SUPREME COURT COPY

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SUPREME COURT
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Frederick K. Ohlrich Clerk

Deputy

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),[1] should be interpreted to mean felonious gang-related conduct." The Court also granted leave for the parties to file reply briefs.

In respondent's supplemental letter brief of October 29, 2009, we explained that the answer to the Court's question is "no" because the unambiguous language of the statute, as well as the legislative findings and history, compel the conclusion that no "gang-related" requirement exists in Penal Code section 186.22, subdivision (a). In this reply brief, Respondent explains why appellants' arguments to the contrary are without merit.

I. REPLY TO APPELLANT ALBERT ALBILLAR'S SUPPLEMENTAL LETTER BRIEF

Appellant Albert Albillar's letter brief[2] primarily observes that the statement of legislative intent that accompanied Senate Bill 1555 suggests that the intent of the Senate bill

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

[2] On October 29, 2009, Respondent filed its supplemental letter brief. On November 12, 2009, appellant Albert Albillar filed his supplemental letter brief and included within it his reply to Respondent's letter brief. On November 16, 2009, appellant Alex Albillar joined that supplemental letter brief.

was to eradicate criminal activity by street gangs. (Albillar Supp. Brf. at 3-4.) However, the fact the Legislature intended to put a stop to criminal street gangs does not reveal the precise manner in which the Legislature chose to do so. As set forth in Respondent's supplemental letter brief, the Legislature intended to combat gang violence in two separate ways in subdivisions (a) and (b) of section 186.22, and the legislative findings in section 186.21 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." In enacting subdivision (a), 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. The Legislature addressed its additional concern about felonies intended to benefit gangs by providing for the enhancement in subdivision (b).

Next, appellant Albillar argues that "gang-related" should be read into subdivision (a) of section 186.22 because "as a matter of grammatical construction, inserting the words 'gang-related' after the word 'felonious' in subdivision (a) would create an awkward self-referential redundancy in the sentence . . . ." (Albillar Supp. Brf. at 5.) But appellant Albillar fails to follow the maxim that, 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.) Since the statute itself is not ambiguous, there is no need to add an additional phrase to it. Moreover, there is nothing redundant about "felonious" and "gang-related"—they have two very different meanings.

Appellant Albillar's third argument ignores the clear statutory language of section 186.22, subdivision (a), and instead resorts to extrinsic materials, particularly letters to legislators by supporters of Senate Bill 1555. There are several problems with the usage of these materials. First, such letters, even if considered by some legislators, do not constitute evidence of the intent of the entire Legislature or even the intent of a single legislator to whom such a letter is addressed. Such letters are only, at most, evidence of the thoughts and opinions of the letter writers. (See *Quelimane Company v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46, fn. 9.) Second, such letters contain the writers' summaries of the Senate bill, not the actual language of the bill, and it is the actual language that matters. Third, the Senate bill, as noted earlier, attacked the plague of street gangs by two separate mechanisms: (1) a substantive crime in subdivision (a); and (2) an enhancement in subdivision (b). It is generally not clear from the letters appellant Albillar relies on which subdivision the writers were focusing on or whether the writers bothered to distinguish between the two subdivisions. Many of the letters in question discuss gang crime in generalities, not specifics, and certainly not in terms of statutory language. Fourth, some of the letters appellant Albillar relies on were drafted *prior* to the May 22, 1987 amendment to Senate Bill 1555, which deleted the "gang-related" language from what eventually became subdivision (a). Therefore, those letters, including the April 15, 1987 letter that

appellant Albillar describes as "most emblematic," are simply not evidence of the Legislature's intent regarding the post-May 22, 1987 bill. (Albillar Supp. Brf. at 9.)

Appellant Albillar's fourth argument is that, if subdivision (a) applies to non-gang-related crimes, then the statute runs afoul of the First Amendment. (Albillar Supp. Brf. at 10-11.) However, the language at issue in subdivision (a) has been unchanged for twenty years and has not failed the constitutional test because subdivision (a) does not punish mere membership in a group. Rather, subdivision (a) punishes the commission of felonies by members of a criminal street gang acting together. Engaging in criminal gang activities does not fall within the freedom of association protected by the First Amendment. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1110-1112.) Indeed, in *People v. Castaneda* (2000) 23 Cal.4th 1456, this Court specifically upheld the constitutionality of subdivision (a) because the "active participation" element did not impose punishment for mere membership or association with a gang. (*Id.* at pp. 746-748.)

Appellant Albillar's fifth argument is that the lesser punishment in subdivision (a) than provided for in subdivision (b) evidences an intent to punish more harshly the intent to commit gang-related crimes in subdivision (b) than to punish *unintentional* gang-related crimes in subdivision (a). (Albillar Supp. Brf. at 11.) In other words, appellant Albillar asserts that the Legislature intended subdivision (a) to punish felonies that *unintentionally* aid gangs and that this is why a lesser punishment is prescribed for subdivision (a) than subdivision (b). However, nothing in the legislative history supports his position that the relatively minor difference in mens rea between subdivisions (a) and (b)—willfulness vs. specific intent—solely drove the Legislature's decision to make subdivision (a) a lightly penalized felony offense and subdivision (b) a heavily penalized felony enhancement. Instead, the statutory language and history support the conclusion that the Legislature made the policy decision that the harm from gang members committing felonies with each other (subdivision (a)) deserved separate criminal prohibition, but was not as great the harm from gang members committing gang-related felonies (subdivision (b)).

Next, appellant Albillar asserts that "section 186.22, subdivision (a) cannot be read to encompass any crime committed outside the ambit of the criminal organization." (Albillar Supp. Brf. at 11-12, citing federal RICO cases.) However, appellant Albillar's only support for that proposition is analysis of a federal statute, RICO, bearing no similarity to the gang statute at issue here.

Finally, appellant Albillar queries: "[W]hat's the point [of using section 186.22 to punish crimes that are not gang-related]?" (Albillar Supp. Brf. at 12.) The point is that subdivision (a), in contrast to subdivision (b), is 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. 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." Gang members typically have more experience committing crimes than non-gang members and thus are more

likely to accomplish their criminal objectives and therefore inflict more injury and damage. 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.

II. REPLY TO APPELLANT MADRIGAL'S SUPPLEMENTAL LETTER BRIEF

In his supplemental letter brief filed November 13, 2009, appellant Madrigal makes a number of arguments in support of a pitch to insert "gang-related" into section 186.22, subdivision (a), none of which are compelling. He preliminarily asserts: "Section 186.22, subdivision (a) was designed to place criminal sanctions on an individual who played some role in a gang-related crime, but his or her role may not have been sufficient to establish his or her participation as a conspirator or aider and abettor of that crime." (Madrigal Supp. Brf. at 2.) Appellant Madrigal, however, fails to support this assertion with anything from the legislative record. Indeed, nowhere in the legislative history can such a "design" be found. Moreover, that the Legislature created a lesser punishment in subdivision (a) than (b) for conduct, as well as a mens rea, willfulness, that does not independently support aider and abettor liability, is consistent with respondent's overall position that subdivision (a) targeted a significant but lesser gang problem than subdivision (b).

Appellant Madrigal places great reliance on an April 15, 1987 letter that the Los Angeles City Attorney sent to the Attorney General. Appellant Madrigal quotes extensively from this letter, giving five pages of examples, to explain the ostensible purpose of Senate Bill 1555. (Madrigal Supp. Brf. at 3-5.) But as noted earlier, in the reply to appellant Albillar's letter brief, the problem with relying on that April 1987 letter is that, while it correctly analyzes the original version of Senate Bill 1555, that Senate bill was substantially amended five weeks later on May 22, 1987. Senate Bill 1555 originally provided for a separate crime of "gang-related" offenses in proposed section 186.13, but proposed section 186.13 was deleted from the bill and *never* enacted into law. (Senate Bill 1555, as amended, May 22, 1987.) Contrary to appellant Madrigal's assertions, the fact that the Legislature deleted "gang-related" language form Senate Bill 1555 indicates a clear and unmistakable intent *not* to use such language in what would ultimately become section 186.22, subdivision (a). Also, subsequent amendments to Senate Bill 1555 did not re-introduce the "gang-related" language that had originally been in the bill.

Appellant Madrigal does direct attention to some post-May 22, 1987 language in bill summaries, such as the June 23, 1987 Assembly Public Safety Committee summary that appellant Madrigal quotes from. (Madrigal Supp. Brf. at 6, quoting Ex. B, p. 258.) However, this summary simply does not state that the substantive offense that eventually became subdivision (a) of section 186.22 only applies to "gang-related" crimes. Rather, viewed in context, the summary clearly refers to "criminal activity," not to "gang-related criminal activity." The same is true for the identical August 24, 1987 summary that appellant Madrigal cites. (Madrigal Supp. Brf. at 6.)

Appellant Madrigal also quotes extensively from a Senate Judiciary Committee Analysis. (Madrigal Supp. Brf. at 6-8.) However, that analysis, which was prepared for the May 19, 1987 hearing, was drafted prior to the May 22, 1987 amendments and, therefore, is not indicative of the Legislature's intent following those amendments.

Appellant Madrigal also points to a bill analysis prepared for a May 26, 1987 hearing. (Madrigal Supp. Brf. at 8.) But the analysis states "as amended May 21," and thus it is apparent from the language in the report that it was prepared prior to the May 22, 1987 amendments, which deleted the "gang-related" provisions referred to in the report. Thus, the analysis that appellant Madrigal cites does not describe the bill as it existed *after* the May 22, 1987 amendments.

Appellant Madrigal's reliance on a bill analysis prepared for a June 9, 1987 hearing (Madrigal Supp. Brf. at 8-9) is also misplaced. Appellant Madrigal points to headings under "key issues," including one with the following language: "Should a 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 serious criminal activity, and with the specific intent to participate in this criminal conduct, be guilty of a 'wobbler'?" (Madrigal Supp. Brf. at 8, quoting Ex. B, p. 181.)

A conspicuous problem with appellant Madrigal's reliance on this "key issue" heading is that its language changed from the prior Judiciary Committee analyses prepared for the May 26, 1987 hearing, in a manner demonstrating that the Legislature meant to delete a "gang-related" requirement from the bill. These earlier analyses stated: "Should a person who commits any act which could be charged as a felony, misdemeanor, or infraction be guilty of a separate and distinct offense if it was part of a pattern of criminal gang-related activity *and* committed with the specific intent to promote or further criminal gang activity?" (Ex. B, p. 166.) Thus, the June 9, 1987 analysis removed language containing the phrases "pattern of criminal gang-related activity" and "criminal gang activity," replacing those phrases respectively with "pattern of serious criminal activity" and "criminal conduct." (Ex. B, p. 181.) Therefore, since the committee analyses removed references to "criminal gang-related activity" and "criminal gang activity," the analysis prepared for the June 8, 1987 supports a finding of legislative intent to remove the phrase "gang-related" from the Senate bill at issue.

Moreover, a key distinction between the analysis that the Judiciary Committee prepared for the May 26, 1987 hearing and the analysis prepared for the June 9, 1987 hearing can be found under the May analysis heading: "Criminal gang-related activity - - new offense." In the analysis prepared for the May hearing, the author explains that the bill would create a new offense whereby

> any person who committed any act which could be charged as a felony, misdemeanor, or infraction would be guilty of a separate and distinct offense if the offense was: 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 was *committed with the specific intent to promote or further any of its criminal gang-related activity.*

(Ex. B, p. 169, emphasis added.) In the June analysis, that heading is changed from "Criminal gang-related activity - - new offense" to "Criminal gang activity - - new offense" and the language following that heading included a new offense as follows:

> (b) Any person who actively participated 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 promoted, furthered, or assisted *in any criminal conduct by the gang members or participants*, would be punished by imprisonment in the county jail for a period not to exceed one year, or by imprisonment in the state prison.
>
> Under this provision, an individual who actively participated in a gang which had established a pattern of criminal gang activity, as defined, and who willfully promoted *criminal conduct* by that gang would be subject to "wobbler" penalties, whether or not he or she had participated in the crimes. Opponents again contend that individuals who have not committed crimes would be guilty of the crimes of others due to their involvement with these gangs.

(Ex. B, p. 185, emphasis added.) Contrary to appellant Madrigal's analysis, then, the focus of the June analysis is *not* on gang-related crimes, but on "any criminal conduct" committed by gang members or participants. The June analysis thus also demonstrates a legislative intent to remove "gang-related" language from the substantive offense.

Appellant Madrigal next recounts a number of one-sentence descriptions of Senate Bill 1555 to support his theory. (Madrigal Supp. Brf. at 9-10.) However, those one-sentence descriptions are quick summaries and not full analyses of the bill, and, since they are from June 1987 documents, may not have taken into account the then-recent May 22, 1987 amendments to the bill.

Also, the Assembly Public Safety Committee's analysis prepared for the August 18, 1987 hearing, which appellant Madrigal relies on, actually supports respondent's position that the Legislature did not intend for "gang-related" to be inserted into the statute. (See Madrigal Supp. Brf. at 10-11.) In discussing the new substantive offense, that analysis explains that it would punish persons that either:

> a) actively participate in a criminal street gang with the knowledge that its members engage in or have engaged in a pattern

> of criminal gang activity with the specific intent to promote, further, or assist its *criminal conduct*, or
>
> b) Willfully promote, further, or assist the *criminal activity*.

(Ex. B, p. 253, emphasis changed.) Again, having drafted it for a previous version of the bill, the Legislature certainly knew how to make the offense "gang-related." That they did not ultimately intend to do so is borne out in the analyses issued after the amendment removing this language.

In sum, the Legislature intended subdivision (a) of section 186.22 to function differently from subdivision (b). To that end, the Legislature deliberately removed "gang-related" language from subdivision (a) in the final version of the statute. This Court should not override legislative intent by inserting such language back into the statute.

Respectfully submitted,

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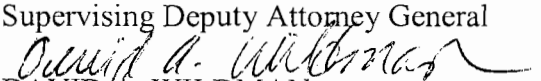

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DECLARATION OF SERVICE

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 November 30, 2009, I placed the attached

LETTER DATED NOVEMBER 30, 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 November 30, 2009, at Los Angeles, California.

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Signature

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