Filed 6/30/05 Certified for publication 7/19/05 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TROY McMAHON, Defendant and Appellant.	G032347 (Super. Ct. No. 00WF0268) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed as modified.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Troy McMahon (defendant) was charged with one count of murder (Pen. Code, § 187; all further statutory references are to the Penal Code unless otherwise stated (count one)) with the special circumstance of intentionally discharging a firearm from a motor vehicle at another person (§ 190.2, subd. (a)(21)), six counts of premeditated attempted murder (§§ 664, subd. (a), 187 (counts two-seven)), one count of shooting at an occupied motor vehicle (§ 246 (count eight)), and one count of street terrorism (§ 186.22,

subd. (a) (count nine)). It was further alleged defendant committed counts one through eight at the direction of, or for the benefit of, the criminal street gang Wisemen/Bu Doi Family (§ 186.22, subd. (b)(1)), discharged a firearm causing great bodily injury during the commission of count one (§ 12022.53, subd. (d)), and personally discharged a firearm during the commission or attempted commission of counts one through eight (§ 12022.53, subd. (c)).

A jury convicted defendant of first degree murder with the special circumstance of murder committed during a drive-by shooting, six counts of premeditated attempted murder, shooting at an occupied vehicle, and street terrorism. All enhancement allegations were found true. The court sentenced him to an indeterminate term of life without the possibility of parole (LWOP) for the murder. It further imposed a consecutive term of 25 years to life for the related firearm enhancement. As to counts two through seven, the court imposed concurrent sentences of life in prison with the possibility of parole, plus consecutive terms of 20 years for discharging a firearm. With respect to count eight, the court imposed a concurrent term consisting of the middle term of five years for discharging a firearm at an occupied vehicle, plus two years for the street gang enhancement and 20 years for the firearm discharge enhancement. A concurrent term of two years was imposed for count nine but stayed pursuant to section 654.

Defendant raises numerous challenges to the judgment. He first contends the court improperly admitted evidence of his custodial interrogation in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He next challenges the sufficiency of the evidence to support six convictions for attempted murder. Defendant challenges the constitutionality of section 186.22, the Street Terrorism Enforcement and Prevention Act (STEP Act), which the Legislature enacted in 1988. In the alternative, defendant contends section 186.22, subdivision (a), the street terrorism offense, applies solely to aiders and abettors of crimes committed for the benefit of a criminal street gang and not to him as a direct perpetrator of the crime. He challenges the sufficiency of the evidence

to support the jury's finding he acted for the benefit of, at the direction of, or in association with the Wisemen/Bu Doi Family street gang.

Defendant raises two challenges to the court's imposition of sentence. Relying on section 12022.53, subdivision (j), defendant argues the consecutive sentence imposed under section 12022.53, subdivision (d) for count one must be stricken because another provision of law, section 190.2, subdivision (a)(21), provides for a longer term of imprisonment. Defendant also contends the term imposed for the section 12022.53, subdivision (c) on count eight constitutes an unauthorized sentence and must be stricken. The Attorney General concedes this issue and the concession is warranted. Therefore, we direct the clerk of the trial court to prepare an amended abstract of judgment reflecting the modified judgment (§ 1260) and to forward a certified copy to the Department of Corrections. As modified, the judgment is affirmed.

I

FACTS

We present the facts in the light most favorable to the judgment in accord with established rules of appellate review. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *Bancroft-Whitney Co. v. McHugh* (1913) 166 Cal. 140, 142-143.)

Prosecution evidence

1. The crime

In July 1998, Trinh Dang associated with the Viet Family criminal street gang. On July 14, 1998 at around 10:00 p.m., Dang drove his mother's 1987 Plymouth Voyager to Sigler Park in Westminster, California. Six other Viet Family gang members and associates were passengers in the van, Thuc Tran, Tho Nguyen, Khanh Nguyen, Sang "Kevin" Ho, Minh Tran and Johnny Nguyen. Dang stated they were looking for members of the Goofy Family criminal street gang "to beat them back up because they beat [Thuc Tran or Sang Ho] up." He denied they had weapons in the van.

As they cruised around Sigler Park, Dang and his companions noticed two males, one Asian and one Caucasian, sitting inside a dark green Acura. He noticed the men were putting on gloves. Dang and his passengers thought the two men were going to steal the Acura, but Dang did not stop because "[i]f they [were] going to steal the car, they can steal the car. It wasn't our business." He and his friends did not see any Goofy Family gang members and eventually decided to leave the area.

As Dang drove back to Westminster, he noticed the dark green Acura behind him. When he stopped at a red light, the car pulled along side his van. Dang heard someone say, "Where you from?" Sang Ho yelled back, "V.F." for Viet Family and made the gang's hand sign. Dang looked into the car and saw a chubby, white male wearing a "fisherman's hat" or a white bandana in the passenger seat. He also saw that the passenger was holding a gun. Dang made a quick right turn, but the Acura followed them. It pulled into the opposing lane and Dang heard several gunshots. Everyone in the van ducked down to avoid the gunfire, but one bullet fatally struck 13-year-old Tho Nguyen in the head.

Westminster Police Detective Richard Mize responded to a gas station near the area of Hoover and Baylor Streets in Westminster. Dang's van was parked in the parking lot. Paramedics were treating the single occupant of the van, Tho Nguyen, who was slumped over in his seat, his face, hair and chest soaked with blood. Mize located four bullet holes in the van's exterior. He found one bullet hole directly below the center window on the driver's side. A second bullet hole was directly below it. The third bullet hole was found inside the wheel well, and the fourth bullet hole was in the van's hood. Using directional rods, Mize traced the trajectory of the bullets. He testified the strike pattern indicated the shooter fired the first shot from outside and slightly behind the driver's door. The placement of the other bullets suggested the shooter was moving alongside and slightly ahead of the van as the remaining shots were fired.

Mize constructed a photographic lineup using six Department of Motor Vehicle pictures. He showed the lineup to Dang, Sang "Kevin" Ho, and Minh Tran. Dang and Ho picked out defendant's picture from the array. Ho pointed to defendant's picture and said, the shooter "looks exactly like that." Minh Tran did not positively identify defendant from the lineup, but he pointed to defendant's picture and indicated the person looked like the shooter.

In January 2000, Mize interviewed Huy Tran, a member of the Tiny Viet Boys criminal street gang while Tran was detained in juvenile hall on an unrelated matter. Tran told Mize he had heard about a shooting at Hoover and Westminster streets. Tran described the shooting as the "one where the V.F. kid got killed in the van[.]" Tran told Mize he had asked defendant for a ride to a job interview sometime after the shooting. During the ride, defendant described the Hoover Street shooting and claimed he shot the victim. Defendant told Tran he had "hit up the guys in the van" and they claimed Viet Family. Defendant also told Tran what caliber gun he used, but Tran could not specifically remember what he had said. Tran said defendant, a member of the Wisemen criminal street gang, had a friend that drove a green Acura Integra. Tran also said the Wisemen gang had seven to nine members, the majority of whom were young, related Asian males and former students of Westminster High School. He claimed most of the Wisemen gang members lived in an apartment complex on Chestnut Street in Westminster. Tran's uncle is Johnny Nguyen, the leader of the Bu Doi Family criminal street gang. Due to Johnny Nguyen's status in the Bu Doi Family gang and all the related members of the Wisemen and Bu Doi Family gangs, the two gangs were tantamount to a single gang. Tran told Mize Wisemen and Bu Doi Family gang members always "back each other up."

On February 10, 2000, Mize and his partner Sam Miller interviewed defendant regarding the shooting. Mize told defendant he was a "suspect" in a murder case. He first asked a series of questions to elicit biographical information from

defendant. Defendant admitted having a "W" tattoo on his left shoulder blade, but denied that it referred to the Wisemen gang. Mize then advised defendant of his *Miranda* rights.

Mize advised defendant of his right to remain silent and asked, "Do you understand that?" Defendant replied, "Uh-huh." Mize continued, "Anything you say may be used against you in court. Do you understand that?" Defendant replied, "Uh-huh." Mize then advised defendant he had "the right to an attorney before and during questioning. Do you understand that?" Defendant replied, "Uh-huh." Mize resumed, "If you cannot afford an attorney, one will be appointed for you free of charge . . . or if you wish." Defendant replied, "Uh-huh." Referring to a printed waiver form, Mize asked, "It says here, I have read the above and I understand each of my rights. Correct?" Defendant replied, "Uh-huh." Mize continued, "Do you understand one thru [*sic*] four?" Defendant responded, "*If I sign this would I be able to make a phone call to get my lawyer*?" (Italics added.) Mize responded, "Uh-huh." Defendant replied, "Okay."

Mize gave defendant the waiver form to sign. There was a brief exchange regarding defendant's use of Mize's pen. Defendant then asked Mize and Miller if they had transferred from Los Angeles and a casual conversation ensued. Mize asked about defendant's job status, residence, and friendships. He again inquired about the "W" tattoo and told defendant he believed it stood for the Wisemen. This started a line of questioning about the Wisemen, including its origins and current members. Mize asked, "Who was in the Wisemen with you? Or said they were the Wisemen?" Defendant responded, "*Actually you know what, I'm gonna call my lawyer. I don't feel comfortable*." (Italics added.) Mize clarified, "Talking about the Wisemen?" Defendant said, "Yeah." Mize replied, "Okay." Then defendant said, "Cause I don't want anyone implicated in anything or whatever's going on. Cause I . . . you guys haven't even told me what's going on." Mize explained he wanted to talk about "the shooting that you were involved in at Hoover and Baylor. [¶] . . . [¶] A thirteen year old boy was killed." Defendant replied, "The who? You must have the wrong guy."

During the remainder of the interview, defendant repeatedly denied any involvement in the shooting. He also claimed the Wisemen gang was simply his "fraternity," a group of former Westminster High School students he identified with "like those guys from Columbine." Mize and Miller suggested defendant move from the area to get away from his gang, but defendant declared the Wisemen gang members were his friends and he did not think he "could live anywhere besides Orange County." The detective offered defendant coffee and Red Vines licorice and they discussed their respective cigarette habits. Defendant admitted smoking marijuana on occasion. When Mize asked how much, defendant responded, "Is this gonna be used against me?" The conversation turned to defendant's job before returning to the topic of the Wisemen gang. Defendant readily admitted numerous fistfights involving the Wisemen gang, but stated he no longer participated in gang-related crimes because "It's about uh, a bunch of immature kids who don't know when to just put the darn gun away, once they pull it they're not adult enough to just put it away. And when somebody claims back at them, I mean hell, you're asking where you guys from, so the guy tells you and then all of a sudden somebody starts shooting. And we get called out and the bodies are there, just like TERRY. You know, TERRY claimed out and they lit him up."

Mize again accused defendant of being involved in the murder case. Defendant stated, "I don't . . . it wasn't me, dude. I don't know what else I can say to you to tell you it wasn't, but that's all I can say, it wasn't me. I don't know where else or how I could prove it. I don't know. It's . . . this is just people saying, you know. I don't know, dude. People can say a lot of shit. I don't know." He admitted that he had "heard" there was a shooting, but claimed to have read about it in a newspaper.

Police officers searched defendant's residence the day of his interview. They recovered photographs of defendant with other Wisemen gang members. A couple of the pictures portrayed individuals displaying the Wisemen gang's hand sign. Officers also found a day planner with the word "Wisemen" written on its cover.

2. The trial

Trial started in early 2003. Trinh Dang, Sang "Kevin" Ho, and Minh Tran testified for the prosecution. Neither Dang nor Ho identified defendant in court. Ho testified he was now only 50 percent certain of his pick during the photographic lineup. Tran stated defendant looked familiar, but he could not be certain he was the shooter.

Westminster Police Detective Mark Nye testified as the prosecution's gang expert. A 16-year veteran, Nye testified he was first assigned to the Little Saigon substation in Westminster in 1988. He spent a year on a Federal Bureau of Investigation anti-terrorist unit dealing with organized crime in the area. Since then, Nye has taught several classes on Asian street gangs.

Nye testified about the social order, characteristics, and habits of criminal street gangs. Gang membership is acquired through an initiation process known as being "jumped in." A person may associate with the gang without going through the initiation process, but an associate is not considered a full member of the gang. On occasion, new gangs will form with its members "walking in" without being initiated. Founding members of a gang are known as original gangsters.

Tattoos indicate a strong allegiance to the gang and some gangs have tattoos unique to their gang. Gang members often have a three-dot tattoo that stands for the phrase, "my crazy life." Asian street gang members frequently have a five-dot tattoo shaped in a dice pattern that represents five Vietnamese words; money, love, prison, sin and revenge. This phrase is known as the "Five T's." Nye explained the Five T's: "Being a gang member is not only about violence, but it is about making money. Members want to make money and they want to aspire to drive a Lexus or BMW or Mercedes Ben[z]. And they see a lot of this through the media, so most of the gang members want to make money either through selling dope, through dealing cars or doing robberies so that the money is there. [¶] The love is the love that they have for one another. The gang is basically a surrogate family to them, or a second family to them,

and the love that they share within one another is like a brotherly love or blood type love. And, sometimes even stronger than their own family love. [¶] The sin that they commit is the crimes that they commit, whether they be murders, attempted murders, robberies, or other crimes against persons. [¶] The prison is that they know as being a gang member they are going to commit crimes and, ultimately, either end up dead or in prison and that's an accepted way of life for them. [¶] The revenge is the fact that they know that as a member of a gang they are going to be involved in ongoing gang rivalries and they are going to have a payback, loss of respect or disrespect in the form of revenge. And, that's what that stands for." Nye had also seen gang members with cigarette burns that symbolize gang allegiance, and individual gangs use cigarette burns as part of the jumping in process. Graffiti is used to mark territory and as a form of communication. It can also appear on various objects that belong to individual gang members.

Gang rivalries generally begin with some disrespectful act between different gang members. As Nye stated, "Sometimes very simple things lead to . . . some very violent acts between these groups." Respect is the primary motive for joining a gang and for the commission of various crimes by gang members. "The way you get respect is by committing an act of violence. The more violence you commit, the more frequent you commit that violence, the higher degree of respect you have in the gang community." Murder garners the most respect. Asking someone, "Where are you from?" is a gang challenge and usually leads to violence.

Gangs use violence to gain respect. Nye testified, "Anytime a member of a gang is involved in some sort of violent confrontation, he gets . . . recognized by his own members of the gang based on the violence he has portrayed. He gets elevated in the gang and the gang gets elevated in the gang subculture as being a violent gang and you don't want to mess with this gang. [¶] So the [] individual member within his gang, and sometimes if that member is known to other gangs outside, his reputation gets enhanced as well as the gang's name gets enhanced reputation as well upon the street."

Nye stated he gathered intelligence on criminal street gangs by collecting data from various sources, including contacting gang members, reviewing police reports, reviewing field interview cards, and talking to other gang investigators and police officers. A snitch is a gang member who talks to police about other gang members or the gang's activities. If discovered, a snitch may be jumped out of their gang or even killed. Nye's testified it was common for snitches to retract statements made to police out of fear of retaliation from fellow gang members.

With respect to Asian street gangs, Nye testified they tend to be "mobile in nature . . . they don't really claim turf." Individual members may live in different neighborhoods, or even as far away as another county. Because they are widely dispersed, Asian gang members may encounter rival gang members at any given time in a wide variety of venues. Their confrontations are often violent therefore Asian gang members generally carry firearms and other weapons. He also noted that at the time of the murder, there were very few Caucasian members of Asian street gangs. Nye stated he had witnessed an increase in the number of small gangs aligning with each other for protection and prestige. He testified, "Some alliances amount to four different gangs working together, some just two. But, they increase their number. As they increase their violence, they increase their potential for survival on the street against rival gangs when they create this alliance between one another."

Specifically addressing the Wisemen street gang, Nye testified this particular gang had been in existence since 1996. In September 1996, Nye investigated a fistfight between the Wisemen and members of two Asian gangs, Tiny Viet Boys and Asian Boyz. Rival gang members identified defendant and several Vietnamese males as Wisemen members. One another occasion, a group of Asian Boyz and Tiny Viet Boys "hit up" Tam and Duc Nguyen, and Hien Nguyen. This precipitated a fight at an Asian restaurant near Westminster High School.

Johnny Hung Thai Nguyen, a former Nip Family gang member, formed Bu Doi Family gang in 1992. Between 1992 and 1995, Johnny and his four brothers, Hein, Hoc, Hue, and Hoang Nguyen were active members of the gang. Initially, Bu Doi Family gang members committed relatively minor crimes like auto theft. However, by 1995, members of the Bu Doi Family gang were implicated in murder and violent assaults involving firearms. Hien and Hoang Nguyen became members of the Wisemen and lived in one of the gang's apartments. In 1998, Johnny Nguyen was involved in an armed robbery and high-speed police pursuit.

By 1998, the Bu Doi Family gang had approximately 20 members. Some of the members have the symbol B.D.F. tattooed on their bodies. Johnny Nguyen had it tattooed on his fingers. Other members have the number 246, which stands for the second (b), fourth (d), and sixth (f) letters of the alphabet, or B-E-D-E for Bede Family. Nye had investigated several crimes involving Bu Doi Family gang members, including, fraud, forgery, and homicides. Nye testified about an attempted murder and robbery committed in 1998 and an attempted murder committed in 1997 were the work of Bu Doi Family gang members Johnny Nguyen and Ryan Truong.

Nye further testified the Wisemen gang and Bu Doi Family gang are allies and essentially "one in the same gang." There are several individual family members in both gangs. Wisemen and Bu Doi Family gang members back each other during gang-related battles. Nye found graffiti and documentation from both gangs in Johnny Nguyen's home, suggesting a close tie between the two gangs. A confidential informant stated the two gangs act in unison. He also learned members of the two gangs share adjacent apartments in Westminster. At one time, Johnny Nguyen, Johnny Hung Thai Nguyen, Hoang Thai Nguyen, and Hien Thai Nguyen lived in one apartment, and Tam and Duc Nguyen lived in an apartment next door. Nye identified defendant as a member of the Wisemen gang based on defendant's statements to police, the statements of a

confidential informant, documents and photographs found in defendant's possession, the tattoo on his shoulder, and his participation in the instant offense.

Nye also testified Tiny Viet Boys and Asian Boyz had a similarly close relationship. Bu Doi Family and the Wisemen had an ongoing rivalry with Tiny Viet Boys, Asian Boyz, and Viet Lost Boys. Little Asian Rascals and Power of Vietnamese were also rivals. The Goofy Family gang is an offshoot of the Tiny Viet Boys gang and considered a rival to the Wisemen. The Wisemen have no specific turf, but gang members regularly congregate at Sigler Park and Westminster High School.

Nye testified the murder Tho Nguyen was gang-related "because of the hit-up. A van drives by another vehicle, a male putting on gloves, there may or may not have been some sort of mad-dogging. The vehicle then follows the van out of the area, assuming that possibly that there [are] members of a gang in the vehicle, does a hit-up 'Where are you from,' and then hand signs are flashed back from ultimately a gang member inside the van, the victim vehicle. They then open fire based on that. That, in my opinion with those facts, is gang-related, yes." Nye opined defendant's involvement in the homicide bolstered the reputation of the Wisemen and Bu Doi Family gangs.

Defense evidence

Defendant called Dr. Elizabeth Loftus, who is an expert in human memory and eyewitness testimony. Loftus testified that in the acquisition phase of memory certain factors influence will influence the individual's recall of events. Lighting, time of exposure to the object, stress, the nature of the object itself all influence perception and retention. "Weapon focus" is a term used to describe the attention weapons draw away from other items. The use of a weapon reduces the ability of an eyewitness to recognize the face of the person holding the weapon. Loftus also described the effect of cross-racial identification. She testified studies suggest people make more errors when trying to identify individuals from a different race. She also testified the passage of time makes

"the person [] more susceptible to having their recollections supplemented or contaminated or distorted and not being aware of it, even if it is happening inadvertently." Further, there is a weak relationship between confidence in one's memory and the accuracy of his or her memory retrieval. She also disapproved of the six-pack photographic lineup used by the police.

David Le, a member of the Little Asian Rascals gang, testified he saw Kevin Ho, a member of rival gang Viet Family, with a gun on March 13, 2001. On cross-examination, his testimony was impeached with a prior felony conviction for assault with a deadly weapon and his admission that he had once told police officers Ho did not have a gun. Lan Pham, an associate of the Little Asian Rascals, also testified Ho possessed a gun on the day of the shooting. However, he had also been convicted of a felony. Westminster Police Sergeant William Collins, Mize, and Miller interviewed Kevin Ho on July 14, 1998. Ho identified defendant as the shooter in the Hoover Street incident.

Defendant did not testify. His counsel asserted an identity defense, arguing the prosecution eyewitnesses were not credible.

II

DISCUSSION

Defendant's custodial interrogation was properly admitted

Defendant contends the trial court erroneously denied his motion to suppress evidence of his custodial interrogation. On review, "[a]n appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court's granting or denial of a motion to suppress a statement under *Miranda* insofar as the trial court's underlying decision entails a measurement of the facts against the law. [Citations.] As for each of the subordinate determinations, it employs the test appropriate thereto. That is to say, it examines independently the resolution of a pure question of law; it scrutinizes for substantial evidence the resolution of a pure question of fact; it examines independently the resolution of a mixed question of law and fact that is

predominantly legal; and it scrutinizes for substantial evidence the resolution of a mixed question of law and fact that is predominantly factual. [Citation.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 730.)

At the pretrial hearing on defendant's motion, the prosecution introduced the video and audiotapes from defendant's interview and a transcript prepared from these records. Following the arguments of counsel, the court ruled as follows: "Well, as both counsel appropriately pointed out, the court is required to apply federal standards, and the court does find that the *Davis* [*v. United States* (1994) 512 U.S. 452] case is the state of the law in this area. I mean, it has certainly instituted a change from the whole line of California cases that [defense counsel] had cited. May be a different result if the court follows the California cases, certainly. [¶] But, just so the record is clear, the court is following this *Davis* case because the court's interpretation is that it must follow the federal law in this area. [¶] I think the People are correct in her [*sic*] analyzing the transcript. The advisement starts on page 10 and, on page 11, [defendant] talks about 'If I sign, would I be able to get my lawyer?' [¶] 'Uh-huh' is the answer, and [defendant] says, 'Okay.' [¶] You know, it was a question to this court, pretty ambiguous whether he is going to follow through. And one could easily interpret that, you know, 'In case you are asking some sticky wicket type questions, then maybe I shut up and ask for my lawyer.' [¶] Maybe that's going through his mind. I don't know, it is ambiguous. Does he want one right then and there? That's not clear. [¶] It would seem to be inconsistent that he wanted a lawyer right then and there, because he didn't have to sign the advisement form. Basically, it is 'I sign this, then can I still ask for a lawyer,' 'Yeah.' I mean, that's one interpretation. So, it is definitely ambiguous. [¶] In the context of the *Davis* case, I understand the argument, [defense counsel], . . . But, you know, as you point out, also under *Davis* there is no requirement for clarification like the California cases suggest. [¶] So this court is finding specifically that [defendant] never really invoked his rights. And when you look at this transcript in context — And I am talking

that — [the prosecutor] pointed this out, also. And then, you move to page 24 where the subject comes up again, and it sounds like he is getting ready to invoke. [¶] Talking about the Wisemen, [¶] '[Defendant]: Actually, you know what, I am going to call my lawyer. I don't feel comfortable in taking about the Wisemen, yeah,' and Mize says, 'Okay.' [¶] Then, [defendant] volunteers, you know, information, 'Because I don't want to — I don't want anyone implicated or — in anything, or whatever is going on, because I — you guys haven't even told me what's going on. [¶] 'Mize: Well — [¶] '[Defendant]: I have no idea.' [¶] And then Mize explains why they are talking and the conversation rolls on. That's ambiguous. [¶] Taking this all in context, you know, there is no clear indication that [defendant] at some point in time had decided that he wanted to stop talking. He never invokes his right to silence and never specifically makes clear that he wants a lawyer right then and there. [¶] With respect to the defendant's B, the advisement of rights. The argument as far as observing how the form reads, the argument made by [defense counsel] is certainly correct. Maybe the semantics of this thing ought to change for the police, I don't know. But, the plain language of it is 'waiver' in bold type underlined. [¶] And then, under 'I have read the above and I understand each of my rights,' that comes under the 'waiver' and he signs it. I mean, I got to think that [defendant] understands what 'waiver' means. And if he doesn't, then it is ambiguous because the plain language says 'waiver.' [¶] In any event, if the court takes all this in the totality of the circumstances, you know, the ambiguity of the statements on page 11 and page 24 of the transcript, plus defendant's B, you know, there is nothing clear that he had no intention of not waiving his rights, invoking his right to silence and/or asking for counsel. It is just not there. [¶] So with all that in mind, defendant's motion to suppress the statements is denied."

Relying on *Edwards v. Arizona* (1981) 451 U.S. 477, defendant argues the interrogation should have stopped after his question, "If I sign this would I be able to make a phone call to get my lawyer?" In the alternative, he suggests a second statement,

"Actually you know what, I'm gonna call my lawyer. I don't feel comfortable[,]" considered alone or in conjunction with the first question, constitutes an invocation of the right to counsel. We disagree.

In *Edwards*, the Supreme Court held a custodial interrogation must cease once a suspect has clearly asserted his or her right to counsel. (*Edwards v. Arizona, supra,* 451 U.S. at p. 455.) The suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona, supra,* 451 U.S. at pp. 484-485.) However, the Supreme Court limited the protection afforded in *Edwards* to cases where the suspect makes an clear, unequivocal request for counsel in *Davis v. United States, supra,* 512 U.S. 452.

"The applicability of the '"'rigid" prophylactic rule' of *Edwards* requires courts to 'determine whether the accused *actually invoked* his [or her] right to counsel.' [Citations.]" (*Davis v. United States, supra,* 512 U.S. at p. 458.) "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' [Citation.] But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." (*Davis v. United States, supra,* 512 U.S. at p. 459.) The suspect must state his or her "desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Ibid*.) The *Davis* court further clarified, "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." (*Id.* at pp. 461-462.)

In *Davis*, the defendant was advised of, and waived, his *Miranda* rights. An hour and a half into the interview he said, "'Maybe I should talk to a lawyer.'"

(*Davis v. United States, supra,* 512 U.S. at p. 455.) The defendant's interrogators re-advised him of his rights and asked if he wanted a lawyer. The defendant stated he did not want a lawyer. The interview continued for approximately one hour before the defendant stated, "'I think I want a lawyer before I say anything else.'" (*Ibid.*) The court concluded the defendant's ambiguous statements regarding his desire for a lawyer did not amount to an assertion of the right to counsel and the interrogators were free to continue their questioning. (*Id.* at p. 462.)

Our own Supreme Court recently addressed the issue in *People v. Gonzalez* (Jan. 24, 2005, S122240) ___ Cal.4th ___, [23 Cal.Rptr.3d 295, 304]. In *Gonzalez,* the defendant was a suspect in a police shooting. Investigating officers read him his *Miranda* rights, which he waived, and questioned him about the circumstances of the crime. One of the officers asked the defendant if he would be willing to take a lie detector test. The defendant agreed to the test, but then stated, "That um, one thing I want to ask you to that, if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing." (*People v. Gonzalez, supra,* ___ Cal.4th at p. ___ [23 Cal.Rptr.3d at p. 299].) The officer assured the defendant he could talk to a public defender "anytime," but also advised the defendant he would be booked for murder that night, but he might not be charged with any crime. (*Id.* at p. 300.) Defendant indicated he understood.

The following day, as the defendant was being questioned by the polygraph examiner, defendant stated, "Sir, I was going to ask you that, is there any, like — cause they told me about a public defender . . . They said that he would show up for anything." (*People v. Gonzalez, supra,* ___ Cal.4th at p. ___ [23 Cal.Rptr.3d at p. 300].) The polygraph examiner asked if the interrogating officers had explained defendant's rights. Defendant stated they had and said nothing more about a public defender. He made several incriminating statements during the polygraph examination, which were admitted

at trial. The Court of Appeal reversed the judgment and the Supreme Court granted review.

The *Gonzalez* court reviewed *Edwards* and *Davis* and concluded, "a reviewing court — like the trial court in the first instance — must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant. [Citation.]" (*People v. Gonzalez, supra,* ___ Cal.4th at p. ___ [23 Cal.Rptr.3d 295, 304].) The court decided, "[D]efendant's statement was conditional; he wanted a lawyer *if* he were going to be *charged.* The conditional nature of the statement rendered it, at best, ambiguous and equivocal because a reasonable police officer in these circumstances would not necessarily have known whether the condition would be fulfilled since, as these officers explained, the decision to charge is not made by police. Confronted with this statement, a reasonable officer would have understood only that 'the suspect *might* be invoking the right to counsel,' which is insufficient under *Davis* to require cessation of questioning." (*Id.* at p. 305.)

Applying this test to the instant case, we conclude defendant's inquiry, "If I sign this would I be able to make a phone call to get my lawyer," is an ambiguous and equivocal reference to his constitutional right. The facts surrounding his statement support this position. Defendant immediately engaged the officers in a casual conversation, and he never indicated a desire to cease the interrogation. Rather, defendant seemed to enjoy the interaction with Mize and Miller. Nothing in the record would have given either officer an indication defendant truly intended to invoke his right to counsel at that point in the questioning.

Defendant's later declaration, "Actually you know what, I'm gonna call my lawyer[,]" is similarly ambiguous and equivocal. Again, defendant makes a cryptic

statement that insinuates an exercise of the right to counsel. However, this cryptic statement is sandwiched between mundane conversation with the officers, their occasional accusations of his criminality, and his assertion of concern that he might implicate others not himself. In this instance and is the first, the best that can be said is defendant knew he had the right to counsel. However, in both cases, defendant failed to unambiguously declare the present intent to exercise this right to counsel.

Defendant urges us to follow the Ninth Circuit's decision in *Alvarez v. Gomez* (9th Cir. 1999) 185 F.3d 995 and the United States District Court's decision in *U.S. v. Hughes* (D. Arizona 1996) 921 F.Supp. 656. We decline the invitation.

In *Alvarez*, the defendant asked three back-to-back questions about getting an attorney after receiving the *Miranda* advisement. The jail had signs posted informing arrestees that lawyers were available around the clock. Although there was no evidence defendant saw these signs, the police officers told him an attorney was not immediately available. The facts surrounding defendant's statements persuaded the *Alvarez* court the officers had indeed violated the defendant's *Miranda* rights. By contrast, defendant's statements had no sense of urgency. The officers never directly addressed defendant's question because they did not understand it to be a genuine request for counsel. There is no indication of dishonesty or bad faith on the part of the officers questioning defendant.

In *Hughes*, Alcohol, Tobacco and Firearms (ATF) agents contacted the defendant outside his residence. Officers advised him of his *Miranda* rights and the defendant responded, "Can I call a lawyer?" (*U.S. v. Hughes, supra,* 921 F.Supp. at p. 657.) An ATF agent replied, "Yes." (*Id.* at p. 657.) However, defendant was never permitted to contact his counsel. The agents asked biographical information after which the defendant stated he had changed his mind and did not want an attorney. The District Court concluded defendant invoked his right to counsel, but the officers' questions about biographical information was not an interrogation and defendant waived his right to counsel before giving incriminating statements. (*Id.* at pp. 658-659.) We do not disagree

with *Hughes*, but find it inapplicable here. At no time did defendant clearly and unambiguously ask to call a lawyer. He merely indicated his belief that calling an attorney might be a good idea.

Substantial evidence supports six convictions for attempted murder

Defendant argues the evidence is insufficient to sustain two of the six counts of attempted murder because the evidence demonstrates he fired one shot that killed Tho Nguyen but only four additional shots at the van's six remaining occupants. We disagree.

"In order to prove an attempted murder charge, there must be sufficient evidence of the intent to commit murder plus a direct by ineffectual act toward its commission. [Citation.] Although malice may be express or implied with respect to a charge of murder, implied malice is an insufficient basis upon which to sustain a charge of attempted murder because specific intent is a requisite element of such a charge. [Citation.] Thus, to sustain a charge of attempted murder, the evidence must demonstrate a deliberate intention unlawfully to kill a fellow human being. [Citation.]" (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Defendant contends there is no evidence he intended to kill all the occupants of the van. But "[t]here is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. [Citation.]" (*People v. Chinchilla, supra,* 52 Cal.App.4th at p 690.) "California cases that have affirmed convictions requiring the intent to kill persons other than the primary target can be considered 'kill zone' cases even though they do not employ that term. In *People v. Vang* (2001) 87 Cal.App.4th 554, 563-565 for example, the defendants shot at two occupied houses. The Court of Appeal affirmed attempted murder charges as to everyone in both houses — 11 counts — even though the defendants may have targeted only one person at each house. 'The jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to

kill every living being within the residences they shot up . . . . The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed.' (*Id*. at pp. 563-564; see also *People v. Gaither* (1959) 173 Cal.App.2d 662, 666-667 [defendant mailed poisoned candy to his wife; convictions for administering poison with intent to kill affirmed as to others who lived at the residence even if not a primary target].)" (*People v. Bland* (2002) 28 Cal.4th 313, 330.)

Defendant fired at close range at a van full of human beings in response to a gang challenge. The exact number of the occupants of the van is immaterial. Defendant's actions created a "kill zone." His act of firing multiple shots at a vehicle full of people endangered the lives of every occupant in that vehicle, especially given the context of gang culture and behavior. Under these circumstances, a reasonable jury could conclude defendant harbored the specific intent to kill each of the van's seven occupants, but fortuitously succeeded in killing only one of them. The evidence supports the verdict.

Section 186.22

Defendant raises several challenges to the jury's verdict and findings regarding the STEP Act, the pertinent portions of which are set forth below.

Subdivision (a) of section 186.22, which sets forth the substantive offense of street terrorism, provides, "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." Subdivision (b)(1), the enhancment provision, provides, "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . ."

The STEP Act defines several important terms. A "'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25),[[1]] inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members

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[1] The 25 enumerated offenses are: (1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245. [¶] (2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8 of Part 1. [¶] (3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1. [¶] (4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code. [¶] (5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246. [¶] (6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034. [¶] (7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13. [¶] (8) The intimidation of witnesses and victims, as defined in Section 136.1. [¶] (9) Grand theft, as defined in subdivision (a) or (c) of Section 487. [¶] (10) Grand theft of any firearm, vehicle, trailer, or vessel. [¶] (11) Burglary, as defined in Section 459. [¶] (12) Rape, as defined in Section 261. [¶] (13) Looting, as defined in Section 463. [¶] (14) Money laundering, as defined in Section 186.10. [¶] (15) Kidnapping, as defined in Section 207. [¶] (16) Mayhem, as defined in Section 203. [¶] (17) Aggravated mayhem, as defined in Section 205. [¶] (18) Torture, as defined in Section 206. [¶] (19) Felony extortion, as defined in Sections 518 and 520. [¶] (20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594. [¶] (21) Carjacking, as defined in Section 215. [¶] (22) The sale, delivery, or transfer of a firearm, as defined in Section 12072. [¶] (23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101. [¶] (24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422. [¶] (25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code. (§ 186.22, subd. (e).)

individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following [25] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons . . . ." (§ 186.22, subd. (e).)

Section 186.22, subdivision (a) is constitutional

Defendant first challenges the constitutionality of section 186.22, subdivision (a). Specifically, he claims punishment imposed pursuant to this statute "criminalizes 'abstract advocacy of lawlessness' in violation of the First Amendment." In essence, he complains section 186.22, subdivision (a) criminalizes mere membership in a gang. We disagree.

Section 186.22, subdivision (a) has been upheld against a variety of constitutional challenges, including claims based upon the First Amendment's guarantee of freedom of association. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 622-633; *People v. Green* (1991) 227 Cal.App.3d 692, 698-704; *People v. Gamez* (1991) 235 Cal.App.3d 957, 969-976; *In re Alberto R*. (1991) 235 Cal.App.3d 1309, 1323-1324. The term "active participation" has been defined as "involvement with a criminal street gang that is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 747, 743, 752.) Using this definition, the plain language of the statute ensures mere membership in a criminal street gang will not be punished, only active participation, i.e. involvement that is more than passive or nominal. (*Ibid.*) We find no merit in defendant's argument to the contrary.

We also conclude the prosecution presented sufficient evidence to prove defendant's active participation in the Wisemen gang. Defendant admitted associating with other members of the Wisemen gang, although he down-played the criminality of the group by calling it a fraternity. He told Mize he participated in numerous gang-related fistfights, and stated his relationship to other Wisemen gang members was so close he could never leave Orange County. Investigating officers discovered photographs of defendant with other Wisemen gang members and defendant knew how to make the Wiseman gang's hand sign. He had a "W" tattooed on his shoulder, a step Nyes testified represented a strong affiliation with the gang. Finally, defendant's commission of the instant offenses demonstrates active, not nominal or passive, involvement in the Wisemen gang. Nyes testified defendant's crimes garnered prestige for defendant and the Wisemen and Bu Doi Family gangs because gangs consider murder to be the most illustrious crime of all. Based on the evidence presented at trial there is no doubt defendant is an active participant in a criminal street gang.

Section 186.22, subdivision (a) applies to direct perpetrators of gang-related crimes

Defendant next contends his conviction for active participation in a criminal street gang must be reversed because section 186.22, subdivision (a) applies solely to aiders and abettors of crime not the direct perpetrator. We disagree.

"Section 186.22, subdivision (a) punishes active gang participation where the defendant promotes or assists in felonious conduct by the gang. It is a substantive offense whose gravamen is the *participation in the gang itself*." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fns. omitted.) "[T]he focus of the street terrorism statute is upon the defendant's objective to promote, further or assist the gang in its felonious conduct, *irrespective of who actually commits the offense*." (*Ibid*., italics added.) As stated in a recent appellate decision, "Given the objective and intent of subdivision (a), we find good reasons not to construe section 186.22, subdivision (a), in

the restricted manner advocated by appellant and instead to conclude that this subdivision applies to the perpetrator of felonious gang-related criminal conduct as well as to the aider and abettor. Courts should give statutory words their plain or literal meaning unless that meaning is inconsistent with the legislative intent apparent in the statute. [Citations.] Under the language of subdivision (a), liability attaches to a gang member who 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' [Citation.] In common usage, 'promote' means to contribute to the progress or growth of; 'further' means to help the progress of; and 'assist' means to give aid or support. [Citation.] The literal meanings of these critical words squares with the expressed purposes of the lawmakers. *An active gang member who directly perpetrates a gang-related offense 'contributes' to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct.* Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity." (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436, italics added.)

Defendant suggests we reject *Ngoun* for various reasons, i.e., it incorrectly interprets the language of the statute, its reasoning is backward, and it misreads the legislative intent of the drafters of section 186.22, subdivision (a). None of these contentions is compelling. To the contrary, we agree with *Ngoun*. The plain language of the statute extends liability to direct perpetrators of gang-related crimes. No other reasonable interpretation is possible. A direct perpetrator of a crime promotes and furthers the goals of his gang no less than one who aids and abets another. We agree with the *Ngoun's* court's analysis and could not have expressed its rationale with any greater eloquence.

Substantial evidence supports the jury's true finding on section 186.22, subdivision (b)

Defendant's third challenge to the STEP Act is the prosecution failed to present evidence sufficient to prove the Wisemen is a criminal street gang as defined by the statute. The standard of review for gang findings, as with convictions, is substantial evidence. (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.) We find sufficient evidence to uphold the verdict.

To establish the requisite pattern of criminal gang activity, the prosecution introduced evidence Bu Doi Family gang members Johnny Nguyen and Ryan Truong were convicted of attempted murder in 1998. Defendant contends the prosecution may not use the crimes of one gang to prove another gang is a criminal street gang under section 186.22. The contention appears to present a case of first impression, but nothing in the statutory language prohibits this method of proof.

The STEP Act defines a "'criminal street gang' as any ongoing organization, association, or group of three or more persons, whether formal or informal, *having as one of its primary activities the commission of one or more of* [*certain enumerated*] *criminal acts* . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f), italics added.)

"The use of expert testimony in the area of gang sociology and psychology is well established. [Citations.]" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370-1371.) Nye, an expert on Asian street gangs, testified about differences between Asian street gangs and other gangs. Defendant did not challenge Nye's qualification as an expert on Asian gangs. As a qualified expert, Nye testified Asian street gangs base loyalty on friendships and familial relationships, not turf, and the membership of the Wisemen and Bu Doi Family gangs is mainly comprised of various members of the same family. The two gangs invariably support each other during gang-related battles. Nye stated the discovery of graffiti and documents from both gangs in Johnny Nguyen's home

was significant because gang members are generally loyal to one gang. He further stated this type of symbiosis is not unique to the Wisemen and Bu Doi Family gangs. Nye testified Tiny Viet Boys and Asian Boyz had a similar relationship.

"The Legislature was explicit in stating its intent in creating the California Street Terrorism Enforcement and Prevention Act, section 186.20 et seq., ' . . . to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.' [Citation.]" (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1000.) We further the legislative intent by permitting law enforcement methods to evolve with the criminal enterprises they seek to eradicate. If two gangs act as one, the crimes committed by either should be attributable to the other under the STEP Act. Our resolution of the issue promotes the legislatures intent to combat the tyranny of criminal street gangs in whatever form they take. Further, "Nothing in this statutory language prohibits the trier of fact from considering the circumstances of the *presen*t or charged offense in deciding whether the group has as one of its primary activities the commission of one or more of the statutorily listed crimes." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Defendant's participation in this particular murder and attempted murder is additional evidence the primary activity of the Wisemen gang is the commission of crime. We find no error in the prosecution's reliance on crimes committed by Bu Doi Family gang members to prove the Wisemen gang is a criminal street gang under the STEP Act.

Sentencing errors

The court imposed section 12022.53, subdivisions (c) and (d) enhancements on count one (murder) and section 12022.53, subdivision (c) enhancements on counts two, three, four, five, six, and seven (attempted murder). On count eight (shooting at and occupied vehicle), the court imposed a gang enhancement

(section 186.22, subd. (b)(1)) and a section 12022.53, subdivision (c) enhancement. Defendant raises two issues regarding the court's imposition of section 12022.53 sentencing enhancements. The pertinent portions of the statute are set forth below.

Section 12022.53 provides, "(a) This section applies to the following felonies: [¶] (1) Section 187 (murder). [¶] (2) Section 203 or 205 (mayhem). [¶] (3) Section 207, 209, or 209.5 (kidnapping). [¶] (4) Section 211 (robbery). [¶] (5) Section 215 (carjacking). [¶] (6) Section 220 (assault with intent to commit a specified felony). [¶] (7) Subdivision (d) of Section 245 (assault with a firearm on a peace officer or firefighter). [¶] (8) Section 261 or 262 (rape). [¶] (9) Section 264.1 (rape or sexual penetration in concert). [¶] (10) Section 286 (sodomy). [¶] (11) Section 288 or 288.5 (lewd act on a child). [¶] (12) Section 288a (oral copulation). [¶] (13) Section 289 (sexual penetration). [¶] (14) Section 4500 (assault by a life prisoner). [¶] (15) Section 4501 (assault by a prisoner). [¶] (16) Section 4503 (holding a hostage by a prisoner). [¶] (17) Any felony punishable by death or imprisonment in the state prison for life. [¶] (18) Any attempt to commit a crime listed in this subdivision other than an assault. [¶] (b) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply. [¶] (c) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years. [¶] (d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term

of imprisonment in the state prison for 25 years to life. Section 12022.53, subdivision (j) provides, "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. *When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.*" (Italics added.)

Relying on section 12022.53, subdivision (j), defendant contends the consecutive sentence imposed pursuant to section 12022.53, subdivision (d) for the murder must be stricken because it is subsumed within the greater sentence imposed under section 190.2, subdivision (a)(21).[2] Defendant argues the plain meaning of the italicized portion of section 12022.53, subdivision (j) supports his position. However, defendant's interpretation of subdivision (j) was thoroughly rejected in *People v. Chiu* (2003) 113 Cal.App.4th 1260.

Initially, the *Chiu* court relied on the rules of grammar to interpret section 12022.53, subdivision (j). The court quoted the following portion of the statute: "*When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for*

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[2] Section 190.2, subdivision (a) provides, "The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶] . . . [¶] (21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, 'motor vehicle' means any vehicle as defined in Section 415 of the Vehicle Code."

a greater penalty or a longer term of imprisonment.'" (§ 12022.53, subd. (j), italics added.) It then stated, "The subject of this [italicized] sentence, grammatically speaking, is the 'enhancement specified in this section' — that is, one of the three applicable enchantments for firearm use of discharge specified in subdivisions (b) through (d). When one of those three enhancements for firearm use of discharge has been properly charged and found true, the court shall impose the applicable punishment under subdivision (b), (c), or (d), unless another provision of law provides for a greater penalty or a longer term of imprisonment *for that firearm use or discharge*, in line with that subject. The 'greater penalty' part of subdivision (j) ensures that the '[n]otwithstanding any other provision of law' language in subdivisions (b) through (d) does not inadvertently supersede a law that would impose an even *greater* punishent on a defendant for employing a firearm in committting one of the enumerated crimes." (*People v. Chiu, supra,* 113 Cal.App.4th at p. 1264.)

The *Chiu* court also considered defendant's argument in light of the Legislative intent behind the statute and found it wanting. "Section 12022.53's language shows the Legislature is serious about this enhancement being applied, unless an even greater *enhancement-related* punishment is legally available." (*People v. Chiu, supra,* 113 Cal.App.4th at p. 1265, italics added.) The court concluded, "In the end, defendant's interpretation of subdivision (j) does away with the concept of *enhancement* and opts for a lesser, rather than a greater, punishment (theoretically speaking here, because of the LWOP sentence). This interpretation is not within the letter, and certainly not within the spirit, of section 12022.53. (See *People v. Garcia* (2002) 28 Cal.4th 1166, 1172 [the legislative intent behind section 12022.53 is clear: substantially longer prison sentences must be imposed on felons who use firearm to commit crimes]; Stats 1997, ch. 503, § 1.)" (*People v. Chiu, supra,* 113 Cal.App.4th at p. 1265.) We agree with the *Chiu* court's analysis of section 12022.53, subdivision (j) and reject defendant's contrary arguments.

Finally, defendant contends the section 12022.53, subdivision (c) enhancement imposed for count eight is unauthorized by law and must be stricken. The Attorney General concedes the error and the concession is warranted.

Section 12022.53, subdivision (j) provides, in pertinent part, "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact." The information charged a violation of section 12022.53, subdivision (c) with respect to counts one through eight and the jury received verdict forms for section 12022.53, subdivision (c) with respect to those counts. However, section 12022.53, subdivision (d) specifically applies to section 246, shooting at an occupied vehicle, and it should have been plead and proven with respect to count eight. It was not. Therefore, sentence imposed pursuant to the inapplicable section 12022.53, subdivision (c) on count eight must be stricken.

III

DISPOSITION

The trial court is directed to strike imposition of the 20-year sentence for use of a firearm during the commission of a felony (§ 12022.53, subd. (c)) related to count eight. The court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections. The judgment is affirmed as modified. (§ 1260.)

MOORE, J.

I CONCUR:

FYBEL, J.

BEDSWORTH, ACTING P. J., concurring and dissenting:

I agree with the majority, except to the extent they uphold McMahon's 25-year-to-life firearm enhancement under Penal Code section 12022.53, subdivision (d).[1] My problem is that McMahon was sentenced to life in prison without the possibility of parole for the underlying murder, and section 12022.53, subdivision (j) seems to me to prohibit imposition of the firearm enhancement in this situation. In clear and unambiguous language, it states the firearm enhancements set forth in section 12022.53 shall not apply when "another provision of law provides for a greater penalty or a longer term of imprisonment." (§ 12022.53, subd. (j).) Section 190.2, under which McMahon was sentenced to life without the possibility of parole, is "another provision of law" that "provides for a greater penalty or a longer term of imprisonment" than 25 years to life. Therefore, I believe section 12022.53, subdivision (j) should apply in this case.[2]

In finding otherwise, the majority relies on *People v. Chiu* (2003) 113 Cal.App.4th 1260. The *Chiu* court interpreted section 12022.53, subdivision (j) as applying only when another enhancement provision provides a greater penalty or longer term than 25 years to life. But that defies the plain terms of section 12022.53, subdivision (j), which contains no such limiting language. When, as here, "statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citations.]" (*People v. Overstreet* (1986) 42 Cal.3d 891, 895.)

Citing the Legislature's objective to impose strict penalties on gun offenders, the *Chiu* court believed its interpretation of section 12022.53 would best

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

[2] The Supreme Court is currently considering whether section 12022.53, subdivision (j) applies under these circumstances. (See *People v. Shabazz*, S131048, Supreme Ct. Mins., Mar. 16, 2005 [court to decide whether section 12022.53, subdivision (j) precludes the imposition of 25-year-to-life enhancement under section 12022.53, subdivision (d) when the punishment for the defendant's underlying felony is life imprisonment without the possibility of parole].)

achieve this goal. (See *People v. Chiu, supra*, 113 Cal.App.4th at p. 1265.) But when, as here, the defendant is already facing life without the possibility of parole, imposition of the subdivision (d) enhancement would not result in increased prison time, so it really does nothing to further the goal of strict penalties.

Furthermore, as the *Chiu* court admitted, there are no enhancements that carry a greater penalty than 25 years to life. (*People v. Chiu, supra*, 113 Cal.App.4th at p. 1264.) Thus, under *Chiu*'s reading of section 12022.53, the exception set forth in subdivision (j) would effectively wither away from nonuse. I do not believe the Legislature intended this to happen. (See *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22 [courts should "not presume that the Legislature performs idle acts"].)

Rather, I suspect this is precisely the situation for which the Legislature intended section 12022.3, subdivision (j): when the defendant has been sentenced to life without the possibility of parole for committing special circumstances murder with a firearm. For in this situation, there is no need to punish the defendant a second time for his gun use because his base term will ensure his life-long imprisonment. That is about the best the law can do in terms of punishing and deterring gun offenders, so I would reverse McMahon's enhancement under section 12022.53, subdivision (d).

BEDSWORTH, ACTING P. J.

Filed 7/19/05

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G032347
v.	(Super. Ct. No. 00WF0268)
TROY MCMAHON,	ORDER GRANTING REQUEST FOR PUBLICATION; NO CHANGE IN JUDGMENT
Defendant and Appellant.	

Respondent has requested that our opinion, filed on June 30, 2005, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 976(b). The request is GRANTED.

The opinion is ordered published in the Official Reports.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.