

No. S266854

In the Supreme Court of the State of California

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THE PEOPLE OF THE STATE OF CALIFORNIA,  
*Plaintiff and Respondent,*  
v.  
CRISTIAN RENTERIA,  
*Defendant and Appellant.*

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Fifth Appellate District, Case No. F076973  
Tulare County Superior Court, Case No. VCF304654  
The Honorable Kathryn T. Montejano, Judge

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RESPONDENT'S ANSWER TO AMICUS CURIAE, THE STATE  
PUBLIC DEFENDER

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April 11, 2022

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## INTRODUCTION

This Court granted review to consider the application of Penal Code section 186.22, subdivision (b) to cases in which a gang member acts alone in committing the current offense.<sup>1</sup> The Legislature subsequently amended the statute in several ameliorative ways when it passed Assembly Bill No. 333 (2021-2022 Reg. Sess.) (AB 333). Some of those amendments might entitle Renteria to relief for reasons that are unrelated to the premise that he acted alone. The State Public Defender (SPD) nonetheless argues against transferring the case for reconsideration because the amendments did not resolve lingering questions about how the first and second prongs of subdivision (b) operate in cases where a defendant acts alone. But SPD's concerns about these questions are overstated, and their resolution is not required to achieve a just disposition of this particular appeal. Additionally, the Court of Appeal has not had the opportunity to consider what effect AB 333 will have on this case. As a result, it would be appropriate for this Court to exercise its discretion to transfer the case for reconsideration in light of AB 333.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified. Rule references are to the California Rules of Court.

## ARGUMENT

### I. AB 333 MAY ENTITLE RENTERIA TO RELIEF FOR REASONS THAT WERE NOT LITIGATED BELOW AND THAT HAVE LITTLE IF ANYTHING TO DO WITH THE PREMISE THAT HE ACTED ALONE

#### A. AB 333 changed the requirements for imposing a gang enhancement

AB 333 amended section 186.22 in several ways. It modified the definitions of “criminal street gang” and “pattern of criminal gang activity,” and it clarified what is required to show an offense “benefit[s], promote[s], further[s], or assist[s]” a criminal street gang. (AB 333 also added section 1109, which addresses bifurcation of gang participation and enhancement charges.)

Under former section 186.22, subdivision (f), a “criminal street gang” was defined as

any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.

AB 333 narrowed the definition of a “criminal street gang”—which is integral to proving both a gang participation offense and gang enhancement—to “an ongoing, organized association or group of three or more persons,” and now requires prosecutors to show that members of the gang “collectively” engage in, or have engaged in, a pattern of criminal gang activity. (Stats. 2021, ch. 699, § 3.)

Additionally, AB 333 amended the definition of “pattern of criminal gang activity.” Under former section 186.22, subdivision (e), a “pattern of criminal gang activity” was defined as

the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter, and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.

Further, under former law, a pattern of criminal gang activity could be established by the current offense(s). (*People v. Zermeno* (1999) 21 Cal.4th 927, 931-932; *People v. Louen* (1997) 17 Cal.4th 1, 10.) AB 333 modified this definition by additionally requiring that: (1) the last offense used to show a pattern of criminal gang activity occurred within three years of the date that the currently charged offense is alleged to have been committed; (2) the offenses are committed on separate occasions or by two or more gang members, as opposed to persons; (3) the offenses commonly benefited a criminal street gang, and the common benefit was more than reputational; and (4) the currently charged offense cannot be used to establish a pattern of criminal gang activity. (Stats. 2021, ch. 699, § 3.) AB 333 also reduced the list of qualifying offenses that can be used to establish a pattern of criminal gang activity from 33 to 26, removing certain offenses related to theft, fraud, and vandalism. (*Ibid.*)

AB 333 further clarified that to “benefit, promote, further, or assist” a criminal street gang for purposes of section 186.22,



subdivisions (a), (b), and (d), “means to provide a common benefit to members of a gang where the common benefit is more than reputational.” (§ 186.22, subd. (g); Stats. 2021, ch. 699, § 3.) Examples of common benefits that are more than reputational “may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant.” (*Ibid.*) The effective date of non-urgency legislation such as AB 333, passed in 2021 during the regular legislative session, was January 1, 2022. (Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600, subd. (a); see *People v. Camba* (1996) 50 Cal.App.4th 857, 865.) Because it is ameliorative and the Legislature did not state a contrary intent, the modifications to section 186.22 enacted by AB 333 apply retroactively to cases such as this one, where the judgment is not final. (*People v. Lopez* (2021) 73 Cal.App.5th 327, 343-344; *People v. E.H.* (2022) 75 Cal.App.5th 467, 478.)

B. The Court of Appeal has not yet considered the impact of AB 333

The passage of AB 333 will likely affect the outcome of this case for reasons that are unrelated to the issue presented for review. The gang enhancement imposed here was based upon the meaning of “benefit” as it existed before AB 333, under which the intent to enhance a gang’s reputation for violence was sufficient. (*People v. Albillar* (2010) 51 Cal.4th 47, 63.) Although mere reputational benefit no longer suffices as a benefit, “retaliation” does. (§ 186.22, subd. (g).) The evidence in this case also showed that Renteria’s conduct was motivated by retaliation.

(4 RT 536-539 [members expected to retaliate]; Aug. CT 48-49; Exhibit 27 23:50-24:35 [Renteria knew retaliation was expected].) The Court of Appeal has not had the opportunity to decide whether the evidence in this case established that retaliation was the benefit Renteria intended, or if it was, whether retroactive application of AB 333 nevertheless requires a different outcome.

Although not raised by Renteria or SPD, AB 333 also redefined “pattern of criminal gang activity.” (Stats. 2021, ch. 699, § 3.) Among the changes to that element, the predicate offenses used to establish the existence of a criminal street gang must now have “commonly benefited a criminal street gang, and the common benefit of the offense is more than reputational” (§ 186.22, subd. (e)(1)), and they may no longer include the charged offenses (§ 186.22, subd. (e)(2)). The Court of Appeal has not considered whether the predicates here satisfy the new requirements. If they do not, reversal would likely be required for a reason completely unrelated to the grant of review.

Given the apparent relevance of AB 333 to the issues presented here, it would be a sound exercise of this Court’s discretion to transfer the case for reconsideration in light of AB 333.

- C. SPD’s concerns about lingering questions regarding the application of section 186.22 are overstated

The California Rules of Court also provide that, following a grant of review, this Court may decide some issues and remand the case back to the Court of Appeal for a decision on any issues that remain. (Rule 8.528(c).) (See *Miller v. Department of*

*Corrections* (2005) 36 Cal.4th 446, 476 [case remanded to Court of Appeal to determine remaining issues in first instance].) A decision by this Court based upon statutes as they existed before AB 333 would be of limited value as precedent. Moreover, it is possible that a decision from this Court will not be required at all if the Court of Appeal determines that reversal is required by retroactive application of AB 333. Consequently, judicial economy supports transferring the matter to the Court of Appeal without decision.

SPD argues that issues of proof regarding the application of the gang enhancement to gang members who commit crimes alone will remain following AB 333. (SPD Brief<sup>2</sup> 15.) Respondent disagrees, because by requiring that the intended benefit be more than merely reputational, the Legislature has closed off the theory that all violent crime benefits a gang, through its reputation. (See II.C.1., *post*.)

1. Eliminating mere reputational benefit from the scope of section 186.22 has answered significant questions about the application of the gang enhancement where a gang member acts alone

Under prior law, when a lone gang member committed a felony for the benefit of a gang, a reputation for violence could be sufficient to establish the “benefit” the defendant intended. Expert opinion that a reputation for violence benefitted a gang, combined with evidence that the violent crime was in fact attributed to the gang, would generally support the inference

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<sup>2</sup> “SPD Brief” refers to the Amicus Curiae Brief of SPD in Support of Appellant Cristian Renteria.

that a lone gang member's violent acts were intended to benefit the gang. However, by requiring "a common benefit [that] is more than reputational" (§ 186.22, subd. (g)), AB 333 has changed the basic elements of the gang enhancement and excluded reputation as the sole intended benefit. (See SPD Brief 13.) Thus, contrary to SPD's assertion (SPD Brief 13), AB 333 has indeed changed the "fundamental structure of the gang enhancement" and addressed concerns pertaining to the category of cases in which gang members commit crimes alone.

There are two "prongs" to the gang enhancement.<sup>3</sup> (*Albillar, supra*, 51 Cal.4th at p. 56; *People v. Gonzalez* (2015) 232 Cal.App.4th 1149, 1464.) Under both the current and the former versions of section 186.22, subdivision (b)(1), the benefit prong refers to felonies committed "for the benefit of, at the direction of, or in association with a criminal street gang." (Stats. 2021, ch. 699, § 3.) Under both the current and former versions of section 186.22, subdivision (b)(1), the specific intent prong refers to felonies committed "with the specific intent to promote, further, or assist," certain criminal conduct by gang members.<sup>4</sup> (*Ibid.*) However, AB 333 also added section 186.22, subdivision (g), which states: "to benefit, promote, further, or assist means to

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<sup>3</sup> For clarity and continuity, respondent refers to the two prongs as the "benefit prong" and the "specific intent" prong. (ABM 10.)

<sup>4</sup> Former section 186.22, subdivision (b)(1), required specific intent to promote, further, or assist "any" criminal conduct by gang members. (*Albillar, supra*, 51 Cal.4th at p. 64-65.) AB 333 removed the word "any." (Stats. 2021, ch. 699, § 3.) The significance of that word being removed is unclear and has not been addressed in any published opinion. (See II.C.3., *post.*)

provide a common benefit to members of a gang where the common benefit is more than reputational." (*Ibid.*) This amendment affected both prongs of the gang enhancement.

By redefining "benefit, promote, further, or assist," AB 333 eliminated mere "reputation" as a permissible objective for both prongs. As a consequence, in future cases, neither prong may be satisfied solely by the theory that violent crimes by lone gang members benefit, promote, further, or assist gang members by enhancing a gang's reputation for violence.

The significance of redefining "benefit" to exclude mere reputation is that prosecutors will have to try cases differently. Prosecutors may no longer charge gang allegations against lone gang members committing acts of violence to "benefit" the gang's reputation based purely on the theory that all violence enhances a gang's reputation. (See *People v. Perez* (2017) 18 Cal.App.5th 598; *Maquiz v. Hedgpeth* (9th Cir. 2018) 907 F.3d 1212, 1220.) Before AB 333, *Albillar* specifically endorsed the theory that a reputation for violence was a sufficient gang benefit. (*Albillar, supra*, 51 Cal.4th at p. 63.) In lone actor cases, this created a dilemma because, if a reputation for violence was a sufficient benefit, then any gang member who committed a violent felony could be subject to the enhancement, essentially penalizing membership in the gang. (See *Perez, supra*, 18 Cal.App.5th at p. 607.) However, AB 333 resolved that dilemma. Thus, to the extent this Court's grant of review was based on addressing the problem of all violent acts by gang members being sufficient to

establish a reputational benefit, resolution of that issue is no longer necessary to achieve a just result in this case.

2. Requiring an intent to provide a common benefit has already answered lingering questions regarding the mental state element in cases where the defendant acts alone

Following the enactment of AB 333, even if a defendant commits a felony at the direction of or in association with other gang members, specific intent to provide a common benefit to members of the gang is required. If there was any confusion about whether an actual benefit could be substituted for an intended benefit (see SPD Brief 17-18, 26), AB 333 has rendered that confusion moot by mandating specific intent to provide a common benefit to members of the gang regardless of the theory. In any case, the evidence here supported the inference that Renteria specifically intended to benefit his gang.

AB 333 added section 186.22, subdivision (g), which says that “to benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational.” This subdivision redefines the specific intent prong, which applies to all theories of the gang enhancement, to require proof of a specific intent to provide a benefit, which was previously only required for the theory that the felony was committed “for the benefit of” the criminal street gang. Thus, post-AB 333, it is clear that the gang enhancement may only be imposed on a defendant who specifically intended to provide a common benefit that is more than reputational. So regardless of whether “for the benefit of” is interpreted to mean

specific intent to benefit the gang, specific intent to benefit the gang is nevertheless required under section 186.22, subdivision (g).

Application of AB 333 aside, in this case the Fifth District Court of Appeal properly inferred that Renteria specifically intended to benefit his gang. Intent can be, and usually must be, inferred from the facts and circumstances of the case. (*People v. Rios* (2013) 222 Cal.App.4th 542, 567–568; *People v. Pre* (2004) 117 Cal.App.4th 413, 420.) “Evidence of a defendant’s state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.” (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) Expert testimony is proper for explaining the potential motives of gang members that would not otherwise be obvious to jurors. (See *Gonzalez, supra*, 38 Cal.4th at p. 947; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384.)

Here, the jury found the gang enhancement under section 186.22 true (1 CT 309-311) and, on appeal, the Fifth District inferred Renteria’s intent to benefit his gang from the fact his actions would have several obvious benefits (Opinion 15). First, the court cited Detective Adney’s opinion that the charged crimes benefitted the Sureño gang even if the victims were not rival gang members. (*Ibid.*; 5 RT 606-608.) Second, the court observed that the crimes occurred in “disputed territory,” and, third, the court cited Renteria’s retaliation motive. (Opn. 15.) The court stated that, “viewed as a whole,” the evidence was sufficient to establish the first prong of the gang enhancement. (*Ibid.*)

The court's ruling that the evidence was sufficient is supported by the evidence presented at trial. Detective Adney's testimony emphasized that "respect is everything" in gang culture. (4 RT 533.) Detective Adney also explained that, in gang culture, reputation is closely tied to violence. (*Ibid.*) Detective Adney explained that the Sureño gang has rules, one of which is not to be a "coward," and would expect its members to retaliate if disrespected. (4 RT 536-539.) Renteria acknowledged that he knew what the gang expected of him in this regard. (Aug. CT 48-49; Exhibit 27 23:50-24:35.)

The trial evidence also supported a finding that Renteria committed a felony with the specific intent to benefit the Sureño gang. Proof that a gang actually or potentially benefitted does not automatically establish the defendant intended that benefit. But evidence supporting an actual or potential benefit is relevant where expert testimony provides a likely motive, such as retaliation, for criminal conduct that would not otherwise be obvious. Based on Detective Adney's testimony and other specific evidence at trial, such as Renteria's acknowledgement of his gang's expectations, it was proper for the jury (and the Court of Appeal) to infer that Renteria committed a felony with the specific intent to benefit the Sureño gang.

3. None of SPD's arguments regarding specific interpretations of section 186.22, subdivision (b)(1), need resolution by this Court

Finally, SPD makes various arguments about specific language in section 186.22, subdivision (b)(1), that it believes this Court should interpret. (SPD Brief 30, 37-46.) However, these



arguments do not accurately reflect the law either before or after AB 333. To the extent this is an appropriate case to argue for new interpretations of section 186.22 which are not based on AB 333, the Court of Appeal should be the first to consider them.

The People are not required to establish specific crimes that the defendant intended to promote, further, or assist. (*Albillar, supra*, 51 Cal.4th at p. 66, quoting *People v. Vazquez* (2009) 178 Cal.App.4th 347, 354; *In re Cesar V.* (2011) 192 Cal.App.4th 989, 1000.) SPD identifies nothing in the language of AB 333 that would now require the People to do so, but nevertheless argues that the specific intent prong of the gang enhancement should require a mental state akin to aiding and abetting a specific crime. (SPD Brief 30.)

Limiting the enhancement to situations where only a specific target crime can be identified does not make sense in the broader context of the statute. The definition of "criminal street gang" contemplates organizations whose primary activities include the commission of enumerated criminal acts and whose members collectively engage in a pattern of criminal activity. (§ 186.22, subd. (f).) Thus, the very definition of a gang embraces the idea that, as an organization, the gang has not one criminal objective, but many, and ongoing, objectives. A gang member might steal a gun to contribute to the gang's arsenal, intending that it promote, further, or assist the gang in future criminal conduct without having a specific offense in mind. Likewise, a gang member might contribute a portion of drug sale proceeds to the gang, intending to provide monetary support to the gang's criminal

endeavors without knowing how the money would be used. There is no requirement that the People establish a specific offense that the defendant intended to promote, further, or assist; nor should there be.

Both before and after AB 333, the Legislature has gone to great lengths to define what a gang is. But it has not tried to define what a “member” is. Even so, SPD asks that this Court construe “members” to be distinct from associates, affiliates, “wannabes” or other levels of gang involvement. (SPD Brief 37-38.) As SPD acknowledges, there is no legal definition of “member” in the context of the STEP Forward Act. (SPD Brief 38-39.) When a word is not specifically defined, it is left to the jury to apply the term using its ordinary, everyday meaning. (CALCRIM No. 200; see *People v. Covarrubias* (2016) 1 Cal.5th 838, 921.)

Who is and is not a “member” of a gang at any given time is a fluid and fact-dependent inquiry. In this case, for example, Detective Adney described a 10-point system used by law enforcement for validating gang membership. (4 RT 560-564.) Under this system, law enforcement officers determine an individual’s level of involvement with a gang by examining 10 factors, such as wearing gang colors, associating with gang members, having gang-themed tattoos, and being able to reside in gang-controlled areas of detention facilities. (4 RT 560-564.)

There is no indication that juries or courts have had any difficulty applying the statutory term “member” or evaluating the evidence commonly used to establish whether a defendant is a

“member” of a gang. This Court need not construe “member” to include a more specific meaning or require the identification of specific members committing specific crimes. The statute has no such requirement.

Finally, SPD contends that for lone actors the specific crime the defendant intends to promote, further, or assist cannot be the current offense. (SPD Brief 39-46.) AB 333 removed the word “any” from the phrase “any criminal conduct” in the specific intent prong of section 186.22, subdivision (b)(1). (Stats. 2021, ch. 699, § 3.) In *Albillar*, the defendant argued that the gang enhancement could apply only to *other* criminal conduct, *i.e.* not the current offense, but this Court held that the word “any” meant that the criminal conduct could include the current offense. (*Albillar, supra*, 51 Cal.4th at p. 64) The Legislature is presumed to be aware of existing law, including the *Albillar*’s conclusion that “any” included the current offense. (*In re W.B.* (2012) 55 Cal.4th 30, 57; *People v. Overstreet* (1986) 42 Cal.3d 891, 897.) Yet, in amending section 186.22, the Legislature did not replace the word “any” with the word “other” in enacting AB 333. Nor did the Legislature otherwise indicate that the phrase “criminal conduct by gang members” is restricted to any particular criminal conduct or suggest that any different analysis be applied to lone actors versus gang members who act together. Most importantly, the evidence here does not suggest that Renteria intended to promote, further, or assist his own criminal conduct in the current offense. So, regardless whether it may be significant in some other context, the removal of “any” from

section 186.22, subdivision (b)(1), has no effect on the question presented here, which specifically included consideration of a situation involving a gang member acting alone.

#### CONCLUSION

Accordingly, it would be an appropriate exercise of this Court's discretion to transfer the case to the Court of Appeal for reconsideration in light of AB 333.

Respectfully submitted,

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April 11, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER TO AMICUS CURIAE, THE STATE PUBLIC DEFENDER uses a 13 point Century Schoolbook font and contains 3,706 words.

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*/s/ Cavan M. Cox, II*

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April 11, 2022

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S.  
MAIL

Case Name:        *People v. Renteria*  
No.:                *S266854*

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. 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 with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On April 11, 2022, I electronically served the attached RESPONDENT'S ANSWER TO AMICUS CURIAE, THE STATE PUBLIC DEFENDER by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on April 11, 2022, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, CA 93721-2271, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 11, 2022, at Fresno, California.

Gabriel Vallejo

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Declarant

*/s/ Gabriel Vallejo*

---

Signature

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

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Supreme Court of California

Case Name: **PEOPLE v.  
RENTERIA**

Case Number: **S266854**

Lower Court Case Number: **F076973**

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

4/11/2022

Date

/s/Gabriel Vallejo

Signature

Cox, Cavan (266793)

Last Name, First Name (PNum)



