

CERTIFIED FOR PARTIAL PUBLICATION<sup>1</sup>

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC HUNG LE et al.,

Defendants and Appellants.

D057392

(Super. Ct. No. SCD212126)

NO CHANGE IN JUDGMENT

The opinion filed April 27, 2012, is modified as follows:

At DISCUSSION III, seventh paragraph beginning with "Although the People" and ending with "makes *People v. Rodriguez* applicable." (slip opn., p. 66), insert footnote 17 after the last sentence. Footnote 17 text reads: "In their petition for rehearing, the People argue that this court erred in affirming the trial court's decision in count 4 to stay additional punishment for personal gun use under section 12022.5, subdivision (a) (personal gun-use enhancement) and to impose the 10-year enhancement

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<sup>1</sup> Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of DISCUSSION I and II.

for the commission of a 'violent felony' – in this case a violation of section 248, subdivision (b) for assault with a semiautomatic weapon – under the criminal gang provision set forth in section 186.22, subdivision (b)(1)(C) (criminal gang enhancement). The People argue that 'the prosecutor in this case never asked the trial court to elevate the punishment for the gang enhancement to the "violent felony" level under subdivision (b)(1)(C) of section 186.22 with the same conduct, personal gun use, that supported the section 12022.5 enhancement. Instead, . . . the prosecutor here pled and proved a "bare" gang enhancement under section 186.22 without reference to (1) gun use, (2) it being a "serious" or "violent" felony, or (3) either subdivision (b)(1)(B) or (b)(1)(C) [of section 186.22]. By doing so, the prosecutor exposed the defendant to the maximum possible sentence while not violating the holding of [*People v.*] *Rodriguez*. It was only by setting the level of punishment for the gang enhancement for a "violent felony" that the sentencing judge created a conflict with the [*People v.*] *Rodriguez* case.' (Fn. omitted.)

"We reject the People's form-over-substance argument. In focusing on the nature of the offense and the circumstances surrounding its commission (see *People v. Rodriguez, supra*, 47 Cal.4th at p. 507), we conclude the trial court did not err in (tacitly) finding, and substantial evidence in the record supports that finding, that the personal gun-use and gang enhancements in this case were both based on firearm use involving the same offense, viz. commission of assault with a semiautomatic weapon (§ 245, subd. (b)). As such, we conclude the instant case falls squarely within the holding of *People v.*

*Rodriguez* and its prohibition against imposing multiple punishments for firearm use in the commission of a single offense. (See § 1170.1, subd. (f).)"

Sequentially renumber subsequent footnotes.

As modified, the petitions for rehearing by appellant and cross-appellant are denied.

There is no change in the judgment.

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McCONNELL, P. J.

Copies to: All parties