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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TOMMY ANGEL MESA, Defendant and Appellant.	) Supreme Court) No.) Court of Appeal) No. D056280) Superior Court) No. RIF137046

APPEAL FROM THE RIVERSIDE COUNTY SUPERIOR COURT
HONORABLE HELIOS J. HERNANDEZ, JUDGE

PETITION FOR REVIEW

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By appointment of the Court of Appeal
under the Appellate Defenders, Inc.
assisted case system

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APPEAL FROM THE RIVERSIDE COUNTY SUPERIOR COURT
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PETITION FOR REVIEW

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF CALIFORNIA, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Tommy Angel Mesa, defendant and appellant, respectfully petitions this court for review following the published decision of the Court of Appeal, Fourth Appellate District, Division One, D056280, filed on July 13, 2010, affirming the trial court's imposition of separate sentences for appellant's convictions for violating Penal Code[1] sections 186.22, subdivision (a) (active participation in a criminal street gang) as well as for violating sections 245, subdivision (a)(2) (assault with a firearm) and section 12021 (ex-felon in possession of a firearm) even though appellant's convictions for violating

[1] Unless otherwise specified, all further statutory references are to the Penal Code.

sections 245, subdivision (a)(2) and 12021 supplied the only evidence of one of the elements of the street gang offense -- that appellant promoted, furthered, or assisted felonious criminal conduct by members of the gang in which appellant was alleged to have been an active participant.

The trial court, in other words, punished appellant twice for committing a single act by imposing separate sentences for appellant's violation of section 186.22, subdivision (a) and for his violations of sections 245, subdivision (a)(2) and 12021 because it sentenced appellant for a crime that required for proof of one of its elements the commission of an underlying offense, and it sentenced appellant for the commission of the underlying offense as well.

A copy of the Court of Appeal's opinion is attached to this petition as Appendix "A."

ISSUES PRESENTED FOR REVIEW

I.

DOES PENAL CODE SECTION 654 BAR SEPARATE SENTENCING FOR VIOLATING SECTION 186.22, SUBDIVISION (a) (ACTIVE PARTICIPATION IN A CRIMINAL STREET GANG), ONE ELEMENT OF WHICH IS THAT THE DEFENDANT PROMOTE, FURTHER, AND ASSIST FELONIOUS CRIMINAL CONDUCT BY MEMBERS OF THE GANG, AND FOR THE UNDERLYING FELONY OFFENSE USED TO SATISFY THAT ELEMENT OF THE GANG PARTICIPATION CHARGE?

NECESSITY OF REVIEW

The various decisions of the Courts of Appeal that have considered this issue are in irreconcilable conflict with one another. Review of this issue is, therefore, necessary to secure uniformity of decision and settle important questions of law. (Cal. Rules of Court, rule 8.500(b)(1).)

Appellant was convicted of two counts each of assault with a firearm in violation of section 245, subdivision (a)(2), being an ex-felon in possession of a firearm in violation of section 12021, and being an active participant in a criminal street gang in violation of section 186.22, subdivision (a) arising out of two separate, unrelated shooting incidents.

The Court of Appeal, Fourth Appellate District, Division One, affirmed the trial court's decision to sentence appellant for his violations of section 186.22, subdivision (a) separately and consecutively to the sentences the court imposed for the violations of section 245, subdivision (a)(2) and 12021 even though proof that appellant committed the latter two offenses supplied the only proof of one of the elements of the 186.22, subdivision (a) charge -- that appellant promoted, furthered and assisted felonious criminal conduct by members of the gang in which appellant was alleged to have been an active participant.

In *People v. Sanchez* (2009) 179 Cal.App.4th 1297, the Court of Appeal, Fourth Appellate District, Division Two, considered the exact question presented by this case and came to the opposite conclusion. The court ruled in that case that since the commission of the underlying felonies (two counts of robbery) supplied the only proof of the "promote/further/assist" element of the gang participation charge, sentencing for the gang participation violation separate from the robbery convictions was barred by section 654. (*Id.* at p. 1316.)

While this case and *Sanchez* are the two most recent decisions on this issue that directly conflict with one another, the conflict itself goes back even further.

In *People v. Herrera* (1999) 70 Cal.App.4th 1456, for example, the defendant, a gang member, and his companion committed a drive-by shooting at a house that was associated with a rival gang in retaliation for an earlier shooting committed by members of the rival gang. Two people were

injured as a result. (*Id.* at p. 1461.) The defendant was convicted of two counts of attempted murder and one count of being an active participant in a criminal street gang. (*Id.* at p. 1462.)

The court held that because the focus of section 186.22, subdivision (a) is on the defendant's objective to promote, further and assist felonious criminal conduct by members of his gang, the section requires a separate intent and objective from the underlying felony, which was the intent to kill. That being the case, the court reasoned, the perpetrator of the underlying felony could have "two independent, even if simultaneous, objectives" which would negate the applicability of section 654. (*People v. Herrera, supra,* 70 Cal.App.2d at pp. 1467-1468.)

In *People v. Vu* (2006) 143 Cal.App.4th 1009 the defendant and another person killed the victim in the mistaken belief that the victim was a member of a rival gang that had, on an earlier occasion, attacked Vu and others in his gang. (*Id.* at pp. 1011, 1013-1014.) The trial court sentenced Vu to concurrent terms for murder and conspiracy to commit murder and imposed a consecutive eight-month term for a gang participation charge. (*Id.* at p. 1013.)

The same court that decided *Herrera* (Fourth Appellate District, Division Three) came to a conclusion on the same issue in *Vu* that cannot be reconciled with the holding in *Herrera.* In *Vu*, the court decided that section 654 precluded separate sentencing for the gang participation charge and the underlying felony because the defendant had but a single objective in committing the murder, the conspiracy to commit murder and the gang charges. The objective was to avenge the earlier attack on the defendant and his fellow gang members so that the intent to kill and the intent to promote the gang were "dependent on, and incident to the other." Section 654, therefore, precluded separate punishment for the gang participation charge. (*Id.* at p. 1034.)

Division One's decision in this case is legally unsound. The underlying felonies of which appellant was convicted supplied the proof of one of the elements of the gang participation charge. Since appellant was convicted of, and sentenced for, a crime that required the commission of an underlying offense and of the underlying offense itself, his intent and objective in committing the gang participation crime had to be the same as his intent and objective in committing the underlying felonies. It negates the operation of section 654 to hold otherwise.

This court should grant review to resolve the conflict between this case and *People v. Sanchez, supra,* 179 Cal.App.4th 1297, as well as the conflict created by the other cases that have considered the same issue, and to affirm section 654's application to the situation presented by this case.

STATEMENT OF THE CASE

Appellant was convicted of a number of offenses stemming from his shooting and seriously wounding two people in two separate, unrelated incidents -- Galen White on April 27, 2007 and Alvin Pierre on April 29, 2007. As it relates to this petition, appellant was convicted of two counts of assault with a firearm in violation of section 245, subdivision (a)(2) (Counts 2 and 6), two counts of being an ex-felon in possession of a firearm in violation of section 12021 (Counts 3 and 7), and two counts of actively participating in a criminal street gang in violation of section 186.22, subdivision (a) (Counts 4 and 8). One count of assault with a firearm (Count 2), one count of being an ex-felon in possession of a firearm (Count 3), and one count of being a participant in a criminal street gang (Count 4) related to the April 27 shooting of Galen White, and the other three counts (Counts 6,

7, and 8) related to the April 29 shooting of Alvin Pierre. (2 CT 389-390; 4 RT 741-746.)

Allegations that appellant committed the crimes charged in Counts 2 and 3 for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b) were found true, but the jury deadlocked on the same allegations with respect to Counts 6 and 7. (2 CT 389-390; 4 RT 741-746.) The court later granted the prosecution's motion to dismiss the section 186.22, subdivision (b) allegations as to Counts 6 and 7. (2 CT 470-471; 4 RT 764-768.)

The trial court sentenced appellant to an aggregate determinate term of 39 years, eight months in state prison. The sentence included two terms of eight months each for appellant's convictions of violating section 186.22, subdivision (a) consecutive to the sentences the court imposed for appellant's convictions for violating sections 245, subdivision (a)(2) and 12021.

STATEMENT OF FACTS

For purposes of this petition, the Court of Appeal's opinion accurately describes the facts of the case. Briefly, on April 27, 2007, the defendant accosted a man named Galen White and asked him, "Why are you walking tough in my neighborhood?" (1 RT 94-95, 107.) When Mr. White said he wasn't from that neighborhood, appellant pulled out a handgun and fired it three times at Mr. White, striking him once in the left side. (1 RT 101-104, 109.)

On April 29, 2007, appellant said, "What the fuck are you looking at?" to some people in a passing car. (1 RT 198, 200-201.) When he saw Alvin Pierre, who happened to be passing by on his bicycle, looking at him, appellant asked Mr. Pierre the same thing. Appellant then shot Mr. Pierre

from about 10 feet away, the shot striking Mr. Pierre in the groin and destroying his left testicle. (1 RT 202-206, 209-210.)

Appellant was arrested on May 30, 2007, and the gun that was used in both shootings was found in the closet in which he was hiding when he was confronted by the police. (2 RT 323, 325, 352.)

ARGUMENT

I.

SECTION 654 BARS SEPARATE SENTENCING FOR VIOLATING SECTION 186.22, SUBDIVISION (a) AND THE UNDERLYING FELONY OFFENSE THAT SUPPLIES PROOF OF THE "PROMOTE/FURTHER/ASSIST" ELEMENT OF THAT CHARGE

Section 654, subdivision (a), in pertinent part, provides as follows: "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."

Section 654 "expressly prohibits multiple sentences where a single act violates more than one statute." (*In re Jose P.* (2003) 106 Cal.App.4th 458, 468.) In that situation, "the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, [but] the trial court may impose sentence for only one offense -- the one carrying the highest punishment." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

Section 654 also precludes multiple punishment where a defendant commits more than one act violating more than one statute when the acts comprise an "indivisible course of conduct" with a single intent or objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

On the other hand, separate punishment for each offense is permitted when the defendant has more than one criminal objective, even if the

offenses constituted parts of an indivisible course of conduct. (*People v. Beamon* (1973) 8 Cal.3d 625, 637-639.)

"Whether the course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses, but not for more than one." (*Neal v. State of California, supra,* 55 Cal.2d at p. 19.) If all the offenses are "merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The issue in any case where the applicability of section 654 is at issue, therefore, is whether the defendant entertained single or multiple criminal objectives in committing the crimes for which he suffered convictions. (*People v. Adams* (1975) 14 Cal.3d 629, 635.)

"The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced." (*People v. Adams* (1982) 137 Cal.App.3d 346, 355.)

The trial court's express or implied findings on this issue will be upheld on appeal if they are supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

A court acts in excess of its jurisdiction when it erroneously stays or fails to stay a sentence pursuant to section 654. Any such sentence is unauthorized. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) As a result, "[e]rrors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal." (*People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn. 3.)

To prove a violation of section 186.22, subdivision (a) the prosecution must show three things: That (1) the defendant actively participated in a criminal street gang (2) with knowledge that its members engage in or have engaged in a pattern of criminal gang activity and that (3) he must have willfully promoted, furthered, or assisted in felonious criminal conduct by members of the that gang. (§ 186.22, subd. (a).)

The "promote/further/assist" element of the offense has been held to be satisfied by the defendant's own commission of a felony offense. A gang member who commits a felony, in other words, also promotes, furthers and assists felonious criminal conduct (his commission of that felony) by a gang member (himself) for the purpose of determining if there has been a violation of section 186.22, subdivision (a). (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.)

In this case, the court used CALCRIM No. 1400 to instruct the jury that the "promote/further/assist" element of the gang participation charge was satisfied by appellant's commission (either as a perpetrator or as an aider and abettor) of the underlying felonies of assault with a firearm or possession of a firearm by an ex-felon. (2 CT 359-360; 3 RT 637-639.)

The prosecutor argued that appellant satisfied that element of the gang participation charge in the same way. "In this situation we're dealing with a crime he committed himself. How do we know he actively participated? The circumstances of his offense." (Supp. RT 99-100.)

In this case, then, appellant could ***only*** have been convicted of the gang participation charge if the jury found that he promoted, furthered, and assisted felonious criminal conduct by gang members, and it could ***only*** have made that finding based upon the evidence that he committed the underlying felonies of assault with a firearm and possession of a firearm by an ex-felon. No other evidence was presented as to that element of the offense.

To impose separate punishments consistent with the terms of section 654, "There must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced." (*People v. Adams, supra,* 137 Cal.App.3d at p. 355.)

Given this factual and procedural background, the answer to the question whether there was evidence that supported a finding that appellant harbored a separate intent and objective for every crime for which he was sentenced has to be answered in the negative. For a number of reasons, Division One's conclusion that there was such evidence does not withstand scrutiny.

First, the opinion relies upon the decision in *People v. Herrera, supra,* 70 Cal.App.4th 1456.) (Opn., Appendix A, p. 21.) In *Herrera*, the defendant and a fellow gang member, in retaliation for an earlier shooting by members of a rival gang, drove by a house associated with the rival gang and fired a number of shots, injuring two people. The court upheld separate sentencing for the defendant's convictions of attempted murder and gang participation. The *Herrera* court reasoned that since section 186.22, subdivision (a) required a different intent (to participate actively in a gang) than the intent necessary for the commission of the underlying felony (the intent to kill), the perpetrator of the underlying crime could have a separate intent from that necessary for the gang participation charge, "precluding application of section 654." (*Id.* at p. 1468.)

While it is true that a violation of section 186.22, subdivision (a) requires for its proof a showing of an intent different than that necessary for an underlying crime, that fact is irrelevant for purposes of section 654 analysis. A proper analysis of an issue involving section 654 should focus, not on the statutory elements of the particular crime, but on the defendant's intent and objective. Section 654 bars multiple punishment even where a defendant has "multiple criminal objectives" if those objectives were not "independent,"

but "merely incidental to" each other. (*People v. Harrison, supra,* 48 Cal.3d at p. 335.)

For example, a defendant who kidnaps a woman and drives her to an isolated area where he rapes her has to entertain two separate intents to be convicted of both kidnapping and rape -- he has to intend to take the victim from one place to another against her will and he has to intend to force her to have intercourse with him. However, since the kidnapping is the means by which the rape is accomplished and is incidental to its commission, the defendant's multiple criminal objectives are not independent of one another and section 654 bars separate sentencing for both the kidnapping and the rape. (*People v. Latimer* (1993) 5 Cal.4th1203, 1216.)

In addition, the *Herrera* court asserted that if section 654 were to apply to the situation presented by this case, the gang participation charge would become a nullity (*People v. Herrera, supra,* 70 Cal.App.4th at p. 1468), an assertion echoed by the court below (Opn., Appendix A, p. 22). That is simply not the case. First, there is nothing to prevent the prosecution from proving the "promote/further/assist" element of the gang participation charge in some way other than relying on the defendant's commission of the underlying offense. Second, the *Herrera* court's resolution of the issue is basically that a court would be justified in imposing separate sentences for gang participation and the underlying felony necessary for the proof of the gang participation charge if the crimes had different statutory elements. If that were the correct analysis, section 654 would never apply to bar separate sentencing. The truth is that the *Herrera* court's analysis (and, by extension, the analysis of the court below) is would nullify the operation of section 654.

Moreover, Division One's finding that appellant had two motives in shooting the two victims -- "to both harm the individual victims and to demonstrate to the entire community the power of [appellant's] gang" (Opn.,

Appendix A, p. 22) -- belies its conclusion that appellant had two separate, independent objectives.

Assuming that the court below was correct in its assessment of appellant's intent and that he simultaneously intended to harm his victims and to assert the power of the gang in which he was alleged to have actively participated, it is apparent that those intents cannot be said to have been "independent" of each other for purposes of section 654 analysis. If appellant shot his victims to assert the power of his gang, then the two objectives were clearly not independent of one another, but the one was incidental to the other. By that reasoning, the shooting was the means by which appellant asserted the power of the gang in the same way that the kidnapping in *Latimer* was the means by which the defendant in that case accomplished the act of rape. In either case, section 654 bars separate sentencing for both crimes.

Finally, and most importantly, the only way the jury in this case could have found appellant guilty of the gang participation charge was by finding that he committed the underlying offenses -- assault with a firearm and possession of a firearm. The commission of those offenses supplied the proof of one of the elements of the gang participation charge and turned appellant's gang membership, which, of itself, was not a crime, into a criminal offense.

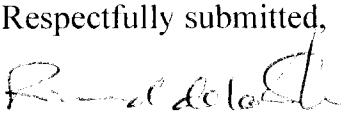
"[The] crucial point is that, here, as in *Herrera* and *Vu*, [appellant] stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself." (*People v. Sanchez, supra,* 179 Cal.App.4th at p. 1315.) Since the proof of the commission of the one offense depended upon the commission of the other, appellant's intent and objective in committing the one must have been the same as it was in committing the other. (*Id.* at p. 1314.)

CONCLUSION

For the reasons set forth above, appellant respectfully submits that his petition for review should be granted.

Dated: August 20, 2010

Respectfully submitted,



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CERTIFICATION OF WORD COUNT

I, Richard de la Sota, hereby certify that, according to the word processing program used to prepare this document, this petition for review contains 3,732 words.

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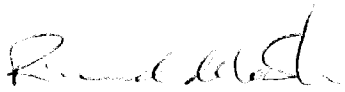

Richard de la Sota

APPENDIX A

Filed 7/13/10

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TOMMY ANGEL MESA, Defendant and Appellant.	D056280 (Super. Ct. No. RIF137046)

APPEAL from judgments of the Superior Court of Riverside County, Helios J. Hernandez, Judge. Affirmed in part; reversed in part with instructions.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Meredith A. Strong, Deputy Attorneys General, for Plaintiff and Respondent.[2]

In separate incidents, Tommy Angel Mesa, a gang member, shot and severely wounded two complete strangers. He used the same gun in both incidents, and later was found in possession of the gun and several rounds of ammunition. Mesa was convicted of two counts of assault with a firearm, three counts of being a felon in possession of a firearm, one count of being a felon in possession of ammunition, and two counts of actively participating in a criminal street gang.

With respect to the assault convictions, the jury found true great bodily injury and personal firearm allegations. With respect to one of the assault convictions and one of firearm possession counts, the jury found gang participation allegations true.

Mesa does not challenge his convictions on the substantive counts or the sufficiency of the evidence supporting the enhancements. Nonetheless, Mesa raises a number of sentencing issues. First, he contends, and the Attorney General agrees, that

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[2] Cristin Morneau, a certified law student, presented oral argument.

with respect to one of the assault convictions, the trial court erred in imposing the gang enhancement. As Mesa points out, Penal Code[3] section 1170.1, subdivsions (f) and (g), prevented the trial court from imposing the gang enhancement along with either the firearm enhancement or the great bodily injury enhancement.

Secondly, he contends the trial court erred in imposing consecutive sentences on the three firearm possession convictions. He argues the record shows he had continuous possession of the firearm and that, in light of that continuous possession, section 654 required that imposition of sentencing be stayed on two of the firearm possession counts.

We agree. A felon's continuous possession of a single firearm does not permit multiple punishments for violation of the statute that prohibits felons from possessing a firearm.

Mesa also argues section 654 prevents separate punishments for assault and for participation in a criminal street gang. We disagree with this contention. The criminal street gang statute punishes conduct and intentions that are separate from the conduct and intentions that give rise to culpability for assault with a firearm.

Finally, Mesa argues he should not have been punished for both possessing a firearm and possessing ammunition. We disagree with this contention as well. Where, as here, a felon has possession of both a firearm and ammunition that is not in the firearm, separate punishments may be imposed.

Accordingly, we reverse Mesa's convictions in part and remand for further proceedings.

FACTUAL BACKGROUND

The record shows Mesa was a member of the Coroneros set of the Corona Varios Locos criminal street gang.

On the evening of April 27, 2007, Ghalen W. was asleep next to his four-year-old son in the apartment in Corona where he lived with his two other sons and their mother. April 27 was prom night and Ghalen's oldest son Jeron was at home that evening with his prom date. At around 10 p.m., Jeron woke Ghalen up and asked him to go outside with him and his date so that they could meet his date's mother. Jeron told his father a group of guys were hanging around outside the apartment.

Ghalen went outside his apartment and saw a group of five or six Hispanic males, including Mesa. Ghalen told his son and his date to stay near the apartment while Ghalen went to see if the date's mother had arrived. As Ghalen walked toward the street, Mesa confronted him and said: "Why are you walking tough in my neighborhood, Holmes?" Ghalen believed this statement meant Mesa and the others were members of a gang and he was in their territory. Ghalen told Mesa he was not from the area, hoping that would satisfy Mesa. It did not. Mesa responding by saying: "But you're still walking tough in my neighborhood." Ghalen then explained he was just there for his son's prom; Mesa repeated the statement "You're still walking tough in my neighborhood." As Mesa continued walking towards Ghalen, Ghalen remembered one of the doors of his car, which was in front of him, was unlocked. Mesa pulled out a gun, pointed it at Ghalen and began shooting as Ghalen dove into his car. Ghalen heard three shots fired and felt

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

severe pain. Mesa looked in the back window of the car and began running. Ghalen had been shot in the side and the bullet traveled through his body and exited on the left side of his torso.

Two days after Ghalen was shot, on April 29, 2007, Alvin Pierre was riding his bike to a shopping center in Corona. As Pierre rode into the parking lot, he heard Mesa say: "What the fuck are you looking at?" Pierre rode past Mesa, got off his bike near a store and tried to ask Mesa what he had said. Before Pierre could complete a sentence, Mesa pulled out a gun and shot Pierre in the groin. The bullet entered Pierre's left leg, traveled through his scrotum, and exited from his right leg. Pierre's shattered left testicle had to be removed.

Police arrested Mesa in his home on May 30, 2007. Officers found Mesa, wearing a bullet proof vest, hiding in a closet. When Mesa was found, he was wearing an empty gun holster and had a .45 caliber magazine in his front pocket with 10 rounds of .45 caliber ammunition in it. The police also found a handgun in the closet; a ballistics expert testified shell casings found near the scene of the Ghalen and Pierre shootings had been fired from the handgun. Police also found a duffel bag in the closet, and in the duffel bag they found a .22 caliber rifle loaded with seven rounds of ammunition and 46 rounds of additional ammunition.

TRIAL COURT PROCEEDINGS

With respect to the Ghalen shooting, Mesa was charged with attempted murder, assault with a firearm, being a felon in possession of a firearm, and being a participant in a criminal street gang. (Counts 1-4.) With respect to the Pierre shooting, Mesa was charged with similar counts of attempted murder, assault with a firearm, being a felon in possession of a firearm, and being a participant in a criminal street gang. (Counts 5-8.) In addition, with respect to the circumstances which existed at the time of his arrest on May 30, 2007, Mesa was charged with an additional count of being a felon in possession of a firearm (count 9) and one count of being a felon in possession of ammunition (count 10).

All three firearm possession counts identified a .45 caliber handgun as the firearm Mesa unlawfully possessed.

The jury could not reach verdicts on either the Ghalen or Pierre attempted murder counts, and the trial court dismissed those counts pursuant to section 1385.

As to both the Ghalen and Pierre shootings, the jury found Mesa guilty of assault with a firearm, being a felon in possession of a firearm, and participating in a criminal street gang. With respect to his arrest, the jury found Mesa guilty on the third count of firearm possession and the ammunition possession count.

In addition to the substantive crimes for which he was found guilty, the jury found true a number of special circumstance allegations. With respect to both assault convictions, the jury found Mesa had committed great bodily harm and had personally used a firearm. With respect to the Ghalen shooting and Mesa's possession of a firearm during the shooting, the jury found true gang enhancement allegations. Mesa admitted the truth of two prison sentences.

The trial court imposed a total sentence of 39 years 8 months. The total term imposed included 23 years in consecutive sentences on the enhancements the jury found

true with respect to the assault on Ghalen: three years for the great bodily injury enhancement, 10 years for the personal use of a firearm enhancement, and 10 years for the gang enhancement. Mesa was eligible for a full strength 10-year gang enhancement, rather than the otherwise applicable two-, three- or four-year enhancement, "*only* because he 'use[d] a firearm which use [was] charged and proved as provided in . . . Section 12022.5.' [Citation.]" (*People v. Rodriguez* (2009) 47 Cal.4th 501, 509.)

With respect to the Ghalen felon in possession of a firearm count, the trial court imposed a consecutive sentence of eight months plus 16 months on the gang enhancement. The trial court imposed consecutive eight-month sentences on the remaining two firearm counts and an eight-month consecutive sentence on the ammunition possession count. On the two gang participation counts, the court imposed consecutive eight-month sentences.

DISCUSSION

I

In his first argument on appeal, Mesa contends and, as we indicated at the outset, the Attorney General agrees, the trial court erred in imposing sentence on all three enhancements found true with respect to the assault on Ghalen.

In *People v. Rodriguez*, *supra*, 47 Cal. 4th at page 509, the court held that, where, as here, the 10-year enhancement for gang participation is based on a defendant's use of a firearm in commission of the underlying offense, the trial court may not also impose a separate enhancement for the personal use of a firearm under section 12022.5, subdivision (a). The court held that, under those circumstances, imposition of both enhancements is barred by section 1170.1, subdivision (f), which provides in pertinent part: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." (*People v. Rodriguez, supra*, 47 Cal.4th at p. 509.)

As the court in *People v. Rodriguez* determined, given these circumstances, the proper remedy is "*not* to strike the punishment under section 12022.5 but to reverse the trial court's judgment and remand the matter for resentencing. [Citation.] Remand will give the trial court an opportunity to restructure its sentencing choices in light of our conclusion that the sentence imposed here violated section 1170.1's subdivision (f)." (*Id.* at p. 509.)[4]

II

Next, Mesa contends the trial court erred in imposing consecutive sentences on all three felon in possession of a firearm convictions. We agree with Mesa.

Section 654, subdivision (a), provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the

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[4] As Mesa points out, section 1170.1, subdivision (g), provides a similar limitation when, as here, a great bodily injury enhancement has been found true.

provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "Section 654 precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. 'Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.' [Citations.] '[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.' [Citation.]" (*People v. Evers* (1992) 10 Cal.App.4th 588, 602.)

In *People v. Spirlin* (2000) 81 Cal.App.4th 119, 130, the court found that where, as here, the evidence showed the defendant had the same handgun on three separate occasions, but there was no evidence which suggested he ever lost possession of the weapon, the defendant could only be punished once for violation of section 12021. In *People v. Spirlin* the defendant used a gun in two separate robberies committed within one month. Six days after the last robbery, the defendant was arrested and found with the same gun. His wife told police he had the gun for a couple months before his arrest. In determining only one punishment could be imposed, the court stated: "The key inquiry here is whether defendant's objective and intent in possessing the handgun on all three occasions were the same, thus making the crime one indivisible transaction subject only to one punishment under section 654. [Citation.] Section 12021 does not require any specific criminal intent; general intent to commit the proscribed act is sufficient. [Citation.] The act proscribed by section 12021 is possession of a firearm by a convicted felon. [Citation.] Possession may be either actual or constructive as long it is intentional. [Citation.] 'The proof need not conform to the exact date laid in the information, it being sufficient to prove the commission of the offense at any time prior to the filing of the information within the statutory period—the commission of the act here charged is not the kind that does not constitute a crime unless committed on a specific date; time is not of the essence or a material ingredient of the offense . . . .' [Citation.]" (*People v. Spirlin, supra*, 81 Cal.App.4th at p. 130.)

The court concluded the defendant completed the offense once he took possession of the gun, and in light of the fact there was no suggestion in the record he ever lost possession, he could not be said to have completed separate violations of section 12021 when he committed the robberies. While the court found that what the defendant did with the gun "i.e. commit the robberies, were 'separate and distinct transaction[s] undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon' [citation], the same cannot be said of his continuous possession of the weapon. In other words, defendant's intent to possess the weapon as a felon did not change each time he committed a robbery or when he was arrested and the gun confiscated." (*People v. Spirlin, supra*, 81 Cal.App.4th at pp. 130-131.)

We agree with the holding and reasoning in *People v. Spirlin*. The conduct proscribed by section 12021, i.e. the actual or constructive possession of a firearm by a felon, is by its nature continuous. As the court in *People v. Spirlin* suggested, that being the case, where possession of a firearm has not been interrupted, there is no acceptable rationale by which such continuous possession can be divided so that separate intention or objectives can be identified. Thus, we decline the Attorney General's suggestion that we depart from *People v. Spirlin*.

Here, as in *People v. Spirlin*, there is no evidence Mesa ever lost actual or constructive possession of the .45 caliber handgun which was the subject of his three convictions for violation of section 12021. Thus, under section 654 he may only be punished for one of those convictions.

III

Next, Mesa contends that under section 654 he could not be punished for both assaulting a victim with a firearm and participation in a criminal street gang. Accordingly, he contends the trial court erred in imposing consecutive eight-month sentences for the two criminal street gang convictions. We disagree with this contention.

A. *The California Street Terrorism and Prevention Act*

The California Street Terrorism and Prevention Act (the Street Gang Act), section 186.20 et seq. was enacted in 1988. (Stats. 1988, ch. 1242, § 1.) In adopting the Street Gang Act, the Legislature made a number of findings, including the following: "[T]he State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected. The Legislature finds that there are nearly 600 criminal street gangs operating in California, and that the number of gang-related murders is increasing. The Legislature also finds that in Los Angeles County alone there were 328 gang-related murders in 1986, and that gang homicides in 1987 have increased 80 percent over 1986. It is the intent of the Legislature in enacting this chapter 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*. The Legislature further finds that an effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by street gangs." (§ 186.21.)

Given these findings, the Legislature enacted section 186.22, subdivision (a), which makes it a crime to participate in street gang activity. Section 186.22, subdivision (a), states: "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."

We think it is worthwhile at the outset to recognize that in both its findings and in describing prohibited conduct, the Legislature was plainly focused on *patterns of gang activity* and the consequent *terror* those *patterns* of activity engender. Thus, it is not surprising that the courts which have considered the issue have consistently held that section 186.22, subdivision (a), may be applied to both the aiders and abettors of gang crimes and where the evidence supports the gang connection to the crime, the direct

perpetrators of crimes. (See *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 130; *People v. Salcido* (2007) 149 Cal.App.4th 356, 368; *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.) Where a direct perpetrator has committed a crime as a means of asserting the power of and respect for the gang, the direct perpetrator is just as culpable under section 186.22, subdivision (a), as any aider and abettor. (*People v. Salcido, supra*, 149 Cal.Ap.4th at p. 368.)

Here, the shootings Mesa committed *were* part of a larger pattern of gang activity, and plainly that pattern created the sort of terror which was the focus of the Legislature's efforts in adopting the Street Gang Act. Moreover, the evidence of the manner in which Mesa's crimes were carried out, including in particular Mesa's statements to the victims, shows they were committed as a means of asserting the gang's power and commanding respect. As we explain more fully below, nothing in section 654 prevented Mesa from being punished for both the grievous harm he did to Ghalen and Pierre and for the separate terror all of his gang activity, including the shootings, engendered in his community.

B. *People v. Herrera, People v. Vu, & People v. Sanchez*

In *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1310-1313, the court recently considered a claim similar to the one Mesa makes and in the course of doing so set forth the development in Court of Appeal opinions of a body of law interpreting the requirements of section 654 when, as here, a defendant has been punished for both violating section 186.22, subdivision (a), and a separate criminal statute: "The earliest case dealing with the application of section 654 in the context of a gang participation charge is *People v. Herrera* (1999) 70 Cal.App.4th 1456 (Fourth Dist., Div. Three).

"In *Herrera*, two gangs engaged in a series of retaliatory shootings. In the most recent one, shots were fired at a house occupied by members of the defendant's gang. One of them then drove and picked up the defendant, who explained to his girlfriend that 'his "home boys were after the guys." ' [Citation.] The defendant and his cohort then drove by a house identified with the rival gang, made a U-turn, and drove by again, firing shots both times. On the first pass, two people were hit. [Citation.]

"As a result, the defendant was convicted of (among other things) one count of gang participation and two counts of attempted murder. [Citation.] The court held that section 654 did not require the trial court to stay the gang participation term. It explained: ' "[M]ultiple punishment . . . may be imposed where the defendant commits two crimes in pursuit of two independent, even if simultaneous, objectives. [Citations.]" [Citation.]

" 'The characteristics of attempted murder and street terrorism are distinguishable . . . . In the attempted murders, Herrera's objective was simply a desire to kill. For these convictions, the identities (or gang affiliations) of his intended victims were irrelevant.' [Citation.] At this point, the court noted that there was 'sufficient [evidence] to establish the specific intent to kill required for both counts of attempted murder. [Citations.]' [Citation.]

"It continued: '[U]nder [Penal Code] section 186.22, subdivision (a) the defendant must necessarily have the intent and objective to actively participate in a criminal street gang. However, he does not need to have the intent to personally commit

the particular felony (e.g., murder, robbery or assault) because the 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. For example, this subdivision would allow convictions against both the person who pulls the trigger in a drive-by murder *and* the gang member who later conceals the weapon, even though the latter member never had the specific intent to kill. Hence, section 186.22, subdivision (a) requires a separate intent and objective from the underlying felony committed on behalf of the gang. The perpetrator of the underlying crime may thus possess "two independent, even if simultaneous, objectives[,]" thereby precluding application of section 654. [Citation.]' [Citation.] At this point, the court found sufficient evidence that the defendant 'intended to aid his gang in felonious conduct, irrespective of his independent objective to murder.' [Citation.]

"Finally, the court added: '[I]f section 654 were held applicable here, it would render [Penal Code] section 186.22, subdivision (a) a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang. "[T]he purpose of section 654 'is to insure that a defendant's punishment will be commensurate with his culpability.' [Citation.]" [Citation.] We do not believe the Legislature intended to exempt the most culpable parties from the punishment under the street terrorism statutes.' [Citation.]" (*People v. Sanchez, supra*, 179 Cal.App.4th at pp. 1310-1311.)

Following its discussion of *People v. Herrera*, the court in *People v. Sanchez* noted: "*Herrera* was followed by the Fourth District, Division Three in *People v. Ferraez* (2003) 112 Cal.App.4th 925 and by the Sixth District in *In re Jose P.* (2003) 106 Cal.App.4th 458. They both indicated that multiple punishment for gang participation and for the underlying offense is permissible as long as the underlying offense requires a different specific intent. (*Ferraez*, at p. 935 [possession of drugs with the intent to sell]; *Jose P.*, at pp. 470-471 [robbery].) Thus, they added little to *Herrera's* analysis.

"Thereafter, however, the Fourth District, Division Three decided *People v. Vu* (2006) 143 Cal.App.4th 1009. The author of *Herrera* was a concurring panel member in *Vu*. There, the defendant and other members of his gang conspired to kill the victim under the mistaken impression that he was a member of a rival gang. [Citation.] The defendant was convicted of (among other things) gang participation and conspiracy to commit murder. [Citation.]

"The court held that section 654 required the trial court to stay the gang participation term. [Citation.] It stated: '*Herrera* is distinguishable because the defendant was charged with a course of criminal conduct involving two gang-related, drive-by shootings in which two people were injured. [Citation.] . . .

" 'Under *Neal*, *Vu* committed different acts, violating more than one statute, but the acts of conspiracy and street terrorism constituted a criminal course of conduct with a single intent and objective. That single criminal intent or objective was to avenge [a fellow gang member]'s killing by conspiring to commit murder. Although that intent or objective could be parsed further into intent to promote the gang and intent to kill, those intents were not independent. Each intent was dependent on, and incident to, the other.' [Citation.]" (*People v. Sanchez, supra*, 179 Cal.App.4th at p. 1312, fn. omitted.)

In *People v. Sanchez* the court rejected the reasoning and holding in *People v. Herrera* and accepted the holding, but not the reasoning, of the court in *People v. Vu*. In *People v. Sanchez* the defendant was convicted of both committing a robbery with a

confederate and participating in a street gang in violation of section 186.22, subdivision (a). In finding that he could not be punished for both crimes, the court stated: "Here, the underlying robberies were the act that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation. Accordingly, it makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies. Gang participation merely requires that the defendant 'willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of that gang . . . .' [Citation.] It does not require that the defendant participated in the underlying felony with the intent to benefit the gang. [Citations.]

"In our view, the crucial point is that, here, as in *Herrera* and *Vu*, defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself. Thus, the most analogous line of cases involves convictions for both felony murder and the underlying felony. It has long been held that section 654 bars multiple punishment under these circumstances. [Citations.] The logic is that the underlying felony 'is a statutorily defined element of the crime of felony murder' [citation], and thus the underlying felony is 'the same act which made the killing first degree murder.' [Citation.]

"Most significantly for our purposes, multiple punishment for both felony murder and the underlying felony is barred even when there is evidence the killing was intentional and premeditated [citation]; thus, the trial court *could* have found that the defendant had the intent and objective of killing in connection with the murder, as well as the separate intent and objective of taking property in connection with an underlying robbery." (*People v. Sanchez, supra,* 179 Cal.App.4th at p. 1315.)

C. *Our Resolution*

With due respect to our colleagues who decided *People v. Sanchez*, we believe the court in *People v. Herrera* has the better of this dispute.

First, from a practical perspective, it seems somewhat incongruous to us to hold, as the court in *People v. Sanchez* did, that although the direct perpetrator of a gang crime may be found guilty of violating section 186.22, subdivision (a), he may not be punished for that crime because of the bar imposed by section 654. (See *People v. Sanchez, supra*, 179 Cal.App.4th at pp. 1308, 1315-1316.) We of course agree with the court in *People v. Sanchez*, as well as the courts in *People v. Salcido* (2007) 149 Cal.App.4th 356 and *People v. Ngoun* (2001) 88 Cal.App.4th 432, that a direct perpetrator is just as culpable as an aider and abettor for violation of section 186.22, subdivision (a). However, rather than ignoring the Legislature's obvious intention that direct perpetrators be punished as well as aiders and abettors, we would draw from that intention an inference that in enacting section 186.22, subdivision (a), the Legislature meant to recognize an independent crime—gang participation—rather than a species of dependent criminal culpability.

Secondly, we are unpersuaded by the court's reliance in *People v. Sanchez* on the rule in felony-murder cases. In a felony-murder case where there is only one victim, the element of malice is found by way of the fact the homicide occurred during the commission of a dangerous felony. Where the underlying felony is robbery, there is but one act, "the act of robbery . . . which made the homicide first degree murder." (*People*

v. Mulqueen (1970) 9 Cal.App.3d 532, 547.) Multiple punishment is not permissible under those circumstances because there was only one act and more importantly only one criminal objective. (*Ibid.*)

Mesa's culpability under the Street Gang Act is quite different. Violation of section 186.22, subdivision (a), does not depend solely on the commission of the underlying offense. Rather, it depends on both the commission of the underlying offense *and* the separate act of actively participating in a gang. Thus, unlike felony murder, liability under section 186.22, subdivision (a), necessarily depends on conduct distinct from the conduct which gives rise to liability for any underlying offense.

Significantly, liability under the statute and liability for an underlying offense will in most instances involve distinct criminal objectives and quite distinct impacts. Here, the record supports the inference the shootings were intended to both harm the individual victims and to demonstrate to the entire community the power of Mesa's gang. The distinct nature of these objectives and consequences can be seen vividly in the behavior of Ghalen's son Jeron.

Jeron plainly knew the danger Mesa's gang posed to him and to his prom date before any shots were fired. The pattern of Mesa's gang activity clearly had already had its impact. The fear Mesa and his fellow gang members created in the mind of that young man and his date on the evening of their prom was the very focus of the Legislature in enacting the Street Gang Act. (See § 186.21.) Importantly, Mesa would have and could have reinforced those fears by committing any number of different and lesser offenses against Jeron's father or his property and still been liable under section 186.22, subdivision (a). Mesa chose to assault Ghalen with a firearm. The shots Mesa fired had a direct and devastating impact on Ghalen; however, in light of the express purposes of the Street Crime Act, we cannot turn a blind eye to the separate and unique impact Mesa's shots no doubt had on Jeron, his date and anyone else in the vicinity who witnessed the shooting or later heard about it. They plainly had to have been terrorized by the shooting and their fear of the gang had to have been amplified. The same is true with respect to the shooting of Pierre. Pierre not only suffered grave harm, but any of the shopkeepers, their employees or members of the public who witnessed the shooting were no doubt terrorized by the act. It is that terror which the Legislature expressly addressed in section 186.21. In this sense, separate punishment under section 186.22 is far closer to the well-recognized exception to section 654 which permits multiple punishment when a defendant's conduct has injured more than one victim than it is to the felony-murder rule, relied upon by the court in *People v. Sanchez*. (See e.g. *People v. Williams* (1992) 9 Cal.App.4th 1465, 1473.)

In sum, we see nothing in section 186.22, subdivision (a), or section 654 which suggests Mesa should not be punished both for the broader crimes of instilling terror in a community by way of the multiple acts of his gang and the distinct and more grievous crimes of wounding Ghalen and Pierre. Thus, we find no violation of section 654 in punishing Mesa for both assault with a firearm and violation of section 186.22, subdivision (a).

IV

Finally, Mesa argues that he could not be punished for both possessing a firearm and possessing ammunition. We find no error.

Arguably, Mesa could not be punished for both possessing a firearm and possessing the ammunition *in* the firearm. (See *People v. Lopez* (2004) 119 Cal.App.4th 132, 137.) Here, however, the record shows that Mesa was in possession of both a weapon and a fair amount of ammunition which was not in the weapon. Under these circumstances, his possession of a weapon and ammunition were distinct enough to permit separate punishment.

DISPOSITION

The judgments of conviction are affirmed in part and reversed in part and remanded for further proceedings consistent with the views we have expressed.

_____

BENKE, Acting P. J.

WE CONCUR:

_____

NARES, J.

_____

AARON, J.

DECLARATION OF SERVICE

Case Name: TOMMY ANGEL MESA No. D056280

I, the undersigned, say: I am over 18 years of age, employed in the County of Riverside, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is P.O. Box 77757, Corona, California. My electronic notification address is delasota45003@gmail.com. I served the PETITION FOR REVIEW of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, or by sending a copy electronically, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Corona, California, on August 23, 2010. Electronic service was made to the parties specified above pursuant to California Rules of Court, rule 2.260(f)(1)(A0-(D) by attaching a copy of this brief and the proof of service to e-mail messages addressed, respectively, to eservice@adi-sandiego.com and ADIEService@doj.ca.gov and sent from my electronic notification address on the same date.

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

Executed on August 23, 2010, at Corona, California.

Richard de la Sota