No. S271178

In the Supreme Court of the State of California

IN RE MIGUEL ANGEL CABRERA,
ON HABEAS CORPUS.

Third Appellate District, Case No. C091962
Siskiyou County Superior Court, Case No. SCCR-HCCR-2018-912-1
The Honorable JoAnn Bicego, Judge

ANSWER BRIEF ON THE MERITS

ROB BONTA (SBN 202668)
Attorney General of California
LANCE E. WINTERS (SBN 162357)
Chief Assistant Attorney General
MICHAEL P. FARRELL (SBN 183566)
Senior Assistant Attorney General
MICHAEL A. CANZONERI (SBN 131649)
Supervising Deputy Attorney General
RACHELLE A. NEWCOMB (SBN 173495)
Deputy Attorney General
*ERIC L. CHRISTOFFERSEN (SBN 186094)
Supervising Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7686
Fax: (916) 324-2960
Eric.Christoffersen@doj.ca.gov
Attorneys for Respondent

March 15, 2022

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

ISSUE PRESENTED

Did the sentencing court err by finding petitioner's conviction for battery with serious bodily injury (Pen. Code, § 243, subd. (d)) was a serious felony (*id*., §§ 667, subd. (a)(1), 1192.7, subd. (c)(8)), despite the jury's failure to reach a verdict on the attached allegation that petitioner personally inflicted great bodily injury (*id*., § 12022.7, subd. (a))? (See *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Blakely v. Washington* (2004) 542 U.S. 296; *Cunningham v. California* (2007) 549 U.S. 270.)

INTRODUCTION

Under the Sixth Amendment to the United States Constitution, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 490.) This case turns on a deceptively simple issue—whether a factual finding of serious bodily injury constitutes a factual finding of great bodily injury. If so, consistent with the Sixth Amendment, a jury finding of serious bodily injury may be used to increase punishment under a statute that requires a finding of great bodily injury. If not, then the Sixth Amendment would prohibit the use of a serious bodily injury finding to increase punishment in place of a great bodily injury finding.

Petitioner Miguel Angel Cabrera was convicted, among other offenses, of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (d)) and of battery with

serious bodily injury (Pen. Code, § 243, subd. (d)).[1] Though the jury convicted Cabrera of battery with serious bodily injury, it was unable to reach agreement on enhancement allegations that Cabrera had personally inflicted great bodily injury on the victim during the commission of the underlying offenses (§ 12022.7, subd. (a)), and those allegations were dismissed.

At sentencing, the trial court designated the battery with serious bodily injury as a "serious felony" pursuant to section 1192.7, subdivision (c)(8), which applies to "any felony in which the defendant personally inflicted great bodily injury on any person, other than an accomplice." In making this designation, the trial court concluded the jury's finding of serious bodily injury was the equivalent of a finding of great bodily injury. Because his conviction for battery with serious bodily injury was a serious felony, and because he had previously been convicted of committing several other serious felonies, Cabrera received a five-year enhancement to his prison sentence (§ 667, subd. (a)).

Cabrera argues that the trial court violated his Sixth Amendment rights by treating the jury's finding of serious bodily injury as the equivalent of a finding of great bodily injury. His argument fails, however, because the trial court did not engage in any fact-finding prohibited by the Sixth Amendment on the issue of great bodily injury. Rather, the trial court properly recognized that, in California, a finding of serious bodily injury necessarily constitutes a finding of great bodily injury. Thus, the trial court

---

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

simply gave the proper legal effect to the jury's serious bodily injury finding.

Nor does the jury's inability to reach unanimous agreement on the great bodily injury enhancement allegations provide Cabrera any relief. The jury's inability to reach agreement "is evidence of nothing" other than it "failed to decided anything." (*Yeager v. United States* (2009) 557 U.S. 110, 124.) That failure has no effect on other verdicts or findings by a jury, and thus has no impact on the legal conclusion that Cabrera's conviction for battery with serious bodily injury constituted a serious felony.

STATEMENT OF THE CASE

A. A jury convicts Cabrera of battery with serious bodily injury but fails to reach a verdict on the great bodily injury enhancement allegations; the trial court sentences Cabrera

On July 6, 2006, while drinking at a local bar, Curtis Barnum met some men and invited them back to his house. (2RT 318-319 [C058828].)[2] One of the men was Cabrera. (1RT 287 [C058828].) At Barnum's house, Cabrera and Barnum argued, with Cabrera saying something about a "deal." (1RT 287, 289 [C058828].)

---

[2] In its order issuing an Order to Show Cause, the Court of Appeal incorporated by reference the records of three matters: the 2008 direct appeal in *People v. Cabrera* (C058828); the 2016 appeal from denial of resentencing in *People v. Cabrera* (C081532), and the 2019 habeas proceedings in *In re Cabrera* (C088611). To avoid confusion, when citing to these matters, the People will refer to the Court of Appeal's applicable case number (e.g., CT 20 [C081532]). Undesignated citations are to the DCA record in the present case, C091962.

During the argument, Cabrera punched Barnum in the face. (1RT 290 [C058828].) As a result of the punch, Barnum was "unconscious on his feet," fell to the ground, and struck his head on the concrete driveway. (1RT 290-291 [C058828].) "There was blood everywhere." (1RT 290 [C058828].) Barnum appeared unconscious on the ground and remained unconscious for one-and-a-half to two minutes. (2RT 341, 343 [C058828].)

In response to questioning from law enforcement, Cabrera admitted that he had punched the victim in the mouth. (2CT 269-270, 275, 277, 279, 285 [C058828].)

Barnum had a one-inch laceration to the back of his head that took three sutures to close. (2RT [C058828] 422.) "The wound was more extensive than that because there was a large swelling surrounding the wound with blood in it." (2RT [C058828] 434.) Barnum's skull was visible within the wound. (2RT 442 [C058828].) In the treating doctor's opinion, Barnum's injury was "a significant or substantial physical injury." (2RT 442 [C058828].) In the 18 months between the offenses and the trial, Barnum continued to suffer bouts of dizziness. (2RT 324 [C058828].)

Among other offenses, Cabrera was charged in counts 1 and 2 with assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)) and battery with serious bodily injury (§ 243, subd. (d), count 2). As to those counts, it was alleged that Cabrera personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)). (1CT 1-4 [C058828].) Finally, it was alleged that Cabrera had four prior felony convictions that were

serious felonies and strikes (§§ 667, subds. (a)(1), (c), 1170.12, subd. (c)). (1CT 6-7 [C058828].)

At Cabrera's trial, the jury was instructed with definitions of both great bodily injury and serious bodily injury.

> Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

(3RT 746-747 [C058828].)

> A serious bodily injury means a serious impairment of physical condition. Such an injury may include but is no [*sic*] limited to loss of consciousness, concussion, bone fracture, protracted loss or impairment of function of any bodily member or organ, a wound requiring extensive suturing and serious disfigurement. Loss of consciousness and a wound or cut requiring extensive suturing is a serious bodily injury.

(3RT 747-748 [C058828].)

During deliberations, the jury submitted a question, "May we have specific definitions of mild and moderate injury as they relate to assault?" (3RT 816 [C058828].) The court responded, "there really are no specific definitions" and it is "up to you to apply your collective common sense and wisdom, to apply the terminology to the case before you. So that is more your job than our job to try to find you an express definition. The answer is that there is no more specific definition." (3RT 819-820 [C058828].)

The jury later submitted another question, "We are having problems reconciling the differences between great bodily injury and serious bodily injury. If we agree the injury was severe, are

we bound to agree that the great bodily injury occurred?" (3RT 836 [C058828].) The court first referred the jury to the definitions of the two terms in the instructions and repeated those definitions to the jury. (3RT 840 [C058828].) The court then instructed the jury:

> There are—as I just read to you, serious bodily injury is not defined exactly the same as great bodily injury. I would like you to just focus in on the statutory language in each instance and see in your wisdom and your collective common sense as jurors whether you believe that the conduct that you found to have actually occurred comes within that definition.
>
> We can't really do much more than tell you that.
>
> The word "severe" which you had mentioned in your question is actually not in either one of those definitions. So I would like you to focus on whether in your mind you have determine [*sic*] what conduct did occur, and then in your mind you have to determine whether it comes within the meaning of serious bodily injury as defined in that section or it comes within the meaning of great bodily injury as defined in that section.
>
> It is—they are not necessarily mutually exclusive so it's entirely—it could certainly occur that the same conduct could comprise serious bodily injury and great bodily injury.
>
> In other words, they are not mutually exclusive. Other than that, I don't know that we can do much for you—more for you.

(3RT 840-841 [C058828].)

Subsequently, the jury indicated that it was deadlocked (11 to 1) on the section 12022.7, subdivision (a) enhancements

charged in counts 1 and 2. (3RT 846-847 [C058828].) The court declared a mistrial on those allegations. (3RT 848 [C058828].)

The jury convicted Cabrera on the assault and battery charges in counts 1 and 2. (3RT 848-852 [C058828].) The jury also found the prior conviction allegations to be true. (3RT 852-853 [C058828].)

Prior to sentencing, Cabrera argued that the court should not impose the five-year prior serious felony enhancements (§ 667, subd. (a)(1)) alleged as to the assault and battery counts. (4RT 890-891.) Cabrera asserted that because the jury had "rejected" the great bodily injury allegation, the trial court could not "essentially override that determination in making a finding on its own." (4RT 891.)

On that issue, the prosecutor argued, "the conviction of count 1 constitutes a serious felony and, more importantly, we believe that the conviction of count 2 constitutes it because the evidence showed that the jury found that serious bodily injury was, in fact, inflicted by Mr. Cabrera on the victim." (4RT 884 [C058828].) The prosecutor further argued that "the authorities section under Cal-Crim 925 states clearly that serious bodily injury and great bodily injury are essentially equivalent elements and it cites People v. Burroughs at 35 Cal.3d 824, page 831." (4 RT 885 [C058828].) The prosecutor also cited to *People v. Hawkins* (1993) 15 Cal.App.4th 1373 as holding "that battery with serious bodily injury is great bodily injury. And therefore, the enhancement of great bodily injury is not applicable." (4 RT 885 [C058828].)

Subsequently, at sentencing (4RT 896-905 [C058828]), the trial court rejected defense counsel's objection to imposition of the prior serious felony enhancements. The court explained that "there is a considerable amount of evidence that the current crimes . . . are serious felonies pursuant to 667(a) . . . ." (4RT 899 [C058828].) The court further noted, "[G]oing back for a minute to whether or not the current crimes are serious felonies, I think the cases cited by [the prosecutor], the Burroughs case, 35 Cal.3d 824 and the Hawkins case, 15 Cal.App.4th 1373, are applicable." (4RT 901 [C058828].)

Under the three strikes sentencing scheme, on both the assault and battery counts, the court sentenced Cabrera to indeterminate terms of 25 years to life plus consecutive determinate five-year terms for the prior serious felony enhancements. (2CT 512 [C058828].) But the court stayed the sentence for the battery with serious bodily injury pursuant to section 654. (2CT 512 [C058828].)

The Court of Appeal affirmed the judgment and sentence on counts 1 and 2. (Opinion 11 [C058828].) Cabrera did not, on appeal, contest the trial court's finding that his battery with serious bodily injury conviction was a serious felony within the meaning of section 1192.7, subdivision (c)(8).

B. Cabrera's petition for resentencing pursuant to section 1170.126 is denied

In 2014, Cabrera filed, in Siskiyou County Superior Court, a petition for resentencing pursuant to section 1170.126. (CT 2-6 [C081532].) At the resentencing hearing, Cabrera sought to challenge the validity of the serious felony designations for his

assault and battery convictions. (CT 217-218 [C081532].) The court denied the petition. (CT 229 [C081532].)

In a published opinion, the Court of Appeal affirmed the denial of resentencing. (*People v. Cabrera* (2018) 21 Cal.App.5th 470, 478.) The court held that Cabrera could not challenge, in the resentencing proceedings, the validity of designations by the sentencing court because they were final. (*Id*. at pp. 476-477.) The court further rejected Cabrera's argument that his sentence was unauthorized and subject to correction at any time. (*Id*. at pp. 477-478.)

C. Cabrera seeks habeas corpus relief on the ground that his prior serious felony enhancements were improperly imposed

In 2018, Cabrera filed a petition for writ of habeas corpus in the Siskiyou County Superior Court. (Petition for Writ of Habeas Corpus (Petition), Exh. 2.) Cabrera asserted the trial court had erred by designating the assault and battery convictions as serious felonies. (Petition, Exh. 2.) In a reasoned opinion, the superior court denied the petition. (Petition, Exh. 2.)

Cabrera then filed a petition for writ of habeas corpus in the Court of Appeal. (3DCA Docket, C088611.) The court denied the petition as untimely. (3DCA Docket, C088611.)

On July 10, 2019, this Court granted review and transferred the matter back to the Court of Appeal directing it "to issue an order to show cause returnable before the Siskiyou County Superior Court . . . why petitioner is not entitled to dismissal of the great bodily injury finding and the resulting five-year serious felony enhancement (see Pen. Code, § 667, subd. (a)(1)), based on

his claim of ineffective assistance of appellate counsel. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Blakely v. Washington* (2004) 542 U.S. 296; *Cunningham v. California* (2007) 549 U.S. 270.)" (Docket, S256165). On July 22, 2019, the Court of Appeal issued the order to show cause as directed by this Court. (3DCA Docket, C088611.)

Following the order to show cause, the Siskiyou County Superior Court denied habeas relief on Cabrera's claim of ineffective assistance of appellate counsel. (Petition, Exh. 3.) The court explained that Cabrera could not satisfy the prejudice prong of his ineffectiveness claim. (Petition, Exh. 3.)

On May 20, 2020, Cabrera filed another habeas petition in the Court of Appeal. (Opn. 8.) Following informal briefing, the court issued an order to show cause. (Opn. 8.) On August 25, 2021, the court denied habeas relief, concluding that Cabrera had "failed to show prejudice in the form of a reasonable probability of a different outcome had appellate counsel raised an *Apprendi* issue." (Opn. 13.) This Court granted review.

SUMMARY OF ARGUMENT

This case concerns the extent that a finding of serious bodily injury equates to a finding of great bodily injury. As a matter of California law, serious bodily injury and great bodily injury require similar severity of injury, but as the more generally applicable statute, the statutory definition of great bodily injury in section 12022.7 covers a greater range of injuries. Thus, serious bodily injury constitutes a subset of injuries within great bodily injury.

The statutory definitions of serious bodily injury and great bodily injury use similar language to describe the required level of injury. (Compare § 243, subd. (d) ["a serious impairment of a physical condition"] with § 12022.7, subd. (d) ["a significant or substantial physical injury"].) The modifying terms in the two definitions—"serious," significant," and "substantial"—require equivalent levels of injury, i.e., one that is greater than trivial, minor, or moderate.

In addition to using similar language, the two statutes serve the same purpose—to increase criminal punishment for the harm caused rather than the conduct involved. (*People v. Parrish* (1985) 170 Cal.App.3d 336, 343, 345.) Given the same purpose served by the two statutes, "similar phrases appearing in each should be given like meanings." (*People v. Lamas* (2007) 42 Cal.4th 516, 525.)

Consistent with the statutory definitions, this Court and the Courts of Appeal "have long held" that serious bodily injury and great bodily injury "are essentially equivalent." (*People v. Johnson* (2016) 244 Cal.App.4th 384, 391, citing cases.)

While the terms serious bodily injury and great bodily injury are equivalent, they are not identical. The terms have distinct statutory definitions that use different language. (*People v. Santana* (2013) 56 Cal.4th 999, 1008.) These distinct definitions show that the Legislature intended great bodily injury to govern a broader range of injuries and serious bodily injury to apply to a narrower class of injuries within great bodily injury.

The Legislature's intent to define great bodily injury broadly is shown by the legislative history of the statutory definition of great bodily injury in section 12022.7. As originally enacted, the definition of great bodily injury was virtually identical to the definition of serious bodily injury with both statutes including a list of illustrative injuries. (*People v. Caudillo* (1978) 21 Cal.3d 562, 581.) However, before it became effective, the original statute was amended to the definition of great bodily injury still in use today. (*People v. Escobar* (1992) 3 Cal.4th 740, 747.) This amendment "reveals a clear legislative intent to discard the original, detailed definition of great bodily injury and substitute [a] more general standard." (*Id*. at p. 748.)

In addition to statutory language and legislative history of the terms, decisions analyzing the extent that serious bodily injury and great bodily injury are included in the offense of mayhem further highlight the broader scope of great bodily injury. Battery with serious bodily injury is not a lesser included offense of mayhem. (*Santana*, *supra*, 56 Cal.4th at pp. 1010-1011.) In contrast, it is well-established that great bodily injury is necessarily included in mayhem. (See *People v. Brown* (2001) 91 Cal.App.4th 256, 272.) Thus, great bodily injury is necessarily broader than serious bodily injury because great bodily injury is always included in mayhem while serious bodily injury is not.

Accordingly, given the inclusion of serious bodily injury within great bodily injury, the trial court in this case did not violate *Apprendi* by determining that Cabrera's conviction for battery with serious bodily injury was a serious felony. The court

did not engage in any improper fact-finding but instead simply recognized that the jury's verdict necessarily established the existence of great bodily injury.

The jury's inability to reach a decision on the charged great bodily injury enhancements does not affect the validity of the court's determination. Here, the jury's failure to reach agreement on the great bodily injury enhancements is "evidence of nothing" and provides no basis to vitiate the validity or effect of Cabrera's conviction for battery with serious bodily injury. (*Yeager, supra,* 557 U.S. at p. 124.)

Though a finding of serious bodily injury establishes great bodily injury, not every conviction for battery with serious bodily injury constitutes a serious felony pursuant to section 1192.7, subdivision (c)(8) because one can be guilty of the offense without personally inflicting great bodily injury on a non-accomplice. (*People v. Bueno* (2006) 143 Cal.App.4th 1503, 1508.) In this case, when convicting Cabrera of battery with serious bodily injury, the jury did not make express findings of personal infliction on a non-accomplice. However, the lack of such express findings is of no help to Cabrera. To the extent that he has not forfeited this specific argument, he is not entitled to relief because any error by the trial court was harmless beyond a reasonable doubt.

On the record here, the evidence that Cabrera personally inflicted the injury on the victim and that the victim was a non-accomplice was "overwhelming and uncontested." (*People v. French* (2008) 43 Cal.4th 36, 53.) Thus, the record establishes

beyond a reasonable doubt, that the jury, if asked, would have found that Cabrera personally inflicted injury on the victim and that the victim was a non-accomplice.

Finally, in the event this Court finds prejudicial error, the matter should be remanded to the trial court to provide the People the opportunity to retry the relevant issues. The jury's failure to reach verdicts on the great bodily injury enhancements does not implicate double jeopardy restrictions. Accordingly, the People may, on remand, seek a jury finding that Cabrera personally inflicted great bodily injury on Barnum.

ARGUMENT

I. FOR PURPOSES OF IMPOSING PUNISHMENT, A JURY FINDING OF SERIOUS BODILY INJURY CONSTITUTES A FINDING OF GREAT BODILY INJURY

A factual finding of serious bodily injury necessarily establishes the existence of great bodily injury. Therefore, consistent with the Sixth Amendment, a court may use a jury finding of serious bodily injury to impose an increased punishment that is based on great bodily injury.

An analysis of the statutory definitions of the two terms, the legislative history of the great bodily injury definition, and judicial interpretation of those terms leads to two conclusions: (1) the definitions of serious bodily injury and great bodily injury require the same threshold severity of injury; and (2) great bodily injury includes a broader range of injury than serious bodily injury. Taken together, these conclusions show that serious bodily injury is included within the broader definition of great

bodily injury such that a finding of serious bodily injury will always constitute a finding of great bodily injury.

A. The Sixth Amendment generally requires that any fact that increases punishment beyond the statutory maximum must be found by a jury

The United States Supreme Court has recognized that the Sixth Amendment requires jury findings on facts that increase punishment beyond the prescribed statutory maximum. (See *Apprendi, supra,* 530 U.S. 466; *Blakely v. Washington, supra,* 542 U.S. 296; *Cunningham v. California, supra,* 549 U.S. 270.)

In *Apprendi*, the United States Supreme Court held that, under the Sixth Amendment, any fact that exposes a defendant to a sentence greater than the relevant statutory maximum must be found by a jury, not a judge, and must be established beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 490.)

In *Blakely*, the Court applied *Apprendi* to consider a trial court's authority to impose a sentence above a "standard range" but still within the statutory range of punishment. (*Blakely*, *supra*, 542 U.S. at p. 298.) The Court held:

> When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [citation] and the judge exceeds his proper authority.

(*Id*. at pp. 304.)

Finally, in *Cunningham*, the Court considered whether imposition of an upper term in California's Determinate Sentencing Law (DSL) violated the Sixth Amendment. (*Cunningham*, *supra*, 549 U.S. at p. 274.) In holding that imposition of an upper term based on judicial fact finding

violated the Sixth Amendment, the Court emphasized that *Apprendi* established a "'bright-line rule'" requiring a jury finding for "facts essential to punishment." (*Id.* at p. 291.)

B. The statutory definitions of serious bodily injury and great bodily injury describe the same level of injury

The terms serious bodily injury and great bodily injury have long been used by California courts. (*People v. Scoggins* (1869) 37 Cal. 676, 683 ["serious bodily injury"]; *People v. Davidson* (1855) 5 Cal. 133, 134 ["great bodily injury"].) In addition, the terms serious bodily injury and great bodily injury appear throughout the California Penal Code. (See, e.g., §§ 148.10, 243, 261, 399, 404.6, 417.6, 601, 653t, 13700, 16120 [referencing serious bodily injury]; §§ 148.3, 197, 198.5, 245, 273ab, 368, 422, 667, 667.5, 1192.7, 1203.075, 12022.53, 12022.7 [referencing great bodily injury].)

Both terms are also specifically defined in the Penal Code. Serious bodily injury was first defined in 1975 with the enactment of battery with serious bodily injury as a felony. (Stats 1975, ch. 1114.) At that time, the Legislature defined serious bodily injury as "a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." (*Ibid.*) The original definition of serious bodily injury remains unchanged today. (§ 243, subd. (f)(4).)

The first effective statutory definition of great bodily injury occurred in 1977 with the enactment of section 12022.7. (Stats 1977, ch. 165, § 94.)[3] There, great bodily injury was defined only as "a significant or substantial physical injury." (*Ibid.*) As with the statutory definition of serious bodily injury, the definition of great bodily injury remains unchanged since its inception. (§ 12022.7, subd. (f).)

A review of the statutory definitions of serious bodily injury and great bodily injury as contained in sections 243, subdivision (d), and 12022.7, subdivision (f), demonstrate that the two terms describe virtually identical levels of physical injury.

When determining the meaning of a statute, a court's "task 'is to ascertain and effectuate legislative intent.' [Citation.]" (*People v. Trevino* (2001) 26 Cal.4th 237, 240.) This task "begin[s] by examining the statutory language, giving the words their usual and ordinary meaning." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) "If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Ibid.*)

Moreover, "'[i]t is an established rule of statutory construction that similar statutes should be construed in light of one another [citations], and that when statutes are *in pari materia* similar phrases appearing in each should be given like meanings. [Citations.]' [Citation.]" (*People v. Lamas, supra,* 42

---

[3] As discussed below (see § I-C-1, *post*), an earlier version of section 12022.7 was enacted in 1976 that contained a more detailed definition, but that version was amended before it became law. (*Escobar, supra,* 3 Cal.4th at p. 747.)

Cal.4th at p. 525, original italics.) "'Statutes are considered to be in pari materia when they relate to the same person or thing, to the same class of persons [or] things, or have the same purpose or object.'" (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4.)

The plain language of the core statutory definitions of serious bodily injury and great bodily injury describe levels of physical injury that are virtually identical. Serious bodily injury requires "a serious impairment of physical condition"[4] while great bodily injury requires "a significant or substantial physical injury." In ordinary usage, there is little, if any, practical difference between "a serious impairment" and "a significant or substantial" injury. In both definitions, the relevant modifiers—serious, significant, and substantial—are closely analogous and all require a similar severity of injury. Specifically, both definitions require that injuries must be more than slight or trivial. (*People v. Flores* (2013) 216 Cal.App.4th 251, 262 [determining that evidence was sufficient to establish serious bodily injury because wounds were "more than merely transitory, or lacking in seriousness"]; *People v. Miller* (1977) 18 Cal.3d 873, 883 [great bodily injury "distinguished from trivial or

---

[4] This Court has recognized that the specific examples of injuries in the statutory definition of serious bodily injury "are merely illustrative and do not constitute serious bodily injuries as a matter of law." (*Santana, supra,* 56 Cal.4th at p. 1010, citing *People v. Nava* (1989) 207 Cal.App.3d 1490, 1497-1498.) Accordingly, these examples serve to illustrate the meaning and scope of the core definition of serious bodily injury—a serious impairment of a physical condition.

insignificant injury or moderate harm"]; see also *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [serious bodily injury and great bodily injury involve "higher degrees of harm to be inflicted" than required by domestic involving willful infliction of traumatic condition (§ 273.5), which is satisfied by "minor" injury].)

In addition to containing similar language, the two statutes are in pari materia because they serve the same purpose. (*Walker, supra,* 47 Cal.3d at p. 124, fn. 4 [statutes serving "same purpose" are in pari materia].) Specifically, both increase criminal punishment based on the level of injury suffered by the victim. "[S]ection 243[d] punishes the consequences" of a battery that results in serious injury. (*Parrish, supra,* 170 Cal.App.3d at p. 345; *People v. Bertoldo* (1978) 77 Cal.App.3d 627, 633 ["section 243 addresses the result of the conduct rather than proscribing specific conduct"].) Thus, "one may commit a felony battery without" using force likely to cause great bodily injury as required for section 245. (*Bertoldo*, *supra*, at p. 633.) Similarly, "[e]nhancement under Penal Code section 12022.7 punishes the actual infliction of great bodily injury. The focus is on the result of one's assaultive behavior." (*Parrish*, *supra*, at p. 343; see also *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1168 ["Section 12022.7 . . . is a legislative attempt to punish more severely those crimes that result in great bodily injury 'on any person'"].)

Given the similarity in the statutory language and purpose of sections 243, subdivision (d), and 12022.7, subdivision (f), it follows that the Legislature intended the statutory definitions of

serious bodily injury and great bodily injury to require the same threshold level of injury before increased punishment is authorized. "There is no indication the Legislature intended to ascribe a different meaning to 'great bodily harm,' . . . than is signified by 'great bodily injury,' or, for that matter, 'serious bodily injury,' in the Penal Code sections we have discussed." (*People v. Burroughs* (1984) 35 Cal.3d 824, 831 [discussing interplay between § 243 & § 12022.7; see also *People v. Moore* (1992) 10 Cal.App.4th 1868, 1871 ["Nothing indicates the Legislature intended that [serious bodily injury and great bodily injury] should have separate and distinct meanings with regard to a 'serious felony' sentence enhancement"].)

Accordingly, this Court has recognized that serious bodily injury and great bodily injury "'are essentially equivalent elements.'" (*Burroughs, supra,* 35 Cal.3d at p. 831; see also *People v. Sloan* (2007) 42 Cal.4th 110, 117 ["essentially equivalent"]; *People v. Hernandez* (1998) 19 Cal.4th 835, 838 [§ 1192.7, subd. (c)(8) "would seem to cover" convictions involving serious bodily injury].) Numerous Courts of Appeal have also recognized the equivalence of the two terms. (See, e.g., *Johnson, supra,* 244 Cal.App.4th at p. 391 ["essentially equivalent"]; *People v. Wade* (2012) 204 Cal.App.4th 1142, 1149 ["our construction of 'serious bodily injury' is consistent with the definition of 'great bodily injury'"]; *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1118 ["'essentially equivalent'"]; *Bueno, supra,* 143 Cal.App.4th at p. 1508, fn. 5 ["essentially equivalent elements"]; *People v. Arnett* (2006) 139 Cal.App.4th 1609, 1613 ["substantially the same

meaning"]; *People v. Taylor* (2004) 118 Cal.App.4th 11, 26 ["the two terms have essentially the same meaning"]; *People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1042 ["the same as"]; *People v. Hawkins* (2003) 108 Cal.App.4th 527, 531 ["substantially the same as"]; *People v. Beltran* (2000) 82 Cal.App.4th 693, 696–697 ["substantially the same meaning"]; *People v. Hawkins, supra,* 15 Cal.App.4th at p. 1375 [same]; *Moore, supra,* 10 Cal.App.4th at p. 1871 ["essentially equivalent" and "synonymous"]; *People v. Otterstein* (1987) 189 Cal.App.3d 1548, 1550 ["essential equivalent"]; *People v. Villarreal* (1985) 173 Cal.App.3d 1136, 1141 ["essentially equivalent terms"]; *People v. Corning* (1983) 146 Cal.App.3d 83, 90 ["essentially equivalent elements"]; *People v. Johnson* (1980) 104 Cal.App.3d 598, 610 ["substantially similar"]; *People v. Kent* (1979) 96 Cal.App.3d 130, 136 [same].)

C. Serious bodily injury covers a subset of injuries within the general class of injuries that constitute great bodily injury

Though serious bodily injury and great bodily injury repeatedly have been described as essentially equivalent terms, this Court has recognized that "the terms in fact 'have separate and distinct statutory definitions' [citations]." (*Santana, supra,* 56 Cal.4th at p. 1008, quoting *People v. Taylor* (2004) 118 Cal.App.4th 11, 24.) The question, therefore, is the effect, if any, those distinct definitions have in practice.

Given the near equivalence of the two terms, in most cases there will be no substantive difference between serious bodily injury and great bodily injury, and an injury that establishes one will usually establish the other. However, a review of the specific

statutory language, the legislative history of section 12022.7, and court decisions interpreting the two terms demonstrate that the definition of serious bodily injury covers a slightly narrower range of injuries than the more-generally-applicable definition of great bodily injury.

1. The Legislature intended the definition of great bodily injury to cover a broader range of injuries than serious bodily injury

The definition of serious bodily injury includes a list of non-exhaustive examples of injury that may constitute serious bodily injury. (§ 243, subd. (d); *Santana, supra,* 56 Cal.4th at p. 1010.) The definition of great bodily injury, on the other hand, contains no such list of example injuries. (§ 12022.7, subd. (f).)

In this circumstance, "the principle of *ejusdem generis* provides guidance in discerning the Legislature's intent." (*International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 342, original italics.) "'Ejusdem generis applies whether specific words follow general words in a statute or vice versa. In either event, the general term or category is "restricted to those things that are similar to those which are enumerated specifically."'" (*Ibid*.) "The canon presumes that if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would be surplusage." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.)

Thus, in defining serious bodily injury, the Legislature's inclusion of specific types of injuries that followed a general

definition shows an intent to restrict the general definition "'to those [injuries] that are similar to those which are enumerated specifically.'" (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160, fn. 7.) In contrast, the lack of any examples in the great bodily injury definition supports the conclusion that the Legislature intended the "words [significant or substantial injury] to carry their broadest possible meaning." (*International Federation of Professional & Technical Engineers, Local 21, AFL-CIO, supra*, 42 Cal.4th at p. 341.)

In addition, the legislative history of section 12022.7 supports the conclusion that the Legislature intended the definition of great bodily injury to broadly apply to all types of physical injury. Section 12022.7 "was originally enacted in 1976 as part of the comprehensive Uniform Determinate Sentencing Act." (*Escobar, supra,* 3 Cal.4th at p. 746; Stats. 1976, ch. 1139.) As originally drafted, section 12022.7 provided "some detail" on "the level of injury necessary to trigger the additional penalty of three years in prison." (*People v. Caudillo, supra,* 21 Cal.3d at p. 581.)

> "As used in this section, 'great bodily injury' means a serious impairment of physical condition, which includes any of the following: [¶] (a) Prolonged loss of consciousness. [¶] (b) Severe concussion. [¶] (c) Protracted loss of any bodily member or organ. [¶] (d) Protracted impairment of function of any bodily member or organ or bone. [¶] (e) A wound or wounds requiring extensive suturing. [¶] (f) Serious disfigurement. [¶] (g) Severe physical pain inflicted by torture." (Pen. Code, § 12022.7, as added by Stats. 1976, ch. 1139 . . . .)

(*Ibid*.)

"This original version of the statute, however, never became law." (*Escobar*, *supra*, 3 Cal.4th at p. 747.) Two separate amendments occurred prior to the effective date of the original statute that made "significant alterations to the definition of great bodily injury in section 12022.7." (*Ibid.*) First, the "detailed enumeration of injuries which defined great bodily injury" were deleted. (*Ibid.*, citing Assem. Amend. to Assem. Bill No. 476 (1977-1978 Reg. Sess.) Apr. 12, 1977.) "One week later, the bill was further amended in the Assembly by changing the remaining definition of 'great bodily injury' from a 'serious impairment of physical condition' to 'a significant or substantial physical injury.'" (*Escobar*, *supra*, at p. 747, citing Assem. Amend. to Assem. Bill No. 476 (1977-1978 Reg. Sess.) Apr. 19, 1977.)

"[I]t appears" the first statutory amendment "was designed to preclude the possibility that the 1976 detailed definition of great bodily injury be construed as all inclusive, leaving no latitude to the trier of fact to find a bodily injury of equal magnitude to the categories specified in the detailed definition but not coming literally within any category set forth therein." (*Caudillo*, *supra*, 21 Cal.3d at p. 582.) The second statutory amendment "adopted the exact language found in the then current CALJIC instruction, which defined great bodily injury as 'significant or substantial bodily injury or damage.' (CALJIC No. 17.20 (1973 rev.) (3d rev. ed. pocket pt.).)" (*Escobar*, *supra*, 3 Cal.4th at p. 748.) This definition "'*codifie[d] the current law*'" defining great bodily injury. (*Ibid.*, original italics; see also

Caudillo, *supra*, at p. 581 [1977 amendment adopted current definition of great bodily injury from case law].)

This Court initially determined "that the 1977 amendment to Penal Code section 12022.7 was not intended to lessen the magnitude of bodily injury required by the 1976 detailed definition of great bodily injury." (*Caudillo*, *supra*, 21 Cal.3d at pp. 581-582.) In 1992, this Court revisited the definition of great bodily injury and held, "*Caudillo* erred in concluding that the Legislature intended no change in the definition of 'great bodily injury' when it discarded the specific criteria set forth in the original version of section 12022.7 and substituted the more general 'significant or substantial physical injury' test then in use." (*Escobar*, *supra*, 3 Cal.4th at pp. 749-750.) "Thus, the legislative history of section 12022.7 reveals a clear legislative intent to discard the original, detailed definition of great bodily injury and substitute the more general standard then currently in use." (*Id.* at p. 748.)

Consistent with this intent, great bodily injury "need not meet any particular standard for severity or duration, but need only be 'a substantial injury beyond that inherent in the offense itself[.]'" (*People v. Le* (2006) 137 Cal.App.4th 54, 59 quoting *Escobar*, *supra*, 3 Cal.4th at pp. 746-747.) Thus, "some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of 'great bodily injury'." (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047.) A "soft tissue injury" may constitute great bodily injury. (*Le*, *supra*, at p. 59.) Indeed, to be great bodily injury, an injury need not even require

medical treatment. (*Wade, supra,* 204 Cal.App.4th at p. 1149.) Nor must the injury "be so grave as to cause the victim permanent, prolonged, or protracted bodily damage." (*People v. Cardenas* (2015) 239 Cal.App.4th 220, 227.)

As this Court recognized in *Escobar*, the Legislature's adoption of a general definition of great bodily injury reflects a deliberate choice to adopt a broadly applicable measure. (See *People v. Cross* (2008) 45 Cal.4th 58, 66, fn. 3 ["'A plain reading of Penal Code section 12022.7 indicates the Legislature intended it to be applied broadly' [Citation]"].) Significantly, the definition of great bodily injury abandoned by the Legislature was virtually identical to the serious bodily injury definition that had recently (at that time) been enacted. In short, this history shows that the Legislature intended great bodily injury to cover a broader range of injuries than serious bodily injury.

2. Judicial decisions interpreting mayhem clarify the distinction between serious bodily injury and great bodily injury

The distinction between the statutory definitions of serious bodily injury and great bodily injury is further highlighted in decisions evaluating how serious bodily injury and great bodily injury relate to the crime of mayhem.[5] Those cases confirm that great bodily injury covers a broader range of injury than serious bodily injury.

---

[5] Mayhem occurs when a person "unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip." (§ 203.)

In *People v. Santana*, this Court considered the extent that the crime of mayhem necessarily includes serious bodily injury. (*Santana, supra,* 56 Cal.4th at p. 1001.) Specifically, this Court considered whether the instructions on mayhem properly required proof that the defendant had caused serious bodily injury. (*Ibid*.) There, the defendant was convicted, among other offenses, of attempted mayhem for a gunshot wound inflicted on the victim. (*Id*. at p. 1002.) The jury was instructed that, to establish mayhem, "the People must prove that the defendant caused serious bodily injury" when inflicting one of the specific injuries listed in section 203, the mayhem statute. (*Id*. at p. 1005.) The instructions also included the statutory definition of serious bodily injury. (*Id*. at p. 1006.)

This Court explored how the definition of serious bodily injury had become incorporated into the CALCRIM mayhem instructions. (*Santana*, 56 Cal.4th at pp. 1007-1008.) The addition of serious bodily injury to the instructions arose as a result of the holding in *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1558, that "'*great* bodily injury is an element of mayhem.'" (*Santana*, at pp. 1008-1009, original italics.) The relevant instruction, however, did "not explain what authority compelled insertion of the 'serious bodily injury' requirement in the first place." (*Id*. at p. 1008.)

This Court recognized that the terms serious bodily injury and great bodily injury "have been described as ""essential[ly] equivalent"" [citation] and as having 'substantially the same meaning' [citation]." (*Santana, supra*, 56 Cal.4th at p. 1008.)

This Court noted, however, "the terms in fact 'have separate and distinct statutory definitions' [citations]." (*Ibid*., quoting *Taylor, supra*, 118 Cal.App.4th at p. 24.) Accordingly, "[t]his distinction may make a difference when evaluating jury instructions that provide different definitions for the two terms." (*Santana, supra,* at pp. 1008-1009.)

This Court then compared the statutory definitions of serious bodily injury and mayhem and concluded that "nothing suggests" the injuries required for mayhem "must involve" the types of injuries described in the serious bodily injury definition. (*Santana*, *supra*, 56 Cal.4th at p. 1010.) The "listed injuries" for mayhem do not "necessarily constitute serious bodily injury as defined." (*Id*. at p. 1011.) Consequently, "we see no basis—compelled either by case law or by the need to give jurors further guidance—to superimpose a wholesale definition of 'serious bodily injury' from section 243(f)(4) in the [mayhem] instruction." (*Id*. at p. 1010.)

Though *Santana* focused on the proper jury instructions for mayhem, the decision made clear that, because "serious bodily injury is not an element required to be proven for the crime of simple mayhem, the offense of battery with serious bodily injury is not a lesser included offense of mayhem." (*People v. Poisson* (2016) 246 Cal.App.4th 121, 125.) In other words, mayhem may be committed without necessarily inflicting serious bodily injury. (*Santana*, *supra*, 56 Cal.4th at p. 1010 ["Nothing suggests that the [injuries required for mayhem] must involve protracted loss

or impairment of function, require extensive suturing, or amount to serious disfigurement"].)

In contrast, great bodily injury has long been considered to be necessarily included in mayhem. (*Pitts*, *supra*, 223 Cal.App.3d at pp. 1559-1561.) In *Pitts*, the court held that a section 12022.7 great bodily injury enhancement could not apply to a conviction for mayhem because great bodily injury is a necessary element of mayhem. (*Ibid*; see also *People v. Brown, supra,* 91 Cal.App.4th at p. 272 ["Mayhem cannot be committed without the infliction of great bodily injury"]; *People v. Hill* (1994) 23 Cal.App.4th 1566, 1575 ["Great bodily injury is unquestionably an element of mayhem"]; *People v. Keenan* (1991) 227 Cal.App.3d 26, 36, fn. 7 ["We agree mayhem requires great bodily injury"].)

These decisions regarding the interplay of serious bodily injury and great bodily injury in the crime of mayhem show that great bodily injury defines a broader class of injury than serious bodily injury. Specifically, a defendant committing mayhem necessarily inflicts great bodily injury but does not necessarily inflict serious bodily injury. This further demonstrates that serious bodily injury is a subset of great bodily injury.

D. Defining serious bodily injury as a subset of great bodily injury is consistent with existing authority

As discussed above, this Court recognizes that the terms serious bodily injury and great bodily injury are "'essential[ly] equivalent,'" but the two terms, "in fact 'have separate and distinct statutory definitions." (*Santana*, *supra*, 56 Cal.4th at pp. 1008-1009.) The apparent tension of these two interpretations may be reconciled by recognizing that serious bodily injury is a

subset of the more-general term great bodily injury. In other words, serious bodily injury and great bodily injury require the same severity of injury, but great bodily injury covers a wider range of injuries. This conclusion is consistent with existing authority regarding the equivalence of the two terms.

The majority of cases that have considered the equivalence of serious bodily injury and great bodily injury have been in the context of determining when a finding of serious bodily injury constitutes great bodily injury. For example, several courts have held that a conviction for battery with serious bodily injury is a serious felony within the meaning of section 1192.7, subdivision (c)(8). (*Arnett, supra,* 139 Cal.App.4th at pp. 1613-1614; *Moore, supra,* 10 Cal.App.4th at p. 1871; see also *People v. Hawkins, supra,* 108 Cal.App.4th at pp. 531-532.) By its own terms, a section 12022.7 enhancement does not apply to any offense where great bodily injury is an element (§ 12022.7, subd. (g)), and courts have also recognized that the enhancement cannot be applied to a conviction for battery with serious bodily injury because great bodily injury is an element of the offense. (*People v. Hawkins*, *supra*, 15 Cal.App.4th at p. 1376; *People v. Hawkins, supra,* 108 Cal.App.4th at p. 531; *Otterstein, supra,* 189 Cal.App.3d at p. 1550; see also *Beltran, supra,* 82 Cal.App.4th at pp. 696-697 [§ 12022.7 enhancement did not apply to Veh. Code § 2800.3 violation that includes serious bodily injury as element].)

A determination that the two terms are generally equal, but serious bodily injury is a subset of great bodily injury, maintains the validity of existing precedent interpreting the two terms. If

serious bodily injury is a more-narrow subset of great bodily injury, then every finding of serious bodily injury necessarily constitutes a finding of great bodily injury. Thus, cases equating a finding of serious bodily injury with great bodily injury remain good law.

Along those same lines, a finding of great bodily injury does not necessarily establish serious bodily injury. This conclusion does not impact or undermine any existing precedent. Despite numerous cases equating the two terms, the People could find no cases that explicitly hold a finding of great bodily injury necessarily constitutes a finding of serious bodily injury.

Cabrera's interpretation of the two terms, however, would result in a substantial disruption of long-standing precedent. For example, under existing law, a section 12022.7 great bodily injury enhancement may not be applied to battery with serious bodily injury conviction. (*Otterstein, supra,* 189 Cal.App.3d at p. 1550.) If, however, a finding of serious bodily injury does not constitute great bodily injury, then section 12022.7 great bodily injury enhancements may properly be charged and applied to any offense with serious bodily injury as an element, including section 243, subdivision (d).

In addition to conflicting with existing precedent, a determination that serious bodily injury is not equivalent to great bodily injury may be inconsistent with legislative intent. As discussed in section I-B, *ante*, both serious bodily injury and great bodily injury are used repeatedly throughout the Penal Code in numerous statutes. Given the long-recognized equivalency of

serious bodily injury and great bodily injury in case law, it should be presumed that the Legislature has also treated the two terms as essentially equivalent in most circumstances. (*Moore v. Superior Court* (2020) 58 Cal.App.5th 561, 574 ["Courts are required to 'assume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules.' [Citation.]"].)

E. The trial court properly concluded that the jury's finding of serious bodily injury constituted a finding of great bodily injury

The trial court here, in finding that Cabrera's battery with serious bodily injury conviction was a serious felony within the meaning of section 1192.7, subdivision (c)(8), concluded that the jury's finding of serious bodily injury constituted a factual finding that the victim suffered great bodily injury. (4RT 899-901 [C058828].) As a result of this conclusion, Cabrera was subject to an additional punishment of five years in prison pursuant to section 667, subdivision (a). (2CT 511, 517 [C058828].) The trial court's conclusion was correct and did not involve improper fact-finding in violation of the Sixth Amendment.

As discussed above, a finding of serious bodily injury necessarily constitutes a finding of great bodily injury. The more-specific definition of serious bodily injury describes a subset of injuries included in the more-general definition of great bodily injury. Thus, a finding of serious bodily injury always includes great bodily injury.

For this reason, the trial court did not err by concluding that the jury's unanimous finding that the victim suffered serious

bodily injury was the equivalent of a finding of great bodily injury. To reach this conclusion, the court did not engage in any judicial fact-finding, nor did the court have to infer what the jury must have found. Rather, the court simply recognized what the jury actually found.

Cabrera suggests serious bodily injury and great bodily injury could be equated only if the Legislature had "written into the serious bodily injury and great bodily injury definitions a catch all provision that a finding of serious bodily injury is factually equivalent to great bodily injury, or used the same language to define both terms." (OBM 24.) Cabrera fails to recognize, however, that one term may be subsumed within another, such that a factual finding of one will necessarily constitute a factual finding of another. For example, "[g]reat bodily injury is by definition inherent in a murder or manslaughter victim's injuries that result in death." (*People v. Cook* (2015) 60 Cal.4th 922, 933.) Thus, a finding of death necessarily includes a finding of great bodily injury, even though each term is defined with different language, and the Legislature has not expressly equated the two in statute. Similarly, as discussed above, a finding of serious bodily injury necessarily includes a finding of great bodily injury, despite differences in the language of the two statutory definitions. Recognizing this equivalence does no harm to the Sixth Amendment. Rather, it simply accords the factual findings of the jury their appropriate legal consequence.

For the same reason, Cabrera's reliance on this Court's decision in *People v. Gallardo* (2017) 4 Cal.5th 120 is misplaced. (OBM 17-19.) In *Gallardo*, this Court considered to what extent a court may engage in judicial fact-finding when determining whether a prior conviction is a serious felony. (*Gallardo*, *supra*, at pp. 123-125.) This Court held "that a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction." (*Id.* at p. 136.) "The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Ibid.*)

Nothing in *Gallardo*, or the United States Supreme Court cases upon which it relies, aids Cabrera here. Consistent with California law, the trial court here simply recognized that the jury's guilty verdict on battery with serious bodily injury necessarily constituted a factual finding of great bodily injury. The trial court did not engage in any impermissible judicial fact-finding under *Gallardo*. The court did not draw "independent conclusions" to determine the "'nature'" of Cabrera's battery conviction. (*Gallardo*, *supra*, 4 Cal.5th at p. 136.) Instead, the trial court simply identified the "facts the jury was necessarily required to find to render a guilty verdict" as including a finding of great bodily injury. (*Ibid.*)

II. THE FAILURE OF CABRERA'S JURY TO REACH VERDICTS ON THE GREAT BODILY INJURY ALLEGATIONS DOES NOT AFFECT THE LEGAL SIGNIFICANCE OF HIS CONVICTION FOR BATTERY WITH SERIOUS BODILY INJURY

The issue here, as defined by this Court, includes consideration of the fact that the jury failed to reach verdicts on the section 12022.7 great bodily injury enhancements alleged in this case. Under well-established law, the jury's failure to reach a decision on the truth of a great bodily injury enhancement is immaterial to the validity of the jury's finding of serious bodily injury and to the legal effect of that finding.

Unlike a verdict, "the fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything." (*Yeager, supra,* 557 U.S. at p. 124.) "[A] hung count hardly 'make[s] the existence of any fact . . . more probable or less probable.'" (*Ibid*.) "A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang." (*Id*. at p. 121; see also *In re Richards* (2016) 63 Cal.4th 291, 316 (conc. opn. of Corrigan, J.) ["Juries fail to agree for a variety of reasons [and] the disagreement may be driven as much by the personality of a juror, a uniquely held world view, or even some friction during deliberations, as by any weakness in the underlying case"].) Thus, a jury's inability to reach an agreement on one count or allegation has no effect on the validity of a verdict that includes the same issue on which the jury could not agree.

Indeed, "hung counts have never been accorded respect as a matter of law or history, and are not similar to jury verdicts in any relevant sense." (*Yeager*, *supra*, 557 U.S. at p. 124.) Thus, if

a "clearly inconsistent verdict [may not be used] to second-guess the soundness of another verdict, then, *a fortiori*, a potentially inconsistent hung count could not command a different result." (*Ibid*., original italics.)

In the present case, the failure of Cabrera's jury to reach verdicts on the section 12022.7 enhancements is irrelevant to the validity and effect of the jury's verdict on the section 243, subdivision (d) count. As the Court of Appeal explained, "a failure to reach a verdict on an enhancement is not an *affirmative rejection* of the enhancement as an acquittal or finding of not true would be." (*Cabrera*, *supra*, 21 Cal.App.5th at p. 478, original italics.) In finding guilt on that count, the jury concluded unanimously and beyond a reasonable doubt that the victim suffered serious bodily injury, which is factually equivalent to a finding of great bodily injury. The jury's failure to reach a decision on the truth of the great bodily injury allegation "is evidence of nothing." (*Yeager*, *supra*, 557 U.S. at p. 124.)

III. THE LACK OF JURY FINDINGS THAT CABRERA PERSONALLY INFLICTED INJURY ON A NON-ACCOMPLICE DOES NOT WARRANT RELIEF

The focus throughout this litigation has been on whether a finding of serious bodily injury is the factual equivalent of a finding of great bodily injury. For a battery with serious bodily injury to be a serious felony within the meaning of section 1192.7, subdivision (c)(8), however, the defendant must personally inflict the injury on any person other than an accomplice. Thus, not every violation of section 243, subdivision (d) is a serious felony within the meaning of section 1192.7, subdivision (c) because, for

example, one can be guilty of the offense as an aider and abettor. (*Bueno, supra,* 143 Cal.App.4th at p. 1508.)

In this case, when convicting Cabrera of a violation of section 243, subdivision (d), the jury did not make express findings that Cabrera personally inflicted serious bodily injury on Barnum or that Barnum was not an accomplice. The People recognize that, by designating the battery count as a serious felony, the trial court necessarily found that Cabrera personally inflicted the injury and that the victim, Barnum, was a non-accomplice. This was technically improper fact-finding. For the trial court to impose an increased sentence consistent with the Sixth Amendment, the jury was required to find that Cabrera personally inflicted the serious bodily injury on a person who was not an accomplice. (*Apprendi, supra,* 530 U.S. at p. 490.) The jury did not make any such express findings here.

Cabrera, however, has never argued that the lack of such findings should be a basis to vacate the trial court's determination that the battery was a serious felony.[6] Nor does he press that argument here. In his opening brief on the merits, Cabrera does not challenge the serious felony finding on the basis that the jury failed to make a finding that he *personally* inflicted great bodily injury and did not on a person *other than an*

---

[6] At Cabrera's 2008 sentencing hearing, defense counsel objected to the serious felony findings only on the basis of the lack of a jury finding of great bodily injury. (4RT 891 [C058828].) In addition, in all of his prior appeals and habeas petitions, including the most recent habeas petition filed in the Court of Appeal, Cabrera has continued to only assert the lack of a great bodily injury finding as grounds for relief.

accomplice. (§ 1192.7, subd. (c)(8).) Cabrera's failure to argue this issue in his opening brief—assuming that it is properly considered as part of the question upon which review was granted—forfeits the matter. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 408, [argument "forfeited by the failure to raise it in the opening brief"].)

Even if this issue is not forfeited, and is included in the question presented, Cabrera is not entitled to relief. *Apprendi* error is subject to review under the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 153.) "[I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true [the finding in question], the Sixth Amendment error properly may be found harmless." (*People v. Sandoval* (2007) 41 Cal.4th 825, 839.) "The failure to submit a fact to a jury may be found harmless if the evidence supporting that fact is overwhelming and uncontested, and there is no 'evidence that could rationally lead to a contrary finding.'" (*French, supra,* 43 Cal.4th at p. 53, quoting *Neder v. United States* (1999) 527 U.S. 1, 19.)

Here, the evidence establishing that Cabrera personally inflicted the injury on Barnum was "overwhelming and uncontested." (*French*, *supra*, 43 Cal.4th at p. 53.) Cabrera was the only possible perpetrator of the injury to Barnum, as the only evidence of the battery was that Cabrera punched Barnum once in the face. (1RT 290 [C058828].) No other evidence presented to

the jury suggested that anyone other than Cabrera battered Barnum. (See *Moore*, *supra*, 10 Cal.App.4th at p. 1871 [since defendant was sole perpetrator of prior battery with serious bodily injury, he "necessarily" personally inflicted great bodily injury on victim when he committed that offense].) In addition, the only theory of guilt presented to the jury was that Cabrera was the sole perpetrator. (3RT 719-760 [C058828].) Therefore, the jury's finding of guilt on the battery charge necessarily established that Cabrera personally inflicted the injuries to Barnum.

In addition, there was no evidence from which the jury could have concluded that Barnum was an accomplice to his own battery. It would be absurd to conclude that Barnum aided in an assaultive crime against himself. (*People v. Samuels* (1967) 250 Cal.App.2d 501, 513-514 ["It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury"].)

Nor is it clear that victims of an assaultive crime can, as a matter of law, even be an accomplice to a crime against themselves. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1202 [victim was not accomplice to "his own attempted murder" or "robbery of himself"]; *People v. Antick* (1975) 15 Cal.3d 79, 91 [decedent killed by police cannot be "found guilty of murder in connection with his own death"].) Moreover, there is no evidence that Barnum was an accomplice with Cabrera in any other crime to which an accomplice finding could attach. (*People v. Flores*

(2005) 129 Cal.App.4th 174, 182 [accomplice exception to firearm enhancement applies to accomplices of intended crime different from offense in which great bodily injury was inflicted].)

On the record here, any Sixth Amendment violation was harmless. This record establishes beyond a reasonable doubt that the jury, if asked, would have concluded that Cabrera personally inflicted the injury on Barnum and that Barnum was a non-accomplice.

IV. IF PREJUDICIAL ERROR OCCURRED, THE PROPER REMEDY IS A REMAND TO PERMIT RETRIAL OF THE GREAT BODILY INJURY ALLEGATION

Any reversible error in this case would be based on improper judicial fact-finding by the trial court. Therefore, the appropriate remedy is to remand the matter for jury fact-finding on the prior serious felony enhancement alleged as to both the assault and battery counts.

Since the original great bodily injury allegations resulted in a hung jury, jeopardy has not attached to those findings, and retrial is permitted. (*Richardson v. United States* (1984) 468 U.S. 317, 323-324.) Moreover, a penalty allegation may generally be retried when the underlying conviction to which it attaches remains in place. (*People v. Anderson* (2009) 47 Cal.4th 92, 123-124 ["Retrial of a penalty allegation on which the jury has deadlocked does not violate federal or state double jeopardy principles, and retrial may be limited to the deadlocked allegation alone"].)

Here, the jury did not reach verdicts on the great bodily injury allegations. Thus, the sentencing court determined that

the assault and battery convictions were serious felonies based on the jury's finding of serious bodily injury. To the extent that the sentencing court erred, it was by usurping the jury's fact-finding role as to the facts necessary to establish that the assault and battery counts were serious felonies. (*Apprendi, supra,* 530 U.S. at p. 490.)

If the trial court erred under *Apprendi*, then the appropriate remedy would be to remand the matter back to the superior court to permit the People an opportunity to retry the prior serious felony allegations. If the People choose not to retry, or the jury finds the allegations not true, then the trial court's finding that the assault and battery convictions constituted serious felonies should be vacated.

CONCLUSION

The petition for writ of habeas corpus should be denied.

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
MICHAEL A. CANZONERI
Supervising Deputy Attorney General
RACHELLE A. NEWCOMB
Deputy Attorney General

/s/ Eric L. Christoffersen

ERIC L. CHRISTOFFERSEN
Supervising Deputy Attorney General
Attorneys for Respondent

March 15, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 10,365 words.

ROB BONTA
Attorney General of California

/s/ Eric L. Christoffersen

ERIC L. CHRISTOFFERSEN
Supervising Deputy Attorney General
Attorneys for Respondent

March 15, 2022

SA2021306261

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

Case Name: **In re Cabrera on Habeas Corpus**
No.: **S271178**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On March 15, 2022, I electronically served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on March 15, 2022, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Andrew J. Marx
Law Office of Andrew J. Marx
P.O. Box 1225
Mt. Shasta, CA 96067

County of Siskiyou
Main Courthouse
Superior Court of California
411 Fourth Street
Yreka, CA 96097

The Honorable James (Kirk)
Andrus
District Attorney
Siskiyou County District Attorney's
Office
P.O. Box 986
Yreka, CA 96097

Court of Appeal
Third Appellate District
Via TrueFiling

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 15, 2022, at Sacramento, California.

/s/ *D. Boggess*
Declarant

SA2021306261
36010442.docx

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **CABRERA (MIGUEL ANGEL) ON H.C.**
Case Number: **S271178**
Lower Court Case Number: **C091962**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Eric.Christoffersen@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ADDITIONAL DOCUMENTS	Cabrera - Answer Brief on the Merits

Service Recipients:

Person Served	Email Address	Type	Date / Time
Eric Christoffersen DOJ Sacramento/Fresno AWT Crim 186094	Eric.Christoffersen@doj.ca.gov	e-Serve	3/15/2022 3:26:10 PM
Attorney Attorney General - Sacramento Office Court Added	sacawttruefiling@doj.ca.gov	e-Serve	3/15/2022 3:26:10 PM
Andrew Marx Law Office of Andrew J. Marx 171237	andrewmarxlaw@gmail.com	e-Serve	3/15/2022 3:26:10 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

3/15/2022
Date

/s/Diane Boggess
Signature

Christoffersen, Eric (186094)
Last Name, First Name (PNum)

DOJ Sacramento/Fresno AWT Crim
Law Firm