In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **PEDRO LOPEZ,** Defendant and Appellant.	Case No. S261747

Fifth Appellate District, Case No. F076295
Tulare County Superior Court, Case No. VCF325028TT
The Honorable Joseph A. Kalashian, Judge

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

Issue Presented 10

Introduction 10

Statement of the Case 11

A. Appellant Received an Indeterminate Sentence for Gang-related Conspiracy to Commit Home Invasion Robbery Under Penal Code Sections 182(a) and 186.22(b)(4)(B) 11

B. The Court of Appeal Affirmed That Section 186.22(b)(4)(B) Applies to Conspiracies 13

Argument 16

I. The Alternate Penalty Provision of Section 186.22(b)(4)(B), Governing Sentences for Gang-related Crimes, Applies to Conspiracies 16

A. Relevant Legal Standard and Statutes 16

B. The Trial Court Was Required To Impose An Indeterminate Sentence on the Conspiracy Conviction Under Section 186.22(b)(4)(B) 20

1. The plain meaning of section 182(a) mandates the same punishment for gang-related convictions of home invasion robbery and conspiracy to commit home invasion robbery 20

2. The statutory language of section 186.22(b)(4)(B) does not dictate a contrary conclusion 26

C. *Athar* Properly Applied the Plain Meaning of Section 182 and Is Not Distinguishable 33

TABLE OF CONTENTS
(continued)

Page

1. *Athar*'s reasoning is consistent with the plain meaning of section 182(a) 33

2. The "convicted of" language in section 186.22, subdivision (b)(4) does not make *Athar* distinguishable 35

3. Appellant's attempts to discredit *Athar* should be rejected 37

a. *Athar*'s reasoning is sound and appellant's cases are distinguishable 37

b. Section 186.22(b)(4)(B) provides the punishment for a gang-related conspiracy to commit home invasion robbery under section 182(a) 43

D. Even Assuming There Is Ambiguity, Extrinsic Evidence Is Consistent with the Conclusion That Section 186.22, Subdivision (b)(4)(B) Is Applicable to Conspiracies 45

E. The Rule of Lenity Does Not Compel Appellant's Interpretation 55

Conclusion 58

Certificate Of Compliance 59

TABLE OF AUTHORITIES

Page

CASES

Amwest Surety Ins. Co. v. Wilson
(1995) 11 Cal.4th 1243 51

Callanan v. United States
(1961) 364 U.S. 587 ..... 34, 35, 56

Day v. City of Fontana
(2001) 25 Cal.4th 268 ..... 50, 51

In re Mitchell
(2000) 81 Cal.App.4th 653 ..... 32, 37, 43, 53

In re Pacheco
(2007) 155 Cal.App.4th 1439 32

In re Reeves
(2005) 35 Cal.4th 765 45

In re Shull
(1944) 23 Cal.2d 745 55

People ex rel. Green v. Grewal
(2015) 61 Cal.4th 544 56

People ex rel. Lungren v. Superior Court
(1996) 14 Cal.4th 294 50

People v. Albillar
(2010) 51 Cal.4th 47 12

People v. Alday
(1973) 10 Cal.3d 392 56

People v. Athar
(2003) 112 Cal.App.4th 73 39

TABLE OF AUTHORITIES
(continued)

Page

People v. Athar
(2005) 36 Cal.4th 396.....*passim*

People v. Boyce
(2014) 59 Cal.4th 672..... 56

People v. Briceno
(2004) 34 Cal.4th 451..... 18, 48

People v. Brookfield
(2009) 47 Cal.4th 583..... 53, 54

People v. Brown
(2012) 54 Cal.4th 314..... 28, 53

People v. Cruz
(1996) 13 Cal.4th 764..... 31

People v. Epperson
(2017) 7 Cal.App.5th 385..... 41

People v. Florez
(2005) 132 Cal.App.4th 314..... 30, 50

People v. Hernandez
(2003) 30 Cal.4th 835.....*passim*

People v. Howard
(1995) 33 Cal.App.4th 1407..... 28, 29, 30, 53

People v. Jefferson
(1999) 21 Cal.4th 86..... 19, 23, 44

People v. Jennings
(2010) 50 Cal.4th 616..... 28, 53

People v. Johnson
(2013) 57 Cal.4th 250.....*passim*

TABLE OF AUTHORITIES
(continued)

Page

People v. Jones
(2009) 47 Cal.4th 566 ..... 18, 19, 44

People v. Kramer
(2002) 29 Cal.4th 720 ..... 38, 39

People v. Lara
(2012) 54 Cal.4th 896 32

People v. Ledesma
(1997) 16 Cal.4th 90 ..... 31, 32

People v. Lopez
(2016) 243 Cal.App.4th 1003 ..... 19, 44

People v. Mares
(1975) 51 Cal.App.3d 1013 ..... 27, 28, 53

People v McCullough
(2013) 56 Cal.4th 589 17

People v. Morante
(1999) 20 Cal.4th 403 49

People v. Porter
(1998) 65 Cal.App.4th 250 ..... 28, 29, 30, 53

People v. Prunty
(2015) 62 Cal.4th 59 16

People v. Ruiz
(2018) 4 Cal.5th 1100 ..... *passim*

People v. Scott
(2014) 58 Cal.4th 1415 17

People v. Strickland
(1974) 11 Cal.3d 946 27

TABLE OF AUTHORITIES
(continued)

Page

People v. Superior Court (Kirby)
(2003) 114 Cal.App.4th 102 ..... 26, 32, 38

People v. Valencia
(2017) 3 Cal.5th 347 31

People v. Vega
(2005) 130 Cal.App.4th 183 ..... 25, 26, 36

People v. Villela
(1994) 25 Cal.App.4th 54 ..... 36, 43

People v. Williams
(1980) 101 Cal.App.3d 711 34

People v. Woodhead
(1987) 43 Cal.3d 1002 21

STATUTES

Health and Safety Code
§ 11370.2 29
§ 11370.4 ..... 28, 29, 30, 47
§ 11372.5 36
§ 11372.5, subd. (a) 22, 25, 35
§ 11372.7 35
§ 11372.7, subd. (a) 22
§ 11590 36

TABLE OF AUTHORITIES
(continued)

Page

Penal Code
§ 15 38
§ 182 ..... *passim*
§ 182, subd. (a) ..... *passim*
§ 182, subd. (a)(1) 12
§ 182.5 ..... 46, 47
§ 186.10 ..... 14, 25, 33, 35
§ 186.10, subd. (c) 13, 24, 36
§ 186.22 ..... *passim*
§ 186.22, subd. (a) 26, 46
§ 186.22, subd. (b) 34, 46
§ 186.22, subd. (b)(1) 12, 19
§ 186.22, subd. (b)(4) ..... *passim*
§ 186.22, subd. (b)(4)(B) ..... *passim*
§ 186.22 subd. (e) 46
§ 186.22, subd. (f) 46
§ 190.2 25
§ 211 ..... 12, 19
§ 212.5 12
§ 213 ..... 12, 17, 18, 19
§ 213, subd. (a)(1)(A) 17, 19, 34, 41
§ 213, subd. (a)(1)(B) 17
§ 664 ..... 41, 49
§ 664, subd. (a) 51
§ 667, subd. (a) 12, 19
§ 667, subd. (a)(1) 48
§ 667, subds. (b)-(f) 48
§ 667.5, subd. (c)(7) 31
§ 667.5, subd. (c)(13) 31
§ 1170 18
§ 1170.12, subds. (a)-(d) 48
§ 1170.12, subd. (c)(1) 12, 19
§ 1192.7 ..... 41, 47, 48, 49
§ 1192.7, subd. (c) 46
§ 1192.7, subd. (c)(19) 41
§ 1192.7, subd. (c)(28) 47, 48

TABLE OF AUTHORITIES
(continued)

Page

§ 1192.7, subd. (c)(34) 49
§ 1192.7, subd. (c)(35) 49
§ 1192.7, subd. (c)(39) 41
§ 1192.7, subd. (c)(42) 47
§ 1203, subd. (k) 48
§ 1203.065 32
§ 1203.085 48
§ 1385 32
§ 2933.1 ..... 32, 37
§ 2933.1, subd. (a) 32
§ 3046 18
§ 12022 ..... 27, 28
§ 12022.5 ..... 27, 28
§ 12310 ..... 30, 31

Statutes of
1993, Chapter 588, § 1 ..... 47, 48
1998, Chapter 754 § 1 48
1999, Chapter 298, § 1 ..... 48, 49

COURT RULES

California Rules of Court Rule
4.405 (3) 19

OTHER AUTHORITIES

Proposition 21 ..... *passim*

Voter Information Guide, Gen. Elec. (Mar. 7, 2000) ..... *passim*

ISSUE PRESENTED

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, § 186.22, subd. (b)(4)(B)) for his conviction for conspiracy to commit home invasion robbery, even though conspiracy is not an offense listed in the penalty provision?

INTRODUCTION

This case presents an issue of statutory construction. Penal Code section 182, subdivision (a) (section 182(a)), generally provides that 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." In *People v. Athar* (2005) 36 Cal.4th 396, 405, this Court construed "punishment of that felony" (Pen. Code, § 182, subd. (a)) to include all punishments for the underlying felony, including enhancements. "The general plain meaning expressed in [Penal Code section 182(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." (*Athar*, at p. 405.)

Appellant claims that the alternate penalty provision in Penal Code section 186.22, subdivision (b)(4)(B) (section 186.22(b)(4)(B)) regarding gang-related home invasion robbery is exempt from *Athar*. He relies primarily on the statutory language of Penal Code section 186.22(b)(4)(B), which lacks an explicit reference to conspiracy, and secondary indicia of voter intent. He alternatively claims that *Athar* was wrongly decided. Finally, he relies on the rule of lenity.

Appellant's claims are unconvincing. *Athar* was correct. A plain and commonsense reading of Penal Code section 182(a) requires that the sentence for conspiracy include all punishment for the target offense, including enhancements and alternate penalty provisions. Penal Code section 182(a) is unambiguous and "does not require additional legislative clarity." (*Athar, supra,* 36 Cal.4th at p. 405.) And there is nothing about the statutory language of other indicia of legislative or electoral intent that suggests an intent to exempt conspiracy from the scope of Penal Code section 186.22(b)(4)(B).

STATEMENT OF THE CASE

A. Appellant Received an Indeterminate Sentence for Gang-related Conspiracy to Commit Home Invasion Robbery Under Penal Code Sections 182(a) and 186.22(b)(4)(B)

Appellant and his fellow gang members conspired to commit two home invasion robberies while several law enforcement agencies were conducting a joint investigation of the gang members involving both wiretaps and personal surveillance. (Opinion 2-6.) As appellant and four other gang members drove to the targeted residences to execute the robberies, law enforcement intercepted them. (Opn. 6.)

Appellant was convicted of various offenses, including two counts of conspiracy to commit home invasion robbery (Pen.

Code,[1] §§ 182, subd. (a)(1), 211, 212.5, 213; counts 19 and 162), and the jury found true allegations that those offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1) and (4).[2] (8CT 1517, 1521, 1524-1525, 1532-1533.)

The trial court sentenced appellant for the conspiracy offenses under the alternate penalty provision of section 186.22(b)(4)(B). (8CT 1653.) For each offense, appellant was sentenced to an indeterminate term of 15 years to life under section 186.22(b)(4)(B), which was doubled to 30 years to life for a prior serious or violent felony conviction under section 1170.12, subdivision (c)(1), plus an additional five years for the prior serious felony conviction (§ 667, subd. (a)), for a total of 35 years to life for each conviction. (8CT 1650, 1653.) The trial court ordered the indeterminate term on count 19 to run consecutive to a 19-year determinate term on a different count, whereas the indeterminate term on count 162 was to run concurrent to the determinate term. (8CT 1650, 1653.)

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] For simplicity, the People will hereafter refer to a felony that is "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), (4)) as "gang related." (See *People v. Albillar* (2010) 51 Cal.4th 47.)

B. The Court of Appeal Affirmed That Section 186.22(b)(4)(B) Applies to Conspiracies

In the Court of Appeal, appellant asserted that the sentences on the conspiracy counts were erroneous because the alternate penalty provision of section 186.22(b)(4)(B) does not apply to conspiracies. In a published opinion, the Fifth District Court of Appeal held in relevant part that the trial court properly sentenced appellant on count 19. (Opn. 24-28.)[3]

The Court of Appeal observed that, when home invasion robbery is found to be gang related under section 186.22, it requires a punishment of 15 years to life under the alternate penalty provision of section 186.22(b)(4)(B). (Opn. 24.) It also observed that section 182, the conspiracy statute, requires that a conspiracy to commit a felony such as home invasion robbery is punishable "in the same manner and to the same extent as is provided for the punishment of that felony" (§ 182, subd. (a)). (Opn. 25.) Although the court agreed with appellant that section 186.22(b)(4)(B) was unambiguous, the court focused primarily on the unambiguous and plain meaning of the language of section 182(a), and thus the court did not look to the history of intent behind section 186.22(b)(4)(B). (Opn. 26-28.)

The Court of Appeal relied heavily on *People v. Athar, supra,* 36 Cal.4th 396, in which this Court applied the money laundering enhancement in section 186.10, subdivision (c), to a conspiracy

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[3] The Court of Appeal reversed the conspiracy conviction in count 162 for insufficient evidence. (Opn. 23-24, 30.) The sentence on count 19 is the only sentence at issue here.

conviction based on the plain meaning of the statutory language in section 182(a). (Opn. 26-28.) In *Athar*, this Court adopted the reasoning of the lower court, which had "'observed that "[h]ad the Legislature intended to apply the money laundering enhancements to only those persons convicted of the substantive offense of money laundering, it would have so provided in subdivision (c) of section 186.10." Therefore, . . . because the Legislature did not exclude conspiracy actions from the enhancement provisions, the enhancement . . . was mandatory.'" (Opn. 26, quoting *Athar*, at p. 401.)

The Court of Appeal also distinguished *People v. Hernandez* (2003) 30 Cal.4th 835, relied on by appellant (OBM 36-37, 40, 44), on the same grounds that this Court did in *Athar*, reasoning that the statute at issue here did not involve the imposition of any penalty raising serious constitutional concerns (Opn. 27, quoting *Athar, supra,* 36 Cal.4th at p. 404). In *Hernandez*, this Court held that special circumstance provisions did not apply to conspiracy to commit murder, in large part due to grave concerns over the constitutionality of imposing capital punishment for crimes not resulting in death. (*Hernandez*, at pp. 864-870.) But in this case, as in *Athar*, the statute at issue did "'not involve imposition of the death penalty without a murder, or any penalty that would raise serious constitutional concerns.'" (Opn. 27, quoting *Athar, supra,* 36 Cal.4th at p. 404.)

The Court of Appeal also rejected appellant's argument that applying the alternate penalty provision of section 186.22(b)(4)(B) would result in a disparity in the punishments for conspiracy and

attempt that did not exist in *Athar*. (Opn. 27-28.) It pointed out that a lack of disparity in the punishments for conspiracy and attempt is "an uncommon scenario," because a conspiracy to commit a crime is ordinarily punished twice as severely as an attempt to commit the same crime. (Opn. 27.) Moreover, "[h]arsher punishment for conspiracy is justified by 'the likelihood that the criminal object successfully will be attained' and the danger of collateral consequences, namely, '"the commission of crimes unrelated to the original purpose for which the combination was formed."'" (Opn. 27.) Nor would there be a "grossly disparate punishment" between conspiracy and attempt in this case, like there would have been in *Hernandez*. (Opn. 28.)

The Court of Appeal thus concluded that "section 186.22, subdivision (b)(4)(B) merely states the punishment for a conviction of gang-related home invasion robbery" and that no further inferences could be drawn from its plain language. (Opn. 28.) "Likewise, '[t]he 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." (Opn. 28, quoting *Athar, supra,* 36 Cal.4th at p. 405.) Therefore, "the trial court did not err by sentencing defendant 'in the same manner and to the same extent as is provided for the punishment of that felony' (§ 182, subd. (a))." (Opn. 28.)

This Court granted appellant's petition for review on the issue.

ARGUMENT

I. THE ALTERNATE PENALTY PROVISION OF SECTION 186.22(b)(4)(B), GOVERNING SENTENCES FOR GANG-RELATED CRIMES, APPLIES TO CONSPIRACIES

The alternate penalty provision of section 186.22(b)(4)(B) applies to conspiracies to commit the enumerated felonies therein by virtue of section 182(a). Section 182(a) provides that 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." A plain and commonsense reading of that statute requires that the sentence for conspiracy include all punishment for the target offense, including enhancements and alternate penalty provisions. (*Athar, supra,* 36 Cal.4th at p. 405.) Section 182(a) "does not require additional legislative clarity." (*Ibid*.) Therefore, the trial court properly sentenced appellant under the alternate penalty provision of section 186.22(b)(4)(B) for his conviction of gang-related conspiracy to commit home invasion robbery.

A. Relevant Legal Standard and Statutes

The interpretation of statutory language is a question of law that this Court reviews de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.) It is well settled that in any case involving statutory interpretation, the court must determine the Legislature's intent so as to effectuate the law's purpose by first examining the statute's words, giving them a plain and commonsense meaning. (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1105; *People v. Johnson* (2013) 57 Cal.4th 250, 260.) The plain meaning of the language in the statute "is generally the most

reliable indicator of the legislative intent and purpose." (*People v McCullough* (2013) 56 Cal.4th 589, 592.) If the statutory language is clear and unambiguous, then the plain meaning controls and the analysis ends there. (*Ruiz*, at p. 1106; *Johnson*, at p. 260.) However, if the statutory language is unclear or ambiguous, the court "'"may 'look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be rendered, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.'" [Citation.]' [Citation.]" (*People v. Scott* (2014) 58 Cal.4th 1415, 1421.)

Section 182 governs the offense of conspiracy. With certain enumerated exceptions not applicable here, 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).) In this case, appellant conspired to commit the felony of home invasion robbery, which was found to be gang related.

The punishment for robbery is generally governed by section 213. Most first degree robberies are punishable by imprisonment in the state prison for three, four, or six years. (§ 213, subd. (a)(1)(B).) Home invasion robbery, which is an aggravated form of first degree robbery, is generally punishable by imprisonment in the state prison for three, six, or nine years. (§ 213, subd. (a)(1)(A).)

However, a different punishment exists for gang-related home invasion robbery. A home invasion robbery that is gang related is punishable by imprisonment in the state prison for an

indeterminate term of life imprisonment with the minimum term of the indeterminate sentence calculated as the greater of (A) the term determined by the court pursuant to section 1170, including any applicable enhancements, or (B) 15 years. (§ 186.22, subd. (b)(4).)[4]

Section 186.22, subdivision (b)(4), which was enacted in March 2000 when the California voters passed Proposition 21, constitutes an alternate penalty provision for home invasion robbery. (*People v. Jones* (2009) 47 Cal.4th 566, 576; *People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7.) The penalty prescribed

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[4] Section 186.22, subdivision (b)(4), provides in relevant part:

> (4) Any 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:
>
> (A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph.
>
> (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 . . . .

by section 186.22, subdivision (b)(4), is not an enhancement like the penalties prescribed in section 186.22, subdivision (b)(1), because it is "not an 'additional term of imprisonment' and it is not added to a 'base term.'" (*People v. Jefferson* (1999) 21 Cal.4th 86, 101; see Cal. Rules of Court, rule 4.405(3) [defining "enhancement"].) Rather, section 186.22, subdivision (b)(4), sets forth an alternate penalty for home invasion robbery itself when the jury has determined that the offense was gang related under section 186.22, subdivision (b)(1). (*Jones*, at p. 576, *Jefferson*, at p. 101.) Thus, the punishment for the offense of gang-related home invasion robbery is set forth in section 186.22, subdivision (b)(4), not section 213. (See *People v. Lopez* (2016) 243 Cal.App.4th 1003, 1011, fn. 8 ["If the [home invasion robbery] is found to be gang related within the meaning of section 186.22, the punishment is life in prison with a minimum parole eligibility period of 15 years"].)

In count 19, appellant was convicted of conspiracy to commit home invasion robbery (§§ 182, 211, 213, subd. (a)(1)(A)). The jury also found that the offense was gang related within the meaning of section 186.22, subdivision (b)(1) and (4). (8CT 1517, 1524.) Therefore, the alternate penalty provision for home invasion robbery was implicated. The trial court imposed a sentence of 15 years to life under section 186.22(b)(4)(B), which was then doubled because of appellant's prior strike conviction pursuant to section 1170.12, subdivision (c)(1), and an additional five years was added for a section 667, subdivision (a) enhancement. (8CT 1650, 1653.)

B. The Trial Court Was Required To Impose An Indeterminate Sentence on the Conspiracy Conviction Under Section 186.22(b)(4)(B)

The clear language of section 182(a) requires that a defendant convicted of conspiracy be punished "in the same manner and to the same extent" as provided for the punishment of the target offense. According to this Court's precedents, this punishment includes any enhancements or alternate penalty provisions. (*Athar, supra,* 36 Cal.4th at p. 405.) Section 186.22(b)(4)(B) does not expressly exclude conspiracies from its application, so the plain meaning of section 182(a) controls. Therefore, the trial court was required to impose an indeterminate sentence on appellant's conspiracy conviction under section 186.22(b)(4)(B).

1. The plain meaning of section 182(a) mandates the same punishment for gang-related convictions of home invasion robbery and conspiracy to commit home invasion robbery

This Court's statutory analysis should focus on the unambiguous language of section 182(a). The clear language of section 182(a) requires that a defendant convicted of conspiracy be punished "in the same manner and to the same extent" as provided for the punishment of the target offense. Home invasion robbery that is gang-related is punishable under the alternate penalty provision of section 186.22, subdivision (b)(4). In this matter, then, appellant should be punished for his conspiracy conviction in the same manner as is provided for in section 186.22, subdivision (b)(4).

"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." (*Athar, supra,* 36 Cal.4th at p. 405.) "[S]ection 182 requires sentencing to the same extent as the underlying target offense, and that the sentencing is not limited to the base term of that offense" (*id.* at p. 406), but "includes all punishment for [the target offense], including enhancements" (*id.* at p. 405). Under the plain meaning of section 182(a), "a consequence prescribed for the offense a defendant conspired to commit—the underlying target offense—may be imposed for a conspiracy conviction only if that consequence constitutes part of 'the punishment' for the underlying target offense." (*Ruiz, supra,* 4 Cal.5th at p. 1106.) There is no ambiguity in the statutory language or anything in the legislative history of section 182 that undermines this plain meaning construction. (See *ibid.*) Clear statutory language, such as the language in section 182(a), does not require further construction. (See *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.)

Accordingly, the conspiracy to commit home invasion robbery with a gang-related finding is punishable in the same way as a gang-related home invasion robbery, that is, as the punishment is prescribed by section 186.22, subdivision (b)(4). Although section 186.22, subdivision (b)(4), does not expressly include language regarding the punishment for conspiracies, it provides the punishment for a gang-related home invasion

robbery, which, in turn, provides the applicable punishment for conspiracy to commit that offense under the same conditions under section 182.

This Court's most recent precedents establish that section 182 is the proper focus of the statutory analysis. In 2018, this Court held in *Ruiz* that a criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) and a drug program fee (Health & Saf. Code, § 11372.7, subd. (a)), which expressly applied to persons convicted of various enumerated offenses related to controlled substances, also applied to a conviction of conspiracy to transport a controlled substance. (*Ruiz, supra,* 4 Cal.5th 1100.) In *Ruiz*, this Court agreed with the lower court, which had relied on the plain meaning of the language in section 182(a) that persons convicted of conspiring to commit a felony "shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony." (*Id.* at pp. 1103-1105.) Although neither relevant fee statute listed conspiracy among the offenses it purportedly applied to, this Court relied on the plain meaning of section 182(a) to determine that the fees, if they constituted punishment, applied to conspiracy convictions. (*Id*. at pp. 1105-1106.)

In reaching this conclusion, *Ruiz* cited *Athar* approvingly for the proposition that under the plain meaning of section 182(a), the punishment for conspiracy includes all punishment for the underlying felony, including enhancements. (*Ruiz*, *supra*, 4 Cal.5th at pp. 1107, 1119.) *Ruiz* did not look to extrinsic aids or the legislative history behind the fee statutes on that question

(*id*. at pp. 1105-1106); it examined the legislative history behind the fee statutes only to determine the separate and distinct question of whether the fees constituted "punishment" at all (*id*. at pp. 1106-1122). Once *Ruiz* determined that the fees constituted punishment, any further inquiry into the underlying character of the fee statutes was unnecessary. (*Id*. at p. 1122.) Although appellant cites *Ruiz* on a tangential point (OBM 35, 38-39), which the People address in section I.C.3.a., he fails to acknowledge either the significance of *Ruiz*'s holding regarding the plain meaning of section 182(a) or *Ruiz*'s agreement with the holding in *Athar*.

Here, there is no question that the alternate penalty provision of section 186.22, subdivision (b)(4), constitutes punishment for a gang-related conviction of home invasion robbery. (*Jefferson, supra,* 21 Cal.4th at p. 101 ["section 186.22(b)(4) establishes the *punishment*" for the underlying conviction (italics added)].) The punishment referred to in section 182(a) includes all punishment for a felony offense, including any enhancements or alternate penalties. (*Ruiz, supra,* 4 Cal.5th at p. 1119 [plain meaning of section 182(a) "renders a convicted conspirator subject to '*all* punishment for' the underlying target offense" (original italics)]; *Athar, supra,* 36 Cal.4th at p. 405 [punishment for conspiracy "includes all punishment for [the underlying target felony], including enhancements"].) Because section 186.22, subdivision (b)(4), codifies the punishment for gang-related home invasion robbery, the plain meaning of section 182(a) requires that a person

convicted of conspiracy to commit gang-related home invasion robbery must be sentenced to the prescribed indeterminate term. And it matters not whether the alternate penalty existed at the time the conspiracy statute was enacted (see OBM 50) because section 182 "incorporates whatever punishment the law prescribed for [the underlying felony] when the conspiracy was committed." (*Hernandez, supra,* 30 Cal.4th at p. 865.)

Athar similarly requires this conclusion. *Athar* held that the enhancement provisions of section 186.10, subdivision (c), for money laundering apply when the defendant has been convicted of conspiracy to commit money laundering but not money laundering itself. (*Athar, supra,* 36 Cal.4th at p. 398.) This Court declared, "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." (*Id.* at p. 405.) It expressly agreed with the lower court, which had relied on the plain meaning rule to conclude that (1) the language of section 182(a) required conspirators to be punished "in the same manner and to the same extent" as those convicted of the target felony, and (2) section 186.10, subdivision (c), required the enhancement to be applied to a conviction of conspiracy to commit money laundering because that statute did not specifically prohibit it. (*Id.* at pp. 400-401.) By referring to the "punishment of that felony," section 182(a) necessarily included all punishment for the underlying felony, including enhancements. (*Id.* at p. 405.)

To the extent *Athar* examined the legislative history of section 186.10, it was only to point out that the statutory construction principles utilized in *Hernandez, supra,* 30 Cal.4th 835, on which the defendant relied heavily, were not helpful to him. (*Athar*, *supra*, 36 Cal.4th at p. 404.) This was because (1) the goal of punishing large-scale money laundering operations necessarily included punishing the conspiracies that underlie those operations, and (2) the money laundering statute did "not involve imposition of the death penalty without a murder, or any penalty that would raise serious constitutional concerns." (*Ibid.*)[5]

The Court of Appeal decision in *People v. Vega* (2005) 130 Cal.App.4th 183 is also supportive. Consistent with this Court's later holding in *Ruiz*, *supra*, 4 Cal.5th 1100, the *Vega* court applied the plain meaning of section 182(a) to hold that the criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) applied to persons convicted of conspiracy to transport or possess cocaine. (*Vega*, at p. 194.) The plain meaning of section 182(a) was sufficient to reject the defendants' argument that, because the statute did not expressly include conspiracy among the convictions to which it applied, the fee did not apply to them. (*Ibid.*) Although *Ruiz* disapproved of *Vega*'s holding that the fee did not constitute punishment (*Ruiz, supra,* 4 Cal.5th at

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[5] Admittedly, *Hernandez* considered extrinsic indicia of voter intent behind section 190.2 when evaluating whether special circumstances applied to conspiracy convictions. (*Hernandez, supra,* 30 Cal.4th at pp. 866-868.) However, for the reasons set forth *post* in section I.C.3.a., *Hernandez* is distinguishable.

p. 1122, fn. 8), *Vega* remains persuasive authority concerning the plain meaning of section 182(a).

2. The statutory language of section 186.22(b)(4)(B) does not dictate a contrary conclusion

Appellant focuses his statutory construction argument on the wrong statute. Appellant focuses on section 186.22, subdivision (b)(4), which, admittedly, does not list conspiracy among its enumerated offenses. (OBM 27-30.) But it is section 182, not the gang statute, that applies the alternate penalty provision of section 186.22, subdivision (b)(4), to gang-related conspiracy to commit home invasion robbery and is thus the appropriate focus of the inquiry. Mention of conspiracy in section 186.22, subdivision (b)(4), is "unnecessary" because section 182(a) expressly encompasses the punishment for any crime that is the object of a conspiracy. (*Johnson, supra*, 57 Cal.4th at p. 267 [conspiracy to commit active participation in a criminal street gang exists despite failure of section 186.22, subdivision (a), to reference conspiracy statute]; accord, *People v. Superior Court (Kirby)* (2003) 114 Cal.App.4th 102, 105 [language of section 182 "leads us to the statutes that . . . set forth the applicable punishments for" the underlying target crimes].)

Even if this Court considers the plain meaning of the language in section 186.22(b)(4)(B), that statute does not expressly exclude conspiracy as a crime to which it may apply. The Court of Appeal concluded below, "section 186.22, subdivision (b)(4)(B) merely states the punishment for a conviction of gang-related home invasion robbery. There are no further inferences

to be drawn from its plain language." (Opn. 28, agreeing with *Athar, supra,* 36 Cal.4th at p. 401.) Appellant's statutory construction argument, which focuses on the lack of any mention of conspiracy in section 186.22(b)(4)(B), fails to properly consider section 182(a), the governing statute for conspiracies, which includes a sentencing scheme that applies generally to all crimes and incorporates all punishment for those crimes.

Appellant relies primarily on four Court of Appeal decisions, all of which preceded this Court's decision in *Athar*. (OBM 27-30.) Each case is distinguishable. Additionally, they conflict with the more recent and persuasive authorities cited above.

People v. Mares (1975) 51 Cal.App.3d 1013 did not have occasion to analyze the question at issue here. Mares was convicted of conspiracy to commit robbery, and the jury fixed the degree of the intended robbery as first degree and also found that he had used a firearm in the commission of the conspiracy (§ 12022.5). (*Id*. at p. 1015.) Mares contended that the firearm use enhancement had to be stricken. (*Ibid*.) The People conceded that conspiracy was not among the crimes listed in section 12022.5 and suggested that the firearm-use finding be amended to a finding that the defendant was armed within the meaning of section 12022, relying on a case[6] that did not involve a conspiracy conviction. (*Id*. at p. 1017.) The Court of Appeal accepted the People's concession and adopted the conclusion that the section 12022.5 enhancement could not be applied to a conspiracy

[6] *People v. Strickland* (1974) 11 Cal.3d 946.

conviction; it did not engage in any further analysis or even mention the statutory language of section 182 as it related to that question. (*Id*. at p. 1023.) The court analyzed only whether the degree of robbery could be reduced to second degree (it could not) and whether section 12022 could apply to a conviction of conspiracy to commit first degree robbery if it did not apply to a first degree robbery conviction (it could not). (*Id*. at pp. 1018-1024.) It is axiomatic that cases are not authority for propositions not considered. (*People v. Brown* (2012) 54 Cal.4th 314, 330; *People v. Jennings* (2010) 50 Cal.4th 616, 684; cf. *Hernandez, supra,* 30 Cal.4th at p. 864 [contrasting prior case in which the People had conceded error with the instant case, where the People did not concede].) Moreover, the court's conclusion that the section 12022.5 enhancement could not be applied to a conspiracy conviction is incorrect for the reasons discussed *ante* in sections I.B.1 and I.B.2.[7]

The decisions in *People v. Howard* (1995) 33 Cal.App.4th 1407 and *People v. Porter* (1998) 65 Cal.App.4th 250 are no more applicable or persuasive. *Howard* construed the existing version of Health and Safety Code section 11370.4, which provides for a weight enhancement for certain narcotics offenses, and held that possession of the requisite amount of narcotics was not required for the enhancement to apply to the defendant's conspiracy

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[7] *Mares*'s holding "that the minimum sentence provisions of Penal Code section 12022 do not apply to a conviction for conspiracy to commit a crime if the provisions could not apply to the conspired crime itself" (*Mares, supra,* 51 Cal.App.3d at p. 1024) is entirely consistent with the People's position in this case.

conviction. (*Howard*, at pp. 1413-1417.) The court did not analyze whether the enhancement could apply to conspiracy convictions generally—the enhancement statute expressly applied to those persons convicted of conspiracy. (See *id*. at p. 1413, fn. 4.) Rather, the court analyzed whether actual possession of a certain amount of narcotics was required for such application. (*Id*. at pp. 1413-1417.) During the course of its analysis, however, the court acknowledged that the statute had been previously amended to expressly apply to conspiracy offenses, which informed the issue of whether the enhancement required actual possession. (*Id*. at p. 1414.)

In *Porter*, the defendant was not convicted of any conspiracy offenses in the current proceedings. (*Porter, supra,* 65 Cal.App.4th at p. 251.) Rather, the question was whether prior federal convictions for conspiracy qualified to enhance the defendant's sentence under Health and Safety Code section 11370.2, which at the time expressly provided an additional three-year term for each prior felony conviction of conspiracy to commit certain enumerated offenses. (*Id*. at pp. 252-255.) Specifically, the court held that evidence concerning the extent of the defendant's involvement in a prior conspiracy was not required by the statute. (*Id*. at p. 255.) Again, in its analysis, the court acknowledged that the enhancement statute had been previously amended to expressly enhance the sentences for conspiracy as well as completed offenses. (*Id*. at p. 253.)

That the Legislature thought it prudent to amend Health and Safety Code sections 11370.4 and 11370.2 to state expressly

that those provisions would apply to conspiracy convictions, as noted in *Howard* and *Porter* (see OBM 28-29), does not negate section 182(a)'s plain meaning that conspiracies shall be "punishable in the same manner and to the same extent as is provided for the punishment of that felony." *Athar* recognized the possibility that the Legislature, if it viewed Health and Safety Code section 11370.4 *in isolation*, might have believed there was "some doubt" as to its applicability to conspiracies prior to the amendment. (*Athar, supra,* 36 Cal.4th at p. 405.) However, in *Athar*'s view, any such belief was unfounded because section 182(a) was and is clear. (*Ibid.*) "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.*) In other words, the statutory amendments to expressly include conspiracy were not necessary for the enhancements to apply to conspiracy convictions, despite the Legislature's possible belief otherwise. Thus, *Athar* expressly rejected the defendant's reliance on Health and Safety Code section 11370.4 in support of his claim in that case. (*Ibid.*)

Furthermore, it is "not uncommon" for the Legislature or electorate to redundantly amend a statute to expressly apply to an offense that it already applies to. (*People v. Florez* (2005) 132 Cal.App.4th 314, 321.) For example, when the electorate passed Proposition 21, which enacted 186.22(b)(4)(B), the electorate also added a violation of section 12310 to section 667.5, subdivision

(c)'s list of violent felonies (§ 667.5, subd. (c)(13)), even though a violation of section 12310 already met the definition of a violent felony because it was a felony punishable by imprisonment in the state prison for life (§ 667.5, subd. (c)(7)). (*Ibid.*) The canon that surplusage should be avoided is merely a guide to statutory interpretation and is not invariably controlling, particularly when the plain meaning of a statute is clear. (*People v. Cruz* (1996) 13 Cal.4th 764, 782; see also *People v. Valencia* (2017) 3 Cal.5th 347, 389 (dis. opn. of Liu, J.) [identifying instances of tolerable surplusage where language was construed as redundant].) Thus, that some enhancement statutes may expressly apply to conspiracy convictions does not compel a finding that other enhancement or alternate penalty statutes do not apply to conspiracy convictions absent such express language. That the Legislature or electorate did not redundantly amend section 186.22, subdivision (b)(4), does not trump the plain meaning of section 182.

Conversely, if the Legislature or the electorate had disagreed with this Court's holding in *Athar* or desired a return to any supposed previous intent that the punishment for conspiracy not include enhancements, either one could have easily amended section 182 or other sentencing provisions to make it so. (See *People v. Ledesma* (1997) 16 Cal.4th 90, 100 ["Although the Legislature had the opportunity, it made no alterations to reflect a different intent"].) But neither the Legislature nor the electorate has done so in the 15 years since *Athar* was decided. Generally, when a statute has been judicially

construed and thereafter the Legislature amends or reenacts the statute without changing the interpretation, the Legislature is presumed to have been aware of and accepted the courts' construction. (*Id*. at pp. 100-101.)

Finally, *In re Mitchell* (2000) 81 Cal.App.4th 653 is distinguishable. *Mitchell* held that the postsentence conduct credit limitations for violent felonies in section 2933.1, subdivision (a), did not apply to conspiracy convictions because conspiracy was not listed in section 667.5, subdivision (c), as a violent felony. (*Id*. at pp. 656-657.) But section 182 concerns only the punishment imposed for conspiracies to commit the underlying felony, not other consequences such as limitations on postsentence conduct credits or probation ineligibility. (See *People v. Lara* (2012) 54 Cal.4th 896, 907, fn. 10 [limiting ability of certain prisoners to earn conduct credits does not impose additional punishment under section 1385]; *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1445 [reduction in postsentence worktime credits under section 2933.1 is not punishment]; see also *Kirby, supra,* 114 Cal.App.4th at pp. 104-107 [section 182's reference to punishment does not incorporate probation ineligibility statute (§ 1203.065) because probation ineligibility is not punishment].[8]) Thus, *Mitchell*'s holding is consistent with the plain meaning of section 182.

[8] *Kirby* was cited approvingly by this Court in *Ruiz*. (*Ruiz, supra,* 4 Cal.5th at p. 1106.)

C. *Athar* Properly Applied the Plain Meaning of Section 182 and Is Not Distinguishable

The Court of Appeal here relied heavily on this Court's decision in *Athar* in holding that the alternate penalty provision in section 186.22(b)(4)(B) applies to appellant's conspiracy conviction in count 19. (Opn. 26-28.) Appellant argues that *Athar* is distinguishable, and he alternatively urges this Court to overrule or limit its application. (OBM 31-41.) His argument is unpersuasive. *Athar*'s reasoning is consistent with the plain meaning of section 182(a), the statutory language at issue in *Athar* is not distinguishable in any meaningful way, and *Athar* should not be overruled or limited.

1. *Athar*'s reasoning is consistent with the plain meaning of section 182(a)

Athar concluded that "'[h]ad the Legislature intended to apply the money laundering enhancements to only those persons convicted of the substantive offense of money laundering, it would have so provided in subdivision (c) of section 186.10.' Therefore, . . . because the Legislature did not exclude conspiracy actions from the enhancement provisions, the enhancement . . . was mandatory" under the plain meaning of section 182(a). (*Athar, supra,* 36 Cal.4th at p. 401 [agreeing with lower court].) Although reliance on the plain meaning of section 182(a) was sufficient to affirm the judgment in *Athar*, the court also recognized that the money laundering statute's aim to address the criminal activity of "large criminal networks" included a parallel intent "to control . . . the conspiracies that necessarily

underlie" large-scale money laundering operations. (*Id.* at p. 404.)

This secondary reasoning in *Athar* applies with equal force here and is consistent with the plain meaning of section 182(a). The same rationales are present when it comes to gang-related conspiracies and home invasion robberies.

Gang-related conspiracies, and conspiracies to commit home invasion robbery in particular, necessarily involve concerted action on a larger scale that is particularly dangerous to the community. Home invasion robbery requires at least three people acting in concert (§ 213, subd. (a)(1)(A)), and a gang-related home invasion robbery, because it is committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)), likely involves, benefits, or affects even more individuals.

"Collaboration magnifies the risk to society both by increasing the likelihood that a given quantum of harm will be successfully produced and by increasing the amount of harm that can be inflicted." (*People v. Williams* (1980) 101 Cal.App.3d 711, 721; accord, *Callanan v. United States* (1961) 364 U.S. 587, 593 [concerted action "increases the likelihood that the criminal object will be successfully attained," "decreases the probability that the individuals involved will depart from their path of criminality," and "often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish"].) The extra component of gang relatedness only adds to the dangerous effect of the collaboration. Among the

reasons for enacting section 186.22(b)(4)(B) was that "[g]ang-related crimes pose a unique threat to the public because of gang members' organization and solidarity" and that "[g]ang-related felonies should result in severe penalties." (Voter Information Guide, Gen. Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (h), p. 119; cf. *Callanan*, at p. 593.) It is hard to conceive the Legislature sought to exclude conspiracy from section 186.22(b)(4)(B) given the parallels between gang activity and conspiracy. Appellant's construction would undermine the applicability of section 186.22(b)(4)(B) to the type of conduct at its core and would thus undermine its efficacy.

2. The "convicted of" language in section 186.22, subdivision (b)(4) does not make *Athar* distinguishable

Athar is not meaningfully distinguishable from this case. Appellant claims that *Athar* is distinguishable because the money laundering enhancements in section 186.10 expressly apply to persons "punished under" that section, whereas section 186.22, subdivision (b)(4), expressly applies to persons "convicted of" the enumerated felonies. (OBM 31.) Appellant's argument focuses on a distinction without a difference.

Ruiz confirmed the lack of a meaningful distinction in this context between the "punished under" and "convicted of" phrasings. *Ruiz* held that the fees in Health and Safety Code sections 11372.5, subdivision (a), and 11372.7, subdivision (a), both of which applied to persons "convicted of" certain enumerated offenses (which did not include conspiracy), must be imposed for a conviction of conspiracy to commit one of the

enumerated offenses. (*Ruiz, supra,* 4 Cal.5th 1100.) The phrase "convicted of" was no barrier to this Court's holding because the plain meaning of section 182(a) established that persons convicted of conspiracy to commit a felony "shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony." (See *id*. at p. 1105.) As long as the fees constituted "part of 'the punishment' for the offense that [the] defendant was convicted of conspiring to commit," they were properly imposed. (*Id*. at p. 1106.)

Like the fee statutes in *Ruiz*, section 186.22(b)(4)(B) sets forth the punishment for gang-related home invasion robbery. Thus, although sections 186.10, subdivision (c) ("punished under"), and 186.22(b)(4)(B) ("convicted of") use slightly different language, section 182 renders the difference meaningless as it relates to punishment for conspiracy.

Vega, which also involved Health and Safety Code section 11372.5, is in accord. (*Vega, supra,* 130 Cal.App.4th at p. 194.) So is *People v. Villela* (1994) 25 Cal.App.4th 54, 57-61, which interpreted Health and Safety Code section 11590, a narcotics registration statute that expressly applied to "any person who is convicted in the State of California of" certain enumerated offenses. *Villela* extended the registration requirement for narcotics offenders under Health and Safety Code section 11590 to those convicted of conspiracy to commit an enumerated drug offense despite the "convicted . . . of" statutory language. (*Id*. at pp. 57-61.) This Court should similarly find any variance in the statutory language at issue here inconsequential.

3. Appellant's attempts to discredit *Athar* should be rejected

Acknowledging that *Athar*'s plain language analysis of section 182 appears to apply in this case, appellant alternatively challenges *Athar*'s reasoning and argues that *Athar* should not be followed. (OBM 32-41.) Appellant's arguments should be rejected.

a. *Athar*'s reasoning is sound and appellant's cases are distinguishable

Appellant begins by attacking *Athar*'s conclusion that the plain meaning expressed in section 182(a) "does not require additional legislative clarity" (*Athar, supra,* 36 Cal.4th at p. 405) by asserting that *Mitchell* dismissed similar reasoning in refusing to apply the conduct credit limitation of section 2933.1 to conspiracy convictions. (OBM 32-33.) As explained *ante* in section I.B.2., *Mitchell*'s holding is not inconsistent with the plain meaning of section 182 because it did not concern punishment within the meaning of section 182. In any event, the People agree with this Court's assertion in *Athar* that section 182 is clear and does not require additional legislative clarity. The punishment statute for each crime need not expressly mention the crime of conspiracy in order for its punishment to apply to a conspiracy to commit that crime. (Cf. *Ruiz, supra,* 4 Cal.5th 1100 [fee statutes apply to conspiracy convictions even though they do not expressly refer to conspiracy].) Otherwise, the sentencing scheme of section 182 would be rendered superfluous.

Appellant's reliance on the principle of statutory construction that statutes on the same subject should be read

together as a single statute is unavailing. (OBM 33.) Sections 182 and 186.22, subdivision (b)(4), do not constitute statutes on the same subject. Section 182 establishes the crime of conspiracy and sets forth the requisite punishments for that crime. Section 186.22, subdivision (b)(4), sets forth alternate penalties for certain enumerated gang-related offenses. To treat these statutes as being on the same subject is a strained interpretation that would deem the conspiracy statute to be on the same subject as virtually each and every statute concerning punishment, whatever the crime, in the entire Penal Code.

Kirby does not help appellant here (OBM 33-34), for it did not apply the above principle of statutory construction to defeat the plain meaning of section 182. Rather, that principle was applied when determining whether probation ineligibility constituted "punishment," a question which the plain meaning of section 182 did not answer. (*Kirby, supra,* 114 Cal.App.4th at pp. 105-107; see *Ruiz, supra,* 4 Cal.5th at p. 1107 ["Unfortunately, the conspiracy statute itself provides no definition of the term 'punishment.' Nor have we found anything in the relevant legislative history elucidating the statute's use of the term."].) Of course, it cannot be disputed that imprisonment constitutes punishment. (See § 15.)

Appellant's criticism of *Athar*'s reliance on *People v. Kramer* (2002) 29 Cal.4th 720 (OBM 34-36) also misses the mark. *Kramer* was not essential to *Athar*'s holding. This Court "agreed with the Court of Appeal majority and the People." (*Athar, supra,* 36 Cal.4th at p. 401.) While the People relied on *Kramer*

to support an argument that section 182 demonstrated a legislative intent to incorporate enhancements into any conspiracy conviction (*Athar*, at p. 401), the Court of Appeal did not.[9] The Court of Appeal relied on the plain meaning rule instead. (*Id.* at p. 401; *People v. Athar* (2003) 112 Cal.App.4th 73, review granted Dec. 10, 2003, S119975 [opinion does not cite *Kramer*].) In other words, the People and the Court of Appeal majority presented different grounds for affirmance, and this Court agreed with both. Thus, it follows that *Kramer* was not essential to *Athar*'s plain meaning construction of section 182.

In any event, *Athar* properly concluded that "*Kramer*'s conclusion that a 'term' is not limited to the base term applies with equal force to the punishment for the crime of conspiracy under section 182, subdivision (a)." (*Athar*, *supra*, 36 Cal.4th at p. 402.) To the extent appellant relies on Justice Kennard's dissenting opinion in *Athar* (*id.* at p. 408), that position was not adopted by the majority, and it is even less persuasive after this Court's decision in *Ruiz*, which acknowledged that "punishment" encompasses not only any confinement for the offense but also fees imposed for criminal laboratory analysis and drug programs (*Ruiz, supra,* 4 Cal.5th at pp. 1107-1122).

Contrary to appellant's claim (OBM 36-37), *People v. Hernandez, supra,* 30 Cal.4th 835 does not compel a finding that section 186.22(b)(4)(B) does not apply to conspiracy convictions. True, *Hernandez* declared that nothing in the statutes governing

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[9] It is unclear whether *Kramer* was imperative to the People's argument or was merely used persuasively.

special circumstances indicated that special circumstances were intended to apply to crimes of conspiracy to commit murder. (*Id.* at pp. 865-866.) But this is unremarkable, considering that the language applying the punishment for murder to conspiracy convictions is found in section 182, not special circumstance statutes.[10] The proper focus of the statutory construction analysis is on section 182. As *Athar* properly concluded and *Ruiz* confirmed, the plain meaning of section 182 requires that *any* punishment prescribed for the offense a defendant conspired to commit must be imposed for the conspiracy to commit it (*Ruiz, supra,* 4 Cal.5th at p. 1106; *Athar, supra,* 36 Cal.4th at p. 405) and "does not require additional legislative clarity" (*Athar*, at p. 405).

In any event, *Hernandez* must be read in the context of the unique and most significant constitutional concerns at issue when considering applicability of the death penalty to crimes of conspiracy, particularly those that do not result in a death. (See *Athar, supra,* 36 Cal.4th at p. 404.) *Hernandez*'s reasons for not applying special circumstances to conspiracy convictions included (1) the serious constitutional concerns raised by construing the death penalty law as permitting capital punishment for conspiracy to commit murder in a case where no person dies (*Hernandez, supra,* 30 Cal.4th at pp. 868-869), (2) the fact that no other state applied the death penalty to conspiracy to murder (*id.*

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[10] ". . . [I]n the case of conspiracy to commit murder, . . . the punishment shall be that prescribed for murder in the first degree." (§ 182, subd. (a).)

at p. 869), (3) the inference that the electorate, being aware of the serious constitutional concerns, would have intended to ensure the constitutionality of the death penalty law by restricting capital punishment to the crime of first degree murder (*id*. at p. 867), and (4) the unlikelihood that the electorate intended the death penalty for an unsuccessful conspiracy to murder when the maximum punishment for attempted premeditated murder was just nine years in prison (*id*. at p. 868).

This case does not involve the same concerns. The death penalty—the harshest possible sentence and the ultimate deprivation of life and liberty—is not implicated. There are no doubts as to the constitutionality of imposing a sentence of 15 years to life for a gang-related conspiracy to commit home invasion robbery. Also, the disparity in punishments between gang-related conspiracy to commit home invasion robbery and gang-related attempted home invasion robbery would be nowhere near as great as the one in *Hernandez*, regardless of whether section 186.22(b)(4)(B) can be applied to attempts. A gang-related attempted home invasion robbery is punishable by up to either nine years (§§ 186.22, subd. (b)(4)(B), 664 [where target crime's max punishment is life, punishment for attempt is five, seven, or nine years]) or nine years six months, based on half of the maximum term of nine years for attempted home invasion robbery (§§ 213, subd. (a)(1)(A), 664; see opn. 24; *People v. Epperson* (2017) 7 Cal.App.5th 385, 388-391) plus five years for the applicable gang enhancement for a serious felony (§§ 186.22, subd. (b)(1)(B), 1192.7, subd. (c)(19), (39)). Whereas *Hernandez*

could easily assume the voters did not intend to permit the death penalty for one offense and nine years for the other (*Hernandez, supra,* 30 Cal.4th at pp. 867-868), the same inference cannot be so easily made where the death penalty is not implicated and the comparison is between sentences of 15 years to life and approximately nine years. This is especially true when considering that "conspiracy is often punished more severely than attempt." (*Id.* at p. 868.)

Appellant also misinterprets this Court's treatment of *Athar* in *Ruiz*. (OBM 38-39.) In *Ruiz*, the People argued that *Athar* supported its position that the fees at issue applied to conspiracy convictions regardless of whether they constituted punishment for the underlying felony offense. (*Ruiz, supra,* 4 Cal.5th at pp. 1105-1107.) *Ruiz* rejected that particular notion (*id.* at pp. 1106-1107), yet it agreed with *Athar*'s general holding concerning the plain meaning of section 182 as it applies to punishment (*id.* at pp. 1105-1107, 1119). It cited with approval *Athar*'s rejection of the argument that section 182 authorizes imposition only of "the base term" for the underlying target offense and quoted *Athar* for the proposition that section 182(a) "'specifically refers to the "punishment of that felony" [citation] and thus includes all punishment for money laundering, including enhancements . . . .'" (*Ruiz*, at p. 1107, quoting *Athar, supra,* 36 Cal.4th at p. 405; see also *Ruiz*, at pp. 1105 [citing lower court reliance on the plain language of section 182, which it ultimately agreed with], 1106 ["under the plain language of Penal Code section 182, subdivision (a), whether the trial court properly imposed the fees at issue

here depends on whether they are part of 'the punishment' for the offense that defendant was convicted of conspiring to commit"], 1119 ["we held in *Athar* . . . that the 'general plain meaning' of this language renders a convicted conspirator subject to '*all* punishment for' the underlying target offense"] (original italics).)

People v. Villela, supra, 25 Cal.App.4th 54, which was cited by *Athar*, *supra*, 36 Cal.4th at page 406, is not meaningfully distinguishable. (OBM 37-38.) *Villela* is no different than *Ruiz*; in both cases, the relevant statutes were applied to conspiracy even though they expressly applied to persons "convicted" of certain offenses, lists of which omitted conspiracy. Their holdings concerning the plain meaning of section 182 apply broadly.

b. Section 186.22(b)(4)(B) provides the punishment for a gang-related conspiracy to commit home invasion robbery under section 182(a)

This Court has made it clear, and correctly so, that punishment for conspiracy to commit a crime includes all of the punishment for the underlying crime, including enhancements for additional imprisonment as well as other consequences. (*Ruiz, supra,* 4 Cal.5th at pp. 1105-1107, 1119; *Athar, supra,* 36 Cal.4th at p. 405.) Appellant's attempt to exclude application to conspiracy where an enhancement, as in *Athar*, or an alternate penalty provision, as in this case, requires any finding of fact beyond the bare conviction contradicts the plain meaning of section 182(a) as construed by this Court. (OBM 37, 39-40.) He identifies this point as "crucial[]" and cites *Mitchell, supra,* 81 Cal.App.4th 653 in support, but *Mitchell* did not mention this

point, much less give it dispositive significance like appellant does (OBM 37, 39-40).

In any event, section 186.22(b)(4)(B) is an alternate penalty provision, not an enhancement, so it sets forth the punishment for home invasion robbery when it is gang-related. In other words, it sets forth the punishment for the felony. (*Jones, supra,* 47 Cal.4th at p. 576; *Jefferson, supra,* 21 Cal.4th at p. 101; *Lopez, supra,* 243 Cal.App.4th at p. 1011, fn. 8.) Thus, even if this Court is inclined to overrule or limit *Athar*, as appellant urges, the alternate penalty provision here provides more solid footing than existed in *Athar*. Because section 186.22(b)(4)(B) provides *the punishment* for gang-related home invasion robbery, and not some additional punishment, it constitutes the appropriate punishment for conspiracy to commit it under section 182.

Under appellant's construction of the law, the language of section 182(a) would apply differently in various contexts. Whether a particular punishment for an underlying felony would apply to a conspiracy to commit that felony would depend on numerous factors, such as the form of punishment, whether the punishment statute refers to being "punished under" or "convicted of," and whether it involves an enhancement or an alternate penalty scheme. Applicability to conspiracy under appellant's construction might also depend on when the punishment statute was written, i.e. if it was enacted pre-*Hernandez* or pre-*Athar*. However, if this Court adopts a plain meaning construction of section 182(a), the statute can be more consistently and straightforwardly applied. Thus, the plain

meaning of section 182(a) should control in the absence of any express language in section 186.22(b)(4)(B) excluding conspiracy from its application.

D. Even Assuming There Is Ambiguity, Extrinsic Evidence Is Consistent with the Conclusion That Section 186.22, Subdivision (b)(4)(B) Is Applicable to Conspiracies

Because the plain meaning of section 182 unambiguously provides that the punishment for conspiracy to commit a felony shall be "in the same manner and to the same extent as is provided for the punishment of that felony," the plain meaning of the statute controls, and this Court should not look to extrinsic indicia of intent. However, even if this Court finds ambiguity, either in the language of section 182 or when that statute is read together with section 186.22 (see *In re Reeves* (2005) 35 Cal.4th 765, 770-771 [seemingly clear statutory language may still be ambiguous as applied if its application "reveals ambiguities the Legislature apparently did not foresee"]), extrinsic evidence does not require the conclusion that section 186.22(b)(4)(B) is inapplicable to conspiracies. Applying section 186.22(b)(4)(B) to conspiracies promotes, rather than defeats, the purposes of that statute.

Appellant first focuses on the text of Proposition 21, which passed the Gang Violence and Juvenile Crime Prevention Act of 1998 and added section 186.22(b)(4)(B) (Voter Information Guide, Prim. Elec. (Mar. 7, 2000) text of Prop. 21, §§ 1, 4, pp. 119-120). (OBM 41-43.) He contends that the omission of conspiracy in section 186.22(b)(4)(B) was deliberate because the proposition

made other changes expressly involving conspiracy by (1) amending the definition of a "pattern of criminal gang activity" to include conspiracy to commit the enumerated crimes (§ 186.22, subd. (e)), (2) creating the new offense of criminal gang conspiracy (§ 182.5), and (3) adding conspiracy to the list of serious felonies (§ 1192.7, subd. (c)). (OBM 41-43.)

None of these changes demonstrates that the electorate intended to preclude section 186.22(b)(4)(B) from applying to conspiracies under section 182. First, a "pattern of criminal gang activity" (§ 186.22, subd. (e)) is one of the elements establishing the existence of a criminal street gang under section 186.22, subdivision (f). This element is necessary to prove the substantive gang crime under section 186.22, subdivision (a), and a gang enhancement under section 186.22, subdivision (b), but it is not itself punishment. Thus, the electorate could not rely on section 182 to incorporate conspiracy into the list of offenses that may contribute to a pattern of criminal gang activity. Instead, the electorate had to specifically include conspiracy in the list of enumerated offenses in section 186.22, subdivision (e), for it to constitute a pattern offense for purposes of establishing a criminal street gang. There was no similar need to add conspiracy to section 186.22(b)(4)(B), a punishment provision. (See OBM 41.)

Second, the offense of criminal gang conspiracy (§ 182.5) was an entirely new offense. It is a different offense from traditional conspiracy, governing a different kind of conduct. (See *Johnson, supra,* 57 Cal.4th at pp. 261-263.) Because it was a new offense,

the electorate necessarily had to describe the new crime and its punishment, so using the phrase "conspiracy" was necessary, and referencing section 182 was an efficient way to set forth the applicable punishment for a violation of section 182.5. Again, there was no similar need to add conspiracy to section 186.22(b)(4)(B). Thus, the creation of section 182.5 does not suggest any intent regarding the application of section 186.22(b)(4)(B) to conspiracies.[11] (See OBM 41.)

Third, and finally, the express addition of conspiracy to the list of serious felonies in section 1192.7 does not reflect an intent to exclude conspiracies from the ambit of section 186.22(b)(4)(B). (See OBM 42.) The voters' addition of conspiracy to commit any serious felony (see § 1192.7, subd. (c)(42)) was because former section 1192.7, in effect at the time that Proposition 21 was passed, included only one specific conspiracy crime (see former § 1192.7, subd. (c)(28) ["any conspiracy to commit an offense described in paragraph (24) as it applies to Section 11370.4 of the Health and Safety Code where the defendant conspirator was substantially involved in the planning, direction, or financing of the underlying offense"]; Stats. 1993, ch. 588, § 1 (A.B. 327).) Accordingly, the voters' addition of the all-encompassing conspiracy language in Proposition 21 was not because they

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[11] Appellant was convicted of criminal street gang conspiracy (§ 182.5) in count 20. (8CT 1526.) The Court of Appeal modified the conviction in count 20 to criminal street gang conspiracy to commit attempted home invasion robbery. (Opn. 16-18.) The criminal street gang conspiracy conviction and its sentence are not at issue before this Court.

needed to "expressly [make] a conspiracy to commit a serious felony into a serious felony" (OBM 42) but rather because they wanted to ensure no confusion arose, by the removal of former section 1192.7, subdivision (c)(28) (Stats. 1993, ch. 588, § 1 (A.B. 327)).[12]

Moreover, the impact of the amendment to section 1192.7 was not limited to punishment for the underlying offense. Committing a serious felony carried consequences for the offender beyond the reach of section 182, such as current or future probation ineligibility (see, e.g., §§ 1203, subd. (k) [person who commits serious felony while on probation is ineligible], 1203.085 [person who commits serious felony while on parole is ineligible]), limitations on plea bargaining (§ 1192.7 [limiting plea bargaining in cases where serious felony is charged]), and increasing the punishment for a future serious offense (§§ 667, subds. (a)(1) [prior serious felony enhancement] & (b)-(f) ["Three Strikes" law sentencing], 1170.12, subds. (a)-(d) [same];[13] see *Briceno, supra,* 34 Cal.4th at p. 465 ["[s]ection 1192.7, subdivision (c), comes into play only if the defendant reoffends, at which time any *prior* felony that is gang related is deemed a serious felony"]). Express inclusion of conspiracy as a serious felony was thus

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[12] Former section 1192.7, subdivision (c)(28), was subsequently renumbered prior to the passage of Proposition 21. (See, e.g., Stats. 1998, ch. 754, § 1 (A.B. 357); Stats. 1999, ch. 298, § 1 (A.B. 381).)

[13] Appellant incorrectly refers to the amendment to section 1192.7 as "amend[ing] the Three Strikes law." (OBM 42.) Section 1192.7 is not the Three Strikes law.

required to achieve these consequences for a conspiracy conviction.

An additional effect of the section 1192.7 amendment was that it cured the existing incongruity of treating attempts to commit a crime more harshly than conspiracies to commit the same crime. Prior to Proposition 21, conspiracies were generally not considered serious felonies, whereas attempts were generally considered serious felonies. (See former § 1192.7, subdivision (c)(34), (35); Stats. 1999, ch. 298, § 1 (A.B. 381).) This was so even though conspiracy justifies punishment twice as long as attempt (see §§ 182, 664), and even though conspiracy is otherwise considered the more severe and dangerous offense (see *People v. Morante* (1999) 20 Cal.4th 403, 416, fn. 5, quoting *Callanan, supra,* 364 U.S. at p. 594 [it is "conspiracy that increases the likelihood that the criminal object successfully will be attained, and 'makes more likely the commission of crimes unrelated to the original purpose for which the combination was formed'"]; *Morante*, at p. 416, fn. 5 ["Collaboration in a criminal enterprise significantly magnifies the risks to society by increasing the amount of injury that may be inflicted," such that public policy "requires that criminal conspirators be held liable whether or not their scheme actually is carried out, thus justifying intervention by the state at an earlier stage in the course of that conduct"]). By expanding the list of serious felonies to include conspiracy to commit any serious felony, the voters also enacted a more consistent approach to inchoate crimes in general. Again, the amendment to section 1192.7 does not reflect

an intent to exclude conspiracies from the ambit of section 186.22(b)(4)(B).

Moreover, as the People have stated *ante* in section I.B.2, expressly including conspiracy among the enumerated offenses in section 186.22, subdivision (b)(4), would have been redundant. (See *Athar, supra,* 36 Cal.4th at p. 405, *Florez, supra,* 132 Cal.App.4th at p. 321 [involving Prop. 21].) Thus, the mention of conspiracy in Proposition 21's other statutory amendments and the lack of a redundant amendment to add conspiracy to the enumerated offenses of section 186.22(b)(4)(B) does not suggest an intent to exclude conspiracy from that provision.

Next, appellant cites the Proposition 21 ballot materials as evidence that the voters deliberately omitted conspiracy from the ambit of section 186.22(b)(4)(B). (OBM 43-44.) As stated in this section, the voters mentioned conspiracy where they needed to mention it for the reasons expressed herein. But the ballot materials are silent or neutral on section 186.22(b)(4)(B)'s application to conspiracy, and hence are inconsequential. (*See Day v. City of Fontana* (2001) 25 Cal.4th 268, 282.) It is not surprising that the title and summary, the analysis, and the arguments made no reference to conspiracy as it applied to the lengthy punishments under section 186.22, subdivision (b)(4), because ballot materials "are not legal briefs and are not expected to cite every case the proposition may affect." (*Id.* at p. 278, quoting *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 237; see *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 308 [refusing to limit the

scope of an initiative measure based upon the Legislative Analyst's analysis]; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243 [Proposition 103 applied to surety insurance even though the ballot materials had not specifically told voters of that application].) Appellant would unreasonably require that each time the Legislature or the electorate endeavors to change the punishment for an offense, it must also expressly comment on the correlating change in punishment for conspiracy to commit that offense, or, analogously, the punishment for an attempt to commit that offense (see § 664, subd. (a) [generally prescribing the punishment for an attempted crime as one-half the term of imprisonment prescribed for the crime if it had been completed]). But such express declaration is not required.

And while it may be that the text of Proposition 21 and the ballot materials do not affirmatively show that the electorate intended section 186.22(b)(4)(B) to apply to conspiracy, such application is consistent with Proposition 21 and promotes rather than defeats its stated purposes. (See *Day, supra,* 25 Cal.4th at p. 282 [ballot materials did not specifically refer to the statute's operation in such cases, but such application "promotes rather than defeats the declared purpose" of the proposition].) The "Findings and Declarations" of Proposition 21 recognized that "[c]riminal street gangs [had] become more violent, bolder, and better organized in recent years," some even evolving into "organized crime groups rather than mere street gangs." (Voter Information Guide, Prim. Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (b), p. 119.) "Gang-related crimes pose a unique threat to

the public because of gang members' organization and solidarity. Gang-related felonies should result in severe penalties." (Voter Information Guide, Prim. Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (h), p. 119.) The electorate also declared, "Dramatic changes are needed in the way we treat . . . criminal street gangs . . . if we are to avoid the predicted, unprecedented surge in . . . gang violence." (Voter Information Guide, Prim. Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (k), p. 119.) Such application is also consistent with, although doubtfully the reason for, the Legislative Analyst's explanation that Proposition 21 "expands the law on conspiracy to include gang-related activities." (Voter Information Guide, Prim. Elec. (Mar. 7, 2000) legislative analysis, p. 46.)

Thus, imposing the alternate penalty provision of section 186.22(b)(4)(B) to gang-related conspiracy to commit home invasion robbery would be consistent with the general purposes of Proposition 21. It would also further the original purposes of section 186.22 by making additional punishment available in gang cases. (*Johnson, supra,* 57 Cal.4th at pp. 260-261.) The voters mentioned conspiracy when it was necessary to further the purposes of Proposition 21, but there was no reason to mention it in section 186.22(b)(4)(B). For all these reasons, this Court should reject appellant's argument that the text of Proposition 21 and the ballot materials affirmatively demonstrate an intent to exclude conspiracy from section 186.22(b)(4)(B)'s reach.

Appellant's reliance on decisional law (OBM 45-50) and the legislative history of various Health and Safety Code provisions

as support for his contention that Proposition 21 voters intended to preclude section 186.22(b)(4)(B) from applying to conspiracy is also unavailing. *Mares*, *Porter*, *Howard*, and *Mitchell* do not compel appellant's asserted conclusion for the reasons expressed *ante* in section I.B.2. And to the extent that they could be read to hold or suggest that a punishment provision for an offense, including an enhancement provision, does not apply to a conspiracy to commit that offense unless the provision expressly says so, they are incorrect. The fact that the Legislature or electorate may have amended certain statutes based on a mistaken interpretation of statutory construction or incorrect court of appeal decisions does not negate the plain meaning of section 182.

Appellant's reliance on *People v. Brookfield* (2009) 47 Cal.4th 583 as evidence of legislative or voter intent underlying section 186.22(b)(4)(B) is also misplaced for two reasons. (OBM 49-50.) First, as appellant acknowledges, the defendant in *Brookfield* did not challenge the sentence that was imposed and stayed on the conspiracy conviction, and thus the court did not analyze section 186.22 as it applied to a conspiracy conviction, nor did it examine the propriety of Brookfield's sentence.[14] Cases are not authority for propositions not considered. (*Brown, supra,* 54 Cal.4th at p. 320; *Jennings, supra,* 50 Cal.4th at p. 684.) Second, no significance should be placed on the lack of a legislative

[14] The People submit that the sentence imposed on the conspiracy conviction in *Brookfield* was erroneous for the reasons explained in this brief.

amendment to section 186.22(b)(4)(B) post-*Brookfield* because (1) the subsequent intent of a Legislature is not relevant evidence of voter intent of an initiative, (2) a voter initiative is not easily amended by the Legislature (Voter Information Guide, Gen. Elec. (Mar. 7, 2000) text of Prop. 21, § 39, p. 131 [requiring two-thirds vote of both houses]), and (3) after *Athar*, which expressly analyzed the issue and found that the punishment referred to in section 182 encompassed all punishments including enhancements, the Legislature had no reason to amend the statute in response to the unanalyzed sentence in *Brookfield*. Conversely, if the Legislature disagreed with *Athar*, one would have expected the Legislature to have subsequently amended section 182 or other sentencing provisions consistent with the sentence imposed in *Brookfield*. But it has not done so.

Finally, appellant's assertion that "punishment" under section 182 should not be construed to include offense-specific enhancements because no such enhancements existed when that language was first enacted (OBM 50) is contrary to this Court's decision in *Hernandez, supra,* 30 Cal.4th 835. *Hernandez* explained that, where a statutory reference to another law is specific, the reference is to that law as it then existed and not as subsequently modified, but where the statutory reference is general, the reference is to the law as it may be amended from time to time. (*Id*. at p. 865, citing *People v. Anderson* (2002) 28 Cal.4th 767, 779.) *Hernandez* declared, "Because section 182 refers generally to the punishment prescribed for murder in the first degree, it incorporates whatever punishment the law

prescribed for first degree murder when the conspiracy was committed" (*Hernandez,* at p. 865); the penalty was not permanently fixed at the punishment that had existed when the relevant language of section 182 had been enacted (*id*. at pp. 864-865). Similarly here, section 182 incorporates the punishment for gang-related home invasion robbery as it existed at the time appellant committed the conspiracy (the punishment prescribed in section 186.22(b)(4)(B)), not the punishment as it existed over 100 years ago.

The language in *In re Shull* (1944) 23 Cal.2d 745, cited by appellant (OBM 50), supports the People's plain meaniissue in *Shull* was described by the court as "merely impos[ing] additional *punishment for the felony committed*, when armed with the weapons mentioned." (*Id*. at p. 749, italics added.) In other words, this Court has long characterized offense-specific enhancements as "punishment for the felony committed." (*Ibid*.) Thus, under section 182, punishment for the underlying felony includes all applicable enhancements and penalty provisions, even those requiring separate findings of fact.

E. The Rule of Lenity Does Not Compel Appellant's Interpretation

Appellant also argues that any ambiguity that exists should be resolved in his favor under the rule of lenity. (OBM 51-54.) The rule of lenity does not apply here because the plain meaning of section 182 is clear and is not susceptible of two equally convincing interpretations.

The rule of lenity applies only when two reasonable interpretations of a penal statute stand in relative equipoise.

(*People ex rel. Green v. Grewal* (2015) 61 Cal.4th 544, 565.) Although "true ambiguities" are resolved in the defendant's favor under the rule of lenity, an appellate court should not strain to interpret a penal statute in the defendant's favor if it can fairly discern a contrary intent. (*Ibid*.) The rule is merely a tie-breaking principle that applies ""'only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.'"" (*People v. Boyce* (2014) 59 Cal.4th 672, 695.) The rule of lenity "is only an aid to construction and cannot be invoked until the statute is shown to be ambiguous or uncertain as applied to the particular defendant. (See *Callanan v. United States* (1961) 364 U.S. 587, 596.)" (*People v. Alday* (1973) 10 Cal.3d 392, 395.)

Here, there is no uncertainty or relative equipoise. A plain and commonsense reading of section 182(a) reflects the intent for a convicted conspirator of gang-related home invasion robbery to be subject to all punishment for the underlying target offense, which includes the alternate penalty provision of section 186.22(b)(4)(B). While section 186.22(b)(4)(B) may be silent as to its applicability to conspiracy, section 182(a) is not. Like in *Athar*, which refused to apply the rule of lenity, the application of section 186.22(b)(4)(B) to conspiracy "does not involve imposition of the death penalty without a murder, or any penalty that would raise serious constitutional concerns." (*Athar, supra*, 36 Cal.4th at p. 404.) To the extent appellant relies on Justice Kennard's dissenting opinion in *Athar*, which advocated applying the rule of lenity (*id*. at p. 410), that position was not adopted by the

majority, and it is even less persuasive after this Court's decision in *Ruiz*, which acknowledged that "punishment" encompasses not only any confinement for the offense but also fees imposed for criminal laboratory analysis and drug programs (*Ruiz, supra,* 4 Cal.5th at pp. 1107-1122).

For the reasons expressed in this brief, this is not a case where two reasonable interpretations of a provision stand in relative equipoise. Therefore, the rule of lenity should not be applied.

CONCLUSION

Accordingly, respondent respectfully requests that the Court of Appeal opinion be affirmed.

Dated: December 30, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 11,301 words.

Dated: December 30, 2020

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

Case Name: **People v. Lopez**
No.: **S261747**

I declare:

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

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 30, 2020, at Sacramento, California.

J. Ostrander	*/S/ J. Ostrander*
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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