**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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

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

# APPELLANT'S REPLY BRIEF ON THE MERITS



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

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Appellant was convicted of two counts of assault with a firearm in violation of Penal Code[1] section 245, subdivision (a)(2) stemming from two separate, unrelated shootings occurring two days apart. Appellant was also convicted of 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"), one count with respect to each incident. The proof of one of the elements of the gang participation charge -- that the appellant "promote[d], further[ed], or assist[ed]" felonious criminal conduct by members of the gang -- was satisfied solely by the proof that appellant

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

committed the assaults.[2] The trial court sentenced appellant for the gang participation charges consecutively to the assault charges. The question presented by this appeal is whether the trial court exceeded its authority by sentencing appellant separately and consecutively for the assault charges and the gang participation charges or whether section 654 barred the multiple punishment imposed by the trial court under the circumstances of this case.

In his brief on the merits appellant argued that the trial court exceeded its authority by punishing appellant twice for a single act by imposing consecutive sentences for his convictions of violating section 245, subdivision (a)(2) and 186.22(a) because, by doing so, it sentenced appellant for committing a crime -- violating section 186.22(a) -- which relied for proof of one of its elements on appellant's commission of an underlying offense -- his violation of section 245, subdivision (a)(2) -- and for the underlying offense as well.

In its answer brief on the merits, respondent argues that the legislative history of the passage of section 186.22(a) shows that the legislature intended that the "community" be considered a separate victim of the commission of the gang participation charge and that, therefore, the

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[2] The trial court instructed the jury that it could find that appellant satisfied the "promote/further/assist" element of the gang participation charge by his commission of the underlying felonies of assault with a firearm and the three counts of being an ex-felon in possession of a firearm with which he was charged, and the prosecution argued to the same effect. In his brief on the merits, appellant, in the interest of accurately reflecting the record, recited that the jury must have relied on the commission of *both* of those offenses to find appellant guilty of the gang participation charge. However, the Court of Appeal ruled, pursuant to section 654, that appellant could only be punished for *one* count of being an ex-felon in possession of a firearm. For that reason, the Court of Appeal framed the section 654 issue presented by this appeal as whether that section barred multiple punishment *only* for the assault with a firearm and gang participation charges. In its answer brief, respondent framed the issue in the same way. In the interests of consistency and focusing the issue, appellant will frame the issue in the same way.

"multiple victim" exception of section 654 should apply to allow the court to punish appellant separately for the assaults and for the crime of being an active participant in a criminal street gang.

Respondent also argues that substantial evidence supports the trial court's implied finding that appellant harbored separate intents and objectives in committing the underlying offense of assault with a firearm and being an active participant in a criminal street gang, and that, therefore, section 654's prohibition against multiple punishment for the same course of criminal conduct does not apply.

Appellant submits the following brief in reply to respondent's brief on the merits. If appellant does not address a specific point raised by respondent, it should not be considered a concession of the validity of respondent's argument. Rather, it reflects appellant's view that the matter was adequately addressed in his brief on the merits.

## ARGUMENT

### I.

### THE TRIAL COURT EXCEEDED ITS AUTHORITY BY SENTENCING APPELLANT SEPARATELY AND CONSECUTIVELY FOR HIS CONVICTIONS BECAUSE THAT SENTENCE PUNISHED APPELLANT TWICE FOR A SINGLE "ACT OR OMISSION," A RESULT BARRED BY SECTION 654; THE "MULTIPLE VICTIM" EXCEPTION TO THE OPERATION OF SECTION 654 DOES NOT APPLY TO THIS CASE

The California Street Terrorism Enforcement and Prevention Act (the "STEP Act") makes it a crime to participate actively in a criminal street gang as that term is defined in the statute. Section 186.22(a), defining the crime, 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 -- 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. (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436; *People v. Salcido* (2007) 149 Cal.App.4th 356, 369-370.) In this case, the jury was instructed in accord with this theory 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.) The prosecutor's argument was consistent with the same theory, "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.) There was no other evidence that appellant promoted, furthered, or assisted any felonious criminal conduct by members of the gang in which he was alleged to have actively participated.

Since 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 underlying offenses to satisfy that element, and there was no other proof of

it, 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.

As a result, when the trial court sentenced appellant consecutively for the gang participation charge *and* for the underlying felony that provided the only proof of one of its elements, it necessarily punished him twice for the same act, a result that is barred by the operation of section 654.

Section 654 expressly bars multiple punishment where 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.) Because the defendant's single act of throwing and igniting the gasoline constituted violations of more than one statute (attempted murder and arson) he could be punished only for the crime providing the greater sentence. (*Id.* at p. 20.)

However, when the defendant in *Neal* argued that section 654 barred multiple punishment for the two counts of attempted murder as well (*Neal v. State of California, supra,* 55 Cal.2d at p. 20), the court rejected his argument, pointing out that the "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.'" (*Id.* at pp. 20-21, citing *People v. Brannon* (1924) 70 Cal.App. 225, 235-236.)

Respondent argues that the long established "multiple victim" exception to section 654 noted in *Neal* should apply in this case 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." (RBOM 17, emphasis added.) For a number of reasons respondent's attempt to fit this case into the multiple victim exception by describing the "community as a whole" as the victim of the gang participation charge is the legal equivalent of attempting to fit the proverbial square peg into the round hole.

First, even in the cases cited by respondent, the multiple victim exception applies to crimes of violence committed against specific, individual human beings, not against the amorphous concept of the "community as a whole." In *Neal*, the defendant attempted to kill two human beings, a husband and wife. (*Neal v. State of California, supra,* 55 Cal. 2d at p. 15.) While the court pointed out that a defendant who attempts 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" (*id.* at p. 20) even the *Neal* court's hypothetical "planeload of passengers" (see RBOM 20) would necessarily be comprised of specific, identifiable human beings, not the community as a whole. The policy behind the multiple victim exception is that the defendant's punishment should reflect the harm he causes, and the more individuals he harms or places in danger, the greater should be his punishment. (*Neal v. State of California, supra,* 55 Cal.2d at pp. 20-21.) Respondent's assertion that the community as a whole is the victim of a violation of section 186.22(a) does not advance that policy. In fact, it is completely unrelated to it.

Moreover, a violation of section 186.22(a) is not a crime of violence for the purposes of the multiple victim exception. In fact, it does not even require the existence of a victim for its commission. A violation of the statute requires only that a defendant actively participate in a criminal street gang, as that term is defined, with certain knowledge and intent requirements.

In fact, even the "felonious criminal conduct" that the defendant must promote, further, or assist need not be a crime of violence. (§ 186.22, subd. (a); *People v. Lamas, supra,* 42 Cal.4th at p. 523.)

Respondent's use of the legislative history of section 186.22 is similarly unpersuasive. That the Legislature passed section 186.22 in the belief that criminal street gangs pose a danger to the peace and well-being of the citizens of California is not dispositive, nor does it make a violation of section 186.22(a) a violent crime. The same could be said of the passage of legislation relating to any non-violent crime, such as theft, vandalism, or the possession or sale of controlled substances. For example, a person who violates section 186.22(a) by promoting the possession or sale of drugs (see, e.g., *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930) is not guilty of a crime of violence. Moreover, not all the "predicate offenses" necessary to a finding of the "pattern of criminal gang activity" required for the existence of a criminal street gang are crimes of violence. (§ 186.22, subd. (e).)

Further, there is nothing in the legislative history of the statute or the legislative findings recited in section 186.21 that demonstrates the Legislature's intent to make the "community" the "victim" of a violation of section 186.22(a) such that section 654 would be inapplicable whenever a gang member committed an underlying felony that supplied the proof of the "promote/further/assist" element of a violation of section 186.22(a). Such a reading of the history of the statute and the legislative findings would operate as an implied repeal of section 654 in that situation, a result that would run afoul of the commonly accepted rule of statutory interpretation that repeals by implication are not favored. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 379.) If the Legislature had wanted to make a violation of section 186.22(a) based upon the defendant's own commission of an underlying felony an exception to the application of section 654, it could have said so. (*People v. Palacios* (2010) 41 Cal.4th 720, 731.)

The most that can be said for the legislative history of the statute and the declarations accompanying it is that the Legislature found that the passage of section 186.22(a), making active participation in a criminal street gang a crime, was in the best interests of the state, a result that exists in the passage of any legislation.

Even respondent acknowledges that there is no authority for its position. "Respondent recognizes that the multiple victim exception has traditionally been applied only in situations involving crimes of violence committed against direct victims. [Citation.] 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." (RBOM 23.) Nonetheless, respondent argues that the operation of section 654 would "nullify" the gang participation charge and "eradicate" its existence. (RBOM 24.) This is simply not true.

First, section 654 has long been held applicable where the commission of one crime supplies the proof of one of the elements of another. (*People v. Logan* (1953) 41 Cal.2d 279, 290 [where the crime of assault constitutes the force necessary to complete the crime of robbery, punishment for both the assault and the robbery is barred by section 654].) The situation presented by this case involves exactly the same principle. Appellant's commission of the crime of assault with a firearm supplied the only proof of the "promote/further/assist" element of the gang participation charge. If anything, then, respondent's position would negate the operation of 654 in a situation to which it is clearly applicable.

Moreover, the assertion that the application of section 654 in the situation presented by this case would nullify section 186.22(a) is a classic example of a false choice. Respondent's argument is that if the prosecution cannot prove the commission of the gang participation statute by simply proving that the defendant committed some underlying felony, section

186.22(a) would be written out of existence. The truth is, however, that the application of section 654 in the circumstances presented by this case would do nothing of the sort. First, nothing prevents the prosecution from proving the "promote/further/assist" element of section 186.22(a) by evidence other than the defendant's commission of an underlying felony. In addition, since a violation of section 186.22(a) is a strike offense (§ 1192.7, subd. (c)(28)), even a sentence for a gang participation conviction stayed pursuant to section 654 would remain a strike on the defendant's record. (*People v. Benson* (1998) 18 Cal.4th 24, 36.)

In sum, the multiple victim exception to the operation of section 654 is inapplicable to the situation presented by this case.

## II.

## THE "INTENT AND OBJECTIVE" TEST RELIED UPON BY RESPONDENT IS INAPPLICABLE IN THE CIRCUMSTANCES PRESENTED BY THIS CASE BECAUSE APPELLANT WAS PUNISHED MORE THAN ONCE FOR THE SAME "ACT OR OMISSION"

In his brief on the merits appellant's primary argument was that since his single act of shooting the victims provided the proof of the "promote/further/assist" element of the gang participation charges, the trial court punished appellant twice for the same "act or omission," a result that is expressly forbidden by section 654. Further, appellant argued that where a single "act or omission" violates more than one penal provision, the "intent and objective" test formulated by *Neal v. State of California, supra,* 55 Cal.2d 11 is inapplicable. (ABOM 14-17.)

Notably, respondent does not address appellant's first point -- that both the gang participation and assault convictions arose out of the single act of shooting the victims. Nor does respondent identify any other act by which

appellant promoted, furthered, or assisted felonious criminal conduct by gang members. If both convictions *did* arise from a single act, of course, multiple punishment is barred by the express terms of section 654. Instead, however, respondent argues that substantial evidence supported the trial court's implied finding that appellant harbored separate intents and objectives in committing the assaults and the gang participation charges. (RBOM 25.)

Preliminarily, respondent misstates appellant's argument: "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." (RBOM 25.)

Appellant does not argue that section 654 applies because the crimes of assault with a firearm and gang participation share proof of "felonious conduct" as an "overlapping element." Rather, section 654 applies because appellant's commission of the assaults provided the proof of the element of the gang participation charge that he promoted, furthered, or assisted in felonious criminal conduct by gang members. Having misstated appellant's argument and the law, respondent's conclusion that "the fact that the two crimes share underlying acts is not dispositive of this issue" is both inaccurate and irrelevant.

Next, respondent focuses on the statutory elements of the gang participation charge and asserts that the shooting of the victims was a "single act" but that his commission of the crime of gang participation was a "course of conduct." (RBOM 27.) However, the resolution of the multiple punishment issue presented by this case does not depend upon the elements of the crimes for which appellant was punished, but whether appellant was punished more than once for the same act (the "statutory" application of section 654) or whether he committed more than one act violating more than

one statute as part of an indivisible course of conduct undertaken with a single objective (the "judicially created" application of section 654). The elements of the two crimes are different regardless of which theory of section 654 applies. The fact that the elements of the two crimes are different is irrelevant. If that were the test, section 654 would never apply to bar multiple punishment. As a result, respondent's reliance on the elements of the crimes for which appellant suffered convictions is misplaced.

To illustrate the point, section 186.22(a) requires for its commission proof 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 that gang. (*People v. Lamas, supra,* 42 Cal.4th at p. 523.)

Respondent recites at length the evidence that appellant actively participated in the Corona Varios Locos gang (CVL). (RBOM 27-28.) Respondent goes on to argue that because appellant's involvement in the gang went back for several years it was not the product of a single act. (RBOM 28.) Similarly, respondent describes the evidence of appellant's knowledge that the gang engaged in a pattern of criminal gang activity and argues that appellant's knowledge "was not imparted by a single act." (RBOM 28.)

While respondent correctly describes the evidence of these elements of the gang participation crime, that is irrelevant to the resolution of the issue in this case. Active participation in a gang and knowledge of its pattern of criminal gang activity do not by themselves constitute a violation of the gang participation statute. A violation of section 186.22(a) occurs only when all three elements of the statute -- that the defendant actively participated in the gang *and*, with knowledge of its commission of a pattern of criminal gang activity, promoted, furthered, and assisted felonious criminal conduct by its

members -- are present at the same time. The real question, therefore, is whether the evidence that appellant promoted, furthered, and assisted felonious criminal conduct and the shooting of the victims comprised the same act or course of conduct.

In this case, the prosecution alleged that all three elements of the gang participation statute were present twice, once when appellant shot Galen White and once when he shot Alvin Pierre. Counts 4 and 6 of the information charged appellant with assaults with a firearm upon White (Count 4) and Pierre (Count 6). The assault on White was alleged to have occurred on April 27, 2007 and the assault on Pierre on April 29. Counts 6 and 8 charged appellant with violating section 186.22(a), Count 6 on April 27, 2007 and Count 8 on April 29. (1 CT 288-291.)

Further, the court's instructions and the prosecutor's argument made it clear that the prosecution was relying on appellant's commission of the shootings to satisfy the "promote/further/assist" element of the gang participation charge. (2 CT 359-360; 3RT 637-639; Supp. RT 99-100.) Conversely, had the shootings not occurred, the prosecution would *not*, on this record, have been able to charge appellant with a violation of section 186.22(a) and the jury could not have found him guilty of it had it done so. As a result, the prosecution's own theory of the case requires an affirmative answer to the question whether the shootings and appellant's participation in CVL constituted the same act within the meaning of section 654.

Additionally, respondent argues that the two crimes, assault with a firearm and gang participation, were committed independently, although at the same time. "Appellant could have possessed the same intent to shoot [the victims] had he not been an active participant of CVL . . . [and he] could have intended to actively participate in CVL without ever assaulting [them]." (RBOM 31.)

This argument is inconsistent with the way the case was charged, the prosecution's theory of the case, and the way the jury was instructed. Appellant was charged with two counts of gang participation, each count corresponding to one of the shooting incidents. The prosecution's theory of the case was that both crimes were committed for the benefit of the gang and gang enhancement allegations pursuant to section 186.22, subdivision (b) were also charged as to each shooting. The People's gang expert, Detective Dan Bloomfield, testified that gang members commit crimes to instill fear and respect in the community in which they operate, so that appellant's shootings of the two victims were committed for the benefit of the gang. (3 RT 417, 451-455.) The jury was instructed that it could find that the "promote/further/assist" element of the gang participation charge was satisfied by appellant's act of shooting the victims (2 CT 359; 3 RT 637-638), and the prosecutor argued to the same effect (Supp. RT 99-100).

Even if, therefore, respondent were correct in its assertion that the case turns on whether appellant had separate intents and objectives in shooting the two victims and in committing the gang participation charge, the answer would have to be that those crimes were "merely incidental to, or were the means of accomplishing or facilitating one objective." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) If appellant shot the victims to instill fear, respect and intimidation in the community on behalf of his gang (see RBOM 15-17) then his two objectives, to shoot the victims and to participate in the gang, were not independent of one another, but the one was incidental to the other. The shooting was the means by which appellant was alleged to have instilled fear and respect in the community. If the prosecution's theory of the relationship between the gang culture and the shootings is correct, therefore, the commission of the one crime can only be considered incidental to the commission of the other. In such an "indivisible course of conduct" situation, "[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.)

In any event, however, for the reasons discussed *ante*, at pages 10-11 and in appellant's brief on the merits at pages 14 through 17, the "independent intent and objective" test is inapplicable because appellant was punished twice for a single act, a result that is expressly barred by the terms of section 654, and which does not require an inquiry into the perpetrator's intents or objectives. The *only* proof that appellant promoted, furthered, or assisted felonious criminal conduct by members of CVL consisted of the evidence that he shot the two victims. The jury was instructed to that effect and the prosecutor argued the same point. (2 CT 359; 3 RT 637-638; Supp. RT 99-100.)

In *People v. Sanchez* (2009) 179 Cal.App.4th 1297, Division Two of the Fourth Appellate District considered the identical issue presented by 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. (*Id.* at p. 1301.) As in this case, the only proof that appellant promoted, furthered or assisted felonious criminal conduct by gang members was his own participation in the robbery. The court sentenced the defendant to a concurrent, unstayed sentence for the gang participation charge. (*Id.* at p. 1309.)

Division Two held that since the defendant 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" section 654 barred separate punishment for each crime. (*People v. Sanchez, supra,* 179 Cal.App.4th at pp. 1315-1316.) The *Sanchez* court analogized the situation in that case to the 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 first-degree murder. (*Id.* at p. 1315.)

Not surprisingly, respondent disagrees with the holding in *Sanchez* and argues that it should be overruled. Respondent disagrees primarily with the *Sanchez* court's reliance on the rule against punishing a defendant both for a first-degree murder based on a felony-murder theory and for the underlying felony that made the killing a first-degree murder. (RBOM 33-38.) Respondent acknowledges the rule, but cites two cases that it contends cast doubt on its application in this case.

The first is *People v. Nguyen* (1988) 204 Cal.App.3d 181. In *Nguyen*, the defendant and an armed accomplice entered a market and, while Nguyen stayed in the store rifling the till, the accomplice forced the proprietor into the back of the store, forced him to lie on the floor, took property from him, and then shot him in the back (not fatally) while he lay helpless and unresisting on the floor. (*Id.* at p. 185.) Nguyen claimed that separate sentencing for the attempted murder and the robbery were barred by section 654. (*Id.* at p. 189.) The court held that the shooting of the proprietor was a "gratuitous" act of violence that was neither necessary nor incidental to the robbery and that, therefore, separate sentencing for the two crimes was not barred by section 654. (*Id.* at pp. 190, 193.) *Nguyen's* application to this case is unclear. It is not a felony-murder case, and the legal and factual context in which the section 654 issue arose is completely dissimilar from the context of this case.

The second is *People v. Osband* (1996) 13 Cal.4th 622 in which the defendant was found guilty of murder in which the special circumstances of burglary, robbery and rape were found true. (*Id.* at pp. 652-653.) The defendant was sentenced to death (*Id.* at p. 652) and the trial court sentenced the defendant consecutively for the rape and the robbery, a sentence the defendant argued was barred by section 654 (*Id.* at p. 730). The prosecutor

had argued to the jury that the defendant could be found guilty of first-degree murder as a result of premeditation and deliberation or on a felony-murder theory. (*Id.* at p. 680.) The court ruled that since there was no way to determine whether the jury's verdict was based on a felony-murder theory or premeditation and deliberation, the trial court's implicit determination that there were separate objectives had to be upheld as long as there was substantial evidence to support it. (*Id.* at p. 730.) In any event, the court ruled that it was not going to decide whether section 654 was violated "because the jury *may* have found him guilty on a theory of felony murder" because once the sentence of death was carried out, there would be no further punishment. (*Id.* at p. 731, original emphasis.) The applicability of *Osband* to this case is not clear. The court's statement implies that if the defendant *had* been convicted on a felony murder theory, additional punishment for the underlying felonies would have been barred by section 654. However, the case is distinguishable because, in essence, the court held that there could be no multiple punishment in any event because of the defendant's death sentence.

On the other hand, as respondent concedes (RBOM 34, 36), where a first-degree murder conviction *does* rest on a felony-murder theory, section 654 prevents sentencing for both the first-degree murder and the underlying felony that elevated the killing to a first-degree murder in the first place. (*People v. Meredith* (1981) 29 Cal.3d 682, 695-696; *People v. Boyd* (1990) 222 Cal.App.3d 541, 576; *People v. Mulqueen* (1970) 9 Cal.App.3d 532, 544-545.) 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.

Moreover, as appellant pointed out in his brief on the merits (ABOM 18) this rationale is not confined to the felony-murder context. It has long been

held that where evidence of the commission of one crime proves one of the elements of another, section 654 forbids separate punishment for both crimes.

In *People v. Logan, supra,* 41 Cal.2d 279, for example, 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. "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]; *In re Jesse F.* (1982) 137 Cal.App.3d 164, 171 [same]; *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].)

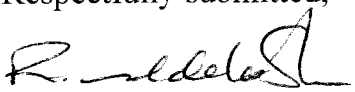
In this case, appellant's assault with a firearm upon the two victims supplied the only proof of the element the gang participation charge that appellant promoted, furthered, or assisted felonious criminal conduct by members (in this case himself) of the gang in which he was alleged to have actively participated. For that reason, he was punished twice for the same act, a result that is prohibited by the express terms of section 654, and by a long line of well-established precedent.

## CONCLUSION

The underlying felonies of which appellant was convicted supplied the only proof of the "promote/further/assist" element of the gang participation charge. Since appellant was sentenced for a crime that depended on the commission of an underlying offense for the proof of one of its elements and for the underlying offense as well, he was punished twice for the same act, a result that is barred by the terms of section 654. Respondent's arguments to the contrary are unpersuasive. The trial court should have stayed the sentences for appellant's convictions of violating section 186.22(a) and the Court of Appeal erroneously affirmed the trial court's failure to do so.

Dated: May 6, 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, appellant's reply brief on the merits contains 5,670 words.

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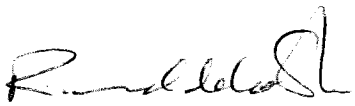


Richard de la Sota

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 REPLY 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:

Attorney General
110 W. "A" St., Ste 1100
P.O. Box 85266
San Diego, CA 92186-5266
(Served electronically and by mail)

Riverside County District Attorney
Attn: Appeals Division
3960 Orange St.
Riverside, CA 92501

Tommy Mesa #P85323
P.B.S.P. B06 226
P.O. Box 7000
Crescent City, CA 95532

Riverside County Superior Court
Attn: Appeals Division
4100 Main Street
Riverside, CA 92501

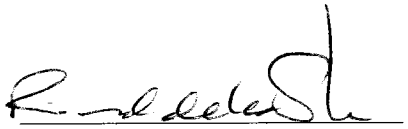
Appellate Defenders, Inc
555 West Beech St., Suite 300
San Diego, CA 92101-2939
(Served electronically)

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

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 May 9, 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 May 9, 2011, at Manhattan Beach, California.



Richard de la Sota