Filed 6/17/05 P. v. Mitchell CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JESSICA JULIE MITCHELL, Defendant and Appellant.	B172940 (Los Angeles County Super. Ct. No. NA 053043)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur Jean, Jr., Judge. Affirmed with modifications.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Ana R. Duarte and Lisa J. Brault, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Jessica Julie Mitchell was sentenced to life imprisonment without the possibility of parole, plus 35 years to life in prison, for committing first degree murder during an attempted carjacking. She contends on appeal that (1) application to her of the felony-murder special circumstance constitutes cruel and unusual punishment and a denial of due process of law under the Eighth and Fourteenth Amendments of the U.S. Constitution; and (2) the firearms enhancement, gang enhancement, and $200 parole revocation fine must be stricken from her sentence.

We strike the firearms enhancement, gang enhancement, and restitution and parole revocation fines, and otherwise affirm.

PROCEDURAL HISTORY

Counts 1 and 2 of the information charged appellant and Richard Mandac with crimes which occurred on June 9, 2002. Count 1 alleged that the defendants murdered Suzan Stewart during the attempted commission of a carjacking, within the meaning of the felony-murder special circumstance of Penal Code section 190.2, subdivision (a)(17) (section 190.2(a)(17)).[1] Count 2 alleged that they attempted to carjack Stewart's car. Those counts also alleged that both defendants personally used and personally discharged a firearm, within the meaning of section 12022.53, subdivisions (b) through (d).

Counts 3 and 4 were alleged solely as to appellant. Those counts alleged that on June 18, 2002, she made criminal threats to Vicky P. (count 3) and possessed cocaine base for sale (count 4).

It was further alleged that all of the offenses were committed for the benefit of a criminal street gang.

The defendants were tried separately. Appellant was convicted of all the charges. She was sentenced to life imprisonment without the possibility of parole on count 1, plus 25 years to life for the firearms enhancement, plus 10 years to life for the street gang

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[1] All subsequent code references are to the Penal Code unless otherwise stated.

enhancement. Further details of the sentence will be provided, *post*, in the discussion of sentencing issues.

FACTS

Prosecution testimony

Around midnight on June 9, 2002, Mercedes O. was awakened from sleep by a loud bang, "like a car crash." She lived near a cul-de-sac which was close to the intersection of Palos Verdes Street and Amar Street in San Pedro. Opening her front door, she heard a man say, "Motherf-----, let's go." Then a woman said, "Let's go, let's go." The man and woman sounded scared.

Shortly thereafter, a six-foot tall man who weighed about 160 pounds ran by Mercedes's door.

The sound which awakened Mercedes was Suzan Stewart's car as it crashed into parked cars at a fairly high rate of speed. Stewart was found dead behind the steering wheel from a gunshot that went through the car seat and into her back. The car had both collision and bullet damage. On its front floorboard was a small address book which contained Stewart's driver's license. She had neither a wallet nor money on her person. The fingerprints of Mandac, the separately tried codefendant, were on the outside of the car's front passenger window. A .44-caliber fired bullet was found on the street, 138 feet from the car.

According to the autopsy, Stewart was killed by a .44-caliber bullet which entered her back beneath the left shoulder blade. The bullet was fired from more than two feet away. It traveled forward and left to right, passing through Stewart's lungs, heart, and two major blood vessels before it came to a stop under her right armpit. The slightly upward angle of the wound suggested that Stewart probably was ducking or hunched over when the shot hit her.

Damage to the car showed the trajectories of two bullets. The bullet which killed Stewart entered from the rear window on the driver's side and traveled in a down direction, from left to right and back to front. The other bullet came into the car from the passenger side. It traveled from right to left and back to front in a down direction,

passing through the seat. The higher angle of the shot from the passenger side suggested that it was fired from a closer distance to the car, if other variables were the same.

Nine days later, around 6:30 p.m. on June 18, 2002, Los Angeles Police Sergeant Alan Pesanti was in a marked patrol car in an area of San Pedro which was frequented by the Rancho San Pedro (RSP) street gang. Pesanti was looking for appellant and Mandac in connection with Stewart's death. He had known appellant, who was 18 years old, since she was a little girl.

Pesanti saw appellant walking on West 9th Street with a man who was later identified as Raul Romero. As Pesanti made a U-turn to arrest appellant, she ran with Romero into an apartment complex. Pesanti called for backup, parked, and rushed up the stairs into the building. He did not see appellant or Romero, and decided to wait for other officers to arrive.

Appellant and Romero had run into the apartment of Vicky P. Vicky was inside with her young children and some friends. She had not given appellant permission to enter. She knew that appellant was "Little Loca" of the RSP gang.[2] Appellant had scared Vicky when she had been inside the apartment on a previous occasion. When appellant ran into the apartment with Romero, Vicky was frightened for her children and for herself.

Appellant told Vicky to "just f---ing be quiet." She said she was going to use the telephone, would leave when she was done, and would never see Vicky again. She also said that if the police came to the door, Vicky should not tell them she was there, and should tell them they could not enter without a search warrant. Appellant said, "I'm Little Loca from RSP. You know who I am. You know what I do." She told Vicky she was wanted for "187 [murder]," and if Vicky told the police she was there, "it'll be 187 on you and your kids."[3] Vicky asked appellant and Romero to leave, as she was afraid

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[2] Appellant is five feet three inches tall.

[3] These words were used for the criminal threats charge of count 3.

for her children. They told her not to worry, as the police would not enter without a warrant.

Appellant and Romero went into the patio area of the apartment. They placed something inside of a stuffed animal they found there. Romero said to appellant, "I'll pay you for this later."

Once other officers had arrived, Pesanti knocked on the door of Vicky's apartment. At first, Vicky said that nobody had come there. However, she seemed fearful, so Pesanti had her leave the apartment with her children and friends. Once they were all outside, Vicky told Pesanti that appellant was inside, and she had denied that fact only because of appellant's threats. The police went inside and arrested appellant and Romero.

Vicky told the police about the stuffed animal on the patio. Inside of a rip in the toy, the police found a plastic bag which contained 10 bindles of rock cocaine and a bindle of methamphetamine. The quantity and packaging of the drugs indicated that they were possessed for sale.[4]

Appellant made a detailed taped statement to Pesanti and a homicide detective at the police station. She gave several increasingly incriminatory versions of the crime.

At first appellant told the police that she had heard about the shooting but was not involved in it. Then she said that on the afternoon of the shooting, she had been approached on 9th Street by a young woman who was driving a car. Appellant had never before seen either the woman or a man who was with her in the car. The woman asked where she could purchase marijuana. Appellant told her that she would take her to buy marijuana if she returned around 5:00 p.m. The woman drove back around 5:30 or 6:00 p.m. This time she was with a young Hispanic man whom appellant did not know. Appellant got into the front passenger's seat. The three of them drove to a location where

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[4] This evidence formed the basis of the drug charge in count 4.

the woman and appellant obtained marijuana. The woman drove appellant back to 9th Street, dropped her off, and drove away.

Appellant told the police that she had been in the woman's car for about 10 minutes, which would explain why her fingerprints would be in it. Around 9:00 p.m., at a time when appellant was high on marijuana, the woman returned to 9th Street and purchased more drugs from her. However, appellant did not know who had shot her. If somebody had suggested that appellant and Mandac did it, that might be because there were girls who hated Mandac and who might resent appellant because she spent time with him.

The police told appellant that Stewart's parents were grieving, and asked if she thought that Stewart deserved to die. Appellant answered that Stewart simply had wanted to "get high," and did not deserve to die. Mandac used a lot of methamphetamine, which caused him to get "wigged out." The police told appellant that Mandac's fingerprints were in the car, that he had told his stepmother about the crime, and that there were witnesses.

Appellant then said that she "didn't have the guts to like just shoot her because she didn't want to give up no car, you know what I'm saying." She denied that she had had a gun. She guessed that Mandac wanted to take the car so he could "come up," which meant acquire status in the gang. He also wanted the girl's money. Appellant then said she was surprised when Mandac told the girl to drive to Amar Street, and appellant had asked to be dropped off at her cousin's house instead. Mandac told her, "Just come with me real quick." He had not slept for days and was "tweaking real bad" from using methamphetamine. He sat with the Hispanic man in the back seat while appellant sat in the front seat. After the car crashed, the Hispanic man ran away.

Appellant then added more facts. Mandac told the woman that she could get drugs at Amar Street. The woman, Mandac and appellant got out of the car. Mandac told the woman to start walking. Instead, she got back into the car and started it. As she began to drive away, Mandac shot her once with a little gun, "like a one shot .22," "a Derringer." Before that, appellant had been telling Mandac that she "didn't want nothing to do with

it," and they should just walk away. The woman's companion had been telling the woman to "just give him the car." The woman had given Mandac $10 for narcotics, and he kept it. Since then, appellant had been looking for the woman's companion, whom she described to the police.

The officers went through the incident again with appellant. She still denied having a gun, but provided more details this time.

Appellant said that Mandac was like a family member to her. They had grown up together, and he had fathered a child with her aunt. She had taken the woman to buy marijuana around 5:00 or 5:30 p.m. Later that night, about half an hour before she was killed, the woman came back to 9th Street, asking for "crack" (cocaine). Appellant and Mandac were standing on the street at that time. Mandac got into the back seat with the Hispanic man, while appellant got into the front passenger seat. Mandac directed the woman to two different locations to buy drugs, but nobody was there. He then told her to drive to Amar Street and Palos Verdes Street. That instruction surprised appellant, as there were no narcotics there. Once the car was stopped in the cul-de-sac, the Hispanic man said he needed to urinate, and left the car. Appellant, Mandac and the woman exited the car as well. The woman handed Mandac $10. He told her not to get back in the car and to keep on walking, or he would shoot her. He was holding a little gun. The woman got back in the car, he shot her, and the car crashed. Mandac, appellant and the Hispanic man then ran away. Mandac later showed appellant the gun, and said it was a .22. They decided to keep quiet and go their separate ways. Appellant did not know why the police might think that her family members were hiding a gun. She had made a mistake to go with Mandac as she did not really trust him.

Appellant denied making threats or hiding narcotics when she ran into Vicky's apartment. She thought that Vicky was lying to protect herself. She also thought that Mandac might tell her where his gun was if she asked him.

The police asked appellant to describe the shooting again. She then stated that after the Hispanic boy got out of the car, the girl got out on the driver's side. Appellant and Mandac got out and stood next to each other on the passenger's side. The girl

handed Mandac the money over the car. He pulled the gun out, pointed it over the car, and told the woman to start walking and not get back into the car. The Hispanic man told the girl to give up the car. Appellant told Mandac that they should just leave, but he looked at her in disgust. The woman jumped into the car and started to drive away, so Mandac shot at her, from the passenger's side. He was tall, and the shot probably hit the woman in the back.

Appellant also said that, earlier on the day of her arrest, Mandac had told her that the police were looking for her. He must have told his stepmother what happened, as the stepmother had warned appellant to be careful.

Pesanti told appellant that he had a dilemma, as Vicky and appellant were giving different versions of whether appellant made threats and possessed the narcotics at Vicky's apartment. He promised to try to ascertain the truth. The homicide detective asked appellant why she thought Mandac had described the incident to his stepmother. Appellant said she thought the police had told her that. Pesanti said that a lot of people knew about the incident. Appellant insisted that Vicky was lying about who owned the narcotics.

Following a break in the tape, appellant inexplicably gave a final, much more incriminatory version of the shooting. This time she said that she had gotten a big gun, a .44, from a fellow gang member. She stood on the passenger's side of the car while Mandac confronted the woman on the driver's side. She pulled out her gun when Mandac pulled out his, because she was following his lead. Mandac fired at the woman as the car pulled away. Appellant fired as well. She shot the big gun one time, straight into the door of the car. Afterwards, she asked her aunt's boyfriend to get the gun from where she had hidden it, and dispose of it for her.

Based on appellant's statement, the police went to the residence of the aunt and her boyfriend. The boyfriend showed them a muddy crawlspace under the building, where they found a cloth-wrapped, unloaded .44 magnum revolver. That weapon might have fired the .44 caliber bullet that was removed from Stewart's body, but the damaged condition of the bullet made it impossible to definitely eliminate or identify the gun.

About a week after appellant's arrest, her aunt asked Vicky to testify that appellant had her permission to enter her home. On another occasion, appellant's grandfather told Vicky "to remember that she [meaning appellant] was in, but that they [meaning appellant's relatives or friends] were out."

At the trial, a gang expert testified that appellant and Mandac admitted membership in the RSP gang, which was the dominant gang in San Pedro. After an arrest in 2001, appellant had said she had been in the gang for four years. The gang had existed for decades and had over 500 documented members, some of whom were third generation members.

The gang expert further testified that the primary activities of the RSP gang included "robbery, car-jacking, attempted murders, assaults, murders, and sales of narcotics." Specified members of the gang had been convicted of sale of cocaine base, voluntary manslaughter, and robbery. The gang controlled the area's narcotics trade, which was an important source of income for its members. Selling narcotics and threatening Vicky would benefit the gang. Committing more serious crimes like carjacking would also be for the gang's benefit, to increase fear in the community and respect from rival gangs.

Defense Testimony

Kristin B. was another neighbor who lived near the scene of the shooting. She was awakened by a loud noise on the night of the crime. Looking out her window, she heard an argument involving two men and a woman. One man was very loud and angry. She could not understand everything he said, but heard him say, "I'll do it. I'll do it." The woman said something like, "Please don't, Dominic. Please don't." A different voice, which sounded less upset and "more in charge," said several times, "Don't pull. Don't pull." Kristin could not understand what else the voices said, and went back to sleep.

DISCUSSION

Appellant admitted that she shot into Stewart's car during an attempted carjacking. There are no issues regarding guilt. Appellant attacks solely the constitutionality of the

felony-murder special circumstance and imposition of the enhancements and parole revocation fine.

1. The Felony-murder Special Circumstance

Appellant contends that imposition of the penalty of life imprisonment without the possibility of parole constitutes cruel and unusual punishment and a violation of due process of law (U.S. Const., 8th & 14th Amends.), because there was no meaningful way for the jurors to distinguish between the factual findings which were necessary for a verdict of first degree murder and the factual findings which were required for the felony-murder special circumstance.

A. Waiver

As a preliminary matter, we reject respondent's argument that this contention was waived because it was not raised below. Application of the waiver doctrine of *People v. Scott* (1994) 9 Cal.4th 331, and its progeny, would be inappropriate here. Appellant's argument has been consistently rejected in the past, so it would have been futile to raise it below. The issue is a question of law which does not require the resolution of conflicting evidence. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 17; *People v. Smith* (2001) 24 Cal.4th 849, 852.) Moreover, a finding of waiver might lead to a habeas corpus claim based on the ineffective assistance of counsel. (See *People v. Butler* (2003) 31 Cal.4th 1119, 1128.) We therefore address the issue.

B. The Record

We agree with appellant that essentially the same facts were used for the issues of first degree murder and the felony-murder special circumstance.

The jury was instructed that it could find first degree murder based either on (1) premeditation and deliberation or (2) the felony-murder rule, if the killing was committed during a carjacking. Appellant was guilty of first degree felony murder if a killing occurred either while she actively committed the crime of attempted carjacking or while she aided and abetted it. If the jury found first degree murder, it had to decide the truth of the special-circumstance allegation, a murder during an attempted carjacking. The special circumstance was proven if appellant was either the actual killer or the aider and

abettor during an attempted carjacking, but not if the attempted carjacking was merely incidental to the murder.

The prosecutor argued to the jurors that if they believed appellant's statement that she shot from the passenger's side of Stewart's car, she was guilty as an aider and abettor, even if she was not the actual killer. However, the prosecutor argued, the actual facts were more likely to be that appellant killed Stewart by firing the .44-caliber revolver from the driver's side of the car.[5] The prosecutor further told the jurors that the issues on the special circumstance were "very similar to felony murder, [with a] lot of repetition here," and the evidence established that the shooting was committed to facilitate the carjacking.

C. Analysis

To comply with the Eighth Amendment, a state's capital punishment scheme must "'afford some objective basis for distinguishing a case in which the death penalty has been imposed from the many cases in which it has not.'" (*People v. Crittenden* (1994) 9 Cal.4th 83, 154; see also *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.) Therefore, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877, fn. omitted; see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244 (*Lowenfield*).) The same rule applies to the life without parole portion of the special-circumstance law. (*People v. Estrada* (1995) 11 Cal.4th 568, 575-576.)

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[5] Among the facts which suggested that appellant shot from the driver's side were her running from the police, the statement to Vicky that she was wanted for "187," and her attempt to dispose of the .44-caliber revolver. We further note that Mandac's fingerprints were on the passenger side, and the .44-caliber bullet which killed Stewart had a left-to-right trajectory.

At the sentencing hearing, the judge said there was "compelling evidence" that appellant fired twice and shot Stewart in the back, although it was possible that Mandac was the actual killer.

The narrowing function which limits the death sentence to a small subclass of murderers is provided in California by the special circumstances in section 190.2, subdivision (a). (*People v. Crittenden, supra*, 9 Cal.4th 83, 154-155, citing *People v. Bacigalupo* (1993) 6 Cal.4th 457, 467.) The applicable special circumstance here is the felony-murder special circumstance of section 190.2(a)(17).[6]

Appellant contends that dual use of the same felony-murder facts to establish first degree murder and the special circumstance of section 190.2(a)(17) resulted in a denial of the constitutionally required narrowing of death-eligible murderers. However, our Supreme Court "has consistently rejected the claim that the statutory special circumstances, including the felony-murder special circumstance, do not adequately narrow the class of persons subject to the death penalty." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1195.) The court has repeatedly authorized "use of a felony to qualify a defendant both for first degree murder and for a special circumstance . . . ." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1183, citing *People v. Ochoa* (1998) 19 Cal.4th 353, 479, *People v. Memro* (1995) 11 Cal.4th 786, 886-887, and *People v. Marshall* (1990) 50 Cal.3d 907, 945-946.)

The rationale for these holdings appears in *People v. Anderson* (1987) 43 Cal.3d 1104, 1147: "Whether or not we approve of the wisdom of the statutory classification, it appears to be generally accepted that by making the felony murderer but not the simple murderer death-eligible, a death penalty law furnishes the 'meaningful basis [required by the Eighth Amendment] for distinguishing the few cases in which [the death penalty] is

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6 Section 190.2(a)(17) states in pertinent part: "The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [¶] . . . [¶] (L) Carjacking, as defined in Section 215."

Section 215 was added to the Penal Code in 1993, partly due to reports that incidences of carjacking were dramatically increasing because the crime was "becoming the initiating rite for aspiring gang members." (*People v. Medina* (1995) 39 Cal.App.4th 643, 648.)

imposed from the many cases in which it is not.' (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.)."

Appellant complains that our Supreme Court has consistently misread the decision by the United States Supreme Court in *Lowenfield, supra*, 484 U.S. at pages 241-246. *Lowenfield* does not resolve the specific issue here, as it was a multiple-murder case, not a felony-murder case, and concerned use of the same fact to narrow the class of death-eligible murderers and as an aggravator for the death penalty. In any event, we are bound by the numerous decisions by our Supreme Court which have rejected appellant's argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We therefore find no violation of the Eighth or Fourteenth Amendments in the imposition of the felony-murder special circumstance here.

2. Sentencing Issues

Appellant was sentenced to life imprisonment without the possibility of parole on count 1, plus 25 years to life for causing death by discharging a firearm (§ 12022.53, subds. (d) & (e)). The judgment added 10 more years to count 1 for a criminal street gang enhancement (§ 186.22, subd. (b)(1)), although that enhancement was not imposed at the sentencing hearing (see part 2.C., *post*). Count 2, attempted carjacking, was stayed pursuant to section 654. Determinate sentences of two years on count 3 (criminal threats) and four years on count 4 (possession for sale of cocaine base) were made concurrent to count 1. The firearms enhancement on count 2 and the gang enhancements on counts 2 through 4 were stayed. A restitution fine of $200 was imposed; a parole revocation fine of $200 was suspended unless parole was revoked. Credit was given for 721 actual days in custody.

Appellant makes a multi-pronged challenge to the firearms discharge enhancement, and also contends that the gang enhancement and parole revocation fine must be stricken.

A. The Firearms Discharge Enhancement

Subdivisions (b), (c), and (d) of section 12022.53 provide for successively increasing penalties when a person commits specified felonies and "personally uses a

firearm," "personally and intentionally discharges a firearm," or "personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death." Pursuant to subdivision (e)(1) of section 12022.53, the same penalties apply to "any person who is a principal in the commission of an offense" if the crime was committed for the benefit of a criminal street gang (§ 186.22) and any principal committed an act specified in section 12022.53, subdivisions (b) through (d).[7]

As to counts 1 and 2, the jury found true that both appellant and a principal personally and intentionally used a firearm, discharged a firearm, and discharged a firearm, proximately causing great bodily injury and death (§ 12022.53, subds. (b)-(e)).

The 25-year-to-life enhancement which was imposed here is based on the jury's findings under subdivisions (d) and (e) of section 12022.53. The remaining firearms enhancements were stayed.

Appellant maintains that the language of subdivision (j) of section 12022.53 (section 12022.53(j)) forbids addition of any section 12022.53 enhancement to a sentence of life imprisonment without the possibility of parole. She alternatively contends that her

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[7] Section 12022.53, subdivisions (b) through (e) provides: "(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. [¶] (e)(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c) or (d)."

conviction for first degree murder with a felony-murder special circumstance necessarily includes the intentional discharge of a firearm, so she can be subject only to an enhancement under subdivision (b) and not under subdivisions (c) or (d) of section 12022.53,[8] based on either the doctrine of merger, the prohibition against double punishment, the case of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), or the rule precluding multiple punishment for lesser included offenses.

i. Section 12022.53(j)

We agree with appellant that the language of section 12022.53(j) precludes any section 12022.53 enhancement in this case.[9]

Section 12022.53(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.)

We are "guided by the rule of statutory construction which directs us, when determining legislative intent, to look first to the words themselves for the answer." (*Owen v. Superior Court* (1979) 88 Cal.App.3d 757, 762.) There is no ambiguity in the statute. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) A section 12022.53 enhancement was precluded here because the trial court imposed a "longer term of

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8 The jury made findings, and the enhancement was imposed, pursuant to both subdivisions (d) and (e) of section 12022.53. The briefing refers to the enhancement which was imposed as a section 12022.53, subdivision (d) enhancement. The difference has no apparent effect on the issues.

9 We used similar analysis for this issue in *People v. Shabazz* (2004) 125 Cal.App.4th 130, review granted March 16, 2005, S131048. A contrary result was reached in *People v. Chiu* (2003) 113 Cal.App.4th 1260.

imprisonment," life without the possibility of parole, pursuant to the felony-murder special circumstance of section 190.2(a)(17).

If the Legislature intended to limit the second sentence of section 12022.53(j) to enhancements, it could have easily done so. Rather than refer in the second sentence to "another provision of [the] law," reference could have been made to enhancements. The choice of the phrase "another provision of law," rather than the word "enhancement," in the second sentence of section 12022.53(j) indicates that the Legislature did not intend to limit this provision to enhancements. This choice appears to have had cases in mind such as the one at bar, in which the punishment for the offense exceeds the 25-years-to-life enhancement of section 12022.53, subdivision (d). The choice appears to be reasonable, since one cannot "enhance" a life sentence without the possibility of parole, if the premise of a criminal sentence, whether for an offense or an enhancement, is that the offender can serve the sentence. A person, however, cannot serve an enhancement that is to take effect only upon his or her death, i.e., upon the expiration of a life sentence without the possibility of parole.

We conclude that appellant's sentence precludes imposition of a section 12022.53 enhancement. We strike the enhancement which was imposed.

We reject appellant's alternative challenges to imposition of enhancements under subdivisions (c) and (d) of section 12022.53, for the following reasons:

ii. Merger

Appellant maintains that the merger doctrine of *People v. Ireland* (1969) 70 Cal.2d 522, 538-540, is applicable, because the elements of the section 12022.53, subdivisions (c) and (d) enhancements merged with the crime of murder with firearm use. We do not agree. The merger doctrine precludes application of the felony-murder rule when the only underlying felony is an assault, to avoid eliminating the prosecution's burden to establish malice in the great majority of homicide cases. (*Ireland*, *supra*, at p. 539.) The merger doctrine "has not been applied other than in the context of felony murder and assault." (*People v. Sanders* (2003) 111 Cal.App.4th 1371, 1374 (*Sanders*).) Application of the merger doctrine to a firearms enhancement in a felony-murder case was

specifically rejected in *Sanders*, on the ground that the underlying rationale of *Ireland* does not apply to an enhancement which was found true by the jury beyond a reasonable doubt. (*Sanders*, *supra*, at pp. 1373-1375.) We agree with that reasoning.

iii. Section 654

Appellant further argues that enhancements pursuant to subdivisions (c) or (d) of section 12022.53 were precluded by section 654, subdivision (a), which states: "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."

Like other courts before us, we reject this argument. The additional punishment for the enhancement does not constitute multiple punishment for the same act. Rather, it is the result of a legislative determination that use of a firearm during a crime constitutes a particularly dangerous form of violence which merits additional punishment. (*Sanders*, *supra*, 111 Cal.App.4th at p. 1375; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1311-1315.)[10]

Appellant further argues that the words "[n]otwithstanding any other provision of law" in subdivisions (b), (c) and (d) of section 12022.53 should not be interpreted as mandatory, because of the Supreme Court's interpretation of similar language in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 524 (*Romero*).

We do not find support for appellant's position in *Romero.* It held that the words "[n]otwithstanding any other law" in section 667, subdivision (f)(1) do not preclude a trial court from striking a prior "strike" conviction pursuant to section 1385. The statutory language was interpreted in the context of the entire "Three Strikes" law, including section 667, subdivision (f)(2), which authorizes the People to move to strike the prior conviction pursuant to section 1385. The situations are not analogous.

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10 In *People v. Oates* (2004) 32 Cal.4th 1048, 1066, footnote 7, our Supreme Court found it unnecessary to reach this issue.

iv. *Apprendi*

Appellant also maintains that under *Apprendi, supra*, 530 U.S. 466, 490, a firearms enhancement that relates to the facts of the offense should be treated the same as other criminal offenses for the purpose of merger or section 654.

Like the court in *Sanders, supra*, 111 Cal.App.4th at page 1375, we find no *Apprendi* violation. The correctness of that holding is further shown by the Supreme Court's post-*Apprendi* decisions in *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531], and *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738]. The crux of these decisions is that the right to a jury trial in the Sixth Amendment limits a defendant's maximum sentence to facts which were reflected in the jury verdict or admitted by the defendant. There could be no Sixth Amendment violation here, as the section 12022.53 findings were made by the jury.

For similar reasons, we reject appellant's related argument that *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*) establishes that there was an *Apprendi* violation here. *Seel* overruled *People v. Bright* (1996) 12 Cal.4th 652, 656, 657, which had held that an allegation of premeditation in an attempted murder case was a penalty provision to which double jeopardy did not apply. Based on *Apprendi, Seel* held that the premeditation allegation is an element of the offense and not a penalty provision, so that allegation could not be retried after it was reversed on appeal due to insufficiency of the evidence. As *Seel* recognized, the relevant inquiry for *Apprendi* purposes is whether or not a defendant was exposed to greater punishment than was authorized by the jury's verdict. (*Seel, supra*, at p. 546.) The firearms discharge enhancement here was expressly authorized by the jury's verdict, so there is no Sixth Amendment problem.

v. Necessarily Included Offenses

Relying upon the rule that multiple convictions may not be based on necessarily included offenses (*People v. Pearson* (1986) 42 Cal.3d 351, 355; *People v. Ortega* (1998) 19 Cal.4th 686, 692), appellant argues that firearms discharge enhancements could not be imposed, because they fell within the charge of first degree murder with firearms use, if the enhancements are included in the "accusatory pleading test" for determining lesser

included offenses. (See *People v. Wolcott* (1983) 34 Cal.3d 92, 110-113 (dis. opn. of Bird, C.J.) (*Wolcott*).) However, our Supreme Court has specifically held that "a 'use' enhancement is not part of the accusatory pleading for the purpose of defining lesser included offenses." (*Id.* at p. 96; *People v. Bright*, *supra*, 12 Cal.4th at p. 670, overruled on other grounds in *Seel*, *supra*, 34 Cal.4th at p. 550, fn. 6.) Since we are bound by the decisions of our Supreme Court, we reject appellant's argument.

In her reply brief, appellant maintains that *Wolcott* should be reassessed, based on a new case, *People v. Sloan* (2005) 126 Cal.App.4th 1148, 1159 (*Sloan*).

Sloan held that, "for purposes of determining whether an offense is necessarily included within another for purposes of prohibiting multiple convictions, enhancements should be considered." (*Sloan*, *supra*, 126 Cal.App.4th at p. 1151.) The *Sloan* court limited *Wolcott* to the determination of what crimes are lesser included offenses for the purpose of sua sponte jury instructions. (*Sloan*, *supra*, at p. 1159.) It reasoned that different considerations are involved in determining whether a sentence violated the double jeopardy protection, and the Three Strikes law would not be served by treating the defendant's act as three separate offenses which qualified as three strikes. It therefore vacated the defendant's conviction on the second and third counts.

We understand the concern of the *Sloan* court with the potential effects of multiple convictions under the Three Strikes law. That is not the issue here, however. For the purpose of the firearms discharge enhancement in this case, we are bound by the direct authority of the Supreme Court in *Wolcott*.

B. The Stayed Enhancements Pursuant to Section 12022.53, Subdivisions (b) and (c)

The trial court stayed the enhancements under sections 12022.53, subdivisions (b) and (c) when it imposed the section 12022.53, subdivision (d) enhancement on count 1. Appellant maintains that the former two enhancements should have been stricken and not stayed. We reject the contention based on *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 713.

C. The Gang Enhancement

At the sentencing proceedings, the judge initially imposed a sentence of 10 years to life for commission of a felony for the benefit of a criminal street gang. The prosecutor pointed out that because count 1 carried a life sentence, a determinate term on that count was forbidden, and the gang enhancement could be used only to set the minimum parole term at 15 years. The judge responded, "No sentence is pronounced with respect to the gang allegation." Nonetheless, a 10-year gang enhancement appears both on the abstract of judgment and the minute order of the sentencing hearing.

It is the oral pronouncement of judgment which is controlling. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.) Since it shows that the trial court did not intend to impose a gang enhancement, that aspect of the judgment must be corrected.

D. The Parole Revocation Fine

According to the abstract of judgment, a restitution fine of $200 was imposed "per PC 1202.4(b) forthwith per PC 2085.5." A fine of $200 "per PC 1202.45 [was] suspended unless parole is revoked." The trial court mentioned neither of the fines at the sentencing hearing.

We strike the parole revocation fine, as appellant is ineligible for parole. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.)

Although the issue was not raised, it further appears that the restitution fine must also be stricken. In *People v. Tillman* (2000) 22 Cal.4th 300, 303, the trial court imposed neither a restitution fine nor a parole revocation fine, and stated no reason for its failure to do so. The Supreme Court held that the failure to impose the fines could not be corrected on appeal, as the People waived the issue by not objecting at the trial court level. Here, the judge mentioned neither fine, and the People did not object to that omission at the sentencing hearing. The circumstances justify correcting the judgment to delete both of the fines.

DISPOSITION

In accordance with the views expressed herein, the judgment is hereby modified to strike the 25-years-to-life enhancement which was imposed on count 1 pursuant to

section 12022.53, subdivisions (d) and (e). The judgment is corrected to strike the 10-year gang enhancement pursuant to section 186.22, subdivision (b)(1), the restitution fine pursuant to section 1202.4, subdivision (b), and the parole revocation fine pursuant to section 1202.45. The superior court is directed to send a corrected abstract reflecting these changes to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

RUBIN, Acting P.J.

BOLAND, J.