IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	Supreme Court No. S185688
v.	Court of Appeal No. D056280
TOMMY ANGEL MESA,	Superior Court
Defendant and Appellant.	No. RIF137046

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

APPELLANT'S BRIEF ON THE MERITS

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Appellant shot and wounded two individuals in two separate, unrelated incidents that occurred two days apart. He was convicted of two counts of assault with a firearm in violation of Penal Code[1] section 245, subdivision (a)(2), two counts of being an ex-felon in possession of a firearm in violation of section 12021, and two counts of being an active participant in a criminal street gang in violation of section 186.22, subdivision (a) (hereinafter section 186.22(a) or "gang participation") with respect to each incident. [2]

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

[2] Appellant was also convicted of, and sentenced consecutively for, a third count of violating section 12021 related to the possession at the time of his arrest of the pistol that he used to commit the two shootings. (2 CT 389-390, 469-70.)

The trial court sentenced appellant to consecutive terms for the assault, for being an ex-felon in possession of a firearm, and for gang participation as to each incident. The trial court's imposition of separate, consecutive sentences for the crime of gang participation violated section 654's prohibition against multiple punishment for a single act or omission.

The Court of Appeal agreed that section 654 prohibited the trial court from imposing consecutive sentences for all three counts of being an ex-felon in possession of a firearm and ordered the terms for two of those counts stayed pursuant to section 654. However, the Court of Appeal ruled that separate, consecutive sentences for gang participation did not violate section 654. In this respect, the Court of Appeal erred.

Section 654 prohibits multiple punishment where more than one violation of law results from a single "act or omission." This case presents a narrow sentencing issue -- does Penal Code section 654 bar multiple punishment for gang participation in violation of section 186.22(a) ***and*** for the underlying felony used to satisfy the element of the gang participation offense that the defendant "willfully promote[d], further[ed], or assist[ed] . . . felonious criminal conduct" by members of that gang?

In this case, the trial court punished appellant twice for committing a single act by imposing separate, consecutive sentences for appellant's conviction for actively participating in a criminal street gang and for his violations of sections 245, subdivision (a)(2) and 12021 because it sentenced appellant for a crime (gang participation) that required for the 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.

This court should modify the judgment, therefore, by staying execution of the sentences imposed for the gang participation charge.

STATEMENT OF THE CASE

Appellant was convicted following a jury trial 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.

Specifically, 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 incident, and the other three counts (Counts 6, 7, and 8) related to the April 29 incident. In addition, appellant was convicted of a third count of violating section 12021 (Count 9) related to the recovery on the day he was arrested of the gun he used in the shootings. Allegations that appellant personally used a firearm within the meaning of section 12022.5 and inflicted great bodily injury within the meaning of section 12022.7 during the commission of the offenses charged in Counts 2 and 6 were found true. (2 CT 389-390; 4 RT 741-746.)[3]

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

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[3] Counts 1 and 5 charged appellant with attempted premeditated and deliberate murder. The jury deadlocked as to those counts and the court declared a mistrial. (2 CT 389-390; 4 RT 741-746, 750.) The court later dismissed those counts pursuant to section 1385. (2 CT 470-471; 4 RT 764-768.)

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.)

Appellant admitted that he had suffered the two prior felony convictions alleged against him pursuant to section 667.5, subdivision (b) and the court found them true based on appellant's admission. (2 CT 390; 4 RT 749-750.)

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(a) consecutive to the sentences the court imposed for appellant's convictions for violating sections 245, subdivision (a)(2) and 12021. (2 CT 469-470; 4 RT 758-762.)

On appeal, the Court of Appeal, Fourth Appellate District, Division One, ruled in appellant's favor on two other sentencing issues and remanded for re-sentencing, but affirmed the imposition of consecutive sentences for the two counts of gang participation in violation of section 186.22(a).

This court granted appellant's petition for review on October 27, 2010.

STATEMENT OF FACTS

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

On April 29, 2007, appellant had just finished lunch with his girlfriend at a strip mall in Corona when he got into a loud argument with 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, appellant asked him, "What the fuck are you looking at?" Appellant then shot 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. The gun used in both shootings was found in the closet in which appellant was hiding when he was arrested. (2 RT 323, 325, 352.)

A Corona Police Department gang expert testified that appellant was a member of a particular "clique" or faction of the main Hispanic gang in Corona, which was known as Corona Varios Locos (CVL)[4], and that the shootings were committed for the benefit of, at the direction of, or in association with that gang. (3 RT 450, 451-455.)

ARGUMENT

I.

APPELLANT WAS PUNISHED SEPARATELY AND CONSCUTIVELY FOR THE GANG PARTICIPATION CHARGE (§ 186.22(a)) AND FOR THE VIOLATIONS OF SECTIONS 245, SUBDIVISION (a)(2) AND 12021, WHICH SUPPLIED THE PROOF OF ONE OF THE ELEMENTS OF THE GANG CHARGE; HIS CONVICTION OF THE GANG PARTICIPATION CHARGE, THEREFORE, RESULTED FROM THE COMMISSION OF A SINGLE "ACT OR OMISSION" AND SEPARATE SENTENCING FOR THAT CHARGE WAS BARRED BY SECTION 654

Section 654 applies in two different situations -- first, where a single act violates more than one penal statute, and, second, where a defendant

[4] Appellant testified that he "claimed," or was a member of, CVL, but that CVL was not a gang. CVL was Corona. Claiming CVL was just a way of showing where one was from. (3 RT 490, 525.)

commits more than one act violating more than one statute as part of an "indivisible course of conduct" undertaken with but a single intent or objective.

In both cases, section 654 prohibits multiple punishment. However, it is only in the latter situation that the defendant's intent and objective become relevant. In the former situation, the mere fact that the defendant's single act violates more than one statute is sufficient to implicate section 654 and preclude punishment for each statute violated by the defendant's single act.

In this case, the application of either the "single act" or "indivisible course of conduct" test requires that appellant's sentences for violating section 186.22(a) be stayed because the crimes of assault with a firearm and ex-felon in possession of a firearm constituted the only proof of the "promote/further/assist" element necessary for a conviction of the gang participation charge. Thus, one act violated more than one statute and, at the same time, constituted an indivisible course of conduct. As a result, the imposition of separate, consecutive sentences for appellant's convictions of violating section 186.22, subdivision (a) exceeded the trial court's authority.

A. The Street Terrorism Enforcement and Prevention Act

In 1988, the legislature enacted the Street Terrorism Enforcement and Prevention Act (the STEP Act) as a way of dealing with the "crisis . . . caused by violent street gangs . . . ." (§ 186.21.)

To this end, the STEP Act provides enhanced penalties for a defendant convicted of any felony committed "for the benefit of, at the direction of, or in association with" a criminal street gang, as that term is defined in the statute. (§ 186.22, subd. (b).)

In addition, the STEP Act makes it a crime punishable by up to a year in the county jail or by 16 months, two or three years in state prison to "actively participate" in a criminal street gang. (§ 186.22(a).)

Section 186.22(a), which defines the substantive crime created by the STEP Act, provides as follows:

> 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.

A violation of section 186.22(a) requires the prosecution to prove 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 (3) he willfully promoted, furthered, or assisted in felonious criminal conduct by members of the that gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

The third element of the gang participation offense, and the one at issue in this case -- that the defendant promote, further, or assist felonious criminal conduct by gang members -- has been held to be satisfied by the defendant's own commission of an underlying felony offense. Thus, a gang member who commits a felony also promotes, furthers and assists felonious criminal conduct by a gang member (himself) by committing that felony. (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436; *People v. Salcido* (2007) 149 Cal.App.4th 356, 369-370; contra, *People v. Rodriguez* (2010) 188 Cal.App.4th 722, 734-735, review granted January 12, 2011, S187680.)

In the present case the jury was instructed in accord with this principle that the "promote/further/ assist" element of the gang participation charge was satisfied by proof of appellant's commission of the crimes of assault

with a firearm and ex-felon in possession of a firearm. (2 CT 359-360; 3 RT 637-639.) In addition, the prosecutor argued that appellant satisfied the same element of the charge by the commission of the same underlying offenses, stating, "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.)

It is clear from the court's instructions and the prosecutor's argument that the jury's verdict on the gang participation charge was based solely on appellant's commission of the underlying felonies.

B. Section 654 Bars Multiple Punishment Where a "Single Act or Omission" Violates More than One Penal Statute, or Where More than One Statute Is Violated by the Commission of More than One Act in an "Indivisible Course of Conduct" Committed with but One Intent or Objective

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."

Generally, section 654 applies in two different situations. The first is where, as the statute expressly provides, a single act violates more than one statute. For example, in *Neal v. State of California* (1960) 55 Cal.2d 11, the defendant threw gasoline into a married couple's bedroom and ignited it, severely burning both individuals. (*Id.* at p. 15.) In that case, the act of throwing the gasoline and setting the room ablaze supported convictions for attempted murder and arson. (*Id.* at p. 18.) However, because the defendant's single act of throwing and igniting the gasoline constituted violations of more than one statute he could be punished only for the crime providing the greater sentence. (*Id.* at p. 20.)

Similarly, where a defendant rapes a child under the age of 14, that single act constitutes not only a violation of section 261, subdivision (a)(2) (forcible rape), but a violation of section 288, subdivision (b) (forcible lewd act with a child) as well. In that situation, separate punishment for both crimes is barred by section 654. (*People v. Siko* (1988) 45 Cal.3d 820, 823.)

Where a single "act or omission" violates more than one statute, "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.)

However, "few if any crimes . . . are the result of a single act." (*Neal v. State of California, supra,* 55 Cal.2d at p. 19.) For that reason, courts have expanded the application of section 654 to include situations in which a defendant commits ***more*** than one act violating more than one statute if the acts comprise an "indivisible course of conduct" undertaken with a single intent or objective. (*Ibid.; In re Jose P.* (2003) 106 Cal.App.4th 458, 468.) For example, a person who enters a building with the intent to commit theft once inside and thereafter steals property inside the building can only be punished for the greater of the two offenses thus committed even though the person commits more than one act (entering the building and stealing property) resulting in more than one violation of the criminal law (burglary and theft), because both crimes are committed with but a single objective -- to steal property from inside the building. (*People v. McFarland* (1962) 58 Cal.2d 748, 762.)

In the judicially created "indivisible course of conduct" situation, separate punishment for each offense is permitted only if the defendant acted with a separate criminal objective or intent with respect to each "act or omission." (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208; *People v. Beamon* (1973) 8 Cal.3d 625, 637-639.) Thus, the issue of whether there was

more than one "act or omission" within the meaning of section 654 in this context, and whether, therefore, multiple punishment is permissible, depends upon the "intent and objective" of the defendant. If all the acts and 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; *Neal v. State of California, supra,* 55 Cal.2d at p.19.)

The issue in any "indivisible course of conduct" case, 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.) For multiple punishments to be valid in such a situation, "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.) "Errors 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.)

C. Appellant's Conviction for Being an Active Participant in a Criminal Street Gang Was Supported Solely by his Commission of the Crimes of Assault with a Firearm and Being an Ex-felon in Possession of a Firearm; His Commission of the Gang Participation Offense Was, Therefore, Based upon the Same Act or Omission as his Commission of the Other Offenses, and Separate Sentencing for the Gang Participation Charge Was Precluded by Section 654

Section 186.22, subdivision (a) makes it a crime to participate actively in a criminal street gang with knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity and to promote, further, or assist any felonious criminal conduct by members of that gang. (*People v. Lamas, supra,* 42 Cal.4th at p. 523.)

Appellant was convicted of two counts of violating this statute, one conviction correlating to each shooting incident. The trial court sentenced appellant to consecutive eight-month terms for each such violation. The imposition of separate, consecutive sentences for these violations was prohibited by section 654's prohibition against multiple punishment for the same "act or omission."

Because the "promote/further/assist" element of the gang participation offense has been held to be satisfied by the defendant's own commission of a felony offense (*People v. Ngoun, supra,* 88 Cal.App.4th at p. 436; *People v. Salcido, supra,* 149 Cal.App.4th at pp. 369-370), the court instructed the jury using CALCRIM No. 1400 that appellant's conduct would satisfy that element if:

> [t]he defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by: a. directly and actively committing a felony offense; OR b. aiding and abetting a felony offense. ¶ ***Felonious criminal conduct means committing or attempting to commit any of the following crimes: . . . Assault with a Firearm, PC 245(A)(2) or Felon in Possession of a Firearm, PC 12021.***

(2 CT 359; 3 RT 637-638, emphasis added.)

Similarly, the prosecutor argued that appellant satisfied that same element of the offense by committing the underlying crimes. "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.)

Thus, the jury could ***only*** have convicted appellant of the gang participation charge if it found that he promoted, furthered, and assisted felonious criminal conduct by members of his gang by committing the crimes of assault with a firearm and possession of a firearm by an ex-felon. The court's instructions and the prosecutor's argument made it clear to the jury that it could rely solely on appellant's commission of those two offenses to satisfy that element.

People v. Sanchez (2009) 179 Cal.App.4th 1297 presented an issue identical to this case. In *Sanchez*, the defendant robbed two employees of a pizza restaurant at gunpoint. He was convicted of two counts of robbery as well as one count of being an active participant in a criminal street gang in violation of section 186.22(a). (*Id.* at p. 1301.) As in this case, the underlying offenses -- the robberies -- provided the only proof of the "promote/further/assist" element of the gang participation charge. (*Ibid.*)

Under these circumstances, Division Two of the Fourth Appellate District held that section 654 barred separate sentencing for the gang participation charge and for the underlying felonies that supplied the only proof of the "promote/further/assist" element of that charge because "almost by definition, defendant had to have the same intent and objective in committing all of these crimes." (*People v. Sanchez, supra,* 179 Cal.App.4th at p. 1316.) The *Sanchez* court analogized the situation in that case to the long-standing rule that section 654 bars separate sentencing for a conviction of first-degree murder based on a felony-murder theory and for the underlying felony that made the homicide a first-degree murder. (*People v.*

Sanchez, supra, 179 Cal.App.4th at p. 1315, citing *People v. Meredith* (1981) 29 Cal.3d 682; *People v. Boyd* (1990) 222 Cal.App.3d 541; *People v. Mulqueen* (1970) 9 Cal.App.3d 532; and *People v. Magee* (1963) 217 Cal.App.2d 443.)

This case involves exactly the same principle. That is, as in the felony-murder example, appellant cannot be punished for the crime that supplied the only proof of one of the elements of the gang participation charge and for the crime of gang participation as well.

In this case, however, Division One of the same court held that section 654 did not bar separate sentencing for appellant's convictions of the gang participation charge and for the underlying felonies that supplied the proof of "promote/further/assist" element of that charge. Division One based its conclusion on two separate grounds. First, the court found it "somewhat incongruous" that the perpetrator of a gang crime could be convicted of violating section 186.22(a) but that section 654 would bar separate punishment for that offense. (*People v. Mesa* (2010) 186 Cal.App.4th 773, 786, review granted October 27, 2010, S185688.) That, of course, is no objection at all. Section 654 is designed to do exactly that where one act violates more than one statute. (*In re Wright* (1967) 65 Cal.2d 650, 653 ["Section 654 forbids multiple punishment by imposition of the proscribed multiple sentences, but not multiple convictions"].)

In addition, Division One held that appellant's violation of section 186.22(a) did not depend "solely on the underlying offense." Rather, according to the court, it depended on the commission of the underlying offense ***and*** the separate act of actively participating in a criminal street gang. (*People v. Mesa, supra,* 186 Cal.App.4th at p. 786.) For that reason, according to Division One, appellant's violation of section 186.22(a), unlike the felony-murder example relied upon by the *Sanchez* court, depended on conduct separate from the underlying felony offense.

The Court of Appeal was incorrect. There was no evidence that appellant committed more than one "act or omission" within the meaning of section 654 in committing the gang participation charge, assault with a firearm and possession of a firearm by an ex-felon. In fact, the evidence that appellant shot the two victims and possessed a firearm as an ex-felon supplied the ***only*** proof that he "willfully promote[d], further[ed], or assist[ed] . . . felonious criminal conduct" by gang members. The prosecutor argued that those underlying felonies supplied the proof of that element of the gang participation charge, and the court instructed the jury that it could find that appellant promoted, furthered, or assisted felonious criminal conduct by gang members if it found that he assaulted the victims with a firearm and possessed a firearm as an ex-felon.

Contrary to the court's assertion, appellant's conviction for violating section 186.22(a) ***did*** depend solely on the commission of the underlying offenses. Consequently, as in the felony-murder situation, where the commission of one crime supplies the proof of one of the elements of another, there was but one act, and that act supplied the proof of all the offenses.

Moreover, although they reached opposite conclusions on the applicability of section 654 both courts, Division One in this case, and Division Two in *Sanchez*, focused on the "separate intent and objective" test. However, for the reasons that follow, neither court ever had to decide whether appellant had a "separate intent and objective" for each offense for which he was sentenced (*People v. Adams, supra,* 137 Cal.App.3d at p. 355) because both cases involved a single "act or omission" that violated more than one statute, and in that situation, the "separate intent and objective" test is inapplicable.

By its terms, section 654 applies only to a situation in which one "act or omission" violates more than one penal statute. "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." (§ 654, emphasis added.)

For example, placing a bomb in a car can support convictions for attempted murder, assault with intent to commit murder, and malicious use of explosives, but because criminal liability for all three offenses rests solely on the single "act or omission" of placing the bomb in the car, a defendant convicted of all three offenses can be sentenced for only one of them. (*People v. Kynette* (1940) 15 Cal.2d 731, 762

However, the California Supreme Court has "engrafted" a "judicial gloss" upon section 654 by broadening the interpretation of the term "act or omission" to include not only the situation in which one act violates more than one statute, but the situation in which a defendant commits more than one act violating more than one statute as part of an "indivisible course of conduct" undertaken with only one intent or objective. (*People v. Siko, supra,* 45 Cal.3d at p. 822.)

In *People v. Brown* (1954) 49 Cal.2d 577 the Court stated, "Few if any crimes, however, are the result of a single physical act. Section 654 has been applied not only where there was but one 'act' in the ordinary sense [citation], but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654." (*Id.* at p. 591.)

For example, in *People v. Beamon, supra*, 8 Cal.3d 625, the defendant was convicted of kidnapping for the purpose of robbery and robbery arising out of the same incident. (*Id.* at p. 629.) The court held that under those circumstances the defendant could not be punished both for kidnapping for the purpose of robbery and the robbery for which the kidnapping was

committed since both crimes were committed "pursuant to a single objective, i.e., to rob [the victim] of [his property]." (*Id.* at p.639.)

The "intent and objective" test used by Division One in this case and by Division Two in *Sanchez* was first articulated in 1960 in *Neal v. State of California, supra,* 55 Cal.2d 11. In *Neal*, the defendant threw gasoline into a married couple's bedroom and ignited it, severely burning both individuals. (*Id.* at p. 15.) Since the act of throwing and igniting the gasoline could have supported convictions for arson and for attempted murder, the court held that separate punishment for both crimes was prohibited by section 654. (*Id.* at p. 19.)

Neal involved what might be called the "statutory" application of section 654. That is, it involved a single "act or omission" which constituted violations more than one penal statute, a situation that is specifically addressed by the language of section 654. As a result, the court could have ruled simply that separately punishing the defendant for both arson and attempted murder was prohibited by the express terms of section 654. (*People v. McFarland, supra,* 58 Cal.2d at p. 765 (conc. & dis. opn. of Schauer, J.).)

Nonetheless, the *Neal* court went on to quote *People v. Brown, supra,* 49 Cal.2d at p. 591 that because "few, if any, crimes . . . are the result of a single act," section 654 applied not only to the statutory "single act or omission" situation, but to the judicially created "indivisible course of conduct" situation as well. (*Neal v. State of California, supra,* 55 Cal.2d at p. 19.) The *Neal* court then articulated what amounted to a new test in the "indivisible course of conduct" situation. "Whether ***a 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, emphasis added.) The intent and objective test first announced in *Neal* has been used in the judicially expanded "indivisible course of conduct" application of section 654 ever since. (*People v. Latimer, supra,* 5 Cal.4th at p. 1208.)

This brief history[5] of the "intent and objective" test first articulated in *Neal* and relied upon by Division One in this case and by Division Two in *Sanchez* demonstrates that it "applies ***only*** to cases in which the defendant's conviction was based on an indivisible course of conduct." (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1043, emphasis added.)

The *Neal* "intent and objective" test does not, therefore, apply to the situation in which a ***single*** "act or omission" violates more than one statute, which is the situation addressed by the terms of section 654 itself. The *Neal* court had already discussed the situation in which one act violated more than one statute, and had gone on to explain that section 654 applied to the judicially created "indivisible course of conduct" situation as well. (*Neal v. State of California, supra,* 55 Cal.2d at p. 19.) It was only at that point that it articulated the new test that whether an act was divisible and thus gave rise to more than one "act" within the meaning of section 654 depended on the "intent and objective" of the defendant. (*Ibid.*)

This case does not involve the "indivisible course of conduct" situation. Rather, it involves the commission of one "act or omission" violating more than one statute. More precisely, it involves appellant's commission of one offense supplying the proof of one of the elements of another offense with which he was charged. Appellant's conviction of violating section 186.22(a) rested solely on his commission of the underlying offenses of assault with a firearm and being an ex-felon in possession of a firearm, because the commission of those offenses provided the only proof of the

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[5] A more detailed version can be found in *People v. Latimer, supra,* 5 Cal.4th at pp. 1207-1210 which upheld the use of the "intent and objective" test.

"promote/further/assist" element of the gang participation charge. Because the case does not involve an "indivisible course of conduct" situation the "intent and objective" test is inapplicable.

The *Sanchez* court was correct, therefore, in analogizing the situation in that case (and, by extension, this one) to the rule in the felony-murder context against separate sentencing for the underlying felony that makes the homicide a first-degree murder and the first-degree murder as well. (*People v. Sanchez, supra,* 179 Cal.App.4th at p. 1315.)

The reasoning in that situation should apply in this case. The "underlying felony [in the felony-murder situation] '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]." (*People v. Sanchez, supra,* 179 Cal.App.4th at p. 1315.) Similarly, because the underlying felonies in this case supplied the proof of one of the elements of the gang participation charge, they were the "same act" that transformed appellant's gang membership (which was not illegal of itself) into the crime of active participation in a criminal street gang. (*Ibid.*) Since they were the same act, they cannot be punished separately.

Moreover, this rationale is not confined to the felony-murder context. It has long been recognized that where the commission of one crime supplies the proof of one of the elements of another crime, section 654 bars separate sentencing for both offenses. For example, in *People v. Logan* (1953) 41 Cal.2d 279, the defendant struck the victim with a baseball bat and took her purse. (*Id.* at pp. 282-283.) He was convicted of both robbery and assault with a deadly weapon. (*Id.* at p. 282.) The court held that section 654 barred separate sentencing for both crimes because the act of striking the victim with the bat supplied the proof of the crime of assault with a deadly weapon ***and*** the element of force necessary for the commission of the crime of robbery. "The one act of inflicting force with the bat cannot both be punished

as assault with a deadly weapon and availed of by the People as the force necessary to constitute the crime of robbery . . . ." (*Id.* at p. 290; see also, *People v. Ridley* (1965) 63 Cal.2d 671, 678 [assault upon robbery victim "was the means of perpetrating the robbery" and separate sentencing for both crimes was, therefore, barred by section 654]; *People v. Moore* (1967) 249 Cal.App.2d 509, 514 [separate sentencing for kidnapping and assault with a deadly weapon barred by section 654 because the assault was the force by which the kidnapping was effected].)

Appellant's conviction for the gang participation charge in this case depended solely on his commission of the underlying felonies of assault with a firearm and being an ex-felon in possession of a firearm. Those underlying felonies were, therefore, the "same act" that proved his guilt of the gang participation charge. As in *Sanchez*, therefore, appellant was "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.)

For that reason, this case involves the "statutory" application of section 654. That is, it involves one "act or omission" that supplied the proof of a violation of more than one penal statute. As a result, the "intent and objective" test, which the *Neal* case formulated to deal with the "indivisible course of conduct" situation, and which Division One used to find that section 654 did not bar separate sentencing for the gang charge in this case, simply did not apply. In sum, appellant was punished twice for the same act, a result that is barred by the express terms of section 654.

D. Section 654 Bars Multiple Punishment in this Case Even Under the "Intent and Objective" Test Because the Underlying Felonies Were the Means by which Appellant Committed the Gang Participation Charge; Appellant, Therefore, Had but One Criminal Intent in Committing the Crimes Charged Against Him

Division One erred in concluding that appellant had a separate intent and objective for each of the crimes for which he suffered convictions and that, therefore, section 654 did not preclude multiple punishment for the underlying felonies of assault with a firearm and being an ex-felon in possession of a firearm as well as for the gang participation charge. For the reasons set out in the preceding section, appellant committed one act that violated more than one statute. As a result, the "intent and objective" test, which is uniquely applicable to the "indivisible course of conduct" situation was not applicable to appellant's case. Appellant's commission of a single act that violated more than one statute sufficed to bar multiple punishment pursuant to section 654. However, section 654 would prohibit multiple punishment even under the "intent and objective" test applicable to the "indivisible course of conduct" situation.

Whether there was more than one "act" under the judicially created "indivisible course of conduct" application of section 654 and whether, therefore, multiple punishment is permissible depends on whether the defendant harbored a separate intent for each offense for which he was sentenced. (*People v. Adams, supra,* 137 Cal.App.3d at p. 355.)

If the offenses committed by the defendant 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, supra,* 48 Cal.3d at p. 335.)

For example, in *People v. Latimer, supra,* 5 Cal.4th 1203, the defendant kidnapped the victim to a remote area, where he beat and raped her. (*Id.* at p.

1206.) The defendant pled no contest to two counts of rape and one count of kidnapping. The trial court sentenced the defendant consecutively for the rapes and the kidnapping. (*Ibid.*) Under these circumstances, the Court ruled, "Although the kidnapping and the rapes were separate acts, the evidence does not suggest any intent or objective behind the kidnapping other than to facilitate the rapes." (*Id.* at p. 1216.) For that reason, separate sentencing for the kidnapping was held to violate section 654's prohibition against multiple punishment for the same "act or omission." (*Ibid.*)

Similarly, in *People v. McFarland, supra,* 58 Cal.2d 748, the defendant was sentenced both for burglary and for grand theft for stealing an air compressor from inside a hospital. (*Id.* at p. 760.) The Court held, "the entry of the hospital and the taking of the air compressor were parts of a continuous course of conduct and were motivated by one objective, theft; the burglary, although complete before the theft was committed, was incident to and a means of perpetrating the theft." (*Id.* at p. 762.) As a result, the defendant could be "punished for either offense but not for both," and the sentence for the less serious offense had to be stayed pursuant to section 654. (*Ibid.*)

Given the record in this case, 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* (1999) 70 Cal.App.4th 1456.) 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. (*Id.* at p. 1461.) The court upheld separate sentencing for the defendant's convictions of attempted murder and gang participation, holding

that because the focus of section 186.22(a) is on the defendant's objective to promote, further and assist felonious criminal conduct by members of his gang, a violation of that section required a separate intent and objective from the underlying felony, attempted murder, which was the intent to kill. Thus, 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. (*Id.* at pp. 1467-1468.)

While it is true that a violation of section 186.22(a) requires for its proof a showing of an intent different than that necessary for the underlying crime (attempted murder in *Herrera*), 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 crimes, 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.) If the test were whether the statutory elements of the offenses were the same, section 654 would never apply to bar multiple punishment.

For example, in *People v. Latimer, supra,* 5 Cal.4th 1203, discussed above, the defendant kidnapped a woman and drove her to an isolated area where he raped her. (*Id.* at p. 1206.) To be convicted of both kidnapping and rape (as the defendant in that case was) he had to entertain two separate intents -- he had to intend to take the victim from one place to another against her will and he had to intend to force her to have intercourse with him. However, since the kidnapping was the means by which the rape was accomplished and was incidental to its commission, the defendant's multiple criminal objectives were not independent of one another and section 654 barred multiple punishment for both the kidnapping and the rape. (*Id.* at p. 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 Division One in this case (*People v. Mesa, supra,* 186 Cal.App.4th at p. 787). 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 (and, by extension, Division One's) would nullify the operation of section 654. Appellant's commission of the gang participation charge in this case depended on his commission of the underlying felonies of assault with a firearm and ex-felon in possession of a firearm. Assault with a firearm is a strike offense (§ 1192.7, subd. (c)(31).) A violation of section 186.22(a) is also a strike offense. (§ 1192.7, subd. (c)(28).) Two strike offenses were thus added to appellant's record. Even if the sentence for the gang participation charge were to be stayed pursuant to section 654, appellant's conviction for that charge would remain on his record as a strike. (*People v. Benson* (1998) 18 Cal.4th 24, 36.)

The better analysis of the issue can be found in a later decision by the same court that decided *Herrera* -- Division Three of the Fourth Appellate District. In *People v. Vu, supra,* 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 25-year-to-life terms for murder and conspiracy to commit murder and imposed a consecutive eight-month term for a gang participation conviction. (*Id.* at p. 1013.)

First, the Attorney General conceded and the court held that the trial court should have stayed the defendant's sentence for murder (rather than ordering it to run concurrent to the conspiracy to commit murder charge) pursuant to section 654. (*People v. Vu, supra,* 143 Cal.App.4th at p. 1032.) More importantly for the resolution of this case, the court decided that section 654 precluded separate sentencing for the gang participation charge and the underlying conspiracy offense because the defendant had but a single objective in committing the conspiracy to commit murder and the gang charge -- to avenge the earlier attack on the defendant and his fellow gang members. Thus, 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.)

By the same token, if appellant intended in this case to assert the power of his gang by shooting the victims, as Division One posited, the one act was the means by which the other was accomplished. Each was, therefore, "dependent on, and incident to the other." (*People v. Vu, supra,* 143 Cal.App.4th at p. 1034.)

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" -- belies its conclusion that appellant had two separate, ***independent*** objectives. If appellant shot the 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. 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, and the murder was the means by which the defendant in *Vu* "promoted" his gang by seeking to avenge the earlier attack on his fellow

gang members. In both cases, 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 by an ex-felon. 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, "almost by definition, defendant had to have the same intent and objective in committing" those offenses. (*Id.* at p. 1316.)

Even if, therefore, the "intent and objective" test were applicable to the situation presented by this case, and appellant shot the two victims with the intent to demonstrate the power of his gang, the shooting was the means by which that power was asserted and, therefore, appellant had but one intent and objective in committing the two offenses. As a result, section 654 would prohibit separate sentencing for them.

CONCLUSION

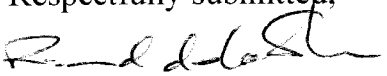
Division One's decision in this case is legally unsound. The underlying felonies of which appellant was convicted supplied the proof of one of the elements of the gang participation charge. Since appellant was sentenced for a crime that depended on the commission of another offense for the proof of

one of its elements and for the other offense as well, he was punished twice for the same act, a result that is barred by the terms of section 654.

Because the same act violated more than one statute, appellant's intent and objective in committing the crimes for which he was sentenced were irrelevant to the question whether 654 barred separate sentencing. However, even if that were the test, appellant's intent 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.

Dated: February 9, 2011

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 8,175 words.

Executed at Manhattan Beach, California, on February 9, 2011.

Richard de la Sota

DECLARATION OF SERVICE

Case Name: TOMMY ANGEL MESA No. S185688

I, the undersigned, say: I am over 18 years of age, and not a party to the subject cause. My business address is 1140 Highland Ave. #137, Manhattan Beach, California. My electronic notification address is delasota45003@gmail.com. I served the APPELLANT'S BRIEF ON THE MERITS of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, or by sending a copy electronically, addressed to each such addressee respectively as follows:

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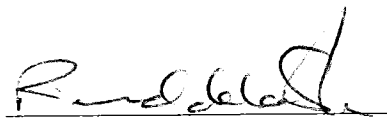
Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Manhattan Beach, California, on February 10, 2011. Electronic service was made to the parties specified above pursuant to California Rules of Court, rule 2.260(f)(1)(A)-(D) by attaching 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 February 10, 2011, at Manhattan Beach, California.



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