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ORIGINAL

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.


**ALBERT ANDREW ALBILLAR,
JOHN ANTHONY MADRIGAL,
ALEX ADRIAN ALBILLAR,**

Defendants and Appellants.

Case No. S163905

**SUPREME COURT
FILED**

MAR 27 2009


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Second Appellate District, Division Six Case No. B194308 Deputy
Ventura County Superior Court Case No. 2005044985
The Honorable Edward F. Brodie, Judge

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

| | Page |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Introduction..... | 1 |
| Statement of the Case..... | 2 |
| Summary of Argument..... | 9 |
| Argument | 10 |
| I. The evidence was sufficient to support appellants’ convictions and enhancements under section 186.22 | 10 |
| A. The Ninth Circuit Court of Appeals misinterpreted section 186.22, and this Court should adopt the holdings of the intermediate state appellate courts on this issue..... | 11 |
| B. The gang expert’s opinion, based on the evidence in this case, supported the gang enhancements and convictions | 18 |
| Conclusion | 26 |

TABLE OF AUTHORITIES

| | Page |
|-------------------------------------------------------------------|----------------|
| CASES | |
| <i>Briceno v. Scribner</i> (9th Cir. 2009) 555 F.3d 1069 | passim |
| <i>Garcia v. Carey</i> (9th Cir. 2005) 395 F.3d 1099 | passim |
| <i>In re Frank S.</i> (2006) 141 Cal.App.4th 1192 | 17, 18, 22 |
| <i>People v. Bolin</i> (1998) 18 Cal.4th 297 | 19 |
| <i>People v. Bragg</i> (2008) 161 Cal.App.4th 1385 | 21 |
| <i>People v. Duran</i> (2002) 97 Cal.App.4th 1448 | 21 |
| <i>People v. Ferraez</i> (2003) 112 Cal.App.4th 925 | 19, 22, 25-26 |
| <i>People v. Gardeley</i> (1996) 14 Cal.4th 605 | passim |
| <i>People v. Hernandez</i> (2004) 33 Cal.4th 1040 | 19 |
| <i>People v. Hill</i> (2006) 142 Cal.App.4th 770 | passim |
| <i>People v. Hillhouse</i> (2002) 27 Cal.4th 469 | 19 |
| <i>People v. Killebrew</i> (2002) 103 Cal.App.4th 644 | 23 |
| <i>People v. Morales</i> (2003) 112 Cal.App.4th 1176 | 15, 16, 17, 22 |

| | |
|-----------------------------------------------------------------|---------------|
| <i>People v. Ochoa</i> (1993) 6 Cal.4th 1199 | 24 |
| <i>People v. Romero</i> (2006) 140 Cal.App.4th 15 | 11, 13-15, 17 |
| <i>People v. Valdez</i> (1997) 58 Cal.App.4th 494 | 19 |
| <i>People v. Villalobos</i> (2006) 145 Cal.App.4th 310 | 15-17, 19 |
| <i>People v. Wader</i> (1993) 5 Cal.4th 610 | 19 |
| <i>People v. Ward</i> (2005) 36 Cal.4th 186 | 19 |
| STATUTES | |
| Evid. Code, § 801..... | 19 |
| Penal Code | |
| § 186.22..... | passim |
| § 261.5..... | 8 |
| § 264.1..... | 8 |



ISSUE PRESENTED

Does substantial evidence support defendants' convictions under Penal Code section 186.22, subdivision (a), and the true findings with respect to the enhancement under Penal Code, section 186.22, subdivision (b)?

INTRODUCTION

Appellants, who were active members of the notorious SouthSide Chiques criminal street gang, committed a rape in concert of 15-year-old Amanda M. All three lived together in the same apartment where the rape occurred. A gang expert versed in the habits and customs of the SouthSide Chiques noted that this gang committed brutal and vicious crimes, including rape, outside its claimed territory, and even targeted family members and those close to them. The expert opined that the rape was gang-related in that it helped appellants work together on a collaborative criminal level and, further, that the crime generated fear in the community that benefitted the gang as a whole.

On appeal, the Court of Appeal held that sufficient evidence, in the form of this expert's testimony rooted in the evidence of the trial, supported the finding that these offenses were gang-related. As such, the Court of Appeal upheld appellants' convictions of the substantive gang offense (Pen. Code, § 186.22, subd. (a)), and the gang enhancements (Pen. Code, § 186.22, subd. (b)).

This Court should affirm the Court of Appeal's decision. Respondent specifically asks that this Court find that for the crime of street gang terrorism under Penal Code section 186.22, subdivision (a), a gang member's commission of a felony in concert with known fellow gang members is substantial evidence that the gang member willfully promoted, furthered, or assisted in felonious criminal conduct by members of that

gang. As to the gang enhancement under Penal Code section 186.22, subdivision (b), this Court should adopt the prevailing view of the Courts of Appeal that have considered the issue and find that sufficient evidence is present if a reasonable jury could infer that the defendant promoted, furthered, or assisted *this* criminal conduct, not only *other* criminal conduct. In so doing, this Court should disagree with recent precedent of the United States Court of Appeals for the Ninth Circuit that finds that the Court of Appeal's view does not comport with this Court's interpretation of state law.

STATEMENT OF THE CASE

This appeal involves the interpretation and application of crime and enhancement statutes related to criminal gang activity. At the time of the offenses, the gang crime statute punished

any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang

(Pen. Code, § 186.22, subd. (a).) The gang enhancement separately punished

any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members

(Pen. Code, § 186.22, subd. (b)(1).)

In this case, Amanda M., a 15-year-old girl, met 20-year-old appellant Albert Albillar, appellant Alex Albillar, Albert's twin brother, and

appellant Madrigal, their 24-year-old cousin in 2004.¹ (1RT 121-125; 3RT 506.) Amanda did not have a “romantic relationship” with any of the appellants. (1RT 123-124.) Amanda was aware that Alex and Albert were members of the SouthSide Chiques gang. (1RT 127-129.) Albert’s gang moniker was “Sneaky,” Anthony called himself “Spanky,” and Alex was known as “Monstro.” (1RT 131-132.) Amanda knew that Monstro was Spanish for monster. (1RT 132-133) She was not, however, scared of appellants, and none of them had previously threatened her. (1RT 130-131.)

On December 29, 2004, Albert and Anthony picked up Amanda and her friend, 14-year-old Carol M., Alex, and another girl named Adriana, and went to Adriana’s house. (1RT 133, 135-137.) While Amanda was alone in a room with all three appellants, Albert suggested to Amanda, “Let’s have a foursome.” Amanda did not think Albert was serious, and she replied in a laughing manner, “no.” (1RT 138; 2RT 373.)

The group later went to appellants’ apartment, and appellants drank beer. (1RT 139, 3RT 506-507.) While Carol and Albert were alone in the bedroom, Albert removed Carol’s pants, licked her vagina, and, after asking for Carol’s consent and hearing no reply, engaged in sexual intercourse with Carol, but withdrew his penis when Carol told him to stop. (3RT 508-513.) Carol was upset, and told Albert she wanted to go home. (3RT 513.)

It was decided that appellants would take all three of the girls home. Appellants and the three girls got back into the car. (1RT 144; 2RT 420-421.) After appellants dropped Carol and Adriana off at their homes, leaving Amanda alone with the three men, one appellant said he needed to

¹ As two of the appellants in this case share the same last name, respondent will refer to each appellant by his first name. Throughout trial, appellant John Anthony Madrigal was referred to as Anthony. For consistency, respondent will do the same.

use the bathroom, and they all returned to appellants' apartment. (1RT 145-146; 2RT 374, 421-422; 3RT 514.) Amanda, who believed the stop at the apartment would be brief, telephoned Carol and told her she was on her way home. (1RT 146-147; 2RT 375.)

In the apartment, Albert told Amanda he wanted to talk with her alone in the bedroom. In the bedroom, with the door closed, Albert told Amanda that he had engaged in oral sex and sexual intercourse that evening with Carol. (1RT 148-151; 2RT 376, 422.) Albert kissed Amanda and removed her jeans. She did not object. (1RT 153; 2RT 376-377.) Alex and Anthony opened the bedroom door, and asked if they could "get in." (1RT 154; 2RT 423.) Amanda yelled, "No. Get out." Not heeding Amanda's demand to leave, Alex and Anthony entered the room. Albert grabbed one of Amanda's legs and Anthony grabbed the other. The two men spread Amanda's legs apart, and Alex climbed on top of her. Alex pushed her panties to one side and digitally penetrated her vagina. (1RT 155; 2RT 424.) Alex pinned Amanda's hands above her head using his forearm, and had his full body weight on top of her. (1RT 156, 158.) Amanda told appellants to stop and get off of her. (1RT 156-157.) She struggled to close her legs, but Albert and Anthony continued to hold them apart. (1RT 157.) Alex pulled his finger out of her vagina. He then inserted his penis into her vagina and engaged in sexual intercourse. (1RT 158; 2RT 425, 429.) Amanda did not know whether he ejaculated. (1RT 159.)

When Alex finished and withdrew his penis from Amanda's vagina, Anthony got on top of her. (1RT 159; 2RT 425.) Anthony was wearing boxer shorts, and Amanda noticed a tattoo just above his right knee. (1RT 159-161.) She had never before seen the tattoo. (1RT 161; 2RT 381.) Anthony also wore a black T-shirt on which the letters "S O X" were printed. (3RT 592.) Amanda slapped Anthony. Anthony replied in a threatening manner, "You don't know what you just did." (1RT 161-162;

2RT 426.) Anthony then bit Amanda on her thigh and shoulder. (1RT 162-163; 2RT 425.) Amanda suffered bruises on her thighs and shoulder. (1RT 163-164; 2RT 397-400, 425-426; Peo. Exh. 1.) Anthony stuck his fingers in her vagina. He attempted to kiss Amanda on her mouth, but she moved her head back and forth, to prevent him from kissing her. She repeatedly told him, “get off me,” “no,” and “stop.” (1RT 165; 2RT 429.) After digitally penetrating her, Anthony inserted his penis in Amanda’s vagina. Amanda tried to push Anthony away, but could not. (1RT 166; 2RT 426.) During the attack, the other two appellants stood in the doorway giggling and laughing. (1RT 165, 166.)

After Anthony finished, stood up and walked to the door, Amanda attempted to get up, but Albert approached, and pushed her back on the bed. (1RT 166-167; 2RT 427.) He climbed on top of her, and pushed his fingers into her vagina. She told him to stop, but Albert did not. (1RT 167-168; 2RT 429.) He next put his penis in her vagina and engaged in sexual intercourse. While this was happening, Amanda told him to stop a couple of times, but then just gave up and mentally withdrew. (1RT 169.) At some point, Albert withdrew his penis and ejaculated on Amanda’s stomach. He got up and left the room. (1RT 169; 2RT 428.) When Amanda later left the bedroom, Alex tried to fondle her breasts, but she pushed him away. Albert stated, “Let’s take her home,” and appellants did so. (1RT 170-172; 2RT 428.)

The next morning, Amanda told her younger sister Alexandria about being raped by appellants the previous night. (1RT 174; 2RT 443.) Amanda had soreness in the legs, and bruising, and walked in an odd manner, appearing to be in pain. (1RT 174; 2RT 444-446.) Amanda later told Carol, “What would you do if I told you I got gang raped?” (3RT 545-546, 548-549.) On, December 31, 2004, Amanda told another friend, Susy Cortez, about how appellants had sexually assaulted her. (1RT 176.) On

January 4, 2005, Amanda received a telephone call from Carol's friend, Jazmin. (1RT 178-179, 3RT 556-557.) Jazmin threatened Amanda and told her not to report the crimes to the police. After speaking with Jazmin, Amanda feared for her and her family's safety. (1RT 179-181.) Amanda finally told her mother what had occurred with appellants, and Amanda's father called 911. A sheriff's deputy interviewed Amanda, and photographs were taken of her bruises. (1RT 181-182; 2RT 394-397, 420, 431.)

Oxnard Police Detective Neil Holland testified as a gang expert. Detective Holland had extensive training regarding gangs, and contact with gangs in Oxnard and the surrounding areas. (3RT 594-600.) The SouthSide Chiques is a mostly Hispanic gang in the Oxnard area with more than 150 members. (3RT 600-603.) The gang does not limit its criminal activities to a specific geographic area, although they do claim a certain territory. (3RT 602-603, 605.) Not all members of the SouthSide Chiques live within the claimed gang territory. (4RT 700-701.)

Detective Holland explained that the SouthSide Chiques had engaged in a pattern of criminal gang activity, which included at least 30 crimes enumerated in section 186.22, subdivision (e), including rape. (3RT 632-636; 4RT 702.) Detective Holland explained that the various targets of the gang's activities are "rival gangs, residents within their community, residents outside their community, family members, people that are close to them and even members within their own gang." (3RT 611.)

Detective Holland observed that the SouthSide Chiques criminal activities are often "violent and vicious and brutal." (3RT 603.) This gang does not have a hierarchy or chain of command. The gang is, however, a "tightly-knit organization" which "operates on the concept of respect, reputation and status." Gang members earning a strong status can influence younger gang members. (3RT 604.) Gang members obtain status within

the gang through various means. This includes wearing certain types of clothing, bearing gang tattoos, associating in the neighborhood with other SouthSide Chiques gang members, committing crimes, and assisting other SouthSide Chiques gang members. (3RT 604-605.) Conversely, a SouthSide Chiques gang member would lose status in the gang, by among other things, “not supporting other gang members when they’re out committing crimes or committing gang activities.” (3RT 605.) The term “doing work” refers to gang members committing crimes for the benefit of the gang. This, in turn, elevates a gang member’s status. (3RT 605-606.)

Gang members generally commit crimes together in order to increase their chances of success, bolster their confidence in one another, and to permit the participants to boast about each other’s criminal endeavors to fellow gang members that were not present. (3RT 627-628.) This boasting helps promote each other’s status within the gang. (3RT 628.) When a gang member does “work” for the gang, he needs to “do it with other SouthSide Chiques gang members so that it’s recognized within the group that this person is contributing to the gang or is still showing his heart and interest in the gang.” (3RT 608.) The concept of respect is also important to the gang members. The detective explained that gang members gain respect by being an active participant in the gang. (3RT 608-609.) Gang members rely on intimidation and violence to gain respect. The detective observed that intimidation is a “very big part of the gang,” and members use intimidation as a means to further the gang’s interests. (3RT 609.)

Appellants were active gang members and participants in the SouthSide Chiques gang. (3RT 636, 639, 641.) Given a hypothetical based on the evidence in this case, Detective Holland opined that the rape of the 15-year-old girl was committed for the benefit of, at the direction of, or in association with a criminal street gang. (3RT 644-646.) The detective’s opinion was based on the manner in which the gang members worked

together to subdue the victim. He noted that the gang members were “counting on each other’s trust and loyalty. They can do it in handling the division of labor in restraining the victim, in standing by the door, possibly preventing escape, [and] in mentally containing the victim” (3RT 646-647.) The crimes benefitted the gang members because they worked in association with one another. This permitted them to evaluate each other’s actions. Additionally, the gang members provided help to each other by restraining the victim and standing by the door. This division of labor helped toward the objective of completing the crime. (3RT 647-648.) By committing such a violent crime, the gang members were “putting notches in their reputation[s].” (3RT 648.) The gang also would have benefitted as a whole when word of the attack spread to the community by illustrating that the SouthSide Chiques gang had a reputation for violence. (3RT 648-650.)

After a trial in Ventura County Superior Court, a jury found appellants guilty of forcible rape while acting in concert (Pen. Code, § 264.1; count 1),² forcible rape by a foreign object while acting in concert (§ 264.1; count 2), and street gang terrorism (§ 186.22, subd. (a); count 3). As to counts 1 and 2, the jury found that the rape offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further or assist in the criminal conduct by gang members. (§ 186.22, subd. (b).) In counts 1 through 3, the victim was identified as Amanda M. The jury also found appellant Albert guilty of an additional count of unlawful sexual intercourse with a minor, Carol M., who was more than three years younger than appellant. (§ 261.5, subd. (c); count 4.) (Madrigal 2CT 182-186; Alex Albillar 2CT 215-

² All further statutory references are to the Penal Code, unless otherwise specified.

219; Albert Albillar 2CT 198-202.) The trial court imposed state prison sentences of 20 years for Albert, 24 years, four months for Alex, and 19 years, four months for Anthony.

On appeal, appellants claimed that the evidence was insufficient to sustain the jury's findings on the street gang allegations and the conviction on the substantive gang offense in count 3. They argued that their rape in concert of Amanda M. fell outside the realm of their gang membership and gang-related criminal activities. As such, they contended, an insufficient nexus existed between the rape and gang-related conduct to sustain the enhancements and convictions. The Court of Appeal disagreed, and found the evidence was sufficient to sustain the jury's findings. (Slip Opn. at pp. 11-13.)

SUMMARY OF ARGUMENT

Under both the gang enhancement and crime statutes, a defendant must have the intent to promote, further, or assist in "any" criminal conduct by gang members. The plain meaning of the term "any" encompasses criminal conduct in a current case. As such, the Ninth Circuit's interpretation of the statute to require that the intent be for "other" criminal conduct is wrong, and the contrary interpretation of the California Courts of Appeal is correct.

Appellants gang raped a 15-year-old girl who knew of their SouthSide Chiques gang identities and who afterwards was frightened of retaliation upon reporting the crimes to police. The gang expert testified that the SouthSide Chiques gang committed a pattern of crimes, including rape, and that this gang operates by respect, reputation, and status. The expert also opined that by doing this type of crime in concert, appellants benefitted the gang because it would enhance their reputation for violence in the community. The jury could reasonably infer from this evidence that appellants promoted, furthered, or assisted the gang-related rapes.

Accordingly, the Court of Appeal below correctly held that the evidence was sufficient to support the gang crime convictions and the gang enhancement findings.

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS AND ENHANCEMENTS UNDER SECTION 186.22

Although appellants were three members of the same criminal street gang working in concert to rape the 15-year-old victim, they nevertheless contend there was insufficient evidence that they “willfully promote[d], further[ed], or assist[ed], in any felonious criminal conduct by members of [a] gang” for the purposes of their convictions of the street gang terrorism count (§ 186.22, subd. (a)). They similarly claim there was insufficient evidence of their “specific intent to promote, further, or assist in any criminal conduct by gang members,” in order to sustain the jury’s findings on the gang enhancement (§ 186.22, subd. (b)). Appellants assert that the expert witness’s testimony to the contrary was incorrect, and their actions were, in essence, but a mere sexual “frolic and detour unrelated to the gang.” (Alex Albillar AOB 16-32; Madrigal AOB 11-25; Albert Albillar AOB 18-38.) Their claim, however, amounts to nothing more than an impermissible attempt to have this Court reweigh the evidence and apply an incorrect interpretation of California law. As the Court of Appeal found, the rape in concert of a 15-year-old girl by undisputedly active gang members, coupled with explanatory expert testimony as to the gang purpose of committing crimes together, is substantial evidence which supports the finding that appellants acted with the specific intent to promote, further or assist gang members in the commission of criminal conduct. In turn, the substantive count was also sufficiently shown to be gang-related. (Slip Opn. at pp. 11-13.) Accordingly, appellants’ sufficiency claim should be rejected.

A. The Ninth Circuit Court of Appeals Misinterpreted Section 186.22, and This Court Should Adopt the Holdings of the Intermediate State Appellate Courts on This Issue

This Court granted review in order to determine whether the evidence in this case is legally sufficient to sustain appellants' street gang terrorism convictions under section 186.22, subdivision (a), and to sustain the true findings as to the street gang enhancements under section 186.22, subdivision (b). As relevant to this case, both provisions require the intent to promote, further, or assist in felonious criminal conduct by gang members. On this requirement, section 186.22, subdivision (b) has been the subject of recent disagreement between the California Courts of Appeal and the United States Court of Appeals for the Ninth Circuit.

This is an appropriate case for this Court to resolve the dispute and clarify the proper state law interpretation of section 186.22. Respondent further submits that the California Court of Appeal decisions that have disagreed with the Ninth Circuit's interpretation of section 186.22, subdivision (b) represent the correct approach, and that under the Court of Appeal's approach, there was ample evidence in this case to support the gang-related violations. (See *People v. Romero* (2006) 140 Cal.App.4th 15, 19 (*Romero*); *People v. Hill* (2006) 142 Cal.App.4th 770, 774 (*Hill*)). Contrary to the Ninth Circuit's view in *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, and *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, nothing in the enhancement or crime statutes indicate that for a defendant to be criminally liable under these provisions, the criminal conduct must be with the intent to promote, further, or assist *other* criminal conduct. Instead, both statutes explicitly state that it must be with the intent to promote, further, or assist *any* criminal conduct.

In *Garcia v. Carey*, *supra*, 395 F.3d 1099 (*Garcia*), a divided three judge panel of the Ninth Circuit read into section 186.22, subdivision (b), an additional requirement of specific intent to promote the gang's criminal activity beyond the charged crime, and found the gang expert's testimony suggesting that the crimes were gang-related was insufficient to sustain the conviction. (*Garcia*, 395 F.3d at pp. 1102-1104.)³ In that case, the defendant and two companions conducted a robbery. (*Id.* at p. 1101.) At trial, a gang expert testified that the defendant was a member of a "turf oriented" gang that engaged in robbery. (*Id.* at pp. 1101 1102.) The jury convicted the defendant of robbery, and found true a gang allegation. (*Id.* at p. 1102.) After exhausting state remedies, the defendant filed a petition for writ of habeas corpus in federal court, contending, *inter alia*, that insufficient evidence supported the gang finding. (*Id.* at p. 1100.) On appeal, the majority in *Garcia* agreed with this contention, reasoning that subdivision (b)(1) of section 186.22 requires a specific intent to "further *other* criminal activity of the gang," and there was no evidence that the defendant performed the robbery with this intent. (*Id.* at pp. 1102 1104, italics added.)⁴

³ Albert suggests that the Ninth Circuit's holding in *Garcia* is "instructive" (Albert Albillar AOB 37), and the other two appellants rely on it as well (Madrigal AOB 22-23; Alex Albillar AOB).

⁴ The dissenting judge in *Garcia* took issue with the majority's interpretation of section 186.22, subdivision (b), and concluded the statute did "not require proof that the crime of conviction was committed with the intent to further some other specifically identified crime or category of crimes" (*Garcia, supra*, 395 F.3d at p. 1105 (dis. opn. of Wallace, J.)) He also concluded that it was reasonable to determine that the evidence of Garcia's intimidation of others during the robbery would facilitate the gang's control of the area and make it easier to commit crimes there in the future. (*Id.* at pp. 1106-1107.)

Implicit in the *Garcia* decision was that, at the time, there was a paucity of California case law interpreting the scope of section 186.22. (See, e.g., *Garcia, supra*, 395 F.3d at p. 1104 [Ninth Circuit forced to draw an “inference” from other state court decisions].) The Ninth Circuit, therefore, stepped in to fill the perceived void with its own interpretation of California law. But the rationale in *Garcia* rests on a misapprehension about the specific intent required under subdivision (b)(1) of section 186.22. This was evident from two subsequent California appellate decisions which expressly rejected the Ninth Circuit’s approach. (See *Romero, supra*, 140 Cal.App.4th at p. 19; *Hill, supra*, 142 Cal.App.4th at p. 774.) As the Court of Appeal explained, “By its plain language, the statute requires a showing of specific intent to promote, further, or assist in ‘any criminal conduct by gang members,’ rather than other criminal conduct.” (*Romero, supra*, 140 Cal.App.4th at p. 19; see also *Hill, supra*, 142 Cal.App.4th at p. 774 [“[t]here is no requirement in section 186.22, subdivision (b), that the defendant’s intent to enable or promote criminal endeavors by gang members relate to criminal activity apart from the offense the defendant commits”].)

Notwithstanding the California appellate courts’ intervening clarification of California law, the Ninth Circuit recently reaffirmed its holding in *Garcia* in another divided three judge panel. (*Briceno v. Scribner, supra*, 555 F.3d at 1069 (*Briceno*)). The trial situation in *Briceno*, involving the testimony of an expert gang witness, is similar in certain respects to the instant case, wherein the expert testified based on hypothetical questions that the crimes perpetrated in concert with fellow gang members were done with the specific intent to promote, further, or assist gang members in the commission of a crime. In *Briceno*, the defendant committed a string of four robberies with codefendant Evaristo Landin while both were active members of the Hard Times street gang. (*Id.*

at pp. 1072-1073.) Although no specific indicia of the gang (i.e. gang paraphernalia, gang turf, gang-related statements, etc.) were flaunted during the robbery, the expert's opinion was based on the facts that the robberies were committed by two gang members within a short period of time and involved the type of crimes which enhanced the status of the individual members within the gang as well as the gang itself. (*Id.* at pp. 1074-1075.) The expert testified that his opinion would not change even if the defendant harbored a dual intent to also commit the robberies for the purpose of buying Christmas gifts, because the robberies nevertheless would enhance the gang's reputation (through fear) in the community. (*Ibid.*)

Following its prior decision in *Garcia*, the *Briceno* court found there was insufficient evidence that *Briceno* had the specific intent to benefit the gang in committing the robberies. Recognizing that the state appellate courts in *Romero* and *Hill* had held *Garcia* was wrongly decided in reading into section 186.22, subdivision (b)(1), an intent to aid other criminal gang conduct, the court nevertheless disregarded those holdings by declaring them inconsistent with this Court's holding in *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*), and predicting that this Court would disapprove of the lower courts' holdings if presented with an opportunity to address the issue. (*Briceno, supra*, at pp. 1080-1081.)

The *Briceno* court's reliance on *Gardeley* for its interpretation of the second element of the gang enhancement was misplaced. The court relied, in part, on footnote 10 in *Gardeley* which stated that the gang enhancement punishes "a defendant who committed a felony to aid or abet criminal conduct of a group that has a primary function the commission of specified criminal acts and whose members have actually committed specified crimes, and who acted with the specific intent to do so." (*Briceno, supra*, at p. 1080, quoting *Gardeley, supra*, 14 Cal.4th at p. 624 fn. 10, emphasis added in majority opinion). However, this language in *Gardeley* pertained

to the “pattern of criminal street gang activity” required as part of the first element of the gang enhancement – not the specific intent requirement contained in the second part of the subdivision. (See *Gardeley, supra*, 14 Cal.4th at p. 624 fn. 10.)⁵ “[S]pecific intent to benefit the gang is not required. As one Court of Appeal has noted, “what is required is the ‘specific intent to promote, further, or assist in any criminal conduct by gang members.’” (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (*Morales*)). All that is required under the second element is the specific intent to assist a known gang member in committing a crime. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 (*Villalobos*)).

In interpreting the second element of the gang enhancement, the *Briceno* court also cited this Court’s statement that section 186.22, subdivision (b) ““does not criminalize mere gang membership”” (*Briceno, supra*, at p. 1080, quoting *Gardeley*, 14 Cal.App.4th at p. 623.) Neither *Romero, Hill*, nor *Villalobos* suggest, however, that mere gang membership suffices to satisfy the gang enhancement. Rather, as noted above, the second element requires a specific intent to assist a known gang member with *any* criminal conduct. Indeed, it is not even necessary under California law that the defendant himself be a member of the gang to be liable for a gang enhancement. (See *Villalobos, supra*, 145 Cal.App.4th at pp. 315, 321-22 [finding sufficient evidence for gang enhancement for co-

⁵ Subdivision (b) of section 186.22 is triggered when the defendant is “convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . .” As this Court explained in *Gardeley*, a criminal street gang under the first element is defined as an ongoing association of three or more persons sharing a common name, identifying sign or symbol, which has one of various specified offenses as one its primary activities and engages in a pattern of criminal gang activity consisting of certain predicate offenses. (*Gardeley, supra*, 14 Cal.4th at pp. 609-610.)

defendant Osika, who was not gang member].)⁶ As the court in *Villalobos* logically explained, the “[c]ommission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant[s] acted with the specific intent to promote, further or assist gang members in the commission of the crime.” (*Villalobos, supra*, 145 Cal.App.4th at p. 322.)

The case of *People v. Morales* is instructive as to what evidence is sufficient to show that a crime was committed in association with a gang. In *Morales*, the defendant and two other members of a gang robbed occupants of a house. (*Morales, supra*, 112 Cal.App.4th at pp. 1179 1183.) During the robbery, the defendant’s coparticipants murdered one of the occupants. The defendant was convicted of robbery, and his sentence was enhanced under section 186.22, subdivision (b)(1). On appeal, the defendant argued that there was insufficient evidence to support the enhancement because the trial testimony showed only that he and his coparticipants in the robbery belonged to the same gang. (*Id.* at p. 1197.) The court said that such evidence might be insufficient to establish that the crime was committed for the gang’s benefit, but the “crucial element . . . requires that the crime be committed (1) for the benefit of, (2) at the direction of, or (3) in *association* with a gang.” (*Id.* at p. 1198.) The court went on,

⁶ The gang crime has additional requirements that the gang enhancement does not contain: that the defendant “actively participates in any criminal street gang” and that the criminal conduct be with “members of that gang . . .” (§ 186.22, subd. (a).) That difference, however, does not affect this case, as it is undisputed that there was substantial evidence that the rape perpetrators, appellants, all actively participated in the same gang.

Thus the typical close case is one in which one gang member, acting alone, commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang. Here, however, there was no evidence of this. Thus, the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members.

(*Ibid.*) Although the court in *Morales* held that the mere fact that a defendant commits a crime in association with a fellow gang member can satisfy the association element of the gang enhancement, the court nevertheless held open the possibility that the association element may be negated in a particular case by evidence that the defendant and his gang cohorts are on a “frolic and detour unrelated to the gang.” (*Ibid.*)

The *Briceno* majority further cited *In re Frank S.* (2006) 141 Cal.App.4th 1192, in reasoning that California’s intermediate courts are not all in agreement as to the specific intent element of section 186.22(b). (*Briceno, supra*, 555 F.3d at p. 1082.) The Ninth Circuit is also incorrect that this case creates a conflict. *In Frank S.*, the court reversed a gang enhancement because “[t]he prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense.” (*Frank S., supra*, 141 Cal.App.4th at p. 1199, emphasis added.) Unlike in *Frank S.*, in *Villalobos, Romero and Hill*, there was substantial evidence that the defendant acted in concert with a gang member. Thus, *Frank S.* is not inconsistent with these other Court of Appeal cases.

The *Briceno* court’s majority further cited the specific intent language of the gang enhancement itself as support for *Garcia*’s holding. (*Id.* at p.

1083.) Yet, the second element of section 186.22, subdivision (b)(1), requires “the specific intent to promote, further or *assist in* any criminal conduct by gang members” (Emphasis added.) Contrary to the reasoning in *Garcia* and *Briceno*, the specific intent element, which is stated in the disjunctive, does not require a specific intent to promote or further the gang’s criminal activity, only to assist in it, language which further indicates that the criminal activity referred to can be *this* crime, not some other crime.

In applying section 186.22 to the facts of this case, this Court should clarify the scope of section 186.22 by finding it to encompass the intent to promote, further, or assist in the criminal conduct of the instant offense. The Court should therefore approve the California appellate decisions interpreting it this way and reject the Ninth Circuit’s contrary construction.

B. The Gang Expert’s Opinion, Based on the Evidence in this Case, Supported the Gang Enhancements and Convictions

Appellants contend that Detective Holland’s opinion should not be credited as it “amounted to no more than an expression of his general belief as to how the case should be decided.” (Alex Albillar AOB 25; Madrigal AOB 13-15.) Respondent disagrees. The hypothetical facts presented to the gang expert were properly rooted in the evidence presented at trial. (See *Gardeley, supra*, 14 Cal.4th at p. 618.) Detective Holland’s expert opinion testimony, taken together with the other evidence in this case, was sufficient to sustain appellants’ convictions and enhancements.

To determine whether the evidence is sufficient to sustain a criminal conviction, an appellate court reviews the entire record in the light most favorable to the judgment to decide “whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty

beyond a reasonable doubt.’ [Citations.]” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496 .) “We draw all reasonable inferences in support of the judgment. [Citation.]” (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears ““that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) “This standard applies to convictions resting primarily on circumstantial evidence [citation], and to gang enhancement findings [citation].” (*Villalobos, supra*, 145 Cal.App.4th at pp. 321-322.)

A jury may rely on expert testimony about gang culture and habits to reach a verdict on a gang-related offense or a finding on a gang allegation. (*People v. Ward* (2005) 36 Cal.4th 186, 210; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047; *Gardeley, supra*, 14 Cal.4th at p. 617; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) In *People v. Ferraez* (2003) 112 Cal.App.4th 925, for example, the defendant was found outside a swap mall with cocaine in his pocket. Even though the defendant specifically denied any intent to sell drugs for a gang, claiming he was selling drugs for the sole personal purpose of raising money to buy a car, the opinion evidence provided by the testimony of a gang expert was sufficient to support a true finding of the gang enhancement. (*Id.* at pp. 930-931.)

Here, Detective Holland’s expertise with the SouthSide Chiques was especially probative, given that the gang did not, in some respects, fit the typical mold of a criminal street gang. This gang committed crimes outside its territory and even perpetrated crimes against their own families and others close to them. (3RT 602-606, 611.) Thus, in this regard, Detective Holland’s testimony was particularly “beyond common experience [such] that the opinion of an expert would assist the trier of fact” (Evid. Code, § 801, subd. (a).)

Appellants nonetheless argue that the evidence in this case demonstrated that their joint rape of Amanda and sexual assaults were committed solely for their sexual gratification, and were unrelated to their gang activities. (Albert AOB 18-32; Alex AOB 21-32; Albillar AOB 19-24.) Detective Holland opined, however, that the crimes served multiple gang-related purposes. The detective explained that by committing crimes together, the gang members increased the likelihood of completing the crime, bolstering each other's confidence in the commission of the crime, and helping train them to work together as a cohesive criminal unit. Additionally, the detective noted that the commission of crimes in concert works to increase trust and loyalty among the participating gang members. (3RT 626.) Detective Holland further explained:

[O]ne of the most important things why gang members commit crimes together is the value of one gang member witnessing another gang member committing the crime because that gang member can share it with others or keep it within the group and bolster this person's status by their level of participation in the crime

(3RT 626-627.)

Unlike gangs that generally target a specific geographic area, Detective Holland explained, members of the SouthSide Chiques did not limit their criminal activities to their claimed gang territory. (3RT 602-606.) As such, appellants' assertions that the crimes were not gang-related because the rapes were committed outside the gang's geographic area have little bearing on this analysis. Further, the SouthSide Chiques gang had perpetrated crimes not only on rival gangs and on the public at large, but also on their own family members and people who were close to them. (3RT 611.) They were, in Detective Holland's words, a "violent and

vicious and brutal” gang. (3RT 603.) Amanda was thus a prime target for these gang members, all of whom were previously acquainted with her. (1RT 122-125.)

Detective Holland acknowledged that sexual offenses are generally frowned upon by Hispanic gangs, and that a conviction for such an offense might lower a gang member’s status within the gang. (4RT 677, 696-697, 702.) Nevertheless, Detective Holland indicated that rape, one of the various predicate crimes for section 186.22,⁷ had been committed by other SouthSide Chiques gang members. (4RT 702.) He further explained that SouthSide Chiques gang members who perpetrated rape would not necessarily admit to committing that specific crime. (4RT 702.) Rather, the community plagued by this gang would learn that unnamed members of the gang had raped a young girl. This, in turn, would cause fear and intimidation of the gang and, in their eyes, would gain them respect. (3RT 609, 702.) Installing fear in a community by committing any number of statutorily enumerated crimes is a legitimate basis for imposing the gang enhancement because this fear promotes, furthers or assists the gang’s criminal conduct. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1465 [expert’s testimony that the gang’s primary activity was ““putting fear into the community”” was based in part upon his personal experience in the field gathering gang intelligence, contacting gang members, and investigating gang-related crimes]; cf. *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1392 [expert opined that gang member’s “actions helped instill fear of the gang . . . in the community”].) Therefore, the gang benefitted two-fold from the instant crimes by bolstering appellants’ reliance on each other (3RT 646-648), and spreading fear throughout the community that the SouthSide Chiques were, as they affectionately referred to themselves,

⁷ See subdivision (e)(12) of section 186.22.

“Sickside” (3RT 612, 648-650) – a gang willing to commit any brutal and violent crime even on a purported friend.

Still, appellants insist there just was not enough proof their conduct was gang-related, and cite *In re Frank S.*, *supra*, 141 Cal.App.4th 1192 in support. (Alex Albillar AOB 26-27; Albert Albillar AOB 22-23; Madrigal AOB 14-15.) In that case the crime in question was “found to be gang related based solely upon [the minor’s] criminal history and gang affiliations.” (*Id.* at p. 1195.) “The prosecution did not present any evidence that the minor was in gang territory, had *gang members with him*, or had any reason to expect to use the knife [he was charged with concealing] in a gang related offense.” (*Id.* at p. 1199; italics added.) Under those circumstances, the court determined there was insufficient evidence to support the gang enhancement. (*Id.* at pp. 1199-1200.)

Here, in contrast, not only was there evidence of appellants’ gang affiliations and prior predicate offenses – which included rape (see 4RT 702) – appellants were three SouthSide Chiques gang members working in concert to complete the offense. As Detective Holland explained, the SouthSide Chiques also committed crimes outside their claimed territory, and relied on violence and intimidation to increase their power and influence. (3RT 609.) Anthony even wore a gang-identified T-shirt, printed with the letters “S O X,” during the rape. (3RT 592.) Certainly the brutal rape of a 15-year-old girl would achieve the gang objective of causing fear in the community. This was not a case like in *Frank S.*, where “one gang member, acting alone, commits a crime.” (*Morales, supra*, 112 Cal.App.4th at p. 1197.) A reasonable trier of fact could find appellants’ actions were gang-related. Even if appellants possessed an additional motive of sexual gratification, the existence of a simultaneous personal motive does not defeat this gang finding. (*People v. Ferraez, supra*, 112 Cal.App.4th at pp. 930-931.)

Relying on *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651-659, Albillar and Alex contend that Detective Holland's opinion "that the offense was committed for the benefit of, in association with, or at the direction of a criminal street gang was nothing more than general speculation based on Holland's personal beliefs about what gangs and gang members do." (Alex Albillar AOB 25; see also Madrigal AOB 22.) Killebrew is distinguishable, and not of assistance to appellants' case. There, the prosecution's gang expert testified, through a series of hypothetical questions, as "to the subjective *knowledge and intent* of each" of the gang members involved in the crime. (*Id.* at p. 658.) As *Killebrew* explains, an expert's opinion regarding the defendants' subjective knowledge and intent is improper and "is much different from the expectations of gang members in general when confronted with a specific action." (*Ibid.*) The *Killebrew* court expressly acknowledged that experts may properly testify, inter alia, about a "defendant's membership in, or association with, a gang . . . the primary activities of a specific gang . . . [or] whether and how a crime was committed to benefit or promote a gang" (*Killebrew, supra*, 103 Cal.App.4th at p. 657.) Here, the gang expert was not permitted to offer an opinion as to appellants' specific intent (see 3RT 649), only that based on a hypothetical set of facts, it was his opinion that the rape of the 15-year-old girl was committed for the benefit of, at the direction of or in association with a criminal street gang (3RT 644-646).

Appellants suggest that the Court should not credit their mutual gang association as evidence tending to show the rape was gang-related because they were family members living in the same apartment. (Alex Albillar AOB 30-31; Albert Albillar AOB 31; Madrigal AOB 21.) While certainly appellants' familial ties were relevant to the trier of fact's determination on the subject – and defense counsel strenuously argued that there were no gang-related crimes committed (5RT 906, 930-931, 942, 957-959, 987-

993) – to discredit their gang association in this forum would be nothing more than an impermissible reweighing of the evidence. (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) There was substantial evidence that appellants’ rape in concert of Amanda was not simply a “frolic and detour unrelated to the gang.” The existence of gang members’ family ties should not immunize them from the provisions of section 186.22 when their felonious activities are conducted in concert. As the Court of Appeal correctly observed here, “A person who joins a criminal street gang, boasts of his membership, and commits crimes with fellow gang members, is in a poor posture to complain about evidence of gang association.” (Slip Opn. at p. 1.)

As explained in Argument A., *ante*, respondent submits that this Court should adopt the interpretation of section 186.22 that requires only that the defendant promote, further, or assist *this* criminal conduct by gang members, rather than *other* criminal conduct. Under this framework, the jury’s verdict supported the conviction and enhancement because appellants were all members of the same gang and helped each other commit the rapes.

However, even under an interpretation that requires that the defendant promote, further, or assist other criminal conduct, there was sufficient evidence to satisfy this requirement as well. As explained above, the expert evidence demonstrated that the crimes served gang-related purposes, several of which promoted, furthered, or assisted other criminal conduct, by helping train them to work together as a cohesive criminal unit, increasing trust and loyalty among the participating gang members, and illustrating to the community that the gang is violent. (3RT 626-627, 648-650.)⁸ Indeed,

⁸ The Ninth Circuit may have retreated, properly so, from the position that California state law requires that there be the intent to

(continued...)

the victim's fear for her own and her family's safety upon reporting the crimes to the police (1RT 179-181) exemplifies how these gang members use the community's fear of violence to commit crimes and avoid apprehension. (See *Gardeley, supra*, 14 Cal.4th at p. 619 [intent element satisfied by testimony that "criminal street gangs rely on such violent assaults to frighten the residents of an area where the gang members sell drugs, thereby securing the gang's drug-dealing stronghold"]; 3RT 609 [where Detective Holland testified that gang members rely on intimidation and violence to gain respect, that intimidation is a "very big part of the gang," and that members use intimidation as a means to further the gang's interests].)

A reasonable jury could find that appellants committed the instant crimes "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b).) Similarly, there was substantial evidence that appellants all actively participated in SouthSide Chiques, that they knew that its members engaged in a pattern of criminal activity, and that they all assisted each other in the rape. (See § 186.22, subd. (a).) Detective Holland's expert opinion was founded on the evidence at trial, which was sufficient to demonstrate a gang connection to the crimes. (See *People v. Ferraez, supra*, 112 Cal.App.4th at p. 930 [expert's opinion based on hypothetical facts rooted in evidence allowed jury to reasonably infer crime was gang-

(...continued)

promote, further, or assist other *specific* criminal conduct, as opposed to aiding generally the ability to commit criminal conduct in the future. (Compare *Garcia, supra*, 395 F.3d at pp. 1103-1105 with *Briceno, supra*, 555 F.3d at pp. 1080-1081; see also *Garcia, supra*, 395 F.3d at p. 1105 (dis. opn. of Wallace, J.).)

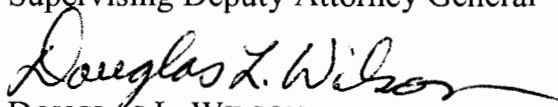
related].) Accordingly, this Court should reject appellants' challenge to the evidentiary sufficiency of the gang crimes and enhancements.

CONCLUSION

For these reasons, Respondent requests that this Court uphold the Court of Appeal's decision affirming appellants' judgments.

Dated: March 27, 2009

Respectfully submitted,

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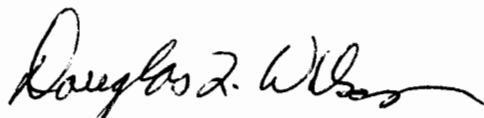
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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 7,589 words.

Dated: March 27, 2009

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **The People of the State of California v. Albert Andrew Albillar, John Anthony Madrigal, Alex Adrain Albillar**

No.: **S163905**

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 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 March 27, 2009, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On March 27, 2009, I caused fourteen (14) copies of the **ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 300 South Spring Street, North Tower, 2nd Floor, Los Angeles, CA 90013 by **Personal Delivery**. Also, by internal mail collection system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, a copy of the **ANSWER BRIEF ON THE MERITS** is addressed to the Clerk of the Court of Appeal, Second Appellate District, Division Six, at Ventura, CA 93001.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 27, 2009, at Los Angeles, California.

M. Louie

Declarant



Signature