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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S273797

THE PEOPLE,
Plaintiff and Respondent,

v.

RAYMOND GREGORY REYNOZA,
Defendant and Appellant.

Court of Appeal of California
Sixth District
No. H047594

Superior Court of California
Santa Clara County
No. C1775222
Hon. Charles E. Wilson

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

In their opening brief on the merits, Plaintiff sets forth the issue presented as whether Penal Code section 136.1, subdivision (b)(2) (hereinafter 136.1(b)(2)) encompasses attempts to dissuade a witness from “assisting in the prosecution” of a case after a complaint has been filed. Plaintiff contends that the Sixth District Court of Appeal held erroneously that “the words ‘[c]ausing a complaint . . . to be sought’ in section 136.1(b)(2) refer to attempts to prevent a complaint from being filed.” (Opening Brief at p. 10; Opn. at pp. 1–2.) Plaintiff further urges that “[s]ection 136.1(b)(2) should be construed as encompassing attempts to dissuade a witness from assisting in the prosecution of a filed accusatory pleading: “Although section 136.1(b)(2) is ambiguous, the Legislature intended to prohibit dissuasion of more than the mere filing of an accusatory pleading.” (Opening Brief at p. 11.)

Relying on the legislative history of section 136.1(b)(2), as well as on grammatical analysis and comparisons with sister-state statutes, Plaintiff urges this Court to reject the holding by the Sixth District Court of Appeal that “section 136.1(b)(2) requires proof that, among other prohibited acts, the defendant attempted to prevent or dissuade another person from causing a complaint, indictment, information, probation or parole violation to be filed.” (Opinion at p. 9.)

Petitioner contends that “permutations in phrasing” lead to the conclusion that the two gerund phrases in section 136.1(b)(2)

– “causing a complaint . . .” and “assisting in the prosecution thereof” – are “independently prohibited acts,” not a series of elements that together define a single offense. (Opening Brief at pp. 23–24, 27.)

Appellant disagrees. The legislative history provides no indication of the intent to create two separate offenses. Moreover, not only the punctuation of subdivision (b)(2), but also the specific words used in the subdivision (as well as in surrounding subdivisions) support the conclusion that the entirety of section 136.1(b)(2) stands on its own as a unified prohibited act, consisting of two elements, both of which must be proven to convict a defendant and simultaneously protect their due process rights as guaranteed by the United States and California constitutions. (*In re Winship* (1970) 397 U.S. 358, 364; U.S. Const., amend. XIV; Cal. Const., art. I, § 16.)

The Court of Appeal reversed Appellant’s conviction for lack of evidence that he attempted to prevent or dissuade another person from causing a complaint [or other accusatory pleading] to be filed. (Opinion at p. 9.) Appellant also argued on appeal that there was insufficient evidence of the second *element* of the statute, that he attempted to dissuade the witness in this case from “assisting in the prosecution” of a complaint. In other words, neither of the two necessary elements of section 136.1(b)(2) was proven beyond a reasonable doubt, and the reversal should stand.

STATEMENT OF THE CASE AND FACTS

Procedural History

Appellant was charged by information filed on November 21, 2017, with one count of murder (§ 187 - count one), one felony count of dissuading or attempting to dissuade a witness by use of force or threat of force (§ 136.1, subd. (c)(1) - count two) and one felony count of witness dissuasion with an act done in furtherance of a conspiracy (§ 136.1, subd. (c)(2) - count three). (1CT 28–30.) On March 23, 2018, at the close of the prosecution's case-in-chief, the information was amended on motion of the district attorney:

Count two was amended to a violation of section 136.1, subdivision (b)(2) (witness dissuasion)[1], with two allegations that the witness dissuasion was committed with use of force upon a person and in furtherance of a conspiracy (§ 136.1, subds. (c)(1) and (c)(2)); count three was dismissed. (17RT 2361; 2CT 353, 355.)

Following the trial, the jurors returned the following verdicts with respect to Appellant Reynoza:

Not guilty of second degree murder (count one), and not guilty of the lesser included offense of manslaughter. (2CT 444.)

Appellant was found guilty of witness dissuasion (count two - § 136.1, subd. (b)(2)). (2CT 444.)

---

[1] The parties used the terms dissuasion and intimidation interchangeably. The parties stipulated and the jury was instructed in modified CALCRIM No. 205 that "the phrases 'witness intimidation,' 'intimidating a witness,' and 'witness dissuasion' have the same meaning." (18RT 5104; 2Aug. RT 371.)

As to the allegations to count two, the jury found not true the allegation that Appellant acted maliciously and used force during the witness dissuasion (§ 136.1, subd. (c)(1)) and found true the allegation that Appellant acted maliciously and with the intent to assist in a conspiracy to intimidate a witness (§ 136.1, subd. (c)(2)). (2CT 444.)

Appellant filed notice of appeal on August 16, 2019. On February 14, 2022, the Sixth District Court of Appeal returned its published opinion, reversing Mr. Reynoza's conviction for witness dissuasion, Penal Code section 136.1, subdivision (b)(2). The Attorney General filed a petition for review with this Court on March 28, 2022, which was granted on May 11, 2022.

Overview of the Incident Underlying the Case

At around 9:00 p.m. on the evening of June 22, 2017, Rafael Cornejo and Benjamin Valladares arrived at the Sky Bar and Restaurant in San Jose. (9RT 1487–1488.) Cornejo and Valladares were partners in a used car business and set out together on that day to sell a white Toyota truck. (7RT 1137, 1139, 1150.) Their plan on June 22, 2017, was to sell the truck, but instead they started "partying" in the afternoon at another bar, Micheladas, where Valladares continued the drinking he had begun earlier that day. (9RT 1489, 1492, 1495, 1497.) Around 9:00 p.m., Cornejo drove them in the truck to Sky bar and parked in front of the bar. (9RT 1487–1488, 1492.)

After arriving at the bar, Cornejo and Valladares went in, got a table and ordered a bottle of Hennessy. (9RT 1502–1503.) At some point, the bar manager, Nghia Mac, came to their table and

told Valladares there was a group of people outside (appellant, Guillermo Cervantes, Cesar Chavez, and other unnamed individuals); Mac asked Valladares if everything was all right between him and the outside group. (9RT 1503; 10RT 1633.) Mac went out and told appellant and Cervantes not to enter the bar because Valladares was inside and Mac didn't want any trouble. (10RT 1682.) Valladares told Cornejo to stay inside and went out to assess the situation. (9RT 1515–1516.)

When Valladares came back inside, Cornejo was on his way out the door; Valladares told Cornejo to not go outside because he didn't want Cornejo to get into a fight (9RT 1521, 1530, 1534), but Cornejo went out anyway (9RT 1530). Valladares went back to the table to pick up a few items and then proceeded outside, where he saw Cornejo falling to the ground. (9RT 1522, 1535.)

Nghia Mac, the manager, had arrived at the Sky Bar before 9:00 p.m. on June 22, 2017. (10RT 1631.) He saw a group of approximately five or six individuals that included appellant, Guillermo Cervantes, and Cesar Chavez arriving in two cars; Mac knew appellant and Cervantes as previous customers. (10RT 1631–1632.) Valladares and Cornejo had also been at the bar previously. (10RT 1618, 1620.)

Ronald Johnson was the bouncer at Sky Bar on June 22, 2017. (8RT 1363, 1370; 10RT 1617.) While he was on duty outside of the bar, Johnson saw a group of five or so men and two individuals whom he described as "large" and Hispanic. (8RT 1375.) Johnson noticed an altercation building between a couple of individuals. (8RT 1374.) When Johnson approached the group to defuse any possible problem, Mac, who had also walked up, told him to go back to covering the bar entrance. (8RT 1378.) As

he turned away, Johnson heard the phrase "drop the charges" and the sound of a single punch. (8RT 1378–1379.) He turned and saw a large man (Cornejo) fall to the ground. (8RT 1379.) According to Johnson, everyone was very intoxicated. (8RT 1421.)

After Cornejo was hit, Mac told Cervantes, appellant, and the others to leave, which they did. (8RT 1422; 10RT 1668.) Mac and Johnson then tried to revive Cornejo, who was still lying unconscious on the pavement. (8RT 1412.) Several individuals lifted Cornejo into the back of the Toyota truck, and Valladares drove him home. (8RT 1416–1417; 9RT 1538.) Cornejo died at his house one to two hours later. (6RT 1006, 1008.)

ARGUMENT

I. SECTION 136.1(B)(2) IS A UNIFIED STATUTE THAT COMPRISES TWO ELEMENTS, "*CAUSING* A COMPLAINT . . . TO BE SOUGHT AND PROSECUTED, AND *ASSISTING* IN THE PROSECUTION THEREOF."

A. The origin of the current version of section 136.1(b)(2) underscores the ambiguity found therein.

In 1980, when the California Legislature undertook the important task of revising sections of the Penal Code relating to intimidation of witnesses and victims, it looked to the model statute proposed by the Criminal Justice Section of the ABA. (ABA Section of Crim Justice, Victims Com., Reducing Victim/ Witness Intimidation: A Package (1979) ("ABA Package").) The legislative process of adopting the model statute in 1980 raised

concerns about the wording and resulted in certain modifications: Assembly Bill 2909 called for deletion of previous section 136 and converted it to a section encompassing definitions of terms such as “malice,” “victim” and “witness.” Section 136.1 was added (Stats. 1980, ch. 686, § 2.1), but not before the Senate Committee on Judiciary commented on the version as amended on April 9, 1980 that

> [r]edrafting [is] necessary. It should be remembered that the ABA proposal is a draft model intimidation statute. As such, it has numerous rough edges and the quality of language is far worse than that produced by our Legislative Counsel. [¶] The syntax is cumbersome and the sentences extremely lengthy (Sec. 136(b) contains a single sentence of 17 lines and 150 words) and the drafters found it necessary to define terms such as “victim” and “witness” in ways which defy the common sense meanings of the words. . . . [¶] At some point the bill should be cleaned-up and rewritten in order to smooth out such rough spots.

(Report of Senate Com. on Judiciary, AB 2909 (Torres) as amended April 9, [1980].)

The model statute, entitled “Misdemeanor – Intimidation of Witnesses and Victims,” stated

> Except as provided in Section 3, every person who knowingly and maliciously prevents or dissuades or attempts to so prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding or inquiry authorized by law or who attempts to prevent or dissuade another person who has been the victim of a crime or who is a witness to a crime or a person acting on behalf of the victim of a

> crime from (a) making any report of such victimization to any peace officer or state or local or federal law enforcement officer or probation or parole of correctional officer or prosecuting agency or to any judge; (b) causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted and assisting in the prosecution thereof; (c) arresting or causing or seeking the arrest of any person in connection with such victimization, is guilty of a misdemeanor.

(ABA Package at pp. 7–8.)

The only substantive differences between the model statute and the current version enacted by the California Legislature are found in the introductory subdivision (b) – namely additional description of a person as a victim or witness and language about punishment that indicates that section 136.1(b) is a wobbler. Otherwise, the three subsections of section 136.1(b) – namely (1), (2), and (3) – closely replicate the model statute's (a), (b), and (c) breakdown:

> (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.
>
> (2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.[2]

[2] Petitioner's attention to the comma (Opening Brief at pp. 33, 34, 36) that was added by the Legislature in subsection (2) before the word "assisting" will be addressed below.

> (3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

(Pen. Code, § 136.1, subd. (b), subsections (1)–(3).)

Despite the Judiciary Committee's recommendation that the statute should be "cleaned up," the Legislature enacted a law that opens the door to ambiguous interpretations of subsection (b)(2); additionally, in subsection (b)(3), the law is nonsensical as written.

B. Various analyses of the statute do not support Petitioner's position.

1. The wording of the statute.

Petitioner argues that section 136.1(b)(2) goes beyond prohibiting attempts to dissuade the filing of an amended pleading and extends to dissuasion attempts directed at the prosecution of the filed pleading. In other words, Petitioner's reading of 136.1(b)(2) allows prosecution for two separate offenses, namely dissuading a person from causing the complaint [. . .] to be sought and, separately, dissuading a person from assisting in the prosecution of the filed pleading. (Opening Brief at p. 22.) This position is weakened by the presence of the word "thereof" at the end of the second phrase in 136.1(b)(2). "Thereof" is a formal way of saying "of that"[3] and refers back to the complaint (or other accusatory pleading) which is to be sought. An example of such usage is found, for example, in the beginning of the Fourteenth Amendment to the United States Constitution:

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[3] Merriam-Webster's Collegiate Dictionary, (10th ed., 2001).

> All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(U.S. Const., amend. XIV; see also *United States v. Wong Kim Ark* (1898) 169 U.S. 649, 680.) The referent to "thereof" is "United States," just as "thereof" in section 136.1(b)(2) refers to the complaint.

Alternately, because the gerund "causing" functions as a noun (Garner, The Chicago Guide to Grammar, Usage, and Punctuation (2016) p. 88, § 157), the question can be raised as to whether "thereof" relates back to the "causing." The actual "assisting" might include providing material information relevant to the potential charge before it is filed, for example, by an investigator's interview. Thereafter, as posited by the Sixth District justices, an amended complaint or information might be filed.

The canon of consistent usage favors a conjunctive interpretation of "and."

> For the past fifty years, dictionaries and statutory-construction treatises have instructed that when the term 'and' joins a list of conditions, it requires not one or the other, but all of the conditions. See, e.g., Merriam-Webster's Collegiate Dictionary 46 (11th ed. 2020) (defining 'and' to 'indicate connection or addition'); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts

> 116–20 (2012) (stating that 'and' combines a list of conditions in a statute); New Oxford American Dictionary 57 (3rd ed. 2010) (stating that 'and' is 'used to connect words of the same part of speech, clauses, or sentences that are to be taken *jointly*') (emphasis added); Oxford English Dictionary 449 (2d ed. 1989) (stating that 'and' introduces 'a word, clause, or sentence, which is to be taken side by side with, along with, or in addition to, that which precedes it') (italics omitted); Webster's Third New International Dictionary 80 (1967) (defining 'and' to mean 'along with or together with' or 'as well as').

(*United States v. Lopez* (9th Cir. 2021) 998 F.3d 431, 436.) The conjunctive "and" in subdivision (b), subsection (2) of section 136.1 is just that. It unites the two elements of the subdivision.

CALCRIM No. 2622 provides additional insight. It reads, in pertinent part:

> The defendant is charged [in Count ___] with intimidating a witness [in violation of Penal Code section 136.1. [¶] To prove that the defendant is guilty of this crime, the People must prove that:
>
> <Alternative 1C–causing prosecution>
>
> [1. The defendant [maliciously] (tried to (prevent/ [or] discourage)/(prevented/ [or] discouraged)) ______ <*insert name of person defendant allegedly sought to influence*> from cooperating or providing information so that a (complaint/indictment/information/ probation violation/parole violation) could be sought and prosecuted, and from helping to prosecute that action;]

CALCRIM No. 2622 clearly presents the offense as unified conduct. The phrase “that action” refers to the complaint or other charging instrument that could be sought. If the “helping” (“assisting” in the statute) was a separate offense, it would have its own separate instruction. As written, both conditions have to be satisfied to reach a conviction. If the “assisting” was a separate condition, the conjunction “or” would be necessary so that either one or both would have to be satisfied to convict. The jury was instructed with CALCRIM No. 2622. (2CT 413.)

Stepping back to take a broader view of section 136.1(b)’s construction, the use of the word “or” merits attention. In subsections (1) and (3) of section 136.1, subdivision (b), the Legislature consistently uses the word “or” to distinguish separate individuals or acts: “(1) . . . to any peace office *or* state *or* local law enforcement officer *or* probation *or* parole *or* correctional officer or prosecuting agency *or* to any judge.” (§ 136.1, subd. (b)(1)), and “(3) Arresting *or* causing *or* seeking the arrest of any person . . .” (§ 136.1, subd. (b)(3)) (italics added). The word “or” appears but once in subsection (2) of section 136.1(b), between the words “probation” and “parole,” indicating that those two are violation options in the non-carceral system, depending on the nature of the offense and sentence imposed.

But the legislative history gives us no guidance as to the intent driving the structuring of the statute. If, indeed, the Legislature intended “assisting in the prosecution thereof” to exist as a separate prohibited act, the drafters would have structured that phrase differently and added it as a stand-alone subsection.

The ABA model for subsection (2) reads: "(b) causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted and assisting in the prosecution thereof;" (ABA Package at p. 7). The ABA model does not separate the phrases "to be sought and prosecuted" and "assisting in the prosecution thereof" with a comma, implying that the actions described therein are a unit. Further, the Legislative Counsel's Digest of July 8, 1980, describes the ongoing legislation in pertinent part as follows:

> AB 2909, as it passed the Assembly, made it a misdemeanor, to knowingly and maliciously prevent or dissuade or attempt to prevent or dissuade any witness or victim from attending or giving testimony at any trial or authorized proceeding or inquiry or to attempt to prevent or dissuade another person who has been the victim of a crime or who is a witness to a crime or a person acting on behalf of the victim of a crime from making reports to law enforcement officers*, causing initiation of criminal proceedings,* or arresting or seeking the arrest of any person in connection with the victimization.

(Legislative Counsel's Digest, AB 2909 as amended in Senate July 1, 1980, emphasis added.) Clearly, the legislators in the California Senate viewed subsection (2) of section 136.1(b) as proscribing initiation of criminal proceedings; any assisting of the prosecution in that action was simply a part of it, not a separate offense.

2. Sister-state statutes do not resolve the ambiguity.

As Petitioner points out, other states considering the ABA model language chose to change "and" to "or" in varying permutations. (Opening Brief at pp. 33–37.) Petitioner accurately characterizes "[t]he experiences of these jurisdictions [as] confirm[ing] the ambiguity of the phrasing of the (b)(2) provision of the ABA model statute." (Opening Brief at p. 37.) However, it is an overstatement to say that "the courts and legislatures of other jurisdictions have consistently treated the 'assisting' phrase as a freestanding prohibition." (*Ibid.*) The Kansas statute not only added the comma before the "and assisting" phrase, it also added the word "its," the possessive pronoun implying a direct link to the complaint or other charging instrument that would be caused to be sought or the probation violation that would not be reported; it was not necessarily an independent offense. The Wisconsin court, in *State v. Freer* (Wis. Ct. App. 2009) 769 N.W.2d 877 determined that the statute was ambiguous; subsequently, in order to be in accord with its decision in *Freer*, the legislature amended the statute, replacing the "and" with "or." (Wis. Stat., § 940.44.)

The drafting gymnastics that various legislatures have had to employ to support their courts' prosecutorial goals underscores the inherent ambiguity of the ABA model statute, which California seemingly adopted without any significant modifications to section 136.1(b)(2). Delaware's modifications included adding the word "from" before the two phrases and changing the "and" in the assisting phrase to "or." (See Opening

Brief at pp. 34–35.) These significant changes in the structure of Delaware's law do appear to support interpreting the "assisting in the prosecution"as an independent offense, but that is the law in Delaware, not in California. California did not, with the exception of the addition of the comma, make those modifications.

3. The comma between the gerund phrases underscores the ambiguity.

The ABA model statute lacked a comma between the two gerund phrases found in model section (b), which was adopted by the California Legislature into the new 136.1(b)(2): "(b) causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted and assisting in the prosecution thereof." (ABA Package at p. 7.) California added a comma, as did some other jurisdictions. Did the model statute ascribe a meaning to the statute by omitting the comma or was the absence of the comma just another example of the rough state of the model statute?

The evolution of the California statute shows that the bill was introduced on March 6, 1980, without a comma between the gerund phrases in subdivision (b)(2): "causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted and assisting in the prosecution thereof;" (Assembly Bill No. 2909 (1979–1980 Reg. Session), March 6, 1980.) The bill was amended in the Assembly on April 16, 1980, again with no comma in the subdivision at issue. (Assembly Bill No. 2909 (1979–1980 Reg. Session), April 16, 1980.) The comma finally appeared in subdivision (b)(2) of the bill as amended by

the Senate on June 18, 1980, without any commentary as to why. (Assembly Bill No. 2909 (1979–1980 Reg. Session), June 18, 1980.) At all stages of the bill's development, the accompanying Legislative Counsel's Digest states that the bill would proscribe a person from "attempt[ing] to prevent or dissuade another person who has been the victim of a crime or who is a witness to a crime from performing *specified acts relating to assisting law enforcement or prosecution activities*." (Assembly Bill 2909, Legislative Counsel's Digest, amended in Senate, June 18, 1980, p. 2.) The specified acts are "(1) making a report," "(2) causing a complaint . . . to be sought," and "(3) arresting or causing or seeking the arrest." Consistent with the Legislative Counsel's comments, the "assisting" in subsection (2) is tied to the "causing" by the word "thereof." Moreover, nothing in the legislative history suggests that the statute, *as written* and enacted, with or without the comma, meant to independently proscribe assisting in the prosecution of the causing.

Section 136.1, subdivision (b)(3) provides another example of what appears to have been a rather inartful case of legislative drafting. A comma was clearly necessary in subsection (3), which reads "arresting or causing or seeking the arrest. . .." (§ 136.1, subd. (b)(3).) Without a comma following the first word, "arresting," the statute can be parsed as "arresting [. . .] the arrest". A comma is needed to make both causing and seeking apply to the arrest and to allow "arresting" to refer to "any person" not the arrest. To avoid this absurdity, the drafters should have included a comma after "arresting." In the (b)(2) subdivision, there is no explanation for the addition of the comma during the legislative process, which helped create the ambiguity.

Finally, it must not be forgotten that "[p]unctuation is tiny. So there must be added to the number of those who do not know the rules of punctuation the even greater number of those who are careless. Perhaps more than any other indication of meaning, punctuation is often a scrivener's error, overcome by other textual indications of meaning." (Scalia and Garner, Reading Law: The Interpretation of Legal Texts (2012) pp. 164–165.)

In sum, none of the tools of statutory analysis resolve the question of the ambiguity of section 136.1(b)(2). The legislators appear to have adopted the ABA model without much thought. There is no indication in the history that section 136.1(b)(2) was intended to proscribe two separate offenses. The split decisions by reviewing courts reflect the difficulty in resolving the ambiguity in the statute.

II. THE SIXTH DISTRICT COURT OF APPEAL REACHED THE CORRECT CONCLUSION THAT INSUFFICIENT EVIDENCE SUPPORTED RAYMOND REYNOZA'S CONVICTION.

A. Petitioner's reliance on *People v. Velazquez* (2011) 201 Cal.App.4th 219 does not resolve the issue.

Petitioner urges that the Court of Appeal erred by rejecting the reasoning in *People v. Velazquez*, *supra*, 201 Cal.App.4th at p. 211, instead adopting the reasoning in *People v. Fernandez* (2003) 106 Cal.App.4th 943, *People v. Hallock* (1989) 208 Cal.App.3d 595, and *People v. Brown* (2016) 6 Cal.App.5th 1009. (Opening Brief at p. 47.)

The *Velazquez* court found, "To the extent the court in *Fernandez* intended to include subdivision (b)(2) in its statement that subdivision (b) applies only to prearrest attempts to dissuade the reporting of a crime, the statement is dictum." (*People v. Velazquez*, *supra*, 201 Cal.App.4th at p. 232, citing *People v. Fernandez*, *supra*, 106 Cal.App.4th at p. 950.) To support its position, the *Velazquez* court reinterpreted section 136.1, subdivision (b)(2) by substituting "or" for "and" between the two gerund phrases: "Subdivision (b)(2) clearly encompasses more than prearrest efforts to dissuade, inasmuch as it includes attempts to dissuade a victim from causing a complaint or information to be prosecuted *or* assisting in that prosecution." (*People v. Velazquez*, *supra*, at p. 233, italics added.) The *Velazquez* court also neglected to include the phrase "to be sought," which indicates that the complaint has not yet been filed. The *Velazquez* court provided no legislative history or grammatical analysis in support of these re-wordings. As discussed above, nothing in the grammatical structure or legislative history of this statute supports the conclusion that two separate offenses are being proscribed. The "causing" of a complaint "to be sought" is impliedly a pre-arrest act. The "assisting" is just as easily construed as occurring before any arrest, or after, if an amended complaint or information is filed. The vagueness of the language does not automatically create a separate, post-filing offense.

The term "pre-arrest" in *Fernandez* was perhaps too limiting in the sense that complaints and other charging instruments can be amended, as was the case with Mr. Reynoza, who was initially charged by information with violating Penal Code section 136.1,

subdivision (c), subsections (1) [count two] and (2) [count three]. (1CT 28–30.) Mid-trial, count two was amended to a violation of section 136.1, subdivision (b)(2), with the subdivision (c) subsections being alleged as to use of force and participation in a conspiracy; count three was dismissed. (17RT 2361; 2CT 353.) This was obviously not a pre-arrest amendment to the information. One could imagine a situation where during a trial, an individual came forward to the prosecutor and revealed material information that could lead to the modification of the charges, thereby assisting in the prosecution of the now-amended charging instrument.

Penal Code section 804 provides that

> *prosecution for an offense is commenced* when any of the following occurs:
>
> (a) An indictment or information is filed.
>
> (b) A complaint is filed charging a misdemeanor or infraction.
>
> (c) the defendant is arraigned on a complaint that charges the defendant with a felony.
>
> (d) An arrest warrant or bench warrant is issued . . .

Notwithstanding the “pre-arrest” language in *Fernandez*, the fact remains that the three acts – reporting, causing [. . .]to be sought, and arresting – that introduce the three subsections of section 136.1(b) are pre-prosecution actions. “Assisting” is, by virtue of

the word "thereof," a part of the causing. If a complaint or information is amended, a new aspect of the prosecution process begins.

B. "Drop the charges" cannot be given significance.

Petitioner provides numerous examples of cases in which the use of the phrase "drop the charges" was evidence of witness or victim dissuasion. (Opening Brief at pp. 39–42.) The facts must be examined on a case-by-case basis. Some cases clearly point to dissuasion after a charge has been filed, e.g. *People v. Becerrada* (2017) 2 Cal.5th 1009, 1014–1015. In *People v. Cribas* (1991) 231 Cal.App.3d 596, a witness bribery case, the court could not affirm the conviction under section 137, subdivision (a), for lack of evidence of the defendant's understanding that only the prosecution, not the victim, could dismiss the case.

As Petitioner acknowledges, the challenge is in determining what defendants mean when they use the phrase "drop the charges." (Opening Brief at p. 42.) The circumstances surrounding the attempted dissuasion are important. In the case at bar, the bouncer at the Sky Bar heard "something like just 'drop the charges' or something like that" (8RT 1379), but had turned away at that moment and couldn't discern whose voices were whose; he did not know who spoke those words. (8RT 1381.) Moreover, here, "drop the charges" does not make sense. If, indeed, the phrase was directed at the victim, Cornejo, there is no evidence that he planned to separately "assist in the prosecution." Accordingly, there was insufficient evidence of any dissuasion on that element. At trial, the parties stipulated that

Cornejo and Appellant's brother were charged with the same misdemeanor offense; nothing further was proffered to the jury concerning Cornejo's case. (7RT 1132–1133, People's Exhibit 13.)

C. The language of Penal Code section 137, subdivision (b) suggests an alternate charging option in this case.

Petitioner rejects the Sixth District's suggestion (Opn. at p. 9) that the defendant could have been charged under another statutory provision. (Opening Brief at p. 39.) However, one such possibility is section 137, subdivision (b), which prohibits an attempt to induce a person by force or threat of force to withhold material information pertaining to a crime from a law enforcement officer, as defined in subdivision (f). (§ 137, subds. (b) & (f).) If applied here, the state could have retained its power to deter and punish the defendant's conduct.

III. THE AMBIGUITY IN PENAL CODE SECTION 136.1, SUBDIVISION (B)(2) TRIGGERS THE RULE OF LENITY.

Petitioner refers to the ambiguity (also using the term "ambiguous") of Penal Code section 136.1(b)(2) numerous times (Opening Brief at pp. 11, 15, 16, 30, 35–37, 44, & 45), even going so far as to acknowledge in the introduction that "section 136.1(b)(2) *is* ambiguous." (*Id*. at p. 11, italics added.) The ensuing argument urges that the tools of statutory construction lead to the conclusion that the Legislature intended to prohibit dissuasion of more than the filing of an accusatory pleading, in

other words, separately prohibit the dissuasion of assisting the prosecution. For the reasons set forth above, appellant disagrees. It can be said with a high degree of certainty that the statute was a poorly drafted borrowing from the ABA model. But nowhere in the legislative history is there any indication that the Legislature was re-writing the ABA model as two separate offenses. There are arguments for both positions, but section 136.1(b)(2) is simply ambiguous.

"Blurred signposts to criminality will not suffice to create it." (*United States v. C.I.O.* (1948) 333 U.S. 106, 142 (Rutledge, J., concurring).) The rule of lenity "generally requires that 'ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of interpretation." (*In re M.M.* (2012) 54 Cal.4th 530, 545.) But several courts have held that "that rule applies 'only if two reasonable interpretations of the statute stand in relative equipoise.'" (*Ibid.*, internal citations omitted.) In *In re M.M.*, for example, the issue was whether a school security officer is a public officer within the meaning of Penal Code section 148, subdivision (a)(1). (*Id.* at p. 541.) This Court examined the evolution of the common law definition of "public officer" and the legislative history of section 148(a)(1) to ascertain the meaning of the term and concluded that the opposing parties' interpretations of the statute were not "in relative equipoise." (*Id*. at p. 545, quoting *People v. Soria* (2010) 48 Cal.4th 58, 65.")

Determining whether two interpretations are in relative equipoise has led to significant confusion as to when the rule of lenity applies and has given rise to a multiplicity of expressed standards, "ranging from when the court 'can make "no more

than a guess,'" " to when the court is "left with an ambiguous statute," to when there remains "grievous ambiguity or uncertainty." (Scalia and Gardner, Reading Law: The Interpretation of Legal Texts (2012) at pp. 298–299.) Scalia and Gardner suggest the following criterion: whether, after all the legitimate tools of interpretation have been applied, "a reasonable doubt persists." (See *Moskal v. United States* (1990) 498 U.S. 103, 108 [lenity reserved "for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute."].)

As discussed above, the Legislature intended to proscribe dissuasion of a single course of action, namely the causing of a charging instrument to be sought, and the assisting in the prosecution of that instrument. To have a fair legal system, there must be precision in defining offenses and punishments. "If a statute defining a crime or punishment is susceptible of two reasonable interpretations, the court ordinarily adopts the interpretation that is more favorable to the defendant." (*People v. Arias* (2008) 45 Cal.4th 169, 170.) Assuming that this Court finds there is a reasonable doubt as to the ambiguity of section 136.1(b)(2), Appellant respectfully urges this Court to heed the rule of lenity and affirm the Sixth District Court of Appeal's opinion in *People v. Raymond Reynoza*.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeal should be upheld.

Law Office of Nancy S. Brandt

Respectfully submitted,

Dated: August 3, 2022 By: /s/ Nancy S. Brandt

Attorney for Defendant and Appellant
Raymond Gregory Reynoza

CERTIFICATE OF COMPLIANCE

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Dated: August 3, 2022 By: /s/ Nancy S. Brandt

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Sixth District Appellate Program

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Dated: August 3, 2022 By: /s/ Nancy S. Brandt

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STATE OF CALIFORNIA
Supreme Court of California

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