ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ALBERT ANDREW ALBILLAR ET AL., Defendants and Appellants.	No. S163905 (Related Cases: Second Appellate District, Division Six, No. B194358; Ventura County Superior Court No. 2005044985)

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

Honorable Edward F. Brodie, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

CONRAD PETERMANN
State Bar Number 51907
Suite 110, PMB 142
323 East Matilija Street
Ojai, CA 93023
Firm@Cpetermann.com

Attorney for Appellant
John Madrigal

TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ALBERT ANDREW ALBILLAR ET AL., Defendants and Appellants.	No. S163905 (Related Cases: Second Appellate District, Division Six, No. B194358; Ventura County Superior Court No. 2005044985)

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

Honorable Edward F. Brodie, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

ARGUMENT

THERE WAS NO EVIDENCE THAT THE TWO CHARGED SEX OFFENSES WERE COMMITTED WITHIN THE MEANING OF EITHER SECTION 186.22, SUBDIVISION (A) OR SUBDIVISION (B)

A. SUMMARY OF APPELLANT MADRIGAL'S ARGUMENT

Two appellants are twins and all three appellants are cousins and roommates. They were charged and convicted of two counts of rape while acting in concert (§ 264.1) for acts committed in the single bedroom of their apartment with a female friend who was a frequent visitor of all three and a girlfriend of two.

No evidence was presented that their gang membership in any way enhanced the fealty that these three male/cousins/roommates/generational cohorts had for each other. They shared a one bedroom apartment with their mother/aunt and godmother. (RT 186-187.) You cannot get much closer together than that. They did not even live within the territory claimed by the gang. The offenses were committed in their apartment. They were the only members known by the prosecution's gang expert to live in Thousand Oaks, well outside the territory of the gang. (4RT 681, 690-691.) The point here is not that they were not gang members. The point here is that because of the incredible confluence of commonality amongst these young males, their gang membership, as well as their gang, was an irrelevancy to the charged sexual offenses. Their gang membership was a mere incidental to their lives; akin to school loyalty, or which football team they favored, or whether they drank their coffee with or without cream.

The sexual offenses themselves and the context in which they were committed provide insufficient evidence of either the substantive offense of participating in a criminal street gang (Pen. Code, § 186.22, subd. (a)[1]) or the criminal street gang sentencing enhancement of section 186.22, subdivision (b).[2]

---

1 All references are to this code unless otherwise noted.
Section 186.22, subdivision (a) provides:

> Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years. (§ 186.22, subd. (a).)

2 Section 186.22, subdivision (b) provides in pertinent part:

> (1) Except as provided in paragraphs (4) and (5) [not applicable to this discussion], any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to

The failing here is the absence of, as counsel for Appellant Albert Albillar, phrased it, any nexus between the cousins' gang status and the criminal offenses. There was no evidence that the activities of these cousins were committed to promote the gang, to further the gang, or to assist each other *as gang members*, requisite elements of subdivision (a); or for the benefit of the gang, at the direction of the gang, or in association with the gang, requisite elements of subdivision (b.)

That such a nexus is a requisite of both subdivision (a) and (b) is what saves section 186.22 from defining an impermissible status offense or enhancement. *People v. Gardeley* (1996) 14 Cal.4th 605, 623-624 [59 Cal.Rptr.2d 356].) Again, relying on counsel for Appellant Albert Albillar's observation, "If the drafters of the STEP Act wanted to create a status/conduct offense similar to that of being an ex-felon with a gun, *i.e.,* to specially criminalize any felony committed by gang members, the statute, like the ex-felon with a gun law, would have simply proscribed being an active gang participant and committing a felony." (Appellant Albert Albillar, *Brief on the Merits*, p. 26.)

A gang member pursuing a personal agenda, rather than a gang agenda does not satisfy the requisite elements of section 186.22. (*People v. Olquin* (1994) 31 Cal.App.4th 1355, 1382 [37 Cal.Rptr2d 596].) Gang affiliation by itself is not enough. (*People v. Gardeley, supra,* 14 Cal.4th 605, 623; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 [46 Cal.Rptr.3d 839]; *People v. Martinez* (2004) 116 Cal.App.4th 753, 756, 762 [10 Cal.Rptr.3d 751] [in the context of section 186.30].) Yet, that is all there is here.

Other than the bare supposition of Officer Holland, no evidence was introduced that the acts committed by appellants in their own bedroom of their own family's apartment aided or abetted the *criminal conduct of a group*, a

---

the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follow: ¶¶

(C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years. ¶¶ (§ 186.22, subd. (b).)

requisite requirement of section 186.22, subdivision (b) (*People v. Gardeley, supra,* 14 Cal.4th 605, 624, fn. 10) or that their gang membership was at all *related* to their charged criminal conduct, a requisite of section 186.22, subdivision (a) (*Id.* at pp. 623-624; *c.f., Roberto L. v. Superior Court* (2003) 30 Cal.4th 894, 906-907 [135 Cal.Rptr.2d 30] [the ballot measures of Proposition 21 "clearly show that the voters intended to dramatically increase the punishment for *all* gang-related crime..."]; *People v. Briceno* (2004) 34 Cal.4th 451, 462 [20 Cal.Rptr.3d 418] [the voters' intent in the passage of Proposition 21 was to increase the penalties for "all gang-related felony offenses"].)

There were no permissible inferences the jury could draw from the gang evidence. Its admission into evidence with the charged sexual offenses was so inflammatory and dominated the State's case. The result dissolved appellants' presumption of innocence. It assured that the jury could never set aside what they had been told and the character inference it provided as they balanced Amanda's account with that of the defense. The resulting prejudice was so great that it denied Appellant Madrigal of his federal constitutional rights of due process, rendering his trial fundamentally unfair, in violation of the Fifth and Fourteenth Amendments. (See, *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [116 L.Ed.2d 385, 112 S.Ct. 475]; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919-920; *People v. Partida* (2005) 37 Cal.4th 428, 439 [35 Cal.Rptr.3d 644]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229 [57 Cal.Rptr.3d 92].)

B. RESPONDENT'S ARGUMENT

Respondent cites Officer Holland's view of the "various targets of the gang's activities," which Holland candidly acknowledged included "everybody." Officer Holland's effort to be more specific demonstrated that he really did mean everybody: "rival gangs, residents within their community, residents outside their community, family members, people that are close to them and even members within their own gang." (Respondent's *Brief on the Merits*, p. 6.)

Respondent does not dispute that Officer Holland also admitted that he had no evidence that appellant's status in Southside Chiques increased as a result of anything that happened during the charged offense, nor did he have any evidence that anyone in Southside Chiques was ever made aware of this offense. (4RT 698.) Moreover, Holland conceded that the crime of rape is generally frowned upon by Hispanic street gangs and that if a gang member were convicted of committing the crime of rape, that gang member would lose status within the gang. (4RT 677; 696-697.)

Holland also conceded that he had no particular evidence to prove that the offense was gang related other than his opinion that "based on my reviewing and knowledge of the three individuals' participation in [sic] crime and reading the activity of those individuals during the commission of the crime, and it is through those collectively that I form the opinion that they are doing it to receive benefit amongst themselves and do it in association with fellow activitists[sic]/participants in Southside Chiques." (4RT 698-699.) Asked by defense counsel whether he could point to any specific piece of evidence, other than generalities about how gangs work, to show that this was a gang related crime, Officer Holland answered that his opinion was based on "a collective totality on everything that has occurred in their prior history." (4RT 699.) Officer Holland's meaningless generalities coupled with his above concessions should have provided nothing meaningful to the jury's task of resolving whether the requisites of subdivisions (a) and (b) of section 186.22 had been met.

In 2005 in *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 and, since the filing of Appellants' Briefs on the Merits, in *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069 two federal courts have found that section 186.22, subdivision (b) requires a finding that the defendant's offense somehow facilitated the gang's criminal operations.

In *Garcia v. Carey, supra,* the defendant challenged in federal habeas proceedings a gang enhancement on the ground of lack of sufficient evidence to

establish he committed the offense with the intent to promote, further or assist in any criminal conduct by gang members. (*Id.* at p. 1100.) The district court ruled that the prosecution failed to present any direct or circumstantial evidence that the defendant committed the robbery with the specific intent to promote, further, or assist in other criminal conduct by the El Monte Flores street gang. (*Id.* at p. 1002.) The Ninth Circuit agreed, noting there was "nothing inherent in the robbery that would indicate it furthers some other crime." (*Id.* at p. 1103.) Although a gang expert testified the gang was "turf oriented," the court noted that nothing in the record connected the turf-oriented nature of the gang with the commission of robberies generally or, more importantly, with the commission of this robbery in particular. (*Ibid.*) Nor did the expert explain what criminal activity was furthered or intended to be furthered by the robbery in this case. (*Ibid.*)

The Ninth Circuit noted that the California Court of Appeal had held that the jury properly could conclude that the robbery was one of a series of robberies committed by the gang not only to obtain the property of the victims, but also as a means of instilling fear of the gang in residents of the neighborhood, thereby facilitating the gang's criminal operations in the area. (*Ibid.*) The Ninth Circuit found, however, that there was nothing in the record to support an inference that the defendant robbed the victim in order to facilitate other gang-related criminal operations in El Monte. Also, this theory of specific intent had never been argued to the jury by the prosecutor and the jury had not been asked to make such an inference. The court concluded that it would be pure speculation to assume the jury found that the gang was involved in criminal activity not mentioned in any of the testimony. Although there was testimony that the gang committed robberies, there was nothing to indicate why those other robberies were aided by this robbery. *Id.* at pp. 1103-1104.

In *Briceno v. Scribner, supra* ,the defendant and another, both members of the same gang, committed four robberies within a couple hours from which they gained little. (*Id.* at pp. 1072-1073.) Briceno *also* challenged in federal habeas

proceedings the gang enhancements to his robbery convictions on the ground of lack of sufficient evidence to establish he committed the offenses with the intent to promote, further or assist in any criminal conduct by gang members. (*Id.* at p. 1078.) His defense at trial had been that the robberies were committed to buy Christmas presents. (*Id.* at p. 1074.) The prosecution's gang expert provided similar banal opinions to those proffered in Appellants' trial that the crimes would glorify the gang, despite the small amounts taken, and increase the defendants' status in the gang. (*Ibid.*)

The Ninth Circuit observed:

> California law requires the prosecutor to prove two things. First, the prosecutor must demonstrate that the defendant committed a felony "for the benefit of, at the direction of, or in association with [a] criminal street gang." Cal. Penal Code § 186.22(b)(1). Second, the prosecutor must show that the defendant committed the crime "with the specific intent to promote, further, or assist in any criminal conduct by gang members." *Id.* We have previously recognized the importance of keeping these two requirements separate, and have emphasized that the second step is not satisfied by evidence of mere membership in a criminal street gang alone. (*Id.* at p. 1078, citing *see Garcia v. Carey, supra,* at pp. 1102-1103 & fn. 5.)

The Ninth Circuit first noted that the prosecution's expert "dealt almost exclusively in hypotheticals;" and had not provided any direct or circumstantial evidence of the second element of subdivision (b), the specific intent prong of the enhancement. (*Id.* at pp. 1078-1079.)

Second, the Court found that the state appellate court had run afoul of *Garcia v. Carey, supra.* "In *Garcia,* there was no evidence, aside from the gang expert's generic testimony, 'that would support an inference that [the defendant] robbed [the victim] with the specific intent to facilitate other criminal conduct by the [gang].'" (*Briceno v. Scribner, supra* , at p. 1079, quoting *Garcia v. Carey, supra,* at p. 1103.) The Court reasoned that aside from evidence of the defendants' gang membership, the record was "singularly silent" as to "what criminal activity of the gang was … intended to be furthered by the robbery." Without this

evidentiary link, it was "unreasonable to conclude that a rational jury could find [the defendant] committed [this robbery] with the specific intent to facilitate other gang crimes. There was simply a total failure of proof of the requisite specific intent." (*Briceno v. Scribner, supra*, at p. 1079, quoting *Garcia v. Carey, supra,* at p. 1104.)

Respondent argues that the second element of subdivision (b) specifies a "specific intent to promote, further, or assist in *any* criminal conduct by gang members," rather than *other* criminal conduct, the modifier employed by the Ninth Circuit in *Garcia v. Carey, supra,* and *Briceno v. Scribner, supra*. From this, respondent argues that the subdivision does not require that the defendant's intent to promote, further, or assist criminal endeavors by gang members relate to criminal activity apart from the offense or offenses the defendant is charged with committing. (Respondent's *Brief on the Merits,* pp. 11-14.) Yet, respondent has not addressed Appellants' observation, that such a minimalist's view of the subdivision would render it merely a status offense. If that had been the drafters' goal, all that would have been required to satisfy the sentence enhancement was being a gang member or assisting a gang member and one of them committing a felony.

Although the Ninth Circuit in *Garcia v. Carey, supra,* and *Briceno v. Scribner, supra,* found the deficiency of evidence to satisfy the second element of subdivision (b) dispositive, the first element also warrants attention. The first element manifests the drafters' intent that the defendant's conduct must somehow relate to the gang, rather than just to the membership status of the perpetrator or perpetrators of the charged offense or offenses. The first element of subdivision (b) of section 186.22[3] is provided in three prepositional phrases which define three conditions in which "any person who is convicted of a felony" would satisfy this

---

3 The full text is in footnote 2, above.

first element. Grammatically parsed, the three conditions of this first element of the statute can be read:

> 1. "Any person who is convicted of a felony committed for the benefit of... any criminal street gang...."
>
> 2. "Any person who is convicted of a felony committed ... at the direction of... any criminal street gang...." And,
>
> 3. Any person who is convicted of a felony committed ... in association with any criminal street gang...."

Notably, each of these does not require a benefit to a gang *member*, a direction by a gang *member,* or an association with a gang *member.* But rather it requires more than any constituent parts, i.e., a member or members; it requires the entity itself, a *criminal street gang*. If Respondent's construct was correct, the drafters would have used here gang *member* rather than "criminal street gang."

Alternatively, Respondent offers that even if the object of the requisite benefit, direction, or association is the "criminal street gang," sufficient evidence was provided. The expert opined that this was accomplished "by [1] helping train them to work together as a cohesive criminal unit, [2] increasing trust and loyalty among the participating gang members, and [3] illustrating to the community that the gang is violent." (Respondent's *Brief on the Merits,* p. 24.) The first is too farfetched to require more than its mention. The second similarly dissolves of any significance once "gang members" is substituted for the reality that these were cousins who lived together. The third is unsupported by the record—the offenses were not committed in the community (Oxnard) whose territory the gang claimed (RT 600-601); neither Appellants nor the victim lived in that community (RT 137, 145, 194-195); the gang "expert" admitted that the crime of rape is generally frowned upon by Hispanic street gangs and that if a gang member were convicted of committing the crime of rape, that gang member would lose status within the gang (4RT 677; 696-697); and the "expert" did not have any evidence that anyone in the gang was ever made aware of this offense (4RT 698.) In fact, the very nature of their crime would distance them from the gang.

C. CONCLUSION

Other than the bare supposition of Officer Holland, no evidence was introduced that the acts committed by appellants' in their own bedroom of their own family's apartment aided or abetted the *criminal conduct of a group*, a requisite requirement of section 186.22, subdivision (b). (*People v. Gardeley, supra,* 14 Cal.4th 605, 624, fn. 10.) The fact that each of the three appellants was a gang member was not determinative. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1197 [5 Cal.Rptr.3d 615]; *In re Frank S, supra,* 141 Cal.App.4th 1192, 1999.) It is respectfully submitted that both subdivisions (a) and (b) of section 186.22 require that the acts of the defendant must have some connection with the activities of a criminal street gang. (Cf. *In re Frank S., supra,* 141 Cal.App.4th 1192, 1999; *People v. Martinez, supra,* 116 Cal.App.4th 753, 756, 762.) Otherwise, the result would be strict liability for section 186.22 subdivision (a) or (b) for merely aiding and abetting a gang member or members regardless of whether the gang or group was promoted, furthered, or assisted; or benefited, directed or associated in the endeavor.

From a review of the entire record, a rational trier of fact could not have found appellant guilty beyond a reasonable doubt of Counts Three or the sentencing enhancements of section 186.22, subdivision (b). The issues appellant raise are one of federal constitutional law. A conviction or other finding which is not supported by sufficient evidence constitutes not just an error of state law, but is also a denial of due process of law and a violation of the accused's rights under the United States Constitution. (*Jackson v. Virginia* (1979) 433 U.S. 307, 309 [61 L.Ed.2d 560, 99 S.Ct. 2781].) The federal constitutional standard for determining the sufficiency of evidence is identical to the standard under California law. (*People v. Staten* (2000) 24 Cal.4th 434, 460 [101 Cal.Rptr.2d 213].) Under both, reversal is required if one of the essential elements of the crime or enhancement is not supported by substantial evidence. (*People v. Hernandez* (1988) 47 Cal.3d 315, 345-346 [253 Cal.Rptr. 199].) The substantial evidence standard applies to a

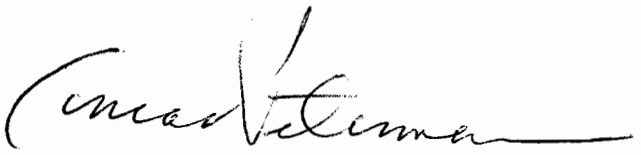
claim of insufficiency of evidence to support a gang enhancement. (*People v. Vy* (2004) 124 Cal.App.4th 1209, 1224 [22 Cal.Rptr.3d 203].)

Furthermore, since double jeopardy considerations bar a retrial (*Burks v. United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141]), the trial court should be directed to dismiss these offenses from the accusatory pleading with prejudice and resentence appellant. To premise appellant's conviction and enhanced sentence on such insufficient evidence violates his rights to due process of the law under the Fifth and Fourteenth Amendments.

Appellant Madrigal was tried and convicted with Appellants Alex and Albert Albillar. Their appeals have been joined in this direct appeal. Appellant Madrigal hereby joins in those arguments of his coappellants that may benefit him. (See *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5 [172 Cal.Rptr. 445].)

For the foregoing reasons, appellant's convictions must be reversed.

Dated: April 11, 2009



Respectfully submitted,
Conrad Petermann
Attorney for Appellant Madrigal

CERTIFICATE OF WORD COUNT

The brief is proportionately spaced with Times Roman typeface, point size of 13, and the total word Count is 3,701, not including tables, and thus is not within the limits (4,200 words) of California Rules of Court, rule 8.520, subdivision (c).

Conrad Petermann
Attorney for Appellant Madrigal

CONRAD PETERMANN
323 East Matilija Street
Suite 110, PMB 142
Ojai, CA 93023

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'S REPLY BRIEF ON THE MERITS 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:

Edmund G. Brown, Jr.
Attorney General
300 South Spring St
Los Angeles, CA
90013

Clerk Superior Court
For Hon. Edward F.
Brodie, Judge
P.O. Box 6489
Ventura, CA 93006

Second Appellate
District, Div. Six
200 E. Santa Clara St.
Ventura, CA 93001

Mr. Rameen Minoui
Deputy District
Attorney
800 South Victoria
Ventura, CA 93009

Mr. John A. Madrigal
F-47052, B2-247-U
P.O. Box 3030
Susanville, CA 96130

Mr. Charles Cassy
Attorney at Law
800 South Victoria
Avenue
Ventura, CA 93009

California Appellate
Project
520 S. Grand Ave.
Fourth Floor
Los Angeles, CA
90071

Ms. Vanessa Place
Attorney at Law
P.O. Box 351951
Los Angeles, CA
90035

Ms. Sharon Jones
Attorney at Law
P.O. Box 1663
Ventura, CA 93002

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 11, 2009, at Ojai, California.

Conrad Petermann
Attorney for Appellant