ARTHUR MARTIN CALIFORNIA STATE BAR NUMBER 222569

Post Office Box 5084
Klamath Falls, Oregon 97601

arthurmartin.law@gmail.com
ph: 541-331-9671

September 16, 2014

The Honorable Frank A. McGuire, Clerk/Administrator
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797



Re: *People v. Eric Hung Le et al.*
Supreme Court No. S202921
Court of Appeal No. D057392

Dear Mr. McGuire:

I am appellate counsel for appellant and defendant Down George Yang in the above noted case. This letter is responding to the Court's August 27, 2014, request for supplemental letter briefs addressing whether the People adequately met their pleading burden by generically pleading the Penal Code section 186.22 enhancement under subdivision (b)(1) without greater specificity as to whether the People sought enhancement under subdivision (b)(1)(A), (b)(1)(B), or (b)(1)(C) of that section, and whether, in light of such generic pleading, the People should be estopped from relying or permitted to rely at sentencing on subdivision (b)(1)(B) of section 186.22. (Pen. Code, § 1170.1, subd. (e); *People v. Mancebo* (2002) 27 Cal.4th 735.)

Appellant Yang concludes, as detailed below, that:

**(1)** The People met their pleading burden with regard to the gang enhancement, section 186.22, subdivision (b)(1), because: **(a)** the applicable subsection of the enhancement – (A), (B), or (C) – is a matter of law, not prosecutorial discretion; or **(b)** under the facts of this case, in which the gang enhancement is attached to a charged crime, assault with a semiautomatic firearm (§ 245, subd. (b)), that is defined as a "serious felony" as a matter of law (§ 1192.7(c)(31)), neither section 1170.1, subdivision (e), nor the due process right to notice appears implicated in the application of a gang enhancement under subsection (B) rather than (A) or, with the addition of a personal gun use finding, (C).

**(2)** The People should be estopped from arguing at sentencing for enhancement under section 186.22, subdivision (b)(1)(B), because the plain language of the statute says the enhancement under (b)(1)(C) applies.

Appellant respectfully avers that the issue presented in this case does ultimately not turn on pleading or notice requirements, but on the constitutional separation of powers. The District Attorney is asking to Court to find ambiguity in clear, unambiguous statutory language based on the fact that the statutes do not enable prosecutors to maximize sentences in a particular way they would like. The District Attorney cites no authority for this innovative form of executive-power-enhancing statutory interpretation, capable of transforming plain language into ambiguity, and the Court should reject it. Instead, the District Attorney should seek her desired change in the language of the law through legislative action, a campaign that could provide the Legislature an opportunity to consider and possibly rethink the entire gang law/prosecution complex as it has come to exist.

**(1)(a)** The People adequately met their pleading burden because the applicable subsection of the gang enhancement under section 186.22(b)(1) – subsection (A), (B), or (C) – is not up to the People. Which subsection applies is an operation of law, dependent solely on whether the crime of conviction, along with any enhancements alleged and found true, is defined as a violent or serious felony under the law. If a person's crime of conviction is defined as a "violent felony" under section 667.5, subdivision (c), and the gang enhancement has been proved, subsection (C) requires "the person shall be punished by an additional term of 10 years." This additional term is an operation of law; the plain language of the statute leaves no room for the government to pick a different subsection once the crime has been defined as violent.

Appellant proposes that the language of the gang enhancement requires the People *only* plead the generic 186.22(b)(1). The specific applicability of subsection (A), (B), or (C), cannot be determined until the final verdicts have been reached. At that point the statutes determine whether the crime of conviction, along with any enhancements pled and proved, is a "serious" or "violent" felony under the law, which in turn determines which subsection, (A), (B), or (C), applies. (See §§ 667.5. subd. (c) [defining "violent felonies"], 1192.7, subd. (c) [defining "serious felonies"].)

**(1)(b)** If, on the other hand, prosecutors have the discretion to pick which specific subsection of the gang enhancement will apply in order to maximize a defendant's sentence, is a defendant's right to notice implicated in that choice? A defendant has a due process right to fair notice of the allegations that will be invoked to increase the punishment for his or her crimes. (*People v. Mancebo* (2002) 27 Cal.4th 735, 747; § 1170.1, subd. (e).) The due process right to fair notice "requires that an accused be advised of the charges against him in order that he may

have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (*In re Hess* (1955) 45 Cal.2d 171, 175.) Thus, the right to notice involves what the government purports to prove, and what evidence they will use to prove it.

When a prosecutor charges a gang enhancement under section 186.22(b)(1), she purports to prove that the defendant committed a specific felony "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).) That language provides the elements that must be proved for imposition of a gang enhancement. The subdivision goes on to specify the terms of enhanced punishment that apply to different specific felonies, depending on whether they are defined as violent (C), serious (B), or neither (A), by the defining statutes: section 667.5, subdivision (c), defining violent; section 1192.7, subdivision (c), serious. In some cases, whether a felony is defined as serious or violent involves additional facts beyond the crime standing alone. For instance, any felony becomes violent if the government alleges and proves the additional fact that a defendant personally uses a gun. (§§ 667.5, subd. (c)(8), 12022.5.) If the government does not allege and prove the additional fact, a crime not otherwise defined as violent would not become violent, even if evidence at trial makes clear the defendant personally used a gun. Facts that make a difference in defining a crime as serious or violent must all be alleged in advance and proved in court; then, depending on what is alleged and proved, the crime attains a particular definitional status that determines which additional term under the gang enhancement applies. As long as all the facts that ultimately define a crime as serious or violent are pled, either as elements of the crime, or attached to a crime through additional enhancement allegations, a defendant is on notice of how long the gang enhancement's additional term could be.

The situation with the gang enhancement is different than that addressed in *People v. Mancebo, supra*, 27 Cal.4th 735. *Mancebo* concerned notice of a sentence-enhancing factual circumstance that had to be pled and proved to a jury under section 667.61. (See § 667.61, subd. (*o*) [pleading and proof requirement]). The section 667.61 circumstances constitute distinct factual findings that a defendant must have the opportunity to contest before they can be used to enhance a sentence. By contrast, once a defendant has been convicted of a felony and the elements of the gang enhancement under section 186.22(b)(1) have been pled and proved, there is no separate defense against the different subsections of the gang enhancement. The only question is whether the statutes define the felony at issue as "serious" or "violent." Thus, the notice implicated in a prosecutor's decision to seek imposition of a gang enhancement term under subsection (A), (B), or (C), would be

notice of the maximum possible sentence. It seems fair and just for a prosecutor to give such notice, but the law of due process as described in *In re Hess, supra,* 45 Cal.2d 171, 175, which focuses on charges and the purported proof of those charges, does not require it.

In the case at bar, where the underlying charge was a violation of section 245, subdivision (b), the right to notice is not implicated in the application of the specific gang enhancement term for serious felonies under section 186.22(b)(1)(B). A conviction under section 245, subdivision (b) – "assault . . . with a semiautomatic firearm" – is defined as a "serious felony" under section 1192.7(c)(31), which specifically encompasses "assault with a . . . semiautomatic firearm." The crime itself qualifies as serious without any additional findings that would trigger an additional notice requirement under the principles of due process.

**(2)** As discussed in appellant Yang's Answer Brief on the Merits, the gang enhancement penalties defined in section 186.22(b)(1) are specific to the crimes of conviction to which the enhancement attaches. A crime defined as violent under section 667.5 "shall be" enhanced by the term defined in subdivision (b)(1)(C). The language is plain and mandatory and should estop the District Attorney from arguing for the application of an enhancement term under subdivision (b)(1)(B) when (C) applies.

The District Attorney has not put forth a convincing case that the mandatory, "shall" language in section 186.22(b)(1) gives the government discretion to choose a lesser gang enhancement in order to maximize an overall sentence. Instead, she asks the Court to "harmonize" the various statutes, by which she means read them in a way that finds ambiguity in plain language and rewrite them in a way that gives the government the broadest possible sentencing power. But "maximizing the prosecutor's sentencing power" is not an accepted canon of statutory interpretation that can transform plain language into ambiguity.

This is the crucial fact: the Legislature wrote section 186.22(b)(1) so that the enhancement term imposed is mandatory based on the nature of the underlying crime, which, in some percentage of cases, takes account of the use of a gun. In other words, the applicable gang enhancement depends on the serious or violent nature of the crime and in some cases the serious or violent nature of the crime depends on the use of a gun. When the use of a gun alters the gang enhancement term by making a crime serious or violent, the gang enhancement term (based on a status that is determined by gun use) uses up the gun use for enhancement purposes. (See *People v. Rodriguez* (2009) 47 Cal.4th 501, 509.) Accordingly, in such cases, section 1170.1, subdivision (f), precludes imposition of both a gang enhancement and a gun use enhancement because both are based on the single use of a gun.

## DECLARATION OF SERVICE

Case Name: PEOPLE V. ERIC HUNG LE et al. No. S202921

I declare:

I am employed in the County of Klamath, Oregon. I am over 18 years of age and not a party to the within entitled cause; my business address is P.O. Box 5084, Klamath Falls, OR 97601.

On September 16, 2014, I served the attached

**APPELLANT DOWN GEORGE YANG'S SUPPLEMENTAL LETTER BRIEF**

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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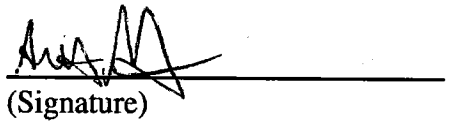
|---|---|
| Office of the District Attorney<br>of San Diego County<br>Attn: Craig Evans Fisher<br>330 W. Broadway, Ste. 860<br>San Diego, CA 92101 | Judge Charles G. Rogers<br>Superior Court of San Diego County<br>P.O. Box 122724<br>San Diego, CA 92112-2724 |
| California Court of Appeal<br>Fourth District, Division One<br>750 B Street, Suite 300<br>San Diego, CA 92101 | Appellate Defenders, Inc.<br>555 W. Beech St., Suite 300<br>San Diego, CA 92101 |
| Down George Yang, No. G00263<br>Kern Valley State Prison<br>P. O. Box 5102<br>Delano, CA 93216 | [Co-appellant attorney]<br>Laura Gordon, Atty. at Law<br>P.O. Box 177<br>Escondido, CA 92033 |

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Klamath Falls, Oregon, on September 16, 2014.

I declare under penalty of perjury of the law of California that the foregoing is true and correct, and this declaration was executed at Klamath Falls, Oregon, on September 16, 2014.

ARTHUR MARTIN
(Name)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