IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

The Honorable Anne-Christine Massullo
Judge Presiding

APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION AND BACKGROUND

Respondent concedes that, with respect to Counts 3 through 7, the prosecution violated the pleading rules dictated by Penal Code[1] section 12022.53, subdivision (e)(1) [hereafter § 12022.53(e)].[2] (Answer Brief on the Merits [RBM] 7.) However, respondent argues that, notwithstanding this violation, the 25 years-to-life enhancements imposed on each of those counts need not be stricken, although it acknowledges "the better practice is

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[1] Further statutory references will be to the Penal Code, unless otherwise specified.

[2] Under subdivision (d) of the statute, an accused who personally discharges a firearm, causing great bodily injury or death, will be punished with an additional sentence of 25 years-to-life. Subdivision (e) imposes vicarious liability on any participant in the underlying shooting if it is proved that the participant committed the offense in association with a criminal street gang and that any principal in the offense shot the fatal bullet.

to allege the section 12022.53(e) enhancement in the accusatory pleading itself with respect to every count on which the prosecution intends to seek it." (RBM 9.) As respondent puts it,

> This Court, however, should still affirm the Court of Appeal's judgment. In this case, the jury instructions and verdict forms gave Anderson notice that the prosecution intended to seek the section 12022.53(e) enhancement with respect to these five counts, and Anderson raised no objection to having the jury decide their truth.

(*Ibid.*)

In light of respondent's complete reliance on its contention that jury instructions and verdict forms provided Mr. Anderson fair notice of the prosecution's intention to seek an additional term of 125 years-to-life, it is necessary to set out in detail the chronology and circumstances surrounding the jury instructions and verdict forms to which respondent makes reference.

Testimony in this case began on February 23, 2011. (18 RT 3279.) The case went to the jury on **April 19, 2011.** (5 CT 1291.)

On April 4, 2011, the prosecution submitted its list of proposed jury instructions, including CALCRIM No. 1402, which sets out the pleading

requirements imposed by § 12022.53(e).[3] There is no indication in the record that CALCRIM No. 1402 was also applicable to Counts 3 through 7, in addition to Count 1. (See 4 CT 965.)

On April 12, 2011, the day before both sides rested (see 44 RT 7980), the prosecution successfully moved to amend the original information in this case to conform to the proof by adding an additional attempted robbery victim. (4 CT 992, 996.) In the amended information, as it did in the original information, the prosecution pled subdivision (e) in connection with Count 1, the murder of Zachary Roche-Balsam. However, with respect to Counts 3 through 7 (including the newly added attempted robbery count), the prosecution continued to plead, as it did in the original

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[3] CALCRIM No. 1402 states: "If you find the defendant guilty of the crime[s] charged in Count[s] [,] [or of attempting to commit (that/those) crime[s]] [or the lesser crime[s] of <insert name[s] of alleged lesser offense[s]>] and you find that the defendant committed (that/those) crime[s] for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether[, for each crime,] the People have proved the additional allegation that one of the principals (personally used/personally and intentionally discharged) a firearm during that crime [and caused (great bodily injury/ [or] death)]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.] To prove this allegation, the People must prove that: [¶] [1.] Someone who was a principal in the crime personally (used/discharged) a firearm during the commission [or attempted commission] of the <insert appropriate crime listed in Penal Code section 12022.53(a)(./;) [¶] [AND] [¶] [2.That person intended to discharge the firearm(./;)] [¶] [AND] [¶] 3.That person's act caused (great bodily injury to/ [or] the death of) another person [who was not an accomplice to the crime]."

information, that Mr. Anderson "personally used a firearm in the commission of this offense within the meaning of section 12022.53, subdivision (b)." (4 CT 980-983 [Amended Information]; see 1 CT 98-100 [Original Information].) This subdivision (b) enhancement carries a consecutive term of 10 years rather than 25 years to life.[4] Thus, like the original information, the amended pleading filed near the end of the trial affirmatively told appellant that the ten year enhancements provided by subdivision (b) would apply to him. The last-minute amendment did not afford any notice that the prosecution would nevertheless seek to impose an additional 125 years-to-life under § 12022.53(e).

On April 13, 2011, both sides rested. (44 RT 7980.)

On April 14, 2011, the court, in reviewing the jury instructions stated: "CALCRIM 1402, the People will add an and/or in the first full sentence of that, as we've discussed off the record, so that it's – it looks like – and/or will be added in." (45 RT 8039.) The mention of CALCRIM No. 1402 is no surprise, given that the prosecution pleaded the § 12022.53(e) enhancement with respect to Count 1, the murder count. However, the

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

court's cryptic reference gave the defense no reason to believe that the prosecution would, in addition, seek to apply to Counts 3 through 7 the § 12022.53(e) enhancements that CALCRIM No. 1402 explains. The significance of the court's remark only became clear on **April 18, 2011**, when the court instructed the jury:

> If you find the defendant guilty of the crimes charged in Counts III and/or IV, robbery of Bella Kizziah and Yana Peselev, respectively, and/or the crimes charged in Counts V, VI, and/or VII, attempted robbery of Ryan Williams, Justin Marks, and/or Keith Gallo respectively, and you find that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether the People have proved the additional allegation that one of the principals personally and intentionally discharged a firearm during that crime and caused death.
>
> To prove this allegation, the People must prove that: One, someone who was a principal in the crime personally discharged a firearm during the commission of, or attempted commission of, robbery; and, two, that person intended to discharge the firearm; and, three, that person's act caused the death of another person.

(46 RT 8095-8096.)

There is no record of any other discussion between the parties and the court about the applicability of this instruction, or the verdict forms embodying it, to Counts 3 through 7. Neither is there any indication that

Mr. Anderson was present at whatever off-the-record discussions were had about CALCRIM No. 1402, or its use in connection with those counts.[5]

ARGUMENT

I. THE PROSECUTION'S CONCEDED FAILURE TO FOLLOW THE PLEADING REQUIREMENTS OF SECTION 12022.53, SUBDIVISION (E) WITH RESPECT TO COUNTS THREE THROUGH SEVEN OF THE AMENDED INFORMATION FILED THE DAY BEFORE BOTH SIDES RESTED RENDERS THE CONSECUTIVE 25 YEARS-TO-LIFE ENHANCEMENTS IMPOSED ON THOSE COUNTS UNAUTHORIZED AND IN EXCESS OF JURISDICTION.

A. Under The Reasoning of *People v. Mancebo,* the Uncharged 25 Years-to-Life Enhancements Imposed on Counts 3 Through 7 Were Unauthorized.

In *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), this Court held that failure to follow the specific pleading requirements of the statute under examination in that case was reversible error because the resulting sentence was "unauthorized." (*Id.* at pp. 749-750.) The Court concluded that this result was dictated by the "plain language and express provisions" of the statute. (*Id.* at p. 744.) Under the specific terms of the statute under

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[5] As noted in Appellant's Opening Brief on the Merits [AOB], the record reveals no objection to this instruction. (AOB 13-14.) As respondent points out, defense counsel initialed the instruction and verdict forms and told the court that the proposed packet of instructions appeared to be in order and complete. (RBM 13.)

consideration in *Mancebo*, the prosecution was required to plead in the charging document the qualifying circumstances authorizing the imposition of life sentences. (*Ibid.*) Subsequent cases have followed *Mancebo* and have found enhancements unauthorized because the accusatory pleading did not allege the specific enhancement later imposed. (See, e.g., *People v. Sawyers* (2017) 15 Cal.App.5th 713, 727 [imposition of a Three Strike sentence unauthorized where prosecution failed to allege that it would use prior qualifying convictions to impose Three Strike sentence]; *People v. Nguyen* (2017) 18 Cal.App.5th 260, 266-267 [failure to allege that a prior serious felony would be used as a five-year enhancement" under § 667, subd. (a) as well as a strike not enough to satisfy "pled and proved" requirement of *Mancebo* even though *fact* of existence of prior serious felony was pleaded].)

In the present case, respondent expressly acknowledges:

> The People agree that the operative information in this case [i.e., the amended information filed a few days before the parties rested] did not meet *Mancebo*'s pleading requirements. To seek the enhancement provided for in section 12022.53, subdivision (e) (section 12022.53(e)), the prosecution was required to "ple[a]d and prove[]" certain circumstances. (§ 12022.53, subd. (e).) In *Mancebo*, this Court held that an identical phrase in a separate statutory provision requires the prosecution to identify, in the accusatory pleading itself, the "specific sentence enhancement allegations" it intends to invoke to increase the defendant's sentence. (*Mancebo*, *supra*, 27 Cal.4th at p. 747.) The operative information here

> did not comply with that requirement with respect to the five counts at issue in this appeal.

(RBM 7.)

Respondent's further contention that its pleading failure in the present case is nevertheless not fatal founders on Justice Baxter's explanation in *Mancebo* that, apart from problems of due process/notice, the imposition of a more onerous enhancement than the one pleaded renders the resulting sentence "unauthorized" under the plain language the statute before it – identical language, as respondent concedes, to the language in § 12022.53(e). The *Mancebo* court rejected respondent's attempt to find "a way around" the statutory prerequisite of specific and express charging of the enhancement . (*Mancebo*, *supra*, 27 Cal.4th at pp. 744-745.)

In *Mancebo*, the prosecution had pleaded "gun use" as a basis for an indeterminate life sentence under section 667.61 (the "One Strike" law). However, the sentencing court later substituted another qualifying circumstance – multiple victims – so that the gun use would be available to impose an additional enhancement under section 12022.5, subdivision (a). (*Mancebo*, *supra*, 27 Cal.4th at pp. 744-745.) Respondent argued that a reading of the information as a whole made it clear that there were two victims, even if that was not pleaded as the basis for imposing a One Strike sentence. (*Ibid.*) This Court found respondent's argument unpersuasive.

The Court held that the information "was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms under section 667.61, subdivision (a) and use the circumstance of gun use to secure additional enhancements under section 12022.5(a)." (*Id.* at p. 745.)

Thus, the lesson of *Mancebo* is that it is not enough that the factual basis to support an unpleaded enhancement can be gleaned from the facts pleaded. *It is necessary that the accusatory pleading allege the specific enhancement as to the particular count to which it is meant to apply.* As another court, construing *Mancebo*, put it, "under *Mancebo*, *what matters is notice by pleading, not actual notice.* The defendant in *Mancebo* certainly knew from the counts alleging different victims that a multiple-victim enhancement could be at issue, but the Supreme Court in *Mancebo* found that this fact did not satisfy the requirements of [the statute] or due process. [Citation.]" (*People v. Perez* (2015) 240 Cal.App.4th 1218, 1225 [emphasis added].)

In the present case, as a "way around" the *Mancebo* holding, respondent offers as a kind of *deus ex machina* the jury instruction that the court gave with respect to Counts 3 through 7. As seen earlier, the record

sheds no light on the origin or rationale for this instruction, which makes its first appearance in the record when the trial court read it to the jury just before sending them out for deliberations. What *is* known is that the instruction was given in the conceded violation of the pleading rules established in *Mancebo* and was, accordingly, "unauthorized." Thus, far from curing the pleading defect, the application of that instruction to Counts 3 through 7 represents the genesis of the error.

B. The Unauthorized Sentence Claim Was Not Forfeited.

Respondent contends that appellant forfeited the argument that the pleading error requires reversal. The argument fails.

An "unauthorized sentence" represents a disposition in "excess of jurisdiction" and is not subject to waiver or forfeiture. (See generally, e.g., *People v. Smith* (2001) 24 Cal.4th 849, 852-853; *People v. Scott* (1994) 9 Cal.4th 331, 354A defendant cannot consent to a statutorily unauthorized sentence. (*People v. Nguyen*, *supra*, 18 Cal.App.5th at p. 272 [defendant "could not and he did not forfeit a statutory objection . . . because the violation resulted in an unauthorized sentence"].)

Forfeiture is defined as the preclusion from raising an issue on appeal by reason of a defendant's "failure to make the timely assertion of a

right . . ." (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) Even where (in contrast to unauthorized sentences) forfeiture is potentially applicable, whether to apply the forfeiture doctrine in a particular case is discretionary with the reviewing court. (See, e.g., *People v. Cross* (2015) 61 Cal.4th 164, 171-172 [court exercises discretion to review otherwise forfeited claim implicating fundamental rights and presenting pure question of law].)

Relying on this Court's decision in *People v. Houston* (2012) 54 Cal.4th 1186 (*Houston*), respondent argues that because the record does not show that appellant objected when the trial judge announced she would instruct the jury in accordance with the unpleaded § 12022.53(e) enhancement, the claim is forfeited. (RBM 26-29.) However, the facts giving rise to forfeiture in *Houston* are very different from the facts in the present case. In *Houston*, the prosecution concededly failed to comply with the pleading requirements of section 664, subdivision (a), which specifies that a life sentence for attempted murder "shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact." This Court nevertheless ruled that the claim of error was forfeited under the unique circumstances of that case where the court

specifically raised the subject of the unpleaded enhancement in colloquy with the attorneys and defense counsel did not object despite the court's express invitation (*Houston*, *supra*, 54 Cal.4th at p. 1226.) However, with respect to the present case, in the words of the court in *People v. Perez* (2017) 18 Cal.App.5th 598, 616, "there the similarity ends." As the *Perez* court explained:

> In *Houston*, the trial court raised the issue at the end of the first day of the defendant's presentation of his case. [Citation.] The court discussed the issue at some length and put the defendant on notice that the verdict forms would ask the jury to distinguish the two types of attempted murder. 'And the final thing that is not completely clear in the verdict form, because I don't think I had it clear in my mind when I was putting it together, is the distinction between the two kinds of attempted murder, and if I understand what the prosecution is doing in [the attempted murder counts], I believe the prosecution is intending to charge premeditated attempted murder. [¶] *If that's not right, you should tell me now*, or as soon hereafter as you are able to, because it would help me. [¶] In other words, the type of attempted murder [that is] punished by life imprisonment rather than five, seven, nine.' [Citation.]

(*People v. Perez*, *supra*, 18 Cal.App.5th at pp. 616-617.)

The *Perez* court, in words easily applicable to the present case, went on to explain why these differences were decisive:

> In *Houston*, the trial court directly and plainly informed the defendant that it was planning to instruct the jury on the two options for attempted murder. Not only did the trial court expressly raise the issue, but it invited a response from the parties. Receiving none, it again informed the defendant that

> it had prepared a verdict form directing the jury to make a special finding whether the attempted murders were willful, deliberate, and premeditated. Having been given notice twice during the trial that he would be subject to an attempted first degree murder verdict, the court then instructed on the additional elements necessary to find premeditated attempted murder. As a result, even though the prosecution violated section 664's directive to give the defendant advance notice in the accusatory pleading, the court found that he was given ample notice of the charges against him and the opportunity to object.

(*People v. Perez*, *supra*, 18 Cal.App.5th at p. 618.)

In the present case, the first moment when the disclosure of the prosecution's true intentions would have been of real use to Mr. Anderson and his counsel came before the evidentiary phase of the trial had even begun, when Mr. Anderson and his lawyer were faced with the decision whether to accept the prosecution's plea offer. (See *Mancebo*, *supra*, 27 Cal.4th at p. 752; cf. *In re Alvernaz* (1992) 2 Cal.4th 924, 933 [counsel's duty to provide accurate advice to defendant about whether to plea bargain].) Had Mr. Anderson and his lawyer known that, in addition to his other exposure, he faced an additional 125 years-to-life term, it cannot be gainsaid that he might well have made a different decision about whether to accept the prosecution's offer of 15 years to life. (See 17 RT 3003; *Mancebo*, *supra*, 27 Cal.4th at p. 752 ["in many instances a defendant's decision whether to plea bargain or go to trial will turn on the extent of his

exposure to a lengthy prison term"].) There was no such notice in the present case at any point before trial. Indeed, even near the conclusion of trial, the prosecution filed an amended information which continued to charge the section 12022.53(e) enhancement *only* as to the murder, not on Counts 3 through 7.

Indeed, until the morning that the additional five life sentences were imposed, Mr. Anderson had good reason to believe that any danger of facing more time based on the enhancements to Counts 3 through 7 was purely theoretical. The prosecutor remained committed to staying the § 12022.53(e) enhancements with respect to Counts 3 through 7 until the morning of the day that sentence was imposed. (See 56 RT 24109-24110.) Indeed, in his original sentencing memorandum, filed August 29, 2011, the prosecutor mentioned the § 12022.53(e) enhancement only in connection with the murder charged in Count 1 of the amended information. As to the robbery and attempted robberies (Counts 3 through 7), the information pled only the gun use and gang enhancements (§ 12022.5; § 12022.53, subd. (b); § 186.22). (6 CT 1346-1347 [People's Sentencing Memorandum].) The prosecutor took the same position in the People's Revised Sentencing Memorandum filed June 12, 2012, a month before sentencing. (6 CT 1423-1424.) Appellant operated under the same understanding in his reply, filed

July 9, 2012, the day before sentencing. (6 RT 1435-1436.) It was the trial judge who first posed the question as to what effect to give the § 12022.53(e) enhancements. The prosecutor's response was to impose the enhancement on Count 1 and to impose but stay the enhancements on the other counts. (See 56 RT 24109.)[6]

In sum, *Houston* provides no support for the application of the forfeiture doctrine in this case, where the lack of timely, useful notice is plain to see. Indeed, even if it were determined that respondent has made a colorable case of forfeiture here, the Court should, in its discretion, nevertheless decide on the basis of the undisputed facts of this case that by the time Mr. Anderson learned of his real jeopardy, it was too late.

C. Conclusion.

In arguing that the conceded failure to plead the § 12022.53(e) violation as to Counts 3 through 7 does not require reversal, respondent goes wrong in overlooking the fact that *"Mancebo* is primarily a statutory decision, not a constitutional decision." (*People v. Nguyen*, *supra*, 18 Cal.App.5th at p. 271.) Viewed in that light, *Mancebo* is perhaps best

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[6] The court mentioned Counts 5, 6, and, 7, overlooking the enhancements attached to Counts 3 and 4. (56 RT 24109.)

viewed as construing the language and force of the operative language of the One Strike law – identical, as respondent concedes, to the language § 12022.53(e) – so as to avoid constitutional problems. "[A] statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question." (*People v. Engram* (2010) 50 Cal.4th 1131, 1161.) So construed, the language of § 12022.53(e) means that the prosecution's non-compliance with the statute's pleading rules renders the five sentence enhancements at issue in this case unauthorized. (See *Mancebo*, 27 Cal.4th at p. 749 [where prosecution clearly understood pleading requirements, failure to follow them must "be deemed a discretionary charging decision"].)

II. APPELLANT WAS DEPRIVED OF FAIR NOTICE THAT THE PROSECUTION INTENDED TO SEEK CONSECUTIVE 25 YEARS-TO-LIFE SENTENCE ENHANCEMENTS AS TO THE ROBBERY/ATTEMPTED ROBBERY COUNTS.

A. The Amended Information, Filed One Day Before the Parties Rested, Specifically Informed Appellant that, as to Counts 3 Through 7, he was Liable to 10-Year Enhancements under § 12022.53(b), but not 25 Years-to-life Enhancements under § 120122.53(e).

"[I]n addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process

right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Mancebo*, *supra*, 27 Cal.4th at p. 747.)

There was no fair notice in the present case. The first discernible indication that CALCRIM No. 1402 would be given with respect to Counts 3 through 7 came on April 14, 2011, *the day after the parties rested.* The notion that an instruction first interposed after the close of evidence can substitute for pleading notice in the charging documents would render the statutory requirement of express pleading of enhancements nugatory.

Moreover, the very fact that section 12022.53 and other California statutes do unequivocally require charging of enhancements in the accusatory pleading has crucial implications for the due process analysis, as well as application of those statutes. (See *Russell v. United States* (1962) 369 U.S. 749, 763 [due process requires that charging document sufficiently apprise defendants of what they must be prepared to meet]; *Gautt v. Lewis* (9th Cir. 2007) 489 F.3d 993, 1002-1003 [due process forbids conviction on charge not contained in charging document]; *People v. Carbonie* (1975) 48 Cal.App.3d 679, 691["The purpose of the information is to provide the accused with fair notice of the charges he or she is expected to answer."].) Furthermore, there was a particular reason for the defense to have such

assurance here. This is so because, as seen in the Introduction and Argument I, the prosecution filed an amended information *the day before both sides rested.* This document, like the original pleading, charged only section 12022.53, subdivision (b) enhancements, not § 12022.53(e) enhancements, as to Counts 3 through 7. The post-evidentiary phase inclusion of the greater enhancing allegations in the jury instructions cannot seriously be considered fair notice. Had appellant known prior to trial that, upon conviction, he faced 125 years-to-life in addition to the life sentences imposed on the murder count, he might well have accepted the prosecution's plea offer. (See *Mancebo*, *supra*, 27 Cal.4th at p. 752 ["in many instances a defendant's decision whether to plea bargain or go to trial will turn on the extent of his exposure to a lengthy prison term"]; see also *People v. West* (1970) 3 Cal.3d 595, 612 ["'Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to and present his defense and not be surprised by evidence offered at his trial.'"].)

Respondent seeks to distinguish *Mancebo* because in that case, the first notice that the prosecution would seek an additional penalty came at the time of sentencing. (RBM 20-21.) In this case, to the extent that Mr. Anderson received any semblance of implied notice of his true jeopardy, it

came only after the parties had rested. Until then, the charging document informed him of something else entirely, namely, that the prosecution would seek the ten year sentence enhancement provided in section 12022.53, subdivision (b), and the life sentences imposed by section 12022.53, subdivisions (d) and (e). Moreover, though defense counsel may have had an opportunity to review the instruction packet, there was no discussion at all of the instructions' application of the uncharged section 12022.53(d) enhancement to Counts 3 through 7, and there is no indication whatever in the record that Anderson or his counsel were actually aware of the instructions' dramatic escalation of his sentencing exposure beyond that pleaded in the amended information just a few days earlier.

Moreover, even after trial, right up to when sentence was actually imposed, the defense had no reason to believe that Anderson would receive any enhancements on those counts. *The prosecution had informed the court and Mr. Anderson that it would ask the court to stay the five life sentences attached to Counts 3 through 7.* On these facts, the argument that appellant had anything resembling fair notice falls of its own weight.

B. Appellant Did Not Consent to an Informal Amendment of the Information.

Respondent offers *People v. Toro* (1989) 47 Cal.3d 966 for the proposition that appellant's failure to object to the inclusion of jury instructions imposing § 12022.53(e) liability in substitution for the section 12022.53, subdivision (b) liability announced in the original information (and re-affirmed at the end of the evidentiary portion of the trial in the amended information) amounted to implied acquiescence to an informal amendment of the information. That is not so. In *Toro*, this Court held that "[b]ecause submission of the lesser related offense to the jury enhances the reliability of the fact-finding process to the benefit of both the defendant and the People, and because lack of notice is an issue which generally may not be raised for the first time on appeal, we have concluded that when a lesser related offense is submitted to the jury without objection, the defendant must be regarded as having impliedly consented to the jury's consideration of the offense, and that absent other reversible error the judgment of conviction should be affirmed." (*Id.* at pp. 969-970.)

Respondent argues that the Court should extend the holding of *Toro* to include instances, like the present case, where the added charge can only increase a defendant's exposure, in this case drastically. Properly construed, as relating to informal amendments that offer a defendant, at worst, a conviction on a lesser offense, *Toro* makes perfect sense. A

defendant should not be permitted to remain silent, gambling that he or she will be totally acquitted, and then complain after the fact, on appeal, about his or her conviction for the lesser offense. "It has long been the rule in this state that, in the absence of prejudice, a defendant may not complain of error favorable to the defendant, including the giving of correct, but inapplicable, instructions and return of a verdict of an offense less than that which the evidence shows. (*People v. Lee* (1999) 20 Cal.4th 47, 57.) Transposed to the present situation, where the added charge is obviously to appellant's detriment, it makes no sense to infer consent. The reason for this was well expressed decades ago by Justice Traynor, "A person cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense." (*In re Hess* (1945) 45 Cal.2d 171, 174-175.) This right to notice is, as *Mancebo* teaches, a fundamental constitutional right. (*Mancebo*, *supra*, 27 Cal.4th at p. 750; *People v. Toro*, *supra*, 47 Cal.3d at p. 973.) Accordingly, to protect this fundamental right, waiver will not be presumed where, as here, the record is silent. (See *Mills v. Superior Court* (1973) 10 Cal.3d 288, 301; see also *Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *Carnley v. Cochran* (1962) 369 U.S. 506, 515-516.)

Further, respondent's argument on this point is belied by the procedural facts. After submitting CALCRIM No. 1402 on April 4, 2011, the prosecution, as previously seen, amended the information on April 12 and made the same allegations regarding Counts 3 through 7 as it had made in the original information filed on July 22, 2008. (1 CT 97.) Under these circumstances, the prosecution's re-affirmance of pleadings which did not comply with the requirements of § 12022.53(e) after it submitted CALCRIM No. 1402 "must be deemed a discretionary charging decision." (*Mancebo*, *supra*, 27 Cal.4th at p. 735.) Thus, "informal amendment" provides no basis for an end run around *Mancebo.*

III. THE DOCTRINE OF HARMLESS ERROR DOES NOT APPLY TO AN UNAUTHORIZED SENTENCE.

Finally, respondent argues that, despite the pleading error, this Court should affirm the Court of Appeal's decision because any error was harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, because there was no reasonable probability that the outcome of this case would have been any different if the pleading rules had been followed, and "it is not reasonably probable that the result in this case would have been different had the prosecution expressly included the section 12022.53(e) enhancements in the first amended information." (RBM 29.)

This argument fails for two reasons. First, as appellant has shown in Argument II, it cannot be credibly argued that Mr. Anderson had fair notice that he would be subject to the § 12022.53(e) enhancements in Counts 3 through 7. As respondent acknowledges, *Mancebo* teaches that harmless error does not apply where the due process right to notice has been breached. (RBM 29.) Second, as *Mancebo* also holds, harmless error analysis is simply unavailable to rehabilitate an unauthorized sentence, imposed in violation of the express pleading requirements of the case before it, as respondent concedes they were in this case. (See *Mancebo*, *supra*, 27 Cal.4th at pp. 750-751.) "'An unauthorized sentence is just that. It is not subject to a harmless error analysis.' [Citation.]" (*People v. Cabrera* (2018) 21 Cal.App.5th 470, 478.)

CONCLUSION

The conceded failure of the prosecution to comply with the pleading rules of § 12022.53(e) and the lack of any fair or useful notice of the prosecution's choice of a 25 years-to-life over the 10 year enhancement for personal use of a firearm (§ 12022.53(b)) requires that the judgment of the Court of Appeal be reversed and the five enhancements at issue be stricken.

Respectfully submitted,

John Ward
Counsel for Appellant

WORD COUNT CERTIFICATE

Pursuant to rule 8.520© of the California Rules of Court, and in reliance on the word count of the computer program used to prepare this document, I hereby certify that this document contains 6,027 words.

_____
John Ward

DECLARATION OF SERVICE

Re: *People v. Anderson*, S253227

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

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San Francisco County District Attorney
8500 Bryant Street, #322
San Francisco, California 94103

Each envelope was then, on September 30, 2019, sealed and deposited with the United States Postal Service at San Francisco, California, in the county in which I am employed, with the first class postage thereon fully prepaid.

I also electronically served true copies of the attached document on September 30, 2019, upon the following persons at the following email addresses:

First District Appellate Project
eservice@fdap.org

Samuel P. Siegel,
Deputy Solicitor General
Sam.Siegel@doj.ca.gov

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

Executed at San Francisco, California, on September 30, 2019.

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