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November 7, 2009

Clerk, for delivery to
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

RE: *People* v. *Albert A. Albillar, et. al.*
Supreme Court No. S163905

Dear Clerk:

This letter brief is in response to the Court's August 26, 2009 request for supplemental briefing on the question of whether the phrase "felonious criminal conduct" in Penal Code section 186.22, subdivision (a) should be interpreted as meaning "felonious criminal gang-related conduct." In this response, appellant will not unduly reiterate arguments made in prior pleadings; the following is a demonstration how, by way of both the forest and the trees, the Legislature manifestly intended that the anti-gang legislation curtail and punish gang-related felonies, not non-gang-related felonies which simply happen to be committed by gang members.

Introduction

The predicate principle of statutory construction is that statutes are to be read with an eye towards inner and outer harmony. (*People v. Acosta* (2002) 29 Cal.4th 105, 134, quoting *People v. Murphy* (2001) 25 Cal.4th 136, 142.) As this Court has trenchantly put it: "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. (*Summers v. Newman* (1999) 20 Cal.4th 1021, 1026; *People v. Honig* (1996) 48 Cal.App.4th 289, 327 ["the rule of statutory construction governing statutes *in pari materia* describes a process of interpretation by reference to related statutes."].) Plain meaning is preferred, so long as it is not absurd. (*People v. Hammer* (2003) 30 Cal.4th 756, 762 ["We begin by examining the statute's words, giving them a plain and commonsense meaning."].) There is no rule of strict construction of penal statutes in California (Pen. Code § 4; *People v. Bamberg* (2009) 175 Cal.App.4th 618, 627), however, the rule of lenity will apply in case of ambiguity. (*People v. Avery* (2002) 27 Cal.4th 49, 57 ["....when a statute is capable of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant."].) By its terms and history, section 186.22 does not appear overtly ambiguous; if

it is ambiguous as applied, then the rule of lenity should also apply, and lead to the same conclusion. (*Ladner v. United States* (1958) 358 U.S. 169, 177-178.)

1. SB 1555: The evolution of the law

In March, 1987, California State Senator Alan Robbins introduced Senate Bill 1555 ("SB 1555") to address a perceived void in existing law which provided no additional or separate criminal punishment for "the commission of criminal offenses by individuals who are members of street gangs." (Leg. Counsel's Dig. SB 1555, Mar. 6, 1987, p. 1; see Appellant's Motion for Judicial Notice of Legislative History Materials[1].) The preface to SB 1555 set forth the following statement of purpose:

> Under existing law, there are no provisions which specifically make the commission of criminal offenses by individuals who are members of street gangs and [sic] separate and distinctly punished offense, or which provide for the forfeiture of the proceeds of gang-related activity. [¶] This bill would provide that any person who commits any act which constitutes a felony, misdemeanor, or infraction in violation of any state law or city ordinance, 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 or further any of its criminal gang activity, or to assist in continuing its pattern of gang-related activity, as specified.

(Leg. Coun. Dig., SB 1555, p. 1.) The introductory materials went on to dilate:

> The Legislature, however, further finds that the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods....It is

[1] By separate motion submitted on behalf of all appellants, it is requested this Court take judicial notice of the non-published legislative history materials referred to in this letter brief, such as the letters in support of the bill. Although such documents are not automatically considered relevant as an aid to statutory construction, they are entitled to consideration insofar as they represent a reiteration of legislative discussion and events. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 608 fn. 19; *see also, California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 700.) This is particularly true where an author or sponsor's statements "appear to be part of the debate on the legislation wand were communicated to other legislators...." (*Carter v. California Dept.of Veterans Affairs* (2006) 38 Cal.4th 914, 928.) By comparison, a "simple citation to 'published' legislative documents (e.g., legislative bills, committee and floor analyses) is suffient to bring such documents to this Court's attention." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 440, fn. 18; *Quelimane Co. v. Steart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46, fn. 9.) All documents related to the legislative history of the STEP Act cited herein are included in a Motion for Judicial Notice filed in conjunction with this letter brief by co-appellant Madrigal.

> the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing on patterns of criminal activity by street gangs and upon the organized nature of street gangs, which in combination, are the chief source of terror created by street gangs.

(*Id.*, at p. 3.) Thus, from the bill's inception, the stated legislative impetus was to target violent crimes committed by violent street gangs, *i.e.* gang-related violent offenses. (*Id.*, at p. 20 ["In order to provide the tools necessary for law enforcement to stem the tide of illegal gang warfare without infringing upon the constitutional rights of any individual, at the earliest possible time, it is necessary that this act take effect immediately."].)

As originally drafted, SB 1555 added several Penal Code sections, beginning with section 186.10, and was called the "California Street Terrorism and Anti-Gang Act," a title that was subsequently changed to the "Street Terrorism Enforcement and Prevention Act." (SB 1555, as amended in Senate on May 22, 1987.) The original bill also incorporated the above intent to eradicate gang crimes, an intent stated in unequivocal language, language which changed little during the STEP Act's many amendments:

> It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang-related activity and upon the organized nature of street gangs, which in combination, are the chief source of terror created by street gangs....

(Leg. Dig. SB 1555, Mar. 6, 1987, p. 3; Leg. Dig. SB 1555, May 22, 1987[2], p. 5; AMJN pp. ___; *see also*, Leg. Dig. SB 1555, May 22, 1987, pp. 3-4 [requirement that the Attorney General submit a report on the bill's effect "On the control of criminal street gang activity."].) This short statement of intent was subsequently prefaced by a more expansive declaration of purpose, which included the factual motivation behind the proposed legislation: "The Legislature finds that there are nearly 600 criminal street gangs operating in California, and that the number of gang-related murders is increasing. The Legislature also finds that in Los Angeles County alone there were 328 gang-related murders in 1986, and that gang homicides in 1987 have increased 80 percent over 1986. It is the intent of the Legislature...." The section goes on to state that the Legislature's additional finding that forfeiture of profits, proceeds and instrumentalities acquired/used by street gangs are another way of "punishing and deterring the criminal activities of street gangs." (Leg. Dig. SB 1555, May 22, 1987, p. 5; *People v. Canty* (2004) 32 Cal.4th 1266, 1280 ["In considering the purpose of legislation, statements of the intent of the enacting body contained in a preamble, while not conclusive, are entitled to consideration. [Citations.] Although such statements in an uncodified section do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute."].)

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[2] The May 22, 1987 amendment renumbered the code sections, beginning with section 186.20, instead of 186.10. (Leg. Dig. SB 1555, p. 5.)

Just as forfeiture furthered the overall goal of penalizing "gang" activity, the above-quoted passage from the bill's statement of intent was amended in June 4, 1987, to substitute the phrase "criminal gang activity" for the phrase "criminal gang-related activity." (Leg. Dig. SB 1555, p. 5.) Over the course of ten subsequent amendments, this language was not changed. The final version of SB 1555 was enacted and signed into law on September 23, 1988, and contained the same statement of legislative intent in its section 186.21. (Leg. Dig. SB 1555, Jun. 4, 1987, p. 5.; Jun. 23, 1987, p.5; Aug. 20, 1987, p. 5; May 2, 1988, p. 5; Jun. 30, 1988, p. 5; Aug. 9, 1988, p. 5; Aug. 25, 1988, p. 5; Aug. 29, 1988, p. 5; Aug. 30, 1988, p. 5.) As will be discussed, this change was a change in prosecutorial application, not Legislative intent. Given the statutory scheme in which the statement of purpose was promulgated, the deletion of the word "related" in the context of "patterns of criminal gang-related activity" implicates the predicate offense provisions of the prohibition. Put another way, the Legislature's statement of intent says that the Legislature wants to eliminate current criminal activity by gangs by way of focusing on "patterns" of criminal "gang" activity, particularly those gangs that act as an organized unit. Removing "related" from the "pattern of criminal gang activity" clause puts the emphasis back on the "gang" origin of the criminal history sought to be prospectively abated—thus confirming that the Legislature was targeting gangs with criminal pasts while disavowing any legislative intent to substantively address future criminal activity *outside* the rubric of the "gang." For purposes of establishing a qualifying pattern of conduct, it mattered not so much to the Legislature that the constituent criminality was itself proven to be gang-related as much as that it was being committed by a gang acting as a "gang." This allowed prosecutors and courts to consider all predicate criminality committed by gang members as constituting the aforementioned "pattern," thus relieving the State from having to retroactively demonstrate that the prior offenses constituting the predicate pattern or criminality of the group were gang-related. An analysis which mirrors that reached by this Court in *People v. Gardeley* (1996) 14 Cal.4th 602, in finding that section 1866.22, subdivision (e) did not require a prosecutor demonstrate that the prerequisite "pattern" of criminal offenses be gang-related because of the phrase was omitted from subdivision (e). (*Id.*, at pp. 621-622.)

The original version of what eventually became subdivision (a) of section 186.22, set forth the elements of the substantive criminal offense:

> Any person who commits any act which may be charged as a felony, misdemeanor, or infraction in violation of any state law or ordinance of any city, shall be guilty of a separate and distinct offense punishable pursuant to Section 186.14 if the felony, misdemeanor, or infraction: (1) is part of a pattern of criminal gang-related activity, or is done for the benefit of, at the direction of, or in association with, any gang, and, (2) is committed with the specific intent to promote or further any of its criminal gang-related activity, or to assist in continuing its pattern of criminal gang-related activity.

(Leg. Dig. SB 1555, Mar. 6, 1987, p. 5.)

The first amendment to SB 1555, on May 22, 1987, renumbered and rewrote the above section to read: "Any 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 criminal gang activity, and with the specific intent to promote, further, or assist in any criminal conduct by its members or participants, shall be punishable by imprisonment..." (Leg. Dig. SB 1555, May 22, 1987, p. 10.) A later amendment dropped the words, "or participants" from the subdivision. (Leg. Dig. SB 1555, June 23, 1987, p. 6.) The May 22nd amendment, then, conformed to the revised statement of intent (and the above analysis) by eliminating the requirement that the "pattern" of criminality be gang-related. What the amendment did not do was revise the Legislature's intent to have the instant offense be part of the problem the STEP Act was to address—the problem of gang-related felonies.

Moreover, as a matter of grammatical construction, inserting the words "gang-related" after the word "felonious" in subdivision (a) would create an awkward self-referential redundancy in the sentence, which would then read, "any felonious gang-related criminal conduct by members of that gang." Inasmuch as membership in this context implies active membership, a member's criminal conduct would be definitionally gang-related, else it would fall outside the ambit of active membership. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang."].) By way of comparison, subdivision (b) warrants the supplement: because that section reaches the non-gang member, the prerequisite that the crime be gang-related must be separately articulated as an element, for unlike the relationship of active gang member to gang crime, the gang-relationship of non-gang member to gang crime cannot be imputed or assumed. In this, the principle of *noscitur a sociis* (it is known by its associates) applies. Under this principle, "'a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant.'" (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 307.) But, as noted, the primary flaw in expanding "gang crimes" to mean "non-gang-related crimes" is that the punishment would no longer fit the crime, for:

> Contrary to what is required for an enhancement under section 186.22(b), section 186.22(a) does not require that the crime be for the benefit of the gang. Rather, it "punishes active gang participation where the defendant promotes or assists in felonious conduct by the gang. It is a substantive offense whose gravamen is the *participation in the gang itself.*"

(*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1334, emphasis in the original, quoting *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fns. omitted.) It is perhaps too obvious to point out that "benefit" is qualitatively different from "related." A gang member may commit any number of gang-crimes that do not ultimately "benefit" the gang, but are "gang-related." For example, a botched robbery or inept shooting—even the spare fact of simple weapon possession

may be enough to prove active participation plus commission of a gang-related crime while not being necessarily sufficient proof that the crime actually benefited or promoted the gang as a gang. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.)

The Los Angeles City Attorney's Office and the Los Angeles District Attorney's Office were the sponsoring agencies behind SB 1555. In a report prepared by the City Attorney's Office for the Senate Committee on Judiciary for a May 19, 1987 hearing (and reissued for later hearings), the first of the proposed legislation's "Key Issues" was whether guilt should be ascribed to a separate 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." In the comment section, under the heading "Need for legislation," the City Attorney cites Sen. Robbins as citing the nearly 800 California street gangs, gang-related murders, and the fact that "[y]outh gangs represent both big business and big-time crime in California." (Emphasis in the original.)[3] The gang-relationship of the crimes targeted was thus embedded in the very definition of "street gang" and in the legislative desire to eradicate or curtail this particular form of organized crime.

A subsequent memorandum prepared jointly by the City Attorney and District Attorney for a May 26, 1987 Senate Committee on Judiciary hearing, states:

> Under this bill, any person who actively conducted or participated, either directly or indirectly, in any gang, with the specific intent to promote or further any of its criminal gang-related activity, would be guilty of an offense.

In a similar Senate Committee on Judiciary memorandum prepared for a June 9, 1987 hearing, the two prosecution agencies explain that fears of creating a "status offense" are unfounded, as: "Courts have repeatedly held that mere association with a group having both illegal and legal aims cannot be punished unless there is proof that the defendant knows of, and either shares in, or 'specifically intends' to further the illegal aims. Scales v. United States (1961) 367 U.S. 203, 229." (Emphasis in the original.) "The illegal aims" here grammatically referencing the illegal aims of the gang. And if one knows of and shares in/intentionally advances the gang *qua* gang's criminality, one thereby has committed a gang-related crime. Otherwise, the nexus is broken, and what crime has been committed is not a gang crime, and is outside the purview of the proposed legislation. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324; *People v. Castenada* (2000) 23 Cal.4th 743, 752; *People v. Zermeno* (1999) 21 Cal.4th 927, 930; *People v. Loeun* (1997) 17 Cal.4th 1, 9-10.)

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[3] Similarly,in a Senate Committee on Judiciary Background Information memorandum marked "DRAFT – February 23, 1987," and titled "Robbins Calls for Crackdown on Teen Terrorist Gangs," the aim of the bill was, according to its Senate sponsor,"to provide California law enforcement officials with the legal tools to 'put the growing number of murdering, drug-pushing youth street gang members behind basrs where they can no longer terrorize the State's citizens."

For, again, it was gang-related gang crime that had been identified as the plague the Legislature was to stop. In the earliest report prepared for the Legislature on the topic, the Attorney General's Youth Gang Task Force's "Report on Youth Gang Violence in California" (June 1981)[4], notes in its "Definitions" section that "[t]he purpose of classifying 'gang related' crimes is to show the frequency of gang members involved in criminal activity and how that criminality impacts the community." Similarly, a sampling of the California Council on Criminal Justice's State Task Force[5] on Youth Gang Violence's Final Report (February 3, 1986) shows that the Task Force assumes as a foundational matter that the problem before the Council is a gang problem, not a problem involving people who happen to be gang members.[6] "What we found is very basic: youth gang violence in California is one of the most pressing criminal justice issues facing our great state...." [Letter to the Governor]; "Most of today's youth gangs operate similarly to corporate structures or age-old fraternal organizations."[Statement of the Chairman]; "The following are actual case facts on reported incidents of violence related to these gangs." [Crimes By Youth Gangs In California]. In the same vein, an April 24, 1987 letter from the Los Angeles City Council Office of the Chief Legislative Analyst to the Senate Judiciary Committee endorsed SB 1555 as "an effective tool in our constant struggle with gang-related crimes." In a letter dated June 26, 1987, the County of Los Angeles Chief Administrative Officer supported SB 1555 to the Senate Appropriations Committee by saying that the crimes created by the bill would "combat gang-activity or street terrorism, its penalties dependant on the nature of the crime and the "pattern of criminal gang-related activity." A "Bill Analysis Worksheet" from the Assembly Committee on Public Safety, stamped received on June 20, 1987, has, under the form header "Need for bill," a handwritten, "need to stop gang related violence." A June 30, 1987 memorandum prepared by the bill's sponsors for the Senate Rules Committee flatly states that "Specifically, SB 1555 provides for misdemeanor and felony penalties depending on the nature of the offense and the pattern of criminal gang related activity," and focuses "on the patterns of gang related criminal activity and on the organized nature of street gangs." Finally, an August 10, 1988 letter from the Los Angeles City Attorney to the director of the Commission on State Mandates, with copies sent to the Legislative Analyst, the Department of Finance, the consultant to the Senate Committee on Appropriations, the bill's sponsor, and Assemblywoman Gwen Moore, indicates that the legislation would not create additional agency costs due to its

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[4] In its Introduction, the report indicates that one of its purposes is to provide a basis for recommendations for legislation prepared by its Legislative Subcommittee. (*Carter v. California Dept.of Veterans Affairs*, *supra*, 38 Cal.4th at p. 928.)

[5] The California Council on Criminal Justice is identified in the report as the "primary advisory board to the Governor and the Legislature on criminal justice issues and policies." Its members included the Attorney General, the Administrative Director of the Courts, and appointees named by the Govenor, the Sentate Rules Committee, and the Speaker of the Assembly. (*Carter v. California Dept.of Veterans Affairs*, *supra*, 38 Cal.4th at p. 928.)

[6] Or, more precisely, a criminal gang problem, not a problem involving criminals who happen to be gang members.

requirement that the City Attorney prepare gang violence statistics because the office already routinely prepared statistics "concerning gang related offenses."

2. SB 1555: The bill as understood

Various reports and memoranda prepared by supporters of SB 1555 from outside the Legislature also show that the "street terrorism" provisions of the bill were, from the start, concerned with gang-related crimes committed by gang members. This understanding is evidenced in descriptions by the bill's supporters of the social evil sought to be ameliorated, in the language used in endorsing the proposed legislation, and in their efforts to assuage opponents' fears that the bill would improperly punish mere membership in violation of First Amendment rights; would duplicate existing criminal sanctions, such as conspiracy provisions; or reach unintended targets, such as unwitting participants in gang crimes. Descriptions and language that, again, exactly parallel the description and language used in the legislative debate/process. (*Carter v. California Dept. of Veterans Affairs*, *supra*, 38 Cal.4th at p. 928; *Donovan v. Poway Unified School Dist.*, *supra*, 167 Cal.App.4th at p. 608 fn. 19.)

Letters supporting the STEP Act evidence a catholic comprehension that its provisions would only be applied to gang-related crimes.[7] So that an April 21, 1987 letter from the Neighborhood Action Group to Sen. Robbins said the legislation was "badly needed to fight the growing gang problem in Los Angeles and other areas." Letters from the City of Compton Crime Committee, the Southern Christian Leadership Conference/LA, and the Chief of the Los Angeles Police Department uniformly refer to "street gang criminal activity," "crimes committed by gangs," and "the battle against gangs." The Chief of Police for the City of San José supported the bill in a letter dated May 5, 1987 by saying that "For the first time, illegal acts committed as a result of gang-related activities will be punishable as a separate offense...." In its May 27, 1987 letter of support, the Los Angeles County Board of Supervisors endorsed the bill based on its understanding that SB 1555 "would stiffen penalties in cases when a crime can be shown to be part of a pattern of gang activity." KHJ-TV/Los Angeles broadcast an editorial from June 11 to June 14, 1987, supporting Sen. Robbins' bill: "The key to his bill is to jail the violent gang member if he commits any offense as part of a pattern of gang related crimes." On June 16, 1987, the Legislative Oversight Committee of the combined California Peace Officers' Association, California Police Chiefs' Association, and California State Sheriffs' Association writes to Sen. Robbins that "Gangs and gang related activities are a major police problem in every major city in California." On June 22, 1987, the California District Attorneys Association writes that the legislation is needed because "[e]xisting law does not make gang related criminal offenses separate and distinct crimes," and "[g]ang related activities have become a serious problem." The

[7] These lettters, and letters in opposition to the bill, were referenced and their authors identified in various memoranda prepared for state lawmakers, including as part of the Senate Floor Analyses and as part of the legislative recommendation for the Governor to sign SB 1555 (over its legislative rival, AB 2013) presented to the Governor. (*Carter v. California Dept.of Veterans Affairs*, *supra*, 38 Cal.4th at p. 928.)

League of California Cities supported SB 1555 as a "strong and creative approach to dealing with the many significant problems resulting from gang activity." Concerned Citizens for Better Government on June 29, 1988 issued an open letter to "Elected Officials, Judges, and Paid Public Servants" asking for passage of SB 1555 as a response to its organization's call for "stricter laws against gang-related activities."

In other words—and many of them—criminal gangs were understood by all backers of the proposed legislation to be a problem only because of—and to the extent of—their "gang-related" criminal activities. (*Accord*, *People v. Castenada*, *supra*, 23 Cal.4th at p. 752 [section 186.22(a) properly links "criminal liability to a defendant's criminal conduct in furtherance of a street gang"].) This relationship was publically and privately reaffirmed by Sen. Robbins in an October 18, 1988 letter in which he assured the publisher of *Political Needle* that its September issue "correctly stated" that "gang members involved in furthering the criminal activities of gangs should be removed from the streets, and this bill does exactly that." For absent its "gang-related" criminality, a gang is just another First Amendment-protected group. (*Contra*, *Scales v. United States* (1961) 367 U.S. 203, 224-225.)

Perhaps most emblematic is a letter to the State Attorney General from the one of the legislative sponsors, dated April 15, 1987, in which the Los Angeles City Attorney wrote, "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." The letter goes on to describe, under the heading "EXAMPLES OF FACTUAL APPLICATIONS," the following scenario as the kind of offense punishable as "street terrorism" under SB 1555:

> 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 <u>both</u> offenses."

It is worth adding that the example given under the forfeiture section hypothesizes a situation in which a robber, fresh from stealing an elderly woman's purse, is found to have "a lengthy record of robberies, thefts, and assaults—all connected with his membership and participation in a street gang…[I]nvestigation reveals that all of these robberies were planned and coordinated by the gang." Were, in two words, gang-related. In fact, every subsection of the

proposed legislation as illustrated by the City Attorney's memorandum absolutely contemplates that the underlying offense be gang-related. So that, for example, in the scenario provided for subsection (d), the defendant buys a motel with money derived from "on-going illegal activity of the street gang." Subdivision (e) details a gang member's request for "protection" money from a legitimate businessman: the hypothetical street gang "primarily obtains money through extortion of legitimate business persons." Subdivision (f) concerns a hypothetical gang member demanding that a citizen allow the gang to use his yard to sell drugs, else his house "be shot-up." In the example for subdivision (h), the police determine that the minor gang member's parents are profiting by their son's gang-related drug sales.

As previously noted, the sentiments and rationales expressed in the preceding documents in support of the STEP Act accurately reflect the sentiments and rationales of the Legislature in drafting the Act itself: the issue at hand involved outlawing criminal street gangs, *i.e.*, outlawing gang-related criminality. (*Carter v. California Dept. of Veterans Affairs*, *supra*, 38 Cal.4th at p. 928.) The legislative drafters and supporters of SB 1555 were well aware of the fact that any law addressing criminal street gangs and imposing criminal penalties for acts committed by members of such gangs must specifically address only criminal conduct related to the gang and a pattern of criminal gang activity as defined by the legislation. Otherwise, what would be outlawed under the new law would be the status of being a gang member, and this would be constitutionally untenable. (*People v. Loeun* (1997) 17 Cal.4th 1, 11.) For if the criminal conduct proscribed in subdivision (a) is not gang-related, then the conduct is irrelevant in proving the defendant's "'guilty knowledge and intent' of [his] organization's criminal purposes" that this Court has cited as the thing that distinguishes the STEP Act from an impermissible status prohibition (*People v. Castenada, supra,* 23 Cal.4th at p. 749) and/or proof of the defendant's personal knowledge of his group's unlawful goals or his specific intent to advance those goals that the United States Supreme Court has required of statutes imbricating group membership. (*Scales v. United States, supra,* 367 U.S. at pp. 228-230). Absent a relationship between the criminal gang and its criminal conduct, the "any felonious criminal conduct" language in section 186.22, subdivision (a) is a license to admit other crimes evidence wholly unrelated to the statute's universally understood target of active gang participation. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467; *c.f.*, *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 632 ["Penal statutes will not be made to reach beyond their plain intent; they include only those offenses coming clearly within the import of their language."].)

3. SB 1555: Respondent's analysis

Respondent primarily argues the force of what is omitted from the statute: if "gang-related" does not appear in subsection (a), it should not be so construed. (Respondent's October 28, 2009 Letter Brief [RSLB], at pp. 2-3, 8-10, 13, 17-18.) But more telling than absence is what is present—a repeated intent to reach gang-related gang violence. As has been shown, the anti-gang legislation was passed on its pledge to target gang-related violent crime. To dilate that into a Government mandate to doubly-prosecute criminal gang members for being criminal gang

members is to intentionally misread the statute into linguistic redundancy and First Amendment-sanctioned associations. (*Contra*, *Reno v. Baird* (1998) 18 Cal.4th 640, 658 ["It is a maxim of statutory construction that 'Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.'"], quoting *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) Put another way, if respondent is correct that subdivision (a) applies "even when [gang members are] committing crimes solely for individual benefit" because such crimes "pose additional problems for the community not posed by criminal collaborations by non-gang members" (RSLB, p. 4), then subdivision (a) criminalizes only the fact of someone's gang status as the predicate offense is otherwise criminalized, just as the fact of criminal collaboration is otherwise criminalized. Given that the sponsors of SB 1555 took some pains to explain to the Legislature that the scienter requirement of the bill saved it from constitutional condemnation, and that it did not duplicate existing criminal syndicalism or conspiracy statutes, this more generous/bloated reading cannot withstand historical scrutiny. (*See e.g.*, Memorandum prepared for June 9, 1987 Senate Committee on Judiciary; Memorandum prepared for August 18, 1987 hearing by Assembly Committee on Public Safety; "Factual Applications" section of the April 15, 1987 letter/memorandum prepared by the Los Angeles City Attorney for the Attorney General.)

Respondent additionally argues that the harsher terms provided by subdivision (b) indicate a legislative desire to deal more drastically with gang-related offenses versus non-gang-related offenses. (RSLB, p. 4.) Leaving aside the fundamental illogic of enacting anti-gang legislation to target non-gang crime, this argument (again) raises the spectre of improper prosecution of gang members whose offenses are otherwise covered by other Penal Code provisions, a spectre the bill's supporters (again) took pains to lay to rest during the legislative process. Moreover, it is a simpler matter to note that subdivision (b) does proscribe the specific intent to promote the gang, whereas subdivision (a) requires no such proof. Facilitation of a gang-related crime without specifically intending that it promote the gang would thus be a lesser offense, so to speak, than intentionally advancing the gang's criminal cause, and would thus warrant a shorter prison term. The "lower bar" (RSLB, p. 5) contemplated by subdivision (a) is the lower bar of a lesser mens rea, not the lack of a gang-nexus to the gang-crime. (*Accord*, RSLB, pp. 5-6 [citing Legislative intent to combat gang violence, as exemplified by gang-related murders].)

By the same token, there are several comparisons in the legislative history between the current manifestation of the criminal street gang and organized crime. Like statutes opposing organized crime, section 186.22, subdivision (a) cannot be read to reach any crime committed outside the ambit of the criminal organization. (*C.f.*, *Cedric Kushner Promotions, Ltd. v. King* (2001) 533 U.S. 158, 164-165 [purpose of Racketeer Influenced and Corrupt Organizations Act [RICO] is to protect public from pattern of unlawful corporate activity committed by corporate agents]; *United States v. Turkette* (1981) 452 U.S. 576, 580-582 [acts sanctioned by RICO are unlawful acts by members of a corporate enterprise, whether the enterprise is otherwise legitimate or illegitimate].) Like a criminal syndicate, a gang is as a corporate body, able to act

only through its individual members; but this does not mean that the actions of those individual members are always gang-related. (*People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198 ["frolic and detour"].)

Conclusion

Like the factual scenarios sketched above, the legislative language and history of Penal Code section 186.22, subdivision (a) assume that the offenses addressed by the creation of a separate, distinct crime of "street terrorism" were those with a nexus to gang-related criminal activities. Not to put too fine a point on it, but otherwise, what's the point? Absent some relationship to the gang, crimes committed by gang members are not gang-related crimes, and thus, the statute fails to punish what it set out to punish—active gang membership. The legislative history of section 186.22, subdivision (a) is replete with official use of the collective noun ("gang") and the plural form "gang members." Collective nouns are nouns that are singular in form but denote a collection of persons/things regarded as a unit, like "team" or "government." (http://www.britishcouncil.org/learnenglish-central-grammar-collective-nouns.htm.) Members of a team are members of a team only when playing for that team. The only thing that makes a crime a gang crime is its relationship to the gang.

Very truly yours,

Vanessa Place

Proof of Service

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is Post Office Box 18613, Los Angeles, California 90018. I am a member of the bar of this court.

On November 9, 2009, I served the within

SUPPLEMENTAL LETTER BRIEF

in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

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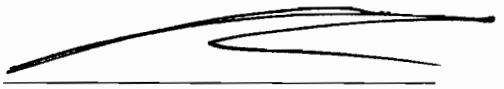
I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of November, 2009 at Los Angeles, California.



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