Supreme Court Copy

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November 10, 2009

Frederick K. Ohlrich
Clerk of the Supreme Court
Supreme Court of the United States
350 McAllister Street
San Francisco, CA 94102-4797

Re: *The People of the State of California v. Albert Andrew Albillar, et al.*,
Case Number S163905

Dear Mr. Ohlrich:

On August 26, 2009, this Court has asked counsel to address "the question of whether the phrase felonious criminal conduct, appearing in Penal Code[1] section 186.22, subdivision (a) should be interpreted to mean felonious criminal gang-related conduct." Respondent, in its Letter Brief of October 28, 2009, asserts that the answer is "no."

However, the answer is "yes," as demonstrated by the specific activity targeted and cited by the proponents of the legislation as the activity requiring criminal sanction, as well as in the language the proponents employed during the development of this legislation. Moreover, there is nothing in the legislative history of section 186.22

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1 All references are to this Code unless otherwise noted.

that explicitly expresses the intent that subdivision (a) of section 186.22 was designed to encompass *any* criminal act by a gang member, regardless of whether the act was or was not gang-related.

Contemporaneously with the submission for filing of this letter brief, a request is submitted for judicial notice of the Legislative history of the enactment of the Street Terrorism Enforcement and Protection Act (STEP Act) that added section 186.22. That request is accompanied by two exhibits consisting collectively of 640 pages of documents. The first of these (Exh. A) is the transmitting communication from the Legislative Intent Service and the Declaration of Maria A. Sanders regarding their effort in producing this history and authentication of the documents provided. The second exhibit (Exh. B) contains the 632 pages of documents that make up that history.

In short, as the above history will demonstrate, the mission of the Legislature was to address and hopefully reduce criminal gang-related conduct. Section 186.22, subdivision (b) added additional sanctions for specified crimes where it could be proved that a gang-related crime had been committed by the perpetrator of that crime. Section 186.22, subdivision (a) was designed to place criminal sanctions on an individual who played some role in a gang-related crime, but his or her role may not have been sufficient to establish his or her participation as a conspirator or aider and abettor of that crime.

A. Legislative History of the Introduction of Senate Bill 1555 (Robbins–1988)

Section 186.22 became operative on September 26, 1988 (*In re Lincoln J.* (1990) 223 Cal.App.3d 322, 328 [272 Cal.Rptr. 852]) as part of emergency legislation (*In re Alberto R.* (1991) 235 Cal.App.3d 1309, 1318 [1 Cal.Rptr.2d 348]) the product of the California Street Terrorism Enforcement and Prevention Act (*In re Leland D.* (1990) 223 Cal.App.3d 251, 256 [272 Cal.Rptr. 709]), known as the STEP Act (*People v. Gardeley* (1997) 14 Cal.4th 605, 609 [59 Cal.Rptr.2d 356].)

It was the product of Senate Bill 1555. The latter was written by attorneys in the Los Angeles City Attorney's office. (Exh. B, p. 420.) It was believed by its supporters that the legislation would "'make it easier to convict'" gang members" and give "prosecutors additional grounds to prosecute gang members...." (Exh. B, p. 421.)

The Los Angeles City Attorney's Office requested that Senator Alan Robbins introduce the bill, which he did. (Exh. A, p. 1, Exh. B, p. 153, et seq. The bill was denominated Senate Bill 1555. (Exh. B, p. 153.) Senator Robbins, explained in a letter to a constituent:

> While there are already many laws dealing with specific criminal activities in which gang members engage, there is a gap in current law as it relates to these activities within the context of gang membership. SB 1555 is taking a new approach in dealing with street gangs.
>
> The bill would, for the first time, enhance penalties for crimes that are intended to promote gang activity. (Exh. B, p. 420.)

In a letter dated April 15, 1987, James K. Hahn, the Los Angeles City Attorney explained in a letter to Attorney General John Van de Kamp:

> This bill would provide that any person who commits any crime is guilty of a separate offense if the underlying offense: (1) is part of a pattern of *gang related activity, or is done for the benefit of, at the direction of, or in association with, any gang*, as defined, *and* (2) is committed *with the specific intent to promote any of its criminal gang activity*, as specified. (Exh. B, p. 465 [emphasis added].)

To further explain the scope of the bill, the City Attorney attached "some examples of factual applications of [their] bill." (Exh. B, p. 466.) Among the five pages of examples provided, are the following applicable to the instant question raised by this Court:

> The police receive an urgent call that a residence is being shot at. Upon arrival, they interview the victims who indicate that an known individual drove by their residence and fired a semiautomatic weapon striking it in numerous places. Later that day, the police observe the suspect driving in a vehicle and arrest him for the crime of shooting into an inhabited dwelling. Further investigation reveals that the individual is an active participant in a violent street gang and that the shooting was a retaliation for the victims testifying against a gang member friend of the suspect. Under the proposed legislation, the suspect would be guilty of the crime of shooting into an inhabited dwelling, but he would also be guilty of the crime "street terrorism" and could be punished for both offenses.
>
> ... Police officers see a vehicle being driven in an erratic manner. They stop the vehicle and determine that the driver is under the influence of PCP. Four other individuals are also present in the vehicle but are released.
>
> Investigation determines that all of the individuals are active participants in a street gang which has a lengthy history for sales of narcotics, robberies, and burglaries. The police officers locate a prior report where the defendant had been arrested for selling PCP to a minor and another report for carrying a concealed knife during a gang fight. He was convicted for both offenses.

After the suspect recovers from his state of intoxication, he makes a voluntary statement to the police that he and his "home boys" were on their way to a party to get "high" and to discuss how the gang is going to raise some money. He states that he has been to these parties before and that criminal activity is always discussed. In particular, such things as narcotic pickup points, distribution areas, sales prices, and likely targets for burglaries or robberies are often included. He states that it is his intention to participate in these activities because he needs his share of the money. He also states that he was helping the other individuals in his car get to the party because they were needed to act as look-outs.

In this situation, the suspect would be guilty of driving while intoxicated. Under current law, he would not be guilty of aiding and abetting because no criminal offense had been committed yet. He would not be guilty of the crime of conspiracy because there had not been an agreement to participate in any <u>particular</u> crime. Under the proposed legislation, however, he would be guilty of "active participation in a street gang". He has taken active steps and participated in a gang with a history of criminal acts with the intent to assist in furthering those unlawful acts.

... The police investigate a series of robberies by a certain individual. He has just held up an elderly women at gun point and taken her purse. He has a lengthy record of robberies, thefts, and assaults--all connected with his membership and participation in a street gang. The suspect is apprehended, and investigation reveals that all of these robberies were planned and coordinated by the gang. Pursuant to the new legislation, the suspect would be guilty not only of the crimes of robbery but also of "street terrorism" and could be punished for <u>both</u>. (Exh. B, pp. 468-469 [emphasis in orig.])

A further example was provided in a summary of the bill as amended June 23, 1987 prepared by the Assembly Committee on Public Safety:

> The sponsors state that current law does not adequately punish this type of organized crime. Conspiracy laws require an agreement to commit a crime, and an "overt act," which cannot always be shown in the case of a gang member. For example, where a gang member is driving a car with other gang members who then shoot into a home, the driver may or may not be guilty of the shooting depending on his knowledge and intent. Under this bill, he would be guilty of an alternate felony/misdemeanor regardless of his intent concerning the shooting. (Exh. B, p. 258.)

The summary of the bill as amended on August 20, 1987 prepared by this same committee repeated the above statement. (Exh. B, p. 267.)

According to a summary of the bill prepared by the Senate Committee on Judiciary, among the "KEY ISSUES" that Senate Bill 1555 was designed to address was:

> Should a person who commits any act which could be charged as a felony, misdemeanor, or infraction be guilty of a separate and distinct offense if it was part of a pattern of criminal *gang-related* [emphasis added] activity and [emphasis in orig.] committed with the specific intent to promote or further criminal gang activity? (Exh. B, p. 153 [emphasis added].)

In that same summary, among the "PURPOSE[s]" that the bill was designed to address was the following:

> any person who committed any act which could be charged as a felony, misdemeanor, or infraction would be guilty of a separate and distinct offense if the felony, misdemeanor, or infraction was both: part of a pattern of criminal *gang-related* activity or was done for the benefit of,

> at the direction of, or in association with any gang; and committed with the specific intent to promote or further any of its criminal gang-related activity. (Exh. B, p. 154 [emphasis added].)

This language was repeated in a subsequent section of the document entitled, "Criminal gang-related activity—new offense." (Exh. B, p. 156.)

Thus, it can be seen that the principal target of that part of the legislation under scrutiny here was to criminalize a gang member's participation in *gang-related* criminal activity to encompass situations where there may not be sufficient evidence to prove that the person himself or herself committed the target crime undertaken by a member of the gang.

B. The Evolution of the Language of Senate Bill 1555

Three analyses of Senate Bill 1555 were prepared for the Senate Committee on Judiciary. (Exh. A, p. 6.) The first of these was prepared for the May 19, 1987 hearing on the bill. The first of the "KEY ISSUES" described in the analysis provided:

> Should a person who commits any act which could be charged as a felony, misdemeanor, or infraction be guilty of a separate and distinct offense if it was part of a pattern of criminal gang-related activity and committed with the specific intent to promote or further criminal gang activity? (Exh. B, p. 153 [emphasis in the orig.])

The analysis stated that the "bill would establish the 'California Street Terrorism and Anti-Gang Act.'" (Exh. B, p. 154.) Among the provisions it would enact would be the following:

> Any person who committed any act which could be charged as a felony, misdemeanor, or infraction would be

> guilty of a separate and distinct offense if the felony, misdemeanor, or infraction was both: part of a pattern of criminal gang-related activity or was done for the benefit of, at the direction of, or in association with any gang; and committed with the specific intent to promote or further any of its criminal gang-related activity. (Exh. B, p. 154.)

As can be readily seen, the language employed encompassed the perceived targeted need, and that need was limited to gang-related conduct.

The second of the three analyses was prepared for the May 26, 1987 hearing on the bill. The provisions quoted above from the first analysis remained essentially unchanged as relevant to the Court's question. (Exh. B, pp. 166-167, 169-170.) The targeted need remains "gang related criminal activity." (*Ibid.*)

The third of the three analyses was prepared for the June 9, 1987 hearing on the bill. Here, the "KEY ISSUES" as applicable to the Court's question has some new language. The first of these provides:

> Should a person who actively participates in any criminal street gang with knowledge that its members or participants engage in or have engaged in a pattern of serious criminal activity, and with the specific intent to participate in this criminal conduct, be guilty of a "wobbler"? (Exh. B, p. 181.)

Now the language has changed a little. But, the final qualifier "this criminal conduct," refers back to "serious criminal activity" by the criminal street gang's members or participants. In the section describing the provisions that would be enacted, as applicable here is the following:

> any person who actively participated in any criminal street gang with knowledge that its members or participants engage in or have engaged in a pattern of criminal gang

> activity, and with the specific intent to promote, further, or assist in any criminal conduct by its members would be guilty of a "wobbler". (Exh. B, p. 182.)

As relevant here, this language is similar to that now found in Section 186.22, subdivision (a). But, at no point in these legislative intent documents is there any expression of the need or desire to expand the target beyond "gang related criminal activity" to *any* criminal activity. At another point in this third analysis, the language employed reinforces the point that the target remains "gang-related criminal activity. There it was explained:

> Under this provision, an individual who actively participated in a gang which had established a pattern of criminal gang activity, as defined, and who willfully promoted criminal conduct by that gang would be subject to "wobbler" penalties, whether or not he or she had participated in the crimes. (Exh. B, p. 185.)

The focus here is "criminal conduct by that gang," again perfectly consistent with "gang-related criminal activity."

This view is reinforced by a Department of Finance document entitled, *Local Cost ESTIMATE*, addressing the June 23, 1987 amended form of the bill. This document explained:

> This bill, an urgency measure, would make it a felony or misdemeanor offense, depending upon the primary offense, for a person to knowingly participate in a criminal street gang, or to promote *gang related* criminal activity. (Exh. B, p. 368 [emphasis added].)

Also consistent with this view is a document from the Senate Rules Committee, Office of Senate Floor Analyses, entitled *Third Reading*, addressing the bill in its June 23, 1987 amended form. The document explained:

> This bill establishes criminal penalties for (a) willfully promoting or assisting in any felonious criminal conduct *of a street gang*, as defined, and (b) receiving proceeds derived from a pattern of criminal gang activity under specified conditions. (Exh. B, p. 236.)

Also consistency is found in an analysis of the bill in its June 23, 1987 amended form prepared for the Assembly Committee on Public Safety. The author explained:

> Current law contains no provisions which specifically make commission of criminal offenses by members of criminal street gangs a separate offense from the crime actually committed. (Exh. B, p. 253.)

In the COMMENTS, CRIMINAL PROVISIONS, New Offense and Sentence Enhancements portion of the document, it is explained:

> Under this bill, active participation in a criminal street gang, with knowledge of its activities and the willful promotion, assistance, or furtherance of any of the criminal activities would be an alternate felony/misdemeanor. (Exh. B, p. 257.) ¶¶
>
> The sponsors state that current law does not adequately punish this type of organized crime. Conspiracy laws require an agreement to commit a crime, and an "overt act," which cannot always be shown in the case of a gang member. For example, where a gang member is driving a car with other gang members who then shoot into a home, the driver may or may not be guilty of the shooting depending on his knowledge and intent. Under this bill, he would be guilty of an alternate felony/misdemeanor regardless of his intent concerning the shooting. (Exh. B, p. 258.)

This clearly demonstrates that the target is unchanged; it is to criminalize participation in *gang-related* criminal activity and to apply criminal sanctions to one where the evidence may not be sufficient to

prove a conspiracy or aiding and abetting the gang-related crime committed.

C. Legislative History Provides Extrinsic Aide to Statutory Construction

There is an established tradition of examining a statute's legislative history:

> To resolve ambiguities, courts may employ a variety of extrinsic construction aids, including legislative history, and will adopt the construction that best harmonizes the statute both internally and with related statutes. [Citations.] (*Summers v. Newman* (1999) 20 Cal.4th 1021, 1026.)
>
> "The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. [Citations]" ... "When the language is susceptible of more than one reasonable interpretation,... we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." [Citations.] (*People v. Jefferson* (1999) 21 Cal.4th 86, 94.)

Legislative committee reports and other legislative records are an aid to ascertaining the Legislature's intent. (*In re Rottanak K.* (1995) 37 Cal.App.4th 260, 267, fn. 8; *Perez v. Smith* (1993) 19 Cal.App.4th 1595, 1598.)

> A wide variety of factors may illuminate legislative design, such as context, object in view, evils to be remedied, history of times, and of legislation upon the same subject, public policy, and contemporaneous construction. (*People v. White* (1978) 77 Cal.App.3d Supp.

17; *Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, 733; *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688.)

In addition, statements by the authors of legislation are frequently considered. (*California Teachers Assn. v. San Diego Community College District* (1981) 28 Cal.3d 692, 698-699; *In re Marriage of* Buol (1985) 39 Cal.3d 751, 761-762; *County of Los Angeles v. State* (1987) 43 Cal.3d 46, 54, fn. 6; *Quelimane Company, Inc. v. Stewart Title Guaranty Co.* (1988) 19 Cal.4th 26, 46, fn. 9.)

Thus, the documents provided in the exhibits accompanying Appellant Madrigal's request for judicial notice are very relevant and proper as a tool for understanding the Legislative history and thereby the scope of subdivision (a) of Section 186.22.

D. The Legislative History of Section 186.22 Readily Demonstrates that the Legislative Target was *Gang-Related* Criminal Activity Not All Criminal Activity

Prior to the introduction of Senate Bill 1555, a statewide concern for the rise of youth gang violence had been building for a number of years, as evidenced by the Attorney General's 1981 *Report on Youth Gang Violence in California* (Exh. B, pp. 518-645) and the California Council on Criminal Justice's 1986 Final Report, *State Task Force on Youth Gang Violence* (Exh. B, pp. 479-517.) Part A, above, demonstrated that it was quite clear that from the inception of the bill in 1987 its focus was on criminal *gang-related* conduct.

Although through the course of this overall complex and wide sweeping legislation, its language went through some change, at no point was the intent expressed to expand section 186.22, subdivision (a) to encompass all criminal conduct. Early reviewers of section

186.22 have lamented that the "vague language [of the STEP ACT] lends itself to arbitrary and discriminatory enforcement." (*California's Anti-gang Street Terrorism Enforcement and Prevention Act: One Step Forward, Two Steps Back, I. Introduction*, 22 Sw. U. L. Rev. 457 (1993).) In particular, "[t]he primary section of the STEP that has ignited the most controversy is section 186.22 (a)...." (*Id., B. Legislative History and Judicial Interpretation of STEP.*) It is apparent that the question raised by this Court is a further manifestation that greater clarity may be called for.

However, since it has taken 11 years to pass for the instant question to gain this Court's attention, it seems most plausible that the drafters of subdivision (a) had not even considered that one might attempt to apply the provisions of subdivision (a) to non-gang-related criminal activity. After all, the entire impetus of the legislation was gang-related activity. That was the mindset of those seeking some legislative ameliorating solution.

Moreover, it is the policy of this state to construe statutes as favorably to the defendant as its language and the *circumstances* of its application permit (*Keeler v. Superior Court, supra,* 2 Cal.3d 619, 631; accord *People v. Robles* (2000) 23 Cal.4th 1106, 1115), a sub silentio abrogation of these fundamental due process principles cannot have been the intent of the Legislature in its adoption of section 186.22, subdivision (a).

Respondent's argument is conceptually grounded in an interpretation of Penal Code section 186.22, subdivision (a) that would make it a substantive crime for street gang members to commit any felony together, regardless of whether the crime had any relationship to

the gang or their gang status. According to Respondent's construct, a gang + a crime (any crime) = a violation of section 186.22 (a) regardless of whether the crime had any relationship to the gang or their gang status.

Respondent reaches this point by ignoring the legislative history of the genesis of the STEP Act, to curb gang-related conduct. Respondent argues that where "there is 'no ambiguity in the language of the statute, "then the Legislature is presumed to have meant what it said and the plain meaning of the language governs."'" (Respondent's Letter Brief, p. 2.) Respondent ignores the ready exceptions to this limiting interpretation of the purview of a statute. In this Court's decision in *Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, the Court found that such limitation was not appropriate where "'the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning.' (2A Sands, Statutes and Statutory Construction (4th ed. of Sutherland, Statutory Construction, 1973) § 46.01, p. 49.)" (*Great Lakes Properties, Inc. v. City of El Segundo, supra*, at p. 156, citing *Leroy T. v. Workmen's comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438.)

That is just the situation here, as demonstrated in the preceding Parts.

Respondent's entire hypothesis for legislative intent is supposition; without authority and without historical support. There is a substantial history in support of the Legislative intent that Section 186.22, subdivision (a) applies only to *gang-related* criminal activity.

There is only inexact draftsmanship to explain the interpretation that Respondent seeks.

Sincerely,

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CASE NUMBER: S163905

DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, a resident of Ventura County, over 18 years of age, not a party to this action and with the above business address. On the date executed below, I served the APPELLANT MADRIGAL'S LETTER BRIEF by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Ojai, California. Said copies were addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 13, 2009, at Ojai, California.

Conrad Petermann
Attorney for Appellant