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September 17, 2014

Frederick K. Ohlrich
Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

RE: **S202921, *People v. Le et al.***
Supplemental Letter Brief Requested by the Court

Dear Mr. Ohlrich:

On August 27, 2014, the Court directed the parties to file supplemental letter briefs. As the representative of the People of the State of California, the named plaintiff and respondent in this matter, the District Attorney of San Diego County respectfully submits this letter in compliance with the Court's order.

The Court requested the parties to address the question "whether the People adequately met their pleading burden by generically pleading the Penal Code section 186.22 enhancement under subdivision (b)(1) without greater specificity as to whether the People sought enhancement under subdivision (b)(1)(A), (b)(1)(B), or (b)(1)(C) of that section, and whether, in light of such generic pleading, the People should be estopped from relying or permitted to rely at sentencing on subdivision (b)(1)(B) of section 186.22. (Pen. Code, § 1170.1, subd. (e); *People v. Mancebo* (2002) 27 Cal.4th 735.)"

As will be shown, the People adequately met their pleading burden as to the Penal Code[1] section 186.22, subdivision (b)(1) (§ 186(b)(1)), enhancement in this case and, thus, are not estopped from arguing that defendant Yang should be sentenced under subdivision (b)(1)(B) of section 186.22 (§ 186(b)(1)(B)). The Court's decision in *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*) is distinguishable.

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

Before addressing the Court's specific questions, it is important to review the background and history regarding pleading and proof of the gang enhancement in count 4 of the information. As it is the primary focus of the Court's inquiry, the facts, holding, and rationale of the *Mancebo* case are then detailed. *Mancebo* is then contrasted and distinguished in the Argument portion of this letter brief. We conclude with a discussion as to why the concept of prosecutorial estoppel does not apply here.

PROCEDURAL HISTORY

This People's appeal involves the sentencing parameters related to count 4 of the information against defendant Down George Yang. Count 4 charged defendant Yang with committing the crime of assault with a semiautomatic firearm in violation of section 245, subdivision (b) (§ 245(b)). (I C.T. p. 17.) It was also alleged defendant Yang personally used a firearm in the commission of this offense within the meaning of section 12022.5, subdivision (a)(1) (§ 12022.5(a)(1)). (I C.T. p. 17.) As relevant here, count 4 also stated:

> And it is further alleged that the defendants DOWN GEORGE YANG ... did commit the above felony offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members within the meaning of PENAL CODE SECTION 186.22(b)(1).

(I C.T. p. 17.) Preceding the list of formal charges on the information is the "Charge Summary." The charge summary is a helpful, quick reference to the sentencing options for each count and allegation set forth within the information. The "Charges Summary" lists count 4, § 245(b), as having a "sentencing range" of "3-6-9." (I C.T. p. 15.) The "special allegation" of "PC186.22(b)(1)" indicates to "Check Code." (I C.T. p. 15.) Finally, the "special allegation" of "PC12022.5(a)(1)" indicates the "allegation effect" is "+3-4-10." (I C.T. p. 15.) Defendant Yang never filed a demurrer to the information.

At trial, the jury was instructed as to the factual elements necessary to prove the § 186.22(b)(1) allegation. (II C.T. pp. 288-290; 15 R.T. pp. 3138-3141.) The jury found defendant Yang guilty of violating count 4 and found true the personal use of a firearm allegation. (II C.T. p. 307; 17 R.T. pp. 3376-3377.) In addition, the jury stated:

> We further find True the allegation that [defendant Yang] did commit the above felony for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members, in violation of Penal Code section 186.22(b).

(II C.T. p. 307; 17 R.T. p. 3376.)

Defendant Yang's probation report listed the sentencing options for the enhancements and allegations found true by the jury. (II C.T. p. 380.) The probation officer noted: "Counts 4-5 PC186.22(b)(1) 5 years or 10 years (if imposed as a serious or violent felony)." (II C.T. p. 380.) The probation officer "recommended that 5 years be imposed as to PC186.22(b)(1) enhancements so that punishment can be imposed as to the PC12022.5(a)(1) enhancements per *People v. Rodriguez* (2009) 47 Cal.4th 501." (II C.T. p. 380.)

At defendant Yang's sentencing on count 4, the legal issue debated by the parties and the trial judge was how *People v. Rodriguez*, *supra*, 47 Cal.4th 501 impacted the sentencing choices for the gang enhancement under section 186.22, subdivision (b)(1) and the gun-use enhancement under section 12022.5(a)(1). As set forth in detail in the briefing on the merits, the prosecution's position (and the basis for this People's appeal) is that the trial judge had the legal authority (if not duty) to impose additional punishment on count 4 as to defendant Yang under both section 186.22(b)(1)(B) and section 12022.5(a)(1). The prosecutor asked for a sentence as to count 4 that consisted of its three charged components as found true by the jury: (1) The underlying crime of assault with a semiautomatic firearm under section 245(b); (2) the personal use of a firearm enhancement under section 12022.5, subdivision (a)(1); and (3) the criminal street gang allegation under section 182.22(b).

Rejecting this approach, the judge shifted these components around so that the gun-use allegation was grafted onto the gang enhancement necessitating staying sentencing on the section 12022.5(a)(1) enhancement under the holding of *People v. Rodriguez*, *supra*, 47 Cal.4th 501. Division One of the Fourth Appellate District affirmed. (D057392.)

At no time during the pendency of the proceedings in the trial court or the appellate court did defendant Yang challenge whether he was given adequate notice that the People sought to sentence him for the gang enhancement attached to count 4 at the serious felony level under section 186.22(b)(1)(B).

THE *MANCEBO* CASE

In the *Mancebo* case, the Court examined the pleading and proof requirements of section 667.61, known as the "One Strike" law. (*Mancebo*, *supra*, 27 Cal.4th at p. 738.) The One Strike law is "an alternative, harsher sentencing scheme for certain forcible sex crimes." (*Ibid.*) The narrow question presented in *Mancebo* was whether the circumstance of a defendant using a firearm could support both imposition of increased sentencing under the One Strike law and an enhancement under section 12022.5, subdivision (a). (*Ibid.*)

Two provisions of the One Strike law were implicated in *Mancebo*. Subdivision (f) of section 667.61 states:

> If only the minimum number of circumstances specified in subdivision (d) or (e) that are required for the punishment provided in subdivision (a), (b), (j), (l), or (m) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a), (b), (j), (l), or (m) whichever is greater, rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section. ...

Subdivision (o)[2] states: "The penalties provided in this section shall apply only if the existence of any circumstance specified in subdivision (d) or (e) is alleged in the accusatory pleading pursuant to this section, and is either admitted by the defendant in open court or found to be true by the trier of fact."

Defendant Mancebo was convicted of eight forcible sex crimes against two separate victims. The information alleged, and the jury found true, that the defendant used a firearm in the commission of all these offenses under section 12022.5, subdivision (a). It was also alleged that the defendant was eligible for sentencing to 25 years to life under the One Strike law because there were two qualifying circumstances under subdivision (e) of section 667.61 as to each victim. Specifically, it was pled and proved that the defendant used a gun and kidnapped the first victim and that the defendant used a gun and tied or bound the second victim.

At sentencing, the judge imposed additional punishment for the section 12022.5, subdivision (a), gun enhancements, because he believed he could "substitute the specified circumstance of conviction of offenses against more than one victim (§ 667.61, subd. (e)(5) or the multiple victim circumstance) for the gun-use circumstance in order to satisfy the 'minimum number of circumstances' required to be pleaded and proved for One Strike sentencing treatment. (§ 667.61, subd. (f).)" (*Mancebo*, *supra*, 27 Cal.4th at pp. 738-739.) "For reasons not disclosed by the record, the information never expressly alleged a multiple victim circumstance under section 667.61, subdivision (e)(5), nor was the information ever amended to include this allegation." (*Id.* at p. 739.)

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[2] This provision is referenced by its former designation as subdivision (i) in the *Mancebo* opinion.

The Court agreed with the defense argument that enhancements under section 12022.5, subdivision (a), should be stricken because firearm use was pled and proved as one of the minimum number of circumstances qualifying the defendant for sentencing under section 667.61, subdivision (a). (*Mancebo*, *supra*, 47 Cal.4th at p. 739.) The holding in *Mancebo* was clearly dictated by ordinary rules of statutory construction.

> The plain wording of subdivisions (f) and [former] (i) of section 667.61 together controls here. Subdivision (i) requires that "[f]or the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) *shall be alleged in the accusatory pleading* and either admitted by the defendant in open court or found to be true by the trier of fact." (Italics added.) Neither the original nor the amended information ever alleged a multiple victim circumstance under subdivision (e)(5). Substitution of that unpleaded circumstance for the first time at sentencing as a basis for imposing the indeterminate terms violated the explicit pleading provisions of the One Strike law.

(*Mancebo*, *supra*, 47 Cal.4th at p. 743.)

The Attorney General did not contest that there was error, but instead urged that substitution of the uncharged multiple victim circumstance for the pled and proved gun-use finding was harmless because the defense was given adequate notice that he was charged with crimes against two victims. By alleging qualifying forcible sex crimes against two separate victims, the Attorney General argued " the information alleged all of the facts necessary to prove the multiple victim circumstance." (*Mancebo*, *supra*, 27 Cal.4th at p. 744.) Thus, the Attorney General contended the multiple victim special circumstance was "effectively pleaded and proved." (*Ibid.*)

The Court rejected this argument because use of the fact that the crimes involved multiple victims for purpose of sentencing under the One Strike law, was contrary to the express statutory requirement that the " 'circumstances specified in subdivision (d) or (e) which are required for the punishment provided in subdivision (a) or (b) [are] *pled and proved* ... .' (§ 667.61, subd. (f), italics added ... .)" (*Mancebo*, *supra*, 47 Cal.4th at p. 745, citations and footnote omitted.)

> In other words, no factual allegation in the information or pleading in the statutory language informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing under section 667.61, subdivision (a). Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms under section

> 667.61, subdivision (a) and use the circumstance of gun use to secure additional enhancements under section 12022.5(a).

(*Ibid.*)

The Court in *Mancebo* found a due process basis for requiring that a sentencing enhancement be pleaded and proved. (*Mancebo*, *supra*, 27 Cal.4th at p. 747.) "[I]n addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Ibid.*) The Court explained that substitution of an uncharged enhancement provision for a charged enhancement "without the defendant's consent, violates his right to adequate notice of the factual and statutory bases of sentence enhancement allegations brought against him. That logic should apply as well in a case, such as this one, where the substituted enhancement provision is neither alleged in the information nor found true by the jury through a separate finding." (*Id.* at p. 746.)

The Court in *Mancebo* then discussed the concepts of waiver and estoppel in relation to how the prosecution charged that case.

> The information in this case expressly alleged the gun-use, kidnapping, and tying or binding circumstances, and made specific reference to subdivision (e) of section 667.61 in which they are set forth. There can be little doubt that the prosecution understood the One Strike law's express pleading requirements and knew how to comply with them. We agree with the Court of Appeal's conclusion that the People's failure to include a multiple-victim-circumstance allegation must be deemed a discretionary charging decision. Not only is this conclusion supported by the record, but respondent does not contend, much less suggest, how the failure to plead the multiple victim circumstance was based on mistake or other excusable neglect. Under these circumstances, the doctrines of waiver and estoppel, rather than harmless error, apply. [Citations.]

(*Mancebo*, *supra*, 27 Cal.4th at p. 749.) The Court surmised that the prosecution deliberately did not plead the multiple victim circumstance to ensure that defendant would receive consecutive life sentences. (*Ibid.*)

The Court cited additional rationale for its holding that section 667.61's "pleading and proof requirements was breached in the present case when the gun-use circumstances, which had been properly pled and found true by the jury, were struck from the calculation of the One Strike indeterminate terms so that gun use could instead be used to impose lesser determinate terms under another enhancement statute (§ 12022.5(a)), with the unpled multiple victim circumstances purportedly substituted

into the One Strike calculation for the first time at sentencing." (*Mancebo*, *supra*, 27 Cal.4th at p. 751.) First, while acknowledging that a multiple victim allegation may be difficult to meaningfully contest, "[i]n many instances, the fair notice afforded by that pleading requirement may be critical to the defendant's ability to contest the factual bases and truth of the qualifying circumstances invoked by the prosecution in support of One Strike sentencing." (*Id.* at p. 752.) Second:

> [I]n many instances a defendant's decision whether to plea bargain or go to trial will turn on the extent of his exposure to a lengthy prison term. Under the People's position, there would be less incentive to plea bargain since the defendant would not be informed in advance of trial or sentencing that the prosecution intends to rely on the fact of convictions of offenses against multiple victims in support of a harsher One Strike term.

(*Ibid.*)

The Court then returned to the crux of its holding: "Sentencing error occurred because defendant was given notice that gun use would be used as one of the two pleaded and minimally required circumstances in support of the One Strike terms, whereafter, at sentencing, the trial court used the *unpled* circumstance of multiple victims to support the One Strike terms, and further imposed two 10-year section 12022.5(a) enhancements that could otherwise not have been imposed but for the purported substitution." (*Mancebo*, *supra*, 27 Cal.4th at p. 753, italics in original.)

The Court concluded by narrowing the scope of its holding while broadening the acceptable means by which prosecutors can satisfy the notice requirements related to section 667.61.

> [W]e do not here hold that the specific numerical subdivision of a qualifying One Strike circumstance under section 667.61, subdivision (e), necessarily must be pled. We simply find that the express pleading requirements of section 667.61, subdivisions (f) and (i), read together, require that an information afford a One Strike defendant fair notice of the qualifying statutory circumstance or circumstances that are being pled, proved, and invoked in support of One Strike sentencing. Adequate notice can be conveyed by a reference to the description of the qualifying circumstance (e.g., kidnapping, tying or binding, gun use) in conjunction with a reference to section 667.61 or, more specifically, 667.61, subdivision (e), or by reference to its specific numerical designation under subdivision (e), or some combination thereof. We do not purport to choose among them.

(*Mancebo*, *supra*, 27 Cal.4th at pp. 753-754.)

ARGUMENT

I

THE GENERIC PENAL CODE SECTION 186.22, SUBDIVISION (B)(1), GANG ALLEGATION IN COUNT FOUR SATISFIED THE PEOPLE'S PLEADING BURDEN AND GAVE THE DEFENDANT FAIR NOTICE OF THE RANGE OF ADDITIONAL PUNISHMENT HE FACED FOR THAT SENTENCING ENHANCEMENT.

A. There Was Adequate Notice.

It is a fundamental principle of due process that "one accused of a crime must be 'informed of the nature and cause of the accusation.' (U.S. Const., Amend. VI.)" (*People v. Thomas* (1987) 43 Cal.3d 818, 823.) This requirement is satisfied when the accused is advised of the charges against him so that he has a reasonable opportunity to prepare and present a defense and is not taken by surprise by the evidence offered at trial. (*Ibid.*; see also *People v. Valladoli* (1996) 13 Cal.4th 590, 607; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368.)

> In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused ... .

(§ 952.)

"All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found true by the trier of fact." (§ 1170.1, subd. (e).) "It is the specific factual allegations of a pleading which determine what offenses are charged. An accusatory pleading must likewise allege each fact required for imposition of an enhancement term. [Citations.]" (*People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1117-1118.)

Whether as to the underlying crime or an enhancement required to be alleged under section 1170.1, subdivision (e), if the accusatory pleading informs the defendant of the specific conduct alleged and the accused cannot show that preparation of his or her defense would have been altered absent some error in the charging language, no modification of the judgment is required. (*People v. Neal* (1984) 159 Cal.App.3d 69,

72-73 [information alleged the use of a deadly weapon (§ 12022, subd. (b)) during the commission of a sex offense; no error for the court to impose sentence pursuant to the applicable deadly weapon use statute (§ 12022.3)].)

> "There is 'no requirement that the statute which the accused is charged with violating be designated by number, and even a reference to the wrong statute has been viewed of no consequence ... .' [Citation.] A mistake in designating the statute on which a charge is based or in naming an offense is ' "immaterial unless the defendant is misled thereby ... .' " [Citation.] Consistent with this authority, we may not conclude that a complaint is insufficient, or set aside a guilty plea or sentence, unless we first determine that a 'defect or imperfection in matter of form' has 'prejudice[d] a substantial right of the defendant upon the merits.' (Pen. Code, § 960.)"

(*People v. Ramirez* (2003) 109 Cal.App.4th 992, 999 (*Ramirez*).)

The crimes and enhancements set forth in count 4 here alleged "every fact necessary to place appellant on notice" (*Ramirez, supra,* 109 Cal.App.4th at p. 1000) that he was subject to the five-year enhancement of section 186.22, subdivision (b)(1)(B). It charged that he committed a felonious assault with a semiautomatic firearm in violation of section 245(b), and that he committed this offense "for the benefit of, at the direction of, and in association with a criminal street gang ... within the meaning of Penal Code section 186.22(b)(1)."

Anyone consulting section 186.22(b)(1) (as recommended in the "Charge Summary"), would have seen that the additional punishment for the gang enhancement was dependent on the classification of the underlying felony. Section 186.22(b)(1) states: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall upon conviction of that felony ... " be punished as set forth in subparagraph (A), (B) or (C). Upon consulting section 186.22(b)(1)(B) and its cross-referenced section 1192.7, subdivision (c), it would have been obvious that the charged offense of section 245(b) was a serious felony as a matter of law, supporting or requiring a five-year additional term under section 186.22(b)(1)(B). It is incontrovertible that a violation of section 245(b) is a serious felony as a matter of law. (§ 1192.7, subd. (c)(31).) And under subdivision (b)(1)(B) of section 186.22, "[i]f the [underlying] felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years." (See *People v. Taylor* (2004) 118 Cal.App.4th 11, 22-23 [When jury has found defendant guilty of felony enumerated in section 1192.7, subdivision (c), trial court may find that offense is a serious felony as a matter of law].)

Thus, it was not necessary to plead or prove any facts beyond those thus alleged, i.e., that defendant committed an assault with a semiautomatic firearm in violation of section 245(b), and did so in association with a criminal street gang for purposes of section 186.22(b)(1). This was ample notice of the nature of the charges. (See *Ramirez, supra*, 109 Cal.App.4th at pp. 1000-1001 [defendant received adequate notice of exposure to five-year mandatory Vehicle Code enhancement where facts supporting enhancement were alleged and total term stated in plea form could only be arrived at using enhancement; failure to specify applicable subdivision not fatal where nothing in pleading affirmatively misled defendant].)

Where, as here, "the information puts the defendant on notice that a sentence enhancement will be sought, and further notifies him of the facts supporting the alleged enhancement, modification of the judgment for a misstatement of the underlying enhancement statute is required only where the defendant has been misled to his prejudice." (*People v. Neal, supra*, 159 Cal.App.3d at p. 73.) Defendant Yang cannot seriously contend that he was unaware section 245(b) qualified as a serious felony. That subdivision (b)(1)(B) of section 186.22 was not specifically referenced in the information in no way misled or prejudiced the defendant.

In sum, it was easily discernable for due process purposes which enhanced penalty under section 186.22(b)(1) would apply because section 245(b) is a serious felony as a matter of law. It was for the trial court to determine which sentence was appropriate once the jury found the gang allegation to be true, depending on the factual findings of the jury. Imposing further hyper-technical pleading requirements simply would not be consistent with the statutory scheme and would not provide any additional notice to the defendant not otherwise readily apparent by simply reviewing the Penal Code provisions alleged in count 4 of the information.

B. *Mancebo* is Distinguishable.

The Court's opinion in *Mancebo* does not mandate that subdivision (b)(1)(B) of section 186.22 had to be expressly referenced in the information in order for a defendant to be sentenced under it. The points of distinction are many.

First, unlike subdivision (o) [former subd. (i)] of section 667.61, which formed the backbone of the Court's holding in *Mancebo*, section 186.22 contains no express requirement that the "existence of any circumstance" subjecting the defendant to gang enhancement be plead and proved. Indeed, section 186.22 contains no pleading requirement at all and, thus, is governed only by the notice pleading requirements of sections 960 and 1170.1, subd. (e), discussed above. That the holding in *Mancebo* was primarily dictated by the special statutory requirements of section 667.61 was highlighted

by the Court: "We caution that our holding is limited to a construction of the language of section 667.61, subdivisions (f) and [former] (i), read together, as controlling here. We have no occasion in this case to interpret other statutory provisions not directly before us." (*Mancebo, supra*, 27 Cal.4th at p. 745, fn. 5.)

Second, unlike *Mancebo*, the People do not seek to predicate imposition of an additional term for the gang enhancement under section 186.22(b)(1) on facts not alleged in the pleadings, or facts alleged for some other purpose. As noted previously, the information explicitly alleged all the facts necessary to support sentencing defendant Yang under section 186.22(b)(1)(B). In contrast to *Mancebo*, the information provided no basis for defendant Yang to believe that the facts alleged in connection with the gang enhancement would support a shorter term than that sought by the People here. So far as this record shows, defendant "could not possibly have been misled." (*In re Mitchell* (1961) 56 Cal.2d 667, 670.)

In *Mancebo*, the People attempted to rely on facts and circumstances not separately pleaded and proved—as statutorily required—but "implicitly" proved by the verdicts on the substantive charges. In contrast, both the information and the verdict form as to count 4 in this case separately stated the gang allegation in the appropriate statutory language. The trial court properly instructed the jury on the factual elements of the gang allegation. The jury returned a true finding on the facts supporting the gang enhancement. At sentencing, the prosecutor asked for a sentence that reflected the facts of the separately pleaded and proved gang and weapon enhancements in count 4. There was no attempt to take facts, either proved or "implied," from another charge or allegation in the information and incorporate them into the sentencing scheme for count 4. Under these circumstances, the failure to cite specifically to subdivision (b)(1)(B), rather than generically to subdivision (b)(1), of section 186.22, does not mirror the last second shifting around of enhancement facts and circumstances from the way they were alleged and proved prompting the Court's reversal in *Mancebo*.

Finally, the underlying circumstances supporting the section 667.61 enhancement sought to be imposed on the defendant in *Mancebo* were all factual in nature (e.g., the victim was "kidnapped," there was "tying or binding," or there were "multiple victims") and, thus, potentially contestable before the trier of fact. In contrast, there is no contestable fact involved in determining whether section 245(b), if proved, is a serious felony mandating sentencing for the gang enhancement under section 186.22(b)(1)(B). This crime is a serious felony as matter of law under section 1192.7, subdivision (c)(31).

C. The *Thomas* and *Equarte* Decisions, Rather Than *Mancebo*, are Controlling.

The Court's attention is directed to *People v. Equarte* (1986) 42 Cal.3d 456 (*Equarte*) and *People v. Thomas* (1986) 41 Cal.3d 837 (*Thomas*), which more aptly fit the proper approach to the issue of whether the defense was given proper notice in this case.

The Court in *Thomas* stated that if there are "several ways" in which a crime may qualify as a serious felony under section 1192.7, the "better practice" is to "allege specifically" the basis of the charged enhancement, such as the infliction of great bodily injury. (*Thomas*, *supra*, 41 Cal.3d at p. 843.) The Court also stated a defendant is entitled to "notice of the facts the prosecution intend[s] to prove to justify" an enhancement. (*Equarte*, *supra*, 42 Cal.3d at p. 466.) "*The defect in the pleading, however, is one of uncertainty only, and is waived by defendant's failure to demur.* [Citations.]" (*Thomas*, *supra*, 41 Cal.3d at p. 843, emphasis in italics added; accord, *Equarte*, *supra*, 42 Cal.3d at p. 467.)

The Court in *Equarte* held that a defendant is entitled to notice of the factual basis underlying the serious felony allegation rather than the precise subdivision designation. (*Equarte*, *supra*, 42 Cal.3d at p. 465.) *Equarte* held the trial court was entitled to find the charged offense to be a serious felony under subdivision (c)(23) of section 1192.7, even though that subdivision was not alleged in the information, because the prosecution proved the defendant's "personal use" of such a weapon. (*Id.* at pp. 459, 460, 465, 467.)

> Further, although defendant contends that the enhancement was improperly imposed in this case because the complaint failed to allege the section 667 enhancement with sufficient particularity, we conclude—on the basis of our decision in *People v. Thomas* (1986) 41 Cal.3d 837—that while the complaint may have been subject to a special demurrer for uncertainty, defendant—having failed to demur—may not challenge the enhancement on this ground on appeal.

(*Equarte*, *supra*, 43 Cal.3d at p. 459.) The Court contrasted a situation such as it would face in *Mancebo*. "We do not suggest that where an information charges that an offense qualifies as a serious felony by virtue of a specific subdivision of section 1192.7, the prosecution is free to change its theory at trial and attempt to sustain the enhancement on the basis of a different subdivision." (*Id.* at p. 467, fn. 13.) The instant case does not mirror this latter scenario.

The holdings in *Thomas* and *Equarte* dictated the result in *People v. Flynn* (1995) 31 Cal.App.4th 1387 (*Flynn*), which is also illustrative. The amended information in *Flynn* alleged the current offense was a serious felony under section 1192.7, subdivision (c)(8), because the defendant personally inflicted great bodily injury. The jury, however,

found the great bodily injury allegation under section 12022.7 not true. The trial judge, nevertheless, found the current offense was a serious felony under subdivision (c)(23) because the defendant personally used a knife. The appellate court in *Flynn* found no due process violation even though the prosecutor never alleged subdivision (c)(23) in the amended information.

> Appellant ... contends a serious felony finding under subdivision (c)(23) is precluded for the reason the information expressly alleged subdivision (c)(8) and no mention was made of subdivision (c)(23). We disagree. The absence of any reference to that particular subdivision is not controlling. *Equarte* expressly upheld a serious felony finding under subdivision (c)(23) although the information contained no allegation that the defendant had personally used a dangerous or deadly weapon in the charged offense. (*People v. Equarte*, *supra*, 42 Cal.3d at pp. 459, 467.)

(*Id.* at p. 1392.)

> We conclude that *Equarte* did not hold a prior serious felony enhancement must be reversed in all instances where the prosecution proves a serious felony under a specific provision of subdivision (c) of section 1192.7 other than the one expressly pleaded in the information. *The pivotal inquiry is whether the defendant had notice of the undesignated serious felony category and if not, whether he nonetheless had an opportunity to defend.*

(*Id.* at p. 1393, italics added.)

> We conclude that reversal of a serious felony enhancement is not required where the prosecution's change in the theory underlying the charged serious felony does not deprive the defendant of an opportunity to defend against this change. In the present case, appellant makes no claim of prejudice resulting from the prosecution's reliance on its theory based on subdivision (c)(23). The record in fact reveals appellant was not deprived of the opportunity to defend against this theory. The amended information alleged appellant committed the assault with a deadly weapon, to wit, a knife, and with personally inflicting great bodily injury. Appellant thus knew he would have to show that he did not personally use a knife in defending against the allegations of the amended information, which was filed before the impanelment of the jury. Accordingly, appellant was fully cognizant of the factual basis underlying the prosecution's theory that the current offense was a serious felony within the meaning of subdivision (c)(23) ("defendant personally used a dangerous or deadly weapon") of section 1192.7. His burden was in no way increased or otherwise altered by reason of his having to defend against a charge of personal use of the

knife since the uncontroverted evidence disclosed no accomplice. (See *People v. Equarte*, *supra*, 42 Cal.3d at pp. 460, 467.) The enhancements are therefore valid. (*People v. Thomas*, *supra*, 43 Cal.3d at pp. 830-831.)

(*Flynn*, *supra*, 31 Cal.App.4th at pp. 1394-1395.)

The present case does not present the same pleading problems as in *Equarte* or *Flynn*, let alone *Mancebo*. Defendant Yang was fully cognizant of the factual basis underlying the prosecutor's argument at sentencing that he should be sentenced under subdivision (b)(1)(B) of section 186.22 because the underlying offense was a serious felony as a matter of law. Defendant's burden or strategy for defending the crime and enhancement allegations in count 4 was not impacted in any way from the generic pleading of the gang allegation under section 186.22(b)(1), rather than under section 186.22(b)(1)(B). Defendant had adequate notice of the gang allegation, as well as ample opportunity to defend it. Any defense contention to the contrary at this point in the proceeding should be deemed forfeited by the lack of objection or demurrer in the trial court.

II

THE PEOPLE ARE NOT ESTOPPED FROM RELYING UPON PENAL CODE SECTION 186.22, SUBDIVISION (B)(1)(B) AT DEFENDANT YANG'S SENTENCING ON COUNT FOUR.

The foregoing discussion forecloses any claim that the People are estopped from relying on section 186.22(b)(1)(B) at sentencing on count 4. Further, the record in *Mancebo* demonstrated that the prosecutor's failure to allege and prove the multiple victim circumstance under section 667.61 may have been a discretionary charging decision rather than due to mistake or excusable neglect. (*Mancebo*, *supra*, 27 Cal.4th at p. 749; see also *People v. Botello* (2010) 183 Cal.App.4th 1014, 1028 (*Botello*).) The opposite is true here. In addition to the section 186.22(b)(1) gang allegation, the People separately pleaded and proved a gun use allegation solely based on section 12022.5(a)(1). The defendant could not have been misled into believing the People would seek anything less than the greatest punishment permitted under the Penal Code for both enhancements.

No additional notice as to how the People might ask the judge to sentence defendant Yang on count 4 was possible, let alone practicable. Should the People be required to allege that if the gun use is found not true that we will seek sentencing for the gang enhancement under section 186.22(b)(1)(B) because the underlying crime is a serious felony, even though the serious felony designation attaches as a matter of law and is not a "fact" submitted to the jury? Should the People have to allege that they will seek to punish under section 186.22(b)(1)(B) if the jury finds both the gang enhancement and gun-use allegation true, but only if the judge decides to impose the upper term for

the gun-use allegation under section 12022.5(a)(1)? Should we have to allege in the alternative that we will seek sentencing under section 186.22(b)(1)(C) if the gun-use allegation is found true and the judge decides to only give the lower or middle term for the gun-use allegation under section 12022.5(a)(1)? All these possibilities existed in the current case. But neither the prosecution nor the defense could know when the information was filed what the outcome of any negotiated plea or contested trial would be, or what sentencing options would be sought, let alone imposed by the trial judge.

In addition, unlike the One Strike law's requirement that the minimum number of qualifying circumstances be applied first to it (§ 667.61, subd. f), there is no requirement in section 186.22 that the judge impose sentence first for the gang allegation at the highest possible level before imposing sentence on another statutory enhancement that could be used to elevate the gang enhancement to a serious or violent felony level under either subdivision (b)(1)(B) or (b)(1)(C). Indeed, the sentencing judge has the power to strike the additional punishment for any gang enhancement under subdivision (g) of section 186.22.[3]

Finally, defendant Yang clearly received notice that the People intended to prove a gang allegation pursuant to section 186.22(b)(1), and use that allegation to increase his sentence on count 4. The gang allegation was separately pleaded and proved to the jury. The People cannot conceive how the defense would have differed had the more specific subdivision ((b)(1)(B)) been cited. Indeed, given the record, we cannot conceive of any such prejudice whether during settlement negotiations, at trial, or before sentencing. The charge of assault with a semiautomatic weapon under section 245(b) is a serious felony as a matter of law. Therefore, also as a matter of law, the additional sentence for the accompanying gang allegation under section 186.22(b)(1) is five years. Any error, which we do not concede, must be deemed harmless. (See *People v. Thomas* (1987) 43 Cal.3d 818, 831; *People v. Sok* (2010) 181 Cal.App.4th 88, 96, fn. 8 [it was harmless error under section 960 that the amended information "cited section 186.22, subdivision (b)(4)(B), rather subdivision (b)(4)(A) or (B), or even more simply subdivision (b)(4), as the basis for imposing an alternate penalty because the crime was committed to benefit a criminal street gang"]; cf. *Mancebo*, *supra*, 27 Cal.4th at p. 749 [harmless error analysis inapplicable where record demonstrates discretionary charging decision]; *Botello*, *supra*, 183 Cal.App.4th at p. 1028 [same].) There is no basis to find the prosecutor in the instant case made a discretionary decision, or somehow led the defense to believe, that defendant Yang would not be subject to imposition of sentencing on the gang enhancement at the serious felony level under section 186.22(b)(1)(B) as to count 4.

[3] The scope of this power and the interplay of section 1385 is currently pending before the Court in *People v. Fuentes*, S219109.

CONCLUSION

The Court requested supplemental briefing on whether the People adequately pleaded and proved that defendant Yang was subject to sentencing for count 4 under section 186.22(b)(1)(B). As has been demonstrated, the defendant had adequate notice of this potential under the applicable statutory requirements (i.e. § 1170. subd. (e)) and under principles of due process (*Mancebo*). There is no basis, therefore, to find the People are estopped from seeking additional punishment for the gang enhancement under section 182.22(b)(1)(B). If there was any error at all comparable to the pleading and proof error which occurred in *Mancebo*, it occurred when the trial judge took away the gun-use allegation under section 12022.5(a)(1) and transferred the fact of gun use to the generically pleaded and proved gang enhancement which contained no reference to gun use. That is why the San Diego County District Attorney's Office, on behalf of the People of the State of California, respectfully requests the Court remand defendant Yang's case for resentencing on count 4.

Respectfully submitted,

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By: 

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Supreme Court	Court of Appeal	Superior Court No.
No. S202921	No. D057392	SCD212126

PROOF OF SERVICE

I am a citizen of the United States and a resident of San Diego County. I am over 18 years and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On September 17, 2014 a member of our office caused to be delivered **via Federal Express overnight delivery** the original and 13 copies of the attached **SUPPLEMENTAL LETTER BRIEF REQUESTED BY THE COURT** for filing with the Supreme Court of the State of California at:

California Supreme Court
The State Building
350 McAllister Street, Room 1295
San Francisco, California 94102

and I placed a true and correct copy thereof in the U.S. Mail to:

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

Executed on September 17, 2014 at San Diego, California.

Kristen Howard

Kristen Howard