# 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.**

Case No. S185688



Appellate District Division One, Case No. D056280
Riverside County Superior Court, Case No. RIF137046
The Honorable Helios J. Hernandez, Judge

## RESPONDENT'S ANSWER BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General
MEREDITH A. STRONG
Deputy Attorney General
State Bar No. 255840
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2297
Fax: (619) 645-2271
Email: Meredith.Strong@doj.ca.gov
*Attorneys for Plaintiff and Respondent*

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## ISSUE PRESENTED

Appellant's Petition for Review sets forth the following issue:

"Does Penal Code section 654 bar separate sentencing for violation of 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?" (See Petition for Review, at p. 2)

## INTRODUCTION

In April 2007, appellant, a gang member, shot two complete strangers. The first victim was shot because he was "walking tough" in appellant's neighborhood and the second victim was shot because he "stared" at appellant and appellant's girlfriend. When officers arrested appellant days after the second incident, they found him hiding in the closet of his house wearing a bullet-proof vest and armed with two weapons and ample ammunition. He was apparently preparing for a gun battle with police.

On appeal, appellant argued that his conviction for active participation in a criminal street gang had to be stayed pursuant to Penal Code[1] section 654 because the only felonious criminal conduct he "promoted, furthered, or assisted" was the underlying felony of assault with a firearm. The Fourth District Court of Appeal, Division One, disagreed. The court determined that section 654 did not apply to appellant's convictions because he harbored separate and distinct intents when he committed both crimes. Accordingly, the Court of Appeal affirmed the trial court's determination that appellant could be separately punished for the assault and the active participation in a criminal street gang.

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[1] All future statutory references are to the Penal Code unless otherwise indicated.

The Court of Appeal correctly decided this issue. As it highlighted, the legislative history behind the creation of the crime of active participation directly conflicts with appellant's proposed application of section 654 in this context. The Legislature very clearly sought to punish active participants of criminal street gangs because of the unique danger criminal street gangs pose to California's communities. When viewed in light of this history, the Legislature signaled that active participation in a criminal street gang injures a victim separate and distinct from the victim of a defendant's underlying felonious conduct; it injures the community in which the crime is committed, or, stated another way, the citizens of the street on which the terror is inflicted. Thus, as the Court of Appeal here correctly noted, this situation is analogous to the multiple victim exception and section 654 is not applicable. Even if the multiple victim exception is not applicable in this context, appellant was appropriately punished separately for his active participation in a criminal street gang because substantial evidence supported the trial court's determination that he harbored separate intents and objectives which were not incidental to one another.

## STATEMENT OF THE CASE

On March 2, 2009, a Riverside County jury convicted appellant of two counts of assault with a firearm (§ 245, subd. (a)(2); counts 2 & 6). On these two counts the jury found true two attendant special allegations: 1) that appellant personally inflicted great bodily injury on Ghalen White (count 2) and Alvin Pierre (count 6) (§§ 12022.7, subd. (a) & 1192.7, subd. (c)(8)), and 2) that appellant personally used a firearm (§§ 12022.5, subd. (a) & 1192, subd. (c)(8)). (4 RT 743-744 [count 2]; 4 RT 745[count 6].) On count 2, the jury found true a third special allegation that appellant committed that count for the benefit, at the direction or in association with a

criminal street gang (§ 186.22, subd. (b)). (4 RT 744.) The jury also convicted appellant of three counts of being a felon in possession of a firearm (§ 12021, subd. (a)(1); counts 3, 7, & 9). Count 3 also had an attendant gang allegation which the jury again found true (§ 186.22, subd. (b)). Appellant was also convicted of two counts of active participation in a criminal street gang (§ 186.22, subd. (a); counts 4 & 8; 4 RT 744-746), and one count of being a felon in possession of ammunition (§ 12316, subd. (e)(1); count 10; 4 RT 746).

The jury could not reach verdicts on two counts of attempted murder (§ 666/187; counts 1 & 5). Additionally, the jury could not reach unanimous verdicts on two gang allegations (§ 186.22, subd. (b); counts 6 & 7). (4 RT 764.) Pursuant to section 1385, the court dismissed the attempted murder counts. (4 RT 768.)

On April 17, 2009, the trial court sentenced appellant to the upper term of four years on count 2 with an additional consecutive term of three years for the great bodily injury enhancement, the upper term of 10 years for the firearm enhancement, and 10 years for the gang enhancement, for a total of 27 years. (4 RT 758.) On count 3, the trial court selected to run the sentence consecutive to count 2 and imposed a sentence of one-third the midterm or eight months, with one-third the upper term on the gang enhancement (also to run consecutively), for a total of two years. (4 RT 759.) On count 4, active participation, the trial court imposed a consecutive term of eight months (one-third the midterm). (4 RT 759-760.) On count 6, the court imposed a consecutive sentence because it involved a different victim. The court imposed one-third the midterm, or one year, with an additional one year (one-third the term) for the great bodily injury enhancement and an additional three years, four months (one-third the upper term of 10 years) for the use of a firearm enhancement, bringing the total consecutive sentence on count 6 to five years, four months. (4 RT

760.) On count 7, possession of a firearm, the court imposed another consecutive sentence at one-third the mid-term, or eight months. On count 8, the second active participation charge, the court again imposed a consecutive term of eight months, which is one-third the midterm. (4 RT 760-761.) On counts 9 and 10, the trial court imposed consecutive terms of eight months. (4 RT 761-762.)

Additionally, appellant admitted the truth of two prison priors, and was sentenced to an additional consecutive year on each of those. (4 RT 762.) The court imposed a total term of imprisonment of 39 years, 8 months. (4 RT 762.) Appellant timely appealed the judgment. (2 CT 499.)

On July 13, 2010, the Court of Appeal for the Fourth District, Division One, affirmed the judgment. The court agreed with several other issues raised by appellant, but on the issue of section 654's application to his gang participation counts, the court affirmed the trial court's rulings. (Slip Op. at pp. 10-20.) Appellant filed a petition for review with this Court on August 24, 2010, and this Court granted the petition on October 27, 2010.

## STATEMENT OF THE FACTS

### A. April 27 Incident, Victim: Ghalen White

In April 2007 Ghalen White was living in an apartment in Corona with his three sons and their mother. (1 RT 90.) On the evening of April 27, 2007, White was asleep with his four-year-old son. (1 RT 91.) It was prom night, and White's oldest son, Jeron, was at home that night with his prom date. (1 RT 92.) At around 10:00 p.m., Jeron woke White up and asked him if he could accompany him and his girlfriend outside to meet the girlfriend's mother. (1 RT 93.) Jeron told White there was a group of guys hanging around outside the apartment. (1 RT 94.)

When White went outside onto the sidewalk, he noticed the group: it was a group of five or six Hispanic males, including appellant. (1 RT 94.) White told his son and his son's girlfriend to wait by the apartment, while he went to the street to check to see if her mother had arrived. (1 RT 94.) As White got closer to the street, appellant approached him and said, "Why are you walking tough in my neighborhood, Holmes?" (1 RT 95.) White took this to mean the men were gang members, and he was in their territory. (1 RT 96.) White told appellant he was not from around the area, hoping that would diffuse the situation. (1 RT 97.) Instead, appellant said, "But you're still walking tough in my neighborhood." (1 RT 97.) White told appellant he was just there for his son's prom, and appellant again said, "you're still walking tough in my neighborhood." (1 RT 98.) Appellant continued to move towards White. At the same time, White remembered his car, which was parked in front of him, had an unlocked door. (1 RT 99.) Appellant pulled out a gun, pointed it at White and fired. (1 RT 103.) White dove into his car for protection. (1 RT 100.) He heard three gunshots and felt pain. (1 RT 104.) Appellant pointed the gun at the car, looked in the back window, and then took off running. (1 RT 105-106.) White had been shot in his side; the bullet traveled entirely through his body and exited the left side. (1 RT 109.)

**B. April 29 Incident, Victim: Alvin Pierre**

In April 2007, Alvin Pierre was also living in Corona. (1 RT 195.) Two days after the White incident, on April 29, Pierre was riding his bicycle to a shopping center at 3:00 p.m. (1 RT 196.) As he rode into the parking lot, he heard appellant saying, "What the fuck are you looking at?" (1 RT 198.) Pierre rode past appellant on his bike, and got off the bike near a store. (1 RT 201.) Pierre made eye contact with appellant, and tried to ask him what he had said. Pierre could not complete his sentence because he saw a gun in appellant's hand. (1 RT 204.) Appellant pointed the gun at

Pierre's groin and fired one shot. (1 RT 206.) The bullet hit Pierre in the left leg, traveled through his scrotum, into his right leg and out the far side of his right thigh, for a total of six bullet holes. (1 RT 209-210.) The bullet shattered Pierre's left testicle and it had to be removed. (1 RT 210-211.)

**C. Gang Evidence**

Detective Dan Bloomfield, of the Corona Police Department, testified as a gang expert. (3 RT 407.) Specifically, Detective Bloomfield was an expert on the Corona Varios Locos (CVL) criminal street gang. (3 RT 413.)

CVL is the predominant Hispanic gang in Corona, California, with over 220 members. (3 RT 413, 421.) It is the largest criminal street gang in Corona, and the gang claims the entire city of Corona as its territory. (3 RT 418, 421.) CVL originally started on 4th street in Corona, and that portion of the city is considered the "main hub" of CVL activity. (3 RT 419, 434.) Both shootings in this case happened within blocks of 4th street, in the heart of CVL territory. (3 RT 434.) CVL has several different cliques or factions within it. Appellant was a member of CVL generally, and he was a member of one of these cliques, the Coroneros. (3 RT 420.)

Detective Bloomfield explained that gang members use several methods to identify themselves as affiliated with their gang. (3 RT 413.) They wear the color of the gang, clothing displaying the gang's insignia, belt buckles associated with the gang, and tattoos. (3 RT 413-414.) Gangs also use hand signs to identify themselves. (3 RT 414.) Only members of a gang are permitted to put tattoos on their body. If a non-gang member wears a tattoo of a certain gang, there will be serious consequences. (3 RT 414.)

In Corona, the typical way to become a member of a gang is to be "jumped in," or physically beaten by other gang members. (3 RT 415.) Sometimes people become gang members by "criming in," or committing a crime for the gang. (3 RT 415.) Gang members are expected to constantly

reaffirm their status in the gang by "putting in work," or committing crimes on behalf of the gang. (3 RT 416.) Gang members commit these crimes to either secure money for the gang, or to elevate the status of the gang by instilling fear in the community. (3 RT 416.) In the gang culture, respect is all important. The gang considers fear to be respect. This is where gangs derive their power. (3 RT 417.) Often times, the gang will instill fear in the community because it deters witnesses to their crimes from coming forward out of fear of retaliation. (3 RT 417.)

CVL's primary activities include attempted murders, assaults with deadly weapons, and possession of firearms. (3 RT 420.) Another member of CVL and the Coroneros, Jose Villa, committed an attempted murder and a residential burglary in 2004. (3 RT 427-428.) Johnny Aguirre and Edward Cuellard, both CVL members, were convicted of murder in 2005. (3 RT 430.)

When he was arrested, appellant had at least five tattoos on his face and neck which indicated he was a member of CVL. (3 RT 437.) He also had a tattoo on his back of a crown, and the words "Corona" and "Crown Town," and "Surreno" written on him. (3 RT 438.) Appellant had additional gang-related tattoos on his shoulder, both arms, his abdomen, across the backs of his hands and in the webs of his fingers. (4 RT 439-440.) Appellant's moniker was "Sick Dog," "Sick," or "Sick Fuck." (3 RT 440.) In 2005, appellant admitted being a member of CVL. (3 RT 441.) In a search of appellant's bedroom, officers found multiple items with writing on them, which all indicated appellant was a member of the Coroneros sect of CVL. (3 RT 441-448.) Officers also recovered pictures of appellant flashing CVL hand signs with other gang members. (3 RT 448-449.)

Detective Bloomfield testified that, in his expert opinion, appellant was an active participant in CVL and the Coroneros sect of CVL at the time

of the assaults. (3 RT 451.) He also opined that both assaults were committed for the benefit of CVL. (3 RT 451-455.)

### D. Appellant's Arrest

On May 30, 2007, officers entered appellant's house and found him hiding inside a bedroom closet. (2 RT 323.) They arrested appellant in connection with the shootings described above. (2 RT 324.) In the closet where appellant had been hiding, officers found a handgun matching the description of the one used in both shooting incidents. (2 RT 325.) Officers also found a duffel bag in the closet which contained a .22-caliber rifle with seven rounds of ammunition loaded in the gun. (2 RT 326, 355, 356.) The duffle bag had a side zipped pouch which contained 46 rounds of additional ammunition. (2 RT 357.) Appellant was wearing a bullet proof vest underneath his shirt, he had an empty gun holster on his hip, and he had a .45-caliber magazine in his front pocket with 10 additional rounds of .45-caliber ammunition loaded into it. (2 RT 328, 355 [10 rounds].) The gun recovered from the closet had one round of ammunition in the chamber and another in the magazine. (2 RT 354.) A ballistics expert testified that the shell casings recovered from the scene were shot from the gun recovered from the closet where appellant was hiding. (2 RT 391, 392, 394.)

### E. Appellant's testimony

Appellant testified and admitted his membership in the gang. (3 RT 489-490.) Appellant testified that he started hanging out with the Coroneros gang when he was 15 or 16. (3 RT 496.) Appellant was 27 at the time of the assaults. (3 RT 493.) Appellant admitted claiming CVL, but denied that CVL was a gang. (3 RT 525.) He admitted becoming a

member in 2005. (3 RT 526.) Appellant also admitted that he knew other members of CVL committed crimes. (3 RT 534.)

Appellant testified that when he shot White, the gang never crossed his mind, and the shooting did not have anything to do with the gang. (3 RT 503.) Appellant testified that his gang did not play a role in the incident. (3 RT 505-506.) The shooting of White "just had to do with what was going on right there." (3 RT 507.) It was strictly something between appellant and White. (3 RT 507.)

Likewise, with the Pierre incident, appellant testified that the gang did not make him shoot Pierre. (3 RT 512.) The gang had nothing to do with the incident. (3 RT 513.) Appellant testified that he shot Pierre because he was mad, and he just took his anger out on Pierre. (3 RT 511.) Appellant testified that the gang had no role in the second shooting either. (3 RT 513.) Appellant testified that he shot Pierre because he felt disrespected and angry; it was for personal reasons. (3 RT 513.)

## ARGUMENT

### I. SECTION 654 DOES NOT BAR PUNISHMENT IN THIS CASE, BECAUSE THE MULTIPLE VICTIM EXCEPTION APPLIES

The legislative history for section 186.22, subdivision (a)[2], demonstrates a legislative recognition that active participation in a criminal street gang has a separate victim than a defendant's general felonious conduct. Thus, as the Court of Appeal noted below, the multiple victim exception prohibits section 654's application in this context. (Slip Op. at p. 19-20.) Appellant should be punished for victimizing White and Pierre by

[2] Respondent has separately requested judicial notice of several relevant portions of the legislative history for the enactment of section 186.22, subdivision (a), part of what was known as, "The California Street Terrorism and Prevention Act," or "The STEP Act."

assaulting them with a firearm, but, he should also be separately punished for victimizing his community. When enacting the substantive gang participation offense, the Legislature clearly intended that defendants guilty of the gang participation offense be punished more harshly than those without similar gang affiliation because of the separate harm inflicted on the community.

### A. Legal principles related to section 654

Section 654, subdivision (a) provides that,

> [a]n 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 applies to sentencing for crimes resulting from an indivisible course of conduct which violates more than one statute. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) This Court has explained that when more than one criminal act is shown, section 654 still may bar multiple punishment in some circumstances. This is so because

> [s]ection 654 has been applied not only where there was but one 'act' in the ordinary sense ... 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.' [Citation.] [¶] 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* (1960) 55 Cal.2d 11, 19 (*Neal*).) Where a defendant harbors multiple or simultaneous objectives, independent of and not incidental to each other, the rule against multiple punishments is inapplicable. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) A defendant

may be punished for each violation committed in pursuit of each objective, even if the violations shared common acts or were parts of an otherwise indivisible course of conduct. (*Ibid.*)

In an often quoted passage from *Neal*, this Court explained the rationale behind section 654:

> The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person. This distinction between an act of violence against the person that violates more than one statute and such an act that harms more than one person is well settled. Section 654 is not applicable where one act has two results each of which is an act of violence against the person of a separate individual.

(*Neal v. State, supra*, 55 Cal.2d at pp. 20-21, internal quotations omitted.) The test established in *Neal* to determine whether or not section 654 is applicable to a defendant's convictions, has three parts. The first question is: can a "separate and distinct act...be established as the basis of each conviction, or [was] ... a single act ... committed that [violated] more than one statute"? (*Neal v. State, supra*, 55 Cal.2d at p. 19.) The *Neal* court went on to recognize, "[f]ew 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 ... 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." (*Ibid.*)

This brings us to the second question. When a defendant has committed more than one act (and thus, a course of conduct), is the course of conduct divisible? To answer this question, *Neal* explains, "[w]hether 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." (*Neal v. State, supra*, 55 Cal.2d at p. 19) Where the defendant harbors multiple intents or objectives, the third, and final, question is whether or not all of the "offenses were incident to one objective." If they were, "the defendant may be punished for any one of such offenses but not for more than one." Conversely, where the offenses were incident to multiple, divergent objectives, the defendant may be punished for all of his separate criminal objectives.

There is an exception to section 654's prohibition against multiple punishment where the single criminal act or indivisible course of conduct involved multiple victims. The "multiple victims" exception "permits one unstayed sentenced per victim of all the violent crimes the defendant commits incidental to a single criminal intent." (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1784.) This exception was judicially created based, in part, on this Court's holding in *Neal*:

> The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person.

(*Neal v. State, supra*, 55 Cal.2d at p. 20; see also *People v. Oates* (2004) 32 Cal.4th 1048, 1063.) Thus, "section 654 does not apply if 'one act has two results each of which is an act of violence against the person of a separate individual.'" (*People v. Ridley* (1965) 63 Cal.2d 671, 678.) This is because, "[t]he commission of multiple violent offenses against different individuals

imports a higher degree of culpability than the commission of a single offense against one individual." (*People v. Massie, supra,* 66 Cal.2d at pp. 899, 908.)

### B. Legislative intent behind section 186.22, subdivision (a)

The legislative intent in passing the STEP Act is related in section 186.21, which reads, in part,

> 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.

(§ 186.21.) In addition to this codified declaration, the entire history of the bill demonstrates a legislative intent that gang crimes be punished in an effort to deter gang behavior. The Legislative Counsel's Digest for the chaptered version of the bill reads, "Under existing law, there are no provisions which specifically make the commission of criminal offenses by individuals who are members of street gangs a separate and *distinctly punished* offense[.]" (Leg. Counsel's Dig., Assem. Bill 2013 (1987-1988 Reg. Sess.) March 6, 1987, at p. 1, emphasis added.)

When the bill was before the Assembly Committee on Public Safety, the issue being addressed was described as follows:

> Current law contains no provisions which specifically make commission of criminal offenses by members of criminal street gangs a separate offense from the crime actually committed.... This bill would make it an alternate felony/misdemeanor, punishable by up to one year in the county jail, or 16 months, two or three years in state prison, to actively participate in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal activity and willfully promote, further, or assist in any felonious conduct by gang members.

(Assem. Com. on Public Safety, Report on Assem. Bill 2013 (1987-1988 Reg. Sess.) as amended July 9, 1987, at p. 1.)

One of the arguments raised by the opposition was that sending gang members to prison would not necessarily have the desired effect. (*Id.* at p. 3.) In response to this opposition, the author of the bill replied:

> It is true that certain gang members who have been to prison are regarded as having greater status when they are released. But what is the alternative that the opponents of AB 2013 would suggest? Surely, society cannot tie its hands and refuse to punish gang related crime because of this factor. Certainly, *the gang members who are sent to prison are removed from their streeet [sic] environment for the duration of their sentence.* Experts believe that when hard core gang members are removed from the gang, the gang will itself dissipate, or at least have its criminal activity greatly reduced.

(Assem. Com. On Public Safety, Rep. on Assem. Bill 2013, "A Reply Memorandum", at p. 3, emphasis added.)

In addition, when addressing a concern about the constitutional implications of the bill, the author responded, "This bill imposes sanctions on active participation in the gang only when the defendant knows of felonious criminal activity and willfully promotes, furthers or assists it." (*Id.* at p. 4.) This demonstrates a clear intention that such active participation would be met with "criminal sanctions."

When the bill was in front of the Ways and Means committee, it was described as "a comprehensive law to impose penalties on participation in a criminal street gang." (Assem. Ways and Means Committee, Republican Analysis of Assem. Bill 2013, (1987-1988 Reg. Sess.) August, 20, 1987, at p. 1.) The analysis from the Ways and Means Committee included concern regarding the fiscal impact of the measure which would increase prison costs by imposing lengthier sentences and additional prison commitments. (*Id.* at Analysis of Assem. Bill 2013, as amended August 18, 1987, at p. 3.)

Before the Senate Committee on Judiciary, the purpose of the bill was described as an effort, "to provide law enforcement officials with the legal tools to 'put the growing number of murdering, drug-pushing youth street gang members behind bars.'" (Senate Committee on Judiciary, Analysis of AB 2013, hearing date March 22, 1988, at p. 3.)

In describing the substantive gang offense, the report stated,

> under this provision, an individual who actively participated in a gang which had established a pattern of criminal gang activity, as defined, and who willfully promoted felonious conduct by that gang *would be subject to "wobbler" penalties, whether or not he or she had participated in the crimes.*

(*Id.* at p. 4, emphasis added.)

### C. The multiple victim exception applies in this context

The legislative history makes clear that the Legislature sought to address the unique harm inflicted on communities as a result of the crimes committed by street gangs. This legislative intent comports with the recognized exception to section 654 in cases involving multiple victims. Thus, the multiple victim exception to the section 654 punishment bar is applicable in this context.

In passing the STEP Act, the Legislature was clearly concerned with the unique danger posed by criminal street gangs and the victimization of California's communities. Several quotes from section 186.21, which states the Legislature's intent in ratifying the STEP Act, demonstrate this:

> The Legislature hereby finds and declares that it is the right of every person, regardless of race, color, creed, religion, national origin, gender, age, sexual orientation, or handicap, to be secure and protected from *fear, intimidation, and physical harm caused by the activities of violent groups and individuals.*
>
> The Legislature... further finds that the 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.

(§ 186.21, emphasis added.) As the Court of Appeal noted in its opinion,

> [w]e 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.

(Slip op. at p. 12.)

The legislative history clearly indicates that the Legislature recognized the victimization of communities at the hands of criminal street gangs, and the STEP Act was ratified in an effort to combat this victimization. Given the unique legislative intent in enacting the substantive gang crime, section 654 should not apply in this context because the multiple victim exception applies. (*Cf. People v. Hicks* (1993) 6 Cal.4th 784, 792 [looking to the legislative history of section 667.6, subd. (c) to find an implicit exception to section 654's prohibition on multiple punishment.) Criminal street gangs pose a substantial threat to the safety and security of the communities in which they operate. In enacting the substantive gang participation count, the Legislature sought to punish active participants for their role in victimizing the communities in this manner. Accordingly, the section 654 bar to multiple punishment is not applicable because here the two crimes involve different victims. Ghalen White and Alvin Pierre were the victims of appellant's assaults with the deadly weapon, but the community as a whole was the victim of appellant's active participation in a criminal street gang. The Court of Appeal here recognized this and aptly described the multiple victim exception and its applicability to this case:

> 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, 12 Cal.Rptr.2d 243.)

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).

(Slip Op. at pp. 19-20.)

This Court has also recognized the unique harm inflicted on communities by criminal street gangs: "Crimes committed by gang members, whether or not they are gang related or committed for the benefit of the gang, . . . pose dangers to the public and difficulties for law enforcement not generally present when a crime is committed by someone with no gang affiliation." (*People v. Albillar* (2010) 51 Cal.4th 55.) Accordingly, the commission of a crime by an active participant in a criminal street gang carries a heightened criminal liability, and should be punished accordingly. The activities of criminal street gangs, "'both individually and collectively, present a clear and present danger to public order and safety. . . .'" (*Ibid.*, quoting Pen. Code, § 186.21.) Finding section 654 applicable in this context would wholly undermine the Legislature's intent in enacting section 186.22, subdivision (a), which was to punish active participants in criminal street gangs for the terror and havoc they are wreaking on California's communities.

As recognized by this Court in *Neal*, at its core, section 654 is aimed at ensuring that a defendant's punishment is commensurate with his criminal liability. (*Neal v. State of California, supra,* 55 Cal.2d at p. 20.) In *People v. Kramer* (2002) 29 Cal.4th 720, this Court reiterated that principle:

> As we have often stated, the purpose of section 654 'is to insure that a defendant's punishment will be commensurate with his culpability.' [Citations.] A person who commits two crimes is not less culpable than if that person had committed only one of those two crimes. Allowing a reduced sentence because of increased criminal behavior is not reasonable, and does not make punishment commensurate with culpability." (*People v. Kramer, supra*, 29 Cal.4th at p. 723, citing *People v.*

*Norrell* (1996) 13 Cal.4th 1, 15 (conc. & dis. opn. of Arabian, J.).)

Here, too, allowing appellant a reduced sentence in spite of his increased criminal behavior is not reasonable, and does not make punishment commensurate with culpability. The example offered in *Neal* illustrates this point:

> A defendant who commits an act of violence with the intent to harm more than one person *or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person.* For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person.

(*Neal v. State of California, supra,* 55 Cal.2d at p. 20, emphasis added.) Here, appellant's conviction for active participation in a criminal street gang demonstrates that he has chosen a means of committing crimes which subjects a greater number of people to injury. As an active participant in CVL, the injury he inflicted through his assaults was not confined to the direct victims. Instead, appellant also victimized everyone who saw the assaults, heard about them at a later point, or is somehow familiar with the reputation of CVL. The gang expert testified to exactly this injury. The perpetration of crimes helps to elevate the gang's status and reputation within the community and it necessarily enhances the community's fear of the gang. (3 RT 416-417.) Appellant's assaults do not simply inflict injury on his direct victims; they will help pave the way for future gang conduct. When another active participant in CVL commits a crime at some point in the future, the witnesses to that crime will also be less likely to come forward and testify against CVL. Appellant's unprovoked attacks will

necessarily get adopted into the overall reputation of CVL, and will be incorporated into the fear from which the community already suffers.

The legislative history is replete with references to the additional criminal punishment which active gang members would be subjected to by virtue of their commission of the substantive offense. As one court noted, "if section 654 were held applicable here, it would render section 186.22, subdivision (a) a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 (*Herrera*).) The *Herrera* court went on to conclude, "[T]he purpose of section 654 'is to insure that a defendant's punishment will be commensurate with his culpability.' [Citation.] We do not believe the Legislature intended to exempt the most culpable parties from the punishment under the street terrorism statutes." (*Ibid.*, citing *People v. Latimer, supra,* 5 Cal.4th at p. 1203, 1211.)

As *Neal* pointed out, in order to qualify for the multiple victim exception to section 654, the defendant must "commit[] an act of violence with the intent to harm more than one person or by means likely to cause harm to several persons." (*Neal v. State of California, supra,* 55 Cal.2d at p. 20-21.) To qualify as a crime of violence, this Court has stated that the criminal act "prohibited by the statute is centrally an 'act of violence against the person.'" (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 351, quoting *Neal v. State of California, supra,* 55 Cal.2d at p. 20.)

In *People v. Hall* (2000) 83 Cal.App.4th 1084, 1095-1096 (*Hall*)[3], the Court of Appeal addressed the question of whether or not brandishing a firearm could be considered a crime of violence for purposes of the

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[3] Respondent does not address whether or not *People v. Hall* was correctly decided, but this Court need not reach that issue in the present case.

multiple victim exception. (*People v. Hall, supra,* 83 Cal.App.4th at p. 1088.) There, the defendant brandished his weapon at three officers and was charged and found guilty of three separate counts of brandishing. The Court of Appeal determined that section 654 required the staying of two of the counts because brandishing was not a crime of violence. (*Id.* at p. 1096.) In so finding, the court noted that the crime of brandishing did not have victims, it had observers, because nothing in the statute required those present to have been actually victimized. (*Id.* at p. 1094.)

In *People v. Solis* (2001) 90 Cal.App.4th 1002, another district of the Court of Appeal was faced with the same question, but with respect to criminal threats (§ 422). (*Id.* at p. 1021.) The *Solis* court found that criminal threats did constitute a crime of violence because there was a clear victim (the listener) and the victim suffered an injury (sustained fear). (*Id.* at p. 1025.)

Active participation in a criminal street gang is also a crime of violence for similar reasons. The crime has a direct victim: the community in which the gang operates. And, appellant's active participation in the criminal enterprise coupled with his knowledge of the pattern of violent criminal behavior demonstrates an intent to harm the community directly. In addition, the entire legislative history indicates that the Legislature recognized that these communities were certainly suffering from that injury by way of sustained fear of the criminal street gangs, an inability to combat the reign of gangs because the gangs intimidated witnesses and threatened anyone who might otherwise report crime. As noted above, section 186.21 codified the legislative findings and noted, "that the 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.*" (Emphasis added.) These facts suffice to qualify active participation in a criminal street gang as a crime of

violence for purposes of the multiple victim exception. (*Cf. People v. Solis, supra,* 90 Cal.App.4th at pp. 1002, 1024-1025.)

Respondent recognizes that the multiple victim exception has traditionally been applied only in situations involving crimes of violence committed against direct victims. (*Cf. People v. Hall, supra,* 83 Cal.App.4th at p. 1084.) In addition, respondent is mindful that all crimes harm society in a general sense, and this fact does not give rise to the imposition of additional punishment for the harm done to direct victims and to society generally. But, the legislative intent behind the STEP Act signals a clear intent to target a specific type of injury which was (and is) being inflicted on the specific communities in which criminal street gangs operate. A finding that the multiple victim exception applies in these situations would be narrowly applicable to the criminal street gang context based on the clear legislative history signaling an intent to punish criminal street gang members more harshly than other criminals because of the injury caused to their communities.

This is consistent with the example mentioned in *Neal*: "a defendant who chooses a means of murder that places a planeload of passengers in danger . . . is properly subject to greater punishment than a defendant who chooses a means that harms only a single person." (*Neal v. State of California, supra,* 55 Cal.2d at p. 20, emphasis added.) Applying the multiple victim exception in this context would reiterate the point first espoused in *Neal*: The defendant who chooses a method of committing a crime which puts an entire planeload of passengers in danger is more culpable and should be punished more harshly. This is true even if that defendant only directly causes injury to one person. Likewise, appellant has chosen a method of committing crimes which subjects an entire community to danger and thus, he is more culpable and should be punished

more harshly. And, this, too, is true even though appellant only directly injured White and Pierre when he committed his assaults.

Further, one of the fundamental canons of statutory construction requires a reviewing court to, "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246, citing *People v. King* (1993) 5 Cal.4th 59, 69.) If appellant's contention were accepted by this Court, the crime of active participation in a criminal street gang would essentially cease to exist. Ordinarily, permitting a sentencing court to pronounce sentence on convicted offenses while subsequently staying imposition of those sentences pursuant to section 654 provides a defendant with the protection to which he is entitled while simultaneously ensuring that he does not escape punishment for a convicted offense or impose an undue burden on the courts should the imposed offense be overturned or remanded on appeal. (*People v. Niles* (1964) 227 Cal.App.2d 749, 756; and see *People v. Pearson* (1986) 42 Cal.3d 351, 359-360.) But here, if the conviction on the underlying felony is overturned, presumably the conviction on the active gang participation count will also be overturned as the felony was a part of the evidence supporting that conviction. Accordingly, prosecutors would stand to gain nothing from charging an active participation count. This would effectively nullify the statute and eradicate the existence of the crime. This is not only inconsistent with the legislative intent and the spirit of the STEP Act, but the canons of statutory construction also preclude judicial construction that renders part of the statute meaningless or inoperative. (*Thornburg v. Superior Court* (2006) 138 Cal.App.4th 43, 49; see also *People v. Hicks, supra,* 6 Cal.4th at pp. 784, 796, internal citations omitted ["[A] statute should not be given a construction that results in

rendering one of its provisions nugatory. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose."].)

This Court has already recognized the increased threat that criminal street gangs pose to society. (*People v. Albillar. supra,* 51 Cal.4th at p. 55.) Prohibiting additional punishment for active participants of criminal street gangs is the exact opposite outcome originally intended by section 654 because active gang participants are clearly more culpable than defendants not involved in a criminal organization. Adopting appellant's position in this case would contradict the legislative intent in enacting section 186.22, subdivision (a), and it would run contrary to the legislative intent behind section 654. Appellant did not just injure White and Pierre by shooting them without any rational justification; he also injured the City of Corona by reminding its citizens that the city is overrun by criminal street gangs who will use violence without provocation. This injury ensured that the citizens of Corona remained in fear of CVL, the precise type of injury the Legislature sought to address in ratifying the STEP Act.

## II. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S CONCLUSION THAT APPELLANT HARBORED SEPARATE INTENTS AND OBJECTIVES FOR THE UNDERLYING FELONIES AND THE SUBSTANTIVE GANG OFFENSES

Alternatively, regardless of whether appellant's behavior falls within the multiple victim exception, section 654 does not apply because appellant harbored separate objectives and intents. Appellant essentially asserts that he could not have harbored separate intents when he committed the street gang participation crimes and when he assaulted his two victims with a firearm because the two crimes necessarily contained an overlapping element, i.e. the felonious conduct. (AOB 26.) Contrary to appellant's assertions, the fact that the two crimes share underlying acts is not dispositive of this issue. Further, because appellant *could* have harbored

such distinct intents and, in fact, substantial evidence supports the conclusion that he *did* harbor separate intents, the Court of Appeal appropriately affirmed the trial court's imposition of consecutive sentences.

### A. Appellant's crimes constituted a divisible course of conduct

At the outset, appellant argues that his act of firing the gun was but a single act which gave rise to both statutory violations. (AOBM 5.) But, this argument ignores the elements of a violation of Penal Code section 186.22, subdivision (a).

Section 186.22, subdivision (a), punishes active gang participation where the defendant promotes or assists in felonious conduct by the gang. This Court recently explained, "[t]he gravamen of the substantive offense set forth in section 186.22(a) is active participation in a criminal street gang." (*People v. Albillar, supra,* 51 Cal.4th at pp. 47, 55.) In *Albillar*, this Court, citing *People v. Castenada* (2000) 23 Cal.4th 743, went on to explain,

> the phrase 'actively participates' reflects the Legislature's recognition that criminal liability attaching to membership in a criminal organization must be founded on concepts of personal guilt required by due process: "a person convicted for active membership in a criminal organization must entertain 'guilty knowledge and intent' of the organization's criminal purposes.

(*People v. Albillar, supra,* 51 Cal.4th at pp. 55-56, citing *People v. Castenada*, *supra*, 23 Cal.4th at p. 749.)

Another court held similarly,

> It is a substantive offense whose gravamen is the *participation in the gang itself.* Hence, under section 186.22, subdivision (a)

> the defendant must necessarily have the intent and objective to actively participate in a criminal street gang.

(*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1467, italics in original, fns. omitted.) To prove a charge of gang participation, the People must show three things: 1) "[a]ctive participation in a criminal street gang, in the sense of participation that is more than nominal or passive, . . ." 2) "knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity," and 3) that the defendant "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." (*People v. Lamas* (2007) 42 Cal.4th 516, 524, citing § 186.22, subd. (a).)

On the other hand, assault with a firearm requires "the general intent to willfully commit an act the direct, natural and probable consequences of which [,] if successfully completed [,] would be the injury to another." (*People v. Miller* (2008) 64 Cal.App.4th 653, 662, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899.)

Respondent agrees that appellant's commission of the assault with a firearm was comprised of a single criminal act, as opposed to a course of conduct. But, appellant's commission of the active gang participation crime was very clearly a course of conduct. To prove the elements of active participation, the People had to demonstrate that appellant "actively participated" in CVL, in a manner which was "more than nominal or passive." (See *People v. Lamas, supra*, 42 Cal.4th at p. 524.) Here, the evidence proved appellant's involvement with CVL was extensive and occurred over a number of years. Appellant testified that he began hanging out with CVL gang members when he was 15 or 16, over a decade before his commission of the instant offenses. (3 RT 496, 493.) He admitted becoming a member in 2005. (3 RT 526.) Appellant was covered in CVL-related tattoos. Detective Bloomfield testified that non-gang members are

not permitted to don the tattoos of a gang without subjecting themselves to "serious consequences." (3 RT 414.) Appellant testified that he received his first tattoo at 14 or 15 (3 RT 492), and he continued to get additional tattoos every time he returned to prison. (3 RT 492-493.) Appellant had a moniker, "Sick Dog" or "Sick Fuck". (3 RT 440.) When officers searched appellant's room, many of his possessions were covered in writings which showed appellant's allegiance to CVL and the Coroneros sect. (3 RT 441-448.) In addition, officers recovered multiple pictures of appellant with other CVL members, flashing hand signs of CVL, again demonstrating his membership and participation in the gang. (3 RT 448-449.)

Appellant's active participation in CVL was not the product of a single act. His involvement in the gang happened over several years and was demonstrated by his repeated and consistent need to show his allegiance to CVL through tattoos, hand signs, and the graffiti on his personal possessions.

The jury also had to determine that appellant had knowledge of the pattern of criminal gang activity. (See *People v. Lamas, supra*, 42 Cal.4th at p. 524.) To prove the pattern of criminal gang activity, the People presented evidence of two predicate crimes. The first, an attempted murder and residential burglary, took place in 2004. (3 RT 427-428.) The second, a murder carried out by two CVL members, was committed in 2005. (3 RT 430.) The instant assaults were committed in 2007. (1 RT 90, 195.) Appellant admitted knowing that members of CVL had committed crimes. (3 RT 534.) Accordingly, appellant's knowledge of the pattern of criminal behavior, was not imparted by a single act. He knew of the criminal behavior for years before his commission of the instant offenses. His knowledge of this pattern coupled with his active participation in CVL demonstrates that his commission of the substantive gang offense could not have been a single act. Instead, the evidence demonstrated that his

commission of this offense undeniably involved a course of conduct. Accordingly, appellant's claim to the contrary should be rejected.

### B. Substantial evidence supports the trial court's implied determination that appellant harbored separate intents and objectives which were not incidental to one another

Section 654 determinations made by the trial court are reviewed for substantial evidence supporting a finding of multiple intents. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Herrera, supra,* 70 Cal.App.4th at pp. 1456, 1466 (*Herrera*).)

> The question whether [Penal Code] section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them.

(*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) The court's findings may be either express or implied from the court's ruling. (See *People v. Blake* (1998) 68 Cal.App.4th 509, 512.) In the absence of any reference to Penal Code section 654 during sentencing, the fact that the court did not stay the sentence on any count is generally deemed to reflect an implicit determination that each crime had a separate objective. (See, e.g., *Id.*, at p. 512; *People v. Osband, supra*, 13 Cal.4th at pp. 730–731.) "We must view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Hutchins, supra*, 90 Cal.App.4th at pp. 1312–1313, internal citations omitted.)

Simply put, for purposes of the issue raised here, appellant was convicted of two counts of assault with a deadly weapon (one count for each victim) and two counts of active participation in a criminal street gang (one count for each incident). In addition, the jury determined that the assault on Ghalen White was committed for the benefit, in association, or at

the direction of a criminal street gang. (§ 186.22, subd. (b).) Here, the trial court did not discuss section 654 on the record with respect to the sentences on the active participation counts. (See 4 RT 759-761.) Accordingly, the imposition of consecutive terms is treated as an implicit determination that the trial court found substantial evidence to support a finding that appellant harbored separate intents and objectives when he committed the assaults and when he participated in CVL. The trial court was correct, and indeed, when viewed in the light most favorable to the judgment, substantial evidence supports the finding of different objectives and intents for appellant's underlying assault crimes and the active participation crimes.

Appellant assaulted the victims with the intent to proximately cause an injury. At the time of the offenses, he harbored a separate and distinct intent to actively participate in his criminal street gang.

With respect to the assaults, appellant testified that he shot White because he was walking tough in his neighborhood. According to appellant, it had nothing to do with CVL, and it was strictly a response to the situation between appellant and White. (3 RT 505-507.) Similarly, when appellant shot Pierre, he explained that he did it because he was angry and he felt disrespected. (3 RT 513.) He made clear that his decision to shoot Pierre had nothing to do with CVL and was a "personal" decision to take out his anger on Pierre. (3 RT 511-513.)

Separately, the evidence demonstrated appellant's intent to actively participate in CVL. As noted above, appellant had a history with CVL. He had been a member for at least two years at the time of the shootings (according to his admission). The evidence showed a deep-seeded allegiance to CVL, through his tattoos, association with other members, graffiti, and use of hand signs. In addition, Detective Bloomfield testified that crimes committed by gang members elevate the status of gangs in communities by instilling the community with fear. (3 RT 416.) Even

without a distinct intent to benefit the gang, the commission of crimes by gang members can perpetuate the fear and prevent witnesses from coming forward against members of the gang. (3 RT 417.) Both assaults happened in the heart of CVL territory. (3 RT 434.) For the community, this fact would reemphasize the power of the gang and CVL's reign over the city of Corona. Whether or not appellant had a specific intent to benefit his gang is irrelevant, as the mere commission of these offenses helped to bolster the gang's reputation for violence and thus, heighten the community's fear. All of this demonstrates appellant's separate and distinct intent to participate in his gang when he committed the assaults.

Appellant's intent to redress the perceived personal affronts levied at him by White and Pierre was distinct from his intent to actively participate in CVL. He undoubtedly possessed both intents simultaneously, but the two were not incident to the same objective. Appellant's intent in assaulting White and Pierre was to, as he mentioned, deal with the immediate situation at hand. (3 RT 507.) But, appellant's intent in committing the substantive gang crime was to actively participate in an organization he knew to have a criminal purpose. These intents were separate, distinct, and not incidental to one another. Appellant could have possessed the same intent to shoot White and Pierre had he not been an active participant of CVL. And similarly, appellant could have intended to actively participate in CVL without ever assaulting White and Pierre. Accordingly, the trial court correctly determined that appellant could be separately punished for the commission of both offenses.

Appellant likens this case to *People v. Vu* (2006) 143 Cal.App.4th 1009 (*Vu*). (AOBM 23-24.) In *Vu*, the defendant was convicted of conspiracy to commit murder, first degree murder and street terrorism. The first two substantive counts included gang enhancements, which the jury found true. (*Id.* at 1012.) The court stayed the sentence on the murder

charge, as section 654 does preclude imposition of a sentence for both the conspiracy and the substantive crime. (*People v. Vu*, *supra*, 143 Cal.App.4th at pp. 1032-1033, citing *People v. Hernandez* (2003) 30 Cal.4th 835, 866 ["Under [Penal Code] section 654, a defendant may not be punished for both the murder and the conspiracy"].) The court determined that section 654 applied because,

> 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.

(*People v. Vu*, *supra*, 143 Cal.App.4th at p. 1034.)

*Vu* is distinguishable on its facts because the underlying felony in *Vu* was conspiracy to commit to murder. (*People v. Vu*, *supra*, 143 Cal.App.4th at p. 1012.) The evidence demonstrated that *Vu* conspired to kill the victim, believing he was a rival gang member, in retaliation for the murder of his best friend. (*Id.* at p. 1019.) An expert testified that when a gang member is killed by a rival gang, the other members will pursue violent retaliation. (*Id.* at p. 1014.) Because the motivation behind the conspiracy was inherent in the participation in the gang, the court found that the two intents and objectives were "dependent on, and incident to" each other. (*Id.* at p. 1034.) However, in the instant case, there was substantial evidence to support a conclusion that the separate intents were independent of one another, and not incidental to one objective. Vu's active participation in his gang and his commission of the conspiracy were inextricably intertwined. Here, appellant's commission of the assaults was not inextricably tied to his participation in CVL. Rather, the evidence suggests his assaults were motivated, at least in part, by his perception of personal affronts. In retaliation for these perceived insults, he shot each victim. Separately, appellant intended to actively participate in CVL.

Substantial evidence supports the trial court's conclusion that appellant harbored distinct intents and could be punished separately for such intents.

Appellant's crimes constituted a divisible course of conduct because he harbored separate intents when he committed the two offenses, and his separate intents were not incident to the same objective. Based on the foregoing, the trial court's imposition of concurrent sentences on counts 4 and 8 was proper and Penal Code section 654 was not violated. The Court of Appeal correctly affirmed the judgment.

### C. *People v. Sanchez*[4] was wrongly decided and its use of section 654's application in the felony-murder context was misguided

Appellant relies heavily on *People v. Sanchez, supra*, 179 Cal.App.4th 1297 (*Sanchez*). (AOBM 12.) There, the appellate court found that section 654 required a stay of the gang participation sentence because the underlying felony was an element of the street terrorism conviction. (*Id.* at p. 1314.) The *Sanchez* court applied the felony-murder rule to find that section 654 bars multiple punishment where the defendant was convicted of active gang participation and the underlying felony offense. (*Id.* at p. 1315.) With all due respect, *Sanchez*'s use of section 654's application in the felony-murder context is misplaced, and fails to appreciate the original justification for the rule's creation. *Sanchez* announced a rule of law which effectively obliterates the legislative intent behind enacting a statute to punish active participants of criminal street gangs. Respondent respectfully disagrees with the reasoning in *Sanchez*, and requests that the decision be overruled.

As outlined above (see Section II, subdivision (a)), the test established in *Neal* has three parts. The second and third questions are relevant to the

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[4] *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (*Sanchez*).

*Sanchez* court's use of the felony-murder rule in this context. The first question is whether or not a course of conduct is divisible based on the intent and objective of the actor, and the third question, after finding the course of conduct divisible, is whether or not the separate intents harbored by the defendant were incidental to one objective, or whether the defendant harbored separate intents in pursuit of separate objectives. It is in answering the third question that courts have discussed the application of section 654 to felony-murder cases.

In felony-murder cases, courts often determine that where a defendant commits a felony and a murder in the context of the commission of the felony, while he may have harbored separate intents or objectives (i.e. to commit the felony and to kill the victim), the two separate intents were merely incidental to one another. (See e.g. *People v. Meredith* (1981) 29 Cal.3d 682, 695-696 (*Meredith*) ["The evidence reveals a single course of conduct with one objective, and thus defendants may be punished only for the most serious offense, first degree murder."].) In such circumstances, courts generally conclude that the commission of the murder was incidental to the commission of the felony, and accordingly, the defendant cannot be punished for both crimes. Stated another way, the murder was, in essence, a means to an end; a criminal act which was necessary to complete the original felony, and thus both crimes were committed in pursuit of the same objective. One court explained it as follows:

> In a felony-murder case the inquiry into multiple punishment parallels, but not precisely, inquiry into the question whether the murder is "committed in the perpetration" of the felony.

(*People v. Chapman* (1968) 261 Cal.App.2d 149, 180 (*Chapman*), internal citation omitted.) In *Chapman*, the court explained the application to the particular case,

> The evidence pointed to two acts of robbery upon Adcock: a taking of the bar receipts at the Spot Bar and a taking of the

> victim's personal funds at the scene of the shooting. The fatal shots were inextricably combined with both takings. There is no evidence that the shooting was motivated by any design or impulse independent of the double robbery. All the offenders' actions were incident to the single objective of robbery, and only one punishment, for the more serious crime, is lawful.

(*Chapman, supra*, 261 Cal.App.2d at p. 180.) Similarly, when a defendant commits an assault to effectuate a robbery, it is subject to section 654. (See *In re Jesse F.* (1982) 137 Cal.App.3d 164, 171.) But, "[w]hen there is an assault *after* the fruits of the robbery have been obtained, and the assault is committed with an intent other than to effectuate the robbery, it is separately punishable. (*Ibid.*, emphasis in original, citing *People v. Massie* (1967) 66 Cal.2d 899, 908; *In re Chapman* (1954) 43 Cal.2d 385, 391; *People v. Williamson* (1979) 90 Cal.App.3d 164, 172; *People v. Birdwell* (1967) 253 Cal.App.2d 621, 631-633.) Likewise in the felony-murder context, the murder is not always determined to be "incidental" to the commission of the underlying felony.

In *People v. Nguyen* (1988) 204 Cal.App. 181, 190-191, the court explained:

> The defense nevertheless argues section 654 bars multiple sentences here because the facts suggest the clerk was shot in order to eliminate him as a witness or to facilitate the assailants' escape. Perhaps; but at some point the means to achieve an objective may become so extreme they can no longer be termed "incidental" and must be considered to express a different and a more sinister goal than mere successful commission of the original crime. We should not lose sight of the purpose underlying section 654, which is "to insure that a defendant's punishment will be commensurate with his culpability."

(*People v. Nguyen, supra*, 204 Cal.App.3d at pp. 190-191, citing *People v. Perez, supra*, 23 Cal.3d at p. 552, and *Neal v. State of California, supra*, 55 Cal.2d at p. 20.)

*Sanchez* relies on a different case, *People v. Boyd* (1990) 222 Cal.App.3d 541 (*Boyd*), for the proposition that multiple punishment is prohibited in the felony-murder context because the underlying felony, "is a statutorily defined element of the crime of felony murder." (*People v. Sanchez, supra,* 179 Cal.App.4th at p. 1315, citing *People v. Boyd, supra,* 222 Cal.App.3d at p. 576.) But, this analysis, while temptingly straight-forward in its application, is overly simplistic.

With felony-murder, the fact that the felony is an element of the first degree murder charge is not, in and of itself, the reasoning behind the felony-murder rule. The cases which first held section 654 applicable in this context demonstrate that the inquiry was not regarding the elements of the offenses, but rather, it was a mere application of the test established in *Neal*.

This Court has held that the trial court violated section 654 by punishing the defendant for both felony murder and the underlying felony. (See *People v. Meredith, supra,* 29 Cal.3d at pp. 682, 696.) But, it is not clear if it did so as a matter of law or whether it did so on the facts of the case. In *Meredith*, the defendants, Scott and Meredith, were convicted of first degree murder and first degree robbery of the victim Wade. Meredith arrived at a club and told Scott he was going to rob Wade and asked that he help him get Wade outside. With the help of a third person, Wade was lured out to his car where Meredith attacked him from behind. After a brief struggle, two shots were fired. (*Id.* at p. 687.) This Court agreed that the defendants' sentences for the robbery must be stayed because "[t]he evidence reveal[ed] a single course of conduct with one objective . . . ." (*Id.* at p. 696.)

But, in other cases, section 654 has not been violated. When a defendant is charged with murder and the jury is instructed on two separate theories of first-degree murder, the application of section 654 becomes

more complicated. In *People v. Mulqueen* (1970) 9 Cal.App.3d 532, the defendant was convicted of first degree murder and first degree robbery. The jury in *Mulqueen* was instructed on alternate theories of felony murder and deliberate and premeditated murder. There was "ample evidence upon which the jury could sustain the verdict under either theory and there is sufficient substantial evidence to support the judgment as a matter of law." (*People v. Mulqueen, supra*, 9 Cal.App.3d at pp. 544-545.) But in addressing the defendant's concurrent sentence for robbery, the court cited section 654 and stated the sentence must be stayed because "[i]t is clear from the record here that there was but one act and that the act of robbery was the act which made the homicide first degree murder." (*Id.* at pp. 547-548.)

Conversely, in *People v. Osband, supra,* 13 Cal.4th at p. 622 (*Osband*), the defendant was sentenced to death after he was convicted of murder and three special circumstances were found true: that the murder was committed during a burglary, a robbery, and after raping the victim. He was also convicted of the underlying burglary, robbery, and rape. (*Id.* at p. 652.) The prosecution argued different theories to the jury: that the defendant was guilty of first degree murder for committing felony murder or that he committed a premeditated and deliberate murder. (*Id.* at p. 680.) The trial court in *Osband* imposed consecutive sentences for the rape and robbery of the victim. The defendant argued that, because the jury could have found him guilty of the murder on the basis of the underlying felonies of rape and robbery, the sentence violated section 654. (*People v. Osband, supra,* 13 Cal.4th at p. 730.) This Court disagreed, stating:

> [T]he People contend that because it is unknown whether he was found guilty of first degree murder on a theory of felony murder or premeditation and deliberation, there is no ... violation of section 654. Nor, they contend, is there any question of a single objective: ... when the court sentenced him on the rape and

> robbery counts it implicitly found that the crimes against [the victim] involved more than one objective, a factual determination that must be sustained on appeal if supported by substantial evidence. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438....) In response to the latter point, defendant replies that there was no substantial evidence that the crimes were committed for more than one objective. [¶] We agree with the People that the standard of review articulated in *Saffle* is correct, and disagree with defendant that no substantial evidence sustains the court's implicit determination that he held more than one objective when he committed the crimes against [the victim]. *Therefore we decline to stay any sentence on the ground of section 654.*

(*People v. Osband, supra,* 13 Cal.4th at pp. 730-731, emphasis added.) Thus, where a defendant is guilty of felony murder, he may still be subjected to multiple punishment for the felony and the murder if substantial evidence supports the conclusion that the murder was *not* merely incidental to the felony.

As explained above, the felony-murder rule is merely one example of a divisible course of conduct where the defendant possessed different intents, but where the intents are typically incidental to one objective. The fact that the commission of the felony was necessary to find the defendant guilty of first-degree murder was not the test; rather, the test was whether or not the commission of the murder was "in the course of the felony," and thus merely incidental to the overall objective of committing the felony.

Further, with felony murder, the first-degree murder punishment is indicative of a heightened punishment for the felony in addition to the homicide. Accordingly, those punished for first-degree murder are essentially being punished for both the homicide and the felony. Conversely, in this context, if section 654 operated to stay the punishment for active gang participation, then essentially the defendant would only be punished for the felony, and would never receive punishment for the active participation in a criminal street gang. Thus, the felony-murder element

test is not applicable in this context. It is not the overlapping of an element which necessarily dictated a violation of the bar against multiple punishment, but rather, the exposure to a heightened criminal sanction as a result of the combination of the two offenses. Here, there is no exposure to a heightened criminal sanction, unless courts are permitted to impose consecutive sentences for the active gang participation conviction.

If this Court determines that the multiple victim exception is inapplicable to these cases, the application of section 654 in this context is no different than in all others. Where the defendant's crimes constituted a course of conduct, the trial court must determine whether that course of conduct can be made divisible by separate intents and objectives. Where it is divisible, the next inquiry is whether or not the multiple intents were incident to one overall objective. If the answer is yes, section 654 applies to bar punishment for the various crimes, but where the answer is no, section 654 does not bar punishment for each independent criminal objective. Accordingly, the court in *Sanchez* improperly analogized this situation to that of felony-murder. This was error, and the opinion should be overruled.

## CONCLUSION

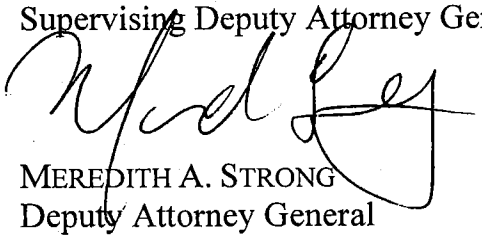
Under appellant's contention, his active participation in the Corona Varios Locos criminal street gang should not expose him to any additional criminal sanctions or punishment. Such a construction of section 654 and its application to cases like this one would render the crime of active participation in a criminal street gang a nullity. The Legislature clearly did not intend such an outcome. Because participants in criminal street gangs committing felonies are plainly more culpable, they should be punished more harshly than those criminals not actively participating in a group whose purpose is crime and the terrorization of their community.

Accordingly, respondent respectfully requests this Court affirm the judgment of the lower court and hold that section 654 is not applicable in this context.

Dated: April 15, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVEN T. OETTING
Supervising Deputy Attorney General



MEREDITH A. STRONG
Deputy Attorney General
*Attorneys for Plaintiff and Respondent*

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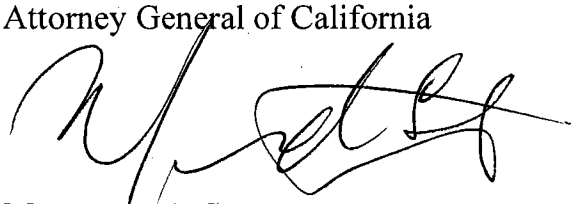
## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 12,215 words.

Dated: April 15, 2011

KAMALA D. HARRIS
Attorney General of California



MEREDITH A. STRONG
Deputy Attorney General
*Attorneys for Plaintiff and Respondent*

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## DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **The People v. Tommy Angel Mesa**
No.: **S185688**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 15, 2011, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

The Honorable Helios J. Hernandez
Riverside County Superior Court
Riverside Hall of Justice
4100 Main Street
Department 63
Riverside, CA 92501

The Honorable Paul E. Zellerbach
District Attorney
Riverside County District Attorney's Office
3960 Orange Street
Riverside, CA 92501

Fourth Appellate District
Division One
Court of Appeal of the State of California
750 B Street, Suite 300
San Diego, CA 92101

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on April 15, 2011 to Richard DeLa Sota electronic notification address elasota45003@gmail.com to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 15, 2011, at San Diego, California.

A. Curiel
Declarant

Signature

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