IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ERIC HUNG LE, et al., Defendants and Appellants.	**No. S202921** Court of Appeal No. D057392 Superior Court No. SCD212126 **APPELLANT'S BRIEF ON THE MERITS** **[From People's Cross-Appeal Regarding Codefendant Down George Yang]**

SUPREME COURT
FILED

AUG 27 2012

Frank A. McGuire Clerk

Deputy

CRC 8.25(b)

APPELLANT'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ERIC HUNG LE, et al., Defendants and Appellants.	**No. S202921** Court of Appeal No. D057392 Superior Court No. SCD212126 **APPELLANT'S BRIEF ON THE MERITS** **[From People's Cross-Appeal Regarding Codefendant Down George Yang]**

ISSUES PRESENTED

Does Penal Code section 1170.1, subdivision (f), as interpreted by this Court in *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*), preclude a trial court from imposing both a firearm enhancement under Penal Code section 12022.5, subdivision (a)(1), and a gang enhancement under Penal Code section 186.22, subdivision (b)(1)(B), when the offense is a serious felony as a matter of law? [1]

INTRODUCTION

As will be demonstrated, the correct resolution of the question presented is that section 1170.1, subdivision (f), as interpreted by this Court in *Rodriguez*, does not preclude the sentencing judge from imposing both a firearm enhancement under section 12022.5, subdivision (a)(1), and a gang enhancement under section 186.22, subdivision (b)(1)(B), when the underlying felony offense is a serious felony as a matter of law.

[1] All statutory references are to the Penal Code unless otherwise specified.

This case began as a People's cross-appeal intended to settle a recurring sentencing issue of importance to gang prosecutors statewide. The People seek to clarify the available sentencing options in situations where this Court's holding in *Rodriguez*, interpreting section 1170.1, subdivision (f), precludes imposing additional punishment for both a gun-use enhancement under section 12022.5, subdivision (a)(1), and a ten-year gang enhancement under section 186.22, subdivision (b)(1)(C), when the felony was elevated to a violent felony by virtue of the gun enhancement, because each enhancement involved the identical gun use conduct.

Unfortunately the opinion from Division One of the Fourth Appellate District Court of Appeal, *People v. Le* (D057392, Apr. 27, 2012, modified May 24, 2012), did not, in our view, correctly analyze the question or come to the right result. Instead of discussing available sentencing options in a *Rodriguez* scenario, the Court of Appeal expanded the holding of *Rodriguez* beyond its limits or rationale. The appellate court opinion requires that a sentencing court elevate the punishment under section 186.22 to the subdivision (b)(1)(C) level when a section 12022.5, subdivision (a), enhancement has been pled and proved, even where alternate sentencing choices would result in a longer sentence, consistent with the spirit of section 1170.1, subdivision (f). The appellate court went on to interpret *Rodriguez* as precluding the imposition of any additional punishment for personal use of a firearm under section 12022.5, subdivision (a)(1), where a gang allegation under subdivision (b)(1) of section 186.22 was also proven. The punishment for the gang enhancement in this case should have been five years due to the underlying assault with a semiautomatic gun in violation of section 245, subdivision (b), being statutorily defined as a serious felony. This five-year sentence enhancement was triggered and required without reference to any other enhancement or allegation, in contrast to the circumstance in *Rodriguez*,

where the firearm enhancement was used by the sentencing court to both add a number of years under section 12022.5, subdivision (a)(1), and to re-classify the crime as a violent felony under section 667.5, subdivision (c)(8), thereby imposing the elevated punishment for the gang enhancement under subdivision (b)(1)(C) of section 186.22. The Court of Appeal relying on *Rodriguez*, nevertheless, ruled imposition of both a gang enhancement and gun enhancement would violate section 1170.1, subdivision (f). This was an unwarranted expansion of the *Rodriguez* decision. The Court granted our petition for review to settle the issue.

STATEMENT OF FACTS

In 2002 defendant Yang (Yang) and codefendant Erik Hung Le (Le) were members of the Tiny Oriental Crips (TOC), a criminal street gang that claimed as its territory Linda Vista and parts of Mira Mesa, communities within the City of San Diego. (7 Reporter's Transcript (R.T.), pp. 314-315, 326; 10 R.T. pp. 2201-2202; 15 R.T. pp. 2973, 2990-2991.) TOC territory included the Han Kuk Pool Hall (pool hall). (7 R.T. p. 233; 8 R.T. pp. 473-474; 10 R.T. pp. 2222-2223; 15 R.T. p. 2973.)

On June 14, 2002, Le spotted rival gang members near the pool hall. (8 R.T. pp. 341-349, 484-487; 10 R.T. pp. 2065-2066.) He made a derogatory comment about them and yelled a gang challenge. (8 R.T. pp. 345-346, 394-395; 10 R.T. p. 2066.) Le made a telephone call to Yang who was with other TOC gang members. (8 R.T. pp. 487-488; 10 R.T. pp. 2066, 2239-2241.) Yang told the TOC gang members that Le was on the telephone and that he and Le were going to check out the pool hall. (10 R.T. pp. 2214-2243.) About 15 minutes later Le arrived at Yang's location. (10 R.T. p. 2244.) Le told the TOC gang members about the rival gang members at the pool hall and asked if anyone had a gun. (10 R.T. pp. 2246-2248.)

Yang, Le, and another TOC member left and drove in Le's car to a tea house near the pool hall. (7 R.T. pp. 234-235; 8 R.T. pp. 345, 351, 490-492; 10 R.T. pp. 351, 2068, 2249-2254.) Le told an acquaintance at the tea house not to follow him and to stay away from the pool hall. (8 R.T. pp. 494-495; 10 R.T. p. 2068.) Le then walked back to his car and talked to someone inside. (8 R.T. p. 495.) Another car pulled up next to Le's car and Le then spoke to the passenger in that car. (8 R.T. pp. 495-498; 10 R.T. p. 2069.) Both cars then drove away. (8 R.T. pp. 497-498; 10 R.T. p. 2069.)

Outside the pool hall were the owner, Don Su, and his friend, and nearby were two rival gang members. (8 R.T. pp. 420, 427, 449-452; 9 R.T. pp. 665-669, 711, 716, 726.) A car with two people inside pulled into the alley near the pool hall. (8 R.T. p. 453.) Shots were fired towards the pool hall from the car and it then sped away. (8 R.T. pp. 430, 434, 453-455.) One of the bullets struck Don Su in the neck area. (8 R.T. pp. 438-439, 456.) He died three days later from this gunshot. (8 R.T. p. 424; 9 R.T. pp. 754-765.) Two other bullets struck the two rival gang members, one in the right elbow and one in the right foot. (8 R.T. p. 433; 9 R.T. pp. 665-666, 671, 713, 718, 734-735.)

After the shootings Le claimed to several TOC members that he was the driver and that Yang was the shooter. (10 R.T. pp. 2256-2265.) Yang was present and corrected some of Le's statements about the shooting. (10 R.T. pp. 2257-2259.)

The gun used in the shooting was later recovered by police. (12 R.T. pp. 2512-2514; 13 R.T. pp. 2782-2789.) Yang's older brother had purchased the gun in October 2001. (13 R.T. pp. 2670-2676.) He bought it for Yang. (13 R.T. pp. 2731-2738, 2766-2767.)

Police later obtained authorization to wiretap Yang's telephone. (14 R.T. pp. 2851-2852.) Yang made a number of incriminating statements. (Augmented Clerk's Transcript (Aug. C.T.) pp. 16-109.) These included, for example, asking his brother to say he sold the gun to a third party. (Aug. C.T. p. 67.)

PROCEDURAL HISTORY

Trial Court

Defendant Yang and codefendant Le were charged by information with murder in violation of section 187, attempted willful, deliberate and premeditated attempted murder in violation of sections 664 and 187, discharging a firearm from a motor vehicle in violation of section 12034, subdivision (d), and two counts of assault with a semiautomatic firearm in violation of section 245, subdivision (b). (1 Clerk's Transcript on Appeal [C.T.], pp. 14-18.) This People's appeal relates only to defendant Yang, and focuses on only one charge, count 4, with its accompanying allegations.

Defendant Yang was charged in count 4 with committing the crime of assault with a semiautomatic firearm under section 245, subdivision (b), as well as a criminal street gang allegation under section 186.22, subdivision (b)(1), and a personal use of a firearm enhancement allegation under section 12022.5, subdivision (a)(1). (1 C.T. p. 17.) The jury convicted Yang of the charged crime in count 4 and both allegations. (2 C.T. p. 307; 3 C.T. pp. 583-584, 588.) As charged and as found true by the jury, the gang allegation under section 186.22, subdivision (b)(1), made no mention of the use of a firearm.

The offense charged in count 4 occurred in 2002. Then, as now, the crime of assault with a semiautomatic firearm under section 245, subdivision (b), has a triad of sentencing choices of three, six, or nine years. Then, as now, the sentencing enhancement for personal use of firearm under section 12022.5, subdivision (a)(1), also has a triad of sentencing choices consisting of three, four, or ten years, which must be imposed consecutive to the punishment for the underlying felony. Finally, then, as now, upon a finding that the defendant committed the underlying felony for the benefit of a criminal street gang under section 186.22, subdivision (b)(1), an additional term is added to the sentence. For most felonies there

is a triad of sentencing options of two, three or four years. This additional term is increased to five years if the underlying crime is a serious felony as defined by section 1192.7, subdivision (c) (§ 186.22, subd. (b)(1)(B)), and to ten years if the crime is a violent felony as defined by section 667.5, subdivision (c) (§ 186.22, subd. (b)(1)(C)). A simple chart is helpful to understand the sentencing options.

<u>Count 4 Sentencing Options for Defendant Yang [In Years]</u>

Section 245(b)	3 – 6 – 9
Section 12022.5(a)(1)	3 – 4 – 10
Section 186.22(b)(1)	2 – 3 – 4
or	
(B) As serious felony	5
or	
(C) As violent felony	10

At sentencing, the prosecutor asked the trial judge to consider a sentence as to count 4 for defendant Yang consisting of three components:

(1) The principle term for the crime of assault with a semiautomatic firearm under section 245, subdivision (b);

(2) the personal use of a firearm enhancement under section 12022.5, subdivision (a)(1); and

(3) the criminal street gang allegation related to a serious felony under section 182.22, subdivision (b)(1)(B).

(18 R.T. pp. 3442-3452.)

In effect, the prosecutor was arguing that the maximum prison sentence that could be imposed on count 4 was 24 years consisting of the upper term of nine (9) years for the crime, the upper term of ten (10) years for the gun-use enhancement, and five (5) years for the gang allegation treated as a serious felony rather than a violent felony.

Count 4 Sentence Requested by the People	
Section 245(b)	9
Section 12022.5(a)(1)	10
Section 186.22(b)(1)(B)	5
TOTAL	24

The trial judge found that, in his reading of *Rodriguez*, he did not have the legal authority to even consider imposing this sentence.

> So that the reviewing court can have the benefit of my alleged wrong, to the extent that can be discerned from this record, I'm concluding as a matter of law that this [section 1170.1, subd. (f) as interpreted by *Rodriguez*] precludes the application of the term … under 12022.5. I specifically do not embrace the notion that I could use the firearm and choose a term under the firearm enhancement and then just take the base gang allegation and impose a term with respect to that.

(18 R.T. p. 3458, lines 10-18.)

As a result, the judge imposed what he believed to be the maximum sentence on count 4 (19 years in prison). (2 C.T. p. 410; 18 R.T. p. 3458, lines 19-24.) The judge felt he "should" impose the ten-year violent felony term for the gang allegation under section 186.22, subdivision (b)(1) (18 R.T. p. 3458, lines 7-9) and, thus, he stayed sentencing for the firearm-use allegation under section 12022.5, subdivision (a)(1) (18 R.T. p. 3458, lines 21-22).

Count 4 Sentence Imposed by the Court	
Section 245(b)	9
Section 12022.5(a)(1)	Stayed
Section 186.22(b)(1)(C)	10
TOTAL	19

The judge's sentence was five years less than what he could have imposed while still complying with the requirements of section 1170.1, subdivision (f), as interpreted by the *Rodriguez* decision. As the prosecutor pointed out: "And if we read *Rodriguez* or 1170.1 as saying we can only get one or the other, then they are both 10-year allegations. And, in fact, we would be losing 5 years under the gang allegation." (18 R.T. p. 3451, lines 23-27.)

The judge indicated that were he able to impose sentence on just the gun enhancement under section 12022.5, he would have chosen the upper term of ten years.

> And there was indication at least one or both of the defendants claimed or bragged to have emptied the clip. There were other people cowering down. There were multiple bullet strikes. There was injury inflicted, and I think that all of these factors warrant the upper term. If the court were to impose or to be called upon to impose a term under the 12022.5 allegation, the court would and hereby does find that the upper term would be appropriate.

(18 R.T. p. 3464, lines 10-18.) But, as indicated, the judge felt he could not legally impose this additional sentence under the compulsion of the *Rodriguez* decision. The People disagreed and appealed (we were designated cross-appellant in the defendants' consolidated appeal).

Court of Appeal

The thrust of the People's argument in Division One of the Fourth Appellate District Court of Appeal was that the trial court erred during Yang's sentencing as to count 4 by misinterpreting subdivision (f) of section 1170.1 and the holding in *Rodriguez*, and thus not considering the sentence requested by the prosecution. Specifically, we argued that the sentencing judge had the power to impose additional punishment on the charge of assault with a firearm in count 4 for both the gang and firearm-use enhancements found true by the jury.

As the Court of Appeal paraphrased our position:

> Thus, according to the People, if the trial court had merely imposed the 10-year sentence under [Pen. Code] section 12022.5 and the five-year sentence under 186.22, subdivision (b)(1), the two enhancements would not have conflicted with the dual use prohibition of section 1170.1, subdivision (f) as discussed in *People v. Rodriguez*, *supra*, 47 Cal.4th at page 509. Yang therefore would have been sentenced to 24 years in prison under count 4 as opposed to the 19 years he received.

(*People v. Le*, *supra*, slip opinion, p. 66.) This was not an academic discussion because, as discussed above, the sentencing judge was inclined to impose the upper term of ten years for the section 12022.5, subdivision (a)(1), enhancement in addition to the gang enhancement, but felt he did not have the discretion to do so. (18 R.T. pp. 3462-3464.) "If the Court were to impose or to be called upon to impose a term under the 12022.5 allegation, the Court would and hereby does find that the upper term would be appropriate." (18 R.T. p. 3464, lines 15-18.)

As to the issue of remedy, the People asked the Court of Appeal to remand the matter for resentencing on count 4 so the sentencing judge could consider the option of imposing the aggravated upper term sentence of ten years under section 12022.5, subdivision (a)(1), and reducing the ten-year sentence for the gang enhancement from a violent felony under section 186.22, subdivision (b)(1)(C), to a five-year sentence for a serious felony under subdivision (b)(1)(C). The defense conceded that "[if] this Court agrees with the People's position, … appellant would agree that remand for resentencing, as requested by the People, is the proper remedy." (Appellant Yang's Reply Brief, pp. 16-17.)

Division One of the Fourth Appellate District Court of Appeal, nevertheless, affirmed the judgment of the trial court as to defendant Yang's sentence in count 4. In rejecting the People's appeal the appellate court wrote:

> Although the People attempt to distinguish *People v. Rodriguez* on the basis that the gang enhancement in the instant case was generically pled and there was no gun use allegation or finding made by the jury in connection with that enhancement, we conclude this is a distinction without a difference. That the trial court may have exercised its discretion and treated the gang enhancement as a mere serious felony and not as a violent felony for purposes of section 186.22, subdivision (b)(1), as the People contend, does not change the fact that under either scenario the gang enhancement involved Yang's use of a firearm, which we conclude makes *People v. Rodriguez* applicable.
>
> We therefore conclude the trial court did not err when it found it lacked the discretion under the facts of this case to impose both the personal gun use enhancement under section 12022.5, subdivision (a) and the gang enhancement under section 186.22, subdivision (b)(1)(B) or (b)(1)(C).

(*People v. Le*, *supra*, slip opinion, pp. 66-67, footnote and original italics omitted.)

At odds with the holding and unsure as to the rationale behind it, specifically the basis for the conclusion that "the gang enhancement involved Yang's use of a firearm," the People sought rehearing. In response the Court of Appeal modified its opinion to add the following lengthy footnote:

> In their petition for rehearing, the People argue that this court erred in affirming the trial court's decision in count 4 to stay additional punishment for personal gun use under section 12022.5, subdivision (a) (personal gun use enhancement) and to impose the 10-year enhancement for the commission of a violent felony—in this case a violation of section 245, subdivision (b) for assault with a semiautomatic weapon—under the criminal gang provision set forth in section 186.22, subdivision (b)(1)(C) (criminal gang enhancement). The People argue that "the prosecutor in this case never asked the trial court to elevate the punishment for the gang enhancement to the 'violent felony' level under subdivision (b)(1)(C) of section 186.22 with the same conduct, personal gun use, that supported the section 12022.5 enhancement. Instead, ... the prosecutor here pled and proved a 'bare' gang enhancement

under section 186.22 without reference to (1) gun use, (2) it being a 'serious' or 'violent' felony, or (3) either subdivision (b)(1)(B) or (b)(1)(C) [of section 186.22]. By doing so, the prosecutor exposed the defendant to the maximum possible sentence while not violating the holding of [*People v.*] *Rodriguez*. It was only by setting the level of punishment for the gang enhancement for a violent felony that the sentencing judge created a conflict with the [*People v.*] *Rodriguez* case." (Fn. omitted.)

> We reject the People's form-over-substance argument. In focusing on the nature of the offense and the circumstances surrounding its commission (see *People v. Rodriguez*, *supra*, 47 Cal.4th at p. 507), we conclude the trial court did not err in (tacitly) finding, and substantial evidence in the record supports that finding, that the personal gun-use and gang enhancements in this case were both based on firearm use involving the same offense, viz. commission of assault with a semiautomatic weapon (§ 245, subd. (b)). As such, we conclude the instant case falls squarely within the holding of *People v. Rodriguez* and its prohibition against imposing multiple punishments for firearm use in the commission of a single offense. (See § 1170.1, subd. (f).)

(*People v. Le*, *supra*, see modification order dated May 24, 2012.) Although the appellate court modified its opinion, helping to clarify the rationale for its ruling, it otherwise made no change in the judgment.

The People filed a timely petition for review which this Court granted on July 25, 2012.

ARGUMENT

I

PENAL CODE SECTION 1170.1, SUBDIVISION (f), AS INTERPRETED BY THIS COURT IN *RODRIGUEZ*, DOES NOT PRECLUDE THE TRIAL COURT FROM IMPOSING BOTH A FIREARM ENHANCEMENT UNDER PENAL CODE SECTION 12022.5, SUBDIVISION (a)(1), AND A GANG ENHANCEMENT UNDER PENAL CODE SECTION 186.22, SUBDIVISION (b)(1)(B), WHEN THE UNDERLYING OFFENSE IS A SERIOUS FELONY AS A MATTER OF LAW.

Section 1170.1, subdivision (f), controls the sentencing parameters when an individual like Yang is convicted of multiple enhancements, including those involving the use of a firearm in the commission of the underlying felony offense. In 2002 when this case occurred, as now, section 1170.1, subdivision (f), reads:

> When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury.

The extent to which this statutory provision applies in the instant case turns to a large degree on the proper interpretation of this Court's decision in the *Rodriguez* case.

A. The *Rodriguez* Decision Does Not Prohibit Imposition of the Sentence Requested by the People.

The defendant in *Rodriguez* was convicted of three counts of assault with a firearm in violation of section 245, subdivision (a)(2). As to each count the jury found true two sentencing enhancements: (1) That the defendant personally used a firearm (§ 12022.5, subd. (a)(1)) and, (2) That the offense was a violent felony committed for the benefit of a street gang

(§ 186.22, subd. (b)(1)(C)). The defendant's use of a firearm qualified each felony assault charge as a violent felony under section 667.5, subdivision (c)(8), thus raising the punishment for the gang-related crime allegation to ten years under section 186.22, subdivision (b)(1)(C). The trial court imposed sentence on both enhancements.

In *Rodriguez, supra*, 47 Cal.4th 501, this Court held that under section 1170.1, subdivision (f), a defendant's single act of personally using a gun during the commission of a felony could not be used both to support a sentence enhancement for personal use of a firearm under section 12022.5, subdivision (a)(1), and to elevate the punishment for a criminal street gang allegation to a violent felony under section 186.22, subdivision (b)(1)(C). (*Id.* at p. 504.) Thus, the Court held, it was error to impose a sentence for the personal use of a firearm enhancement under section 12022.5, subdivision (a)(1), and to increase the sentence for an additional ten years as a violent felony under section 186.22, subdivision (b)(1)(C). The Court reasoned that to impose two enhancements both based upon one act of firearm use violated the dual use prohibition of section 1170.1, subdivision (f). (*Id.* at pp. 508-509.)

The Court remanded the case to the trial court without giving any guidance as to the available options on resentencing. (*Rodriguez, supra*, 47 Cal.4th at p. 510.) The lower court was simply directed to impose a sentence that did not violate section 1170.1, subdivision (f). (*Ibid.*) One treatise describes the nature of the uncertainty left from this portion of the *Rodriguez* decision:

> If the felony is a "violent" felony, for these purposes, solely because a Penal Code Section 12022.5(a) enhancement also attaches to the felony, Penal Code Section 1170.1(f) will preclude the trial court from imposing both the Penal Code Section 186.22(b)(1)(C) enhancement and the Penal Code Section 12022.5(a) enhancement, as that statute allows the court to impose only the greater of the two enhancements. However, in so holding,

> *the California Supreme Court has left open the question of whether a lesser punishment may be imposed under a different subdivision of Penal Code Section 186.22(b)(1) in addition to the Penal Code Section 12022.5(a) enhancement.*

(6 Millman, Sevilla & Tarlow, Cal. Criminal Defense Practice (Matthew Bender, 2011) Crimes Against Order, chap. 144, § 144.03[4], p. 144-69, fn. omitted, italics added.)

This issue was debated extensively in the trial court during sentencing as to count 4 regarding defendant Yang. (See 18 R.T. pp. 3438-3459.) The prosecutor argued that such lesser punishment could be imposed under subdivision (b)(1)(B) of section 186.22 without violating the holding of *Rodriguez*. As described above, the trial judge disagreed and, under the perceived compulsion of *Rodriguez*, stayed the punishment for the personal use of a firearm allegation under section 12022.5, subdivision (a)(1).

The People appealed to Division One of the Fourth Appellate District. Our argument was based on the fact that the gang allegation could be punished as a serious felony under subdivision (b)(1)(B) of section 186.22 without reliance on the personal use of a gun allegation under section 12022.5, subdivision (a)(1). This avoided violating the holding of *Rodriguez*, which was premised on a reading of section 1170.1, subdivision (f), which precluded punishing two different sentence enhancements "each pertaining to firearm use."

> Here, defendant became eligible for this 10-year punishment only because he "use[d] a firearm which use [was] charged and proved as provided in ... Section 12022.5." (§ 667.5, subd. (c)(8).) Thus, defendant's firearm use resulted in additional punishment not only under section 12022.5's subdivision (a) (providing for additional punishment for personal use of a firearm) but also under section 186.22's subdivision (b)(1)(C), for committing a violent felony as defined in section 667.5, subdivision (c)(8) (by personal use of firearm) to benefit a criminal street gang. *Because the firearm use*

> *was punished under two different sentence enhancement provisions, each pertaining to firearm use, section 1170.1's subdivision (f) requires imposition of "only the greatest of those enhancements" with respect to each offense.*

(*Rodriguez*, *supra*, 47 Cal.4th at p. 509, original italics omitted, new italics added.)

The Court of Appeal rejected our arguments. According to the appellate court, *Rodriguez* prohibits "imposing multiple punishments for firearm use in the commission of a single offense" even when the firearm use component of one of the sentence enhancements is derived from the nature of the underlying felony offense, here assault with a semiautomatic handgun under section 245, subdivision (b). (*People v. Le*, *supra*, as modified May 24, 2012.)

Our petition for review followed because the People believe that the Court of Appeal misinterpreted this Court's reasoning in *Rodriguez* resulting in an unwarranted expansion of the *Rodriguez* holding. In this case, as distinguished from *Rodriguez*, the only gun-use allegation alleged and found true by the jury against defendant Yang in count 4 was pursuant to section 12022.5, subdivision (a)(1). Unlike *Rodriguez*, the gang enhancement in the instant case was generically pled and proved under section 186.22, subdivision (b)(1), without a gun-use allegation and without such a finding made by the jury. (1 C.T. p. 17; 2 C.T. pp. 288-290; 3 C.T. pp. 588, 601.) The trial and appellate court each erred, albeit in different ways, by rejecting the prosecutor's argument that *Rodriguez* did not prohibit imposing two enhancements, namely subdivision (b)(1)(B) of section 186.22 and subdivision (a)(1) of section 12022.5, on the felony offense of assault with a semiautomatic handgun as charged in count 4.

We ask the Court to hold that neither section 1170.1, subdivision (f), nor the *Rodriguez* decision interpreting this statutory provision, preclude

the sentencing judge from imposing both a firearm enhancement under Penal Code section 12022.5, subdivision (a)(1), and a gang enhancement under section 186.22, subdivision (b)(1)(B), when the underlying felony offense is a serious felony as a matter of law and involves use of a firearm. A critical analysis of the trial and appellate court holdings will help to further explain why their reasoning was incorrect and our interpretation of the *Rodriguez* holding is correct.

B. The Trial Court's Interpretation of *Rodriguez* Should Be Rejected.

The sentencing judge chose to treat the gang enhancement as being under section 186.22, subdivision (b)(1)(C), because defendant Yang's personal use of a firearm could have been used to define the underlying felony (§ 245, subd. (b)) as a violent felony under section 667.5, subdivision (c)(8), instead of as only a serious felony pursuant to section 1192.7, subdivision (c)(31).[2] By stepping up the punishment for the gang allegation from five years to ten years under section 186.22, subdivision (b)(1)(C), the judge unnecessarily overlapped the gun-use allegation under section 12022.5, subdivision (a)(1), thus bringing the gang enhancements in conflict with the dual use prohibition of section 1170.1, subdivision (f). (*Rodriguez*, *supra*, 47 Cal.App.4th at p. 509.) Also by doing so, and then staying the punishment for the section 12022.5, subdivision (a)(1) allegation, the trial court violated the mandate of section 1170.1, subdivision (f), that the "greatest" punishment for the gun use be imposed.

The first analytical step is determining which enhancement attached to count 4, the gang allegation or the personal use of a firearm allegation,

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[2] A violation of section 245, subdivision (b), is a serious felony as a matter of law pursuant to section 1192.7, subdivision (c)(31).

qualifies as the "greatest" under section 1170.1, subdivision (f). The threshold question here is which term the sentencing judge was likely to impose for the gun-use allegation under subdivision (a)(1) of section 12022.5—three, four, or ten years. If only a three or four year term was contemplated, then the additional five-year bump-up of the gang enhancement from a serious felony to a violent felony under section 186.22, subdivision (b)(1), would be the greatest term under section 1170.1, subdivision (f), those five years being added to the sentence as a direct result of the gun-use allegation. In this case, however, the judge indicated that if he had the power to sentence on the section 12022.5, subdivision (a)(1), enhancement, he would have imposed the upper term of ten years. (18 R.T. pp. 3462-3464.) A ten-year sentence enhancement for the gun-use allegation under subdivision (a)(1) of section 12022.5 would net five more years in prison as a direct result of the gun-use enhancement than the five-year bump-up in the gang allegation from a serious felony to a violent felony. By the terms of section 1170.1, subdivision (f), therefore, the "greatest" enhancement which should have been imposed in this case for the use of the firearm was the ten-year term for the section 12022.5, subdivision (a)(1) allegation, rather than the five-year sentence bump-up of the gang allegation from a serious felony to a violent felony.

The next step in the analysis is whether the rules of statutory construction required the judge to impose sentence for the firearm-use allegation under the violent felony portion of section 186.22, subdivision (b)(1)(C), rather than section 12022.5, subdivision (a)(1). The judge felt compelled by section 1170.1, subdivision (f), to transfer the jury's gun-use finding under section 12022.5, subdivision (a)(1), to the sentencing analysis for the gang allegation under section 186.22, subdivision (b)(1), and then stay imposition of sentence under section 12022.5, subdivision (a)(1). (18 R.T. p. 3458, lines 7-24.) There was no statutory requirement that he do so.

Nor did the *Rodriguez* decision mandate this action.

In rejecting the prosecutor's request to enhance the sentence for count 4 with both the section 12022.5, subdivision (a)(1), and section 186.22, subdivision (b)(1)(B), allegations, the trial court cited familiar principles of statutory interpretation. These included the rule that courts should not attempt to rewrite a statute that is not ambiguous and that the Legislature is presumed to know the rest of the statutory scheme when they enact a new provision. (18 R.T. p. 3457, lines 5-16.) The judge reasoned that the Legislature must have known and, thus, intended by enacting the ten-year term for a violent felony under section 186.22, subdivision (b)(1)(C), that this would eviscerate the ability of the sentencing court to impose a section 12022.5, subdivision (a)(1), enhancement when both were based on the same personal use of a firearm by a defendant. (18 R.T. p. 3457, lines 16-21.) This analysis is flawed for a number of reasons.

First, there is no statutory prohibition against imposing sentence on both a gun-use enhancement and a gang allegation as requested by the prosecutor. (§§ 1170.1, subds. (a) & (d); 1170.11.) In fact, subdivision (f) of section 1170.1 explicitly states, in relevant part: "*This subdivision shall not limit the imposition of any other enhancements applicable to that offense*, including an enhancement for the infliction of great bodily injury." (Italics added.) This is especially true here because, unlike the situation in *Rodriguez*, the gang allegation as pled in the information and found true by the jury was based on conduct unrelated to the use of a firearm. Instead, as noted above, the firearm-use allegation was separately pled and proved only under section 12022.5, subdivision (a)(1). It was only by essentially rewriting the information and the jury verdict as to count 4 that the trial judge created a *Rodriguez* "problem" that otherwise did not exist.

Second, no legislative history has been found indicating what the Legislature intended in the instant scenario.[3] Division One of the Fourth Appellate District itself recently and aptly described section 186.22 as "a complex statute." (*People v. Morgan* (2011) 194 Cal.App.4th 79, 84.) It is unreasonable to attribute such omnipotence to the Legislature that it can be assumed it recognized the *Rodriguez* issue and intended the result found by the trial judge in this case. This is especially true when one enhancement (§ 12022.5, subd. (a)(1)) is only "greater" than the other (§ 186.22, subd. (b)(1)(C)) within the meaning of section 1170.1, subdivision (f), when the upper term among three sentencing options is chosen (§ 12022.5, subd. (a)(1)). Common sense and experience mandates finding the Legislature simply never contemplated the issue presented here. Such a problem is best put into the category a "legislative oversight" requiring judicial construction. (*People v. Glass* (2004) 114 Cal.App.4th 1032, 1037.)

The fundamental rule of statutory construction, nevertheless, remains that "[i]n construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration." (*In re Lance W.* (1985) 37 Cal.3d 873, 889.) The clearest and purest expression of Legislative intent applicable to this case is contained in section 1170.1, subdivision (f):

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[3] Indeed, the Legislature was not involved in adding the additional levels of punishment for "serious" and "violent" felonies in section 186.22, subdivision (b)(1). These were enacted as one part of the numerous changes made by an initiative measure commonly referred to as Proposition 21. (Prop. 21, "the Gang Violence and Juvenile Crime Prevention Act of 1998", as approved by voters, Primary Elec. (Mar. 7, 2000), § 4.) In 2001, as part of a large "technical clean up" bill, the Legislature added the subpart designations (A), (B) and (C) to the sentencing options in section 186.22, subdivision (b)(1). (Stats. 2001, chap. 854, § 22.) For simplicity, however, the term "Legislature" will be used to refer to all those involved in the drafting and enactment of the various statutory provisions discussed.

"When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense … ." In this case the "greatest" sentence for the defendant Yang's firearm use was the ten-year sentence under section 12022.5, subdivision (a)(1). As described previously, there was only a five-year bump-up in punishment for the firearm-use allegation (from a serious felony to a violent felony) under section 186.22, subdivision (b)(1)(C). Clearly the judge's decision to use section 186.22, subdivision (b)(1)(C), instead of section 12022.5, subdivision (a)(1), did not result in the imposition of the "greatest" sentence in this case as mandated by the Legislature pursuant to section 1170.1, subdivision (f).

Legislative history is a strong indicator of legislative intent. The "legislative" history related to the higher punishments for "serious" and "violent" felonies added to section 186.22, subdivision (b)(1), indicates they were added to increase the overall sentences available for gang-related crimes, not limit them as occurred in this case. The "Findings and Declarations" in Proposition 21, for example, states "[g]ang-related felonies should result in severe penalties." (Prop. 21, *supra*, § 2, subd. (h).) Proponents of Proposition 21 indicated: "Although we strongly support preventative mentoring and education, the law must be strengthened to require serious consequences, protecting you from the most violent juvenile criminals and gangs offenders." (Ballot Pamp., Primary Elec. (Mar. 7, 2000), Argument in Favor of Proposition 21, p. 48, italics omitted.) More importantly, Proposition 21 has uncodified "Intent" language stating:

> It is the intent of the people of the State of California in enacting this measure that *if any provision of this act conflicts with another section of law which provides for a greater penalty or longer period of imprisonment that the latter provision shall apply*, pursuant to Section 654 of the Penal Code.

(Prop. 21, *supra*, § 37, italics added.)

"[I]t is a general principle of statutory construction that a specific statute relating to a particular subject will govern and take priority over a general statute in matters concerning that subject, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates. [Citations.]" (*People v. Valdez* (1982) 137 Cal.App.3d 21, 27.) "The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply." (*People v. Jenkins* (1980) 28 Cal.3d 494, 505.) The gun-use enhancement under section 12022.5, subdivision (a)(1), is much narrower in scope and focus than the gang enhancement provisions of section 186.22. The five-year bump-up in punishment under section 186.22, subdivision (b)(1), from a serious felony to a violent felony applies to many different fact patterns. The designation of a crime as a violent felony is controlled by section 667.5, subdivision (c). Section 667.5, subdivision (c), has 22 subparts listing numerous qualifying crimes, of which "any felony in which the defendant uses a firearm" is contained in only part of one subpart. (§ 667.5, subd. (c)(8).) Absent the requirement in section 1170.1, subdivision (f), that the sentencing court impose the "greatest" available punishment, section 12022.5, subdivision (a)(1), is clearly a more specific enhancement statute than section 186.22, subdivision (b)(1)(C), when a firearm is used during the commission of a felony.

Similarly, the Legislature has given preferential status to section 12022.5, subdivision (a)(1), firearm-use enhancements beyond that given to gang allegations under section 186.22. Specifically, the Legislature has absolutely prohibited sentencing courts from striking gun-use allegations

under section 1385. (*People v. Thomas* (1992) 4 Cal.4th 206; *People v. Herrera* (1998) 67 Cal.App.4th 987.) In contrast, section 186.22, subdivision (g), enacted as part of Proposition 21, states:

> Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

The courts do not "construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 899.) The trial court's construction of section 186.22, subdivision (b)(1), eviscerated the gun-use enhancement under section 12022.5, subdivision (a)(1). In contrast, the prosecutor's requested sentencing on count 4 harmonized and gave effect to both statutes.

Finally, although not dispositive, this Court's language in the *Rodriguez* decision indirectly supports our position that the trial court here erring by staying the punishment for the section 12022.5, subdivision (a)(1), allegation. The Court of Appeal in *Rodriguez* used section 654 as the basis for ordering the trial court to strike the section 12022.5, subdivision (a)(1), allegation. (*Rodriguez*, *supra*, 47 Cal.4th at p. 509.) This Court rejected such as the proper remedy:

> The proper remedy, however, was *not* to strike the punishment under section 12022.5 but to reverse the trial court's judgment and remand the matter for resentencing. (See *People v. Navarro* (2007) 40 Cal.4th 668, 681.) Remand will give the trial court an opportunity to restructure its sentencing choices in light of our conclusion that the sentence imposed here violated section 1170.1's subdivision (f).

(*Ibid.*, italics in original.)

A remand for resentencing would have been unnecessary in *Rodriguez* if the Court believed its ruling legally precluded the trial court from imposing the section 12022.5, subdivision (a)(1), firearm-use enhancement in lieu of the section 186.22, subdivision (b)(1)(C), gang allegation. Instead, the above-cited language from *Rodriguez* suggests that the trial court was free "to restructure its sentencing choices" in any manner that did violate section 1170.1, subdivision (f), including sentencing under section 12022.5, subdivision (a)(1), and some provision of section 186.22, subdivision (b)(1), other than subpart (C).

C. The Court of Appeal Misinterpreted the *Rodriguez* Decision.

Although the Court of Appeal affirmed the trial court's ruling, it used a completely different analysis from the sentencing judge. The main premise of the Court of Appeal's holding is that "the gang enhancement involved Yang's use of a gun." (*People v. Le*, *supra*, slip opinion, p. 66.) The People disagree. That the underlying felony in count 4, assault with a semiautomatic handgun, involves the use of a gun, does not infuse the gang enhancement with a firearm use component. Stated alternatively, although count 4 necessarily involved firearm use ("assault with a semiautomatic firearm") and was punishable by the gang enhancement, section 186.22, subdivision (b)(1)(B), as a serious felony due to it being a statutorily listed crime in section 1192.7, subdivision (c)(31), this did not mean the gang enhancement itself "pertain[s] to firearm use." (*Rodriguez*, *supra*, 47 Cal.4th at p. 509.)

The gang enhancement under section 186.22, subdivision (b)(1), applies when the defendant committed the charged felony "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by

gang members." The additional prison term for this enhancement comes with one of three levels:

- 2, 3 or 4 years for a normal felony (§ 186.22, subd. (b)(1)(A)) [inapplicable here as § 245, subd. (b) is a statutory serious felony]
- 5 years for a serious felony (§ 186.22, subd. (b)(1)(B)) [the base gang allegation term for a § 245, subd. (b) per § 1192.7, subd. (c)(31)]
- 10 years for a violent felony (§ 186.22, subd. (b)(1)(C)) [which here rests upon the jury's finding that Yang personally used a gun in violation of § 12022.5, subd. (a)]

The generic gang enhancement language from subdivision (b)(1) of section 186.22 was used in the information as to count 4 without reference to subsection (A), (B) or (C). (1 C.T. p. 17.) The jury was instructed in this generic language (2 C.T. pp. 288-290) and the jury so found as to defendant Yang (2 C.T. p. 307). Thus, looking just at the charging document, contrary to the appellate court's main premise, the gang enhancement in this case did not involve defendant Yang's use of a gun.

Unlike *Rodriguez*, the prosecutor in this case never asked the trial court to elevate the punishment for the gang enhancement to the violent felony level under subdivision (b)(1)(C) of section 186.22 with the same conduct, personal gun use, that supported the section 12022.5, subdivision (a)(1), enhancement.[4] Instead, as noted above, the prosecutor here pled and

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[4] In *Rodriguez* the prosecutor specifically charged and proved the gang allegation as a violent felony under subdivision (b)(1)(C). The "jury found defendant guilty of three counts of assault with a firearm (§ 245, subd. (a)(2)), and as to each count made findings under two different sentencing enhancement statutes: (1) that defendant personally used a firearm (§ 12022.5, subd. (a)); and (2) that he committed a 'violent felony' to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C))." (*Rodriguez, supra*, 47 Cal.4th at p. 505.) The same error was made in a recent, not yet final, case from the Second Appellate District Court of Appeal. (See *People v. Martinez* (Aug. 6, 2012, B235011) ___ Cal.App.4th ___ [2102 DAR-DJ 10828, 2012 Cal.App. Lexis 860].

proved a "bare" gang enhancement under section 186.22 without reference to (1) gun use, (2) it being a "serious" or "violent" felony, or (3) either subdivision (b)(1)(B) or (b)(1)(C). By doing so, the prosecutor exposed the defendant to the maximum possible sentence while not violating the holding of *Rodriguez*. As described previously, it was only by setting the level of punishment for the gang enhancement at the violent felony level that the sentencing judge created a conflict with the *Rodriguez* case.

Section 1170.1, subdivision (f) reads in pertinent part: "When *two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense*, only the greatest of those enhancements shall be imposed for that offense." (Italics added.) Thus, the two prerequisites to the sentence restriction under subdivision (f) of section 1170.1 are (1) that each overlapping charging allegation be an "enhancement" and (2) that each of these "enhancements" involve being armed with or using a deadly weapon or firearm. " 'Enhancement' means an additional term of imprisonment added to the base term." (Cal. Rules of Ct., rule 4.405(3).)

The Court of Appeal reasoned that the gang enhancement punishment levels in both subparts (B) or (C) of subdivision (b)(1) of section 186.22, each "involved Yang's use of a firearm" because the underlying felony in count 4 (§ 245, subd. (b)) necessarily involved use of a semiautomatic firearm. But this charge alone, or in conjunction with section 186.22, subdivision (b)(1), does not include or require defendant Yang's *personal* use of the firearm. Thus, per the plain language of section 1170.1, subdivision (f), there is no improper dual use of the firearm-use enhancement under section 12022.5, subdivision (a)(1), and the gang enhancement.

That the substantive crime of violating section 245, subdivision (b), involved use of a firearm does not implicate section 1170.1, subdivision (f)

and, thus, does not produce a violation of the holding in *Rodriguez*. As noted, section 1170.1, subdivision (f), only applies to "two or more *enhancements*" for being armed with or using a firearm. It does not apply to prevent imposing a personal firearm-use enhancement upon conviction of violating section 245, subdivision (b), even though this offense necessarily involves a firearm. (§ 1170.1, subd. (d); *People v. Harper* (2000) 82 Cal.App.4th 1413, 1416-1419.)

This Court in *Rodriguez* did not base its holding upon the fact that the underlying felony involved assault with a firearm under section 245. Instead, its holding was grounded solely on its construction of section 1170.1, subdivision (f). The Court reasoned that imposing the additional five years on the gang enhancement in the form of the ten-year violent felony punishment for the gang enhancement, the crime being made "violent" by the same proof supporting the section 12022.5, subdivision (a)(1), allegation, and imposing additional punishment for this firearm-use enhancement under section 12022.5, subdivision (a)(1), constituted imposing two enhancements each based upon the defendant using the same firearm in the commission of the offense.

> As mentioned earlier ..., the standard additional punishment for committing a felony to benefit a criminal street gang is two, three, or four years' imprisonment. (§ 186.22, subd. (b)(1)(A).) But when the crime is a "violent felony, as defined in subdivision (c) of Section 667.5," section 186.22's subdivision (b)(1)(C) calls for additional punishment of 10 years. *Here, defendant became eligible for this 10-year punishment only because he "use[d] a firearm which use [was] charged and proved as provided in ... Section 12022.5."* (§ 667.5, subd. (c)(8).) Thus, defendant's firearm use resulted in additional punishment not only under section 12022.5's subdivision (a) (providing for additional punishment for personal use of a firearm) but also under section 186.22's subdivision (b)(1)(C), for committing a violent felony as defined in section 667.5, subdivision (c)(8) (by personal use of firearm) to benefit a criminal street gang. *Because the firearm use was punished under two different sentence enhancement*

> *provisions, each pertaining to firearm use, section 1170.1's subdivision (f) requires imposition of "only the greatest of those enhancements" with respect to each offense.*

(*Rodriguez*, *supra*, 47 Cal.4th at p. 509, italics added.)

In the instant case there would be no violation of *Rodriguez* in sentencing Yang under subdivision (b)(1)(B) of section 186.22 because, unlike subdivision (b)(1)(C), the former punishment level (serious felony) does not rely upon or pertain to Yang's personal use of a firearm as charged and proved under section 12022.5, subdivision (a)(1). Thus, there would be no prohibited "dual use" within the meaning of 1170.1, subdivision (f).

In sum, the Court of Appeal was mistaken in holding that under "either scenario," subpart (b)(1)(B) *or* (b)(1)(C) of section 186.22, "the gang enhancement involved Yang's use of a gun." (*People v. Le*, *supra*, slip opinion, p. 66.) Under subdivision (b)(1)(B) the gang enhancement simply involved Yang's conviction for an assault with a deadly weapon as defined by section 1192.7, subdivision (c)(31), whereas under subdivision (b)(1)(C) the gang enhancement involved Yang's personal use of a firearm charged and proved as provided in section 12022.5, subdivision (a)(1), as defined by section 667.5, subdivision (c)(8).

II

THE PROPER DISPOSITION IS REMAND FOR RESENTENCING.

The People request that the Court remand this matter to the trial court with directions to resentence defendant Yang on count 4. The People seek remand not because we believe the trial court had discretion to retain its current sentencing scheme. Instead, the purpose of remand would be for the trial judge to confirm his expressed desire to impose the upper term of ten years for the gun-use enhancement under section 12022.5, subdivision (a)(1): "If the Court were to impose or to be called upon to impose a term under the 12022.5 allegation, the Court would and hereby does find that the upper term would be appropriate." (18 R.T. p. 3464, lines 15-18.) If the judge maintains this opinion, then the People's proposed sentencing scheme would be mandatory. Again, as noted previously, a violation of section 245, subdivision (b), is a serious felony as a matter of law pursuant to section 1192.7, subdivision (c)(31). And under subdivision (b)(1)(B) of section 186.22, "[i]f the [underlying] felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person *shall* be punished by an additional term of five years." (Italics added.) Use of the word "shall" ordinarily connotes that the statutory requirement is mandatory. (*Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 634; *Cole v. Antelope Valley Union High Sch. Dist.* (1996) 47 Cal.App.4th 1505, 1512; *People v. Heisler* (1987) 192 Cal.App.3d 504, 506-507.) This is particularly true when the words "shall" and "may" are used in the same statute. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.) The Legislature used the term "may" within subdivision (g) of section 186.22, lending further credence to the fact that the use of term "shall" in subdivision (b)(1)(B) of that section is mandatory.

Remand for resentencing on count 4 is the proper disposition in this case. "If correction of a sentencing error may affect the trial court's discretionary decisions in determining an appropriate sentence, the remedy is to reverse and remand for resentencing." (*People v. Edwards* (2011) 195 Cal.App.4th 1051, 1060.) There does not appear to be any dispute on this issue. In the Court of Appeal, the defense conceded that "[if] this Court agrees with the People's position, ... appellant would agree that remand for resentencing, as requested by the People, is the proper remedy." (Appellant Yang's Reply Brief in Division One of the Fourth Appellate Dist., pp. 16-17.)

CONCLUSION

The People of the State of California respectfully request that the Court remand this matter to the trial court with directions to resentence defendant Yang on count 4.

Dated: August 24, 2012

Respectfully submitted,

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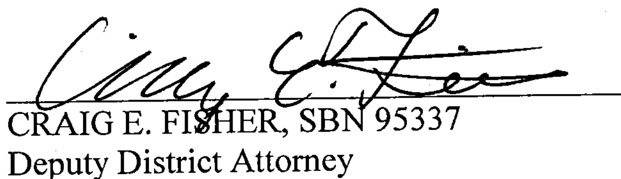
Certificate of Word Count

I certify that this **Appellant's Brief on the Merits**, including footnotes, and excluding tables and this certificate, contains 8,597 words according to the computer program used to prepare it.



CRAIG E. FISHER, SBN 95337
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Supreme Court No. S202921 | **Court of Appeal No. D057392** | **Superior Court No. SCD212126**

PROOF OF SERVICE

I am a citizen of the United States and a resident of San Diego County. I am over 18 years and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On August 24, 2012, a member of our office caused to be delivered **via Federal Express overnight delivery** the original and 13 copies of the attached **APPELLANT'S BRIEF ON THE MERITS** for filing with the Supreme Court of the State of California at:

California Supreme Court
The State Building
350 McAllister Street, Room 1295
San Francisco, California 94102

and I placed a true and correct copy thereof in the U.S. Mail to:

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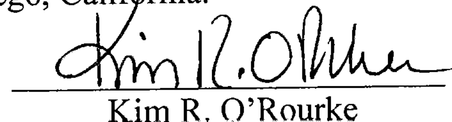
I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 24, 2012, at San Diego, California.



Kim R. O'Rourke