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October 28, 2009

Frederick K. Ohlrich
Clerk of the Supreme Court
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *The People of the State of California v. Albert Andrew Albillar, et al.*
Supreme Court of the State of California, Case No. S163905

Dear Clerk of the Court:

On August 26, 2009, this Court ordered "each party to file a supplemental letter brief directed to the question of whether the phrase felonious criminal conduct, appearing in Penal Code section 186.22, subdivision (a), should be interpreted to mean felonious gang-related conduct." The answer to that question is "no." As discussed below, the unambiguous language of the statute, as well as the legislative findings and history, compel the conclusion that no such requirement exists in Penal Code section 186.22, subdivision (a).[1]

I. RULES OF STATUTORY CONSTRUCTION

In *People v. Coronado* (1995) 12 Cal.4th 145, this Court set out the "familiar canons of statutory construction," explaining:

> "[I]n construing a statute, a court [must] ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246, 40 Cal.Rptr.2d 903, 893 P.2d 1224.) In determining that intent, we first examine the words of the respective statutes: "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.] 'Where the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not exist." [Citation.]'" (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263,

[1] All further statutory references are to section 186.22 of the Penal Code, unless otherwise indicated.

> 268, 36 Cal.Rptr.2d 563, 885 P.2d 976.) If, however, the terms of a statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*See Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744, 38 Cal.Rptr.2d 650, 889 P.2d 970.) "We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins*, *supra*, 10 Cal.4th at p. 246, 40 Cal.Rptr.2d 903, 893 P.2d 1224.)

(*People v. Coronado*, *supra*, 12 Cal.4th at p. 151.)

Thus, to interpret a statute, this Court "begin[s], as usual, with the statutory language, giving the words their plain, commonsense meaning. 'If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary.' [Citations.]" (*People v. Traylor* (2009) 46 Cal.4th 1204, 1212.)

II. THE PLAIN LANGUAGE OF SECTION 186.22, SUBDIVISION (A) IS UNAMBIGUOUS

No ambiguity exists in section 186.22, subdivision (a). It omits any requirement that the conduct that the perpetrator promotes, furthers or assists be "gang-related." The provision states:

> (a) 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, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

The "plain language" of the statute provides that it is "felonious criminal conduct" that is punishable, not "felonious gang-related conduct." Because 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.'" (*Lenanne v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268; accord, *People v. Coronado*, *supra*, 12 Cal.4th at p. 151.) And since the language of the statute is clear, this Court should not "interpret away that clear language in favor of an ambiguity that does not exist." (*Campbell v. State Farm Mutual Auto. Ins. Co.* (1989) 209 Cal.App.3d 871, 875; accord, *People v. Coronado*, *supra*, 12 Cal.4th at p. 151.)

Following this plain meaning conforms to the Legislature's intent in enacting section 186.22. (See *People v. Birkett* (1999) 21 Cal.4th 226, 231 ["We must follow the statute's plain

meaning, if such appears, unless doing so would lead to absurd results the Legislature could not have intended"].) In this regard, an examination of the statute, specifically a comparison of subdivisions (a) and (b), demonstrates that the Legislature would not have wanted the term "gang-related" to be judicially appended to subdivision (a).[2]

First of all, the language of subdivision (b) indicates that the Legislature was aware of, but decided not to add, language such as "gang-related" to the definition of "felonious criminal conduct" in subdivision (a) of section 186.22. In contrast to the street terrorism felony in subdivision (a), subdivision (b) of section 186.22 defines the type of felony to which the gang enhancement applies as "a felony or attempted felony for the benefit of, at the direction of, or in association with any criminal street gang." Thus, had the Legislature intended that subdivision (a)'s street terrorism conduct apply only to "gang-related" crimes, the Legislature could simply have repeated the language from subdivision (b), which rearticulates the term "gang-related." Instead, the Legislature chose not to use that language in subdivision (a), demonstrating its intent not to so limit the "felonious criminal conduct" in subdivision (a).

Second, it is significant that, since 1989, section 186.22 has been amended numerous times and yet, despite these opportunities to add the term "gang-related" to the phrase "felonious criminal conduct" to subdivision (a) of section 186.22, the Legislature has chosen time and time again not to amend the section in this way.

Third, subdivisions (a) and (b) evince different purposes, explaining the absence of a "gang-related" requirement in subdivision (a). In drafting section 186.22, the Legislature sought to criminalize gang violence in two separate ways. In subdivision (b) of section 186.22, the Legislature created a gang enhancement which would append to specific felonies only: namely, "a felony or attempted felony for the benefit of, at the direction of, or in association with any criminal street gang" committed "with the specific intent to promote, further, or assist in any

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[2] There is no constitutional imperative for "gang-related" to be placed in the phrase "felonious criminal conduct." Indirectly speaking to this issue is *People v. Castaneda* (2000) 23 Cal.4th 1456, where this Court upheld the constitutionality of section 186.22, subdivision (a). In particular, this Court resolved that the "active participation" element in section 186.22, subdivision (a), did not impose punishment for mere membership or association with a gang and was thus constitutional under high court precedent. (*Castaneda*, *supra*, 23 Cal.4th at pp. 746-748.) This Court construed the statutory language, "actively participates," as requiring evidence of involvement with a criminal street gang that goes beyond merely passive or nominal participation. (*Id.* at pp. 747, 752.) This Court observed that the requirement for "active participation" rested upon the due process principle of "personal guilt" and that "personal guilt means simply that a person convicted for active membership in a criminal organization must entertain 'guilty knowledge and intent' of the organization's criminal purposes." (*Id.* at pp. 748-749, relying on *Scales v. United States* (1961) 367 U.S. 203, 228 [81 S.Ct. 1469; 6 L.Ed.2d 782].) As the "active participation" requirement of subdivision (a) manifestly satisfies the "personal guilt" aspect of due process, the Constitution does not additionally require that the phrase "felonious criminal conduct" be limited to such conduct that is "gang-related."

criminal conduct by gang members." And, under subdivision (b), such felonies can be committed by *anyone* intending to benefit the gang. Thus, the enhancement was specifically designed to enhance only felonies that were committed for the benefit of a gang.[3] Further, it was designed to prevent anyone from aiding the gang by committing criminal conduct whether or not that person is actually a member or associate of the gang.

Subdivision (a) of section 186.22 solves a different gang problem. Instead of limiting its application only to felonies that were intended to benefit the gang, as in subdivision (b), subdivision (a) seeks to prevent by active gang participants from willfully promoting, furthering, or assisting "felonious criminal conduct" by members of that gang. Thus, subdivision (a), unlike subdivision (b), is not structured to solely impact crimes committed to benefit the gang. It appears, in contrast to subdivision (b), to be designed to deal with the scourge of gang members committing any crimes together, not merely "gang-related" crimes.

A logical purpose exists for such legislation. As experience has shown, even when committing crimes solely for individual benefit, gang members are able to rely on the facilitation and support of other members by holding or handing off weapons, cars, or other evidence, intimidating witnesses, and enforcing "codes of silence." Thus, two or more gang members joining together in a crime, even without the intent to promote the gang, pose additional problems for the community not posed by criminal collaborations by non-gang members.[4]

Fourth, subdivision (b)'s additional requirement that the conduct be for the benefit of the gang justifies the Legislature's greater punishment for violations of subdivision (b) than subdivision (a). A violation of subdivision (a) is punishable either as a misdemeanor or a felony and, as a felony, is only punishable by a short prison sentence of 16 months, two years, or three years. (§ 186.22, subd. (a).) Subdivision (b) only attaches to felonies and is punishable by "an additional and consecutive term of imprisonment" consisting of a minimum of "two, three or four years." Depending on the underlying offense, subdivision (b) can be punishable by five years, ten years, fifteen years to life, or life. (§ 186.22, subd. (b).) Thus, subdivision (b), which,

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[3] This brief sometimes uses a phrase like "for the benefit of a gang" as shorthand for subdivision (b)'s language "for the benefit of, at the direction of, or in association with any criminal street gang . . . ." (See *People v. Brookfield* (2009) 47 Cal.4th 583, 589, fn. 2.)

[4] This case exemplifies the danger that that the Legislature targeted in enacting subdivision (a) of section 186.22. The rape victim, Amanda, was aware that two of the perpetrators, Alex and Albert, were members of the Southside Chiques gang. (1RT 127-129.) Thus, when she was warned by a third party not to report the rapes to the police, Amanda was justifiably fearful for her own safety and that of her family, specifically because the perpetrators were members of a gang. (1RT 179-181.) The SouthSide Chiques criminal street gang was a violent, vicious, and brutal gang. (1RT 603.) SouthSide Chiques gang members were required to support other gang members when they were out committing crimes. (1RT 605.) Thus, the fact that appellants were all gang members served to enable the commission of the crimes, and inhibit the rape victim from reporting the crimes, even assuming the crimes were not committed to specifically benefit the gang as a whole.

in contrast to subdivision (a), requires the felony to be for the gang's benefit, provides for harsher punishment than subdivision (a), demonstrating a legislative intent to treat gang-related crimes more strictly than gang-participating crimes. A comparison of these punishments further indicates that the Legislature's intent was to have a lower bar for prosecutions under subdivision (a) than for enhancement imposition under subdivision (b). (Compare also § 186.22, subd. (b) [willfulness required] with § 186.22, subd. (a) [specific intent required].)

Lastly, the absence of a "gang-related" requirement in subdivision (a) is consistent with section 186.22's treatment of different classes of crimes and defendants. Section 186.22, subdivision (a) punishes a limited class of defendants (active gang participants) for a broad reach of activities (any felonious activity), while section 186.22, subdivision (b)(1), punishes a broad class of defendants (any felon) for a narrow range of activity (acting on behalf of a gang). An interpretation that the felonious conduct proscribed in section 186.22, subdivision (a) must have a "gang-related" nexus with the gang–essentially, that the felonious conduct must be committed with the intent to "promote, further or assist" the gang–would blur the distinction between subdivisions (a) and (b).

Adding "gang-related" to "felonious criminal conduct" in section 186.22, subdivision (a), would alter a legislatively prescribed element. Given the plain meaning of section 186.22, subdivision (a), and the Legislature's evident purpose in defining this offense, this Court need not resort to extrinsic sources. This Court should decline to insert the term "gang-related" into the statute.

III. THE LEGISLATIVE FINDINGS SET FORTH IN SECTION 186.21 FURTHER SUPPORT THE CONCLUSION THAT SECTION 186.22, SUBDIVISION (A), PROHIBITS "FELONIOUS CONDUCT," NOT FELONIOUS GANG-RELATED CONDUCT

The conclusion that the Legislature intended to combat gang violence in two separate ways in subdivisions (a) and (b) of section 186.22 is supported by the legislative findings in section 186.21. In relevant part, as enacted by the Legislature, section 186.21 provides:

> The Legislature, however, further finds that the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected. The Legislature finds that there are nearly 600 criminal street gangs operating in California, and that the number of gang-related murders is increasing. The Legislature also finds that in Los Angeles County alone there were 328 gang-related murders in 1986, and that gang homicides in 1987 have increased 80 percent over 1986. It is the intent of the Legislature in enacting this chapter to seek the

> eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs. The Legislature further finds that an effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by street gangs.

These legislative findings set forth the Legislature's intent to counter not only "gang-related" crime, but also "a multitude of crimes" committed by gang members, "both individually and collectively." They reflect the overarching aim to reduce the "criminal activity" by organized street gangs that terrorizes communities. In enacting subdivision (a) of section 186.22, the Legislature accomplished this goal by targeting all felonies that gang participants commit together, not just the "gang-related" felonies that they do to benefit the gangs themselves. The Legislature addressed its additional concern with felonies benefitting the gangs by providing for the enhancement in subdivision (b) of section 186.22. The Legislature's findings in section 186.21 further demonstrate that the absence of the term "gang-related" in section 186.22, subdivision (a), conforms to its intent.

IV. THE LEGISLATIVE HISTORY OF SECTION 186.22 DEMONSTRATES THAT THE LEGISLATURE DID NOT INTEND "FELONIOUS CRIMINAL CONDUCT" IN SUBDIVISION (A) TO BE LIMITED TO "GANG-RELATED" CRIMES

Assuming, for the sake of argument, that the meaning of section 186.22, subdivision (a), is ambiguous, even in light of the legislative findings of section 186.21, then this Court "may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history." (*People v. Coronado*, *supra*, 12 Cal.4th at p. 151.) As set forth below, the legislative history of subdivision (a) of section 186.22 demonstrates a conscious decision to apply subdivision (a) to all felonious conduct, not only "gang-related" felonious conduct.

Subdivision (a) of section 186.22 was added to the Penal Code by Statutes 1988, chapter 1242 (Assembly Bill 2013) and by Statutes 1988, chapter 1256 (Senate Bill 1555). Assembly Bill 2013 and Senate Bill 1555 were simultaneously introduced in the same session to combat the growing problem of crimes committed by gang members. Despite the thorough consideration of and numerous amendments to these bills, the Legislature did not enact subdivision (a) with the term "gang-related" in it. Indeed, in the original version of Senate Bill 1555, the Legislature classified a series of "gang-related" crimes, but then withdrew this proposal and created the crime in subdivision (a) without the term "gang-related."

A. Assembly Bill 2013

Assembly Bill 2013 was introduced and then amended *thirteen* times, but at no time was it ever amended to add "gang-related" language to define the "felonious conduct" required by subdivision (a) of proposed section 186.22. (Assemb. Bill 2013, introduced March 6, 1987, and

amended April 23, 1987, May 26, 1987, June 3, 1987, June 9, 1987, June 25, 1987, July 9, 1987, August 18, 1987, September 1, 1987, April 4, 1988, June 23, 1988, August 2, 1988, August 5, 1988, August 30, 1988].)[5]

As introduced on March 6, 1987, Assembly Bill 2013 proposed to add section 421 to the Penal Code, which would provide in relevant part:

> (b) Any person who becomes a member of, or who maintains membership in a street gang, who has knowledge that the purpose of the street gang is to engage in assaults with a deadly weapon, robbery, murder, or the unlawful sale or possession for sale of controlled substances listed in Section 11054, 11055, 11056, 11057, or 11058 of the Health and Safety Code, is guilty of a felony.

(Assembly Bill 2013, as introduced on March 6, 1987.) Thus, as originally introduced, the bill only required: (1) membership in a street gang; and (2) knowledge of the purpose of the street gang. As introduced, the bill did not require the commission of a separate felony. As proposed, it did not require that the active participant actually "promote[], further[], or assist[] in any felonious criminal conduct." Also, as proposed at that time, the statute did not even require any "criminal conduct," let alone felonious conduct. Mere membership in a gang would have been the gravamen of the crime.

Assembly Bill 2013 was first amended on April 23, 1987. This amendment added the requirement that the defendant "promotes, furthers, or assists *any criminal activity* committed by gang members." (Assembly Bill 2013, as amended April 23, 1987, Legislative Counsel's Digest.) Almost the entirety of the proposed section 421, subdivision (b), introduced on March 6, 1987 was deleted and replaced as follows:

> (b) Any person who becomes a member of, or who ~~maintains membership in a street gang, who has knowledge that the purpose of the street gang is to engage in assaults with a deadly weapon, robbery, murder, or the unlawful sale or possession for sale of controlled substances listed in Section 11054, 11055, 11056, 11057, or 11058 of the Health and Safety Code, is guilty of a felony.~~ *maintains membership in, a criminal street gang, with knowledge that two or more of its members engage in a pattern of criminal acts, and who promotes, furthers, or assists any criminal activity committed by the gang members, shall be punished by*

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[5] A simple citation to "published" legislative documents (e.g., legislative bills, committee and floor analyses) is sufficient to bring such documents to this Court's attention. (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 440, fn. 18.)

> *imprisonment in the county jail not exceeding one year or in the state prison for 16 months, or 2 or 3 years.*

(Assembly Bill 2013, as amended, April 23, 1987.) Thus, this amendment added a requirement that the defendant promote, further, or assist "any criminal activity," but it did not yet require that the criminal activity even be felonious and certainly did not require that it be "gang-related."

The May 26, 1987 amendment to Assembly Bill 2013 was substantial and included placing the legislative findings language in section 186.20 and making section 186.22 the primary statute rather than section 421. The bill, as now amended, proposed two new crimes, a wobbler and a felony, and proposed, for the first time, gang enhancements. Proposed subdivision (a) of section 186.22 would contain language similar to that originally proposed for subdivision (b) of section 421 except for adding specific intent language:

> (a) *Any person who actively participates in any criminal street gang with knowledge that its members or participants engage in or have engaged in a pattern of criminal gang activity with the specific intent to promote, further, or assist in any criminal conduct by its members or participants, shall be punishable by imprisonment in the county jail for a period not to exceed one year, or by imprisonment in the state prison.*

(Assembly Bill 2013, as amended, May 26, 1987.)

Proposed subdivision (b) of section 186.22 was also similar to the original proposed section 421:

> (b) *Any person who actively participates in any criminal street gang with knowledge that its members or participants engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers or assists in any criminal conduct by gang members or participants, is punishable by imprisonment in the state prison.*

(Assembly Bill 2013, as amended, April 23, 1987.)

Again, neither of these proposed crimes would require that the criminal activity even be felonious let alone require that it be "gang-related." Assembly Bill 2013 only required that the active participant in the street gang have "the specific intent to promote, further, or assist in *any criminal conduct* by its members or participants." (Emphasis added.)

At the same time that the bill proposed these new sections, it also proposed subdivision (c) of section 186.22, which was a proposal for a gang enhancement based on felonies that were

gang-related, and later became subdivision (b) of section 186.22. The proposed subdivision (c) of section 186.22 provided in the relevant part:

> (c) *Any person who is convicted of a felony or a misdemeanor which is 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 or participants, shall be punished in the following manner*:

(Assembly Bill 2013, as amended, April 23, 1987.) Thus, in contrast to proposed subdivisions (a) and (b), proposed subdivision (c) imposed an additional punishment for crimes that are gang-related, i.e., committed for the benefit of the gang, indicating a legislative intent not to include a "gang-related" requirement in sections (a) and (b). (See *People v. Athar* (2005) 36 Cal.4th 396, 409 ["when the Legislature uses a critical word or phrase in one statute, the omission of that word or phrase in another statute dealing with the same general subject generally shows a different legislative intent"].)

The June 3, 1987 amendments to Assembly Bill 2013 did not alter the relevant proposed subdivisions (a) and (b) except to make the punishment for both sections identical: a wobbler. (Senate Bill 2013, as amended, June 3, 1987.) This version contains the same language as today's version, except that "gang members" was later changed to "members of that gang" and the punishment was later increased from wobbler to 16 months, two, or three years. What is noteworthy though, again, is that the language then included no requirement that the "criminal conduct" be "gang-related," only that it be "felonious."

The June 9, 1987 amendments wrought no change in proposed subdivisions (a) and (b) of section 186.22. (Senate Bill 2013, as amended, June 9, 1987.)

The June 25, 1987 amendments to Assembly Bill 2013 deleted former proposed subdivision (a), moved former proposed subdivision (b) to subdivision (a), and moved former proposed subdivision (c) to subdivision (b). It also deleted language in new subdivisions (a) and (b) referring to "participants" and added the requirement in subdivision (a) that the criminal activity be "felonious." It did not require, however, that such activity be "gang-related." Except for the punishment, it was nearly identical to the current version of subdivision (a).

Subdivision (a) of section 186.22, as proposed by the June 25, 1987 amendments, thus provided:

> (a) Any person who actively participates in any criminal street gang with knowledge that its members ~~or participants~~ 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 gang members ~~or participants, is punishable~~ *shall be*

> *punished* by imprisonment in the county jail for a period not to exceed one year, or by imprisonment in the state prison.

(Senate Bill 2013, as amended, June 25, 1987.)

The July 9, 1987 amendments did not alter proposed subdivisions (a) and (b) of section 186.22. (Senate Bill 2013, as amended, July 9, 1987.)

Reports prepared for June 8, June 29, and July 13, 1987 hearings in the Assembly Committee on Public Safety all explain that Assembly Bill 2013 would provide criminal sanctions for participation in criminal street gangs in two separate ways: (1) making it a wobbler offense "to actively participate in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal activity and willfully promote, further, or assist in *any felonious criminal conduct by gang members*;" and (2) enhancing sentences for offenses committed "in furtherance of gang activities." (Assem. Comm. on Public Safety Reports re June 8, June 29, and July 13, 1987 hearings, emphasis added.)

The July 13, 1987 report emphasized that "[t]his bill imposes sanctions on active participation in the gang only when the defendant knows of *felonious criminal activity* and willfully promotes, furthers or assists it." (Assem. Comm. on Public Safety Report re July 13, 1987 hearing, at p. 4, emphasis added.) The report did not explain that the felonious criminal activity be "gang-related." Thus, strong evidence indicates that the legislative intent behind Assembly Bill 2013 was to punish "any felonious conduct by gang members" as a separate offense regardless of whether that felonious conduct was gang-related. "Gang-related" conduct could be enhanced separately, via the subdivision (b) enhancement.

Subsequently, the Assembly amended the bill on August 18, 1987, September 1, 1987, April 4, 1988, June 23, 1988, August 2, 1988, August 5, 1988, and August 30, 1988. Yet, other than the sentencing provisions, no changes were made to proposed subdivision (a) of section 186.22. (Assem. Bill 2013, as amended, August 18, 1987, September 1, 1987, April 4, 1988, June 23, 1988, August 2, 1988, August 5, 1988, and August 30, 1988.) Thus, the legislative amendments to the bill demonstrate absolutely no intent to restrict subdivision (a)'s reach to only "gang-related" felonies.

Furthermore, this distinction between "felonious criminal conduct by gang members," which became subdivision (a) of section 186.22, and crimes committed "for the benefit of, at the direction of, or in association with a criminal street gang," can be found throughout the committee reports on Assembly Bill 2013. None of these reports describe the "felonious criminal conduct" as being only "gang-related" conduct. (Senate Comm. on Judiciary Report re March 22, 1988 hearing; Senate Comm. on Judiciary Report re June 28, 1988 hearing; see also Digest of Assemb. Third Reading, as amended, September 1, 1987 [noting that there are no provisions which make "commission of criminal offenses by members of criminal street gangs a separate offense" and that there are no "specific sentencing provisions for offenses committed in

furtherance of gang activities"]; Sen. Rules Comm., Floor Analysis, for Sen. Floor Vote, Aug. 30, 1988; Sen. Judiciary Comm. Report re May 10, 1988 hearing.)

This review of the legislative history of Assembly Bill 2013 supplies zero evidence that the Legislature ever intended to limit subdivision (a) of section 186.22 to apply only to "gang-related" felonies. In fact, injecting such a limitation into the subdivision would run afoul to the unmistakable will of the Legislature in passing this bill.

B. Senate Bill 1555

Senate Bill 1555 ultimately contained the same language as Assembly Bill 2013 with regard to what became subdivision (a) of section 186.22. Significantly, however, Senate Bill 1555 originally provided for a separate crime in section 186.13 of "gang-related" offenses. Proposed section 186.13 was thereafter deleted from the bill and *never* enacted into law. This deletion from Senate Bill 1555 demonstrates a clear legislative intent not to include this modifier in describing the element of "felonious criminal conduct" in section 186.22, subdivision (a).

In the original version of Senate Bill 1555 introduced by Senator Robbins on March 6, 1987, the Legislative Counsel's Digest provided in part:

> This bill would provide that any person who commits any act which constitutes a felony, misdemeanor, or infraction in violation of any state law or city ordinance, is guilty of a separate offense if the underlying offense: (1) is part of a pattern of *gang/related activity*, or is done for the benefit of, at the direction of, or in association with, any gang, as defined, and (2) is committed with the specific intent to promote or further any of its *criminal gang activity*, or to assist in continuing its pattern of *gang/related activity*, as specified.

(Senate Bill 1555, as introduced, March 6, 1987, emphasis added.)

This original version of the bill proposed to add legislative findings to a proposed section 186.11 of the Penal Code and to add relevant definitions to a proposed section 186.12, which included defining "Criminal gang related activity" as "any act committed, attempted, conspired to be committed, threatened, solicited, coerced, or made to intimidate another person to commit any of the following offenses . . . ." (Senate Bill 1555, as introduced, March 6, 1987.) This original bill also proposed to create section 186.13 of the Penal Code, which would make a series of "gang-related" crimes:

> (a) Any person who commits any act which may be charged as a felony, misdemeanor, or infraction in violation of any state law or ordinance of any city, shall be guilty of a separate and distinct offense punishable pursuant to Section 186.14 if the felony, misdemeanor, or infraction: (1) is part of a pattern of

criminal gang-related activity, or is done for the benefit of, at the direction of, or in association with, any gang, and (2) is committed with the specific intent to promote or further any of its *criminal gang-related activity*, or to assist in continuing its pattern of *criminal gang-related activity*.

(b) Any person who actively conducts or participates, directly or indirectly, in any gang, with the specific intent to promote or further any of its *criminal gang-related activity* or to assist in continuing its pattern of *criminal gang-related activity*, is guilty of an offense punishable pursuant to Section 186.14.

(c) Any person who conducts or participates, directly or indirectly, in the conduct or affairs of any association or group of three or more persons, incorporated or unincorporated, legitimate or illegitimate, which has a common name, through a pattern of *criminal gang-related activity* is guilty of an offense punishable pursuant to Section 186.14.

(d) Any person who has received any proceeds derived, directly or indirectly, from a pattern of *criminal gang-related activity* in which that person has participated as a principal, within the meaning of Section 31, or who uses or invests, directly or indirectly, any part of that income, or the proceeds of that income, in the acquisition of any interest in, or the establishment or operation of, any enterprise whatsoever, is guilty of an offense punishable pursuant to Section 186.14.

(e) Any person who through a pattern of *criminal gang-related activity* acquires or maintains, directly or indirectly, any interest in, or control of, any enterprise whatsoever, is guilty of an offense punishable pursuant to Section 186.14.

(f) Any person who, as part of a pattern of *criminal gang-related activity*, or on behalf of any gang, willfully threatens to commit, or to incite, organize, direct, supervise, or aid or abet others to commit, any crime against the person or property of another, with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, if on its face and in the circumstances in which it is made, it is so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, is guilty of street terrorism, and is punishable pursuant to Section 186.14.

> (g) Any person who, as part of a pattern of *criminal gang-related activity*, or on behalf of any gang, willfully threatens to commit, or to incite, organize, direct, supervise, aid or abet others to commit, any crime against the person or property of another, with the specific intent to cause a person of ordinary emotions and sensibilities to fear for the safety of any person or property, or with reckless disregard of the risk of causing a person of ordinary emotions and sensibilities to fear for the safety of any person of property shall be subject to the civil remedies of Section 186.15.
>
> (h) Any parent or legal guardian having custody and control over a minor child, who fails to exercise reasonable care to control that minor child, and willfully and knowingly allows him or her to violate any civil or criminal provision of this chapter, and who receives any financial profit or gain from any violation, is guilty of a misdemeanor punishable pursuant to Section 186.14.

(Senate Bill 1555, as introduced, March 6, 1987, emphasis added.)

Clearly, then, the Legislature was well aware of the possibility of adding the "gang-related" language to the Penal Code. The original language of Senate Bill 1555, as introduced, used such language repeatedly. Had the Legislature intended to keep such language in what eventually became subdivision (a) of section 186.22, it could have done so. But the Legislature removed this language from Senate Bill 1555. The fact that it deleted this language from its bill strongly indicates a legislative intent *not* to use such language in section 186.22, subdivision (a).

The Legislative Counsel's Digest to the bill, as amended on May 22, 1987, informed of the deletion of the "gang-related" language in the bill, stating in relevant part the following:

> SB 1555, as amended, Robbins. Crimes.
>
> (1) Under existing law, there are no provisions which specifically make the commission of criminal offenses by individuals who are members of street gangs ~~and~~ *a* separate and distinctly punished offense, or which provide for the forfeiture of the proceeds of gang-related activity.
>
> ~~This bill would provide that any person who commits any act which constitutes a felony, misdemeanor, or infraction in violation of any state law or city ordinance, is guilty of a separate offense if the underlying offense: (1) is part of a pattern of gang/related activity, or is done for the benefit of, at the direction of, or in association with, any gang, as defined, and (2) is committed with the specific intent to promote or further any of its~~

~~criminal gang activity, or to assist in continuing its pattern of gang/related activity, as specified.~~

~~This bill would also prohibit other types of criminal activity in furtherance of the criminal objectives of a gang which promote that activity, which result in the acquisition of the illegal proceeds of that activity, or which are intended to intimidate or cause a person of ordinary sensibilities to fear for his or her safety. This bill would prescribe the punishment applicable to the commission of these offenses.~~

This bill would provide that any person who actively participates in any criminal street gang with knowledge that its members or participants engage in or have engaged in a pattern of criminal gang activity, as defined, with the specific intent to promote, further, or assist in ***any criminal conduct*** *by its members or participants, shall be punished by imprisonment in the county jail for a period not to exceed one year, or by imprisonment in the state prison. This bill would provide that any person who actively participates in any criminal street gang with knowledge that its members or participants engage in or have engaged in a pattern of criminal gang activity, and who willfully furthers, or assists in* ***any criminal conduct*** *by gang members or participants, is punishable by imprisonment in state prison.*

This bill would also prescribe the punishment applicable to any person who is convicted of a felony or misdemeanor which is committed or attempted to be 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 or participants, including the minimum term of imprisonment in the county jail and the state prison for these offenses and a 3-year sentence enhancement applicable to the commission or attempted commission of a felony in furtherance of these objectives.

(Legislative Counsel's Digest to Senate Bill 1555, as amended, May 22, 1987, bold emphasis added.)

Thus, according to the Legislative Digest of the bill, as amended on May 22, 1987, the bill would no longer separately punish crimes that are "part of a pattern of gang/related activity" or are committed with the "specific intent to promote or further any of its criminal gang activity." Instead, Senate Bill 1555 now separately punished "any criminal conduct" by fellow gang members. Only the final paragraph of the Digest, quoted above, which pertained to the

enhancement provisions which ultimately became subdivision (b), mentioned a similar requirement that the crime be committed "for the benefit of, at the direction of, or in association with" a gang.

Consistent with the account in the Legislative Digest, the bill as amended deleted the "gang-related" requirement. The entirety of proposed section 186.13, quoted above, was removed from Senate Bill 1555 and replaced by the following provisions, quoted here in relevant part:

> *186.22. (a) Any person who actively participates in any criminal street gang with knowledge that its members or participants engage in or have engaged in a pattern of criminal gang activity, and with the specific intent to promote, further, or assist in any criminal conduct by its members or participants, shall be punishable by imprisonment in the county jail for a period not to exceed one year, or by imprisonment in the state prison.*
>
> *(b) Any person who actively participates in any criminal street gang with knowledge that its members or participants engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any criminal conduct by gang members or participants, is punishable by imprisonment in the state prison.*
>
> *(c) Any person who is convicted of a felony or a misdemeanor which is 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 or participants, shall be punished in the following manner . . . .*

(Senate Bill 1555, as amended, May 22, 1987.)

In sum, the language of the proposed statute (now section 186.22) was amended to exclude any reference to "gang-related" offenses. Further, newly proposed subdivision (b) of section 186.22 (which ultimately became subdivision (a)) applied not only to "gang-related" offenses, but to the much wider category of "any criminal conduct by gang members or participants." The fact that the Senate amended Senate Bill 1555 to delete any reference to "gang-related" offenses and replace such references with "any criminal conduct" indicates the Legislature's intent *not* to limit the new gang offense to "gang-related" conduct.

The June 4, 1987 amendment to Senate Bill 1555 did not re-institute the "gang-related" language. In addition to non-substantive changes to section 186.22, it made the following indicated changes in subdivision (b):

> (b) Any person who actively participates in any criminal street gang with knowledge that its members or participants engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any criminal conduct by ~~gang~~ members or participants *of that gang*, is ~~punishable~~ *punished* by imprisonment *in the county jail for a period not to exceed one year, or by* in the state prison.

(Senate Bill 1555, as amended, June 4, 1987.)

The June 23, 1987 amendment to Senate Bill 1555 made a number of changes to the proposed statute, but, again, did not re-institute the "gang-related" language that had been deleted on May 22, 1987. Primarily, the June 23, 1987 amendment deleted what had been proposed as subdivision (a) of section 186.22, reordered subdivisions (b) and (c) as (a) and (b), and required that the "criminal conduct" at issue in new subdivision (a) be "felonious":

> ~~186.22. (a) Any person who actively participates in any criminal street gang with knowledge that its members or participants engage in or have engaged in a pattern of criminal gang activity, and with the specific intent to promote, further, or assist in any criminal conduct by its members or participants, shall be punished by imprisonment in the county jail for a period not to exceed one year, or by imprisonment in the state prison.~~
>
> ~~(b)~~
>
> *186.22. (a)* Any person who actively participates in any criminal street gang with knowledge that its members ~~or participants~~ 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 ~~or participants~~ of that gang, ~~is~~ *shall be* punished by imprisonment in the county jail for a period not to exceed one year, or by *imprisonment* in the state prison.
>
> ~~(c)~~
>
> *(b)* Any person who is convicted of a felony or a misdemeanor which is 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 ~~or participants~~, shall be punished in the following manner . . . .

(Senate Bill 1555, as amended, June 23, 1987.)

Although the Senate and the Assembly amended Senate Bill 1555 seven more times, it never saw fit to reintroduce "gang-related" language into what was now proposed subdivision (a) of section 186.22. (Senate Bill 1555, as amended, August 20, 1987; Senate Bill 1555, as amended, May 2, 1988; Senate Bill 1555, as amended, June 30, 1988; Senate Bill 1555, as amended, August 9, 1988; Senate Bill 1555, as amended, August 25, 1988; Senate Bill 1555, as amended, August 29, 1988; Senate Bill 1555, as amended, August 30, 1988.) This is strong evidence that the Legislature did not intend for "gang-related" to modify "felonious criminal conduct" in subdivision (a) of section 186.22.

Indeed, after the May 22, 1987 amendment deleting the "gang-related" language from Senate Bill 1555, the Senate Committee Reports discussed the new "offense" of criminal gang activity as punishing "any criminal conduct by its members." That new offense was not required to be "gang-related."[6] (Sen. Judiciary Comm. Report re June 9, 1987 hearing at pp. 4, 5; see also Legislative Analyst Analysis of Senate Bill 1555, as amended June 23, 1987 [noting that the bill established a criminal penalty for "willfully promoting or assisting in any felonious criminal conduct of a street gang"]; Assem. Comm. on Public Safety Report re August 18, 1987 hearing, p. 5 [noting bill would make it a crime to "willfully promote, further, or assist the criminal activity]; Assem. Comm. on Public Safety report re August 24, 1987 hearing, p. 5 [noting that new offense of "willful promotion, assistance, or furtherance of any of the criminal activities would be alternate felony/misdemeanor"]; Assem. Comm. on Public Safety Report re August 1, 1988 hearing, p. 6 [noting bill would create new crime of "willful promoting, furthering, or assisting any felonious criminal conduct by the gang"].)

While some legislative analysis of the Senate bill does refer to "criminal gang activity," such analysis appears to be no more than a shorthand summary of the bill by a legislative staff member rather than indicative of an actual legislative intent to reinsert "gang-related" language into subdivision (a) of section 186.22. (See, e.g., Assem. Comm. on Ways and Means Analysis of Sen. Bill 1555 re hearing on August 22, 1988; Assem. Comm. on Ways and Means, Republican Analysis, August 22, 1988, p. 1.)

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[6] A Senate Judiciary Committee report prepared for a May 26, 1987, hearing explains that the bill would enact provisions, including creating a new criminal offense, "if the felony, misdemeanor, or infraction was both: part of a pattern of criminal gang-related activity or was done for the benefit of, at the direction of, or in association with any gang; and committed with the specific intent to promote or further any of its criminal gang-related activity." (Sen. Judiciary Comm. Report re May 26, 1987 hearing at p. 2; see also Sen. Judiciary Comm. Report re May 19, 1987 hearing [containing the same language].) It also proposed to define "gang-related activity." (Sen. Judiciary Comm. Report re May 26, 1987 hearing at p. 4.) However, it is apparent that this committee report, issued in anticipation of the May 26, 1987 hearing, was prepared prior to the May 22, 1987 amendments, which deleted the "gang-related" provisions referred to in this committee report and, thus, did not describe the bill as it existed after the May 22, 1987 amendments.

Unlike this shorthand description, the Legislative Analyst's August 18, 1988 analysis, which was drafted contemporaneously with the Assembly Ways and Means Committee Analyses, provides clearer explication, stating that this bill: "Establishes criminal penalties for willfully promoting or assisting in *any felonious criminal conduct* of a street gang, as defined. The measure also provides for sentence enhancements that would result in an additional prison term for persons committing crimes in order to promote or assist street gang members." (Legislative Analyst, August 18, 1988, Analysis of Senate Bill No. 1555 (Robbins), as amended in Assembly August 9, 1988, p. 1].) No "gang-related" requirement is indicated.

Similarly, the Senate Rules Committee Analysis, dated August 31, 1988, also issued during that same time period, correctly explains that "[e]xisting law contains no provisions which specifically make the commission of *criminal offenses* by individuals who are members of street gangs separate and distinctly punished offenses" and this bill establishes criminal penalties for "willfully promoting or assisting in *any felonious criminal conduct* of a street gang." (Senate Rules Comm., Office of Sen. Floor Analysis, Analysis of Sen. Bill 1555, August 31, 1988; see also Senate Rules Comm., Office of Sen. Floor Analysis, Analysis of Sen. Bill 1555, June 30, 1987 [same language].)

As a final indication of legislative intent, at the end of 1988 General Session of the Legislature, the Assembly Committee on Public Safety issued a report on "New Statutes Affecting The Criminal Law" and described Senate Bill 1555 (Ch. 1256), in part, as follows:

> Under current law there are no provisions which specifically make the commission *of criminal offenses* by members of street gangs a separate and distinctly punished offense.
>
> This bill makes it an alternate felony/misdemeanor, punishable by 1, 2, or 3 years in state prison or up to one year in county jail, to actively participate in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal activity, and to willfully promote, further or assist in *any felonious conduct* by gang members.

(Assem. Comm. on Public Safety, *New Statutes Affecting the Criminal Law*, 1988 General Sess., p. 17, emphasis added.) Thus, the Assembly Committee on Public Safety described the new felony as requiring "any felonious criminal conduct, not "gang-related" criminal conduct.

Thus, the legislative history of section 186.22, subdivision (a), makes it abundantly clear that, although the original language of Senate Bill 1555 contained numerous references to "gang-related activity," all of those references were deleted from the bill on May 22, 1987, and were later replaced by the qualifier "felonious." Therefore, the legislative intent was not to have the term "gang-related" modify the phrase "felonious criminal conduct."

V. CONCLUSION

For all of these reasons, including the unambiguous language of section 186.22, subdivision (a), the legislative findings in section 186.21, and the legislative history of section 186.22, subdivision (a) (including the purposeful deletion of "gang-related" from Senate Bill 1555 on May 22, 1987), the intent of the Legislature was not to include the qualifier "gang-related" in subdivision (a). Therefore, the term "gang-related" should not be read into section 186.22, subdivision (a), to define "felonious criminal conduct." Consequently, regardless of whether appellants' offenses could reasonably be classified as "gang-related," sufficient evidence supported their convictions under subdivision (a).

Respectfully submitted,

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DECLARATION OF SERVICE

Case Name: **People v. Albillar, et al.** No.: **S163905**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 29, 2009, I placed the attached

LETTER DATED OCTOBER 28, 2009 TO FREDERICK K. OHLRICH RE PEOPLE V. ALBILLAR, ET AL., S163905

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

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In addition, I placed one (1) copy in the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery to:

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on October 29, 2009, at Los Angeles, California.

Signature

DAW:ll