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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND EDUARDO LOPEZ,

Defendant and Appellant.

H035015

(Santa Clara County  
Super. Ct. Nos. CC767952, CC808356)

ORDER MODIFYING OPINION  
AND DENYING REHEARING

CHANGE IN JUDGMENT

BY THE COURT:

It is ordered that the opinion filed herein on March 16, 2012, be modified as follows:

1) On page 29 of the opinion, the following paragraph should be added before the heading “4. Opinion Testimony by Gang Expert”:

If the prosecution does not elect to retry that gang allegation attached to count 1, the trial court upon resentencing defendant shall not impose the alternate penalty under section 186.22, subdivision (b)(4) and defendant shall instead be subject to the gang enhancement set forth in section 186.22, subdivision (b)(1)(B). The section 186.22, subdivision (b)(1)(B) enhancement is included within the section 186.22(b)(4) alternate penalty, and thus defendant was adequately apprised that the prosecution was seeking to prove the elements which comprise a section 186.22(b)(1) enhancement. (See *People v.*

*Dixon* (2007) 153 Cal.App.4th 985, 1001-1002.) Further, the jury was instructed as to the elements of a section 186.22(b)(1) enhancement pursuant to CALCRIM No. 1401, and made a true finding on the basis of that instruction with respect to count 1. By also finding that defendant committed a felony violation of section 136.1, the jury implicitly also found that defendant committed a serious felony for purpose of the section 186.22(b)(1)(B) enhancement. (See *Neely, supra*, 124 Cal.App.4th at p.1261; cf. *People v. Kelii* (1999) 21 Cal.4th 452, 456 [some felonies listed in section 1192.7, subdivision (c) are “per se serious felonies” and thus “the question whether that conviction qualifies as a serious felony is entirely legal”].) Consequently, if the prosecution does not elect to retry the gang allegation attached to count 1, defendant shall instead be subject to the gang enhancement set forth in section 186.22, subdivision (b)(1)(B).

2) On page 54, under the heading “III. Disposition,” the second sentence beginning with “If the prosecution” shall be deleted and the following sentence is inserted in its place:

If the prosecution does not elect to retry that allegation, the trial court upon resentencing defendant shall not impose the alternate penalty under section 186.22, subdivision (b)(4), and defendant shall instead be subject to the gang enhancement set forth in section 186.22, subdivision (b)(1)(B).

This modification changes the judgment. The petition for rehearing is denied.

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BAMATTRE-MANOUKIAN, ACTING P.J.

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DUFFY, J.\*

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\*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.