ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ALBERT A. ALBILLAR, Defendant and Appellant.	Crim. No. S163905 (Court of Appeal No. B194358 Sup. Ct. No. 2005044985)

REPLY BRIEF ON THE MERITS

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Plaintiff and Respondent,	)	
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	)	(Court of Appeal No. B194358
	)	Sup. Ct. No. 2005044985)
ALBERT A. ALBILLAR,	)	
	)	
Defendant and Appellant.	)	
	)	

This reply is limited to those points upon which further discussion may be helpful to the Court. Appellant also joins in the replies of his co-defendants on those issues in which appellant previously joined. (Cal. Rules of Court, rule 8.504(e)(3).)

ARGUMENT

I.

THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S PENAL CODE SECTION 186.22, SUBDIVISION (A) CONVICTION AS THERE IS NO NEXUS BETWEEN APPELLANT'S GANG STATUS AND THE COMMITTED OFFENSES

Respondent argues sufficient evidence existed to sustain appellants' gang conviction and gang enhancements. Respondent's argument is factually based on the gang expert's testimony that crimes committed by gang members working together facilitate and promote the commission of crimes committed by gang members working together. (ABOM 19-25) Respondent's argument is conceptually grounded in an interpretation of Penal Code section 186.22, subdivision (a) that would make it a substantive crime for street gang members to commit any felony together, regardless of whether the crime had any relationship to the gang or their gang status. (ABOM 15-18) Respondent's argument is conceptually incorrect, rendering its factual support equally deficient. (*C.f.*, *People v. Gardeley* (1997) 14 Cal.4th 605, 623-624; *see generally*, *Jackson v. Virginia* (1979) 443 U.S. 307, 324.)

In urging this Court to clarify the parameters of the substantive gang offense, respondent's argument detours through two Ninth Circuit cases in which the federal appellate court held the predicate offense must be related to some other, or additional, gang crime in order for the defendant to be liable under section 186.22, subdivision (a). (ABOM 11) Respondent argues vigorously that this approach, adopted in *Garcia v. Carey*

(9th Cir. 2005) 395 F.3d 1099 and *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, improperly reaches beyond the scope of the anti-gang statute by requiring anything beyond the intent to assist criminal conduct by a gang member. (ABOM 13-18) This detour proves a bit of a straw man: appellant's argument, as set forth in his opening brief on the merits, is simply that section 186.22, subdivision (a) mandates the predicate offense be gang-related, as defined by this Court.[1]

Appellant would like to stress the issue here addressed is the scope of the substantive gang crime, not the gang enhancement—throughout its analysis, respondent conflates cases discussing subdivision (a) and those considering subdivision (b). Subdivision (b) explicitly requires the defendant harbor the specific intent to further or promote the gang as such; the subdivision (a) question before the Court is whether there is any sort of nexus between gang status and predicate offense inherent in subdivision (a), regardless of the defendant's intent. In other words, despite respondent's intimation that

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[1] Respondent footnotes that appellant characterized the *Garcia* holding as "instructive" (ABOM 12); leaving aside the cavil that the term "instructive" was not used in appellant's pleading, the larger point is that it was not *Garcia v. Carey*, *supra*, 395 F.3d 1099 which was the *Garcia* case expanded upon by appellant. Rather, it was *United States v. Garcia* (9th Cir. 1998) 151 F.3rd 1243, which was referenced: in *United States v. Garcia*, the Ninth Circuit criticized the prosecutor's theory that a defendant's gang membership itself constitutes an agreement to participate in any violent confrontations involving other gang members. The federal appellate court indicated that using a general gang practice of mutual support in a confrontation as readymade proof of joint intent (*id.*, at p. 1246, citing *Mitchell v. Prunty* (1997) 107 F.3rd 1337, 1342, overruled on other grounds, *Santamaria v. Horsley* (1998) 133 F.3rd 1242, 1248) is "contrary to fundamental principles of our justice system. '[T]here can be no conviction for guilt by association.'" (*United States v. Garcia*, *supra*, 151 F.3rd at p. 1246, quoting *Melchor-Lopez* (9th Cir. 1980) 627 F.2nd 886, 891.) (Albert Albillar BOM 37-38) It is also worth noting that this point was made relative to the application of section 186.22, subdivision (b), *not* subdivision (a).

even subdivision (b) could be satisfied by the commission of *any* felony in conjunction with another gang member, a suggestion flatly belied by the language of the Street Terrorism Enforcement and Prevention Act (STEP Act), it is perhaps more the case that subdivision (a) may be distinguished from subdivision (b) in terms of intent. Whereas subdivision (b) requires the specific intent to promote the gang, subdivision (a) requires only that the act be gang-related, *i.e.*, within the scope of the defendant's gang's activities and gang membership. (*C.f.*, *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang."].)[2]

Put another way, the requirement of active gang participation in subdivision (a) generally provides the unlawful intent that is specifically provided by the specific intent requirement in subdivision (b). This is somewhat analogous to the unlawful intent required by Penal Code section 261, subdivision (a)(2), being generally supplied by the

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[2] In this, the *Morales* court borrowed from employer/employee tort precepts, albiet inverting the principle: an employer is not liable for the actions of its employee where that employee is acting on a "frolic and detour" outside the course and scope of employment. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 297.) Whether the employee is acting so outside the course and scope of employment is determined by consideration of such factors as the nature of the conduct,"and his or her purpose and intent" in so acting. (*Kephart v. Genuity* (2006) 136 Cal.App.4th 280, 290.) Similarly, a gang member's conduct and intent should be significant factors in determining if he or she is acting outside the scope of his or her gang affiliation. (*c.f.*, *O'Shea v. Pacific Gas & Elec. Co.* (1936) 18 Cal.App.2d 32, 39 ["One who, in furtherance of his own interests or those of his master, asssts the servants of another in the performance of their work, is neiher a fellow servant of such ervant nor a mere volunteer, but occupies a third position; namely, that of a licensee with an interest…."], 40 ["A corporateion is an artificial creature, or creature of the law, and must act through its agents, servants and employees."].)

act of nonconsensual sex (an act otherwise permitted) as compared to the proof of specific intent required by section 288, subdivision (a), which proscribes any unlawful touching (no inherently sexual act). Active participation in a criminal street gang may additionally and properly criminalize gang-related conduct because the gang member is both on notice and intends that his predicate crime serve his gang. The non-gang member prosecuted under subdivision (b), by comparison, must specifically intend to serve the gang because the promotional relationship of his actions to the gang cannot be so imputed. By the same token, if the predicate offense is gang-related, there is no need to reach beyond the predicate offense to satisfy the statute or to address the societal evils so targeted. In still other words, the defendant must have assisted the criminal conduct of a gang member *qua* gang member—there must be "a reasonable nexus between gang status and criminal offense." (Albert Albillar BOM 18) Not to unduly revisit appellant's brief on the merits, but this comports with this Court's other interpretations of other provisions of the anti-gang statute, the majority of appellate court decisions, and is the conclusion recently reached by the Fourth District Court of Appeal on precisely this point. (*People v. Ramirez* (2009) ___ Cal. App.4th ___ [2009 WL 807304, 09 Cal. Daily Op. Serve 4078], published March 30, 2009.)

In *Ramirez*, the defendant was convicted of violating section 186.22, subdivision (a); a subdivision (b) allegation was also found true. The predicate offenses were transporting heroin and methamphetamine, and possession for sale; the defendant was a

long-time member of Santa Ana's Santa Nita gang, the gang had narcotics sales as a primary activity benefiting the gang, and the defendant was caught selling narcotics. (*People v. Ramirez*, *supra*, ___ Cal.App.4th at ___ [2009 WL 807304, at pp. 1-2].) Preliminarily, the Fourth District Court of Appeal rejected the defendant's claim that the gang charges should have been severed, given that the gang expert's testimony established a causal connection between the drug charges and the gang allegations. Too, the gang allegations were "central" to the drug charges as tending to prove the motive and intent behind the defendant's commission of those offenses. (*Id.*, at pp. 3-5, citing *People v. Castenada* (2000) 23 Cal.4th 743, 752 and *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

The *Ramirez* court also rejected the defendant's argument that there was insufficient evidence to sustain the gang allegations: there was ample evidence the defendant's drug offenses were committed within the ambit (and orbit) of his Santa Nita membership. (*People v. Ramirez*, *supra*, ___ Cal.App.4th at ___ [2009 WL 807304, at pp. 11-13].) However, in so finding, the court agreed with the defendant's contention that the third element of section 186.22, subdivision (a)—the requirement that the defendant promote, further, or assist felonious conduct by gang members— "applies to felonious conduct that is *gang-related*, not just any felonious criminal conduct a gang member commits." (*Id.*, at p. 6, emphasis added.) For the contrary interpretation, urged by the Government, "renders the words 'by members of that gang' superfluous." (*Id.*, at p. 7.)

The Fourth District also found that its conclusion that the predicate offense must be gang-related was further bolstered by the other statutory provisions: given the first element of subdivision (a) requires the offender be an active gang member, the requirement of the third element that the offender facilitate the commission of a felony by a gang member must restrict "'any felonious conduct' to gang-related conduct" to avoid impermissible redundancy. Under the doctrine of *noscitur a sociis* (it is known by association), a court must adopt a restrictive meaning of a term if a more expansive reading would make other terms unnecessary or redundant. (*People v. Ramirez*, *supra*, ___ Cal.App.4th at ___ [2009 WL 807304, at p. 7, citing *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 307.) By reiterating the requirement of gang membership in both the first and third elements of the substantive gang crime, the Legislature was indicating that subdivision (a) was only to be used against a gang member acting as a member of the gang—criminal liability accrues "only for conduct by gang members acting as gang members and not in some other capacity." (*People v. Ramirez*, *supra*, ___ Cal.App.4th at ___ [2009 WL 807304, at p. 8.)

As appellant has previously argued (Albert Albillar BOM 18-22), so the *Ramirez* court further found that the STEP Act read as a whole supports the requirement that the predicate crime be gang-related: "Simply put, in the context of an act aimed at gang activity, we find it incongruous to conclude the crime of active gang participation occurs when the defendant commits felonious conduct unrelated to any gang." (*People v.*

Ramirez, *supra*, ___ Cal.App.4th at ___ [2009 WL 807304, at p. 8.) So too, the history of the Act, as previously argued (Albert Albillar BOM 20-22, 32), shows that the Legislature intended to reach (and curb) criminal conduct by gang members acting in their capacity as gang members, or within the course and scope of their membership. The Legislative Counsel's Digest refers to the eradication of "gang-related activity" as the Act's purpose, and various committee reports echo this theme—the Legislature was targeting gang-related crimes committed by active gang members because those were the crimes and criminals plaguing California communities. (*People v. Ramirez*, *supra*, ___ Cal.App.4th at ___ [2009 WL 807304, at pp. 9-10.) As trenchantly put by the Fourth District: "A gang, as a corporate body, can only act through its individual members, but it does not follow that the actions of those individuals are always gang-related." (*Id.*, at p. 11.)

Finally, and again as previously argued, it is this nexus between the defendant's gang status and his current criminal conduct which prevents subdivision (a) from unconstitutionality. A gang member who commits a crime for purely personal reasons has not offended the state beyond the fact of his felonious conduct—and there is thus nothing in his associative status that the state may properly punish or proscribe. (Albert Albillar BOM 22-23, 27-28; *People v. Ramirez*, *supra*, ___ Cal.App.4th at ___ [2009 WL 807304, at p. 11[anarchist who blows up a bank safe to get money to buy a new car would not violate the Smith Act].) Simply put, it is fealty via act, not contact, that subdivision (a) prohibits. (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 609-610.) Because there was no

such actionable allegiance here, appellant's section 186.22, subdivision (a) conviction and subdivision (b) enhancement must be reversed. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 623.)

II.

THE PENAL CODE SECTION 186.22(B) ENHANCMENTS MUST BE REVERSED AS THERE IS INSUFFICIENT EVIDENCE THAT THE UNDERLYING OFFENSES BENEFITED THE RELEVANT CRIMINAL STREET GANG

In *Briceno v. Scribner*, *supra*, 555 F.3d 1069, several members of the Hard Times Street Gang in Orange County robbed four people on Christmas Day; there was evidence the robberies were committed to get money to buy Christmas presents. (*Briceno v. Scribner*, *supra*, 555 F.3d at pp. 1072-1075.) In reversing the gang finding, the federal appellate court held that generic testimony as to the glorification of a gang via its members' criminal activities and the attendant increase in those members' gang status was not constitutionally adequate to prove the defendants' specific intent to promote or assist a criminal street gang by their crimes. (*Id.*, at p. 1079.) In *Garcia v. Carey*, *supra*, 395 F.3d 1099, the expert testified that the gang was notably "turf oriented"; the court found there was nothing so inherently gang-related about a gang member robbing a liquor store customer on his home turf as to warrant an inference of specific intent under Penal Code section 186.22, subdivision (b).[3] (*Id.*, at p. 1103.)

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[3] The exact facts of *Garcia* problematize the connection of that robbery to that gang: the victim entered a liquor store, the defendnat and a couple of friends were already inside. The victim asked Garcia, "how do you do," Garcia asked the victim if he knew him; the victim said no, and Garcia told him not to talk to him if he didn't know him. Garcia asked the victim if he had any change, the victim said he didn't. When the victim started to leave the store, Garcia identified himself as a EMF member, asked the victim if he wanted to get robbed, and robbed him, taking about $15 from his pocket and leaving with the victim's bicycle. (*Garcia v. Carey*, *supra*, 395 F.3d at p. 1101.) Aside from the defendant's crime-related gang identification (in contrast to appellant's case, where there was no mention of the gang during the rape (RT 1:130,

To the extent *Briceno* and *Garcia* interpret subdivision (b), they reject the argument, put forth by respondent, that the specific intent to assist a gang member is the *de jure* and *de facto* equivalent of the specific intent to promote the gang. (ABOM 13, 15) For all the reasons articulated in appellant's brief on the merits, the reading of subdivision (b) that would automatically equate intent to aid a known gang member with intent to promote the gang is an unconstitutional misreading, and one that flies in the face of this Court's other STEP Act analyses and of the constitutionally-mandated concept of personal guilt. (*People v. Castenada*, *supra*, 23 Cal.4th at p. 748; *Scales v. United States* (1961) 367 U.S. 203, 224-225; Albert Albillar BOM 21-23, 26-27.) To the degree lower courts have held otherwise, they are mistaken, and their holdings should be disapproved. (*See*, *People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198; *compare*, *People v. Villalobos* (2006) 154 Cal.App.4th 310, 322 [commission of crime in concert with gang members is "substantial evidence" of specific intent to promote gang under subdivision (b)][4].)

Leaving aside the "other crime" thesis not advanced by appellant, the narrower question before the federal court in those cases, as the narrower question before this Court in this case, is the simpler one of whether there was sufficient evidence to support the

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2:270-271, 2:302-303, 3:470)), there was no other indication that the crime was gang-related, particularly in terms of the expert testimony's that EMF was turf-oriented. By this same token, there is nothing in appellant's case that indicates the rape was gang-related in terms of the expert's testimony that SouthSide is turf and status-oriented. (RT 3:604-605, 3:607-609, 3:626-628, 4:696-697, 4:702).

[4] Note that *Villalobos* was a Fourth District case, the same appellate district which held in *Ramierez* that subdivision (a) requries the predicate crime be gang-related. (*People v. Ramierez*,

section 186.22, subdivision (b) findings. There was not in those cases, as there is not in this case. (*Garcia v. Carey*, *supra*, 395 F.3rd at p. 1103 ["The expert's testimony was singularly silent on what criminal activity of the gang was furthered or intended to be furthered by the robbery...."]; *Briceno v. Scribner*, *supra*, 555 F.3d at pp. 1078-1079 [expert provided no testimony as to defendants' intent, responding "in generalities" about such crimes glorifying the gang and increasing the status of the offenders].)

Without unduly rehashing points more fully made in appellant's brief on the merits, there insufficient evidence that appellant committed the charged sex offenses with the specific intent to promote or assist the SouthSide Chiques. (*People v. Williams* (2008) 167 Cal.App.4th 983, 987-988) Respondent's argument to the contrary is cut and paste proof that does not amount to anything beyond the "frolic and detour" described by the court in *People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198, and the generalities critiqued in *Briceno* and *Garcia*. Furthermore, not only do the parsings not add up, they don't stand up:

Respondent states the gang expert testified rape was a crime committed by other SouthSide members, and thus, the offenses here are in keeping with SouthSide's gang activities. (ABOM 21, citing RT 4:702) This was not the testimony. What the expert said was something far more general, far more hypothetical, and substantively quite the opposite:

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supra, ___ Cal.App.4th at ___ [2009 WL 807304, at p. 6].)

> Gang members commit all kinds of crimes to further themselves or their personal interests, you know. Crimes that involve some type of sexual gratification occurs by other gang members, by other SouthSide Chiques gang members, they are not going to come back and announce that they have committed a rape or promote it that it's a rape at all, you know, and they're going to claim that law enforcement and the district attorney's office is making stuff up, you know, to protect their position, but these crimes still occur.

(RT 4:702) Meaning not that the expert had any particular knowledge that SouthSide members have committed other rapes, but rather that insofar as "gang members commit all kinds of crimes" including those to further "their *personal* interests," SouthSide members who committed rapes would not admit them to their fellows. *I.e.*, if a SouthSide member rapes, he does so on his own time, because rape is not part of the SouthSide Chiques' ethos or praxis. To torque this testimony into contrary proof that rape is typical of SouthSide would be like suggesting that because some gang members have library cards, and some of them don't return their books, bibliophilism is a gang trait. (*Compare*, *People v. Ortega* (2006) 145 Cal.App.4th 1344, 1357 ["No evidence indicated the goals and activities of a particular subset were not shared by the others."].)

More to the point, the expert *did* testify that, while somewhat turf-oriented, SouthSide was primarily driven by, and organized around, status. Status was the be-all and end-all of this "tightly-knit" gang, according to the expert: how one got crimed in, how one got booted out, how one's stock rose and fell within SouthSide, whether retaliation was in order because of disrespect to the gang or gang member or whether the SouthSide member ought be cast in disfavor for going against the tenets of the gang, was

apparently the gang's only guiding principle. A principle appellant violated. (RT 3:603-609) In short, there was simply no proof that these defendants had the specific intent to promote this gang by raping this victim—if appellant's understanding is that rape is anathema to SouthSide, and that commission of a rape would reduce his status in the gang, there is no plausible way he could have intended that the rape would promote his gang or his rank within the gang. Or, as put by the state's expert, "They want to stay away from reducing their status is probably the most important, one of the most important things in a gang member's mind," reduction being so grave a consequence that "they would be a target for harm." (RT 3:605)

Respondent maintains SouthSide benefited in two ways from the sex offenses here: first, by "bolstering appellants' reliance on each other" and second, by "spreading fear through the community" that SouthSide was one nasty street gang. (ABOM 21-22) The first contention is no more than a soft tautology, *i.e.*, if gang members commit a crime together, they are therefore relying on one another to commit a crime, and thus bolstering their reliance on one another to commit crimes. Like the lower court, respondent gives short shrift to the defendants' familial relationship (RT 3:612-620 [court struck expert's testimony that gang tie stronger than blood as not related to SouthSide].) For in appellant's case, this syllogism ran counter to the brothers and their cousin's allegiance to SouthSide: the family that preys together, stays together—because now the gang won't have them.

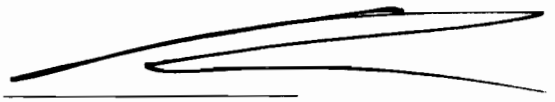
To find sufficient proof in this instance would be to sanction enhancing a defendant's sentence not for what he specifically and actually intended by his conduct, but for how his conduct could be hypothetically read in the broadest possible way by the world at large—even when that reading is both absolutely incorrect and directly unintended. To borrow the *Ramirez* court's analogy, if an anarchist blows up a bank safe to buy money for a new car, thereby betraying his anti-materialist principles and bringing shame both to himself and to the Cause, his sentence should not be enhanced because the general public would be nonetheless all the more frightened of anarchists. (*In re Frank S.* (2006) 141Cal.App.4th 1192, 1195 ["…crimes may not be found to be gang related based solely upon a perpetrator's criminal history and gang affiliations."].) Again, we punish for what men do and what they intend, not who they are or what they believe in. (*Scales v. United States*, *supra*, 367 U.S. at pp. 228-230; *People v. Castenada*, *supra*, 23 Cal.4th at p. 752; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1111, cert. den., 521 U.S. 1121)

CONCLUSION

For the foregoing reasons, in addition to those stated in the opening brief, petitioner's convictions must be reversed.

Dated: April 15, 2009

Respectfully submitted,



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	)	(Court of Appeal No. B194358
	)	Sup. Ct. No. 2005044985)
ALBERT A. ALBILLAR,	)	
	)	
Defendant and Appellant.	)	
	)	

CERTIFICATION

Pursuant to California Rules of Court, rule 8.504, I certify that the foregoing petition for review contains 3,922 words, inclusive.

Vanessa Place
Attorney for Petitioner

Proof of Service

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is Post Office Box 18613, Los Angeles, California 90018. I am a member of the bar of this court.

On April 16, 2009, I served the within

REPLY BRIEF ON THE MERITS

in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

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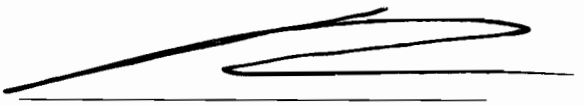
I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of April, 2009 at Los Angeles, California.



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