IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Supreme Court Case No. S275940

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent **v.** **WELDON K. McDAVID, JR.,** Defendant and Appellant.	Court of Appeal Fourth District Division One Case No. D078919 San Diego County Superior Court Case Number SCN363925

APPEAL FROM THE SAN DIEGO COUNTY SUPERIOR COURT

The Honorable Sim von Kalinowski, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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Introduction

Below, the People were resolute in their position that a trial court exercising its discretion under subdivision (h) of section 12022.53 to "strike or dismiss an enhancement otherwise required to be imposed by this section" is prohibited under subdivision (j) from substituting any lesser included enhancement outside the boundaries of that section.[1] (See Pet. Reh. at pp. 11-12 [arguing it is clear from the language of subdivision (j) that "the only choices for lesser enhancements are those found within section 12022.53" and thus, "[a]llowing courts to substitute a lesser enhancement under a different statute, after the trier of fact has made a true finding under section 12022.53, conflicts with this legislative intent"].) On review in this Court, however, the People have adopted a notably softer—indeed, plainly tenuous—stance on the issue presented.

While the People continue to advocate for this interpretation of section 12022.53 despite the amendments effected by Senate Bill 620 ("SB 620"), they stop far short of contending that the controlling canons of statutory construction actually compel this reading of section 12022.53 or even that this is the most accurate or reasonable interpretation of the statute. Rather, in still seeking a construction that "giv[es] effect to subdivision (j)'s prohibition against imposing a lesser enhancement outside of section 12022.53," the People now only go so far as to timidly argue that doing so "would *not necessarily* undermine section 12022.53's purpose or otherwise lead to

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1 Statutory references are to the Penal Code.

absurd results" and, even more hesitantly, that such an interpretation "*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." (Ans. Brf. at 19, 32, emphasis added; see also *id.* at 25, 33, emphasis added [similarly arguing it is "not apparent" that this construction would conflict with legislative intent and that the effect of the amendments under SB 620 "does not *necessarily* indicate" that the general limitation set forth in subdivision (j) cannot or should not be enforced].)

While adopting a stance that, at best, soft-pedals their desired statutory construction, the People do not *directly* dispute the legitimacy or reasonableness of McDavid's position that the amendments under SB 620 have indeed empowered trial courts to substitute lesser included enhancements outside the boundaries of section 12022.53 after invoking subdivision (h) to strike or dismiss an enhancement that "has been admitted or found to be true" under this section. Rather, they abandon any broadside challenge or categorical attack against McDavid's statutory construction and resign themselves to a position that readily admits McDavid's position has "some force" and is supported by "plausible reasons" (Ans. Brf. at 9, 18, 25), while merely arguing it "does not appear" or is "not clear" that "sufficient justification" exists to adopt his construction (*id.* at 19, 21, 25, 32, 39). That is, the People's entire thesis for rejecting McDavid's interpretation in favor of their own rests on the

dubious claim that his arguments, while admittedly of "force" and "plausible," are *probably* just not forceful or plausible enough.

Most notably, the People ignore, or at best gloss over, the most glaring absurdity of the position they maintain—that it would shackle the sentencing court to a binary choice between imposing no additional punishment at all and *10 years* in all cases involving an enhancement under subdivision (b), by essentially creating a minimum mandatory term of 10 years for any additional penalty that the court may intend to impose over and above the base punishment for the substantive crime.

The inherent difficulty and awkwardness of this posturing itself speaks volumes about the unsustainability of the statutory interpretation that the People struggle to maintain. As a byproduct of the fragile foundation on which it rests, the specific arguments that the People make in support of this position quickly fall apart upon examination: they rely on unreasonable constructions of the statutory language that defy basic grammar and common sense, misconstrue and misapply the settled principles of statutory interpretation, and turn a blind eye to absurdities the Legislature certainly could not have intended.

The statutory construction of section 12022.53 that the People seek to avoid is the one that any proper analysis compels. After all, the most the People will say here is it "should be avoided *unless* that construction is strongly justified by countervailing interpretive considerations." (Ans. Brf. at 24, emphasis added.) All considerations relevant to this analysis, including basic logic and common sense, inevitably point to the

conclusion that when a trial court exercises its sentencing discretion under subdivision (h) to "strike or dismiss an enhancement *otherwise* required to be imposed by *this* section," subdivision (j)'s general directive that "the court shall impose punishment for *that* enhancement pursuant to *this* section" simply does not and cannot apply. (§ 12022.53, subds. (h) & (j), emphasis added.) A clear holding to this effect will finally achieve the "fundamental task" of "effectuat[ing] the law's purpose." (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141 (*Gonzalez*.)

Argument

I. The claims that the People timidly advance in support of their plain meaning construction of the statutory language simply bolster McDavid's construction as the only viable statutory interpretation.

The People gingerly pursue several arguments for why, after the enactment of SB 620, the language of subdivisions (h) and (j) does not "necessarily" mean the general sentencing limitation set out in the second sentence of subdivision (j) becomes inoperative when a court invokes the discretionary power under subdivision (h). However, their tepid defense of this position only serves to underscore how a plain reading of the statute compels the interpretation the People seek to avoid.

A. The People's basic construction of the limiting language in subdivision (j) is plainly unsustainable.

The People find themselves forced to admit it would be "entirely illogical" to interpret section 12022.53 as requiring 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" (Ans. Brf. at 23, fn. 8) and "[t]o 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" (*id.* at 23, fn. 12). In explaining this situation, the People further concede that "there is no other plausible interpretation that would preserve its operation in the face of subdivision (h)'s clear command." (*Id.* at 23, fn. 12.) They nevertheless go on to argue that the "portion of subdivision (j) that directs a trial court not to impose a lesser enhancement under any other statute"—as distinguished from "the 'shall impose' portion" of the second sentence—can and should reasonably be read to remain effective *regardless* of "subdivision (h)'s clear command." (*Id.* at 38.)

In other words, maintaining the position of the People requires artificially splicing the second clause of the second sentence of subdivision (j) into two, supposedly distinct parts—one part that becomes inoperative whenever the trial court invokes its discretion under subdivision (h), and one part that somehow remains effective regardless of whether the court does so. Another look at this language of subdivision (j) in its full form illustrates just how untenable such an interpretation really is:

> 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*.

(§ 12022.53, subd. (j), italics added.)

Under the People's construction, the portion of this sentence providing that "the court shall impose punishment for that enhancement pursuant to this section" must somehow be divorced from the portion that follows. The People do not clarify just where the first portion ends and where the second portion begins under this construction. Taking this as literally as possible, "the shall impose portion" would presumably end with "this section"—thus consisting of "the court shall impose punishment for that enhancement pursuant to this section"—while the remainder would consist of the directive "not to impose a lesser enhancement under any other statute." But that leaves nothing more than the fragment "rather than imposing punishment under any other law, unless another enhancement provides for a greater penalty or a longer term of imprisonment," which grammatically and logically has no independent meaning.

As McDavid has already discussed (AOBM 24-27), common sense and basic grammar dictate that the portion of subdivision (j)'s second sentence starting with "rather than" is inextricably tied to the general rule concerning the imposition of punishment *on the enhancement found true or admitted*, as a conditional clause of the same sentence that relates back to and modifies the general rule stated in that sentence. (Merriam-Webster Dictionary online https://www.merriam-webster.com/dictionary/rather%20than ["rather than" is "used

with the infinitive form of a verb to indicate negation as a contrary choice or wish"].) This language has no meaning or significance apart from that general rule. It applies only if and when the general rule itself applies—i.e., when the court actually "impose[s] punishment" on *the enhancement found true or admitted* because it has declined to exercise its discretion under subdivision (h) to strike or dismiss the section 12022.53 enhancement "*otherwise required* to be imposed by this section."

No basis in reason exists for reading the portion of subdivision (j)'s second sentence that "directs a trial court not to impose a lesser enhancement under any other statute" as distinct from "the shall impose portion" of the same sentence—much less for reading this as creating a freestanding principle of law operating independently of that subdivision and to the exclusion of the sentencing authority created in the other subdivisions—as the position of the People would require. For the same reason, the Legislature could never have intended that the language of section subdivision (j) be interpreted or applied in this illogical manner. (*People v. Bullard* (2020) 9 Cal.5th 94, 106 [courts must "choose a reasonable interpretation that avoids absurd consequences that could not possibly have been intended"].)

B. The general "triggering" language of the limitation in subdivision (j) is beside the point in this context.

Another fundamental problem with the People's interpretation of subdivisions (h) and (j) of section 12022.53 is their emphasis that "[t]he 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." (Ans. Brf. at 21.) The implication here is that the mere fact of a true finding or admission of an enhancement under section 12022.53 triggers as an unavoidable consequence the general directive in subdivision (j) that a trial court is not to impose a lesser enhancement under another statute unless that enhancement "provides for a greater penalty or a longer term of imprisonment." The Court of Appeal's majority opinion in this case similarly emphasized this point as significant to upholding the statutory construction for which the People continue to advocate here. (Slip Opn. At pp. 14, 15, 16.)

But again, it will *always* be the case that "an enhancement specified in this section has been admitted or found to be true" when the trial court faces the *sentencing* situation common to all the cases for which resolution of the question presented here is necessary. Given the undisputed authority under subdivision (h), the focus in answering that question is whether *despite* the existence of such a finding or admission, the court should exercise its discretion to strike or dismiss that enhancement "in the interest of justice pursuant to Section 1385," and, if so, the scope of that discretion. When a court invokes this discretion under subdivision (h), it makes no sense to say that the court is then prohibited from imposing any other enhancement unless that enhancement "provides for a *greater* penalty or a *longer* term of imprisonment." This would literally mean the court could not impose *any* enhancement that calls for any *lesser* penalty or *shorter* term of imprisonment, nullifying the very power of the

court under subdivision (h) to "strike or dismiss" the enhancement "otherwise required to be imposed by this section" "in the interest of justice." Nor could any such construction be squared with this Court's opinion in *Tirado*, which has already clarified that the power under subdivision (h) authorizes the trial court to substitute one of the *lesser* enhancements under section 12022.53 for a *greater* one found true or admitted. (*People v. Tirado* (2022) 12 Cal.5th 688, 696 (*Tirado*).)

Such an interpretation is particularly nonsensical given that the People readily admit trial courts possess the power to strike or dismiss a section 12022.53 under subdivision (h) *and* that "the shall impose portion" of subdivision (j) necessarily *cannot* apply when the court invokes this power "in the face of subdivision (h)'s clear command." (Ans. Brf. at 23, fn. 12.) Observing the "clear command" of subdivision (h) necessarily also requires interpreting the remaining portion of subdivision (j)'s second sentence—which, again, is inextricably tied to and cannot reasonably be divorced from the so-called "shall impose portion" of the subdivision—as equally "inoperative."

C. The People's concession about impact of SB 620 on the limiting language of subdivision (f) further illustrates the proper construction of subdivision (h).

The unsustainability of the People's interpretation is punctuated by their further concession that the general requirement in subdivision (f), providing that a sentencing court must impose "the enhancement that provides the longest term of imprisonment" when multiple section 12022.53 enhancements

have been found true or admitted, is now "inoperative" when the court invokes subdivision (h) to strike or dismiss or more of them. (Ans. Brf. at 32.) The People go even further here, saying, "[t]o 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." (Ans. Brf. at 33.) The People hedge against these concessions regarding subdivision (f) by claiming they do "not necessarily" indicate that the same must be said about SB 620's impact on subdivision (j). (Ans. Brf. at 32-33.) However, they do not explain *how or why* this is "not necessarily" true. They apparently believe it's sufficient to just fall back on their unsustainable "plain meaning" interpretation of section 12022.53 that attempts to transmogrify subdivision (j)'s second sentence into a freestanding limitation that somehow applies to constrain the trial court's sentencing discretion without regard to the otherwise "clear command" of subdivision (h).

The admitted impact of SB 620 on subdivision (f) can only further support McDavid's statutory interpretation of section 12022.53 and that the Legislature indeed "anticipated that its amendment to subdivision (h)" would similarly render the limiting language in subdivision (j) inoperative to the extent necessary to comply with the "clear command" of subdivision (h).

D. Whether a "strike" eliminates the enhancement itself or only the punishment is of no consequence to the plain meaning construction of the relevant language.

Finally, the People attempt to make something else out of nothing in arguing about whether the power to "strike" an enhancement under subdivision (h) operates to eliminate just the punishment of the enhancement found true or admitted or the enhancement itself. (Ans. Brf. at 22-23.) The upshot is apparently to show it's the punishment and not the enhancement that is stricken, because otherwise "no factual foundation would remain to support substitution of a different enhancement." (*Id.* at 22.) Initially, this discussion ignores that the discretionary power under subdivision (h) includes the power to "strike *or* dismiss" the enhancement otherwise required to be imposed. (See *People v. Fuentes* (2016) 1 Cal.5th 218, 225 [explaining that the power to "dismiss" an "action"—which includes any individual charge or allegation—under section 1385 *includes* and is thus broader than the power to "strike the additional punishment" for an enhancement that the court may otherwise "dismiss"].)

Anyway, this is a distinction without a difference here. The *purpose* of the power under section subdivision (h), which the People in no way dispute, is to ensure that the defendant is not "required to undergo a statutorily increased penalty which would follow from judicial determination of" the enhancement otherwise required to be imposed, where the court has determined the defendant should not suffer it "in the interest of justice." (*People v. Santana* (1986) 182 Cal.App.3d 185, 190, fn. 6.) This purpose is served so long as the defendant is spared the penalty that would

otherwise apply, whether that's by way of "striking" the additional punishment or "dismissing" the enhancement itself.[2]

II. The People attempt to artificially elevate the anti-surplusage principle above all other canons of construction, including the paramount canon of effectuating the manifest legislative intent.

As outlined above and in the opening brief, the plain meaning construction, backed by common sense and logic, compels the construction that the general limitation in the second sentence of subdivision (j) does not apply to constrain a court's sentencing discretion once it has invoked the power in subdivision (h) to strike or dismiss the section 12022.53 enhancement "otherwise required to be imposed." Going beyond the plain meaning, the People concede the most important point about the principles of statutory construction—that effectuating the manifest legislative intent is paramount. (Ans. Brf. at 20 ["Ultimately, a court should adopt 'the construction that comports

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[2] The distinctions between the "striking" and "dismissal" power under section 1385 generally and specifically in the context of 12022.53 are issues beyond the scope of the issues presented here. But it's worth noting that the People's effort to prove "the enhancement itself" remains in effect after a court strikes or dismisses it under subdivision (h) appears to stem from the same faulty rationale underlying their untenable statutory analysis. That is, they imply that the enhancement stays in effect *so as to* constrain the sentencing discretion under subdivision (j)'s general directive that the court may not impose any lesser enhancement outside section 12022.53 unless it calls for "a greater penalty or a longer term of imprisonment" than the section 12022.53 enhancement that the court has elected to strike or dismiss.

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)"].) They also recognize that the language of particular statutory provisions must be construed "in their statutory context." (Ans. Brf. at 20, citing *People v. Leiva* (2013) 56 Cal.4th 498, 506, and *People v. Valencia* (2017) 3 Cal.5th 347, 357].) And, of course, as the People do not dispute, it is axiomatic that the relevant "statutory context" includes "the entire scheme and related statutes." (*Gonzalez*, *supra*, 2 Cal.5th at p. 1141.)

Despite this recognition, the People essentially ignore the rest of the scheme of which section 12022.53 is part—that is, Part 4, Title 2 of the Penal Code—and thus they overlook the reality that the whole scheme works together to establish a hierarchy of aggravated penalties for offenses involving the use or possession of a firearm based on the severity of the offense involved. It only makes sense that in exercising the power to strike or dismiss "in the interest of justice" section 12022.53 enhancements—which carry the greatest penalties within the scheme—a trial court would have the authority to then substitute any lesser included enhancement supported by the facts found true or admitted in connection with the enhancement stricken or dismissed. Having disregarded the significance of the "statutory context" here, the People offer no reasoned analysis for why a court is or should be cut off from utilizing the entire statutory scheme beyond the People's untenable interpretation of subdivision (j) as confining the court's discretion to the four corners of section 12022.53.

Instead, the People focus on the general principle that we "should avoid construing a statute in a way that renders part of it inoperative." (Ans. Brf. at 24.) This principle becomes the foundation of their leitmotif that McDavid's statutory construction should be rejected as "disfavored" because there "does not appear" to be sufficiently "strong" justification for rendering inoperative "the portion of subdivision (j) that is at issue." (Ans. Brf. at 9, 18, 20, 24, 24-25, fn. 9, 25.) This leitmotif essentially elevates the principle against rendering statutory language surplusage above all else in the order of interpretative canons. However, amidst all the various invocations of this principle, the People admit, as they must, that it is neither overriding nor even primary among the canons: "'the 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.'" (Ans. Brf. at 24, quoting *In re J.W.* (2002) 29 Cal.4th 200, 209.) In other words, the principle applies unless, as the People themselves say, "giving effect to all parts of the statute would conflict with its manifest purpose or would otherwise produce absurd results." (Ans. Brf. at 24.)

"Giving effect to all parts of" section 12022.53, including the general limitation in the second sentence of subdivision (j), despite a court's invocation of the discretionary power vested to it under subdivision (h) would indeed "conflict with" the manifest purposes of section 12022.53 as amended by SB 620 and would indeed "produce absurd results." Again, and notably, the People *admit* this much is true as to the so-called "shall impose portion"

of the language in the second sentence of subdivision (j), and this "portion" of the sentence cannot be divorced from the "portion of subdivision (j) that directs a trial court not to impose a lesser enhancement under any other statute." Either all or no portion of this sentence applies, and it is clear that no portion of it can reasonably be read to apply, when the court has invoked its discretion under subdivision (h) to strike or dismiss the enhancement "otherwise required to be imposed by this section."

III. The legislative history resoundingly supports the statutory construction that McDavid directly advances and demonstrably rejects the construction that the People only timidly advance.

The Legislature's intent in amending section 12022.53 through SB 620 is abundantly clear and effectuating this intent requires adopting the statutory construction that McDavid advances here. The People admit this construction has "force" and is "plausible" and, as to their own construction, will only go as far as to say it's "not necessarily" inconsistent with this intent.

A. The People concede everything about the legislative history which demonstrates that McDavid's statutory construction is the only sustainable one.

The People concede the core purposes of SB 620: "By granting sentencing courts the discretion to strike a firearm enhancement, 'relief would be available to a deserving defendant, while a defendant who merited additional punishment for the use of a firearm in the commission of a felony would receive it.'" (Ans.

Brf. at 27-28, quoting 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).) "'Consequently, SB 620 provides judges the ability to impose sentences that fit the severity of the offender.' (*Id.* at p. 6.)." (Ans. Brf. at 28.) The People go on, "[t]o 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," and "as appellant notes, other recently-enacted legislation evinces a more general trend toward increased sentencing flexibility and amelioration of punishments." (*Ibid.*) The People nevertheless claim the Legislature "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" based on the determination that "12022.53's terms are proportionate to the seriousness of the offense[s]" to which the section applies. (*Id.* at 30.)

But this legislative history cannot reasonably be squared with any such intention. Again, as the history outlined in the opening brief illustrates (AOBM 33-36), the concerns were that, before SB 620, "these sentences [were] imposed as a mandate, regardless of the circumstances of a crime," and, "[i]f for some valid reason a court wanted to impose a lesser sentence they cannot." Thus, "SB 620 provides the court with discretion to strike a firearm enhancement in any case in which that would be in the interests of justice to do so." That is, "SB 620 allows a judge to exercise discretion on whether or not to make a long

sentence longer *if* it is in the interest of justice," and thereby "to impose sentences that fit the severity of the offense." (Assem. Com. on Public Safety, SB 620 (2017-2018 Reg. Sess.), June 13, 2017, Author's Statement, at pp. 3-4, 8, emphasis added.) This expression of intent can only be squared with an interpretation that affords courts the discretion to strike or dismiss and then substitute a lesser included enhancement as to *all* the sentences "otherwise required to be imposed" under section 12022.53—hence, the lawmakers' reference to "*these* sentences" when expressing their concern about the then-existing "mandate" that courts impose the statutorily-prescribed terms under subdivisions (a), (b), and (c). Yet, the People's construction leads to the untenable result that the 10-year term under subdivision (b) becomes the *absolute* minimum sentence in any case where the court may consider striking or dismissing a section 12022.53 enhancement, including one under subdivision (b), for the purpose of substituting a *lesser* penalty of a *lesser* enhancement that it believes best fits the severity of the offense.

In fact, of primary concern to lawmakers in enacting SB 620 was the perverse reality that "[o]ften the enhancement for gun use is longer than the sentence for the crime itself." (Assem. Com. on Public Safety, Comments on SB 620, June 13, 2017, § 3.) Notably in this context, the sentences for many of the crimes to which section 12022.53's enhancements apply are themselves substantially shorter than the minimum 10-year term that the People's construction would impose as the bare minimum for any additional punishment to be meted out after striking or

dismissing the enhancement found true or admitted. (See § 12022.53, subd. (a).)[3] Some of the base terms for the specified offenses carry punishments as low as a maximum of one year in the county jail. (See § 12022.53, subd. (a)(11)-(13).) For a Legislature concerned about eliminating *mandatory* minimum enhancements and making sure that courts *can* "impose a lesser sentence," it seems unfathomable that it would have intended to create this authority only to deny any relief to subdivision (b) offenders and establish a 10-year minimum for everyone else subject to additional punishment under section 12022.53.

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[3] This is true for the range of possible base terms for most of the offenses in subdivision (a): kidnapping (3, 5, 8, or 11 years) (§§ 12022.53(a)(3), 207, 208, subds. (a) & (b), 209, or 209.5); robbery (3, 4, 5, 6, 9 years) (§§ 12022.53(a)(4), 211, 213, subd. (a)(1)-(2)); carjacking (3, 5, or 9 years) (§§ 12022.53(a)(5), 215, subd. (b)); assault with intent to commit a specified felony (2, 4, 5, 6, 7, or 9 years) (§§ 12022.53(a)(6), 220, subd. (a)(1) & (2)); assault with a firearm on a peace officer or firefighter (4, 6, or 8 years) (§§ 12022.53(a)(7), 245(d)(1)); rape or sexual penetration in concert (7, 9, 10, 11, 12, or 14 years) (§§ 12022.53(a)(9), 264.1, subds. (a) & (b)); sodomy (3, 5, 6, 7, 8, 9, or 11 years) (§§ 12022.53(a)(10), 286, subds. (b) – (k)); oral copulation (county jail for a period of not more than one year, or 3, 5, 6, 7, 8, 9, 10, 12 years in prison) (§§ 12022.53(a)(11), 287, subds. (b) – (k)); lewd act on a child (county jail for a period of not more than one year, or 3, 6, 8, 10 years in prison (§§ 12022.53(a)(12), 288, subds. (a) – (c), 288.5)); sexual penetration (county jail for a period of not more than one year or 3, 6, 8, 10, 12 years in prison) (§§ 12022.53(a)(13), 289, subds. (a) – (c), (f), (g), (h), (j)); assault by a prisoner (2, 4, or 6 years) (§§ 12022.53(a)(15), 4501, subds. (a) – (b)); and holding a hostage by a prisoner (3, 5, or 7 years) (§§ 12022.53(a)(16), 4503)).

B. The People ignore, and thus do not dispute, the important legislative intent behind section 1385 as the proxy for the discretionary power at issue.

The foregoing analysis and conclusions are particularly true in light of the legislative priorities under section 1385, which lawmakers expressly incorporated into section 12022.53 when creating this power under subdivision (h). Again, as part of the same recent "general trend toward increased sentencing flexibility and amelioration of punishments" that the People recognize (Ans. Brf. at 28), courts exercising the sentencing discretion under section 1385 must now afford "great weight" to a host of potentially mitigating factors designed to grant the defendant the benefit of the doubt and to *promote* the use of this power to reduce or eliminate altogether the impact of sentencing enhancements. (§ 1385, subd. (4).) Just like the amendments to section 12022.53 itself under SB 620, these amendments to section 1385 are designed to "help ensure that penalties *more closely reflect the circumstances of the crime*." (Sen. Com. On Public Safety, Analysis of Sen. Bill No. 81 (2021-2022 Reg. Sess.), Mar. 16, 2021, p. 3, italics added.) This same trend has prompted the Legislature to enact section 17.2 as one of the "Preliminary Provisions" of the Penal Code, in which it declares the general intent that "the disposition of any criminal case use the *least restrictive* means available." (§ 17.2, subd. (a), italics added.)

C. The People's "not necessarily" arguments assume the correctness of their faulty statutory construction and otherwise lack any persuasive force.

The People gloss over the impact of these express legislative priorities and attempt to push against the trend with three suggestions for why it is still "not necessarily" the case that the Legislature intended the general limitation of section 12022.53, subdivision (j), to become inoperative when a court invokes its sentencing discretion under subdivision (h). First, the People suggest that the Legislature would frown on this interpretation because trial courts "would be able to circumvent [the general limitation] in every case in which a section 12022.53 enhancement is found." (Ans. Brf. at 23.) This *assumes* the validity of their desired statutory construction—that the Legislature intended the general limitation to remain in effect *despite* the operation of subdivision (h). And such a suggestion is really just a lamentation about the mere existence of the power afforded a court under subdivision (h): if the sentencing court has invoked that authority to strike or dismiss the enhancement found true or admitted "in the interest of justice," it hasn't "circumvented" anything, but rather it has done exactly what the Legislature intended in crafting a punishment that fits the severity of the crime based on the facts specific to the case.

The second suggestion is just a slight variation of the first, as the People bemoan that a construction of the statute affording courts the authority to substitute lesser enhancements outside the bounds of section 12022.53 is "in contravention" of the general limitation in subdivision (j) and would thus grant courts

a form of discretion broader than the Legislature intended, because the section 12022.53 enhancements "would cease to be 'the default punishment.'" (Ans. Brf. at 29, 31.) Once again, the People simply assume the correctness of their desired statutory construction. If that construction is wrong—which it is for all the reasons stated—then the People's point here reduces to nothing more than another misplaced criticism of the clear legislative priorities behind SB 620. As the People themselves acknowledge elsewhere in this very context, the whole point of SB 620 is to afford courts the "'flexibility'" necessary to "'impose lighter sentences'" for "'deserving defendants.'" (Ans. Brf. at 31, quoting *Tirado*, *supra*, 12 Cal.5th at pp. 701-702.)

Further, the proper statutory construction does not grant "unlimited options" to sentencing courts. (Ans. Brf. at 29.) Far from providing unbridled discretion as the People portray it, this discretion is bounded by the general parameters that govern all exercises of sentencing discretion under section 1385. (See *People v. Garcia* (1999) 20 Cal.4th 490, 503 [the court must consider "the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects"]; *People v. Romero* (2002) 99 Cal.App.4th 1418, 1433 [the trial court must "balance[] the relevant facts and reach[] an impartial decision in conformity with the spirit of the law . . .' [Citation]."]

Lastly, the People suggest their desired construction sufficiently aligns with the legislative history because confining the sentencing options to section 12022.53 would advance "public

safety" in the meting out of punishments for the specified offenses. (Ans. Brf. at 30.) But the People directly undermine their own suggestion here by acknowledging the legislative history of section 1170 which—just like section 12022.53 as amended—recognizes that "'when a sentence includes incarceration,' public safety 'is best served by term that are *proportionate to the seriousness of the offense*." (Ans. Brf. at 30-31, quoting § 1170, subd. (a)(1), italics modified.) While the People also emphasize the general intent of section 1170 to promote "uniformity" in sentencing, that concerns uniformity for the "'same offense under *similar circumstances*.'" (Ans. Brf. at 31, quoting § 1170, subd. (a)(1), italics added.) If the circumstances are "similar," then it is fair to presume that courts will exercise their discretion under section 12022.53 to impose similar levels of punishment. (See *People v. Reneaux* (2020) 50 Cal.App.5th 852, 874, quoting *People v. Giminez* (1975) 14 Cal.3d 68, 72 ["'[I]n the absence of a clear showing that its sentencing decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate sentencing objectives . . .'"].)

In any event, what matters here are the legislative priorities of *SB 620*, which focus not on "uniformity" but on ensuring that courts are afforded the scope of discretion necessary to "to impose sentences that fit the severity of the offense." (Assem. Com. on Public Safety, SB 620 (2017-2018 Reg. Sess.), June 13, 2017, Author's Statement, at pp. 3-4, 8.)

IV. The backdrop of caselaw against which SB 620 was enacted necessarily further supports McDavid's statutory construction, and the People make no credible attempt to show otherwise.

The People also do not dispute the principles governing the impact of the caselaw existing at the time a statute is enacted or amended. Again, "'[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'" (*Vazquez v. Jan-Pro Franchising International, Inc.* (2021) 10 Cal.5th 944, 951, quoting *Rivers v. Roadway Express, Inc.* (1994) 511 U.S. 298, 312-313.) "Statutes are to be interpreted by assuming that the Legislature was aware of the existing judicial decisions." (*Kusior v. Silver* (1960) 54 Cal.2d 603, 618.) Therefore, "[w]here a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction" (*People v. Harrison* (1989) 48 Cal.3d 321, 329), and we further presume that the Legislature "'was aware of existing related laws and intended to maintain a consistent body of rules'" (*People v. Cervantes* (2020) 55 Cal.App.5th 927, 938, quoting *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199).

Nor do the People dispute that this Court approvingly cited the caselaw existing at the time of SB 620's enactment in support of its decision in *Tirado*—i.e., *People v. Strickland* (1984) 11 Cal.3d 946, *People v. Allen* (1985) 165 Cal.App.3d 616, *People v. Lucas* (1997) 55 Cal.App.4th 721, *People v. Dixon* (2007) 153

Cal.App.4th 985, and *People v. Fialho* (2014) 229 Cal.App.4th 1389. (*Tirado*, *supra*, 12 Cal.5th at pp. 696, 698.) Rather, the People simply sweep aside the lot as individually and collectively insignificant because those cases did not address the specific question at issue concerning the limiting language of subdivision (j). (Ans. Brf. at 37 & fn. 13.) Through this broad-brush treatment of the caselaw, the People imply that the holdings or outcomes of these cases might have been different had the courts considered this limiting language. (*Ibid.*) However, they provide no reasoned analysis of why that would be the case and thus presumably rest this implication on their unsustainable statutory interpretation.

There's no reason to think or assume the cases would have turned out differently had they addressed the limiting language in subdivision (j). These cases, including *Tirado* itself, all turned on the general principle that the charging and prosecution of the greater enhancement was enough to support imposition of the lesser enhancement ultimately imposed *because* the defendant was on adequate notice of the exposure to the lesser—and this was true *regardless* of whether the lesser enhancement emanated from a different statute. In fact, both *Dixon* and *Fialho* specifically involved the substitution of a lesser included enhancement *outside section of 12022.53* for an enhancement found true or admitted under section 12022.53, at a time when the same limiting language of subdivision (j) existed and the discretion under the current version of subdivision (h) did not.

Applying the presumption that the Legislature was aware of and intended to adopt the existing body of relevant caselaw

necessarily bolsters McDavid's interpretation of the legislative history concerning the intent of SB 620, while simultaneously undermining the People's interpretation of this scheme.

V. The People also concede everything about the impact of *Tirado* that shows McDavid's statutory construction is entirely consistent with this opinion.

Regarding the *Tirado* opinion, the People similarly attempt to set it aside as ultimately of no moment because it had no occasion "to address section, subdivision (j)'s prohibition on the imposition of a lesser enhancement from a different statute." (Ans. Brf. at 35.) But they concede everything about *Tirado* that matters in illustrating how and why it further bolsters the statutory construction already compelled by every other interpretative consideration. The People say, "[t]he People acknowledge that, but for the limiting language in section 12022.53, subdivision (j), the principles discussed in *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." (Ans. Brf. at 34-35.) Their "but for" caveat rests on nothing more than the faulty assumption that subdivision (j) continues to operate as a sentencing limitation even when the court has invoked its authority under subdivision (h).

As the People admit, "[t]he rationale of *Tirado* would support appellant's interpretation as a general matter." (Ans. Brf. at 8.) "*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.)" (Ans. Brf. at 13, emphasis added.) In other words, "*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." (Ans. Brf. at 34, emphasis added.) "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." (Ans. Brf. at 13, emphasis added.)

Just as it sounds under the People's own rendition, the *Tirado* opinion is entirely consistent with a construction of section 12022.53 that permits a court exercising the discretion under subdivision (h) to substitute any lesser included offense supported by the facts pled and proved in connection with the greater enhancement found true or admitted under this section. For all the reasons discussed, this is indeed essential to ensuring the flexibility necessary for courts to craft punishments for firearms-related conduct that fit the severity of the offense.

VI. The *Lewis* opinion just underscores the unsustainability of the People's position in this case.

The Fifth Appellate District's opinion in *People v. Lewis* (2022) 86 Cal.App.5th 34, which the People cite for support, adds nothing to the equation here. In fact, the equivocation the People repeatedly display in hedging against their own position with tenuous words and phrases shows they do not fully endorse or support the reasoning or the holding in *Lewis*. And this opinion exemplifies the trouble with the position the People are only confident enough to soft-pedal in this Court. In *Lewis*, the enhancement at issue was the one under subdivision (b), carrying a 10-year term (*Lewis*, *supra*, 86 Cal.App.5th at p. 38), meaning the opinion's failure to recognize the full scope of authority under subdivision (h) produces the very result that illustrates the most glaring absurdity of the People's position: the sentencing court is left with a binary choice between imposing either no additional punishment at all for the firearms-related conduct or 10 years as the mandatory minimum for *any* additional punishment, regardless of whether the court might find that one or more of the "mitigating circumstances" under section 1385 would dictate an additional term *somewhere between* zero and 10 years as best fitting the severity of the offense.

And the factors the *Lewis* court cited in support of this statutory construction are all among those that must be rejected as fundamentally misguided: the notion that "once a section 12022.53 enhancement is admitted or found true," the limiting language of subdivision (j) is triggered so as confine the

sentencing options to the four corners of section 12022.53 regardless of whether the court invokes the discretion afforded under subdivision (h) (*Lewis*, *supra*, 86 Cal.App.5th at p. 39); and the notion that construing subdivision (j)'s limiting language as inoperative in such instances would go too far in granting courts unbounded or unlimited forms of discretion (*id.* at pp. 40-42).

VII. The matter should be remanded with directions that the trial court resentence McDavid based on the full scope of its *actual* discretion under section 12022.53.

The People conclude their Answer Brief with the simple statement that "[t]he judgment of the Court of Appeal should be affirmed." (Ans. Brf. at 39.) Part of the judgment that they seek to have affirmed is the Court of Appeal's order that the matter be remanded "to the trial court for the court to conduct another resentencing hearing at which it shall exercise its discretion" because "the record does not show that the trial court was aware" of the full scope of its discretion under subdivision (h) of section 12022.53. (Slip Opn. At 13.) Yet, the People make no mention of this portion of the judgment and thus make no mention of the Court of Appeal's related finding that "the record supports an inference that the [trial] court may not necessarily have declined to exercise its discretion under *Tirado* if it had been aware of it" given the facts and circumstances that could warrant striking the subdivision (d) enhancement and imposing lesser enhancements. (*Ibid.*) The People's failure to address, much less attempt to refute, this portion of the judgment constitutes a concession to

the remand order and the findings in support of that order. (See *Rudick v. State Bd. of Optometry* (2019) 41 Cal.App.5th 77, 89–90 [finding appellants made an implicit concession by "failing to respond in their reply brief to the [respondent's] argument on th[at] point"]; *Reygoza v. Superior Court* (1991) 230 Cal.App.3d 514, 519, fn. 4 [the reviewing court assumed that an assertion made in the respondent's answer brief was correct because "defendant did not dispute respondent's claim in his reply"].)

Again, while the judgment of the Court of Appeal is correct insofar the order of remand for resentencing and the reasons for that order, it is incorrect about the *scope* of the trial court's resentencing discretion on remand and thus incorrectly limits the court's discretion to substituting "uncharged section 12022.53 enhancements (i.e., § 12022.53, subd. (b) or (c)) pursuant to section 12022.53, subdivision (j)." (Slip. Opn. At 16.) For all the reasons discussed, this discretion is not limited to the confines of section 12022.53 but rather extends to the lesser included enhancements that are part of the same general sentencing scheme in Part 4, Title 2, of the Penal Code. The hierarchy of increased penalties for firearms-related conduct established with this scheme serve as the very foundation for the flexibility that the Legislature envisioned creating in ensuring courts have the power to fix punishments that *fit* the severity of the offense.

Conclusion

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

Dated: August 10, 2023

Respectfully submitted,

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

Certificate of Compliance

I certify that this brief is prepared with 13-point Century Schoolbook font and contains 7,578 words.

Dated: August 10, 2023

Respectfully submitted,

_____
Raymond M. DiGuiseppe,
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Declaration of Service

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

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P.O. Box 7500
Crescent City, CA 95532

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Stephen Hinkle (Court of Appeal appellate counsel)
Ricky Crawford (trial counsel)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and was executed on August 10, 2023.

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

STATE OF CALIFORNIA
Supreme Court of California

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Date

/s/Raymond DiGuiseppe

Signature

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