No. S273797

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

RAYMOND GREGORY REYNOZA,
Defendant and Appellant.

Sixth Appellate District, Case No. H047594
Santa Clara County Superior Court, Case No. C1775222
The Honorable Charles E. Wilson, Judge

REPLY BRIEF ON THE MERITS

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ARGUMENT

SECTION 136.1(B)(2) ENCOMPASSES DISSUADING A WITNESS FROM ASSISTING IN THE PROSECUTION OF A FILED ACCUSATORY PLEADING

Penal Code section 136.1, subdivision (b)(2) prohibits any attempt to prevent or dissuade a witness to a crime from, among other things, "[c]ausing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof." (Pen. Code, § 136.1, subd. (b)(2) (§ 136.1(b)(2)).)[1] Appellant contends that this statute prohibits only attempts to dissuade a witness from causing an accusatory pleading to be filed, and not attempts to dissuade a witness from assisting in the prosecution of a filed complaint. (ABM 12-27.) Section 136.1(b)(2) is best construed, however, as encompassing attempts to dissuade a witness not only from causing the filing of an accusatory pleading but also from assisting in the prosecution of a filed accusatory pleading. That construction respects the text, grammar, and legislative history of the statute, and is strongly supported by the canon against surplusage. Appellant's contrary view is unpersuasive.

A. The text of section 136.1(b)(2) and the statutory scheme as a whole support the People's construction of the statute

The parties agree that section 136.1(b)(2) is ambiguous. (ABM 12, 15.) For the reasons explained in the People's opening brief on the merits, the ambiguity is properly resolved by looking to the full text of section 136.1, subdivision (b), as well as the

[1] All subsequent statutory references are to the Penal Code.

entire witness-dissuasion statutory scheme. (OBM 15-29.) Appellant's proposed resolution of the ambiguity, by contrast, ignores important aspects of the statute's text and focuses on the wrong words.

Most important is what the answer brief does not address: that appellant's construction of the statute renders much of section 136.1(b)(2) surplusage. "[C]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." (*People v. Franco* (2018) 6 Cal.5th 433, 437, internal quotation marks omitted; see Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) p. 174 [no word or provision "should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence" (bold omitted)].) The construction advanced by the People gives meaning to every word, including a contextually proper meaning of the word "and" that joins the two gerund phrases. (§ 136.1(b)(2)) ["[c]ausing a complaint . . . to be sought and prosecuted, *and* assisting in the prosecution thereof," italics added].)

In contrast, the entire second phrase of section 136.1(b)(2)—"and assisting in the prosecution thereof"—would be superfluous under appellant's construction of the statute. (OBM 27-29.) In appellant's view, subdivision (b)(2) contains two elements, *both* of which must be met to result in a crime. Thus, the provision is violated only if the defendant attempts (1) to prevent a witness from "'*causing* a complaint . . . to be sought and prosecuted'" and (2) to prevent that witness from "'*assisting* in the prosecution

thereof.'" (ABM 12, bold omitted.) Appellant does not identify any hypothetical set of facts in which the first element, but not the second, would be present. Dissuasion done to prevent the witness from causing a complaint "to be sought and prosecuted" also is an attempt to prevent the witness from "assisting in the prosecution" of the case. (§ 136.1(b)(2).)[2] The second phrase is meaningful only if section 136.1(b)(2) is construed to encompass attempts to dissuade a witness from assisting in the prosecution of a filed accusatory pleading. The canon against surplusage strongly counsels against appellant's construction of section 136.1(b)(2).

The textual arguments that appellant does make fail to support his position. In interpreting the text of section 136.1(b)(2), appellant relies on authority explaining that the word "and" is typically used conjunctively and "or" is typically used disjunctively. (ABM 16-18.) The People acknowledged this baseline rule in the opening brief (OBM 24), but explained that the surrounding words in section 136.1 demonstrate that, as used

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[2] To avoid superfluity if the "and" were conjunctive, the offense would require two acts of dissuasion at different times: the defendant would first have to unsuccessfully attempt to dissuade the witness from causing a complaint to be sought and prosecuted, and then would have to attempt to dissuade that witness from assisting in the prosecution of the filed complaint. That is, section 136.1(b)(2) could be violated only when the first dissuasion attempt was unsuccessful, which would contravene subdivision (d) of section 136.1: "Every person attempting the commission of any act described in subdivisions (a), (b), and (c) is guilty of the offense attempted *without regard to success or failure of the attempt*." (Italics added.)

in this particular context, "and" is disjunctive in joining the two phrases of section 136.1(b)(2) (OBM 21-26). Appellant does not address the expansive introductory phrase "any of the following" in section 136.1, which brings all of the subsequent gerund phrases within the scope of the statute. (See *Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 635 ["'Any' is a term of broad inclusion, meaning 'without limit and no matter what kind'"]; Scalia & Garner, Reading Law: The Interpretation of Legal Texts, *supra*, at p. 122 ["If the introductory phrase is *any one or more of the following*, then the satisfaction of any one of the elements, or any combination of elements, will suffice"].) Nor does appellant address *Bianco v. Ind. Acc. Com.* (1944) 24 Cal.2d 584, discussed in the opening brief, which interpreted a statute's text and purpose to conclude that "and" should be read disjunctively. (OBM 25-26.) The relevant "and" in section 136.1(b)(2) is part of a larger statutory structure, unaddressed by appellant or the court below, that gives the "and" a disjunctive function in section 136.1(b)(2).

Appellant ascribes little significance to the Legislature's decision to add a comma between the two phrases of section 136.1(b)(2), implying that it might have been a "'scrivener's error.'" (ABM 23.) But this Court typically disregards statutory text on the basis of a "drafting error" only "when compelled by necessity and supported by firm evidence of the drafters' true intent." (*People v. Garcia* (1999) 21 Cal.4th 1, 6.) The Legislature's inclusion of the comma in section 136.1(b)(2) provides another textual reason to interpret the two phrases in

section 136.1(b)(2) disjunctively—a textual reason in accord with the broad opening language of subdivision (b) of section 136.1 and its overall structure. (OBM 26-27.)

Appellant also emphasizes the word "thereof" at the end of the second phrase in section 136.1(b)(2) ("and assisting in the prosecution thereof"), arguing that the word refers back to the accusatory pleading in the first phrase ("a complaint, indictment, information, probation or parole violation"). (ABM 15-16.)[3] The People agree that "thereof" in the second phrase of section 136.1(b)(2) refers to the accusatory pleadings listed in the first phrase of section 136.1(b)(2). But appellant never explains why the use of the word "thereof" supports reading the two phrases of section 136.1(b)(2) conjunctively. (See ABM 15-16.) If appellant contends that the Legislature would have repeated the list of accusatory pleadings in the second phrase had it intended the two phrases to be read disjunctively, he is mistaken. Other subdivisions of section 136.1 contain disjunctive elements without engaging in such repetition.

For example, subdivision (a)(1) of section 136.1 makes it a wobbler offense to "[k]nowingly and maliciously prevent[] or dissuade[] any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law."

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[3] Appellant postulates that "thereof" might also refer to "causing." (ABM 16.) But then section 136.1(b)(2) would mean: "Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution of the causing." This would make little sense since the "causing" is not something that is prosecuted.

The use of "or" when joining the pertinent gerunds—"attending *or* giving testimony at" (*ibid.*, italics added)—confirms that the Legislature intended that subdivision to encompass dissuasion of a witness from "attending . . . any trial, proceeding, or inquiry authorized by law" as well as from "giving testimony at . . . any trial, proceeding, or inquiry authorized by law." That the Legislature did not twice repeat the same lengthy phrase in section 136.1, subdivision (a)(1) does not undermine the meaning of the disjunctive "or."

By the same logic, the Legislature's use of "thereof" in the second phrase of section 136.1(b)(2) to refer back to the first phrase—rather than again listing the types of accusatory pleadings to which section 136.1(b)(2) refers—does not illuminate whether the two phrases should be read conjunctively or disjunctively. Instead, the disjunctive meaning of the two phrases is properly inferred from the expansive introductory text and the legislative purpose. (See OBM 15-44.)

Appellant further argues that the second phrase of section 136.1(b)(2) would be "a stand-alone subsection" if the Legislature had wanted to prohibit dissuading a witness from assisting in the prosecution of a filed accusatory pleading. (ABM 18.) Tellingly, however, none of the state legislatures that directly clarified the ambiguity in the ABA model statute placed the second phrase of section 136.1(b)(2) in a separate subdivision. (Mo. Rev. Stat. § 575.270; Del. Code tit. 11, § 3532; Wis. Stat. § 940.44; Kan. Stat. Ann. § 21-5909.) While separate subdivisions would have been another way to signal the independence of the phrases in section

136.1(b)(2), different ways of committing a crime can still be grouped disjunctively in the same subdivision. (Cf. *In re Mosley* (1970) 1 Cal.3d 913, 918, fn. 5 [discussing former § 245].) It was logical for the Legislature to group the two phrases of section 136.1(b)(2) in the same subdivision because they both relate to the prosecutor's role in a case (filing accusatory pleadings and prosecuting those pleadings), rather than the peace officer's role (receiving reports of a crime and arresting suspects) addressed in subdivisions (b)(1) and (b)(3) of section 136.1. Or, to look at the structure from a procedural perspective, each paragraph of subdivision (b) addresses interference at a different phase of criminal law enforcement: Subdivision (b)(1) addresses reports; subdivision (b)(3) addresses arrests; and subdivision (b)(2) addresses prosecutions.

Nor does the pattern jury instruction illuminate the meaning of the statute. Appellant contends that the pattern instruction for section 136.1(b)(2), CALCRIM No. 2622, "clearly presents the offense as unified conduct." (ABM 17-18.) But "jury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent." (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7; accord, *People v. Covarrubias* (2016) 1 Cal.5th 838, 876, fn. 16.) Moreover, the pattern instruction simply repeats the statute's ambiguity, joining the first and second phrases of section 136.1(b)(2) with the word "and": "The defendant []tried to []prevent . . . [the victim] 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, italics added.)[4] By simply repeating that ambiguous conjunction from the statute, the pattern jury instruction does not meaningfully aid in construing section 136.1(b)(2).

B. The legislative history further supports the People's construction of the statute

The legislative history further supports the conclusion that section 136.1 was intended to prohibit attempts to dissuade a witness from assisting in the prosecution of a filed complaint. Most significantly, as discussed in the opening brief on the merits, two legislative analyses indicated that the legislation creating section 136.1, Assembly Bill No. 2909 (1979-1980 Reg. Sess.), would prohibit dissuading a witness from "assisting law enforcement or prosecution activities." (OBM 30-33, citing Legis. Analyst, analysis of Assem. Bill No. 2909 (1979-1980 Reg. Sess.), May 10, 1980, p. 1; see Assem. Off. of Research, 3d reading analysis of Assem. Bill No. 2909 (1979-1980 Reg. Sess.), May 15,

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[4] The Judicial Council's Advisory Committee on Criminal Jury Instructions makes an invaluable contribution to criminal trial practice but appears to have overlooked *People v. Velazquez* (2011) 201 Cal.App.4th 219, which is not cited in CALCRIM No. 2622. Had the committee conformed the instruction to *Velazquez* by replacing the ambiguous "and" with the more clear "or," appellant would not now rely on it. This further demonstrates that the committee's laudable efforts are an attempt to accurately state the law, not an attempt to settle or interpret the law as a court does.

1980, p. 1 [similar].) Appellant does not address either of those analyses.

Instead, appellant relies on the Legislative Counsel's Digest, which stated that the bill would prohibit dissuading a witness from performing "'*specified acts*.'" (ABM 22, italics added by appellant.) Appellant then offers his own list of acts: "'(1) making a report,' '(2) causing a complaint . . . to be sought,' and '(3) arresting or causing or seeking the arrest.'" (ABM 22, ellipsis added by appellant.) But those acts were not set out in the Legislative Counsel's Digests which are "'printed as a preface to every bill considered by the Legislature'" to "'assist the Legislature in its consideration of pending legislation.'" (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169.) Rather, the digests for Assembly Bill 2909, including the digest for the bill as passed, simply stated in broad terms that the legislation would "make it a misdemeanor to . . . . attempt to prevent or dissuade another person . . . who is a witness to a crime . . . , from performing specified acts relating to assisting law enforcement or prosecution activities." (Legis. Counsel's Dig., Sen. Amends. to Assem. Bill No. 2909 (1979-1980 Reg. Sess.) June 18, 1980, pp. 1-2; Legis. Counsel's Dig., Assem. Bill No. 2909 (1979-1980 Reg. Sess.) 4 Stats. 1980, Summary Dig., p. 188.)

Appellant also relies on a different Legislative Counsel's Digest, one appended to the Assembly's July 8, 1980, placement of the bill on a July 10, 1980, special consent calendar for

concurrence in the Senate's amendments. (ABM 19.)[5] That digest described the bill as criminalizing attempts to dissuade a witness "'from making reports to law enforcement officers, causing initiation of criminal proceedings, or arresting or seeking the arrest of any person.'" (ABM 19, italics omitted.) The negative inference that appellant draws from the omission of the second phrase of section 136.1(b)(2) in that digest's summary of the bill, however, is at odds with the descriptions of the bill found elsewhere in the legislative history. In context, the omission does little to illuminate the meaning of the second phrase of section 136.1(b)(2).

C. Section 137, subdivision (b), does not apply to nonforcible dissuasion like that at issue in this case

As support for its narrow interpretation of section 136.1, subdivision (b)(2), the Court of Appeal below asserted that other provisions of the Penal Code deter and punish attempts at witness dissuasion that occur after the filing of a complaint. (Opn. 9.) In that vein, appellant contends that he could have been charged under section 137, subdivision (b). (ABM 27.) That section prohibits forcibly attempting to induce a witness (1) to

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[5] The digest appears to have been prepared pursuant to Joint Rule 26.5. That rule calls for Legislative Counsel to prepare "a brief digest summarizing the effect of the amendment made in the other house" and for an officer of the relevant chamber to then "cause the digest to be printed in the Daily File immediately following any reference to the bill covered by the digest." (Assem. Conc. Res. No. 2, Stats. 1979 (1979-1980 Reg. Sess.) res. ch. 3, p. 4776 [adopting Temporary Joint Rules].)

give false testimony or reports to law enforcement or (2) to withhold true information. (§ 137, subd. (b).) Even if appellant could have been charged under that provision, he would not have been convicted of that offense. First, the record does not contain any evidence that, by demanding that the victim, Rafael Cornejo, drop the charges, appellant wanted Cornejo to "withhold material information" from law enforcement. (§ 137, subd. (b).) Second, the jury found not true the allegation that appellant used force or a threat of force in dissuading Cornejo under section 136.1, subdivision (c)(1). (2CT 443; 19RT 5409.) He could not, therefore, have been convicted of another witness-dissuasion offense with the element of force, such as section 137, subdivision (b). But the Legislature's intent to cover *nonforcible* witness dissuasion under section 136.1 is clear from the statutory text.

Under appellant's view of the law, his attempt to interfere with an ongoing criminal case by dissuading Cornejo from assisting in the prosecution would not be covered by any of the numerous provisions in the comprehensive legislative scheme prohibiting witness dissuasion. Section 136.1(b)(2) may be—and in this case is—the only available statute that deters and punishes nonforcible attempts to dissuade a witness or victim from assisting in the prosecution of an already filed case. The text, structure, and history of that section demonstrate that it encompasses dissuading a witness from assisting in the prosecution of a filed accusatory pleading. (See OBM 15-44; *People v. Foster* (2007) 155 Cal.App.4th 331, 337 ["The goal of the legislation [enacting section 136.1] was to discourage all who

attempted to dissuade witnesses, regardless of the means selected or the success of the attempt"].)

D. Whether the two phrases of section 136.1(b)(2) create two offenses is irrelevant here and beyond the scope of the issue presented

Appellant characterizes the People's construction of the statute as "allowing[] prosecution for two separate offenses" under section 136.1(b)(2). (ABM 15; see also ABM 24 ["nothing in the grammatical structure or legislative history of this statute supports the conclusion that two separate offenses are being proscribed"]; ABM 20-21 [arguing that changes by the Delaware legislature to the second phrase created an "independent offense," but the changes by the Kansas legislature did not].) But whether the two phrases in section 136.1(b)(2) are disjunctive is a different question from whether that subdivision creates two separate offenses, and it is neither necessary nor informative to resolve the latter issue here.

It is not uncommon for the Legislature to create one offense that may be committed in different ways, with the modes of commission being stated disjunctively. Former section 245, for example, stated: "'Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is'" subject to specified punishment. (*In re Mosley*, *supra*, 1 Cal.3d at p. 918, fn. 4.) This Court explained that former section 245 defined "only one offense," which could be committed in two different ways: "assault (1) with a deadly weapon or instrument, or (2) by means of force likely to produce great bodily injury." (*Id.*

at p. 919, fn. 5.) Thus, the Court recognized that a penal provision can contain disjunctive elements that identify alternative means of committing the offense. (See also § 954 ["An accusatory pleading may charge . . . different statements of the same offense . . ."].)

But whether section 136.1(b)(2) might be interpreted as stating separate offenses, or as stating one offense that may be committed in different ways, need not be resolved here. Appellant was convicted of a single offense. His case, therefore, does not implicate the issue of whether section 136.1(b)(2) creates more than one offense. That issue was not litigated in the Court of Appeal, nor was review sought or granted on the question. And its resolution would shed little light on whether the statute encompasses the sole type of dissuasion appellant engaged in. There is therefore no reason to address the issue here. (See Cal. Rules of Court, rule 8.500(c)(1) ["As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal"]; *id.*, rule 8.516(a)(1) ["Unless the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in them"].)

E. The rule of lenity need not be invoked because the competing interpretations of the statute are not equally reasonable

Appellant asks that, to the extent the Court is left with "reasonable doubt as to the ambiguity of section 136.1(b)(2)," construction of the statute be resolved in his favor according to

the rule of lenity. (ABM 27-29.) His reliance on that rule is misplaced.

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.'" (*People v. Nuckles* (2013) 56 Cal.4th 601, 611.) But the rule applies "'only if two reasonable interpretations of the statute stand in relative equipoise.'" (*Ibid.*) The rule need not be resorted to here because the two competing interpretations of section 136.1(b)(2) are not equally reasonable. (See *Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 202 [declining to apply rule of lenity to § 632.7 in light of statutory language and legislative intent]; *State v. Freer* (Wis.Ct.App. 2009) 779 N.W.2d 12, 19 [rule of lenity did not apply in construing Wisconsin's analogue to § 136.1(b)(2), derived from the ABA model statute].) As addressed in the opening brief, the words, grammar, and structure of section 136.1(b)(2), as well as the statute's legislative history, the canon against surplusage, and the experience of other states that adopted the model statute, demonstrate that section 136.1(b)(2) encompasses attempts to dissuade a witness from assisting in the prosecution of a filed accusatory pleading.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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September 19, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached Reply Brief on the Merits uses a 13 point Century Schoolbook font and contains 3,827 words.

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September 19, 2022

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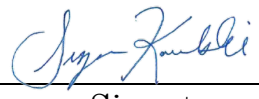
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