**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

ERIC HUNG LE et al.,
Defendants and Appellants.
[Down George Yang]

**No. S202921**

Court of Appeal
No. D057392

Superior Court
No. SCD212126



On review from the
Fourth Appellate District, Division One
and The Superior Court of San Diego County
The Honorable Charles G. Rogers, Judge

# APPELLANT DOWN GEORGE YANG'S ANSWER BRIEF ON THE MERITS

Arthur Martin
State Bar No. 222569

P.O. Box 5084
Klamath Falls, OR 97601
(541) 273-8738
arthurmartin@justice.com

Attorney for Defendant and Appellant
DOWN GEORGE YANG

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## ISSUE PRESENTED

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

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## INTRODUCTION

The answer to the issue presented depends on a threshold question: does the language of the gang enhancement statute, Penal Code section 186.22, subdivision (b)(1), create mandatory terms applicable to felonies defined as serious ((b)(1)(B)) and violent ((b)(1)(C)), or does a court have discretion to treat a violent felony as merely a serious felony to achieve a sentencing objective?

If section 186.22, subdivision (b)(1), mandates imposing the term defined for a violent felony on any violent felony, then the sentence for any serious felony as a matter of law in the commission of which the defendant personally uses a gun must be enhanced as a violent felony as defined in section 667.5, subdivision (c)(8). And for any felony that is defined as violent based on the use of a gun, the gang enhancement will fall within the requirements of section 1170.1, subdivision (f), as interpreted in *People v. Rodriguez* (2009) 47 Cal.4th 501, precluding imposition of enhancement terms under both section 186.22, subdivision (b)(1)(C), and section 12022.5, subdivision (a). This result appears to be compelled by the plain language of the statutes.

On the other hand, if the gang enhancement statute does *not* create mandatory terms for specific types of felonies, and a felony that is violent as a matter of law (under section 667.5, subdivision (c)), can instead be treated as serious (under section 1192.7, subdivision (c)), the answer to the issue presented here – whether section 1170.1, subdivision (f), precludes imposition of enhancements under both sections 12022.5, subdivision (a), and 186.22, subdivision (b)(1)(B) – is "sometimes yes and sometimes no," depending on whether the underlying felony is "serious" within the

meaning of section 1192.7, subdivision (c), *based on use of a gun.* If, as here (and in *People v. Rodriguez, supra*), the felony is serious based on the use of a gun under section 1192.7, subdivision (c)(31), then the serious felony gang enhancement is necessarily based on the use of a gun, and section 1170.1, subdivision (f), precludes imposition of enhancement terms under both section 186.22, subdivision (b)(1)(B), and section 12022.5, subdivision (a).

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## STATEMENT OF THE CASE AND FACTS

As relevant to the issue on review, a jury found appellant Down George Yang guilty in Count 4 of assault with a firearm under Penal Code section 245, subdivision (b). The jury further found that Yang personally used a gun in that assault within the meaning of section 12022.5, subdivision (a), and that the assault was a gang-related crime within the meaning of section 186.22, subdivision (b)(1). (3CT 601 [verdict form].) The verdict indicated jurors accepted the prosecutor's theory that Yang was the gunman in a gang-related drive-by shooting outside a San Diego pool hall.

Attempting to navigate the requirements of the gun use and gang crime enhancement statutes, and this Court's analysis of the relation between those statutes in *People v. Rodriguez, supra*, 47 Cal.4th 501 (hereafter *People v. Rodriguez*), the trial court sentenced Yang to a total of 19 years on Count 4: the upper term of 9 years for the violation of section 245, subdivision (b), plus 10 years under section 186.22, subdivision (b)(1)(C), which applies to violent felonies. (2CT 410 [abstract of judgment]; 3CT 611 [sentencing minutes].) In accord with *People v. Rodriguez, supra*, the court stayed the sentence enhancement under section 12022.5, subdivision (a). (3CT 611; 18RT 3456-3458.)

The court rejected the District Attorney's argument that it could enhance the sentence under both section 12022.5, subdivision (a), and a different subdivision of section 186.22, subdivision (b), specifically (b)(1)(B), thus resulting in 15 years worth of enhancements – 10 under section 12022.5(a), plus 5 under section 186.22, subdivision (b)(1)(B). The trial court reasoned that since the jury's findings resulted in Count 4 being a violent felony under section 667.5, subdivision (c)(8), the proper gang enhancement term was defined by section 186.22, subdivision (b)(1)(C), and *People v. Rodriguez, supra*, 47 Cal.4th 501, precluded any additional

enhancement term under section 12022.5, subdivision (a). (18RT 3458.) The court specifically noted that it was "concluding as a matter of law that this [imposition of the violent felony gang enhancement] precludes the application . . . of the term under section 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." (18RT 3458.)

In other words, the trial court ruled that Yang's conviction for a violent felony required it impose the gang enhancement for a violent felony, which in turn precluded the additional imposition of the enhancement under section 12022.5, subdivision (a), as explained in *People v. Rodriguez, supra.* The court rejected the prosecutor's argument it could ignore the violent felony nature of the conviction and impose a gang enhancement for a non-violent felony, thereby avoiding the *Rodriguez* rule and allowing for an additional enhancement term under section 12022.5 The District Attorney appealed.

On appeal, a panel of the Fourth District Court of Appeal, Division One, affirmed the trial court's sentence, adopting slightly different reasoning than the trial court:

> 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 et al.* (D057392, Apr. 27, 2012, modified May 24, 2012), Slip Opn., pp. 63-64.)

Thus, the appellate court found that even if the trial court did have discretion to ignore the violent felony nature of the conviction when imposing the gang enhancement, the court could not impose the enhancement applicable to a serious felony (§ 186.22, subd. (b)(1)) because, under the facts of this case, Yang's serious felony necessarily involved the use of a gun and thereby overlapped the gun use enhancement in section 12022.5, subdivision (a). The Court of Appeal clarified this point in response to the government's petition for rehearing:

> 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 et al.* (D057392, Apr. 27, 2012, modified May 24, 2012), Slip Opn. Modification, pp. 2-3.)

The Supreme Court granted the District Attorney's petition to review the lawful sentencing parameters when a conviction for a serious felony includes enhancements for both commission of a gang-related crime and personal use of a firearm.

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## ARGUMENT

## I.

**PENAL CODE SECTION 1170.1, SUBDIVISION (f), PRECLUDES IMPOSING ENHANCEMENT TERMS UNDER BOTH SECTIONS 12022.5, SUBDIVISION (a), AND 186.22, SUBDIVISION (b)(1)(B), BECAUSE ANY SERIOUS FELONY AS A MATTER OF LAW DURING WHICH THE DEFENDANT USES A FIREARM BECOMES A VIOLENT FELONY *BASED ON THE USE OF A FIREARM* UNDER SECTION 667.5, SUBDIVISION (c)(8), AND THEREBY FALLS WITHIN THE ANALYSIS OF *PEOPLE v. RODRIGUEZ* (2009) 47 CAL.4TH 501.**

The plain language of the gang crime enhancement statute, Penal Code section 186.22, subdivision (b)(1), mandates specific enhancement terms for specific types of crimes: five years for a serious felony ((b)(1)(B)), and ten years for a violent felony ((b)(1)(C)). Section 186.22, subdivision (b)(1)(A), provides: "Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion." What is provided in subparagraphs (B) and (C) are specific enhancement terms that "shall be" imposed if the underlying felony is serious or violent:

> (B) If the 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.

(C) If the felony is a serious felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.

(§ 186.22, subd. (b)(1).))

The enhancement term to be applied to a particular felony is defined by the statute; it is not a matter of prosecutorial charging discretion or a sentencing choice available to a trial court. There is discretion embedded within subsection (b)(1)(A) for felonies falling within that provision, a discretion that is guided in subsections (b)(2) and (b)(3). But there is no discretion to determine whether to impose a term under (b)(1)(A), (B), or (C). The three sentence provisions under section 186.22, subdivision (b)(1), are not further steps up further levels; they are three separate doors or tracks applicable to three different contexts – a felony (A); a serious felony (B); and a violent felony (C). The statute provides no authority to pick a different door or jump the tracks in an effort to maximize a defendant's sentence as the District Attorney desires in the instant case. The applicable enhancement term is a matter of law, specifically whether the law defines the underlying felony as serious or violent.

This "mandatory," plain language reading of the gang enhancement statute is supported by this Court's decision in *People v. Lopez* (2005) 34

Cal.4th 1002, a unanimous decision authored by Justice Baxter. In *Lopez*, the issue was whether a gang-related first degree murder, which is punishable by a term of 25 years to life, could be enhanced by an additional 10 years as a violent felony under section 186.22, subdivision (b)(1)(C), or whether the applicable gang enhancement was a 15-year minimum parole eligibility term under section 186.22, subdivision (b)(5). (*People v. Lopez*, *supra*, at p. 1004.) The government was understandably interested in applying the 10 years under subdivision (b)(1)(C), because a 15-year minimum parole eligibility would have no practical effect on a first degree murder sentence that already included a 25-year minimum parole eligibility. (*Id.* at pp. 1008-1009.) But the Court ruled the plain language of section 186.22, subdivision (b)(5), explicitly applying to "a felony punishable by imprisonment in the state prison for life," precluded the prosecutor's attempt to enhance the defendant's sentence under a different subdivision, specifically (b)(1)(C). (*Id.* at p. 1011.)

Thus, in *Lopez*, the Court ruled that gang-related felonies punishable by life imprisonment had to be enhanced under section 186.22, subdivision (b)(5), the specific provision applicable to felonies punishable by life imprisonment. The plain language of the statute precluded the prosecutor

from jumping tracks within the gang enhancement, from (b)(5) to (b)(1)(C), in order to maximize the defendant's overall sentence.

The plain, mandatory language in section 186.22, subdivision (b), also resolves the issue presented here, necessarily precluding imposition of both a serious felony gang enhancement under subdivision (b)(1)(B), and a gun use enhancement under section 12022.5, subdivision (a). This is because any serious felony during which the defendant personally uses a gun becomes a violent felony under section 667.5, subdivision (c)(8)[1]. And since that felony is defined as a violent felony *based on the use of a gun*, section 1170.1, subdivision (f), as interpreted by *People v. Rodriguez, supra*, precludes the imposition of both the gang and personal gun-use enhancements.

The felony in the instant case, assault with a semiautomatic firearm (§ 245, subd. (b)) was a serious felony as a matter of law under section 1192.7, subdivision (c)(31). But the jury's finding under section 12022.5, subdivision (a), that Yang personally used a firearm in committing the

1 Section 667.5, subdivision (c), provides in relevant part:

> (c) For the purpose of this section, "violent felony" shall mean any of the following:
>
> . . .
>
> (8) . . . [A]ny felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55.

assault brought the felony within section 667.5, subdivision (c)(8), changing its status from serious to violent. That meant the applicable gang enhancement term was defined by section 186.22, subdivision (b)(1)(C) – the subdivision specifically applicable to violent felonies. The prosecutor's generic charge under section 186.22, subdivision (b)(1), does not change the fact that once the jury found Yang guilty of a gang-related crime and that he personally used a gun, the crime became a violent felony within the meaning of section 667.5, subdivision (c)(8), requiring imposition of the gang enhancement term for violent felonies defined in section 186.22, subdivision (b)(1)(C).

Further, as in *People v. Rodriguez, supra*, the violent felony gang enhancement in this case was applicable solely based on the use of a gun. As the trial court recognized, the applicability of two gun-use-based enhancements (§§ 186.22, subd. (b)(1)(C), & 12022.5, subd. (a)) brought section 1170.1, subdivision (f), into play, requiring the court impose only the longer of those two enhancements. But since the longest term was 10 years whether imposed under section 12022.5, subdivision (a), or section 186.22, subdivision (b)(1)(C), the court could properly impose either enhancement and stay the other, which is exactly what it did, imposing a 10-year term

under section 186.22, subdivision (b)(1)(C), and staying imposition of a term under section 12022.5, subdivision (a). (3CT 611; 18RT 3458.) Since the only available discretion was whether to impose the same 10-year term under one statute or another, and the trial court properly exercised that discretion and imposed a sentence in accord with the law, no remand is necessary and the judgment should be affirmed.

Any serious felony in the commission of which the defendant personally uses a gun becomes by operation of law a violent felony based on the use of the gun. (§ 667.5, subd. (c)(8).) A violent felony must be enhanced under section 186.22, subdivision (b)(1)(C). Since any serious felony becomes a violent felony based on the use of a gun, section 1170.1, subdivision (f), precludes imposition of enhancements under both section 186.22, subdivision (b)(1)(B), and section 12022.5, subdivision (a). Instead, the court must impose the longest gun-use-based enhancement and stay the other. (§ 1170.1, subd. (f).)[2]

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2 If a felony is defined as violent under section 667.5, subdivision (c), regardless whether a gun is used, for instance, a residential burglary in which a non-accomplice is present in the home ((c)(21)), then both the violent felony gang enhancement and the personal gun use enhancement could be imposed if a jury finds both those enhancement allegations true.

## II.

**ALTERNATIVELY, IF, AS IN THIS CASE, A FELONY IS "SERIOUS" SOLELY BASED ON THE USE OF A FIREARM, PENAL CODE SECTION 1170.1, SUBDIVISION (f), PRECLUDES ENHANCING A DEFENDANT'S SENTENCE WITH BOTH SECTION 186.22, SUBDIVISION (b)(1)(B), WHICH APPLIES TO SERIOUS FELONIES, AND SECTION 12022.5, SUBDIVISION (a), SINCE BOTH ENHANCEMENTS ARE BASED ON USE OF A FIREARM.**

If this Court finds the language of Penal Code section 186.22, subdivision (b)(1), is not mandatory, and a violent felony can instead be enhanced as merely serious, there are some serious felonies that can be enhanced under both sections 186.22, subdivision (b)(1)(B), and 12022.5, subdivision (a), and some serious felonies, such as the assault in this case, that are serious based on the use of a gun and can therefore only be enhanced under one of the gun-use-based enhancements, as explained in *People v. Rodriguez, supra*, 47 Cal.4th 501.

Section 1170.1, subdivision (f), precludes the imposition of two or more sentence enhancements "for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense."[3] In

3 In full, section 1170.1, subdivision (f), provides that "[w]hen 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

*People v. Rodriguez, supra*, this Court held that section 1170.1, subdivision (f), operated to preclude enhancing the defendant's sentence under both section 12022.5, subdivision (a), which applies to "any person who personally uses a firearm in the commission of a felony," and section 186.22, subdivision (b)(1)(C), the gang enhancement applicable to violent felonies, when the felony is defined as violent solely based on the use of a gun. (*People v. Rodriguez, supra*, at pp. 508-509.)

In *Rodriguez*, the underlying felony – assault with a firearm in violation of section 245, subdivision (a)(2) – became a violent felony as defined in section 667.5, subdivision (c)(8), by virtue of the fact the jury found the defendant had personally used a firearm in violation of section 12022.5, subdivision (a). Among the types of felonies defined as "violent" in section 667.5, subdivision (c), is "any felony in which the defendant uses a firearm which use has been charged and proved as provided in . . . [section] 12022.5 . . . " (§ 667.5, subd. (c)(8).) Since the felony was classified as "violent" based on the use of a gun, the violent felony gang enhancement was based on the use of a gun, and under section 1170.1, subdivision (f), the defendant's sentence could not be enhanced twice under

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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."

different statutes for the single use of the gun. (*People v. Rodriguez, supra,* at pp. 508-509.)

The question here is whether section 1170.1, subdivision (f), similarly precludes a trial court from imposing both a firearm enhancement under section 12022.5, subdivision (a), and a gang enhancement under section 186.22, subdivision (b)(1)(B), when the underlying offense is a serious felony as a matter of law. The answer is sometimes yes and sometimes no, depending on whether the underlying felony is defined as serious under section 1192.7, subdivision (c), *based on the use of a gun.* If the felony is serious based on the use of a gun, the serious felony gang enhancement is based on the use of a gun, and the analysis of *People v. Rodriguez, supra,* applies.

On the other hand, if the underlying felony is serious without regard to whether a gun was used, then both the serious felony gang enhancement and the personal gun use enhancement could be imposed; section 1170.1, subdivision (f), would not come into play. For instance, say a person approaches a house intending to break in and steal valuables for the benefit of a gang. No one is home and the door is locked. The burglar pulls out a gun and shoots the doorknob to disable the lock. The noise from the gun

attracts the attention of a passing police officer who arrests the foiled burglar. On these facts, the defendant has committed an attempted burglary – a serious felony under section 1192.7, subdivision (c)(18) [first degree burglary] & (39) [attempt]. If someone had been in the house, the crime would have been a violent felony under section 667.5, subdivision (c)(21), but in this scenario, no one was home.[4] Having committed a serious felony for the benefit of a gang, the defendant is subject to the gang enhancement for a serious felony – subdivision (b)(1)(B) of section 186.22. But in addition, since the defendant personally used a firearm while committing a felony, he would be further subject to a gun use enhancement under section 12022.5. Since the serious felony version of the gang enhancement is applicable to first degree burglary whether or not the defendant used a gun, section 1170.1, subdivision (f), has nothing to say about the relation between the two enhancements and both are properly imposed.

But if, unlike first degree burglary, a felony qualifies as serious *based on the use of a gun*, section 1170.1, subdivision (f), precludes imposition of both a serious felony gang enhancement and an enhancement

4 And since the burglar personally used a gun, the attempted burglary would become a violent felony under section 667.5, subdivision (c)(8), but in this Argument II, it is assumed a trial court can treat a violent felony as merely serious for purposes of imposing a gang enhancement term.

under section 12022.5, subdivision (a). That is the scenario presented in this case, and the basis of the Court of Appeal's rejection of the government's argument: whether Yang's felony is treated as "serious" or "violent," "under *either scenario* the gang enhancement involved Yang's use of a firearm, which we conclude makes *People v. Rodriguez* applicable." (*People v. Le et al.* (D057392, Apr. 27, 2012, modified May 24, 2012), Slip Opn., pp. 63-64, italics in original.)

The underlying felony in this case is a violation of section 245, subdivision (b), "an assault upon the person of another with a semiautomatic firearm." Assault with a semiautomatic firearm in violation of section 245 is specifically defined as a serious felony in section 1192.7, subdivision (c)(31). Thus, Yang's felony conviction under section 245, subdivision (b), qualifies as serious based on the use of a gun – on an assault with a semiautomatic weapon. This means application of any enhancement based on the "serious" status of the underlying felony is necessarily being applied *based on the use of a firearm*, which is what made the felony "serious." As the Court of Appeal explained,

> 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 et al.* (D057392, Apr. 27, 2012, modified May 24, 2012), Slip Opn. Modification, pp. 2-3.)

The respondent District Attorney's position at this point is that the fact that the underlying felony, "assault with a semiautomatic handgun, involves the use of a gun, does not infuse the gang enhancement with a firearm component"; in other words, "the gang enhancement itself" does not "pertain to firearm use," and therefore section 1170.1, subdivision (f), is not applicable. (Respondent's Opening Brief on the Merits [hereafter ROBM], p. 24.)[5] But the District Attorney is looking in the wrong place. The relevant issue is whether the designation of a felony as "serious" or "violent" "pertains to firearm use." If it does, then an enhancement applicable based on that designation necessarily "pertains to firearm use," requiring application of section 1170.1, subdivision (f), if, as in this case,

5 In another part of her brief, the District Attorney's argument appears to be that section 1170.1, subdivision (f), *does* apply to the instant case and "mandates" a maximized hybrid of the two gun-use-based enhancements. (See ROBM, pp. 17-18.) This position is based on a misreading of the plain language of section 1170.1, subdivision (f), which says "only the greatest of those [gun use] enhancements shall be imposed. . . ." Where, as here, the two gun-use-based enhancements both result in an additional 10-year term, the court can impose either enhancement, but not both.

other gun use-related enhancements were also found true.

The District Attorney's position is apparently that gang enhancement terms do not raise an issue under section 1170.1, subdivision (f), which by its terms involves enhancements "for being armed with or using a dangerous weapon or a firearm." (ROBM, pp. 24-25.) But if this analysis was correct, it would necessarily apply to the gang enhancement under section 186.22, subdivision (b)(1)(C), as well as (b)(1)(B), and *People v. Rodriguez, supra,* has already held that that in at least some circumstances a gang enhancement is "based on defendant's firearm use" and therefore does require application of section 1170.1, subdivision (f). (*People v. Rodriguez, supra,* at p. 508.) In effect, this part of the District Attorney's argument is re-arguing *Rodriguez.*

Finally, the District Attorney seems to suggest that since neither a conviction under section 245, subdivision (b), nor an enhancement under section 186.22, subdivision (b)(1), require a defendant *personally* use a firearm, section 1170.1, subdivision (f), is not implicated. (ROBM, p. 26.) As the Court of Appeal noted, the District Attorney is placing form over substance, since we know the jury found Yang personally used the gun. (*People v. Le et al.* (D057392, Apr. 27, 2012, modified May 24, 2012), Slip

Opn. Modification, p. 2.) But even more importantly, the District Attorney is misreading the statute. Nothing in section 1170.1, subdivision (f), suggests it only applies if two or more firearm use enhancements involve *personal* use of a firearm; it applies "[w]hen 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," with no distinction between personal versus vicarious arming or use. The District Attorney does not cite any cases supporting the imputation of a personal use requirement into section 1170.1, subdivision (f), and appellant Yang has found none either. "[W]hen a pleading and proof requirement is intended, the Legislature knows how to specify the requirement." (*People v. Lara* (2012) 54 Cal.4th 896, 902, internal quotation marks omitted.) Obviously, the Legislature knows how to specifically require personal, as opposed to vicarious, use of a firearm; they did so in section 12022.5, subdivision (a), and declined to do so in section 1170.1, subdivision (f).

Some crimes that are serious felonies as a matter of law do not necessarily depend on the use of a firearm. A first degree burglary is an example. A conviction for that kind of serious felony could be enhanced both under section 186.22, subdivision (b)(1)(B), and 12022.5, subdivision

(a), without implicating section 1170.1, subdivision (f), or *People v. Rodriguez*. But when, as here, a crime qualifies as serious *based on the use of a firearm*, application of an enhancement based on the crime being serious, such as section 186.22, subdivision (b)(1)(B), is necessarily an application of an enhancement based on the use of a firearm. And enhancements based on the use of a firearm are the specific subject matter of section 1170.1, subdivision (f). Section 1170.1, subdivision (f), precludes a trial court from imposing both a firearm use enhancement under section 12022.5, subdivision (a), and a serious felony gang enhancement under section 186.22, subdivision (b)(1)(B), when, as with the section 245, subdivision (b), conviction in this case, the underlying felony qualifies as serious based on the use of a gun.

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## CONCLUSION

Based on the reasons and arguments presented above, appellant respectfully requests the Court of Appeal's disposition of this case be affirmed.

Dated: November ____, 2012 Respectfully submitted,

_____

Arthur Martin

Attorney for Defendant and Appellant
Down George Yang

**CERTIFICATE OF WORD COUNT**
**(Cal. Rules of Court, rule 8.520(c)(1))**

Appellate counsel certifies that, in accord with California Rules of Court, rule 8.520(c)(1), and based on the word count of the word processing program used to prepare this document, there are 4,639 words in this opening brief, excluding the tables and the case caption.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Klamath Falls, Oregon.

Dated: November ____, 2012

_____
Arthur Martin

**DECLARATION OF SERVICE**

Case Name: PEOPLE V. ERIC HUNG LE et al. No. S202921

I declare:

I am employed in the County of Klamath, Oregon. I am over 18 years of age and not a party to the within entitled cause; my business address is P.O. Box 5084, Klamath Falls, OR 97601.

On November ____, 2012, I served the attached

**APPELLANT DOWN GEORGE YANG'S ANSWER BRIEF ON THE MERITS**

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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| Office of the District Attorney<br>of San Diego County<br>Attn: Craig Evans Fisher<br>330 W. Broadway, Ste. 860<br>San Diego, CA 92101 | Judge Charles G. Rogers<br>Superior Court of San Diego County<br>P.O. Box 122724<br>San Diego, CA 92112-2724 |
| California Court of Appeal<br>Fourth District, Division One<br>750 B Street, Suite 300<br>San Diego, CA 92101 | Appellate Defenders, Inc.<br>555 W. Beech St., Suite 300<br>San Diego, CA 92101 |
| Down George Yang, No. G00263<br>Kern Valley State Prison<br>P. O. Box 5102<br>Delano, CA 93216 | [Co-appellant attorney]<br>Laura Gordon, Atty. at Law<br>P.O. Box 177<br>Escondido, CA 92033 |

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Klamath Falls, Oregon, on November ____, 2012.

I declare under penalty of perjury of the law of California that the foregoing is true and correct, and this declaration was executed at Klamath Falls, Oregon, on November ____, 2012.

ARTHUR MARTIN _____ _____

(Name) (Signature)