

Filed 12/15/11

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RUDY J. MURILLO,

Defendant and Appellant.

D058142

(Super. Ct. No. SCE222140)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed.

Daniel J. Kessler for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Tami Falkenstein Hennick, Deputy Attorneys General for Plaintiff and Respondent.

A jury convicted defendant Rudy J. Murillo of mayhem (Pen. Code,¹ § 203), assault with caustic acid (§ 244, subd. (a)(1)), arson causing great bodily injury (§ 451, subd. (a)), battery with serious bodily injury (§ 243, subd. (a)) and corporal injury to a cohabitant (§ 273.5, subd. (a)) in connection with his assault on the victim, Sheri Vargas. The jury found true the special allegations, appended to all the charged offenses except the arson offense, that Murillo personally used a deadly weapon (§ 12022, subd. (b)(1)) and inflicted great bodily injury within the meaning of section 12022.7, subdivision (e) (infliction of great bodily injury under circumstances involving domestic violence) in committing the offenses. The court sentenced Murillo on the mayhem count to the upper eight-year term, plus a consecutive upper five-year term for the great bodily injury enhancement (GBI), plus a consecutive one-year term for the deadly weapon enhancement, for a total term of 14 years.²

On appeal, this court in an unpublished opinion affirmed the convictions and findings,³ but reversed Murillo's upper terms imposed for the mayhem conviction and the GBI enhancement under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531]. However, following *People v. Black* (2005) 35 Cal.4th 1238, this court vacated its opinion and affirmed the trial court's judgment in its entirety. Then, under *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856], which in part overturned *Black*, the

¹ All further statutory references are to the Penal Code.

² The court imposed but stayed the sentences for the remaining counts under section 654.

³ This court on February 17, 2011, granted Murillo's unopposed request for judicial notice of this court's prior opinion (D042605).

San Diego Superior Court ordered Murillo resentenced. The trial court resentenced Murillo to a 13-year prison term consisting of an eight-year term for the mayhem conviction, a four-year term for the GBI enhancement (§ 12022.7, subd. (e)), and a one-year term for the deadly weapon enhancement (§ 12022, subd. (b)(1)).⁴

Murillo contends section 654 required the trial court to stay the one-year sentence for the deadly weapon enhancement. We disagree, concluding the imposition of separate and consecutive sentences for the deadly weapon enhancement (§ 12022) and the GBI enhancement (§ 12022.7) is mandated by the provisions of section 1170.1.⁵

I

FACTUAL BACKGROUND

On the day of the assault, Murillo and Vargas consumed about 20 beers each. They began to argue and Vargas gathered her clothes to leave. Murillo grabbed the clothes from Vargas, walked outside, threw the clothes on the ground and sprayed lighter fluid on them. Vargas pushed Murillo and a shoving match ensued. As Vargas advanced on Murillo, he lit the sleeve of her sweater on fire. The fire spread quickly despite their joint efforts to extinguish the flames. Murillo shouted for his father, who brought water and eventually extinguished the flames.

⁴ The court again stayed the sentences for the remaining counts under section 654.

⁵ Whether section 654 applies to enhancements and thereby precludes imposition of enhancements for both personal use of a firearm and personal infliction of great bodily injury under circumstances involving domestic violence is currently before the Supreme Court in *People v. Ahmed* S191020 (E049932, 4th District, Div. 2) and *People v. Robinson* S193289 (B223191, 2nd District, Div. 5).

Vargas suffered severe external burn injuries, and also suffered burn injuries to her lungs, trachea and vocal chords. Vargas died from her injuries after Murillo's trial and initial sentencing.

II

ANALYSIS

The question presented is whether a court may apply section 654 where enhancements are found true under both section 1170.1, subdivisions (f) and (g).

Murillo focuses on section 654, and frames the issue as one addressing whether section 1170.1, subdivisions (f) and (g) constitute exceptions to the general rule against double punishment. The People respond that section 654 does not apply to enhancements in general because enhancements do not define a crime or offense but instead relate to the penalty to be imposed.⁶ If section 654 does apply, the People argue it should not apply to section 1170.1.

We believe section 654 does not govern the analysis here. Rather, the clear language of section 1170.1, its legislative history and existing case law support the conclusion that section 1170.1, subdivision (d) presents a directive and subdivisions (f) and (g) are exceptions to that directive. We additionally conclude subdivision (a) of section 1170.1 applies section 654 to formulating the aggregate sentence. Moreover, although section 654 does not limit the enhancements expressed in section 1170.1,

⁶ For this proposition the People rely upon this court's opinion in *People v. Boerner* (1981) 120 Cal.App.3d 506, 511.

subdivisions (f) and (g), those enhancements may be stricken under proper application of section 1385.

A. *The Statutory Language*

"The first principle of statutory interpretation requires that we turn initially to the words of the statute to ascertain the Legislature's intent. '[I]f " 'the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citation.] The plain language of the statute establishes what was intended by the Legislature.' " [Citation.]' " (*People v. Palacios* (2007) 41 Cal.4th 720, 728 (*Palacios*).)

We begin by noting section 1170.1, subdivision (d) states that when a court imposes a prison sentence pursuant to section 1170 or subdivision (b) of section 1168, "the court shall also impose, *in addition and consecutive to the offense* of which the person has been convicted, the additional terms provided for any applicable enhancements." (Italics added.)

There are exceptions to this directive. Section 1170.1 subdivision (f) provides: "When two or more enhancements may be imposed for being armed with or using a deadly or dangerous 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."

Likewise, section 1170.1 subdivision (g) provides: "When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim 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 being armed with or using a dangerous or deadly weapon or a firearm."

In addition, the statute as a whole presents an unambiguous relationship between the directive contained in subdivision (d) and the limitations to that directive found in subdivisions (f) and (g).⁷ The relationship requires additional terms for all applicable enhancements must be added to a defendant's prison sentence. However, if there are multiple GBI enhancements on the same victim in a single offense, only the greatest of the enhancements can be imposed consecutive to the prison sentence. If in a single offense there are multiple enhancements for weapons or firearm use, only the greatest can be imposed in addition and consecutive to the prison sentence. The GBI and weapon use enhancements that are to be added to the prison sentence run consecutive to each other. The limitations on multiple GBI and weapon enhancements in subdivisions (f) and (g) do not affect any other enhancements.

⁷ Additional direction is found in section 1170.1, subdivision (h), which provides that for every sex offense specified in section 667.6, enhancements must be applied without any limitation regardless of whether the enhancements are pursuant to section 1170.1, section 667.6 or some other provision of law. Section 1170.1, subdivision (h) in its present form did not exist at the time this court decided *People v. Dobson* (1988) 205 Cal.App.3d 496, 501-502 (*Dobson*), disapproved by *People v. Jones* (2001) 25 Cal.4th 98, 110. In *Dobson*, we held the intent of section 654 would not be carried out if the court could apply multiple enhancements for GBI and weapon use to individual sex offenses. We declared instead that the enhancements were more appropriately added to the defendant's attempted manslaughter conviction.

B. Legislative History and Intent

Although we find the language and enhancement formula of section 1170.1, subdivisions (d), (f) and (g) to be clear and unambiguous, we conclude our reading of the statute and its subdivisions is supported by the legislative history of section 1170.1.

Prior to 1997, section 1170.1 was the subject of frequent amendment. In 1997 the Legislature, through Senate Bill No. 721 (SB 721), amended section 1170.1. (Sen. Bill No. 721 (1997—1998 Reg. Sess.) § 3, approved by Governor, October 7, 1997.) The rationale for the changes is set forth by the Senate Committee on Public Safety, chaired by Senator John Vasconcellos. The committee issued a report that accompanies the history of SB 721. In the comments to the report, the sponsor of SB 721 observes: "The proposed changes in this bill would correct some of the injustices in our present law, which would result in at least some sentences being increased. The bill would do away with certain 'free' crimes and 'free' enhancements. It would stop rewarding some defendants for their greater criminal ambition and criminal activity. Instead, it would allow such defendants to be more appropriately punished for the full range of their criminal conduct, in the discretion of the court." (Senate Committee on Public Safety on Senate Bill 721 (1997—1998 Reg. Sess., p. 4 (hereinafter 1997 Report).) Against this announced intent, changes were made to subdivisions (h), (f) and (g) of section 1170.1 whereby the double enhancement limitation on GBI and weapons use was eliminated.

Prior to 1997, section 1170.1 subdivision (d) provided the court "shall also impose the additional terms" for sections 12022 and 12022.7 if certain specified offenses

occurred, "unless the additional punishment therefore is stricken pursuant to subdivision (h)." (Stats 1994, ch. 1188, § 12.7, p. 7201.)⁸ Subdivision (h) provided:

"Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in . . . [sections] 12022 . . . [and] 12022.7 . . . if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment." (*Id.* at p. 7202.)

SB 721 repealed subdivision (h). The report states that in repealing subdivision (h), SB 721 "eliminates a confusing, redundant provision on the court's ability to strike some enhancements under PC 1170.1(h). Usually defendants should be punished for enhancements which have been pled or proved. However, the court would still retain the discretion and authority to strike almost all enhancements (including every one listed in PC 1170.1(h)) under the general provision of PC 1385(a)." (1997 Report, p. 6.) In commenting on repeal of subdivision (h), the Legislature did not address application of section 654 but rather, as noted, reaffirmed the power of the court to strike any prior under the authority of section 1385, subdivision (a). (1997 Report, p. 6.)

SB 721 simultaneously restructured the enhancements for weapons and great bodily injury. Subdivision (f) was rewritten to read: "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

⁸ *People v. Boerner, supra*, 120 Cal.App.3d 506 is reflective of this pre-1997 state of the law. There, our court rejected use of section 654 on the ground that dual enhancements for GBI and 12022.7 were proper under section 1170.1, subdivision (d) because the offense was the specified crime of attempted murder.

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 great bodily injury.*" (Stats. 1997, ch. 750, § 3, p. 5067, italics added.) Subdivision (g) was rewritten to read: "When two or more enhancements may be imposed for the infliction of great bodily injury 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 being armed with or using a dangerous or deadly weapon or firearm.*"⁹ (*Ibid.*, italics added.)

Commenting on ending the limitation on GBI and weapon enhancements, the 1997 Report states: "The original impact was so unjust that the limitation has been almost amended out of existence. The last remnants of this terrible policy mistake must be eliminated." (1997 Report at p. 3.) The report thus provides that "a court must impose all applicable sentence enhancements to any felony determinate sentence imposed." (*Id.* at p. 5.)

In 2002, in an effort to further clarify and conform the enhancement statutes to make them legally proper and simpler to understand, section 1170.1 was again extensively amended. (Stats. 2002, ch. 126, § 1, pp. 690—692; see Sen. Com. On Public Safety, Analysis of Assem. Bill No. 2173 (2001—2002 Reg. Sess.) as amended June 4, 2002, p. 5 (hereinafter, 2002 Report).)

⁹ Subdivisions (e) and (f) were later re-lettered (f) and (g) but the substance of the subdivisions did not change.

The amendments clarified the court's discretion to strike enhancements by adding the following italicized language to section 1170.1, subdivision (d): "When the court imposes a prison sentence for a felony pursuant to Section 1170 or subdivision (b) of Section 1168, *the court shall also impose, in addition and consecutive to the offense of which the person has been convicted,* the additional terms provided for any applicable enhancements." (Stats. 2002, ch. 126, § 1, p. 691, italics added.) Simultaneously, AB 2173 repealed provisions relating to consecutive enhancements in sections 12020, 12022.5, 12022.53, 12022.55, 12022.7 and 12022.9. As set forth in the Senate Committee on Public Safety Report for AB 2173, in the repeal "the Legislature intends to apply the more general provisions in section 1170.1, subdivision (d), requiring consecutive imposition of enhancements." (2002 Report, p. 4.)

The legislative history which accompanies the comprehensive changes made to section 1170.1 in 1997 and 2001 thus reflects an intent to eliminate the court's discretion to strike enhancements. The statutory formula created by the Legislature is consistent with the interpretation we apply to subdivisions (d), (f) and (g).

C. Application of Section 654 to Section 1170.1

A question remains as to whether the reference to section 654 in subdivision (a) of section 1170.1 demonstrates a legislative intent that section 654 apply to all subdivisions of 1170.1 including subdivisions (f) and (g). The legislative history of section 1170.1 does not support such a conclusion. Indeed, it strongly supports the view that the Legislature was seeking to eliminate the extension of section 654 and "free" enhancements and crimes.

We also find the opinions of the California Supreme Court supportive of the position we take. *Palacios, supra*, 41 Cal.4th 720 is instructive in this regard. The court there noted that section 1170.1 does not make subdivisions (f) and (g) subsidiary terms with regard to subdivision (a), but rather they are coequal provisions. The court further explained: "Section 1170.1[, subdivision (a)] describes the computation of principal and subordinate terms when consecutive sentences are imposed. The reference to section 654 in section 1170.1 simply ensures that consecutive sentences for subordinate terms do not result in multiple punishment." (*Id.* at pp. 730-731, fn 5.)

Following *Palacios*, our Supreme Court had occasion to comment once again on the relationship of section 654 to the enhancement provisions of section 1170.1. In *People v. Rodriguez* (2009) 47 Cal.4th 501, 507 (*Rodriguez*), the defendant was convicted of multiple assaults on separate victims. An enhancement was applied for violation of section 12022.5, subdivision (a) (personally using a firearm in the commission of a felony). Additional enhancements were also imposed under section 186.22, subdivision (b)(1)(C) (committing a violent felony to benefit a street gang). The appellate court struck the 12022.5 enhancement on the ground that when the same circumstance, i.e., firearm use, calls for additional punishment under two different sentence enhancement provisions based on the nature of the offense, section 654 precludes imposition of both enhancements. The defendant there urged, as he had in the Court of Appeal, that while section 654 did not apply to enhancements based on the *status* of the offender, it did apply to enhancements based on *conduct*.

The Supreme Court first reviewed the language and meaning of *Neal v. State of California* (1960) 55 Cal.2d 11 (*Neal*), emphasizing that *Neal* addressed whether a course of criminal conduct is divisible and therefore gives rise to more than one act, and whether divisibility exists within the meaning of section 654 depends on whether all of the offenses were incident to one intent and objective. The court stated: "With respect to punishment imposed under statutes that define a *criminal offense*, it is well settled that '[s]ection 654 bars multiple punishments for separate offenses arising out of a single occurrence where all of the offenses were incident to one objective.' [Citation.]" (*Rodriguez, supra*, 47 Cal.4th at p. 507.) But "this court has never held that section 654 applies to *sentence enhancements*." (*Ibid.*)

While the court in *Rodriguez* concluded it need not decide the broad question of whether section 654 applies to sentence enhancements based on the nature of the offense, we find it of interest that the court described subdivision (a) as controlling the computation of the aggregate sentence and concluded the language of section 1170.1, subdivision (f) prohibited use of section 654 to strike the 12022.5 enhancement. The court remanded the case to the trial court to allow it the opportunity to restructure its sentencing choices in light of application of section 1170.1, subdivision (f) rather than under section 654.

The *Rodriguez* decision is also helpful in that it offers for consideration a related question: whether application of section 654 to enhancements depends upon a broad category distinction between conduct-based crimes and status-based offenses. Although the court observes there is reference to such a distinction in *People v. Coronado* (1995)

12 Cal.4th 145, it did not describe the distinction as a rule. Indeed, it rejected use of section 654 in the conduct-based case before it.

In short, we find no decision of the Supreme Court which causes us to alter our conclusions as expressed above.¹⁰

Finally, we conclude the language of section 654 itself does not support extension of that statute to the enhancement formula in section 1170.1. Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of the law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 is a mirror statute to section 954 which allows charging a defendant with two or more offenses connected together in their commission. Both statutes became law in 1872.

In *Neal, supra*, 55 Cal.2d 11 the Supreme Court expanded section 654 to include indivisible courses of conduct that constitute a single act. It appears to us that in drafting the current version of section 1170.1, the Legislature declined to extend section 654 to enhancements. As the Supreme Court notes in *Rodriguez*, section 1170.1, subdivision (a), which deals with calculation of the aggregate sentence, allows use of section 654. Section 1170.1, subdivisions (f) and (g) are individual subdivisions of equal integrity that do not allow for application of section 654. In light of the Legislature's intent to limit

¹⁰ We recognize there are additional appellate cases that discuss application of section 654 as it relates to enhancements. While they appear at times inconsistent, we conclude much of the inconsistency is due to their tracking the various versions of section 1170.1.

section 654 within the sentencing structure of section 1170.1 and in light of the existing authority, we decline to expand section 654 beyond that allowed in *Neal*.

CONCLUSION

We conclude that application of section 654 to the enhancement provisions of section 1170.1, subdivisions (d), (f) and (g) would run counter to the express language of those subdivisions and would also result in creating the kind of "free enhancements" our Legislature has expressed a desire to eliminate.

The application of consecutive enhancements for section 1170.1, subdivisions (f) and (g) was proper in this case.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P.J.

I CONCUR:

NARES, J.

McDONALD, J., concurring and dissenting.

I dissent from the majority opinion because execution of the one-year sentence enhancement for personally using a deadly or dangerous weapon (Pen. Code § 12022, subd. (b)(1))¹ should be stayed under section 654, and I concur in the majority opinion because the conviction should otherwise be affirmed.

Murillo contends the imposition of unstayed terms on both the deadly weapon enhancement (i.e. the lighter) (§ 12022, subd. (b)(1)), and the great bodily injury (GBI) enhancement (§ 12022.7, subd. (e)), constituted multiple punishment prohibited by section 654.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] . . . If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Whether offenses are "indivisible" for these purposes is determined by the "defendant's intent and objective, not the temporal proximity of his offenses." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) "If [a]

¹ Statutory references are to the Penal Code.

defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' " (*Ibid.*) The application of section 654 thus "turns on the *defendant's* objective in violating" multiple statutory provisions. (*People v. Britt* (2004) 32 Cal.4th 944, 952.) Where the commission of one offense is merely " 'a means toward the objective of the commission of the other,' " section 654 prohibits separate punishments for the two offenses. (*Britt*, at p. 953.)

Substantial evidence is the appropriate standard of appellate review. "The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial." (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

The enhancement at issue here is the use of a deadly weapon (§ 12022, subd. (b)(1)), i.e. the lighter. The issue is whether Murillo's use of the lighter is an "act or omission that is punishable in different ways." (§ 654, subd. (a).) The People argue section 654 should *never* apply to an enhancement, because an enhancement does not define a crime or offense; rather, it specifies the punishment to be imposed. This categorical claim, however, does not recognize our Supreme Court's distinction between types of enhancements. Enhancements can be categorized as those that "go to the nature of the offender" (the defendant's status) and those that "go to the nature of the offense" (the defendant's conduct). (*People v. Coronado* (1995) 12 Cal.4th 145, 156.) Although our Supreme Court has established that section 654 does not apply to enhancements

based on the *status* of the defendant, it has not established whether section 654 applies to enhancements based on the *conduct* of the defendant. As the law now stands, section 654 may apply to some enhancements under some circumstances.

Circumstances in which section 654 does apply generally involve the defendant's conduct. For example, in *People v. Wynn* (2010) 184 Cal.App.4th 1210, 1220-1221, this court held that section 654 did apply to the deadly weapon enhancement (§ 12022, subd. (b)(1)) because the *conduct* that gave rise to the enhancement, the use of a nunchaku, was the identical conduct that gave rise to the assault convictions.

In contrast, circumstances in which section 654 does not apply tend to involve the defendant's status. For example, in *People v. Rodriguez* (1988) 206 Cal.App.3d 517, the court held that section 654 did not apply to the enhancement at issue (§ 667.5)² because the enhancement was based on "the status of the recidivist offender engaging in criminal conduct, not to the conduct itself." (*Rodriguez*, at p. 519; see also *People v. Warinner* (1988) 200 Cal.App.3d 1352, 1355 [holding that "[s]ince section 12022.1³ provides for an additional penalty and does not describe a criminal offense, the limitation of section 654 does not apply"].)

² Section 667.5 provides in part: "Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows: [¶] . . . [¶] (b) . . . where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony"

³ Section 12022.1, subdivision (b), compels sentence for an enhancement where a defendant, released from custody "on a primary offense," commits another offense.

The factual basis for the enhancement at issue here is based on Murillo's *conduct*, not his status. Here, the deadly weapon enhancement was based on the same indivisible course of conduct as the GBI enhancement. Murillo both personally used a deadly weapon under section 12022, subdivision (b)(1), and personally inflicted great bodily injury under section 12022.7 by a single "act" with a single objective—lighting the lighter. Moreover, this act is made "punishable" by two different statutes. There is no exception or other reason why section 654 would not apply. Under *Coronado*, these enhancements are based on Murillo's conduct. Unlike *Rodriguez* and *Warinner*, the deadly weapon enhancement at issue here (§ 12022, subd. (b)(1)) is based on the nature of the offense, not the nature of the offender. The trial court erred by not staying the one-year sentence for the deadly weapon, section 12022, subdivision (b)(1), enhancement.

The People argue that section 1170.1, subdivisions (f) and (g), create an express statutory exception to application of section 654.

Section 1170.1 provides in pertinent part:

"(f) 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.

"(g) When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim 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 being armed with or using a dangerous or deadly weapon or a firearm." (Italics added.)

Although subdivisions (f) and (g) in themselves permit sentences for both a GBI enhancement and deadly weapon enhancement, they do not refer to, or exclude application of, other limiting statutory provisions like section 654. In contrast to Section 1170.1, subdivisions (f) and (g), section 1170.1, subdivision (h), provides:

"For any violation of an offense specified in Section 667.6 [sex offenses], the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term."

Section 1170.1, subdivision (h), affirmatively bars limitation of enhancements applied "regardless of whether the enhancements are pursuant to this section . . . or some other provision of law." Under section 1170.1, subdivision (h), section 654 does not limit punishment for the enhancements that may be applied to a defendant convicted of one of the sexual offense specified in section 667.6. However, section 1170.1, subdivision (h), does not apply to the instant case because there is no section 667.6 offense.

Whether section 1170.1, subdivisions (f) and (g), limit application of a deadly or dangerous weapon enhancement is one of statutory interpretation. The Legislature may create an express exception to section 654's general rule against double punishment by stating a specific legislative intent to impose multiple punishment. However, under section 1170.1, subdivisions (f) and (g), the Legislature left open the potential for other limiting statutes, including section 654. Therefore, there is no specific legislative intent (express exception) imposing a conflict between section 654 and section 1170.1, subdivisions (f) and (g), that creates an implied exception to section 654 as a general

sentencing statute. Applying section 654 here would not nullify either section 12022.7 (GBI) or section 12022, subdivision (b)(1) (personal use of a deadly or dangerous weapon).

Unlike section 1170.1, subdivision (h), section 1170.1, subdivisions (f) and (g), are capable of two interpretations. It is reasonable to conclude that subdivisions (f) and (g) merely specify that "[t]his subdivision" does not limit enhancements, thereby leaving application of section 654 to limit any enhancements. However, it is arguably reasonable to infer that subdivisions (f) and (g) remove any limitation for a GBI enhancement or use of a dangerous or deadly weapon enhancement, despite section 654.

"When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." (*People v. Ralph* (1944) 24 Cal.2d 575, 581.) Therefore, under the rule of lenity, because the language of section 1170.1, subdivisions (f) and (g), is at the very least reasonably susceptible to the construction that leaves open section 654 to limit punishment for any enhancements, section 654 applies to the deadly weapon enhancement at issue here. Under section 654, the trial court was required to stay execution of the one-year sentence for the section 12022, subdivision (b)(1), deadly weapon enhancement.

McDONALD, J.