In the Supreme Court of the State of California

THE PEOPLE, **Plaintiff and Respondent,** **v.** **MARTIN MANZO,** **Defendant and Appellant.**	Case No. S191400

Fourth Appellate District, Division One, Case No. D055671
San Diego County Superior Court, Case No. SCS 212840
The Honorable Timothy R. Walsh, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

As respondent demonstrated in its opening brief on the merits, a defendant can be convicted of discharging a firearm at an occupied motor vehicle under Penal Code section 246 if he was outside the vehicle at the time he discharged the firearm, but the firearm was inside the vehicle.[1] This is because the purpose of section 246 is to protect the vulnerable victims inside the occupied vehicle. This goal is met whether the shooter is three feet from the vehicle, or standing next to it with the firearm inside the vehicle. In both situations, the occupant of the vehicle is essentially trapped, while the shooter has the unfair advantage of being able to avoid a counter attack and to rapidly escape after committing the crime.

In its opening brief, respondent argued that the Court of Appeal's decision, finding that a person cannot be convicted under section 246 if the gun was inside the vehicle when discharged, must be reversed. This is because the decision contravenes the legislative intent and purpose behind section 246, and conflicts with other California Court of Appeal decisions based on similar facts.

In his answering brief on the merits appellant argues that based on the statutory construction of section 246, it does not apply to a person who places a gun inside the threshold of a vehicle while discharging it. Appellant further contends respondent's analysis of the legislative history of section 246 is "flawed" by relying on the word "into" as expressed in the original title of the bill, and that respondent "recapitulates the mistaken path taken" by the Court of Appeal in *People v. Jones* (2010) 187 Cal.App.4th 266. Lastly, as his "fall-back" position, appellant contends if there is any

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[1] Further statutory references are to the Penal Code unless otherwise indicated.

ambiguity in the statute, the rule of lenity applies and the statute does not apply to the conduct at issue here.

As set forth in respondent's opening brief and below, the statutory construction of section 246, along with its legislative history, purpose and public policy, reveal section 246 was meant to encompass those situations where the shooter is standing outside of the vehicle while discharging a firearm that is inside the vehicle. The Court of Appeal in *Jones* correctly interpreted section 246 to include this factual situation. Moreover, because interpretation of section 246 does not require this Court to resort to the rule of lenity, appellant's argument fails.

ARGUMENT

I. A DEFENDANT MAY BE CONVICTED OF DISCHARGING A FIREARM AT AN OCCUPIED MOTOR VEHICLE IN VIOLATION OF PENAL CODE SECTION 246 IF HE WAS OUTSIDE THE VEHICLE AT THE TIME HE DISCHARGED HIS FIREARM BUT THE FIREARM ITSELF WAS INSIDE THE VEHICLE

In its opening brief respondent argued section 246 encompasses those situations where the shooter is standing outside of an occupied motor vehicle, but the firearm itself is inside the vehicle. Respondent relied upon the legislative history and intent behind the original enactment of section 246 along with several Court of Appeal decision's interpreting the statute. Respondent further argued that the purpose and policy behind section 246, to protect the occupants inside the vehicle, is met even if the firearm was inside the vehicle. Lastly, respondent argued that because there is no ambiguity in the legislative intent of section 246, the rule of lenity did not apply. (OBM 6-26.)

In his answer, appellant contends the rules of statutory construction show that section 246 does not apply to the act of discharging a firearm that is inside an occupied vehicle. Appellant notes there are several definitions of the word "at," and claims the relevant definition of "at" is "to or toward

the direction or location of, especially for a specific purpose." (ABM 6, citing American Heritage Dict. (3rd ed. 1992) p. 115.) According to appellant, this would include the act of shooting at a vehicle with people in it, as well as shooting at the tires of a passing vehicle that is occupied. However, this definition would not include the act of reaching the firearm across the threshold of a vehicle and shooting, because that is no longer "toward the direction or location of" a vehicle; rather, it is shooting at a person inside the vehicle. (ABM 6-8.)

Respondent agrees that "at" is a word with several definitions.[2] In its opening brief, respondent defined "at" as "a function word used to indicate that which is the goal of an action or that toward which an action or motion is directed." (Webster's 3d New Internat. Dictionary (1981) p. 136.) Thus, appellant and respondent appear to agree that the relevant definition of "at" includes an action "to or toward the direction or location of." However, respondent disagrees with appellant's narrow reading of this definition. As set forth in respondent's opening brief, this definition is not limited to those actions where the firearm was outside the vehicle. Instead, it encompasses those situations where the shooter is standing outside of the vehicle, including right next to the vehicle with the firearm crossing the threshold of the vehicle, because the shooter is still discharging the firearm toward or in the direction of the vehicle. (See OBM 21-22.)

Appellant relies on *People v. Stepney* (1981) 120 Cal.App.3d 1016, to support his argument that section 246 is not ambiguous. (ABM 8-9.) Respondent agrees with *Stepney's* analysis of section 246, including the court's observation that "into" was likely changed to "at" in the statute to enable prosecution of those who discharge a firearm at a building but miss. (*People v. Stepney*, 120 Cal.App.3d at p. 1020.) However, the facts in

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[2] Webster's Dictionary lists 13 definitions for the word "at."

Stepney were very different from the situation here because the shooter in *Stepney* was standing completely inside the dwelling, where he aimed and discharged the firearm at a television set. (*Stepney* at p. 1018.) In a footnote, the *Stepney* Court said it did not think the Legislature enacted section 246 to make shooting at a television set a felony. (*Id.* at p. 1021, fn. 5.) This conclusion is correct. Were the rule otherwise, any shooting indoors (and therefore perhaps the vast majority of shootings), would be transformed into a violation of section 246.

Citing *People v. Morales* (2008) 168 Cal.App.4th 1075, appellant analogizes the situation here to burglary, where the test for entry is whether any part of the burglar, or even a tool he is using, breaks the plane of the structure. (ABM 9.) In *Morales*, the Court of Appeal used this reasoning to hold that one who shoots from an attached garage into a house is shooting from "inside" the structure within the meaning of *Stepney*. (*Morales, supra,* at pp. 1080-1082.)

Burglary, however, is not a particularly apt analogy. The essence of burglary lies in the penetration of a structure; it is the violation of the possessory interest the occupants have in the structure. (*People v. Davis* (1998) 18 Cal.4th 712, 721-722.) The essence of section 246, on the other hand, is the endangerment of people in or around a structure by one who shoots "at" the structure. Thus, as set forth in respondent's opening brief, shooting at a group of people standing by a building violates section 246, because shooting at the people also entails shooting "at" the building. (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1356.)

To commit entry within the meaning of the burglary law, the burglar's body need not enter the building. The entry may be accomplished by a tool, and the burglar need not even retain control over the tool for penetration of the building to constitute entry. (*People v. Davis, supra,* 18 Cal.4th at pp. 718-719.) This Court has suggested that a burglary could be

accomplished by use of a remotely controlled robot, operated by the burglar from across the street, or even across town. (*Davis, supra,* at p. 723, fn. 7.) The Court has also suggested that entry could be accomplished by penetration of a building with a laser beam. (*Id.* at pp. 718-719.) Finally, and significant in the context of appellant's case, shooting into a building from a position away from the building can be a burglary, with the entry accomplished by the bullet itself. (*People v. Allison* (1927) 200 Cal. 404, 408; Perkins, Criminal Law, 3d Ed. 1982, p. 254.)

Thus, the fact that one has committed a burglary of a structure does not mean that one is "inside" the structure in any sense that would be meaningful for section 246. For example, the remote operator of a robot that actually entered a structure could, while the robot was inside the structure–and thus while the operator was "inside" the structure for burglary purposes–fire a shot at the structure. Since the operator and the gun would be outside the structure, his shot would indisputably be "at" the building for section 246 purposes, even though the operator was "inside" the building for burglary purposes. Nothing suggests the Legislature intended to adopt the rationale of the common law of burglary, which is a crime against property, for the new statutory crime of section 246, which is an assaultive crime against the person.

Appellant claims *People v. Jischke* (1996) 51 Cal.App.4th 552, supports his argument that section 246 should be analogized to the crime of burglary. (ABM 9-10.) Contrary to appellant's argument, *Jischke* does not support this position. In *Jischke*, the Court of Appeal found the defendant was properly convicted under section 246 when he discharged a firearm through the floor of his apartment into the apartment below. (*Id.* at p. 556.) The Court of Appeal noted that even though the defendant fired the gun while standing in his own apartment, "[i]n shooting through his own floor, defendant necessarily shot into and 'at' the adjacent dwelling unit" below.

(*Jischke* at p. 556.) The *Jischke* court further rejected the defendant's claim that the jury had to find he intended to hit the lower dwelling. (*Ibid.*)

Thus, the important distinction in *Jischke* was that although the defendant was inside the same apartment building when he discharged the firearm, he was outside of the apartment unit that he discharged the firearm at or into for purposes of section 246. The *Jischke* court did not mention the crime of burglary when reaching its conclusion.

In sum, whether one is "inside" a building within the meaning of the burglary law does not appear to answer whether one is shooting "at" it within the meaning of section 246. As set forth in respondent's opening brief, the answer must be found in the purpose of section 246.

While urging this Court to adopt the "reasonable, unambiguous, directional definition of 'at'," appellant recognizes that some Courts of Appeal have addressed a potential ambiguity in the statute, thus resorting to the history and purpose of the statute. Appellant argues that even if this Court looks at the history and purpose of the statute, the result will be the same: discharging a firearm that has crossed the threshold of a vehicle is not an act section 246 was intended to reach. (ABM 10.) Appellant asserts that respondent's analysis in its opening brief of the legislative history of section 246 is "flawed." (AMB 10-11.)

To the contrary, respondent set forth the relevant, limited legislative history available from the 1949 enactment of the statute and from the 1976 amendment adding "occupied vehicle" as one of the enumerated targets. (OBM 8-10; see also Request for Judicial Notice, Exh. Nos. 4-6.) Although it was the 1976 amendment that added "occupied vehicle" to the statute, the history relevant to the determination of the meaning of "at" in the statute is from 1949, when the statute was originally enacted.

According to appellant, respondent "recapitulates the mistaken path taken by the court" in *People v. Jones, supra*, 187 Cal.App.4th 266, by

equating "at" with "into." (ABM 11-13.) However, as set forth in respondent's opening brief, the *Jones* court correctly correlated these two words, based on the legislative history, purpose, and policy behind section 246, and found the statute did apply to the situation where the firearm was discharged while inside a vehicle with the shooter standing outside. (OBM 13-15.) Appellant claims that to equate "at" with "into" is wrong because when someone shoots into a vehicle or building from a distance, he will simultaneously be shooting at the vehicle or building; but if the firearm is across the threshold when discharged, the shooting is into the vehicle or building, but not at the vehicle or building. (ABM 13.) Appellant interprets "at" too narrowly.

First, as the Court of Appeal in *Stepney* observed, the Legislature likely changed the statute from "into" to "at" in order to encompass those situations where the firearm was discharged towards a building but missed. (*People v. Stepney, supra*, 120 Cal.App.3d at p. 1020.) Additionally, even if a firearm is across the threshold of a vehicle or building, the shooter may still be aiming at the vehicle or building. (See *Stepney, supra*, at p. 1019.) As the *Jones* court aptly said, "[t]here is simply no reasonable justification" to distinguish between the situation where a person puts his hand or the firearm inside the vehicle and then discharges it, or stands in the same position and discharges the firearm without placing his hand or the firearm inside the vehicle. (*People v. Jones, supra,* 187 Cal.App.4th at p. 274.) "In both situations, the occupant of the vehicle is particularly vulnerable, in that the victim has minimal opportunities to escape or otherwise protect himself from the bullets." (*Ibid.*)

Appellant criticizes respondent's statement that the purpose of section 246 is to protect the occupants inside the vehicle because there are no citations to the legislative history for section 246. As noted in respondent's opening brief, the available legislative history for section 246 is scarce.

Several Court of Appeal cases, however, have shed light on this purpose. For example, in *Jones*, the court focused on the vulnerability of the victim sitting inside the occupied vehicle to find that it made no difference whether the firearm was entirely or partially through an open door or window when discharged. (*People v. Jones, supra*, 187 Cal.App.4th at p. 274.) Moreover, common sense would reveal the statute was enacted to protect the people inside the enumerated structures, and not the structures themselves.

As set forth in respondent's opening brief, a person sitting in a vehicle is essentially a "sitting duck." A vehicle restricts immediate movement and precludes a vulnerable victim from seeking immediate cover. Moreover, firing into an occupied vehicle increases the risk that random and unintended victims will be injured or killed. Additionally, a shooter standing outside an occupied vehicle has a tactical advantage over the vehicle occupants because he may easily flee and escape detection. Similar to someone who commits a lying-in-wait murder, the tactical advantages held by someone who shoots at an occupied vehicle, and the relative vulnerability of the occupants, render this type of shooting particularly loathsome. These tactical advantages are not diminished if the shooter's hand extends inside the vehicle to trigger the actual discharge. Thus, interpreting section 246 to include those situations where a shooter is standing outside an occupied vehicle while discharging a firearm that is inside the vehicle addresses these policy considerations as well as the legislative intent behind the statute.

Appellant asks this Court to adopt a clear "bright line" rule, as set forth in *Kowis v. Howard* (1992) 3 Cal.4th 888, 898. The proper bright line rule, according to appellant, is to look to the point of discharge–the tip of the barrel of the gun, and if the tip is inside the car when discharged, then section 246 does not apply. (ABM 22-23.) As pointed out in respondent's

opening brief, given the reality of such shootings, it may be impossible for the prosecution to prove the exact location of the firearm. For example, there is often not an eyewitness who had the vantage point to determine whether the firearm broke the plane of the vehicle. Even if an eyewitness is available, other problems of proof exist such as the witness's recollection of the location of the firearm. (See OBM 24.)

On the other hand, focusing on the location of the shooter and not the firearm is consistent with the purpose and policy of section 246. Such a rule protects the vulnerable people inside the vehicle from indiscriminate attacks from people outside the vehicle, who may easily flee the scene. This rule also protects the innocent and unintended victims inside a vehicle. It also prevents criminals from escaping liability for these attacks. Thus, although there may be a reason for the law to distinguish between one who shoots from a position inside a vehicle and one who shoots from outside, there is no reason to distinguish between one who shoots from outside by reaching inside the vehicle, and one who shoots from farther away.

Appellant asserts if any ambiguity remains in the statute, the rule of lenity, as applied by the Court of Appeal in this case, applies and this Court should adopt the interpretation more favorable to appellant. (ABM 20, 22.) The rule of lenity does not compel this result. "The rule [of lenity] applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule." (*People v. Avery* (2002) 27 Cal.4th 49, 58, citing 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53.) This rule "is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable." (*People v. Avery, supra,* 27 Cal.4th at p. 58, citing *People v. Jones* (1988) 46 Cal.3d 585, 599.) The rule of lenity is "a tie-breaking

principle" that has no application where "a court can fairly discern a contrary legislative intent." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1102, fn. 30, internal citations omitted.)

For the reasons explained in respondent's opening brief and here, the meaning of "at" in section 246 does not present an interpretative problem so close that this Court must resort to the rule. As the Court of Appeal in *Jones* found, the only reasonable interpretation of "at" in section 246 is to include discharging a firearm that is "entirely or partially through an open door or window," while the shooter is positioned outside the vehicle. (*People v. Jones, supra*, 187 Cal.App.4th at p. 274.) Thus, this Court need not resort to the rule of lenity.

CONCLUSION

For these reasons, and the reasons explained in respondent's opening brief, respondent respectfully requests the judgment of the Court of Appeal be reversed.

Dated: September 21, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 3,096 words.

Dated: September 21, 2011

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

Case Name: **The People v. Martin Manzo**
No.: **S191400**

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 collection and processing of correspondence for mailing with the United States Postal Service. 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 that same day in the ordinary course of business.

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Additionally, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **September 22, 2011,** to **Appellate Defenders, Inc.** at its electronic address: **eservice-criminal@adi-sandiego.com.**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **September 22, 2011,** at San Diego, California.

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