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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW AGUILAR,

Defendant and Appellant.

G045345

(Super. Ct. No. 08NF2632)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed as modified.

Michelle May, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Andrew Aguilar guilty of premeditated and deliberate attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a)),<sup>1</sup> carrying a loaded unregistered firearm in public (former § 12031, subd. (a)(1), (2)(f)), and two counts of street terrorism (§ 186.22, subd. (a)). As to the attempted murder charge, the jury found true Aguilar *personally* discharged a firearm (§ 12022.53, subd. (c)), and committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). With respect to the carrying a loaded unregistered firearm charge, the jury found true Aguilar committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

Aguilar argues: (1) insufficient evidence supports the jury's finding he committed the attempted murder with premeditations and deliberation; (2) active participation in a criminal street gang is a continuous crime such that he could only be convicted of one count; and (3) there were sentencing errors. None of his contentions have merit, and we affirm the judgment.

## FACTS

*August 11, 2008*

At approximately 8:00 p.m., Irvin Malacara and Luis Olivares were inside Olivares' uncle's garage helping him with his car-washing business. The two men were cleaning up after the day's work and preparing for the following day. They saw two men walk slowly by and look inside the garage. Not recognizing the men, Olivares and Malacara stepped outside the garage to look around.

The men stopped walking, looked at Olivares and Malacara, and began issuing what Olivares and Malacara perceived as gang challenges. They said, “[w]here are you from” and “[f]uck you, mother fucker. Fuck you, bitches. This is my neighborhood.” Neither Olivares nor Malacara responded because they were not gang members. One of the men stepped into the middle of the street and pulled up his shirt,

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<sup>1</sup> All further statutory references are to the Penal Code.

revealing a black handgun. Seeing the gun, Malacara hid behind a car. From a distance of about 20 feet, the man pulled out the gun, aimed at Olivares' chest, and fired a single shot. After the shot was fired, the two men ran down the street toward a dead end where they jumped a fence. Olivares was surprised he was not shot and thought the men might come back and try to kill him.

Anaheim police officers arrived at the scene, where they recovered a .40 caliber bullet casing from the middle of the street, and interviewed Olivares and Malacara. Olivares and Malacara provided officers with physical descriptions of the men, and several days later identified Aguilar as the shooter from a photographic lineup.

*August 12, 2008*

The following day, around 11:00 p.m., two Anaheim police officers were on routine patrol when they saw Aguilar and another man walking down the street. The officers recognized Aguilar's companion from a flyer that had been distributed in connection with a gang-related gun crime. When ordered to stop, both Aguilar and his companion fled. An officer quickly apprehended Aguilar's companion, who was unarmed.

Shortly thereafter, another officer apprehended Aguilar, who also was unarmed. However, when officers retraced his path, they found a loaded .40 caliber handgun with a round in the chamber. Officers found the gun adjacent to a fence in the interior courtyard of an apartment complex; there was gang graffiti in the complex. Later, forensic analysis revealed the gun police found that evening was the same gun that had been used in the shooting the previous night, and in two previous unsolved shootings.

*Trial*

*Prosecution*

During trial, both Olivares and Malacara confirmed they had identified Aguilar as the shooter from a photographic lineup. Olivares also identified Aguilar as the

shooter during courtroom proceedings. The parties stipulated the gun police found was the same gun that had been used to shoot at Olivares. The parties also stipulated South Side Krooks (SSK) was “an active criminal street gang” as statutorily defined at the time of the offenses.

The prosecutor offered the testimony of gang expert Kelly Phillips, who was assigned to investigate SSK. After detailing his background, training, and experience, Phillips testified concerning the culture and habits of traditional, turf-oriented Hispanic criminal street gangs, including respect within gangs, the importance of guns and violence, and protecting the gang’s territory. Phillips also testified extensively concerning SSK and its territory, allies and rivals, graffiti, tattoos, and the crimes committed in its territory.

Phillips testified gang members equate being respected with being feared; they gain respect by intimidating people and committing violent acts. He stated that controlling an area allows gang members to commit crimes without being reported, and provides a safe haven where gang members can hide from the police. He said gangs commit violent acts to intimidate the residents, which allows them to control the neighborhood. Phillips explained gang members “patrol” their territory to see who is coming in and out of their turf, and use this as an opportunity to intimidate the people living in the neighborhood. He added that during these patrols, gang members will “hit up,” or confront, people they do not know by challenging them verbally, saying, “Where are you from?” He said such a challenge often leads to violence. He also said gang members will verbally assert their control over a neighborhood by telling those they encounter, “This is my neighborhood.”

Phillips testified that while on patrol, gang members will often be armed, and gang members frequently have access to a “gang gun,” which is accessible to the entire gang. He stated gang members need to be armed in the event they run into a rival, as well as to intimidate the neighborhood residents. Phillips explained that having a

firearm while on patrol benefits the street gang because it builds fear and respect; it allows gang members to go out and look for targets of opportunity and to build their reputations for committing crimes, and to react violently if challenged by a rival. He added that carrying a firearm allows a gang member the ability to assault somebody if need be.

Phillips testified the area where the August 11 shooting took place, and the area where the gun was found on August 12, were both in SSK gang territory. He opined Aguilar was an active participant in SSK at the time of the offenses based on his numerous prior contacts with Aguilar, Aguilar's prior admissions, including he was jumped into the gang in 2006, and his tattoos, including SSK on his face.

Based on a hypothetical mirroring the facts of the August 11 shooting, Phillips testified the offense would both benefit the gang and would promote and further criminal gang conduct. Phillips explained that by brazenly committing a violent act, a gang member would earn the gang's respect. He added that shooting someone in broad daylight would intimidate neighborhood residents, who are then less likely to call the police. He concluded this would enable gang members to have greater control over the neighborhood and to engage in more criminal activity.

#### *Defense*

The defense called three members of Aguilar's family, who all provided an alibi. Aguilar's father, stepmother, and his cousin's wife each testified Aguilar was home sick on August 11. However, in the two-and-a-half years between the incidents and the trial, none of the three witnesses ever contacted the police, the defense attorney, or the district attorney to provide this information.

### *Verdict and Sentencing*

During closing arguments, defense counsel stated, “Go ahead and find him guilty” of the offenses committed on August 12, i.e., carrying a loaded unregistered firearm in public and street terrorism. Counsel, however, argued there was insufficient evidence to support a conviction for attempted murder or for criminal street gang activity committed on August 11.

As we explain above, the jury convicted Aguilar on all counts and found true all the allegations. As to his conviction for premeditated and deliberate attempted murder, the trial court sentenced Aguilar to prison for 15 years minimum to life pursuant to section 186.22, subdivision (b)(5), and a consecutive term of 20 years for the firearm allegation. The court added, “So, [Aguilar] is, on [the premeditated and deliberate attempted murder count], sentenced to a life term with a minimum of 35 years.” The court stayed sentencing for the street terrorism offenses and imposed a concurrent sentence for the carrying a loaded unregistered firearm in public offense.

## DISCUSSION

### *Sufficiency of Evidence to Support Premeditation and Deliberation*

Aguilar contends insufficient evidence supports the jury’s finding he committed attempted murder with premeditation and deliberation. He does not claim insufficient evidence supports his attempted murder conviction, but instead argues there is no evidence of anything more than a rash and impulsive act. We reject his contention.

“In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same

standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" [Citation.] (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Attempted murder "requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.] However, the requisite reflection need not span a specific or extended period of time. "Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ."" [Citation.] (*People v. Stitely* (2005) 35 Cal.4th 514, 543 (*Stitely*)).

In *People v. Anderson* (1968) 70 Cal.2d 15, the California Supreme Court formulated a framework to aid reviewing courts in analyzing the sufficiency of the evidence to sustain findings of premeditation and deliberation. Three types of evidence are typically relied upon to support an inference of premeditation and deliberation: "(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing--what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim [and] . . . ; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and

exacting that the defendant must have intentionally killed according to a ‘preconceived design’ to take his victim’s life in a particular way for a ‘reason’ which the jury can reasonably infer from facts of type (1) or (2).” (*Id.* at pp. 26-27.) Courts will sustain findings of premeditation and deliberation where there is evidence of all three types. Otherwise, courts require “at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3).” (*Id.* at p. 27.)

Aguilar argues there is nothing in the record to support an inference about his state of mind at the time of the shooting. He contends evidence of planning is completely absent. As to motive, he asserts the gang expert mentioned only assault, and not murder, as a crime of intimidation by a gang member patrolling a neighborhood. Finally, he claims the manner of killing does not support an inference of premeditation; if he had a preconceived plan to kill Olivares, he would have kept on shooting. We disagree and find ample evidence supporting each of the *Anderson* factors.

The fact Aguilar confronted Olivares with a loaded, concealed firearm that was easily accessible is evidence of planning. (*People v. Morris* (1988) 46 Cal.3d 1, 23, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5 [possession of weapon in advance of killing supports inference of planning activity]; *People v. Alcala* (1984) 36 Cal.3d 604, 626, overruled on other grounds in *People v. Falsetta* (1999) 21 Cal.4th 903, 911 [reasonable inference homicide was contemplated from outset where defendant brought along deadly weapon that was employed].) Furthermore, the record includes evidence showing Aguilar confronted Olivares and Malacara verbally, and then stepped into the street before revealing and ultimately firing the handgun. Phillips testified verbal challenges often lead to violence, and a jury could have reasonably concluded Aguilar planned a verbal confrontation with the intention of engaging in violence, i.e., murder. Finally, as to Aguilar’s claim the shooting was rash and impulsive, a decision to kill “need not span a specific or extended period of time.” (*Stitely, supra*, 35 Cal.4th at p. 543.) Even if Aguilar had not planned to murder

someone, a rational juror could have concluded those brief intervals were sufficient for Aguilar to arrive at a cold and calculated judgment to kill Olivares.

There was also sufficient evidence from which the jury could have reasonably concluded Aguilar's actions were motivated by his gang membership. There was overwhelming evidence Aguilar was an active participant in SSK, and the attempted murder took place in SSK claimed territory. Witnesses testified Aguilar or his companion issued a gang challenge and verbally claimed the neighborhood prior to the shooting. Phillips opined a gang member patrolling a neighborhood with a firearm would benefit the gang because being armed allows a gang member to look for targets of opportunity; Olivares and Malacara were Aguilar's opportunistic targets. Phillips explained shooting someone in this manner would intimidate neighborhood residents, giving gang members greater control over the neighborhood, and would earn the respect of the gang. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384 [recognizing gang member can earn respect through a shooting].) Based on all this evidence, the jury could reasonably conclude Aguilar had a gang-related motive for the attempted murder.

As to the manner of killing, the shooting was entirely unprovoked. Even after being confronted with the gang challenge, neither Olivares nor Malacara gave Aguilar any reason to shoot. "The utter lack of provocation by the victim is a strong factor supporting the conclusion that appellant's attack was deliberately and reflectively conceived in advance. [Citations.]" (*People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102.) The evidence also established Aguilar aimed his gun at Olivares' chest, and from approximately 20 feet away, pulled the trigger. Firing a weapon in such a manner indicates intent to kill. "The act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . .' [Citation.] 'The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor

does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind.' [Citation.]" (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) A reasonable juror could have concluded the unprovoked and close-range shooting was done in a manner suggesting a preconceived design to kill.

Aguilar argues his actions were the product of a rash, impulsive act. While the evidence may support that inference, it does not exclude the conclusion that he was acting in a calculated manner. "““““If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.]” [Citation.]” (*People v. Abilez* (2007) 41 Cal.4th 472, 504.) Because we find substantial evidence falling within each of the *Anderson* factors, we affirm the jury's finding Aguilar committed the attempted murder with premeditation and deliberation.

#### *Gang Participation as a Continuous Offense*

While not disputing sufficient evidence supports his convictions generally, Aguilar contends he was improperly convicted of two counts of street terrorism because based on its plain language, section 186.22, subdivision (a), is a continuing offense. We disagree.

“Determining if a particular violation of law constitutes a continuing offense is primarily a question of statutory interpretation. [Citations.] The answer, however, does not depend solely on the express language of the statute. Equally important is whether ‘the nature of the crime involved is such that [the Legislature] must assuredly have intended that it be treated as a continuing one.’ [Citations.]” (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 526 (*Wright*)). “An offense is of a continuing nature when it may be committed by ‘a series of acts, which if individually considered, might not amount to a crime, but the cumulative effect is criminal.’ [Citations.] [¶] The

courts have looked to the statutory language to determine whether the Legislature intended to punish individual acts or entire wrongful courses of conduct and have concluded that when the language of the statute focuses on the goal or effect of the offense, the offense is a continuing offense. [Citations.] Other courts have found a continuing course of conduct where the wrongful acts were successive, compounding, interrelated, and aimed at a single objective. [Citation.]” (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 632 (*Sanchez*).)

Section 186.22, subdivision (a), is a part of the California Street Terrorism Enforcement and Prevention (STEP) Act, which the Legislature enacted in 1988 in response to a finding the State was in a crisis caused by violent street gangs. (§ 186.21.) In enacting the STEP Act, the Legislature sought to eradicate criminal activity by street gangs. (§ 186.21.)

“‘In construing the relevant provisions of the STEP Act, as with any statute, we strive to ascertain and effectuate the Legislature’s intent.’ [Citations.] Because statutory language ‘generally provide[s] the most reliable indicator’ of that intent [citations], we turn to the words themselves, giving them their ‘usual and ordinary meanings’ and construing them in context. [Citation.] “‘If there is no ambiguity in the language of the statute, ‘then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.’” [Citation.]” (*People v. Castenada* (2000) 23 Cal.4th 743, 746-747 (*Castenada*).)

Section 186.22, subdivision (a), defines the crime of street terrorism 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 . . . .” (§ 186.22, subd. (a).) “The gravamen of the substantive offense set forth in section 186.22, subdivision (a) is active participation in a criminal street gang.” (*People v. Albillar* (2010) 51 Cal.4th 47, 55.)

Aguilar suggests the plain statutory language supports his contention because “participate” connotes an ongoing process. However, while participation in a gang may be the gravamen of the offense, and “participation” could be considered an ongoing process, the elements of a section 186.22, subdivision (a), offense are “criminal knowledge, willful promotion of a felony, and active participation in a criminal street gang.” (*Castenada, supra*, 23 Cal.4th at p. 752.) The plain language of the statute suggests street terrorism is not an ongoing offense but is committed each time an active gang member “promotes, furthers, or assists” in committing criminal felonious conduct. (§ 186.22, subd. (a).) We find no ambiguity in the statutory language. When the underlying felony is complete, the street terrorism offense is complete. This construction is further supported by the Legislature’s express intent in enacting the STEP Act: “[T]he eradication of criminal activity by street gangs.” (§ 186.21.)

Aguilar analogizes street terrorism to the crime of conspiracy, arguing the ongoing and continuous involvement in a conspiracy is no different from the participation crime at issue here. “Conspiracy ‘is the classic example of a continuing offense because by its nature it lasts until the final overt act is complete. [Citations.]’ [Citation.]” (*People v. Quiroz* (2007) 155 Cal.App.4th 1420, 1429.) Indeed, the crime of conspiracy falls squarely within courts’ interpretation of a continuing course of conduct because the wrongful acts are “successive, compounding, interrelated, and aimed at a single objective.” (*Sanchez, supra*, 94 Cal.App.4th at p. 632.)

With street terrorism, however, there is no final overt act or single objective. Instead, as we explain above, the crime is committed when all the statutory elements are satisfied. The August 11 street terrorism offense was complete when Aguilar willfully promoted, furthered, or assisted in committing the felonious criminal conduct concerning the attempted murder. The street terrorism offense on August 11 did not continue on and encompass Aguilar’s criminal conduct on August 12, which included

carrying a loaded unregistered firearm in public. Both the statutory language and the Legislature's intent support the conclusion street terrorism is not a continuous offense.

Equally unpersuasive is Aguilar's analogy to federal participation offenses, including 18 U.S.C. section 1962 and 18 U.S.C. section 894, both of which courts have held to be continuing offenses, although in different procedural contexts. Where section 186.22, subdivision (a)'s plain language and legislative history compel the conclusion the substantive crime of street terrorism is an individual act and not a continuing process, we refuse Aguilar's invitation to analogize to federal criminal statutes. Moreover, both cases Aguilar relies on to support his contention involve situations where a defendant's acts spanned months (*U.S. v. Smith* (2d Cir. 1999) 198 F.3d 377, 385 [extortion weekly collections over more than one year]; *U.S. v. Wong* (2d. Cir. 1994) 40 F.3d 1347, 1366 [racketeering activity occurred before and after defendant's 18th birthday]).

In *Wright*, the California Supreme Court recognized “‘the doctrine of continuing offenses should be applied in only limited circumstances . . . .’ [Citation.]” (*Wright, supra*, 15 Cal.4th at p. 528.) We heed that admonishment here. To hold otherwise would produce an absurd result not reasonably contemplated by the Legislature. Characterizing a violation of section 186.22, subdivision (a), as a continuous offense would effectively eviscerate the statute by prohibiting multiple convictions for gang participation in temporal proximity, unless it could be established the gang participation ceased between the underlying offenses. We do not believe this was the Legislature's intent. Thus, we affirm both of Aguilar's convictions for violating section 186.22, subdivision (a).

### *Sentencing Issues*

Finally, Aguilar contends the 15-year-to-life sentence imposed for the attempted premeditated and deliberate murder conviction was unauthorized based on the plain statutory language of section 186.22, subdivision (b)(5). Essentially, he argues

section 186.22, subdivision (b)(5)'s 15-year minimum parole eligibility date should be subsumed in the 20-year firearm enhancement term. Alternatively, he contends the stated sentence of life with a minimum of 35 years erroneously merged the determinate and indeterminate terms. He requests this court direct the sentence for the attempted murder conviction be modified to reflect a term of 15 years to life, plus 20 years. We reject both his contentions, and affirm the sentence as pronounced.

Section 186.22, subdivision (b)(5), provides that “any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall *not be paroled until a minimum of 15 calendar years have been served.*” (§ 186.22, subd. (b)(5), italics added.) The California Supreme Court has held this 15-year minimum term is not a sentence enhancement, but instead “sets forth an *alternate* penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute.” (*People v. Jefferson* (1999) 21 Cal.4th 86, 101, original italics [interpreting former §186.22, subd. (b)(4), now subd. (b)(5).])

Here, the jury convicted Aguilar of attempted premeditated and deliberate murder for the benefit of a criminal street gang. (§§ 664, subd. (a), 187, subd. (a), 186.22, subd. (b)(1).) Section 664, subdivision (a), states “if the crime attempted is willful, deliberate, and premeditated murder, as defined in [s]ection 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole.” (§ 664, subd. (a).) The conditions specified in section 186.22, subdivision (b)(5), were thus satisfied, and the court sentenced Aguilar to the “alternate penalty” of 15 years minimum to life.

The jury also found true Aguilar personally discharged a firearm within the meaning of section 12022.53, subdivision (c), which provides for “an *additional and consecutive* term of imprisonment in the state prison for 20 years.” (§ 12022.53, subd. (c), italics added.) Thus, the trial court properly sentenced Aguilar “to a term of

15 years minimum to life. [¶] And then, consecutive to that . . . to 20 years for the firearm allegation . . . .”

This reading of the statute is supported by Division Two of the Fourth District’s holding in *People v. Villegas* (2001) 92 Cal.App.4th 1217 (*Villegas*). There, the jury convicted defendant of willful, deliberate and premeditated attempted murder with true findings on a criminal street gang enhancement under section 186.22, subdivision (b), and a firearm enhancement under section 12022.53, subdivision (d). (*Villegas, supra*, 92 Cal.App.4th at p. 1221.) The court sentenced defendant to a total prison term of 40 years to life. (*Ibid.*) On appeal, defendant argued, as does Aguilar, the trial court improperly imposed a 15-year-to-life sentence on defendant’s term. The court disagreed, affirming that defendant’s penalty for the street gang enhancement was a minimum eligible parole date of 15 years, and that section 12022.53, subdivision (d), mandated an additional and consecutive term of imprisonment. (*Villegas, supra*, 92 Cal.App.4th at p. 1229.) Following *Villegas*, we find the trial court here properly imposed a 15-year-to-life sentence for the attempted murder and gang enhancement, with an “additional and consecutive” 20-year sentence for the firearm enhancement.

Furthermore, we find Aguilar’s reliance on *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*), unpersuasive. In *Lopez*, the California Supreme Court held a defendant convicted of first degree murder with a street gang enhancement is not subject to a 10-year enhancement under section 186.22, subdivision (b)(1), but rather a 15-year minimum eligible parole date under section 186.22, subdivision (b)(5). (*Lopez, supra*, 34 Cal.4th 1007.) However, because section 190 sets forth the greater penalty (i.e., 25-years-to-life), the 15-year minimum eligible parole date was subsumed in the term of 25-years-to-life the defendant received for the first degree murder. (*Lopez, supra*, 34 Cal.4th 1009; *People v. Harper* (2003) 109 Cal.App.4th 520, 527 [a finding by this court that the 15-year minimum parole eligibility is subsumed in the 25-year minimum parole eligibility imposed for the underlying murder conviction].)

*Lopez* is inapposite as Aguilar did not receive a sentence of 25-years-to-life on the underlying offense. Instead, he received a life term, to which the trial court properly applied a 15-year minimum eligible parole date as specified by section 186.22, subdivision (b)(5). If we were to adopt Aguilar’s reading of the statute, any punishment for his attempted murder conviction would be subsumed in his determinate sentence. We hardly think this was the Legislature’s intent in enacting section 186.22, subdivision (b)(5).

As to Aguilar’s alternative contention, that the stated sentence erroneously merged the determinate and indeterminate terms, we find no error. As previously noted, the trial court orally pronounced Aguilar’s sentence as follows: “[A] term of 15 years minimum to life. [¶] And then, consecutive to that, the defendant is sentenced to 20 years for the firearm allegation . . . . So, the defendant is . . . sentenced to a life term with a minimum of 35 years.” The abstract of judgment mirrors the oral pronouncement, sentencing Aguilar to 15 years to life plus enhancement time of 20 years. Finally, the minute order also reflects a sentence of 15 years to life with a consecutive 20-year term for the firearm enhancement.

How to characterize the sentence has not been decided by our Supreme Court. But we believe that the technically correct way to state Aguilar’s sentence is life with a minimum parole eligibility term of 15 years, plus 20 years. It is unclear how the shorthand reference in the abstract of judgment to the term as 35 years to life in state prison prejudices Aguilar. Nevertheless, we will order the abstract of judgment to be modified to reflect Aguilar’s sentence is what we have technically stated here.

#### DISPOSITION

The abstract of judgment is modified to reflect that Aguilar’s sentence on count 1 is life with a 15-year minimum parole eligibility date, plus 20 years to life. The clerk of the Superior Court is ordered to forward the amended abstract of judgment to the

Department of Corrections, Division of Adult Operations. The judgment is affirmed as modified.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

ARONSON, J.