
IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

vs.

CRISTIAN RENTERIA,

Defendant and Appellant.

S266854

Court of Appeal No. F076973

Tulare County VCF 304654

APPEAL FROM THE SUPERIOR COURT OF TULARE COUNTY

THE HONORABLE JUDGE KATHRYN MONTEJANO,
JUDGE PRESIDING

**APPELLANT'S OPENING BRIEF
ON THE MERITS**

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ISSUE PRESENTED

When a member of a criminal street gang acts alone in committing a felony, what evidence will suffice to establish the felony was “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); see People v. Albillar (2010) 51 Cal.4th 47, 59-60.)

SUMMARY OF ARGUMENT

When a lone gang member commits a crime, the charges together with his gang membership do not satisfy the elements of the gang enhancement, Penal Code

section 186.22, subdivision (b)(1). Instead, the prosecution additionally must prove beyond a reasonable doubt that the gang member participated in a gang-related crime (that is, a crime which carried indicia of gang activity), and further that by his act the gang member intended to promote criminal conduct by members of his own gang.

Here, although Mr. Renteria belonged to a Sureño gang and shot at two houses, the prosecution failed to show that the shooting was gang-related, or that Mr. Renteria intended to promote his own gang members in their criminal conduct by his actions. The prosecution proved neither of these prongs, because the prosecution produced no evidence showing that Mr. Renteria wore gang colors, or sported gang tattoos or shouted out his gang slogans during the commission of the crime, or that either of the houses shot at had any connection with the opposing gang or that their occupants had any knowledge of a gang motive for the crime. In such circumstances, the prosecution's gang expert had no basis to opine that the crime was committed for the benefit of the gang or to promote criminal conduct by its members, and this Court should dismiss the gang allegation as not proven beyond a reasonable doubt.

STATEMENT OF THE CASE

A Tulare County jury on December 11, 2017 convicted Cristian Renteria of shooting at two different inhabited dwellings on August 8, 2014 in violation Penal Code section 246. (CT 311, RT 694-696.) In Count One, the jury convicted Mr. Renteria of shooting at an inhabited dwelling located at 1650 W. Merritt, and in Count Two the jury convicted him of shooting at the home immediately next door, at 1632 W. Merritt. It also found true as to each count the allegation that Mr. Renteria committed the crime to benefit a street gang in violation of Penal Code section 186.22, subdivision (b)(1). (CT 294, 296.) It also found true as to each count the allegation that Mr. Renteria personally used and discharged a weapon in violation of Penal Code sections 12022.53, subdivision (c) and 12022.5, subdivision (a).¹

At sentencing on January 25, 2018, Judge Kathryn Montejano sentenced Mr. Renteria to two consecutive 23-life terms in prison for the two August 8, 2014 shootings. (CT 355.) Each term consisted of the low term of three years on the shooting at an inhabited dwelling consecutive to 20 years for the discharge of the firearm. (RT 716-717.) Judge Montejano found each term carried an

¹The jury also found Mr. Renteria not guilty of a third count alleging that he negligently discharged a firearm the previous day, August 7, 2014, in violation of Penal Code section 246.3. (CT 311.)

indeterminate term of life imprisonment because Mr. Renteria acted to benefit the gang pursuant to Penal Code section 186.22, subdivision (b)(4)(A). (CT 371-372.)

The Fifth District Court of Appeal affirmed the conviction on January 5, 2021, Judge Smith dissenting.² (F076973.) This Court granted a petition for review on April 14, 2021. On April 21, 2021, it limited the issue to the sufficiency of the Penal Code section 186.22, subdivision (b)(1) gang allegation when the defendant acts alone.

STATEMENT OF FACTS

Prosecution Case:

A. The Shootings of August 8, 2014

Anthony Arenviaz lived on the north side of Merritt Avenue in Tulare, California on August 8, 2014. (RT 346.) Around 10:30 p.m that night he saw five or six young men gathered in a vacant field adjacent to his house. (RT 352.) He heard some members of the group holler “Sur Trece.” (RT 359.)

Mr. Arenviaz recognized one of young people, Cristian Renteria, as a neighbor who lived a few houses away. (RT 357-358.) He spoke briefly to Mr.

²The Court of Appeal also struck the Penal Code section 12022.5, subdivision (a) enhancements and remanded the matter for the trial court to exercise its discretion as to whether to strike the Penal Code section 12022.53, subdivision (c) enhancements. (Opinion at pp. 25-26.)

Renteria that evening. (RT 356.) Mr. Renteria told Mr. Arenviaz that some of his friends were drunk and he was trying to help them home. (RT 352.) Mr. Arenviaz told him to “get home safe, I don’t want no problems...have a good night.” (RT 352:19-21.) Mr. Renteria left and Mr. Arenviaz returned to his house, but “a little while later” Mr. Arenviaz heard a “pop” in the field and came out onto his front porch. (RT 353.)

Mr. Arenviaz then saw Mr. Renteria and another man emerge from the field, walk west on Meritt, and then south on Denair, a street which forms a T-intersection with Merritt. (RT 354.) He lost sight of them, but then after one or two minutes, he saw them reappear walking back north on Deniar toward the intersection of Denair and Merritt. (RT 362, 375.)

Mr. Arenviaz then saw Mr. Renteria lift a silver firearm in the air and shoot at Jack Duran’s house at 1650 West Merritt and then, after dogs barked, shoot at Harvey Demp’s home on 1632 West Merritt. (RT 364, 366.)³ . Mr. Arenivaz believed the shooting at the Demp house occurred because when the dogs barked “he [the shooter] was trying to shut ‘em up.” (RT 364.) Then, Mr. Arenviaz saw

³Mr. Demp’s home lay to the immediate west of Mr. Arenviaz’s house, and Mr. Duran lived in the house to the immediate west of Mr. Demp. (RT 363, 379.) Mr. Arenviaz noticed that Mr. Demp’s son had closed the garage door and entered their house just before the shooting. (RT 365.)

Mr. Renteria return to Mr. Duran’s home where he “unloaded the clip” and then left the area running south on Denair with the other man. (RT 364.) Mr. Arenviaz never saw the face of the other man. (RT 375.) Mr. Arenviaz called 911 and reported the incident. (RT 367.) Later, officers showed him a photographic lineup, and he picked Mr. Renteria’s photo out of it and identified him as the shooter. (RT 371-372, 495.)

Jacqueline Dunn visited her cousin Harvey Demp’s home at 1632 West Merritt on August 8, 2018. (RT 383, 389.) While sitting on the living room couch that evening she heard several gunshots. (RT 385.) A bullet struck the TV in the living room. (RT 386.)

Jack Duran lived at 1650 West Merritt on August 8, 2014. (RT 392.) He lived directly north of Denair Street which formed a T intersection at his house. (RT 394.) The police came by his house and pointed out damage near his doorbell. (RT 396.) He could not determine when that damage had occurred. (RT 398.) Mr. Duran denied that any of his family engaged in gang activity. (RT 396-397.)⁴

Andrea Lincon-Solis, a Tulare police officer, responded to a “shots fired” call at 11:50 p.m. on August 8, 2014 at Denair and Merritt and found two .22

⁴ In fact, years later, when contacted by the probation officer, Mr. Duran asked the probation officer “why Mr. Renteria shot at his home.” (Supplemental Confidential Clerk’s Transcript (SCCT) at 39.)

caliber casings at the intersection. (RT 400-402.) She placed the casings in an envelope to which she attached a computer-generated label. (RT 404.)

Tim Sunderland, a Tulare officer, responded to the same call on August 8, 2018 and interviewed witness Arenvaz. (RT 414.) He tried to contact the occupants of Mr. Duran's home at 1650 West Merritt, a residence pointed out by Mr. Arenivaz, but received no response. (RT 415.) He observed multiple bullet holes in and above the garage door. (RT 417.) He noticed a sawed-off shotgun inside the garage. (RT 418.) Officer Sunderland found two Remington .22 caliber casings at the southeast corner of Merritt Avenue and Denair. (RT 424.) He placed the casings in an envelope and affixed a computer-generated lable to it. (RT 426.)

Nancy McCombs, a criminalist at the Department of Justice lab in Fresno, testified that she examined the contents of the envelopes which bore the labels prepared by Officers Sunderland, Lincon-Solis. (RT 462.) The envelopes contained brass-colored .22 casings. (RT 452.) Ms. McCombs determined based on the chamber marks on all of the casings that they were all fired from the same firearm. (RT 453.)⁵

⁵The envelope also contained casings recovered from the shooting the previous day, with which the prosecution charged Mr. Renteria and on which the jury acquitted him. Those casings matched the others. (RT 452-453.)

B. Previous Gang Activity by Mr. Renteria

Officer Sunderland remembered that he had previously interviewed Mr. Renteria in 2008 at Los Tules Middle School, where the assistant principal had contacted him about a student bringing a knife onto campus. (RT 431.) Mr. Renteria, then 13, admitted he had brought the knife to school for protection and that he belonged to a “southern gang.” (RT 434.)

Jerrett Robertson, a Tulare police officer, recalled that in 2010 he found Mr. Renteria, then 15, with another boy in the back of a residence. (RT 479.) The other boy held a spray paint can. (RT 480.) The interior and exterior of the house contained fresh spray paint markings. (RT 482.) Officer Robertson questioned Mr. Renteria at his home on Olympia Street. Mr. Renteria said he knew the house was vacant, but he remained silent when Officer Robertson asked him if he tagged the residence. (RT 485.) Officer Robertson found “SSK” painted inside the residence. (RT 488.)

C. Officer Adney’s Interrogation of Mr. Renteria

Officer Jacob Adney arrested Cristian Renteria on August 13, 2014, five days after the shooting, at his father’s home. (RT 507.) Officer Adney found a plastic container with the word “SUR” written on it in Mr. Renteria’s father’s home. (RT 517.) He initially questioned Mr. Renteria in the back of his patrol car.

He recorded the conversation. Mr. Renteria denied involvement in any crime and told him that he lived with his girlfriend and her mother on “O” street, on the opposite side of town from the shooting. (RT 525, Augmented Clerk’s Transcript [ACT] 28, 37, 40.) However, Officer Adney’s independent investigation determined that Mr. Renteria’s girlfriend and her mother actually lived at 1779 West Woodward just several houses away from the location of the shooting. (RT 519.) Mr. Renteria admitted that some “guys,” whom he supposed belonged to the Norteño gang, threatened him with a shotgun on West Street that evening, a quarter mile east of Denair.⁶ (RT 518, ACT 47, 49.)

Later that same night Officer Adney interviewed Mr. Renteria again at the police station and recorded the conversation on videotape. (RT 522.) Mr. Renteria admitted that he belonged to the Southside Kings gang. (ART 9.) He admitted his girlfriend lived in the area of the shooting and that he recognized the houses involved in the shooting at 1650 and 1632 West Merritt. (ART 16, RT 524.)

D. Predicate Offenses by the Sureño Gang

Officer Adney, an experienced gang officer, related that he had arrested Francisco Cortez, a Sureño or Southside gang member, for possession of a loaded

⁶Although Officer Adney testified that Mr. Renteria told him that the “hit up” incident occurred “earlier that evening,” (RT 518), in the recorded interview Mr. Renteria does not precisely identify on which “evening” the “hit up” occurred. (ACT 46-50)

firearm in 2014 and that Mr. Cortez suffered a conviction for that crime. (RT 551.) He also arrested Fabio Delreal, another Sureño gang member in 2012 for possession of a loaded firearm and that he suffered a conviction for that offense. (RT 554.) Finally, he related the circumstance of the arrest of Armando Flores, a Sureño gang member for a drive-by shooting in 2009, who suffered a conviction for that offense. (RT 555.) Officer Adney opined that Cortez, Delreal and Flores each engaged in Sureño gang activity in committing their respective crimes. (RT 551, 553, 555.)

E. Office Adney's Gang Testimony

Officer Adney identified the South Side Kings (“SSK”) as a subset of the Sureño gang. (RT 559, 584.) He opined that based upon Mr. Renteria’s statements and his history, that Mr. Renteria belonged to a clique of the larger Sureño gang. (RT 558, 584.) Officer Adney opined that the cliques or subsets work together, sharing weapons and information, and that they share a common enemy, the Norteños. (RT 559.) Officer Adney translated “Sur Trece” as an expression signifying a Southern gang affiliated with the Mexican Mafia. (RT 544-547.) Officer Adney opined that Mr. Renteria “was a member of the Sureño gang.” (RT 587)

Officer Adney identified the neighborhood where the shootings occurred as “contested turf” in 2014 between Southsiders and their arch-rivals, the “Norteños.” (RT 548.) Officer Adney also testified that he had prior “contacts” with persons “living at” or “being associated with” Mr. Duran’s residence at 1650 W. Merritt, including Mr. Duran’s grandsons, Steve Delgado and Beau Degado, as well as Robert Pompa Sr. and Robert Pompa Jr. (RT 587.) Officer Adney had personally observed Robert Pompa Jr. in the company of Norteño gang members, including Fabian Carrasco. (RT 600-603.)⁷ The prosecution produced no “gang” evidence in relation to Mr. Demp’s home at 1632 W. Merritt.

Officer Adney also listened to recorded calls made by Mr. Renteria to his girlfriend after his arrest, where he told her that he “fucked up” by going out that night; that if questioned by the police she should “stick to the story,” and that “they were trying so hard to get the truth out of me.” (RT 617, 620-621.)

The prosecutor posed a hypothetical question to Officer Abney, which asked him to assume that a witness heard persons near his house, in an area claimed by

⁷The prosecutor attempted to link the grandsons and Robert Pompa Sr. with the Norteño gang, but the trial court found insufficient foundation for him to do so. (RT 588-595.)

both Sureño and Norteño gangs calling out “Sur Trece” and that “minutes later”⁸ he saw one of them, a Sureño gang member, produce a firearm and shoot at a house (where the police later find a sawed-off shotgun in the garage) and then, when dogs bark, immediately shoot at the house next door. (RT 603-604.) The hypothetical further assumed that the shooter had been “hit up” earlier in the evening when persons he believed belonged to the Norteño gang pulled a gun on him. The prosecutor asked whether, in his opinion, Officer Adney believed that such a shooting would have been committed “at the direction of, for the benefit of or in association with a criminal street gang with a specific intent to promote, further or assist in criminal conduct by gang members.” (RT 604:23-605:2.)

Officer Adney answered in the affirmative. He opined that a gang member “hit up” by another gang who then shoots at houses in an area claimed by both gangs⁹, does so in order to “put in work” for his gang, and to enhance its reputation or notoriety for violence. (RT 606-612.)

⁸Trial counsel objected to the characterization in the hypothetical of the shouting of “Sur Trece” as not occurring “during the commission of the offense,” but “hours” earlier. (RT 608-609.) The trial court overruled the objection. (RT 609.) The prosecutor argued to the court, and later to the jury in closing argument, that the shouts occurred “minutes” before the offense. (RT 609, 694.)

⁹The prosecutor tried to include in the hypothetical that one house “is a residence known to be associated with Norteño activity.” The court struck that portion of the hypothetical as unsupported by the evidence. (RT 605.)

ARGUMENT

I

**TO PROVE THE PENAL CODE SECTION 186.22,
SUBDIVISION (B)(1) GANG ENHANCEMENT WHERE A
LONE GANG MEMBER COMMITS A CRIME, THE
PROSECUTION MUST PROVE BEYOND A REASONABLE
DOUBT BOTH THAT THE LONE MEMBER PARTICIPATED
IN A GANG-RELATED CRIME AND THAT HE DID SO FOR
THE PURPOSE OF PROMOTING THE CRIMINAL CONDUCT
OF HIS OWN GANG**

*A. The Federal Constitution Prohibits the State from Imposing Enhancements
Based Upon Insufficient Evidence*

The Due Process Clause of the United States Constitution requires that the prosecution adduce evidence of a crime which, when viewing the whole evidence in the light most favorable to the prosecution, could convince a rational juror of the truth of the charge beyond a reasonable doubt. (Jackson v. Virginia (1979) 443 U.S. 307, 318-319; People v. Johnson (1980) 26 Cal.3d 557, 576.) The prosecution evidence cannot amount to mere speculation, but must “inspire confidence” and appear “reasonable, credible, and of solid value.” (People v. Maury (2003) 30 Cal.

4th 342, 396; People v. Wilson (2008) 44 Cal.4th 758, 806.) Inferences may support a conviction only if those inferences are “of such substantiality that a reasonable trier of fact could determine beyond a reasonable doubt” that the inferred facts are true. (People v. Raley (1992) 2 Cal.4th 870, 890–891.) The Jackson standard applies to enhancements. (People v. Leon (2008) 161 Cal.App.4th 149, 161.)

B. The Elements of the “Gang Enhancement,” Penal Code Section 186.22, subdivision (b)(1)

The gang enhancement of Penal Code section 186.22, subdivision (b)(1), part of the “California Street Terrorism Enforcement and Prevention Act” (Pen.Code §186.20 et seq.), provides additional punishment for “any person who is convicted of a felony committed for the benefit, at the direction of, or in the association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” The trial court instructed the jury that to prove the enhancement, “the People must prove that: (1) The defendant committed the crime for the benefit or in association with a criminal street gang and (2) the defendant intended to assist, further or promote criminal conduct by gang members.” (RT 648.) Even if the facts do show that the defendant committed a gang-related crime to benefit the gang, the prosecution must

also demonstrate “that the group the defendant acted to benefit, the group that committed the predicate offenses, and the group whose primary activities are introduced, is one and the same.” (People v. Prunty (2015) 62 Cal.4th 59.)

When gang conduct occurs during the crime of shooting into an inhabited dwelling in violation of Penal Code section 246, that crime becomes punishable by an indeterminate life sentence pursuant to Penal Code section 186.22, subdivision (b)(4)(A). Further, the court may then also impose an additional 20-year firearm discharge enhancement to that sentence pursuant to Penal Code section 12022.53, subdivision (c), since that enhancement applies to life crimes. (People v. Jones (2009) 47 Cal.4th 566, 578 n.5; Pen. Code §12022.53, subd. (a)(17).) The gang allegation here turned crimes that might carry a maximum of 12 years and 8 months (5 years for the shooting at an inhabited dwelling in violation of Penal Code section 246, plus 5 years for the use of a firearm pursuant to section 12022.5, plus a 2 year, 8 month consecutive sentence for the second house shooting pursuant to Penal Code section 1170.1, subdivision (a)), into a crime which eventually carried a punishment for Mr. Renteria of 46 years to life.

C. Prosecution Gang Experts Testifying in Cases Involving Lone Gang-Members Must Base Their Opinion of the Applicability of the Gang Enhancement on Specific, Gang-Related Evidence Involved in the Particular Crime

Criminal conduct by a gang member does not necessarily fall within the gang enhancement, since a gang member may commit crimes for his own personal reasons. (People v. Albillar (2010) 51 Cal.4th 47 , 60.)¹⁰ Further, “[m]ere active and knowing participation in a criminal street gang is not a crime.” (People v. Rodriguez (2012) 55 Cal.4th 1125, 1130.)¹¹ Instead, an appellate court must

¹⁰Thus, for example, in People v. Franklin (2016) 248 Cal.App.4th 938, 942-954. a gang member threatened to kill his former girlfriend and falsely imprisoned her. The Court of Appeal found insufficient evidence for the gang enhancement, because the prosecution produced no evidence that anyone in his gang knew about the crimes or benefitted from them. (Id. at p. 950.) Although he did commit the crimes with the assistance of members of other gangs, the prosecution failed to connect his gang with those other gangs, and thus failed to show any direct gang benefit to his crime. (Ibid.) Similarly, in People v. Ramirez (2016) 244 Cal.App.4th 800, 819-820, the Court of Appeal found that a dispute between neighbors did not amount to gang-related activity sufficient to support the gang enhancement. In finding the prosecution introduced insufficient evidence of the Penal Code section 186.22, subdivision (b)(1) enhancement at the preliminary hearing, Ramirez observed, “no gang signs were flashed, no gang names were called out, and no gang attire was worn.” (Ibid.)

¹¹Rodriguez distinguished between the gang participation felony, Penal Code section 186.22, subdivision (a) and the Penal Code section 186.22, subdivision (b)(1) gang enhancement. It held that the language of the gang participation crime, which punishes “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,” refers to a person who actively aids and abets gang members and thus can only apply where two or more persons combine to commit a gang crime.

carefully analyze the two prongs of the gang enhancement--the “gang-related” prong and the “specific intent prong”-- to determine whether sufficient evidence exists to support the enhancement. (Ibid.)

To prove the gang enhancement against a lone actor who happens to be a gang member, the prosecution must show through his acts and intent that he satisfied both prongs of the gang enhancement. In the case of a gang member acting alone, this Court should require for the proof of the gang enhancement, in accordance with the Court of Appeal cases set forth infra, some evidence connecting the commission of the crime to the gang, such as evidence that the defendant wore gang colors, sported gang tattoos, shouted gang epithets during the commission of the crime or tried to protect “gang turf, ” or evidence connecting the victims with the opposing gang or otherwise demonstrating a gang motive for the crime.

Courts of Appeal, in response to Abillar and Rodriguez, have carefully scrutinized the evidence demonstrating the two prongs of the Penal Code section 186.22, subdivision (b)(1) gang enhancement in scenarios where a gang member acts alone. (People v. Rios (2013) 222 Cal.App.4th 542.) This Court should agree

(Rodriguez, supra, 55 Cal.4th at 1132.) It held, however, that under appropriate circumstances, a “lone actor” could violate Penal Code section 186.22 subdivision (b) if the prosecution could show the crime “gang related.” (Id at p. 1139.)

that “[w]here the defendant acts alone, the combination of the charged offense and gang membership alone is insufficient to support an inference on the specific intent prong of the gang enhancement. Otherwise, the gang enhancement would be used merely to punish gang membership.” (Id. at p. 574.)

Thus, for example, In re Frank S. (2000) 141 Cal.App.4th 1192, 1199 held that Frank, a Norteño gang member who admitted possessing a knife “for protection” while riding his bike, did not qualify for the gang enhancement where the prosecution produced no evidence he acted on behalf of the gang during the commission of that crime.

“In the present case, the expert simply informed the judge of her belief of the minor's intent with possession of the knife, an issue reserved to the trier of fact. She stated the knife benefits the Norteños since ‘it helps provide them protection should they be assaulted by rival gang members.’ However, unlike in other cases, the prosecution presented no evidence other than the expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue to establish that possession of the weapon was ‘committed for the benefit

of, at the direction of, or in association with any criminal street gang' 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 in a gang-related offense. In fact, the only other evidence was the minor's statement to the arresting officer that he had been jumped two days prior and needed the knife for protection. To allow the expert to state the minor's specific intent for the knife without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (Id. at p. 1199.)

In People v. Ramon (2009) 175 Cal.App.4th 843, 853, a gang member possessed a firearm while driving a car. The Court of Appeal reversed the true finding on the gang allegation, despite the testimony of the gang expert that in his opinion, those facts warranted the enhancement.. Ramon held that the prosecution produced no facts showing that Ramon harbored an intent to commit the crime for gang purposes. It added, "speculation is not substantial evidence." (Id. at p. 851.)

It concluded that “[w]hile the People's expert's opinion certainly was one possibility, it was not the only possibility...a mere possibility is not sufficient to support a verdict.” (Id. at p. 853.)

In People v. Ochoa (2009) 179 Cal.App.4th 650, Ochoa committed a carjacking with a weapon by himself outside of his gang’s territory. Ochoa found the evidence for the gang enhancement insufficient and further determined that the prosecution’s gang expert “did nothing more than [improperly] inform the jury how [the expert] believed the case should be decided,” (Id. at 662.) Ochoa held:

“[The d]efendant did not call out a gang name, display gang signs, wear gang clothing, or engage in gang graffiti while committing the instant offenses. There was no evidence of bragging or graffiti to take credit for the crimes. There was no testimony that the victim saw any of defendant's tattoos. There was no evidence the crimes were committed in gang territory or the territory of any of its rivals. There was no evidence that the victim of the crimes was a gang member or a...rival. ...The defendant was not accompanied by a fellow gang member.” (Ibid.)

Ochoa found that the expert lacked “evidentiary support” for any

inferences that the carjacking supported the gang or that the gang used the car for transporting drugs or for retaliation against rivals. It concluded that the expert based his testimony “solely on speculation, not evidence.” (Id. at pp. 662–663.)

In People v. Rios, supra, at 222 Cal.App.4th 542, police caught Rios, an admitted Norteño, driving a stolen car. (Id. at p. 548.) Inside the car the police recovered a gun and some letters with gang writing. The jury convicted Rios of joyriding and gun possession and found the gang enhancement true. (Id. at p. 555.) Rios held the evidence of the gang enhancement insufficient, even though the prosecution’s gang expert testified that in his opinion, Rios stole the car and possessed the gun for the benefit of the gang. (Id. at p. 553.) Rios held that the gang expert’s testimony could not support the gang enhancement because the prosecution offered no evidence showing that Rios harbored a gang-related purpose for either stealing the gun or possessing the firearm:

“...[There was no evidence that defendant was in Norteño territory or rival gang territory when he stole the car; that he called out a gang name, displayed gang signs or otherwise stated his gang affiliation; or that the victims of the car theft were rival gang members or saw his tattoos or gang clothing. Here, although there was evidence that

auto thefts and illegal gun possession were among the primary activities of the Norteño gang in Salinas, that evidence alone was insufficient to support the inference that defendant stole the Chrysler and possessed the gun with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (Id. at p. 574.)

In People v. Perez (2017) 18 Cal.App.5th 598, a gang member committed murder and attempted murder by shooting men at a crowded college party. There were some other tattooed “Mexican” men there, but the prosecution offered no evidence of any gang affiliation between them and Mr. Perez. The Court of Appeal found the evidence regarding the gang enhancement insufficient:

“There is no evidence the other Mexicans at the party were members of any gang whatsoever. There is no evidence that any participant shouted out a gang name or threw up a gang sign. There is no evidence defendant or any of the other Mexicans were wearing gang colors.

There is no evidence any of the students at the party knew defendant was a member of a gang. There is no evidence that any rival gang members were present at the party or

that the shooting was done in retaliation or retribution for prior gang activity. There is no evidence the shooting occurred in gang territory. None of the students who testified at trial attributed the shooting to a gang. Thus, there was no eyewitness testimony that even hinted the shooting was gang related” (Id. at p. 609.)

Perez held that although the gang expert testified that such shooting would benefit the shooter’s reputation within his gang, no evidence actually demonstrated the crime “gang-related” no matter what the gang expert opined. (Id. at 610.) “[T]he glaring absence of evidence connecting the shooting to a gang, other than the mere fact the perpetrator was a gang member, leaves the evidence woefully short of the sufficiency needed to sustain the enhancement.” (Ibid.) It concluded its reasons for striking the gang enhancement:

“Missing was all evidence typical of crimes committed for the benefit of the gang and intended to promote, further, or assist the commission of crimes by gang members—gang colors, gang clothing, gang accrements, gang signs, gang epithets, help by other gang members. Here there is no evidence any of the college students

knew of defendant's gang affiliation.” (Id at pp. 613-614.)

The Ninth Circuit has endorsed the reasoning of these Court of Appeal cases. It has held that the prosecution presents insufficient evidence of the Penal Code section 186.22, subdivision (b) enhancement where a gang member commits an armed robbery, without further evidence that the robbery was gang-related and that he intended to benefit the gang. (Macdonald v. Hedgepeth (9TH Cir. 2018) 907 F.3d 1212.) Analyzing the California case law regarding the gang enhancement, the Ninth Circuit found that “California courts find the elements of the gang enhancement satisfied when, for example, defendants commit crimes with gang members, wear gang colors during a crime, victimize rival gang members or others potentially threatening gang turf, bring objects with potential gang symbols to the crime, and have tattoos potentially symbolizing the gang.” But in McDonald it found:

“The evidence presented at trial showed only that [defendant] Maquiz committed the 2001 robbery alone, without wearing or displaying gang symbols, signs, or colors. There also was no evidence that the victim even knew that Maquiz was a gang member. Maquiz's decisions to hold his hand over his face and to wear a

knitted cap pulled down to his eyes indicate a desire to conceal his face and remain anonymous. An anonymous perpetrator's crime has no effect on a gang's reputation, and the perpetrator's gang affiliation, if any, remains a mystery. Thus, no evidence would permit a reasonable inference that Maquiz performed the robbery to secure any particular territory for the gang or to enhance the gang's reputation.” (Id. at pp. 1220-1221.)

Macdonald determined the gang expert’s testimony “conclusory” and without foundation. It struck the gang enhancement and in doing so remarked: “Testimony of this kind from a gang expert, even when coupled with personal knowledge that a defendant is a gang member, is insufficient under Penal Code section 186.22, subdivision (b)(1) to prove that a particular crime committed alone was ‘gang related.’ To hold otherwise would turn the statute into a penalty enhancement simply for committing a crime while being a gang member.” (Id. at 1222.)

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II

**THE PROSECUTION OFFERED INSUFFICIENT EVIDENCE
TO PROVE THE GANG ENHANCEMENT WHERE
APPELLANT, A GANG MEMBER, SHOT AT HOUSES IN HIS
NEIGHBORHOOD, BUT WHERE THE PROSECUTION
OFFERED NO COMPELLING EVIDENCE TO SHOW THAT
HE PARTICIPATED IN A GANG- RELATED CRIME FOR
PURPOSE OF PROMOTING THE CRIMINAL CONDUCT OF
THE MEMBERS OF HIS OWN GANG**

In the cases cited supra, appellate courts discounted the testimony of the prosecution's gang expert that the crime appeared gang related and reversed the true finding on the gang enhancement because, in each case, no evidentiary facts adduced at the trial actually showed the defendant's conduct or purpose gang-related. These cases hold that to provide sufficient evidence for the enhancement, the gang expert's testimony must rely upon gang-related facts adduced at the trial, and not simply the charges or the fact of the defendant's gang membership. In the case of a lone gang actor, the prosecution must show some evidence of the gang-related nature of the commission of the crime, such as evidence that the defendant wore gang colors, sported gang tattoos, shouted gang epithets during the

commission of the crime or tried to protect “gang turf,” or at least adduce evidence connecting the victims with the opposing gang or otherwise demonstrating a gang motive for the crime.

Here, although the prosecution proved that Mr. Renteria joined the Southside gang as a teenager and admitted membership within it, and even assuming that some of the persons with whom Mr. Renteria associated that evening had connections to that gang, the prosecution failed to show that in shooting at the houses Mr. Renteria either engaged in gang activity or intended to promote criminal conduct by his own gang by his actions. Officer Adney’s opinion testimony otherwise could not satisfy the elements of either prong of the gang enhancement because the prosecution offered no solid or credible facts to back it up.

A. The Prosecution Failed to Prove the First Prong of the Gang Enhancement, that Defendant Acted “for the Benefit of a Criminal Street Gang”

The prosecution tried to satisfy the first prong¹² of the gang enhancement, that the crime was gang-related or committed for the benefit of the gang, because

¹²The first prong, that the felony “was committed for the benefit of, at the direction of, or in association with any criminal street gang,” in the case of the lone actor, comes down to whether the prosecution can prove the felony was “committed for the benefit...of a criminal street gang.” A lone actor, by definition, cannot act at the direction or in association with the gang. (See People v. Rodriguez, supra, 55 Cal.4th at 1132.)

someone shouted the gang epithet “Sur Trece” in connection with the crime. (Respondent’s Brief in the Court of Appeal, at p. 13.) But the evidence it offered never proved this connection between the shooting and the gang. No evidence showed that at the time of the shooting, Mr. Renteria wore or displayed gang colors, gang clothing, gang accouterments, or personally shouted any gang epithets.

Mr. Arenviaz testified he heard someone shout that from the field next to his house at about 10:30 in the evening, and when he emerged from his house he saw Mr. Renteria walking by with others. (RT 352.) He then testified that “a little while” after that he saw the shooting. (RT 353.) The police received Mr. Arenviaz’s 911 call at 11:50 p.m. (RT 400-402), meaning that more than an hour could have elapsed between the shouting and the shooting. This renders purely speculative any inference that the shouting of “Sur Trece” in the field bore any connection to the shooting on West Merritt street, several houses south and west of the field. No rational trier of fact could connect these two disparate events beyond a reasonable doubt in order to find the shooting gang-related.

Further, the prosecution tried to prove shooting gang-related by “associating” one of the houses—that located at 1650 W. Merritt and owned by Mr. Duran—with the rival “Norteño” gang. Yet it never achieved this goal so that a rational trier of fact could believe it beyond a reasonable doubt. The examination

of Officer Adney revealed that he believed that Robert Pompa Jr. was “associated” with the 1650 West Merritt residence (RT 587), and that he had once observed Mr. Pompa Jr. in the company of a Norteño gang member. (RT 601-603.) But nothing about this evidence shows that Pompa, Jr. lived at 1650 W. Merritt at the time of the shooting or that 1650 W. Merritt functioned as some sort of repository for Norteño activity at that precise time. Mr. Duran denied that his family maintained any gang affiliation. (RT 396-397.) When the prosecutor in a hypothetical to Officer Adney asked him to assume the 1650 residence was “known to be associated with Norteño gang activity,” the trial court properly struck that reference as unsupported by the evidence. (RT 605:6-19.)

The prosecution produced no evidence of Norteño graffiti or Norteño activity at the 1650 Merritt home. It provided no evidence that this assault occurred in Sureño gang territory or that the shooter attempted to protect or defend that territory. Officer Sunderland observed a sawed-off shotgun in Mr. Duran’s garage, but no evidence demonstrated that gun belonged to the Norteño gang or that the Norteño gang—or anybody else-- had used it against Mr. Renteria. Furthermore, no evidence showed that the persons in the targeted house at 1650 West Merritt or anyone else in the neighborhood were ever aware of any gang purpose, or any purpose at all, for the shooting.

B. The Prosecution Failed to Prove the Second Prong of the Gang Enhancement, that Defendant Acted “With the Specific Intent to Promote in Any Criminal Conduct by Gang Members”

Gang membership by itself cannot prove a specific intent to promote criminal conduct by gang members. (People v. Gardeley (1996) 14 Cal.4th 605, 623.) Although a jury can infer such intent where the defendant works with other members of his gang to commit a crime (People v. Abillar, supra, 51 Cal.4th at p. 66), in the case of a lone gang actor, the prosecution must provide additional specific evidence of an intent to promote criminal conduct by gang members. Here, it failed to meet that standard, because it never connected Mr. Renteria’s statements with the actual shooting.

Mr. Renteria admitted that at some time he got “hit up.” (ACT 49.) The prosecution tried to use that admission as proof of the intent to promote criminal conduct by gang members required for the second prong of the enhancement.¹³ (Respondent’s Brief in Court of Appeal at 17.) Even assuming that a general intent to retaliate could satisfy the second prong, no evidence showed the manner in

¹³The second prong, that the felony “was committed with the specific intent to promote, further or assist in any criminal conduct by gang members,” in the case of a lone actor, comes down to whether he intends to promote any criminal conduct by members of his own gang. A lone actor, by definition, cannot “assist” in criminal conduct. (See People v. Rodriguez, supra, 55 Cal.4th at 1132.)

which the “hit up” event related to the shooting of Mr. Duran’s house. Mr. Renteria never connected the two events in his statement to Officer Adney, and the prosecution failed to prove any such a connection. Mr. Renteria never stated, and the evidence never demonstrated directly or by inference that the “hit up” caused him to take or even contemplate further action, or that it influenced his purposes in any way. An expert may not base his opinion upon “assumptions of fact without evidentiary support.” (People v. Moore (2011) 51 Cal.4th 386, 405.) Without an evidentiary connection to the charged crime, the prior confrontation with an opposing gang cannot support the enhancement. (In re Frank S.,supra, 141 Cal.App.4th at 1199.) In sum, the prosecution proved a lone gang member did a shooting, but failed to prove that he did it in a gang manner or for a gang purpose.

The prosecution case for the gang enhancement thus remained entirely speculative on both the “gang related” and the “intent” prongs, since the prosecution brought forward no admissible, credible, solid evidence that the shooting occurred in a gang context or for a gang purpose. Even if a crime occurs with no obvious purpose, the prosecution cannot convert it into a gang crime with gang intent without solid, credible evidence. Speculation does not constitute the substantial evidence necessary to support a verdict. (People v. Perez (1992) 2 Cal.4th 1117, 1133.)

CONCLUSION

This Court should find that when a defendant acts alone, and the prosecution claims he acted for the purpose of gang retaliation, that in order to sustain a true finding on the gang enhancement, the prosecution must provide independent corroborating evidence that the defendant engaged in gang-related conduct for the purpose of promoting the criminal conduct by members of his own gang. Specific to this case, the prosecution failed to prove either that the defendant attacked a rival gang, or that he believed an attack would bolster the criminal conduct of members of his own gang. If Mr. Renteria committed the shooting for a personal reason, or simply out of an unfocused frustration, it would not amount to conduct for the benefit of his own gang to assist his own gang members and could not meet the elements of the gang enhancement or expose Mr. Renteria to a lifetime sentence.

The prosecution lacked proof here that (a) a specific gang had attacked ("hit up") Mr. Renteria and (b) that such gang was associated with the houses at which Mr. Renteria shot and (c) that Mr. Renteria believed he was helping members of his own gang by his conduct. Instead, the prosecution improperly relied upon speculation and unsubstantiated expert testimony to make its case.

This Court should reverse the true finding on the enhancements for

insufficient evidence and strike the punishment imposed by the trial court on those enhancements.

_____/s/_____
James Bisnow
Attorney for Appellant Cristian Renteria

CERTIFICATE OF WORD COUNT

I hereby certify that this Opening Brief contains 7830 words.

June 1, 2021

_____/s/_____
James Bisnow
Attorney for Appellant
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PROOF OF SERVICE BY MAIL

I am an attorney residing in Los Angeles, California, I am over the age of 18 years, and I am not a party to this action. My business address is 117 East Colorado Blvd., Suite 600, Pasadena, Ca. 91105.

On June 2, 2021 I served the foregoing document described as APPELLANT'S OPENING BRIEF IN THE SUPREME COURT on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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

Executed at Pasadena, California, June 2, 2021

_____/s/_____
JAMES BISNOW

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

Case Name: **PEOPLE v.
RENTERIA**

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Lower Court Case Number: **F076973**

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