) and e).[5]

Despite the fact that there were no 25-year-to-life firearm enhancements pleaded in the information as to the robbery and attempted robbery charges, the trial court, without objection, instructed the jury as if

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[5] Subdivision (b) of section 12022.53 provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) [including murder and robbery/attempted robbery], personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply."

Subdivision (d) of section 12022.53 provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

Subdivision (e)(1) of section 12022.53 provides: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

Subdivision (a) (formerly subdivision (a)(1)) of section 12022.5 provides: "Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."

enhancing allegations under subdivisions (d) and (e) of section 12022.53, had been alleged in connection with those counts:

> If you find the defendant guilty of the crimes charged in Counts III and/or IV, robbery of Bella Kizziah and Yana Peselev, respectively, and/or the crimes charged in Counts V, VI, and/or VII, attempted robbery of Ryan Williams, Justin Marks, and/or Keith Gallo respectively, and you find that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, *you must then decide whether the People have proved the additional allegation that one of the principals personally and intentionally discharged a firearm during that crime and caused death.*

(46 RT 8095, italics added.)

Pursuant to these instructions, the jury was given the following verdict form in connection with Counts 3 through 7:

> We the Jury, having found defendant, Vernon Anderson, guilty of [Robbery OR Attempted Robbery], And having further found TRUE the allegation that he committed that offense "for the benefit of a criminal street gang," do now find the allegation under section 12022.53 (d) and (e) of the Penal Code that [VERNON ANDERSON or A PRINCIPAL] did personally and intentionally discharged [sic] a firearm which proximately caused death to a person other than an accomplice, to wit: Zachary Roche-Balsam, in commission of the above offense, to be [NOT TRUE/TRUE].

(6 CT 1325, 1327, 1329, 1331, 1333.)

As to each of these allegations, the jury found it to be "TRUE" that "A PRINCIPAL" personally and intentionally discharged a firearm which

proximately caused death to Zachary Roche-Balsam.[6] (6 CT 1325, 1327, 1329, 1331, 1333.)

On February 22, 2011, the day before trial of this matter was to begin, the prosecutor made his final settlement offer. Appellant would be permitted to plead guilty to second degree murder, the robbery of one of the victims, and active participation in a criminal street gang.[7] (17 RT 3003.) At the same time, the prosecutor warned appellant in open court that a guilty verdict after trial would expose him to 60 years to life, "or more." The prosecution's offer was rejected: "Your Honor, Mr. Anderson has counsel. I have advised him thoroughly about the prosecution's offer. It is rejected." (17 RT 3004.)

After the case was tried, and the matter came on for sentencing, the prosecutor recommended an indeterminate term of 50 years to life (25 years to life for the murder, plus 25 years to life for a principal's discharge of a firearm in the commission of the murder, as pleaded in connection with

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[6] Counsel for appellant has found no explicit explanation in the record as to how the above-referenced instructions and findings came about. However, it appears that they were requested by the prosecution. "Because the People ask for findings on all of these [counts], and the jury forms and the case was charged that way, so now we need to deal with these." (56 RT 24109.)

[7] Assuming that the court were to impose the upper term on the determinate counts, appellant calculates his exposure under this proposed bargain as 20 years, 8 months to life.

Count 1). (6 CT 1423.) As to the robbery and attempted robbery counts (Counts 3 through 7), the prosecutor asked the court to impose *but stay* the 25-year-to-life vicarious firearm enhancements pursuant to subdivisions (d) and (e) of section 12022.53: "I'm asking the court to impose but stay the .53(d) enhancement[s]." (56 RT 24109.) In addition to the indeterminate term, the prosecutor asked for a determinate term of 48 years (to be served prior to the indeterminate term), "based on consecutive sentences for Counts 3, 4, 5, 6, 7, & 9." (6 CT 1427.) This term was arrived at by virtue of the enhancements for personal use of a firearm in connection with the robbery and attempted robbery counts, and Count 9, shooting at an inhabited dwelling, and because all these offenses were committed for the benefit of a criminal street gang. (See 6 CT 1428-1429 [People's Revised Sentencing Memorandum].)

Obviously, defense counsel did not object to the prosecutor's recommendation that the court not impose the 25-year-to-life enhancements called for by subdivisions (d) and (e) of section 12022.53, but argued that these enhancements had to be stricken rather than stayed. (56 RT 24110.)

After hearing from the parties, the court declared a recess for counsel to research the question of whether the 12022.53, subdivision (d) and (e) enhancements should be stricken rather than imposed and stayed.

After the break, the prosecutor announced to the court that "based on your questions to me, I must now take a different position than what I took in my papers." (56 RT 24119.) "I think the Court must impose the 53(d) enhancement." (56 RT 24120.) The reason for the new position, the prosecutor explained, was his discovery during the break of cases including *People v. Palacios* (2007) 41 Cal.4th 720.[8] As the court acknowledged, "That's certainly going to change the sentencing dramatically." (56 RT 24121.) Thereupon, over defense counsel's objection that the sentence constituted cruel and unusual punishment (6 CT 1452), the court sentenced appellant to 189 years to life in state prison, double the prosecution's recommendation made earlier in the day. (56 RT 24170-24174.)

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[8] *Palacios* held that section 654 does not apply to section 12022.53 enhancements. (*Id.* at pp. 727-728.)

ARGUMENT

THE ENHANCEMENTS ON COUNTS THREE THROUGH SEVEN, IMPOSED PURSUANT TO SECTION 12022.53 SUBDIVISIONS (D) AND (E), TOTALING 125 YEARS TO LIFE, WERE UNAUTHORIZED AND MUST BE STRICKEN; THE INFORMATION ON WHICH THIS CASE WAS TRIED DID NOT ALLEGE A VIOLATION OF THESE SUBDIVISIONS AND APPELLANT HAD NO TIMELY NOTICE OF HIS ACTUAL EXPOSURE IF HE WENT TO TRIAL AND WAS CONVICTED.

A. SECTION 12022.53, SUBDIVISION (E) REQUIRES THE PROSECUTION TO ALLEGE BOTH THAT THE OFFENSE TO WHICH ITS ENHANCEMENT ATTACHES BE COMMITTED FOR THE BENEFIT OF A CRIMINAL STREET GANG AND THAT A PRINCIPAL IN THE OFFENSE DISCHARGED A FIREARM PROXIMATELY CAUSING GREAT BODILY INJURY OR DEATH, IN ORDER FOR THE 25 YEAR TO LIFE CONSECUTIVE SENTENCE IMPOSED THEREON TO BE AN AUTHORIZED SENTENCE.

In *Mancebo*, this Court had before it two penal statutes, section 667.61 (the so-called "One Strike law") and section 12022.5, "which provides generally for a fixed-term enhancement for personal gun use in connection with conviction of a felony offense." (*People v. Mancebo*, *supra*, 27 Cal.4th at p. 738 (*Mancebo*).) The validity of the One Strike law was not at issue. Rather, the narrow issue before the Court was whether the allegation that the defendant used a weapon in the commission of the sex

offenses, used to qualify him for a life sentence under the One Strike law, was also available to be used to impose on him the ten-year enhancement prescribed by section 12022.5. The trial court in *Mancebo* believed that it was permissible to substitute the unpleaded multiple victim circumstance to impose the One Strike sentence and thus free up the gun use allegation so as to impose the section 12022.5 enhancement, even though the multiple victim circumstance was never "expressly" pleaded in the information. (*Id.* at p. 739.) The prosecution had argued successfully in the trial court that the defendant would know that he was exposed to jeopardy under the One Strike law due to the presence of multiple victims, because the counts of the information named two victims, albeit without any specific allegation that the fact that there were multiple victims, together with the allegation that one of the victims was tied up, informed the defendant of his exposure under the One Strike law. (*Id.* at pp. 738-743.[9])

This Court rejected the prosecution's argument, holding instead that that subdivision (f) of section 667.61 requires that the circumstances giving

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[9] "Regarding victim Y., the information alleged 'that within the meaning of Penal Code Sections 667.61(a) and (e), . . . the following circumstances apply: Kidnap and Use of Firearm.' With respect to victim R., the information alleged "that within the meaning of Penal Code Sections 667.61(a) and (e), . . . the following circumstances apply: Use of Firearm and Tie or Bind Victim.'" (*Id.* at pp. 742-743.)

rise to exposure to the One Strike law be pled and proved and that the failure to comply with this requirement is fatal. (*Mancebo*, *supra*, 27 Cal.4th at pp. 744-745.) "[N]o factual allegation in the information or pleading in the statutory language informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing .... Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms ... ." (*Id.* at p. 745.)[10]

In reaching this result, Justice Baxter pointed to the plain language of the One Strike law: "The plain wording of subdivisions (f) and (i) of section 667.61 together controls here. Subdivision (i) requires that '[f]or the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) 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.' (Italics added.) Neither the original nor the

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[10] Unlike the defendant in *Mancebo*, appellant learned of his *potential* exposure to an added sentence of 125 years to life at the time he learned of the jury instructions and verdict forms. However, until the eleventh hour discovery of the holding of *People v. Palacios*, *supra*, 41 Cal.4th 720, it was accepted by the parties that these additional sentences would be stayed.

amended information ever alleged a multiple victim circumstance under subdivision (e)(5). Substitution of that unpleaded circumstance for the first time at sentencing as a basis for imposing the indeterminate terms violated the explicit pleading provisions of the One Strike law." (*Mancebo, supra*, 27 Cal.4th at p. 743.)

Similarly, in the present case, section 12022.53, subdivision (d) provides for a 25 year to life enhancement for one who *personally* discharges a firearm causing great bodily injury or death. Subdivision (e) of the statute makes this personal liability vicarious. The life sentence is to be imposed on any participant in a qualifying offense, whether or not that person was the shooter. However, in order for subdivision (d) to apply to such a person, the prosecution must *plead* as well as prove the circumstance that he or she acted in association with a criminal street gang and that "any principal" in the offense discharged a firearm proximately causing great bodily injury or death. (§ 12022.53, subd. (e).)

In the present case, respondent made essentially the same argument in the Court of Appeal as it made in *Mancebo*,[11] that is to say, as long as the qualifying facts can be cobbled together from the totality of the facts alleged in the charging document, it does not matter if they are specifically

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[11] See *Mancebo, supra*, 27 Cal.4th at p. 744.

pleaded as qualifying circumstances with respect to each of the counts to which they are intended to apply. (See Respondent's Supplemental Letter Brief in the Court of Appeal at pp. 9-10.[12])

This Court, in *Mancebo*, rejected this line of reasoning. As Justice Baxter explained, the basis for respondent's argument was that subdivision (i) of section 667.61 requires only the "existence of any fact" necessary to trigger the one strike life sentence. However, that construction ignores subdivision (f) of section 667.61, which requires that the circumstances triggering the one strike penalty be "pled and proved." (*Mancebo*, *supra*, 27 Cal.4th at pp. 744-745.) That the evidence may have been sufficient to prove the necessary facts to be true was not enough. Substitution of

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[12] Respondent argued in that brief: "Admittedly, the gun enhancement allegations under counts three through seven did not repeat the language of the separate gang allegation set forth on the second to last page of the amended information, nor did they specifically refer to subdivisions (d) and (e) or allege that a principal "personally and intentionally discharged a firearm which proximately caused death" to Roche-Balsam. (4 CT 980-983.) Nevertheless, appellant would have known that if the prosecutor proved the separately pleaded gang enhancement and also proved that either appellant and/or his co-participant used a gun in murdering, robbing, and attempting to rob the victims (implying personal and intentional discharge of the gun), then he would be subject to the 25 years to life gun enhancement sentence under section 12022.53, subdivisions (d) and (e)(1) . . . The amended information, the evidence presented by the prosecutor, and the instructions given to the jury regarding counts three through seven put appellant on notice." (Respondent's Supplemental Letter Brief at p. 9.)

qualifying facts to support the imposition of the life sentence "violated the explicit pleading provisions of the One Strike law." (*Id.* at p. 743.)

Mancebo, of course, construed the language of the One Strike law. However, in *People v. Botello* (2010) 183 Cal.App.4th 1014 (*Botello*), the court applied *Mancebo*'s reasoning to section 12022.53, subdivision (e)(1), the same statutory provision that is at issue in the present case.

In *Botello*, two brothers were found guilty of premeditated attempted murder. In addition, they were charged with personally discharging a firearm in the commission of the offense, in contravention of section 12022.53, subdivision (d). However, it was conceded that there was insufficient evidence to establish that the defendants *personally* discharged a firearm. The prosecution never pleaded subdivision (e)(1), which imposes vicarious liability if "any principal" discharges a firearm in connection with the offense, but only if the circumstance is pled that the underlying substantive offense was committed for a gang purpose and that a principal in that offense discharged a firearm in its commission. Respondent argued that, because the evidence established that both defendants were principals (one of them was the shooter and the other his aider and abettor) and also established that the offense was committed for a gang purpose, it was proper for the appellate court to uphold the imposition of the 25 years to life

term under section 12022.53, subdivision (e)(1), even though that subdivision was not pleaded in the information. (*Botello, supra*, 183 Cal.App.4th at p. 1022.) The *Botello* court rejected this argument. The court held that under *Mancebo*, "the application of section 12022.53, subdivision (e)(1), which was not charged, would violate the statutory language of subdivision (e)(1) and the notice requirement of due process." (*Botello, supra*, 183 Cal.App.4th at p. 1022.) The court explained that "[l]ike the One Strike law in *Mancebo* . . ., section 12022.53, subdivision (e)(1), has a specific pleading and proof requirement: 'The enhancements provided in this section [meaning the enhancements of subdivisions (b), (c) & (d)] shall apply to any person who is a principal in the commission of an offense if both of the following are *pled and proved*: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).' (Italics added.)" (*Botello, supra*, 183 Cal.App.4th at p. 1026.) The failure to comply with these requirements rendered the resulting sentence unauthorized and required reversal. In accordance with *Mancebo*, the *Botello* court held that "a harmless error analysis does not apply to the failure to meet the pleading requirement of section 12022.53, subdivision (e)(1)." (*Id.* at p. 1028.)

In the present case, similarly to *Botello*, the amended information charged appellant with personally using a firearm in the commission of the robberies charged in Counts 3 through 7, but made no mention of vicarious liability because a principal in these alleged gang-related robbery/attempted robbery offenses intentionally discharged a firearm proximately causing death. Thus, like in *Botello*, "'no factual allegation in the information or pleading in the statutory language informed [appellant] that if [he was] convicted of the underlying charged offenses,' [he] would be subject to the firearm enhancement[] of section 12022.53, subdivision[] . . . (d) by virtue of the circumstances listed in subdivision (e)(1). [Citation.]" (*Botello*, *supra*, 183 Cal.App.4th at p. 1027.)

Mancebo's reasoning was also found controlling in other cases outside the context of the One Strike law.

In *People v. Arias* (2010) 182 Cal.App.4th 1009, for example, the charging document alleged two counts of attempted murder but did not allege that the offenses were committed willfully, deliberately, and will

premeditation, as required by section 664, subdivision (a).[13] "No request was made to amend the information to include the required allegations, and nothing in the record suggests the information was ever amended. Nevertheless, the trial court instructed that if the jury found defendant guilty of attempted murder, it must make a separate determination of whether the prosecution proved the attempted murder was done willfully and with premeditation and deliberation." (*People v. Arias*, *supra*, 182 Cal.App.4th at p. 1017, fn. omitted.) The jury found "'first degree attempted murder' as to both victims," and the sentencing court imposed life terms on those convictions pursuant to pursuant to section 664, subdivision (a). (*Ibid.*)

The Attorney General in *Arias* conceded that "the prosecution failed to comply with the unambiguous pleading requirement set forth in section 664, subdivision (a)," but nevertheless argued that "defendant forfeited his appellate claim by failing to challenge the adequacy of the pleading below." (*People v. Arias*, *supra*, 182 Cal.App.4th at p. 1017.) The *Arias* court noted

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[13] Section 664, subdivision (a) provides in relevant part: "[I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. . . . The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated *is charged in the accusatory pleading* and admitted or found to be true by the trier of fact." (Italics added.)

that "[o]ur Supreme Court rejected this same argument in materially indistinguishable circumstances in *People v. Mancebo*," and found that "the *Mancebo* rationale is determinative and requires the striking of defendant's enhanced sentences for attempted murder." (*People v. Arias*, *supra*, 182 Cal.App.4th at p. 1017.) This was so because the defendant was never informed until sentencing that he was potentially liable for life sentences on the attempted murder counts pursuant to section 664, subdivision (a).[14] (*Id.* at pp. 1018-1019; accord, *People v. Perez* (2017) 18 Cal.App.5th 598, 617-619.)

In the present case, similarly to *Arias*, appellant was informed in Count 1 (murder) that he was vicariously liable for the 25-year-to-life enhancement prescribed by section 12022.53, subdivisions (d) and (e) for the discharge of the lethal bullet by the actual shooter ("any principal"), but the pleadings did not inform him that he was also vicariously liable for multiple 25-year-to-life enhancements because a principal discharged a firearm which proximately caused death in the commission of the robbery and attempted robbery offenses charged in Counts 3 through 7. On the

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[14] The *Arias* defendant was informed by the information that he was liable for a 25 year to life firearm enhancement pursuant to section 12022.53, subdivision (d) in connection with a separate murder count in which he personally and intentionally discharged a handgun. (*Id.* at p. 1011.)

contrary, he was told that he was liable only for a 10 year enhancement under sections 12022.53, subdivision (b) and 12022.5, subdivision (a), because he personally used a firearm in the commission of the offenses charged in Counts 3 through 7.

The misdirection in the present case is also like what occurred in *People v. Nguyen* (2017) 18 Cal.App.5th 260. In that case, the defendant admitted a prior conviction for first degree burglary, which qualified as a "strike" prior (§§ 667, subs. (b)-(i), 1170.12), a "prison prior" (§ 667.5, subd. (b)), and a five-year prior serious felony enhancement (§ 667, subd. (a).) Despite the fact that the prior conviction was not pleaded as a "five-year prior," the court imposed an additional five years under section 667, subdivision (a). (*People v. Nguyen*, *supra*, 18 Cal.App.5th at p. 262.) The court in *Nguyen* began its analysis with the plain language of section 1170.1, subdivision (e), which provides that: "All enhancements 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." Relying on *Mancebo*, and the manner in which this Court treated the similar language of the One Strike law, section 667.61, former subdivision (i), the *Nguyen* court observed that the pleadings in that case informed the defendant that his prior conviction was a strike, but failed to plead that the conviction

constituted a five-year prior. (*People v. Nguyen*, *supra*, 18 Cal.App.5th at p. 266.) The court held that this lacuna was fatal. (*Id.* at p. 267.) In the same way, in the present case, the pleadings with respect to Counts 3 through 7 told appellant that he was liable for his personal use of a firearm in the robbery and attempted robbery counts, but did not in any way inform him that he was also liable a life sentence because someone else fired a fatal shot.

The Court of Appeal in the present case made no attempt to analyze *Mancebo* or *Arias* or *Botello*, or even to take note of them. Instead, the Court of Appeal rejected, in a footnote, appellant's contention that the five 25-year-to-life sentences imposed as enhancements on Counts 3 through 7 were unauthorized, simply citing *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*). (Court of Appeal slip opn. at pp. 25-26, fn. 10.)

Riva offers no support for the Court of Appeal's conclusion that the five additional life sentences imposed pursuant to section 12022.53, subdivisions (d) and (e) were authorized, for *Riva* had no occasion to discuss the special pleading requirements of subdivision (e)(1) of section 12022.53. This is so because in *Riva*, unlike the present case, there was no issue of vicarious liability. The *Riva* defendant was charged with

personally discharging a firearm, in violation of section 12022.53, subdivision (d). As the *Riva* court explained:

> The information alleged an enhancement under section 12022.53, subdivision (d) as to the counts charging Riva with attempted voluntary manslaughter and assault but not as to the count charging a violation of section 246, shooting at an occupied vehicle. The verdict forms, however, asked the jury to determine whether the allegations under section 12022.53, subdivision (d) were true or not true as to all three counts. Riva did not object to the verdict form pertaining to the section 246 offense and the jury found the allegations true as to all three counts.

(*Riva*, *supra*, 112 Cal.App.4th at p. 1000.)

The defendant in *Riva* argued that section 12022.53, subdivision (j) required that the enhancement pursuant to subdivision (d) be pled in connection to each count to which it was meant to apply. Subdivision (j) states that "for the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) 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." According to *Riva*, subdivision (j) "only requires the facts necessary to sustain the enhancement be alleged in the information; it does not say where in the information those facts must be alleged or that they must be alleged in connection with a particular count in order to apply to that count." (*Riva*, *supra*, 112 Cal.App.4th at p. 1001, fn. omitted; but cf. *People v. Perez* (2015) 240 Cal.App.4th 1218, 1227 [in the

context of the One Strike law, fair notice is better served "by a more straightforward rule, and the one that we adopt today: The People must allege the specific One Strike law circumstances it wishes to invoke as to each count it seeks to subject to the One Strike law's heightened penalties."]; *Riva*, *supra*, 112 Cal.App.4th at p. 985 ["the better practice is to allege the enhancement with respect to every count on which the prosecution seeks to invoke it," although failure to do so is not fatal as long as the defendant has fair notice of potential punishment"].) In any case, subdivision (j), as construed by the *Riva* court, directs generally that "the existence of *any fact* required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading." (§ 12022.53, subd. (j), emphasis added.) Subdivision (e)(1), on the other hand, deals with the specific case of vicarious liability, and allows "enhancements provided in this section" to be applied to "any person who is a principal in the commission of the offense," *if* it is "pled and proved" that the person violated section 186.22, subdivision (b), and "[a]ny principal in the offense committed any act specified in subdivision (b), (c), or (d)." (§ 12022.53, subd. (e)(1).) Because there was no issue of imposing liability vicariously on the defendant in *Riva*, the special pleading rules of section 12022.53, subdivision (e)(1) did not come into play, and *Riva* does not even mention

that subdivision. Accordingly, *Riva* is not authority for the Court of Appeal's otherwise unexplained affirmance of the trial court's imposition of the five consecutive 25-year-to-life enhancements on Counts 3 through 7, which fall under the explicit pleading requirements of subdivision (e)(1). (See, e.g., *People v. Avila* (2006) 38 Cal.4th 491, 566 [cases are not authority for issues not considered].)

Moreover, the pleading error in this case is more serious than the one before the court in *Riva.* In the present case, the pleadings in Counts 3 to 7 affirmatively charged that in the commission of the robberies and attempted robberies, appellant personally "used" a firearm, in violation of subdivision (b) of section 12022.53 and subdivision (a) of section 12022.5. Violation of those provisions did *not* require evidence that appellant (or anyone else) intentionally discharged a firearm, but only that he engaged in conduct "that produces a fear of harm or force by means or display of a firearm in aiding the commission in one of the specified felonies." (*People v. Chambers* (1972) 7 Cal.3d 666, 672.) Under these circumstances, the information conveyed to appellant in Count 1 – that he was vicariously liable for a principal's discharge of the bullet that killed Zachary Roche-Balsam was not sufficient to impute notice to him that the same was true as to Counts 3 through 7, where he was charged with simple use of a firearm and not

discharging a firearm. The allegations in Count 1 and those in Counts 3 through 7 are different and mutually exclusive.[15] Thus, pleading notice on the murder count does not constitute pleading notice on the robbery and attempted robbery counts. "Charging language which expressly states that a fact is alleged to invoke one particular statute does not adequately inform the accused that the People will use it to invoke a different statute. (*People v. Nguyen*, *supra*, 18 Cal.App.5th at p. 267; see also *People v. Sweeney* (2016) 4 Cal.App.5th 295, 301 [information alleging elevated sentence under section 186.22, subdivision (d) did not provide adequate pleading notice of enhancement under section 186.22, subdivision (b) when the two provisions were mutually exclusive].)

For the reasons just stated, the Court of Appeal's reliance on *Riva* was misplaced as a basis to validate the legality of the five 25-year-to-life sentences that were imposed on appellant in connection with Counts 3 through 7 because someone else shot the gun that killed the victim in Count 1. Rather, as appellant has shown, the reasoning of *Mancebo* and *Botello*, as well as the other cases cited above, compel the conclusion that the

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[15] See § 12022.53, subd. (f): "Only one additional term of imprisonment under this section shall be imposed per person for each crime. If 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."

prosecution's failure to follow the pleading rules in subdivision (e)(1) of section 12022.53 gave rise to an unauthorized sentence, which must be set aside. "The error involved in an unauthorized sentence is not subject to forfeiture, and can never be harmless." (*People v. Cabrera* (2018) 21 Cal.App.5th 470, 477.)

If there remained any doubt about the plain meaning of section 12022.53, subdivision (e)(1), it must be resolved in favor of appellant's construction, for adoption of the mix-and-match procedure espoused by the *Riva* court would fall afoul of the statutory construction canon which counsels that statutes must be construed to avoid constitutional issues. (*People v. Miracle* (2018) 6 Cal.5th 318, 339.) As will now be seen, the pleadings in the present case misinformed appellant about his actual exposure in the event of a guilty verdict, thereby depriving him of the fair and timely notice required by state and federal constitutional guarantees of procedural due process.

B. THE PLEADING REQUIREMENTS OF SECTION 12022.53 MUST BE CONSTRUED IN LIGHT OF THE FUNDAMENTAL REQUIREMENT OF CALIFORNIA AND FEDERAL DUE PROCESS THAT A CRIMINAL DEFENDANT BE AFFORDED FAIR NOTICE OF THE CHARGES AGAINST HIM OR HER AND THE PENAL CONSEQUENCES THEREOF.

Although the Court in *Mancebo* determined that the pleading deficiencies just outlined were sufficient to require reversal, the Court also explained that "in addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right under the Fourteenth Amendment and article I, section 7 of the California Constitution to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Mancebo*, *supra*, 27 Cal.4th at p. 747.)[16] The due process right to which Justice Baxter was referring in *Mancebo* is one that this Court has long recognized as flowing from California Constitution (Cal. Const., art. I, § 7): "A person cannot be convicted of an offense . . . not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense. [Citations.]" (*In re Hess* (1955) 45 Cal.2d 171, 174-175.)

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[16] Accord *Riva*, *supra*, 12 Cal.App.4th at p. 985 [defendant entitled to "fair notice of his potential punishment"].

Besides its deep roots in California law (see, e.g., *People v. Arnett* (1899) 126 Cal.680, 681 [it is settled law that a defendant cannot be convicted on a different charge from the one contained in the indictment]), *Mancebo*'s view of the decisive role of due process builds upon equally clear federal law. Nearly eighty years ago, in *DeJonge v. Oregon* (1937) 299 U.S. 353, the Supreme Court was faced with a charging document that it construed as pleading a different offense from the crime of which the defendant was convicted. Overturning the conviction, the Supreme Court observed, "Conviction upon a charge not made would be sheer denial of due process." (*Id.* at p. 362.) The fact that the evidence adduced at trial supports conviction for an unpleaded offense is not sufficient. For example, in *Cole v. Arkansas* (1948) 333 U.S. 196, the defendants were charged with unlawful assembly. They could have violated the statute either by (1) encouraging or promoting an unlawful assembly; or (2) by using force or violence to prevent a worker from crossing the picket line. The information charging them alleged only the latter. There was no evidence that they forcibly dissuaded strike-breakers. However, there was evidence that they encouraged an unlawful assembly. The Arkansas Supreme Court upheld their convictions based on evidence that the defendants' actions violated the statute by encouraging unlawful assembly.

The United States Supreme Court reversed: "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (*Id.* at p. 201; accord, *Presnell v. Georgia* (1978) 439 U.S. 14, 18.)

The Ninth Circuit, in *Gautt v. Lewis* (9th Cir. 2007) 489 F.3d 993 (*Gautt*), had before it a habeas petition from a California prisoner who was charged with an enhancement under the same statute that is currently before the Court, section 12022.53. Defendant in that case was charged with a violation of section 12022.53, subdivision (b), but he was sentenced under section 12022.53, subdivision (d). The Ninth Circuit had no difficulty in holding that the defendant was deprived of due process of law: "We hold that Gautt's due process right was indeed violated when, as a result of this discrepancy, he was sentenced pursuant to a twenty-five-year-to-life enhancement, rather than a ten-year enhancement." (*Id.* at p. 998.)

The information in *Gautt* charged defendant with murder as well as possession of a firearm by a felon. It alleged, as in this case, that defendant used a firearm in connection with the offense, in violation of section 12022.53, subdivision (b). The information made no mention of

subdivision (d), which requires intentional discharge of a firearm, proximately causing great bodily injury or death. As Judge Berzon put it, "This omission is the pivotal fact in this case." (*Gautt*, *supra*, 489 F.3d at p. 999.)

Although the defendant in *Gautt* was charged in the information with an enhancement under subdivision (b), the jury's verdict form, as in the present case, asked them to find that he "personally discharged a firearm in the commission of the crime of MURDER that porximately [sic] caused the death of Samantha Fields, within the meaning of Penal Code Sections 12022.5(a)(1) and 12022.53(b)." (*Gautt*, *supra*, 489 F.3d at pp. 1000-1001.) "In other words, the verdict form cited to section 12022.53(b), but listed the personal discharge and proximate causation elements unique to section 12022.53(d)." (*Id.* at p. 1001.) Upon a true finding as to this allegation, defendant was sentenced to the 25-year-to-life enhancement prescribed by subdivision (d). The sentence was affirmed by the California Court of Appeal, which, however, "corrected" the abstract of judgment to refer to subdivision (d), rather than subdivision (b). This Court denied review. (*Ibid.*) The Ninth Circuit, relying on *Cole v. Arkansas*, *supra*, granted defendant relief, holding that the Sixth and Fourteenth Amendments confer the right to notice of the charges against a defendant, "*and that a*

charging document, such as an information, is the means by which such notice is provided." (*Id.* at p. 1004, italics added.) "In sum, Gautt was charged with a violation of section 12022.53(b), carrying a ten-year enhancement, but convicted of a violation of section 12022.53(d), requiring proof of three additional elements and carrying a twenty-five-year-to-life enhancement. Gautt's constitutional right to be informed of the charges against him was violated by this stark discrepancy between the crime charged and the crime of conviction." (*Id.* at p. 1008.) Equally apparent is the contradiction between the pleadings in the present case, which, pursuant to subdivision (b) of section 12022.53, exposed appellant to a 10 year enhancement on each of Counts 3 through 7, and the reality of the five consecutive 25-year-to-life sentences which were actually imposed.

Respondent in *Gautt* argued that there was no lack of adequate notice to the defendant because he could have surmised from other sources, such as evidence presented at the preliminary hearing or at trial, jury instructions, or arguments of counsel, the true nature of the charges and his consequent exposure. The Ninth Circuit roundly rejected that suggestion, noting that the Supreme Court "has never held that non-charging-document sources can be used to satisfy the Constitution's notice requirement in the present context." (*Gautt, supra*, 489 F.3d at p. 1009.) Moreover, even if it

were assumed that going outside the four corners of the information to look for signs of actual notice were permissible, eleventh hour notice that comes *after* the case is ready to go to the jury is of no help to a defendant settling on a defense strategy. (*Id.* at p. 1010.)

In the present case, in violation of the due process principles recognized in *Mancebo* and its progeny,[17] as well as in the federal cases cited, appellant faced a higher sentence after trial than the one authorized by the pleadings. The prosecution's ongoing commitment to an indeterminate sentence of 50 years to life remained unchanged until literally the morning of sentencing. It is true that the prosecutor significantly increased appellant's exposure by adding determinate sentences totaling 48 years. (6 CT 1423.) However, this figure was not fixed in stone. It depended upon the trial court's exercise of its discretion to run the determinate sentences consecutively rather than concurrently (see § 669) and also upon the

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[17] See, e.g., *People v. Perez*, *supra*, 18 Cal.App.5th at p. 618 [due process violation where prosecution failed to allege premeditated attempted murder but imposed sentence based on premeditation]; *People v. Perez*, *supra*, 240 Cal.App.4th at p. 1227 [*Mancebo*'s due process concerns better served by requiring enhancement to be pled and proved in connection with each count to which it is sought to be applied]; *People v. Botello*, *supra*, 183 Cal.App.4th 1014, 1022 [imposition of unpleaded section 12022.53, subdivision (e) enhancement would violate due process]; *People v. Arias*, *supra*, 182 Cal.App.4th at p. 1019 [recognizing that due process right to fair notice, as in *Mancebo*, requires prosecution to plead premeditated attempted murder in order to impose higher sentence based on premeditation].

exercise of the court's discretion *not* to strike the enhancement that the prosecutor sought to impose under and section 186.22, subdivisions (b)(1)(B) and (b)(1)(C).[18] (See 6 CT 1428-1429.) However, as seen earlier, at the time that sentence was imposed, the court had no discretion to strike 25-year-to-life terms that were imposed pursuant to section 12022.53, subdivisions (d) and (e). (See *People v. Palacios*, *supra*, 41 Cal.4th at p. 733.) Thus, appellant and his attorney were deprived of actual notice of the extent of appellant's true exposure when he was making his plea decision and deciding upon his trial strategy. *Mancebo* recognized that in some cases, including the case before it, a defendant might have difficulty successfully contesting the truth of well-pleaded allegations that increased his or her sentence, but nevertheless held firm to the requirement that the pleadings provide meaningful notice when decisions about trial strategy and plea bargaining needed to be made. (*Mancebo*, *supra*, 27 Cal.4th at p. 752; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 934-935 [counsel's duty to fully inform defendant of consequences of proposed plea bargain].)

In the case at bench, appellant was unambiguously told in the pleadings that his liability with respect to Counts 3 through 7 was a result of

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[18] See *People v. Fuentes* (2016) 1 Cal.5th 218, 222 [sentencing court has discretion under section 1385 to strike enhancement otherwise called for by section 186.22, subdivision (b)].)

what he was alleged to have done personally – i.e., use of a firearm in the commission of robberies and attempted robberies. Only on the day of sentencing, long after the information was of any use, he learned that he faced far more actual, unstayed prison time by reason of what "a principal" was alleged to have done in the commission of the robberies and attempted robberies. This cannot reasonably be construed as the fair notice guaranteed by due process of law under state and federal constitutional principles.

CONCLUSION

In the case at bar, appellant was never put on notice he was in danger of being sentenced to life terms under section 12022.53 because of a principal's discharge of a firearm. The prosecution's failure to make that reality clear by means of the charging document violated both the pleading rules found in *Mancebo*, which are applicable as well to vicarious liability under section 12022.53, and the fundamental requirement imposed by due process that a defendant is entitled to timely notice of the charges against him or her and the penal consequences thereof. Therefore, the judgment of the Court of Appeal should be reversed insofar as it affirms the imposition of the 25-year-to-life enhancements on Counts 3 through 7.

Respectfully submitted,

John Ward
Counsel for Appellant

WORD COUNT CERTIFICATE

Pursuant to rule 8.520(c) of the California Rule of Court, and in reliance on the word count of the computer program used to prepare this document, I hereby certify that this document contains 8,988 words.

_____
John Ward

DECLARATION OF SERVICE

Re: *People v. Anderson*, S253227

I, John Ward, declare that I am over eighteen years of age, and not a party to the within cause; my employment address is 584 Castro Street, Suite 802, San Francisco, California 94114. I served a true copy of the attached APPELLANT'S OPENING BRIEF ON THE MERITS, on each of the following, by placing same in envelopes addressed as follows:

Superior Court of California
County of San Francisco
850 Bryant Street
San Francisco, California 94103

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San Francisco County District Attorney
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Clerk, Court of Appeal
First Appellate District, Division Three
350 McAllister Street
San Francisco, California 94102

Each envelope was then, on May 13, 2019, sealed and deposited with the United States Postal Service at San Francisco, California, in the county in which I am employed, with the first class postage thereon fully prepaid.

I also electronically served true copies of the attached document on May 13, 2019, upon the following persons at the following email addresses:

First District Appellate Project
eservice@fdap.org

Office of the Attorney General
SFAG.Docketing@doj.ca.gov

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

Executed at San Francisco, California, on May 13, 2019.

_____
John Ward