No. S275940

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

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

Fourth Appellate District, Division One, Case No. D078919
San Diego County Superior Court, Case No. SCN363925
The Honorable Sim Von Kalinowski, Judge

ANSWER BRIEF ON THE MERITS

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June 19, 2023

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ISSUE PRESENTED

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

INTRODUCTION

Senate Bill No. 620 recently gave courts the discretion to strike firearm enhancements under Penal Code section 12022.53.[1] In *People v. Tirado* (2022) 12 Cal.5th 688, this Court held that, where a court exercises that discretion, it may choose to impose a lesser, uncharged section 12022.53 enhancement in place of a greater, charged enhancement under that section. That holding followed from the language in section 12022.53 specifying when a section 12022.53 enhancement may be imposed, and from the general principle that an uncharged, lesser enhancement may be substituted for a charged one so long as the facts supporting the lesser enhancement were properly found in connection with the charged enhancement. And, as the Court observed in *Tirado*, section 12022.53 otherwise contains no restriction on substituting a lesser enhancement under that same section.

In this case, appellant argues that *Tirado*'s rationale should extend to lesser, uncharged enhancements outside of section 12022.53. That is, he contends that when a court strikes an

[1] Unless otherwise noted, further statutory references are to the Penal Code.

enhancement under that section, it retains discretion to impose in its place a lesser enhancement from a different statute. The rationale of *Tirado* would support appellant's interpretation as a general matter. Section 12022.53, however, contains limiting language that was not at issue in *Tirado* and that alters the analysis here. Subdivision (j) of section 12022.53 directs that, once an enhancement under section 12022.53 has been found true, a court may not impose a lesser enhancement from a different statute in place of the section 12022.53 enhancement.

Appellant's construction of 12022.53 would necessarily render inoperative subdivision (j)'s section-12022.53-or-greater directive, which the Legislature did not alter when it passed Senate Bill No. 620. Accordingly, appellant's construction should be adopted only if sufficiently justified by other interpretive considerations. While appellant's arguments supporting his reading are not without force, they ultimately do not justify that reading. It is possible to harmonize subdivision (j)'s restricting language with the dismissal power established by Senate Bill No. 620 and with the legislative intent underlying that bill. And, on balance, the considerations advanced by appellant do not appear sufficient to justify a disfavored construction that would render inoperative the statutory provision at issue here. Any implementation of that construction should be left to the Legislature.

LEGAL BACKGROUND

A. The statutory scheme

Penal Code section 12022.53, also known as "'the 10-20-life law'" (*People v. Brookfield* (2009) 47 Cal.4th 583, 588-589), sets

out a "tiered system of sentencing enhancements" that apply to certain serious felonies committed with a firearm. (*Tirado, supra*, 12 Cal.5th at p. 692; § 12022.53, subd. (a).)[2] The statute calls for "three gradations of punishment based on increasingly serious types and consequences of firearm use" in the commission or attempted commission of the enumerated felonies. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 495.) It specifies a 10-year term when the defendant personally used a firearm, even if the firearm was not operable or loaded (§ 12022.53, subd. (b)); a 20-year term when the defendant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)); and a term of 25 years to life when the defendant personally and intentionally discharged a firearm causing great bodily injury or death to a person other than an accomplice (§ 12022.53, subd. (d)).[3] This "progressive punishment" "aligns with how a firearm was employed" in the enumerated felonies. (*People v. Chiu* (2003) 113 Cal.App.4th 1260, 1264.)

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[2] Such felonies include those specifically listed in the statute, as well as two general categories of felonies—those punishable by death or imprisonment in the state prison for life, and attempts to commit any of the enumerated felonies other than assault. (§ 12022.53, subd. (a)(1)-(18); see also *People v. Jones* (2009) 47 Cal.4th 566, 578-579.)

[3] Subdivision (d) also applies to the commission of a felony specified in section 246 (discharging firearm at inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, or inhabited camper), and section 26100, subdivisions (c) or (d) (discharging firearm from motor vehicle). (§ 12022.53, subd. (d).)

As originally enacted, subdivision (h) of section 12022.53 prohibited courts from striking a section 12022.53 enhancement, stating, "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Former § 12022.53, subd. (h); Stats. 1997, ch. 503, § 3, p. 3137.) Effective January 1, 2018, however, Senate Bill No. 620 amended subdivision (h), which now provides that a court "may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h); Stats. 2017, ch. 682, § 2; *Tirado, supra*, 12 Cal.5th at p. 696.)[4]

Senate Bill No. 620 left in place other parts of section 12022.53 that provide direction regarding the imposition of an enhancement under the statute. As relevant here, subdivision (j) of section 12022.53 states in its first sentence: "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." This provision "authorizes the imposition of enhancements under section 12022.53."

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[4] Section 1385 provides: "[A] judge or magistrate may, either on motion of the court or upon the application of the prosecuting attorney, and in furtherance of justice, order an action be dismissed." (§ 1385, subd. (a).) Pursuant to subdivision (b)(1) of section 1385, where "the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice." (§ 1385, subd. (b)(1).)

(*Tirado, supra*, 12 Cal.5th at p. 700.) It provides "guidance to a trial court when sentencing under the statute," and it "limit[s]" a "court's power to impose a section 12022.53 enhancement. (*Id.* at p. 695.)

Once a section 12022.53 enhancement is admitted or found true, the remaining sentence of subdivision (j) applies. (See *Tirado, supra*, 12 Cal.5th at p. 695.) That sentence states: "When an enhancement specified in this section has been admitted or found to be true, the court must impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other law, unless another enhancement provides for a greater penalty or longer term of imprisonment." (§ 12022.53, subd. (j).)

Subdivision (f) of section 12022.53 provides a similar limitation: "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." Subdivision (f) also prohibits the imposition of certain other firearm enhancements in addition to an enhancement under section 12022.53, and it prohibits the imposition of a great bodily injury enhancement in addition to the enhancement under section 12022.53, subdivision (d).

B. This Court's decision in *Tirado*

In *Tirado*, this Court considered whether a trial court could impose a lesser enhancement under section 12022.53,

subdivisions (b) or (c) after using its discretion to strike a greater section 12022.53, subdivision (d) enhancement, when the lesser enhancement had not been alleged and admitted or found true. (*Tirado*, *supra*, 12 Cal.5th at p. 692.) *Tirado* held that the statutory framework of section 12022.53 permits the trial courts to do so where the facts required by the lesser enhancements were alleged and necessarily found true by the trier of fact in returning the greater enhancement. (*Id.* at pp. 697-700.)

This Court in *Tirado* premised its analysis on the general rule that "a court is not categorically prohibited from imposing a lesser included, uncharged enhancement so long as the prosecution has charged the greater enhancement and the facts supporting imposition of the lesser enhancement have been alleged and found true." (*Tirado*, *supra*, 12 Cal.5th at p. 697.) With respect to section 12022.53, the Court observed that, while subdivision (h) "authorizes a trial court to 'strike or dismiss an enhancement otherwise required to be imposed by this section,'" and does not specifically authorize substitution of a lesser enhancement, subdivision "(j) is the subdivision that authorizes the imposition of enhancements under section 12022.53." (*Id.* at p. 700; see § 12202.53, subd. (j) [application of section 12022.53 enhancement requires that all required facts be alleged in the accusatory pleading and admitted or found true].)

The Court thus reasoned that subdivision (j) permits the imposition of a section 12022.53, subdivision (b) or (c) enhancement after a subdivision (d) enhancement is stricken because the facts necessary for the lesser enhancements are

included within the greater, subdivision (d) enhancement allegation. (*Tirado*, *supra*, 12 Cal.5th at p. 700.) The Court concluded, "When an accusatory pleading alleges and the jury finds true the facts supporting a section 12022.53(d) enhancement, and the court determines that the section 12022.53(d) enhancement should be struck or dismissed under section 12022.53(h), the court may, under section 12022.53(j), impose an enhancement under section 12022.53(b) or (c)." (*Ibid.*)[5]

The Court in *Tirado* further concluded that its interpretation of the statute was consistent with the legislative intent underlying Senate Bill No. 620, which was to grant courts "flexibility to impose lighter sentences in appropriate circumstances," while retaining the "core characteristics of the sentencing scheme," under which the punishments set forth in section 12022.53 "remained the default punishment." (*Tirado*, *supra*, 12 Cal.5th at pp. 701-702.)

STATEMENT OF THE CASE

A. Appellant's crime, conviction, and sentence

In 2016, appellant, who worked at a gun shop, became a shooting instructor to Diana Lovejoy, who was going through a divorce and custody battle with her estranged husband, Greg

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[5] The Court noted that "this general rule only applies when a true finding under section 12022.53(d) necessarily includes a true finding under section 12022.53(b) or (c)," which "would not be the case" where the offense to which the enhancement is sought to be applied is not among those specified in section 12022.53, subdivision (a). (*Tirado*, *supra*, 12 Cal.5th at p. 700, fn. 12.)

Mulvihill. (CT 21-23.) Appellant and Lovejoy began a sexual relationship and hatched a plan to kill Mulvihill. (CT 22-23.) Pursuant to their plan, late one night in September, appellant arranged to meet with Mulvihill in a secluded area. (CT 19-20.) Appellant hid in the bushes with a mounted AR-15 rifle and shot Mulvihill when he arrived. (CT 20, 23-24.) Mulvihill survived and ran away. (CT 20.)

A jury convicted appellant of conspiracy to commit murder (§ 182, subd. (a)(1)) and attempted murder with premeditation (§§ 187, subd. (a)(1), 189, 664). (CT 45, 103-104.) The jury found in connection with both counts that appellant personally and intentionally discharged a firearm, which proximately caused great bodily injury (§ 12022.53, subd. (d)), and that he personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)). (CT 45, 104-105.)

The court sentenced appellant to a total indeterminate term of 50 years to life. (CT 109-110.) The sentence consisted of an indeterminate term of 25 years to life for conspiracy to commit murder, plus a consecutive indeterminate term of 25 years to life for the section 12022.53, subdivision (d) firearm enhancement attached to that count. (CT 109-112.) The court stayed additional punishment under section 654. (CT 109-112.)[6]

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[6] Lovejoy was tried together with appellant and was convicted of the same offenses. The court sentenced her to prison for 26 years to life. (1 RT 74-75.) She is not a party to the current appeal.

B. Appellant's first appeal and resentencing

The Court of Appeal affirmed appellant's convictions. (Opn. 4; see *People v. Lovejoy et al.* (July 28, 2020, D073477) [nonpub. opn.].) It concluded, however, that when appellant was originally sentenced on January 31, 2018, the trial court was unaware that it had the discretion under recently-amended section 12022.53, subdivision (h) to strike the firearm enhancement. (Opn. 4-5.) Accordingly, the Court of Appeal remanded the case to the trial court for a new sentencing hearing in which the court could decide whether to exercise that discretion. (Opn. 4-5.)

At the ensuing resentencing, the trial court noted that appellant was "much more culpable" than Lovejoy and that the offenses were "extremely serious." (2 RT 123-125.) It declined to strike the firearm enhancement, and it reimposed the original sentence of 50 years to life. (CT 98-99, 121-122.)

C. The Court of Appeal's decision below

On appeal from the resentencing, appellant argued that remand was again required because, while the trial court knew at the resentencing hearing that it had the discretion to strike the section 12022.53, subdivision (d) enhancement, it was unaware that it also had discretion to impose a lesser-included section 12022.53, subdivision (b) or (c) enhancement in its place. (Opn. 6.) Appellant also argued that the trial court had discretion to impose any other uncharged lesser enhancement (not just those in section 12022.53), as long as the factual elements of that enhancement were pled and proved. (Opn 14.)

While the resentencing appeal was pending, this Court issued its decision in *Tirado,* supporting appellant's argument

that the trial court could have imposed lesser, uncharged enhancements under section 12022.53. (*Tirado*, *supra*, 12 Cal.5th at pp. 696, 701.) Following *Tirado*, the Court of Appeal remanded for resentencing. The court held that, because *Tirado* had not been decided when appellant was resentenced and the record did not demonstrate that the trial court was aware of its discretion to impose a lesser, uncharged section 12022.53 enhancement in its place as authorized by *Tirado*, appellant was again entitled to a new resentencing hearing. (Opn. 10-13.)

The Court of Appeal, however, rejected appellant's additional argument that the trial court could alternatively impose a lesser, uncharged enhancement under a different section after striking the section 12022.53, subdivision (d) enhancement. (Opn. 14.)[7] It held that "the plain language of section 12022.53, subdivision (j) provides that if the elements of a section 12022.53 enhancement have been alleged in the accusatory pleading and found true by the trier of fact, a trial court may impose an enhancement only under section 12022.53 and not under any other statute, unless the other statute provides for a greater penalty or longer term of imprisonment." (Opn. 14.) The Court of Appeal reasoned that this interpretation was consistent with *Tirado*'s analysis of the statute, including subdivision (j). (Opn. 14.)

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[7] The Court of Appeal initially agreed with appellant on this point, but, after the People filed a petition for rehearing, it issued a new opinion rejecting the argument.

In a concurring and dissenting opinion, Justice Dato concluded that, under the rationale of *Tirado,* subdivision (h) does not preclude imposition of a lesser included enhancement not specified in section 12022.53. (Dis. Opn. 1-5.) He reasoned that, when section 12022.53 was enacted, subdivision (h) complemented subdivision (j) by prohibiting trial courts from striking a section 12022.53 enhancement that had been alleged and found true. (Dis. Opn. 2-3.) The Legislature, however, amended subdivision (h) by "flipping it 180 degrees" to "expressly give[] the sentencing court discretion to strike a section 12022.53 enhancement." (Dis. Opn. 2-3.) Thus, in Justice Dato's view, when the court strikes an enhancement under subdivision (h), subdivision (j) then "plays no role at all" as "[i]t is inconceivable that the Legislature intended to grant judicial discretion in subdivision (h), only to have it taken away by subdivision (j)." (Dis. Opn. 3.)

ARGUMENT

SECTION 12022.53 SHOULD BE CONSTRUED IN A MANNER THAT DOES NOT RENDER A PORTION OF SUBDIVISION (J) INOPERATIVE

Appellant argues that when a trial court exercises its discretion under section 12022.53, subdivision (h) to strike an enhancement under that section, it is permitted to substitute not only a lesser, uncharged enhancement from the same statute (as this Court held was permissible in *Tirado*), but a lesser, uncharged enhancement from a different statute. He offers plausible reasons why the statute might be interpreted that way. His reading, however, would render inoperative the provision in

subdivision (j) of the statute stating that a court may not substitute a lesser enhancement from a different section once a jury finds true a section 12022.53 enhancement. Because that part of the statute would be made inoperative, such a reading is disfavored and would have to be justified by strong countervailing considerations.

When the Legislature amended section 12022.53 in 2018 to grant the trial courts the discretion under section 1385 to strike or dismiss a section 12022.53 enhancement, it did not amend but left intact subdivision (j), including its prohibition against substituting a lesser enhancement from a different statute. Although appellant argues that a plain reading of the statute shows that a dismissal under subdivision (h) necessarily supersedes the portion of subdivision (j) at issue here, it is nevertheless possible to harmonize the two statutory provisions, and doing so would not necessarily undermine section 12022.53's purpose or otherwise lead to absurd results. Thus, it does not appear that there is sufficient justification to adopt an interpretation of section 12022.53 that would make part of subdivision (j) inoperative.

A. Principles of statutory construction

"'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.) To properly ascertain the Legislature's intent, a reviewing court "must first look at the plain and commonsense meaning of the statute because it is generally the most reliable indicator of

legislative intent and purpose." (*People v. Cochran* (2002) 28 Cal.4th 396, 400.) "If there is no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said," and courts "need not resort to legislative history to determine the statute's true meaning." (*Id.* at pp. 400-401.)

To the extent the statutory text is ambiguous, a reviewing court may look to extrinsic interpretive aids, including the ostensible objectives to be achieved and the legislative history. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1369.) In construing a statute, this Court seeks where possible to avoid interpretations that render any part of it meaningless surplusage. (*Brennon B. v. Superior Court* (2022) 13 Cal.5th 662, 691; *People v. Valencia* (2017) 3 Cal.5th 347, 357; *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 828.) Ultimately, a court should adopt "'the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1369.)

B. An interpretation of section 12022.53 that would effectively render a portion of subdivision (j) inoperative is disfavored

Subdivision (j) has been part of section 12022.53 since its 1997 enactment. (Stat. 1997, ch. 503 (Assem. Bill No. 4) § 3.) The second sentence of that subdivision states: "When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other law, unless another

enhancement provides for a greater penalty or a longer term of imprisonment." As the Court of Appeal majority below recognized, the meaning of this text is plain: Where a section 12022.53 enhancement has been admitted or found true, the court is not permitted to impose in its place a lesser enhancement from a different statute. (Opn. 15-16; see also *People v. Lewis* (2022) 86 Cal.App.5th 34, 39 [subdivision (j) "is clear" that when "a section 12022.53 enhancement has been admitted or found true, the court may not substitute it out for a more lenient enhancement from a statute outside of section 12022.53"].)

Like the dissent below, and like at least one other court to have interpreted the statute, appellant advances a textual reading of section 12022.53 under which a court, after exercising its discretion to strike under subdivision (h), would be permitted to impose a lesser enhancement under a different statute. He argues that, by its own terms, section 12022.53, subdivision (j)'s second sentence does not apply in the event the trial court strikes a section 12022.53 enhancement under subdivision (h). (ABM 26-30, 54; see Dis. Opn. 4; *People v. Johnson* (2022) 83 Cal.App.5th 1074, 1089.) According to this reasoning, once a trial court strikes a section 12022.53 enhancement, that enhancement ceases to exist and there is therefore nothing left to which section 12022.53, subdivision (j)'s second sentence can apply. (ABM 27-30; Dis. Opn. 4; *Johnson*, *supra*, 83 Cal.App.5th at p. 1089.)

It is not clear, however, that, once a court exercises its discretion to strike a section 12022.53 enhancement under subdivision (h) of that statute, then subdivision (j) "cannot

possibly apply." (Dis. Opn. 4.) The operative event that triggers section 12022.53, subdivision (j)'s applicability is the admission or true finding on the section 12022.53 enhancement, not the court's ensuing determination to leave it intact. (See § 12022.53, subd. (j) ["*When an enhancement specified in this section has been admitted or found to be true*, the court shall . . . ."], italics added.) Moreover, in order to preserve the factual basis of the enhancement as specified in the first sentence of subdivision (j)—which would permit imposition of an uncharged enhancement under this Court's reasoning in *Tirado* (see *Tirado*, *supra*, 12 Cal.5th at p. 700)—it appears that a court would strike only the punishment and not the enhancement itself. (See § 1385, subd. (b)(1); see also Cal. Rules of Court, rule 4.428(b).) This is because "'[s]triking an aspect of an enhancement does not 'operate to defeat the factual finding of the truth of the allegation, instead, such act merely serves to prohibit a certain purpose for which the allegation may be used.'" (*People v. Fuentes* (2016) 1 Cal.5th 218, 225-226, brackets omitted.) If the court struck the enhancement itself, then no factual foundation would remain to support substitution of a different enhancement. (See *People v. Flores* (2021) 63 Cal.App.5th 368, 383 ["If a judge strikes the enhancement [under section 1385], it's as if the fact of the enhancement never existed"]; see also *People v. Barboza* (2021) 68 Cal.App.5th 955, 965 [the striking of a special circumstance

"means that in the eyes of the law, the original findings never existed. Once a jury's finding is stricken, it is stricken"].)[8]

But even granting the plausibility of appellant's competing construction of the statute, its significant consequence is that, in contrast to the Court of Appeal's construction, it effectively renders a part of subdivision (j) inoperative. Appellant acknowledges that, under his theory, when the sentencing court strikes or dismisses a section 12022.53 enhancement under subdivision (h), "the entire second sentence of subdivision (j) necessarily no longer has any application." (OBM 25-27.) He maintains, however, that the provision still operates to channel a court's imposition of the sentence when it elects *not* to strike or dismiss the section 12022.53 enhancement. (OBM 27.)

The latter would not be true in any practical sense, however. Because subdivision (h) now permits a court to exercise its discretion to dismiss a section 12022.53 enhancement, the court need not ever be constrained, under appellant's reading, to impose that or any other section 12022.53 enhancement instead of a lesser one. In the event that the court decides it would rather impose a lesser enhancement under a different statute, it need only exercise its discretion under subdivision (h).

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[8] Appellant argues that it would be "entirely illogical" to require the trial court to impose a section 12022.53 enhancement pursuant to subdivision (j), when subdivision (h) permits it to strike or dismiss that enhancement. (OBM 25.) That is true, and the People do not contend otherwise. The issue in this case is only whether a court may substitute *a different enhancement* once it strikes a section 12022.53 enhancement.

Subdivision (j)'s instruction that the court impose the section 12022.53 enhancement rather than a lesser enhancement under any other law would therefore serve no purpose, as the trial court would be able to circumvent it in every case in which a section 12022.53 enhancement is found.

It is a settled principle that courts should avoid construing a statute in a way that renders part of it inoperative, unless giving effect to all parts of the statute would conflict with its manifest purpose or would otherwise yield absurd results. (E.g., *Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 630; *People v. Leiva* (2013) 56 Cal.4th 498, 506; see *In re J.W.* (2002) 29 Cal.4th 200, 209 ["[T]he rule against interpretations that make some parts of a statute surplusage is only a guide and will not be applied if it would defeat legislative intent or produce an absurd result"], citing *People v. Rizo* (2000) 22 Cal.4th 681, 687.) Thus, the textual construction offered by appellant is disfavored and should be avoided unless that construction is strongly justified by countervailing interpretive considerations.[9]

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[9] Courts that have interpreted section 12022.53 as permitting imposition of a lesser uncharged enhancement from a different statute following dismissal under subdivision (h) appear to acknowledge subdivision (j)'s clear direction to the contrary. (See *Johnson*, *supra*, 83 Cal.App.5th at p.1089 ["We do not dispute that the directive to trial courts requiring they 'shall impose punishment for that enhancement pursuant to this section,' rather than leaving open an option to impose punishment under a statute with a sentencing scheme that permits more leniency, would indeed seem to preclude reduction to a section 12022.5 enhancement"]; *People v. Fuller* (2022) 83 Cal.App.5th 394, 402 ["We agree that the text suggests that the

(continued…)

C. Other interpretive considerations do not appear to justify disregarding a portion of subdivision (j)

Appellant offers a number of arguments in support of his interpretation of section 12022.53 as amended by Senate Bill No. 620. While not without some force, those arguments to do not appear to justify the disfavored interpretation he advances that would render inoperative the portion of subdivision (j) that is at issue.

1. Legislative intent

Appellant points to the legislative intent behind Senate Bill No. 620, as well as other recent legislative enactments, arguing that they show that the Legislature wanted to permit sentencing courts more flexibility to impose lower sentences. (OBM 33-38, 55.) It is not apparent, however, that giving effect to subdivision (j)'s prohibition against imposing a lesser enhancement outside of section 12022.53 conflicts with legislative intent, or that it does so in such a way that would justify dispensing with that prohibition.

(…continued)

only lesser enhancement that may be imposed when an enhancement under section 12022.53 has been found true would be another enhancement under section 12022.53"].) Those decisions nonetheless construe the statute differently based on other interpretive factors. (See *Johnson*, at pp. 1089-1092; *Fuller*, at pp. 400-403.) But they do not appear to have considered whether those factors strongly justify adopting a disfavored construction that renders a portion of subdivision (j) inoperative in every case.

Prior to section 12022.53's enactment in 1997, a person armed with a firearm in the commission or attempted commission of a felony was subject to penalties ranging from one year in prison to a maximum of 10 years. (See Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 4 (1997-1998 Reg. Sess.) as amended Apr. 28, 1997, citing former §§ 12022, subds. (a)(1), (a)(2), 12022.5, subds. (a)(1), (a)(2), (b)(2).) Other statutes set forth additional firearm enhancements to be imposed in specified circumstances. (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 4 (1997-1998 Reg. Sess.) as amended Apr. 28, 1997.)

In the late 1990s, however, the Legislature determined that these existing enhancement provisions "d[id] not adequately punish the perpetrators of gun violence" and were "complex and full of unnecessary loopholes and exceptions." (Assem. Rep. Caucus, Analysis of Assem. Bill No. 4 (1997-1998 Reg. Sess.) as amended Feb. 19, 1997.) To correct those perceived deficiencies, and with the goal of protecting Californians and deterring violent crime by imposing "substantially longer prison sentences . . . on felons who use firearms," the Legislature enacted section 12022.53 "as part of the state's 'Use a Gun and You're Done' law." (*Tirado, supra*, 12 Cal.5th at pp. 694, 701, citing Stats. 1997, ch. 503, § 1 et seq., p. 3135; see *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129 [section 12022.53 "was enacted to ensure that defendants who use a gun remain in prison for the longest time possible"].)

Section 12022.53 created a straightforward, three-tiered punishment scheme that mandated severe sentence

enhancements for those coming within its provisions. (See Assem. Com. on Appropriations, Analysis of AB 4 (1997-1998 Reg. Sess.).) As part of that scheme, subdivision (h) as originally enacted required a court to impose punishment for any section 12022.53 enhancement that had been alleged and found true, in addition to the punishment it imposed for the underlying felony. (See former § 12022.53, subd. (h); see also former § 12022.5, subd. (c) [same mandatory provision].)

More than twenty years later, the Legislature determined based on emerging research that lengthy sentences might not be an effective deterrent and could even be counterproductive. (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 620 (2017-2018 Reg. Sess.) p. 5, as amended March 28, 2017; see *Tirado, supra*, 12 Cal.5th at p. 701 [noting "the enhancement scheme 'caus[ed] several problems,'" and increased the prison population, as well as the state's budget devoted to corrections].) It therefore enacted Senate Bill No. 620, which amended subdivision (h) of section 12022.53 to give trial courts the discretion to strike or dismiss an enhancement otherwise required to be imposed by sections 12022.53 "in the interest of justice and pursuant to section 1385." (§ 12022.53, subd. (h); § 12022.5, subd. (c).)[10]

By granting sentencing courts the discretion to strike a firearm enhancement, "relief would be available to a deserving

[10] Senate Bill No. 630 similarly amended section 12022.5. (See § 12022.5, subd. (c).)

defendant, while a defendant who merited additional punishment for the use of a firearm in the commission of a felony would receive it." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 620 (2017-2018 Reg. Sess.) p. 4, as amended June 15, 2017.) "SB 620 [did] not dispose of existing sanctions for serious felony offenses. Rather, SB 620 allow[ed] a court to use judicial discretion and take into account the nature and severity of the crime and other mitigating and aggravating circumstances during sentencing. Consequently, SB 620 provides judges the ability to impose sentences that fit the severity of the offender." (*Id*. at p. 6.)

And while Senate Bill No. 620 provided courts with discretion to strike or dismiss section 12022.53 enhancements or their associated punishments, it did not lessen the severity of the punishments in section 12022.53 or result in any other changes to 12022.53. As this Court explained in *Tirado*, the history of Senate Bill No. 620 "reflects a legislative intent to retain the core characteristics of the sentencing scheme. More severe terms of imprisonment with the harshest applicable sentence remained the default punishment. However, courts were granted the flexibility to impose lighter sentences in appropriate circumstances." (*Tirado*, *supra*, 12 Cal.5th at pp. 701-702.)

To be sure, Senate Bill No. 620 was animated by a legislative intent to grant trial courts the power to impose lighter sentences where appropriate by striking or dismissing section 12022.53 enhancements. As this Court held in *Tirado*, because section 12022.53, subdivision (j) authorizes the imposition of a

lesser, uncharged section 12022.53 enhancement necessarily encompassed by a greater enhancement from that section that has been alleged and found true, the sentencing court may impose the lesser enhancement in place of the greater one. (*Tirado*, *supra*, 12 Cal.5th at pp. 700-701.) This accords with the Legislative intent undergirding Senate Bill No. 620 because it affords the courts the "flexibility to impose lighter sentences in appropriate circumstances," while ensuring that "more severe terms of imprisonment with the harshest applicable sentence remain[] the default punishment." (*Id*. at pp. 701-702.) And as appellant notes, other recently-enacted legislation evinces a more general trend toward increased sentencing flexibility and amelioration of punishments. (See, e.g., Senate Bill No. 81 (Stats. 2021, c. 721, § 1, eff. Jan. 1, 2022); Assembly Bill No. 2167 (Stats. 2022, c. 775, § 2, eff. Jan. 1, 2023).)

But while the Legislature undoubtedly intended to confer additional sentencing flexibility by amending section 12022.53, subdivision (h), there is little to suggest the Legislature intended to grant courts the specific discretion to impose in place of a section 12022.53 enhancement a lesser enhancement from a different statute, in contravention of the statutory language that it chose not to amend. In other words, it is not clear that the Legislature intended, as appellant contends, to give courts "maximum flexibility" to pick any lesser enhancement from "the entire scheme of related firearm enhancements in Part 4, Title 2" in place of a stricken section 12022.53 enhancement. (OBM 34-35, 45-46.) The fact that Senate Bill No. 620 "sought to give trial

courts some more options does not mean it was intended to give courts unlimited options." (*Lewis, supra*, 86 Cal.App.5th at p. 42.) After all, "'no legislation pursues its purposes at all costs.'" (*In re Friend* (2021) 11 Cal.5th 720, 740 ["'Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law'"], quoting *Rodriguez v. United States* (1987) 480 U.S. 522, 525-526.)

In a similar vein, appellant contends that it would be unreasonable to limit sentencing courts to the binary choice of striking a section 12022.53 enhancement in its entirety or imposing a section 12022.53, subdivision (b), (c), or (d) enhancement. (OBM 56.) The Legislature, however, could have made a reasonable choice to restrict trial courts to the punishments listed in section 12022.53 upon a true finding on a section 12022.53 enhancement allegation. Section 12022.53 has limited application, as it applies only to the 16 dangerous felonies listed in subdivision (a), attempts to commit one of those 16 felonies, or felonies punishable by death or imprisonment for life. By limiting the enhancements in section 12022.53 to gun use or discharge during the commission of the crimes identified in subdivision (a), the Legislature has determined that section 12022.53's terms are proportionate to the seriousness of the offense. (Accord, § 1170, subd. (a)(1) [stating that "when a sentence includes incarceration," public safety "is best served by

terms that are *proportionate to the seriousness* of the offense with *provision for uniformity* in the sentences of offenders committing the same offense under similar circumstances"].)

The Legislature could also have concluded that the sentencing options available to a court in light of section 12022.53, subdivision (j) are sufficiently varied to fulfill its goal of increased sentencing flexibility. For example, if the court in appellant's case decides to strike the punishment for one of appellant's section 12022.53, subdivision (d) enhancements (which provide for terms of 25 years to life), it would have the choice to impose a 20-year enhancement under subdivision (c), a 10-year enhancement under subdivision (b), or no additional punishment at all, either by striking the section 12022.53, subdivision (d) enhancement in its entirety, or by striking the punishment for it and declining to impose a lesser section 12022.53 punishment in its place.

That level of flexibility would satisfy Senate Bill No. 620's legislative intent to retain the core characteristics of section 12022.53 because the "harshest applicable sentence remain[s] the default punishment," but courts are "granted the flexibility to impose lighter sentences" to deserving defendants by striking the additional term for an enhancement that prior to Senate Bill No. 620, had to be imposed, regardless of whether the court felt the defendant deserved a lighter sentence. (See *Tirado, supra*, 12 Cal.5th at pp. 701-702.) Conversely, if trial courts were free to impose a lesser enhancement from a different statute, section 12022.53 would cease to be the "default punishment" for the use

or discharge of a firearm in the circumstances specified in section 12022.53. (*Ibid.*) This would appear to conflict with the Legislature's intent to retain section 12022.53's primacy as a "core characteristic[] of the sentencing scheme." (*Id.* at p. 701.) At the least, subdivision (j)'s continued prohibition against substituting a lesser, uncharged enhancement from a different statute does not appear to be so contrary to the legislative intent underlying Senate Bill No. 620 that it would support the conclusion that the Legislature necessarily intended to implicitly nullify that portion of the statute.

2. Subdivision (f)

Appellant argues that the amendment to section 12022.53, subdivision (h) rendered a portion of subdivision (f) of the statute inoperative, and so there should be no barrier to interpreting subdivision (h) the same way with respect to subdivision (j). (OBM 30-32, 54.) There is no part of subdivision (f), however, that is parallel to subdivision (j)'s restriction on substituting an enhancement outside of section 12022.53. That provision, unlike the portion of subdivision (f) that appellant points to, can be harmonized with subdivision (h).

As appellant observes, under the new dismissal authority conferred by subdivision (h), a court need not abide by subdivision (f)'s requirement to "impose upon that person the enhancement that provides the longest term of imprisonment." That portion of subdivision (f) is no longer operative simply as a necessary consequence of the directly-conflicting amendment to subdivision (h). There is no alternative way to interpret that

portion of subdivision (f) so that it might retain any effect after the amendment to subdivision (h).[11]

But the same is not true of the portion of subdivision (j) that prohibits substitution of an enhancement outside of section 12022.53. That prohibition may be interpreted together with subdivision (h) in a way that does not render it inoperative. Thus, while subdivision (f) must be interpreted as partially inoperative for lack of any plausible alternative, that is not necessarily true as to subdivision (j). Rather, the question as to subdivision (j) is whether a construction that would render a part of it inoperative should be adopted over another available construction that would preserve that part of the statute.

To be sure, that a part of subdivision (f) has been rendered inoperative suggests that the Legislature may have anticipated that its amendment to subdivision (h) would have the same effect on other parts of section 12022.53. Nonetheless, it does not necessarily indicate that the Legislature so intended with respect to subdivision (j)'s prohibition against the substitution of a lesser, uncharged enhancement outside of section 12022.53.[12]

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[11] Insofar as a court declines to strike a section 12022.53 enhancement, then the remaining parts of subdivision (f), which prohibit the imposition of other firearm or great bodily injury enhancements in addition to the section 12022.53 enhancement, would remain operative.

[12] Appellant similarly argues that the Court of Appeal's interpretation of section 12022.53 "reads the second sentence of subdivision (j) in two different directions." (OBM 53.) On the one hand, he contends, the instruction that a court "shall impose" punishment under section 12022.53 is no longer applicable; while

(continued…)

3. *Tirado* and *Fialho*

Appellant argues that this Court's opinion in *Tirado* compels an interpretation of section 12022.53 that allows for the imposition of a lesser enhancement from another statute. (OBM 38-42, 46-50.) *Tirado* reasoned that courts are generally empowered to substitute an uncharged enhancement for a charged enhancement so long as the facts supporting the uncharged enhancement have been alleged and found true. (*Tirado*, *supra*, 12 Cal.5th at p. 697.) And it held that the general rule applies to section 12022.53 because subdivision (j) of that statute requires the facts supporting the enhancement to be alleged and found true, thus providing support for any uncharged lesser enhancement under the same statute. (*Id.* at p. 700.)

The People acknowledge that, but for the limiting language in section 12022.53, subdivision (j), the principles discussed in

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(…continued)

on the other the prohibition against imposing a lesser, uncharged enhancement under a different section would be given effect. (OBM 53.) To the extent it is possible to read the "shall impose" portion of subdivision (j) in isolation, it is true that this part of subdivision (j) is inoperative since a court is no longer required under subdivision (h) to impose the section 12022.53 enhancement. But again, that is because there is no other plausible interpretation that would preserve its operation in the face of subdivision (h)'s clear command. Because the portion of subdivision (j) that prohibits substitution of an enhancement from a different section may be interpreted in a way that harmonizes with subdivision (h) and preserves its operation, that portion presents a different question of statutory construction. This is not inconsistent with the fact that other portions of the statute may be rendered inoperative by amended subdivision (h).

Tirado would support imposition of an uncharged enhancement even under a different statute, so long as the section 12022.53 finding encompassed the facts necessary to support the uncharged enhancement. *Tirado* had no occasion, however, to address section 12022.53, subdivision (j)'s prohibition on the imposition of a lesser enhancement from a different statute, since the lesser enhancements at issue there were themselves section 12022.53 enhancements. (See *Lewis*, *supra*, 86 Cal.App.5th at p. 41 [giving effect to section 12022.53, subdivision (j) "does not run afoul of *Tirado*, which did not address 'whether trial courts have discretion to strike a section 12022.53(b) enhancement and substitute an uncharged, section 12022.5(a) enhancement'"], citation omitted.) Indeed, in *Tirado*, this Court recognized that the legislature could have drafted a statute that limited the court's ability to impose a subdivision (b) or (c) enhancement once it struck a subdivision (d) enhancement, but it concluded that nothing in section 12022.53's language restricted a court in that way. (*Tirado, supra*, 12 Cal.5th at p. 699.) As relevant in this case, on the other hand, subdivision (j)'s language does contain a prohibition on the imposition of a lesser enhancement outside of section 12022.53 itself.

Appellant additionally relies on *People v. Fialho* (2014) 229 Cal.App.4th 1389, which this Court discussed in *Tirado* (see 12 Cal.5th at pp. 698-699). (OBM 42-43, 49.) In *Fialho*, the jury rendered a true finding on a section 12022.53 enhancement—but, as it turned out, not in connection with any offense listed in section 12022.53. (*Fialho*, at pp. 1391-1393, 1395.) Thus, the

section 12022.53 enhancement found true in that case could not be validly imposed. (*Id*. at p. 1395.) Nevertheless, because the jury's true finding on the section 12022.53 enhancement included all necessary facts to impose an enhancement under section 12022.5, subdivision (a), the trial court imposed a 10-year enhancement pursuant to that section. (*Id*. at p. 1394.)

On appeal, the defendant contended that the section 12022.5, subdivision (a) enhancement was improper because it had not been alleged in the information or found true by the jury. (*Fialho*, *supra*, 229 Cal.App.4th at p. 1392.) The *Fialho* court rejected the argument, concluding that the section 12022.53 enhancement allegation put the defendant on notice of any lesser enhancements necessarily included within it, including the section 12022.5 enhancement at issue. (*Id*. at p. 1397.) Because of that, and because substantial evidence supported the imposition of the section 12022.5, subdivision (a) enhancement, the court concluded that the substitution was legally permissible. (*Id*. at pp. 1397-1398.)

Like *Tirado*, *Fialho* did not address the limiting language in subdivision (j), which was not at issue there. Rather, in *Fialho*, no enhancement under section 12022.53 could lawfully be imposed and therefore none of the statutory provisions regarding the court's imposition of an enhancement under that section were relevant. (See *Lewis*, *supra*, 86 Cal.App.5th at p. 41, fn. 8.) As this Court noted in *Tirado*, the general rule permitting imposition of a lesser section 12022.53 enhancement in place of a greater enhancement from that statute "only applies when a true

finding under section 12022.53(d) necessarily includes a true finding under section 12022.53(b) or (c)," which "would not be the case" where the underlying offense is not one "'specified in subdivision (a),' as required for imposition of an enhancement under section 12022.53(b) or (c)." (*Tirado*, *supra*, 12 Cal.5th at p. 700, fn. 12; quoting § 12022.53, subds. (b), (c).)

This Court's decision in *Tirado* discussed *Fialho* in connection with the principle that "imposition of an uncharged enhancement is permitted so long as the facts supporting its imposition are alleged and found true." (*Tirado*, *supra*, 12 Cal.5th at p. 699.) But because neither case addressed the limiting language in subdivision (j) that is at issue here—or had any reason to do so—those decisions do not provide a rationale for adopting appellant's construction of section 12022.53 notwithstanding that it would render that limiting language inoperative. (See *People v. Baker* (2021) 10 Cal.5th 1044, 1049 ["Cases are not authority for propositions not considered"].)[13]

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[13] The same is true of the other cases appellant relies on. (See OBM 40-42.) *People v. Strickland* (1974) 11 Cal.3d 946, *People v. Allen* (1985) 165 Cal.App.3d 616, and *People v. Lucas* (1997) 55 Cal.App.4th 721, did not concern section 12022.53, but section 12022.5, and they therefore did not implicate section 12022.53, subdivision (j) and its prohibition on the imposition of a lesser enhancement from a different statute. *People v. Dixon* (2007) 153 Cal.App.4th 985, involved a section 12022.53 enhancement allegation, but, as in *Fialho*, there was no section 12022.53 enhancement that could be validly applied in the first place, as the prosecution had failed to prove that the weapon involved was a "firearm" necessary for section 12022.53 (and, consequently, its subdivision (j)) to apply. (*Dixon*, at p. 1001.)

4. Other canons of construction

In support of his interpretation of section 12022.53, appellant also invokes general canons of construction, pointing out that "[i]f conflicting statutes cannot be reconciled, later enactments supersede earlier ones, and more specific provisions take precedence over more general ones." (OBM 44, quotation marks, alteration, and citations omitted; see *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 942.) These canons apply, however, only when an irreconcilable conflict exists between the provisions at issue. (*Pacific Lumber*, at pp. 942-943.) No such irreconcilable conflict exists here. The portion of subdivision (j) that directs a trial court not to impose a lesser enhancement under any other statute does not conflict with a court's discretion to strike a section 12022.53 enhancement under section (h). The construction adopted by the Court of Appeal below gives effect to both subdivision (h) and subdivision (j): Under the former, a court may exercise its discretion to strike a section 12022.53 enhancement altogether or to impose a lesser, uncharged enhancement under that section after striking the greater; but under the latter, the court may not substitute an uncharged lesser included enhancement from a different section. It is instead appellant's construction that brings subdivision (h) into conflict with subdivision (j) by rendering a portion of subdivision (j) inoperative. Thus, the canons relied upon by appellant do not justify the disfavored construction he advances.

* * * * *

In amending section 12022.53, subdivision (h), the Legislature could have, but did not, alter subdivision (j). It is free to do so in the future. (See *Lewis, supra*, 86 Cal.App.5th at p. 42 ["If the Legislature wanted to expand sentencing options, it would need to amend section 12022.53, subdivision (j). And, of course, it is free to do so"].) As it currently stands, however, it does not appear that there is sufficient justification to adopt a construction that would render inoperative subdivision (j)'s prohibition against substitution of a lesser enhancement from a different section.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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June 19, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached A**NSWER BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains **7,816** words.

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June 19, 2023

Supreme Court of California
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