S261747

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,

v.

PEDRO LOPEZ,
Defendant and Appellant.

Court of Appeal, Fifth Appellate District, No. F076295
Superior Court of Tulare County, No. VCF325028TT
Honorable Joseph Kalashian, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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By appointment of the
Supreme Court

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ISSUE PRESENTED

The Court's order granting appellant's petition for review (Order filed July 15, 2020) limited review to a single issue:

> Did the trial court err by sentencing defendant to 15 years to life under the alternate penalty provision of the criminal street gang penalty statute (Pen. Code,[1] § 186.22, subd. (b)(4)(B)) for his conviction of conspiracy to commit home invasion robbery, even though conspiracy is not an offense listed in the penalty provision?**No table of contents entries found.**

INTRODUCTION

This case presents a pure issue of statutory construction. Appellant was convicted, among other things, of conspiracy to commit home invasion robbery. The offense was found to be gang related within the meaning of the gang enhancement statute. (§ 186.22, subd. (b)(1).) That statute specifies a sentence of 15 years to life for a gang-related home invasion robbery. (§ 186.22, subd. (b)(4)(B).) Although the provision does not mention conspiracy, appellant was nonetheless sentenced under it. The Court of Appeal affirmed, relying on this Court's opinion in *People v. Athar* (2005) 36 Cal.4th 396 (*Athar*). For reasons explained in detail in the Argument section below, appellant asks this Court to reverse the lower court's decision and hold that the enhancement is inapplicable to conspiracy. Here he provides an overview of his argument to emphasize its central points without

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

the complexity necessary to the more complete treatment of the issues.

First, the plain language of the alternate penalty provision does not permit its application to a conspiracy conviction because, on its face, it applies to a defendant *convicted* of a listed offense and conspiracy is not one of these. (§ 186.22, subd. (b)(4) & (b)(4)(B).) Furthermore, case law has interpreted functionally identical language in other enhancement statutes as excluding conspiracy convictions from their ambit. There is no reason these should not apply equally here.

Second, *Athar* is distinguishable and even if it is not, to the extent it is contrary to his position appellant respectfully urges that it not be followed. The conspiracy statute provides that conspiracies are "punishable in the same manner and to the same extent as is provided for the punishment of that felony." (§ 182, subd. (a).) Based on this language, *Athar* held that the dollar-amount money laundering enhancements in section 186.10, subdivision (c), applied to a conspiracy to commit money laundering even though the statute did not refer to conspiracy. (*Athar, supra,* 36 Cal.4th at pp. 400–401.) However, the gang enhancement provision of section 186.22, subdivision (b)(4) and (b)(4)(B), is distinguishable because it only applies to those "convicted" of listed offenses while the money laundering enhancements apply to those "punished under" the money laundering statute. Certainly, appellant was not convicted of home invasion robbery.

If *Athar* were nonetheless applied in the instant case, as it was by the Court of Appeal, it would create numerous problems. The Court of Appeal interpreted *Athar* as creating a rule that all enhancement statutes applying to a target felony apply to a conspiracy to commit it unless they expressly state otherwise. If this were correct, as appellant explains in his argument, it would require setting aside established principles of statutory construction. In particular, it would nullify the language of numerous other statutes. It would also contradict *People v. Hernandez* (2003) 30 Cal.4th 835 (*Hernandez*), in which this court determined the death penalty statute did not apply to a conspiracy to commit murder. The death penalty statute clearly indicated it only applied to specific convictions (namely murder), like the statute at issue here. (§ 190.2.) Yet this Court's analysis did not apply a categorical rule of construction such as the Court of Appeal read *Athar* as requiring. Thus, even if *Athar* is not distinguishable it should be limited so as to avoid these problems.

Third, if there is any remaining ambiguity, overwhelming evidence of the intent of the electorate and legislature requires that a conspiracy to commit home invasion robbery cannot be punished under section 186.22, subdivision (b)(4)(B). The subdivision was added by Proposition 21, passed by the electorate in the March 2000 primary election. The measure as a whole and the ballot pamphlet give no indication that the provision would apply to conspiracy. Additionally, as already alluded to, at the time the measure was passed case law interpreted essentially identical language in other enhancement statutes as excluding

conspiracy convictions. Because the electorate was presumably aware of this, it must have intended that meaning under well-settled principles of interpretation.

Also, the legislative history of the conspiracy statute does not suggest that its language, "punishable in the same manner and to the same extent as is provided for the punishment of that felony," should be construed as including an enhancement that on its face only applies to those convicted of specific offenses after the finding of additional facts. Such enhancements are not punishment for the target felony but for the additional findings. When the conspiracy statute was amended a century ago to contain language substantially similar to the current language, specific enhancements did not exist so "punishment" could not have included them.

Lastly, if ambiguity remains after a review of the extrinsic evidence of the electorate and legislature's intent, it must be resolved in appellant's favor under the rule of lenity. This rule of statutory interpretation requires that a penal statute be interpreted in the manner more favorable to the defendant if two potential constructions stand in relative equipoise. In her dissenting opinion in *Athar,* Justice Kennard argued that the rule of lenity should have applied. (*Supra,* 30 Cal.4th at pp. 406–407, 410–411 (dis. opn. of Kennard, J.).) In a nutshell, the conspiracy statute was silent on whether enhancements are included within the "punishment," the money laundering statute was silent on conspiracies, and case law did not resolve the ambiguity. Her argument applies with greater force to section

186.22, subdivision (b)(4)(B), and if the Court reaches the lenity analysis, appellant argues it should be followed in the current context.

For these reasons, as elucidated in detail below, this Court should reject the Court of Appeal's holding and instead find that the 15-years-to-life penalty provision of the gang enhancement statute does not apply to a conspiracy to commit home invasion robbery. In sum, the plain language of the statute forbids it. The conspiracy statute read properly does not suggest otherwise and to the extent *Athar* holds differently it should not be followed. The evidence of the electorate and legislature's intent shows the enhancement was not intended to apply to a conspiracy conviction. Finally, the rule of lenity would not permit a different result.

STATEMENT OF THE CASE

1. Trial court proceedings

On February 24, 2017, a jury found appellant guilty as charged of conspiracy to commit home invasion robbery (counts 19 & 162; §§ 182, subd. (a), 211, 213, subd. (a)(1)(A)), criminal street gang conspiracy to commit home invasion robbery (count 20; §§ 182.5, 211, 213, subd. (a)(1)(A)), possession of a firearm by a felon (count 156; § 29800, subd. (a)(1)), possession of ammunition by a felon (count 160; § 30305, subd. (a)(1)), and attempted home invasion robbery (count 163; §§ 211, 213, subd. (a)(1)(A), 664). Gang allegations under section 186.22, subdivision (b)(4), were found true on counts 19, 20, and 162, and

under subdivision (b)(1) on the remaining counts. Appellant was also found to have suffered a strike prior conviction (§§ 667, 1170.12), a prior serious felony conviction (§ 667, subd. (a)(1)), and to have served two prior prison terms (§ 667.5, subd. (b)). (7 CT 1268–1286; 8 CT 1516–1535.)

On August 14, 2017, appellant was sentenced to a term of 35 years to life in the state prison for the conspiracy to commit home invasion robbery in count 19, consecutive to a 19-year determinate term for the attempted home invasion robbery in count 163. The term for count 19 consisted of 15 years to life under section 186.22, subdivision (b)(4)(B), doubled for the strike prior, consecutive to a five year term for the prior serious felony conviction. An identical sentence on count 162 was stayed pursuant to section 654, as were the terms on the remaining counts. The prior prison term enhancements were also stayed. (8 CT 1652–1653.) Appellant filed a notice of appeal. (8 CT 1654.)

2. Appellate proceedings

The judgment was affirmed in part and reversed in part by the Court of Appeal, Fifth Appellate District, in a published opinion filed March 12, 2020. (*People v. Lopez* (2020) 46 Cal.App.5th 505.) The court agreed with appellant that one conspiracy count had to be reversed because there was only a single conspiracy, that the count of gang conspiracy to commit home invasion robbery could not stand because there was no completed offense of home invasion robbery, and that appellant was entitled to the trial court's exercise of discretion whether to

strike the serious felony enhancement. (*Id.* at pp. 522–523, 527, 532.)

The Court of Appeal rejected appellant's remaining arguments. Among these was his claim that it was error for the trial court to apply the gang enhancement statute's 15-years-to-life alternate penalty provision (§ 186.22, subd. (b)(4)(B)) to his conviction for conspiracy to commit home invasion robbery because the enhancement only applies to the completed offense. (*Lopez, supra,* 46 Cal.App.5th at pp. 529–531.) On July 15, 2020, this court granted appellant's petition for review on this question only.

STATEMENT OF FACTS

Appellant adopts the factual background set forth in the Court of Appeal's opinion. (*Lopez, supra,* 46 Cal.App.5th at pp. 510–514.)

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ARGUMENT

1. The trial court erred by sentencing appellant to 15 years to life under the alternate penalty provision of the criminal street gang penalty statute (Pen. Code, § 186.22, subd. (b)(4)(B)), for his conviction of conspiracy to commit home invasion robbery because the penalty does not apply to conspiracy.

1.1. The relevant statutes

Section 186.22, first enacted in 1988 as part of the California Street Terrorism Enforcement and Prevention Act, otherwise known as the STEP Act, provides for sentence enhancements for certain offenses "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." (§ 186.22, subd. (b)(1); Stats. 1988, ch. 1242, § 1; *People v. Superior Court (Johnson)* (2004) 120 Cal.App.4th 950, 953.) In March 2000, the electorate approved Proposition 21, a tough-on-crime measure which, among other things, added an alternate penalty provision to section 186.22, subdivision (b), for certain offenses. (Prop. 21, Primary Elec. (Mar. 7, 2000).) Subdivision (b)(4), as amended by Proposition 21 and still in force today, provides in relevant part,

> [A]ny person who is **convicted of a felony enumerated in this paragraph** 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, shall, **upon conviction of that felony**, be sentenced to an indeterminate term of life

> imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:
>
> ... .
>
> (B) Imprisonment in the state prison for 15 years, if the felony is a **home invasion robbery**, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55.

(§ 186.22, subds. (b)(4), emphasis added; Ballot Pamp., Primary Elec. (March 7, 2010) text of Prop. 21, p. 120 (hereafter Pamphlet).)

Section 182, the conspiracy statute, specifies the punishments for persons convicted of conspiracy. With certain exceptions given in the statute, a conspiracy to commit a felony is "punishable in the same manner and to the same extent as is provided for the punishment of that felony." (§ 182, subd. (a).) The statute has contained this or functionally identical language for a century. Specifically, after the 1919 amendment, "a conspiracy was 'punishable in the same manner and to the same extent as in this code provided for the punishment of the commission of the said felony.' (Pen. Code, § 182, as amended by Stats. 1919, ch. 125, § 1, p. 170; [citation].)" (*People v. Cortez* (1998) 18 Cal.4th 1223, 1230–1231.) Previous to this, conspiracy was a misdemeanor. (*People v. Cory* (1915) 26 Cal.App. 735, 742.)

1.2. Applicable general principles of statutory construction

It is the goal of statutory construction "'"to ascertain the intent of the enacting legislative body so that we may adopt the

construction that best effectuates the purpose of the law."' [Citations.]" (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919.) Principles of statutory construction apply equally to statutes enacted by voter initiative. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212.) The court first looks to the words of the statute as "the statutory language is generally the most reliable indicator of legislative intent. [Citation.]" (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) "The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context. [Citations.]" (*Ibid.*)

In construing its language, "Significance should be given, if possible, to every word of an act. [Citation.] Conversely, a construction that renders a word surplusage should be avoided. [Citations.]" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799.) Effect must be given to express distinctions in statutes, "unless the whole scheme reveals the distinction is unintended." (*Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886, 894 (*Jurcoane*).) This Court has said, "we are aware of no authority that supports the notion of legislation by accident." (*In re Christian S.* (1994) 7 Cal.4th 768, 776.) Statutes relating to the same subject are to be construed together as a single statute. (*Scholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094, 1107; *Lara v. Board of Supervisors* (1976) 59 Cal.App.3d 399, 408-409.)

"If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls. [Citation.]" (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818.) However, if a

statute is reasonably susceptible to multiple interpretations, "'courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.' [Citations.]" (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171.) "When an initiative measure's language is ambiguous, [courts] refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*People v. Birkett* (1999) 21 Cal.4th 226, 243.)

1.3. The majority opinion in *Athar*

Because of its centrality to the Court of Appeal's decision below, and because appellant here argues it should be overruled or limited to the extent it compels application of the gang penalty provision to his conviction for conspiracy, the opinion in *Athar* requires a detailed treatment. In *Athar, supra,* 36 Cal.4th 396, this Court examined the interplay between the conspiracy statute (§ 182) and the dollar-amount enhancements included in money laundering statute (§ 186.10, subd. (c)). The defendant was convicted of conspiracy to commit money laundering in connection with a large-scale software counterfeiting operation. (*Athar,* at p. 399.) He was not convicted of the substantive offense of money laundering. (*Ibid.*) The jury found true that the amount involved was in excess of $2,500,000. *(Ibid.*) The trial court imposed a four-year enhancement on the conspiracy count pursuant to section 186.10, subdivision (c)(1)(D). (*Ibid.*)

At the time of the defendant's conviction, section 186.10, subdivision (a), defined the substantive offense of money laundering and prescribed its punishment as "… 'imprisonment in a county jail for not more than one year or in the state prison … .'" (*Athar, supra,* 36 Cal.4th at p. 407 (dis. opn. of Kennard, J.).) Subdivision (c) of the statute provided for enhancements, depending on the dollar-amount involved. (*Athar,* at p. 400.) Specifically,

> "Any person who is **punished under** subdivision (a) by imprisonment in the state prison shall also be subject to an additional term of imprisonment in the state prison as follows: [¶] … [¶] (D) If the value of the transaction or transactions exceeds two million five hundred thousand dollars ($ 2,500,000), the court … shall impose an additional term of imprisonment of four years." (§ 186.10, subd. (c)(1).)

(*Athar,* at p. 400, emphasis added.) In a divided opinion, the Court of Appeal affirmed the imposition of the enhancement, finding that its application to conspiracies was required by section 182, subdivision (a), under which conspiracies must be punished "'in the same manner and to the same extent' as those convicted of the 'target felony,' i.e., money laundering." (*Athar,* pp. 400–401.) The plain meaning of section 182 required the enhancement because section 186.10 did not expressly prohibit it. (*Id.* at p. 401.)

Justice Chin, writing for a four-justice majority, agreed with the Court of Appeal. (*Athar, supra,* 36 Cal.4th at p. 401.) The majority first found support in *People v. Kramer* (2002) 29 Cal.4th 720, a case interpreting the language of section 654, the statute barring multiple punishments for a single act. (*Athar,* at

pp. 401–402.) Section 654, subdivision (a), provides in relevant part, "when an act or omission is punishable in different ways by different provisions of law, it 'shall be punished under the provision that provides for the longest potential term of imprisonment … .' [Citation.]." The question in *Kramer* was whether to take enhancements into account when determining the longest potential term. (*Kramer,* at p. 723.) In finding that the calculation must include enhancements, the Court noted, "The statutory language seems clear. Nothing in that language excludes enhancements." (*Ibid*.) *Athar* concluded that the construction of "term" in *Kramer* applied equally to the word as used in section 182. (*Athar,* at p. 402.)

Conversely, the Athar majority found *Hernandez, supra,* 30 Cal.4th 835 distinguishable. (*Athar, supra,* 36 Cal.4th at p. 402–404.) In *Hernandez,* this Court determined that the special circumstances under section 190.2, which provide for death or life without the possibility of parole, did not apply to conspiracy to commit murder. (*Id.* at p. 845.) Section 190.2, subdivision (a), then specified that the penalty for a person found guilty of first degree murder was death or life imprisonment without the possibility of parole if a special circumstance was found true. (*Id.* at p. 865.) Section 182 provided the punishment for conspiracy to commit murder was "'that prescribed for murder in the first degree.'" (*Hernandez,* at p. 864.)

The *Hernandez* court first observed that the wording of the statute did not show that the voters intended the death penalty to apply to any crime other than murder when they enacted the

1978 death penalty law. (*Hernandez, supra,* 30 Cal.4th at pp. 865–866.) Additionally, the initiative did not mention conspiracy. (*Id*. at p. 866.) And also of particular note, "subdivision (a) of section 190.1 state[d]: '*If the trier of fact finds the defendant guilty of first degree murder,* it shall at the same time determine the truth of all special circumstances charged . . . .' (Italics added.)" (*Ibid.*)

Another important factor was that, as a practical matter, a person could not be punished for both a conspiracy to commit murder and the completed crime of murder, which the electorate would have been aware of. (*Hernandez, supra,* 30 Cal.4th at p. 866.) Therefore, it would have known that the only significance of the death penalty for conspiracy would be cases where no person died. (*Ibid.*) The ballot pamphlet did not mention conspiracies so it provided no evidence of an intent to impose such punishment. (*Ibid.*) Also, at the time of the vote, owing to recent United States Supreme Court case law, it was unclear whether the Eighth Amendment permitted the execution of a person for a crime not resulting in a fatality. (*Id.* at p. 867.) Presumably the electorate was aware of this as well. (*Ibid.*) It would have also known that application of the death penalty to conspiracy to commit murder would have resulted in an extreme divergence between the penalties for the similar crimes of attempted murder and conspiracy to commit murder; the former punishable by a determinate sentence of at most nine years once already enacted legislation became effective the following January. (*Id.* at pp. 867–868.)

Lastly, this Court in *Hernandez* considered the application of two venerable rules of statutory construction: the avoidance of serious constitutional doubts and the rule of lenity. (*Hernandez, supra,* 30 Cal.4th at pp. 868–869.) Under the former, a statute or initiative is construed "'to avoid 'serious' doubts as to its constitutionality if that can be done 'without doing violence to the reasonable meaning of the language.'" [Citation.]" (*Id.* at p. 868.) This was implicated because at the time the constitutionality of the death penalty for an unsuccessful conspiracy to commit murder was an open question subject to serious debate and no other state permitted it. (*Id*. at p. 869.) Under the rule of lenity, "when 'two reasonable interpretations of the same provision stand in relative equipoise, i.e., . . . resolution of the statute's ambiguities in a convincing manner is impracticable,' [a court] construe[s] the provision most favorably to the defendant. [Citations.]" (*Ibid*.) Although the court found it more plausible that the death penalty law was intended to not apply to conspiracies, even if the contrary construction were equally defensible the rule of lenity would require not applying it. (*Id.* at pp. 869–870.)

Athar found *Hernandez* distinguishable because legislative history, specifically legislative committee reports, showed that section 186.10 was enacted to stop the laundering of the proceeds of drug sales and to deter the activity through harsher punishment. (*Athar, supra,* 36 Cal.4th at p. 404.) The Court reasoned that because money laundering often involves large criminal enterprises with many people playing a part, it was

reasonable to conclude the statute was intended to reach conspiracies. In *Hernandez* there was no such evidence. (*Id.* at p. 404.)

The *Athar* majority also rejected the rule of lenity. The defendant claimed that section 182, subdivision (a), could be reasonably interpreted as either including the section 186.10, subdivision (c), enhancements or not. (*Athar, supra,* 36 Cal.4th at p. 404.) The argument was dismissed on the basis that *Hernandez* reached its holding on other considerations not applicable to the money laundering statutes. There was no constitutional issue with the imposition of the money laundering enhancements and there would be no disparity between the punishment for attempts and conspiracies because section 186.10, subdivision (c), explicitly applies to attempts. (*Athar,* at p. 404.)

Next, *Athar* dismissed the assertion that the language of section 182, subdivision (b), indicating that a conspiracy is punishable in the same manner as the felony, does not include enhancements. (*Athar, supra,* 36 Cal.4th at pp. 404–405.) To support his argument, the defendant pointed out that Health and Safety Code section 11370.4, which provided weight enhancements to some drug offenses, expressly applied to conspiracies to commit the listed offenses. (*Athar,* at p. 405.) If section 182 required application of enhancements for target crimes to conspiracies, this language would be superfluous. (*Ibid.*) The government countered that that Health and Safety Code section 11370.4 was distinguishable from section 186.10,

subdivision (c), because the former referred to persons "convicted of" listed offenses whereas the latter specifically applies to those "punished under" section 186.10, subdivision (c). (*Ibid.*)

The majority acknowledged that section Health and Safety Code section 11370.4 was amended to include the conspiracy language, which it did not previously include. (*Athar, supra,* 36 Cal.4th at p. 405.) But it reasoned,

> [B]ecause the initial statutory language may have created some doubt as to its applicability, the Legislature could have been could have believed it was necessary to amend the statute in order to apply the statutory enhancements to conspirators because those enhancements had been limited specifically to persons convicted of the target offense.

(*Athar,* at p. 405.) In other words, the language *was* superfluous but that was not a problem. (*Ibid.*) Instead, the Court concluded,

> The **general plain meaning** expressed in section 182, subdivision (a), that a conspirator will be punished in the same manner and to the same extent as one convicted of the underlying felony, **does not require additional legislative clarity**.

(*Ibid.,* emphasis added.)

Finally, the Court considered *People v. Villela* (1994) 25 Cal.App.4th 54, 60–61, which found the narcotics registration requirement applicable to conspirators even though the registration statute did not include conspiracy as a listed offense. (*Athar, supra,* 36 Cal.4th at p. 406.) *Villela* so found because the requirement was punishment for the target offense. (*Athar,* at p. 406; *Villela,* at pp. 60–61.) This was the correct result according to the *Athar* majority, whether or not registration was

in fact punishment, because section 182 requires sentencing to the same extent as the target felony and this is not limited to the base term. (*Athar,* at p. 406; but see *People v. Ruiz* (2018) 4 Cal.5th 1100, 1106–1107 (*Ruiz*).)

1.4. Justice Kennard's dissent in *Athar*

Justice Kennard, joined by Justice Moreno, dissented and would have instead applied the rule of lenity to exclude application of the dollar-amount enhancements to money laundering conspiracies. (*Athar, supra,* 30 Cal.4th at pp. 406–407, 410–411 (dis. opn. of Kennard, J.).) After an examination of the language of sections 182 and 186.10, Justice Kennard had no difficulty concluding that because the punishment for money laundering under section 186.10, subdivision (a), was up to one year in the county jail or imprisonment in the state prison, the punishment for conspiracy to commit money laundering was the same. (*Id.* at p. 407 (dis. opn. of Kennard, J.).) However, whether the dollar-value enhancements applied was unclear. (*Ibid.*)

Section 182 would be unambiguous if it stated expressly "that conspiracy to commit a felony is punishable 'in the same manner and to the same extent' as the target felony is punishable, '*including any enhancement.*'" (*Athar, supra,* 36 Cal.4th at p. 408 (dis. opn. of Kennard, J.).) That other statutes such as the Three Strikes law contain such language is enough to raise a doubt about the intent underlying section 182. (*Ibid.*; § 667, subd. (e)(2)(A)) It could reasonably be interpreted as including or not including enhancements to the target offense in the

punishment for conspiracy. (*Athar,* at p. 408 (dis. opn. of Kennard, J.).) Indeed, "Conspiracy to commit a felony is not *always* punishable by the full range of punishments available for the target felony, including punishments that may be imposed only after additional findings are made." (*Id.* at pp. 408–409 (dis. opn. of Kennard, J.); see *Hernandez, supra,* 30 Cal.4th at pp. 865–879; Health & Saf. Code, § 11370.4.)

Because of this lack of uniformity, in order to determine whether an enhancement to a target crime applies to a conspiracy to commit that offense, the enhancement statute must be evaluated. (*Athar, supra,* 36 Cal.4th at p. 409 (dis. opn. of Kennard, J.).) Section 186.10, subdivision (c), would be unambiguous if it expressly applied to conspiracy. (*Ibid.*) Such language does exist in Health and Safety Code section 11370.4 and its absence in the money laundering enhancement statute creates a doubt as to intent because of the principle that different intents are demonstrated when the legislature uses a "critical word" in a statute and omits it from another dealing with the same subject area. (*Ibid.*)

Justice Kennard also disagreed with the majority on the import of *Kramer* in construing section 182. (*Athar, supra,* 36 Cal.4th at p. 410 (dis. opn. of Kennard, J.).) In spite of *Kramer's* interpretation of section 654, similar language in the Three Strikes law was interpreted as not including enhancements for purposes of computation of an alternate penalty term. (*Athar,* at p. 410 (dis. opn. of Kennard, J.); *Kramer, supra,* 29 Cal.4th at

p. 723.) Thus, *Kramer* does not resolve the ambiguity of section 182. (*Athar,* at p. 410.)

Also, contrary to the majority, the term "punished under" used in section 186.10, subdivision (c), is susceptible of multiple interpretations. (*Athar, supra,* 36 Cal.4th at p. 410 (dis. opn. of Kennard, J.).) It could be said that a person convicted of conspiracy to commit money laundering under section 186.10, subdivision (a), has been punished under that subdivision. However, it could also be said that such a person has instead been punished under the conspiracy statute. (*Ibid.*) Given the ambiguity could not be convincingly resolved, Justice Kennard would have found the enhancement inapplicable under the rule of lenity. (*Id.* at p. 411 (dis. opn. of Kennard, J.).)

1.5. Section 186.22, subdivision (b)(4)(B), does not apply to a conspiracy because the plain language of subdivision (b)(4) excludes the possibility.

Section 186.22, subdivision (b)(4), specifies that its alternate penalty provisions only apply to those persons convicted of listed offenses. Conspiracy is not included in the list. Therefore, on its face, the enhancement provision does not apply to conspiracy. The Court of Appeal, in *People v. Mares* (1975) 51 Cal.App.3d 1013, 1023, construed a materially indistinguishable enhancement statute in the same manner. In that case, the defendant was convicted of conspiracy to commit robbery and simple assault. (*Id.* at p. 1015.) The jury found true that he personally used a firearm in the commission of the conspiracy within the meaning of former section 12022.5. (*Ibid.*) On appeal,

the defendant argued that the firearm enhancement had to be stricken because the listed offenses in section 12022.5 did not include conspiracy. (*Ibid.*) The government conceded the point and the court agreed. (*Id.* at pp. 1017–1023.)

In 1974 when the defendant in *Mares* committed his offenses, former section 12022.5 provided,

> "Any person who uses a firearm in the commission or attempted commission of a robbery, assault with a deadly weapon, murder, rape, burglary, or kidnapping, upon conviction of such crime, shall, in addition to the punishment prescribed for the crime of which he has been convicted, be punished by imprisonment in the state prison for a period of not less than five years. . . . [P] . . . [P] This section shall apply even in those cases where the use of a weapon is an element of the offense." (Stats. 1969, ch. 954, § 1, pp. 1900–1901.)

(*People v. Ledesma* (1997) 16 Cal.4th 90, 96.) The language "upon conviction of such crime" is functionally equivalent to the language in section 186.22, subdivision (b)(4): "Any person who is convicted of a felony enumerated in this paragraph … shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment … ."

Cases interpreting Former Health and Safety Code sections 11370.2 and 11370.4 support this interpretation as well. In *People v. Howard* (1995) 33 Cal.App.4th 1407, 1414–1417 (*Howard*), the Court of Appeal construed Health and Safety code section 11370.4, which provided for weight enhancements for certain narcotics offenses. At that time, as it does now, the statute expressly applied to conspiracies to commit the listed offenses. (Health & Saf. Code, 11370.4, subds. (a) & (b); *Howard,*

at p. 1414.) However, the previous statute did not mention conspiracy. The Court of Appeal observed, "Effective in 1990, the Legislature amended section 11370.4 to make the quantity enhancements applicable not only to persons convicted of committing the enumerated drug offenses, *but also those convicted of conspiracy to commit those offenses*." (*Howard,* at p. 1414.)

A parallel amendment to section 11370.2 was addressed in *People v. Porter* (1998) 65 Cal.App.4th 250, 253 (*Porter*). The statute originally provided for recidivist enhancements to sentences for certain controlled substance offenses but made no reference to conspiracy. (*Porter,* at p. 253.) An amended version expressly applied to conspiracies to commit listed offenses. (*Ibid.*) The court noted that the statute was amended "to expand the circumstances in which enhancements could be imposed and the types of prior convictions which would support them. [Citation.]" (*Ibid.*) "In particular, the section was changed to enhance the sentences for conspiracy as well as completed offenses, … ." (*Ibid.*)

Finally, *In re Mitchell* is instructive. (*In re Mitchell* (2000) 81 Cal.App.4th 653.) In that case, the Court of Appeal construed subdivision (a) of Penal Code section 2933.1, which provides for a 15 percent credit limitation for persons convicted of violent felonies, as not applying to conspiracies to commit those offenses. (*Id.* at pp. 656–657.) Section 2933.1 read at the time, "'Notwithstanding any other law, any person who is convicted of a felony offense listed in Section 667.5 shall accrue no more than

15 percent of worktime credit, as defined in Section 2933.'" (*Id*. at p. 656.) In turn, section 667.5 defines "violent felony" as a crime listed in subdivision (c). Conspiracy is not on the list and therefore the credit limitation of section 2933.1 did not apply to a conspiracy to commit a listed offense. (*Id.* at pp. 656–657.)

The language of section 186.22 under consideration here is functionally equivalent to that in *Mares, Howard, Porter,* and *In re Mitchell.* It involves additional punishment which expressly applies to a specific list of offenses. Like the statutes in those cases, section 186.22, subdivision (b)(4) and (b)(4)(B), should be similarly construed as not applying to conspiracies to commit the listed felonies, including home invasion robbery.

1.6. Notwithstanding *Athar* and the Court of Appeal's decision below, section 182 does not compel the application of section 186.22, subdivision (b)(4)(B), to conspiracies.

Notwithstanding the above, the Court of Appeal below held that *Athar* compelled interpreting section 186.22, subdivision (b)(4)(B), as applying to conspiracy to commit home invasion robbery. (*Lopez, supra,* 46 Cal.App.5th at p. 531.) Although the court found that section 186.22, subdivisions (b)(4) and (b)(4)(B), were *unambiguously,* inapplicable to conspiracy, the reasoning of *Athar* required interpreting the absence of an express exclusion of conspiracy as an inclusion of the offense. (*Lopez,* at pp. 529, 531.) Additionally, the Court of Appeal found *Hernandez* distinguishable because in the instant case, like in *Athar,* there were no constitutional issues with the imposition of the enhancement. (*Lopez,* at p. 530; *Athar, supra,* 36 Cal.4th at p. 404; *Hernandez, supra,* 30 Cal.4th at pp. 868–869.)

Appellant maintains, contrary to the court below, that *Athar* is distinguishable from the instant case. The money laundering enhancements of section 186.10, subdivision (c), applied to those "punished under" subdivision (a). Here, the alternate penalty provision of section 186.22, subdivision (b)(4), applies to those "convicted" of a listed offense. While a person convicted of conspiracy to commit home invasion robbery might be arguably punished under sections 211 and 213, subdivision (a)(1)(A), they have certainly not been *convicted* of that offense. (See *Athar, supra,* 36 Cal.4th at pp. 401, 405; *id.* at pp. 408–409 (dis. opn. of Kennard, J.).)

However, it must be acknowledged that *Athar*'s plain language analysis of section 182 does strongly suggest that the majority would have treated a statute like the one currently before this Court in the same manner as the money laundering statute. (See *Athar, supra,* 36 Cal.4th at p. 405.) Appellant respectfully urges that in this respect *Athar* should not be followed because its reasoning was flawed. The language in question was used in the context of Mr. Athar's argument that interpreting the money laundering enhancements as applicable to his conspiracy conviction would render null language in Health and Safety Code section 11370.4 that expressly applies to conspiracy to commit listed offenses. The majority rejected the argument, reasoning that the amendment inserting that language could have been simply meant as clarification but was unnecessary because the plain meaning of section 182 "does not require additional legislative clarity." (*Athar,* at p. 405.)

In re Mitchell dismissed similar reasoning in rejecting application of the section 2933.1 credit limitation to conspiracy. (*In re Mitchell, supra,* 81 Cal.App.4th at pp. 656–657.) The court acknowledged that section 182 provides for punishment of conspiracies "'in the same manner and to the same extent as is provided for the punishment of that felony.'" (*In re Mitchell,* at p. 657.) But this language did not compel a different result.

> However, to read section 182 as requiring the application of section 2933.1 to conspiracy to commit the violent felonies listed in section 667.5 **begs the question, and is contrary to the plain language of sections 2933.1 and 667.5 and the express**

> **intent of the Legislature**. We shall not indulge such an interpretation. [Citation.]

(*Ibid.*, emphasis added.) This applies equally to the Court of Appeal's expansive reading of *Athar*'s treatment of the money laundering statute. (*In re Mitchell,* at p. 657.)

Furthermore, *Athar* unjustifiably ignored the applicable principle of statutory construction that statutes on the same subject should be read together as a single statute. (*Scholes v. Lambirth Trucking Co.*, *supra,* 8 Cal.5th at p. 1107; *Lara v. Board of Supervisors, supra,* 59 Cal.App.3d at pp. 408–409.) Applying this rule of interpretation would suggest the proper reading is the one appellant urges here because it does not nullify the express language of Health and Safety Code section 11370.4. Beyond the assertion that the language of section 182 is clear, *Athar* does not give a satisfying explanation why this rule of interpretation should be ignored and the implied language of section 182 be treated as privileged over the express language of other statutes. And it is at best implied that enhancements for target offenses apply to conspiracy convictions because, as Justice Kennard noted in her dissent, section 182 is silent on the subject of enhancements. (*Athar, supra,* 36 Cal.4th at p. 408 (dis. opn. of Kennard, J.).) *Athar* should not be followed in this respect.

On this point, *People v. Superior Court (Kirby)* (2003) 114 Cal.App.4th 102 (*Kirby*) is also highly instructive. There, the question was whether the probation ineligibility provision of section 1203.065 applied to a conspiracy to commit pimping or pandering. That statute, like the alternate penalty provision of section 186.22, subdivision (b)(4), expressly applied to those

"convicted" of pimping and pandering, but made no mention of conspiracy. (*Id.* at p. 105.) The Court of Appeal, based on a review of case law, was skeptical whether probation ineligibility could be considered "punishment" so as to make section 1203.065 applicable to conspiracies through section 182. (*Id.* at pp. 105–106.) However, even if it were punishment, interpreting section 1203.065 to apply to conspiracy would violate canons of statutory construction. (*Id.* at p. 106.) This is because section 1203, subdivisions (e)(1) and (e)(5), explicitly makes persons convicted of certain conspiracies probation ineligible by stating that the provision applies to certain listed offenses "or a conspiracy to commit one or more of those crimes." (*Ibid.*) To apply section 1203.065 to a conspiracy would require reading omitted language into it while simultaneously treating language in section 1203 as a nullity. (*Id.* at p. 106.) Applying *Athar* here would similarly read language regarding conspiracy into section 186.22, subdivision (b)(4)(B), while simultaneously nullifying the language in Health and Safety Code sections 11370.2 and 11370.4 that expressly applies those enhancements to conspiracy.

As noted above in the review of the *Athar* majority opinion, *Kramer* was relied on by *Athar* for its construction of the plain language of section 654 as including enhancements within the meaning of "term" in the phrase "longest potential term of imprisonment." (*Athar, supra,* 36 Cal.4th at pp. 401–402; *Kramer, supra,* 29 Cal.4th at p. 723.) However, it is not so clear that *Kramer* relied solely on the statutory language. The Court did state, "The statutory language seems clear. Nothing in that

language excludes enhancements." (*Kramer,* at p. 723.) Yet it also considered the legislative history and purpose at some length, which made crystal clear that the intent was to include enhancements within the calculation of the longest term. (*Kramer,* at pp. 723–724.) An earlier version of section 654 had been interpreted in *People v. Norrell* (1996) 13 Cal.4th 1, 5–6 (*Norrell*), as permitting a court to choose which sentence to impose without regard to whether it was the most serious available. (*Kramer,* at p. 722.) The dissenting opinion of Justice Arabian urged the legislature to abrogate the majority opinion. (*Norrell,* at p. 23 (dis. & conc. opn. of Arabian, J.).) The legislature amended section 654 a year later to include the language regarding the longest potential term. (*Kramer,* at p. 722.) The legislative history also included committee reports stating the intent of the amendment was to abrogate *Norrell* and to require a sentencing court to impose the term with the maximum available sentence. (*Kramer,* at pp. 723–724.) Not including enhancements in the calculation of that term would be clearly contrary to this intent. (*Kramer,* at p. 724.) Thus, insofar as it relied on this evidence of intent, *Kramer* does not necessarily support the *Athar* court's construction of section 182, for which there is no comparable evidence of legislative intent.

Furthermore, even to the extent *Kramer* might have relied purely on the language of the statute, it is important to observe that other cases have interpreted language similar to section 654 as not extending to enhancements. (See *Athar, supra,* 36 Cal.4th at p. 408 (dis. opn. of Kennard, J.).) For example, *Dominguez*

considered whether the "term" to be doubled under the Three Strikes law includes enhancements. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 424.) Relying on the plain language, it decided it did not. (*Ibid.*; see also *People v. Hardy* (1999) 73 Cal.App.4th 1429, 1433.) Also distinguishing *Kramer* from the instant case in regard to its plain language analysis, the Court there did not have statutes such as Health and Safety Code section 11370.4 to suggest a contrary construction of section 654. (*Kirby, supra,* 114 Cal.App.4th at p. 106; *In re Mitchell, supra,* 81 Cal.App.4th at p. 657.) *Kramer*'s plain language analysis should not be applied here.

Athar's reasoning, if applied here, would also be contrary to *Hernandez.* While it is true that *Hernandez* was decided in part on the basis of constitutional concerns, it is also true that it involved a statute, like section 186.22, subdivision (b)(4), which *expressly* applied only to those convicted of specific offense(s) which did not include conspiracy among them. (§ 190.2, subd. (a); *Hernandez, supra,* 30 Cal.4th at p. 865; *Athar, supra,* 36 Cal.4th at p. 404.) In construing section 190.2, the *Hernandez* court found that the plain language of section 182 did not require its application to conspiracy. Specifically, there was

> nothing in the wording of the statutes governing special circumstances indicating that the voters who enacted the 1978 death penalty law intended that the special circumstances would apply to the crime of conspiracy to commit murder or indeed to any crime other than murder. The crime of conspiracy to commit murder is nowhere mentioned in the text of the 1978 death penalty initiative measure, and the initiative's provisions rather strongly imply that

> special circumstances may be charged and found true only as to the crime of murder.

(*Hernandez, at* pp. 865–866.) Had the Court interpreted the language of section 190.2 as *Athar* presumably would have under the Court of Appeal's reading below (*Lopez, supra,* 46 Cal.App.5th at pp. 529–531), it might still have concluded that the death penalty did not apply to conspiracies, but the analysis would have been different because a court will only construe a statute contrary to its plain language in "the most extreme cases where legislative intent and the underlying purpose are at odds with the plain language … ." (*Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1700.) Instead, *Hernandez* applied an analysis only called for where the plain language is not decisive. (*Hernandez,* at pp. 865–869.) Thus, *Athar* cannot be applied in the instant case consistent with the reasoning of *Hernandez.*

Finally, former Health and Safety Code section 11590, the registration statute that was considered in *Villela,* is distinguishable from section 186.22. (*People v. Villela, supra,* 25 Cal.App.4th at p. 57.) That statute required registration for any person convicted a narcotics offense listed therein. (*Ibid.*) Because the *Villela* court determined that registration constituted punishment, it applied as well to a conspiracy to commit such an offense. (*Id.* at pp. 59–61.) Crucially, the registration statute did not require finding any fact beyond the bare conviction and was therefore not an enhancement statute like section 186.22, subdivision (b). Nor did it refer to a separate enhancement scheme. (See *In re Mitchell, supra,* 81 Cal.App.4th at page 657.) Hence, *Villela*'s reading of Health and Safety Code section 11590

is entirely consistent with appellant's construction of section 186.22.

This Court's decision in *Ruiz* supports this view as well as a less expansive reading of *Athar*. (*Ruiz, supra,* 4 Cal.5th at pp. 1105–1107.) In *Ruiz,* the Court discussed *Athar* in course of deciding that the criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) and drug program fee (Health & Saf. Code, § 11372.7, subd. (a)) applied to conspiracies. (*Ruiz,* at pp. 1103, 1105–1107.) The Court of Appeal had determined that the fees did apply under section 182, even though the offense of conspiracy was not listed in the fine statutes. (*Id.* at pp. 1103–1104.) An issue was whether the status of the fees as "punishment" was dispositive of the question, as the Court of Appeal had found. (*Id.* at p. 1105.) The defendant agreed, but argued the fees were not punishment. (*Ibid.*)

The government instead argued, citing *Athar,* that it did not matter whether the fees were punitive because "Penal Code section 182, subdivision (a), '"requires sentencing to the same extent as the underlying target offense,"' … ." (*Ruiz, supra,* 4 Cal.5th at p. 1105; *Athar, supra,* 36 Cal.4th at p. 406.) The Court rejected this last argument because the plain language of section 182, subdivision (a), referred to *punishment.* (*Ruiz,* at p. 1105.) The language relied on by the People from *Athar* was used in the context of its discussion of *Villela,* which *Athar* endorsed, "insofar as it looked to whether a prescribed consequence *for the underlying target offense* 'was a punishment' to determine if Penal Code section 182 required imposition of

that consequence for conspiring to commit that offense. (*Athar, supra,* at p. 406.)" (*Ruiz,* at pp. 1106–1107, emphasis added.)

Because appellant cites the reasoning of *In re Mitchell,* he must acknowledge that the section 2933.1 credit limitation discussed in that case is a little different from the statutes discussed in *Mares, Porter,* and *Howard*. (*In re Mitchell, supra,* 81 Cal.App.4th at pp. 656–657; *Porter, supra,* 65 Cal.App.4th at p. 253; *Howard, supra,* 33 Cal.App.4th at p. 1414; *Mares, supra,* 51 Cal.App.3d at pp. 1017, 1023.) The latter statutes required finding additional facts beyond those that established the underlying offense, whereas the former required finding that an offense was a violent felony listed in section 667.5, subdivision (c), but no further facts. Thus, *In re Mitchell* could be seen as conflicting with *Villela,* which also construed a statute that required no additional factfinding. (*Villela, supra,* 25 Cal.App.4th at pp. 60–61.)

However, the better view is that section 2933.1, by referring to a separate enhancement scheme to determine applicability of the credit limitation, was not imposing punishment for the underlying crime *in itself* but for its status as a violent felony as determined by a separate enhancement scheme. That status is extrinsic to the crime in itself. To see why the distinction is not trivial, consider that under the terms of section 667.5, subdivision (c), a conspiracy to commit a violent felony is not generally speaking a violent felony. If a conspiracy to commit a violent felony were subject to the credit limitation of section 2933.1, in spite of not being a violent felony, the problem with the

resulting inconsistency would be obvious. Because the registration statute instead applied to the underlying crime in itself, *Villela* and *In re Mitchell* are thus distinguishable. (*In re Mitchell, supra,* 81 Cal.App.4th at pp. 656–657; *Villela, supra,* 25 Cal.App.4th at pp. 60–61.) But even if they are not, the reasoning of *In re Mitchell* is correct and applies to a greater extent to an enhancement statute.

Lastly, it is worth considering the consequences of upholding or rejecting the Court of Appeal's reading of *Athar*. Appellant's construction of section 186.22, subdivision (b)(4), is consistent with the holding of *Athar,* if not the entirety of its reasoning, because the statute is distinguishable from section 186.10; the latter does not require "conviction" of a listed offense. (*Athar, supra,* 36 Cal.4th at p. 405) It is also consistent with *Ruiz* and *Villela* because it involves an enhancement based on additional factfinding whereas the statutes considered in those cases did not. (*Ruiz,* at pp. 1103, 1105–1107; *Villela, supra,* 25 Cal.App.4th at pp. 60–61.) In contrast, the Court of Appeal's expansive reading of *Athar* (*Lopez, supra,* 46 Cal.App.5th at pp. 529–531) needlessly calls *Hernandez*'s reasoning into question, as well as that of *Mares, Porter, Howard, In re Mitchell,* and *Kirby*. (*Hernandez, supra,* 30 Cal.4th at pp. 865–866; *Kirby, supra,* 114 Cal.App.4th at p. 106; *Porter, supra,* 65 Cal.App.4th at p. 253; *Howard, supra,* 33 Cal.App.4th at p. 1414; *Mares, supra,* 51 Cal.App.3d at p. 1023.) It also casts a shadow on the settled principles that guide the construction of statutes together. (*Scholes v. Lambirth Trucking Co., supra,* 8 Cal.5th at p. 1107;

Jurcoane, supra, 93 Cal.App.4th at p. 894; *Lara v. Board of Supervisors, supra,* 59 Cal.App.3d at pp. 408–409.) Thus, to the extent, if any, appellant's position requires partially overruling *Athar,* considerations of stare decisis actually weigh in his favor. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1213.)

1.7. Assuming the language of the statutes is ambiguous, extrinsic evidence of voter and legislative intent requires interpreting section 186.22, subdivision (b)(4)(B), as inapplicable to conspiracies.

Appellant maintains that section 186.22, subdivision (b)(4), should be interpreted as unambiguously excluding the application of the 15-years-to-life alternate penalty provision of subdivision (b)(4)(B) to a person convicted of a conspiracy to commit home invasion robbery. However, if this Court finds there is ambiguity, extrinsic evidence of the electorate's and the legislature's intents require adopting appellant's urged construction.

The text of the Proposition 21 itself favors appellant's construction. It specifically mentioned conspiracy in other contexts, even in its amendment to section 186.22, but not anywhere in subdivision (b)(4). First, it amended the definition of offenses qualifying for a "pattern of criminal gang activity" by adding "conspiracy to commit" a listed offense. (§ 186.22, subd. (e); Pamphlet, at p. 120.) Next, in creating the new gang conspiracy offense (§ 182.5), which on its face only applies to completed crimes, it specified that the punishment would be the same as provided by section 182. (Pamphlet, at p. 119.) Finally, it

amended the Three Strikes law by expressly making a conspiracy to commit a serious felony into a serious felony. (Former § 1192.7, subd. (c)(41), as amended by Prop. 21 [now subd. (c)(42)]; Pamphlet, at p. 125.)

These specific references to conspiracy suggest that the omission of conspiracy from section 186.22, subdivision (b)(4)(B), was deliberate. "When the Legislature 'has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.' [Citations.]" (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576; *Evangelatos v. Superior Court, supra,* 44 Cal.3d 1188 at p. 1212 [statutory construction principles apply to voter initiatives].) Moreover, Proposition 21, by adding conspiracy to the list of serious felony offenses and to the crimes which can establish a pattern of criminal conduct, did not merely include specific references to conspiracy. Rather, it conspicuously demonstrated an awareness that Penal Code provisions applicable to specific offenses do not automatically apply to conspiracies to commit those offenses, further supporting an inference that the omission in section 186.22, subdivisions (b)(4)(B), was deliberate. (See, e.g., *Hernandez, supra,* 30 Cal.4th at p. 845; *People v. Hall* (1998) 67 Cal.App.4th 128, 139.) For these reasons, the failure to expressly include conspiracy should be seen as deliberate. However, even if the Court does not reach that conclusion, the absence of the term from section 186.22, subdivision (b)(4)(B), in light of the text of Proposition 21, certainly cannot *support* the construction of

adopted by the Court of Appeal. (*Lopez, supra,* 46 Cal.App.5th at p. 530.)

Neither does the ballot pamphlet suggest that conspiracy to commit home invasion robbery would be punishable by life imprisonment if the gang allegation of section 186.22, subdivision (b), were proven. The "Official Title and Summary" specifies, as relevant,

> Increases punishment for gang-related felonies; death penalty for gang-related murder; **indeterminate life sentences for home-invasion robbery, carjacking, witness intimidation and drive-by shootings**; and creates crime of recruiting for gang activities; and authorizes wiretapping for gang activities.

(Pamphlet, at p. 44, emphasis added.) According to the legislative analysis, which does not mention the life term at all, among other things the initiative would, "Increase[] penalties for gang-related crimes and require gang members to register … ." (Pamphlet, at p. 45.) The analysis explains that the measure,

> increases the extra prison terms for gang-related crimes to two, three, or four years, unless they are serious or violent crimes in which case the new extra prison terms would be five and ten years, respectively. In addition, this measure adds gang-related murder to the list of "special circumstances" that make offenders eligible for the death penalty. It also makes it easier to prosecute crimes related to gang recruitment, **expands the law on conspiracy to include gang-related activities**, allows wider use of "wiretaps" against known or suspected gang members, and requires anyone convicted of a gang-related offense to register with local law enforcement agencies.

(Pamphlet, at p. 46.)

The arguments in favor and against Proposition 21, and the respective rebuttals to them, make no mention of conspiracy at all. (Pamphlet, at pp. 48–49.) The argument in favor promised that to accomplish "protecting you from the most violent juvenile criminals and gang offenders," the measure,

> Prescribes LIFE IMPRISONMENT FOR GANG MEMBERS **convicted of** HOME-INVASION ROBBERIES, CARJACKINGS OR DRIVE-BY SHOOTINGS.

(Pamphlet, at p. 48, bold emphasis added.) Furthermore, as related to gangs, it would.

> "STRENGTHEN ANTI-GANG LAWS making violent gang-related felonies 'strikes' under the Three Strikes law" and "require[] GANG MEMBERS CONVICTED OF GANG FELONIES TO REGISTER … ."

(*Id.* at p. 48.)

There are two significant takeaways from the ballot pamphlet language. First, the sole reference to conspiracy is clearly to the proposed section 182.5 not to some generalized purpose of expanding the conspiracy law to enhancements. (Pamphlet, at p. 46.) Second, the description of the new life term for the gang allegation only mentions the completed offenses listed in section 186.22, subdivision (b)(4)(B). (Pamphlet, at pp. 44, 48.) This specificity would have given the electorate no reason to believe that conspiracy would be subject to a life term. Instead, it suggests that conspiracy was excluded. (*Hernandez, supra,* 30 Cal.4th at p. 866; see *Pasadena Police Officers Assn. v. City of Pasadena, supra,* 51 Cal.3d at p. 576.)

Although the language of the initiative and the ballot pamphlet provide ample reasons to find the life term penalty inapplicable to conspiracy, the decisional law of the Court of Appeal interpreting language similar to that in section 186.22, subdivision (b)(4), is an independent and overwhelming basis for excluding the possibility. "The electorate is presumed to be aware of existing laws and judicial construction thereof.' [Citation.]" (*People v. Gonzales* (2017) 2 Cal.5th 858, 869 (*Gonzalez*).) When courts have construed particular language and the legislature or electorate uses the same language in the same context, the presumption that the meaning given by the courts was intended is all but irresistible. (*Ibid.*)

As noted above, in *Mares,* the Court of Appeal construed the language of former section 12022.5 as excluding application of the enhancement it provided to a conspiracy to commit a listed offense. (*Mares, supra,* 51 Cal.App.3d at pp. 1017, 1023.) Both former section 12022.5 and section 186.22, subdivision (b)(4), indicate that a person who has committed a listed offense and for whom the enhancement-triggering facts have been found, shall "upon conviction" be subjected to the punishment specified in the statute. Similarly, in *Porter* and *Howard,* the courts construed the addition of conspiracy language to Health and Safety Code sections 11370.2 and 11370.4 as expanding those enhancement statutes to conspiracy where they previously did not apply; the former language of those Health and Safety Code sections, like former section 12022.5, specified that they applied to those "convicted of" enumerated offenses. (*Porter, supra,* 65

Cal.App.4th at p. 253; *Howard, supra,* 33 Cal.App.4th at p. 1414.) Clearly there is no meaningful distinction between section 186.22, subdivision (b)(4), and these statutes and the presumption that the electorate intended the same meaning applies. (*Gonzales, supra,* 2 Cal.5th at p. 869.)

In re Mitchell would have also informed the electorate as to how section 186.22, subdivisions (b)(4) and (b)(4)(B), would be interpreted. (*Supra,* 81 Cal.App.4th 653.) Although appellant, as explained above, believes that *Villela, supra,* 25 Cal.App.4th 54 is distinguishable, he has also acknowledged that the two cases could be read as conflicting because neither the registration requirement considered in *Villela* nor the credit limitation at issue in *In re Mitchell* are enhancements in the strict sense. (*In re Mitchell,* at pp. 656–657.) However, even then neither contradicts *Porter, Howard,* or *Mares*. Those cases interpreted actual enhancement statutes that, like section 186.22, subdivision (b)(4), required additional factual findings beyond the underlying offense, and whose language required an actual conviction of a specified offense for them to apply. (*Porter, supra,* 65 Cal.App.4th at p. 253; *Howard, supra,* 33 Cal.App.4th at p. 1414; *Mares, supra,* 51 Cal.App.3d at p. 1023.) Thus, the electorate's intended meaning of section 186.22, subdivisions (b)(4) and (b)(4)(B), would have been informed by those cases whether or not it saw *In re Mitchell* is seen as applicable.

The electorate was also certainly aware of the 1998 case *Hall, supra,* 67 Cal.App.4th 128, 139, in which the Court of Appeal found that conspiracy to commit robbery was not a serious felony

under section 1192.7 (although robbery was). As mentioned above, it was Proposition 21 that added express conspiracy language to the statute. (Pamphlet, at p. 125.) Thus, not only was the electorate presumably aware that conspiracy does not always apply to statutes that apply enhancements to listed crimes, it apparently acted to remedy the situation in a specific context. *In re Mitchell* is also relevant on this score because it implies that a conspiracy to commit a violent felony listed in section 667.5 is not a violent felony. (*In re Mitchell, supra,* 81 Cal.App.4th at p. 657.) The electorate did not include language to change that in Proposition 21 although it did amend the list of violent felonies in subdivision (c) of section 667.5. (Pamphlet, at pp. 123–124.) This provides evidence of another deliberate omission of conspiracy language in another part of the initiative. The case law existing at the time Proposition 21 was enacted all but compels the conclusion that the electorate did not intend a conspiracy to commit home invasion robbery be punished under that subdivision. (*Gonzales, supra,* 2 Cal.5th at p. 869.)

The legislative history of Health and Safety Code sections 11370.2, 11370.4, and 11379.8 is also relevant. In amending those statutes to expressly apply to conspiracy to commit listed offenses, there is evidence that the language was not merely clarifying an ambiguity, as *Athar* suggests, but that the legislature interpreted the previous language as not applying to conspiracy. (*Athar, supra,* 36 Cal.4th at p. 405.) The legislative digest to Assembly Bill No. 2185, which amended health and Safety Code sections 11370.2 and 11370.4 to include conspiracy

language, states, "This bill, in addition, would apply sentence enhancements to persons convicted of a conspiracy to violate these offenses, as specified." (Stats. 1989, ch. 1245.) The legislative digest to Senate Bill No. 1057, which in 1992 amended section 11379.8 to apply its quantity enhancements to conspiracies to commit listed offenses explains,

> Existing law provides for the imposition of prescribed sentence enhancements upon the conviction of any person for certain manufacture-related controlled substance offenses with respect to any substance containing specified weights or volumes of specified controlled substances. **This bill would provide, in addition, for the imposition of the prescribed sentence enhancements upon the conviction of any person for a conspiracy** to commit those controlled substance offenses.

(Stats. 1992, ch. 578, emphasis added.)

In discussing Assembly Bill No. 2448 (Stats. 1989, ch. 1326), whose changes to these statutes were incorporated into AB 2185, the Senate Committee on the Judiciary stated that "'under current law these enhancements do not apply to conspiracies. … .' (Sen. Com. on Judiciary, Rep. on Assem. Bill No. 2448 (1989-1990 Reg. Sess.) p. 2[.])" (*Valenzuela v. Superior Court* (1995) 33 Cal.App.4th 1445; *Porter, supra*, 65 Cal.App.4th at p. 254.) The committee also explained,

> "This bill would apply the above enhancements *where a defendant is convicted of conspiracy to commit the above offenses*. However, the conspiracy enhancements apply only where the defendant was substantially involved in the planning, direction, execution, or financing of the underlying offense.

> "The purpose of this bill is to extend sentence enhancements to large narcotic traffickers who do not personally handle the narcotics but who are often prosecuted for conspiracy." (Italics added.)

(*People v. Salcedo* (1994) 30 Cal.App.4th 209, 217.) Thus, in addition to being aware of judicial interpretation of the language in Health and Safety Code sections 11370.2, 11370.4, and 11379.8 that tracks with section 186.22, subdivision (b)(4), the electorate presumably would have also known that the legislature took the same language as not applying to conspiracy. (See *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 778 ["we may presume that when the Legislature borrows a federal statute and enacts it into state law, it has considered and is aware of the legislative history behind that enactment. [Citations.]"]; *Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1212.)

There is also this Court's decision in *Brookfield* to consider, in which this Court affirmed a sentence that included a determinate term gang enhancement on a conviction for conspiracy to commit the crime of shooting at an occupied building, an offense listed in section 186.22, subdivision (b)(4)(B). (*People v. Brookfield* (2009) 47 Cal.4th 583, 587.) Concededly, the propriety of that aspect of the defendant's sentence was not at issue and "cases are not authority for propositions not considered." (*Fricker v. Uddo & Taormina Co.* (1957) 48 Cal.2d 696, 701.) However, *Brookfield* still involved affirming a sentence that was imposed consistently with appellant's proposed construction and is relevant as evidence of legislative intent. Presumably, the legislature was aware of the decision and has as of yet not amended section

186.22, subdivisions (b)(4) or (b)(4)(B), to include any express reference to conspiracy.

The legislative history of section 182 is also important. In 1919, when the modern language regarding the penalty for conspiracy was first added, there had been status enhancements in the form of habitual offender laws since as early as 1872. (See former Pen. Code, §§ 666; *People v. Brooks* (1884) 65 Cal. 295, 299.) However, there were no offense specific enhancements. (See 4 Kerr's Cyc. Codes of Cal. (Bender-Moss Co. ed. 1921) <http://babel.hathitrust.org/cgi/pt?id=hvd.hl3awn&view=1up&seq=14> [as of Oct. 29, 2020].) Apparently, the first of these was a firearm enhancement enacted as section 3 of the Deadly Weapons Act of 1923, which provided for an additional term of imprisonment for use of a firearm in the commission of a crime. (Stats. 1923, ch. 695; *In re Shull* (1944) 23 Cal.2d 745, 750.) Therefore, the legislature could not have contemplated the treatment of such enhancements with respect to conspiracy convictions. Because "punishment" at the time did not include specific enhancements, that meaning should not be imputed to section 182 after the fact. (*People v. Williams* (2001) 26 Cal.4th 779, 785 [courts look to legislature's intent at the time statute enacted].)

In light of this substantial evidence of the electorate's and legislature's intents, the overwhelming inference is that the section 186.22, subdivision (b)(4)(B), penalty provision was not intended to apply to a conspiracy to commit home invasion robbery. Therefore, it should be interpreted accordingly.

1.8. If there is unresolved ambiguity, the rule of lenity requires interpreting section 186.22, subdivision (b)(4)(B), to not apply to a conspiracy to commit home invasion robbery.

Appellant maintains that the language of the statutes is unambiguous and that section 182 does not compel the application of section 186.22, subdivision (b)(4)(B), to conspiracy to commit home invasion robbery. Even if there were ambiguity, as explained above it must be resolved in his favor on account of the ample evidence of the electorate's and the legislature's intents. However, if that were not so it could still be said with certainty that there is no reasonable way to conclude that the interpretation of the gang enhancement statute adopted by the Court of Appeal is *more* likely to have been intended than appellant's proposed instruction. Under these circumstances, the rule of lenity applies. This preference for the more lenient construction among alternatives is implicated when an ambiguity is such that the intended meaning can only be guessed at. (*People v. Manzo* (2012) 53 Cal.4th 880, 889.) It's purpose is to break a tie between interpretations. (*Ibid.*) The rule is rooted in constitutional due process considerations. (*United States v. Lanier (*1997) 520 U.S. 259, 266; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313.)

As Justice Kennard noted in her dissent in *Athar* and contrary to the majority's reading, the language of section 182 in itself can equally reasonably be interpreted as including or not including enhancements to target offenses in the punishment for conspiracy because it does not explicitly address the matter.

(*Athar, supra,* 36 Cal.4th at p. 408 (dis. opn. of Kennard, J.); see *People v. Ramirez* (2014) 224 Cal.App.4th 1078, 1085 [rule of lenity applied where amended statute silent as to when newly enhanced presentence conduct credits available].) Adding to this, it is not always the case that conspiracy is punishable to the full extent of the target crime. (*Athar,* at pp. 408–409 (dis. opn. of Kennard, J.); *People v. Hernandez, supra,* 30 Cal.4th at pp. 865–870; *Kirby, supra,* 114 Cal.App.4th at pp. 104–107.) And, as Justice Kennard also argued, *Kramer*'s interpretation of section 654 does not eliminate any ambiguity of section 182 because similar language has been given a divergent interpretation in other cases. (*Athar,* at p. 410 (dis. opn. of Kennard, J.); *Kramer, supra,* 29 Cal.4th at p. 723; *Hardy, supra,* 73 Cal.App.4th at p. 1433; *Dominguez, supra,* 38 Cal.App.4th at p. 424.)

Also, section 186.22, subdivision (b)(4)(B), like section 186.10, subdivision (c), could be applicable to conspiracies or not because it does not expressly provide either way. (*Athar, supra,* 36 Cal.4th at p. 409 (dis. opn. of Kennard, J.).) Some statutes enhancing punishment or otherwise imposing additional consequences of conviction do explicitly refer to conspiracy. (See Health & Saf. Code, §§ 11370.2 [recidivism enhancements], 11370.4 [drug quantity enhancements]; 11379.8 [same]; §§ 290, subd. (c)(1) [sex offender registration]; 1203, subds. (e)(1), (5) [parole ineligibility].) But there are aspects of section 186.22, subdivision (b)(4), with lead to a greater doubt about its applicability to conspiracies than there was with section 186.10,

subdivision (c). That is, Justice Kennard's dissent need not be adopted for appellant's argument to prevail.

First, the section 186.10, subdivision (c), applied to those persons "punished under" subdivision (a), whereas the section 186.22, subdivision (b)(4), states that the alternate penalty applies to those "convicted" of specific offenses. Justice Kennard noted that it could be argued either way that a person given the same sentence as a target offense for a conspiracy conviction is "punished under" the statute for the target offense. (*Athar, supra,* 36 Cal.4th at p. 410 (dis. opn. of Kennard, J.).) However, it is doubtful such a person has been "convicted of" the target offense. It is certainly *at least* as reasonable to say they have not been.

Also contributing to a doubt about the meaning of section 186.22 is the question whether the electorate would have intended a disparity between the treatment of conspiracy and attempt, to which the enhancement clearly does not apply. While it is true as the Court of Appeal below observed, that there is normally a disparity between the two, the disparity is significant here if the Court of Appeal's construction is followed. (*Lopez, supra,* 46 Cal.App.5th at p. 530.) Home invasion robbery is punishable by a term of 3, 6, or 9 years in the state prison. (§ 213, (a)(1)(A).) Therefore, the attempted offense would be punishable by 18 months, 3 years, or 4 years and six months. Because the attempt is not a violent felony but is a serious felony, the gang allegation would add five years to the term. This slightly more than doubles the maximum potential term. Converting the conspiracy term to a 15-to-life term is significantly harsher.

Given also that Proposition 21 amended section 1192.7 to equalize attempts and conspiracies for purposes of the Three Strikes law, it is at least questionable whether the electorate intended disparate treatment in section 186.22, subdivision (b)(4)(B). (Pamphlet, at p. 125.)

Lastly, as pointed out above, when the modern language of section 182 was enacted there were no specific enhancements. (See 4 Kerr's Cyc. Codes of Cal. (Bender-Moss Co. ed. 1921).) Thus, the history of section 182, even if it does not *require* concluding that "punishment" does not automatically include enhancements such as the one at issue, as appellant argued in the previous section, it at least raises a doubt on the question. For all of these reasons, at best the language of sections 182 and 186.22 is ambiguous as to whether conspiracy to commit home invasion robbery is punishable with a life term. Therefore, it must be interpreted as not being so under the rule of lenity. (*Kirby, supra,* 114 Cal.App.4th at pp. 106–107.)

CONCLUSION

For the foregoing reasons, this Court should hold that the 15-years-to-life alternate penalty provision of section 186.22, subdivision (b)(4)(B), does not apply to a conspiracy to commit home invasion robbery.

October 29, 2020

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BENJAMIN OWENS
Attorney for Appellant
PEDRO LOPEZ

CERTIFICATION OF WORD COUNT

Re: *People v. Pedro Lopez*/S261747

The attached document—Appellant's Opening Brief on the Merits—was prepared using Microsoft Word and, according to that program, contains 11,653 words, excluding the cover information, tables and signature block. The type is 13-point and one-and-a-half-spaced.

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

October 29, 2020

/s/

_____

Benjamin Owens
Attorney for Appellant
Pedro Lopez

PROOF OF SERVICE

Re: *People v. Pedro Lopez*/Ct.App. 5 S261747

My business address is P.O. Box 64635, Baton Rouge, LA 70896. My electronic service address is bowens23@yahoo.com. I am an active member of the State Bar of California (No. 244289). I am not a party to this action.

On **October 29, 2020**, I served the within **Appellant's Opening Brief on the Merits** by placing a true copy thereof in a sealed envelope, with postage thereon fully prepaid, and depositing the same in a United States Postal Service mailbox at Baton Rouge, Louisiana, addressed as follows:

Pedro Lopez CDCR # BD9812
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PDF copies of the same document were sent the same date to the following email addresses or delivered via electronic upload:

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Fifth Appellate District

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

October 29, 2020

/s/

_____
Benjamin Owens