S163905

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ALBERT A. ALBILLAR, Defendant and Appellant.	Crim. No. S163905 (Court of Appeal No. B194358 Sup. Ct. No. 2005044985)

BRIEF ON THE MERITS

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ISSUE ON REVIEW

Does substantial evidence support the defendant's conviction under Penal Code section 186.22, subdivision (a), and the findings that the offenses were committed for the benefit of, in association with, or at the direction of, a criminal street gang within the meaning of section 186.22, subdivision (b)?

STATEMENT OF THE CASE

An information was filed charging appellant with rape in concert (count 1, Pen. Code § 264.1), rape by foreign object in concert (count 2, Pen. Code § 264.1), street terrorism (count 3, Pen. Code § 186.22(a)), and unlawful sexual intercourse (count 4, Pen. Code § 261.5(c)). A Penal Code section 186.22, subdivision (b)(1) gang enhancement was alleged as to counts 1 and 2.[1] Appellant pled not guilty. (CT 1:30-34, 1:37)

A pretrial motion to bifurcate the gang allegations was denied; an Evidence Code section 352 motion to exclude gang evidence was denied during trial. The court also overruled numerous trial objections to gang evidence on relevance, prejudice, hearsay and foundational grounds. (RT 3:637, 4:710, 4:712, 4:769) (CT 1:92, 1:130; RT 3:469-470) Pretrial, counsel for Alex Albillar moved to exclude references to co-defendant and defense witnesses' criminal histories, including charges and accusations, to sever the gang allegations from the other charges, and to admit evidence of a prior false accusation by one of the victims. The prosecutor's trial brief argued for admission of expert gang testimony and exclusion of evidence of the victims' sexual histories. (2nd Aug. CT 1:1-3, 19-43, 44-56, 57-60; RT 1:20-26)

During deliberations, the jury sent a note pointing out that the instructions indicated the People had to prove the crime was committed "for the benefit of, at the direction of [or] in association w/gang" while the verdict forms said the crime had to be

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[1] Appellant's co-defendants, John A. Madrigal and Alex A. Albillar, were also charged in counts 1, 2, and 3. (CT 1:32-34)

"committed for the benefit of, at the direction of [and] in association with a criminal street gang," asking which was the proper conjunctive. The court responded in writing that "The answer is 'or'." (CT 2:221-224; RT 5:1032-1033)

Appellant was found guilty as charged; the gang enhancement was found true. (CT 2:198-205, 2:225; RT 5:1034-1039) The court denied a motion for new trial, and appellant was sentenced to a total of 20 years: count 1 - the midterm of 7 years, plus 10 years pursuant to section 186.22, served consecutively; count 2 - one-third the midterm of 28 months, served consecutively; count 3 - the midterm of 2 years, served concurrently; and count 4 - one-third the midterm of 8 months, served consecutively. The count 2 section 186.22 allegation was stricken under section 1385. Appellant was credited with 432 days precommitment confinement, including 56 days conduct credit. (CT 2:261-267; CT 1:1-12; RT 5:1050, 5:1058-1059, 5:1082-1085)

Appellant filed a timely notice of appeal from the judgment. (CT 2:268) The judgment was affirmed in a published opinion by the Second District Court of Appeal, Division Six, in *People v. Madrigal, et al.*, Case No. B194358.

STATEMENT OF APPEALABILITY

This is an appeal from a judgment that finally disposes of all the issues between the parties. (Cal. Rules of Court, rule 8.200.) It follows a jury trial and is authorized by Penal Code section 1237 and rule 8.308 of the California Rules of Court.

STATEMENT OF FACTS

Prosecution Case

On December 29, 2004, Amanda M. was fifteen years old.[2] She had met appellant at her friend Jazmin Sarabia's house that September, meeting his twin brother Alex Albillar and his cousin John Anthony Madrigal sometime in November. Amanda and appellant spoke on the phone regularly, and she'd spent some time with the co-defendants, including Friday night visits to their apartment. Before December 29th, Amanda did not have a romantic relationship with any of the co-defendants, and none of them had ever harmed or threatened her. She was not afraid of them. (RT 1:121-127, 1:130-131, 1:139, 1:184-187, 1:193-194, 1:198-205, 2:298-299, 2:309-310, 2:333-335, 2:372, 2:382) Amanda knew appellant was in the SouthSide Chiques gang because he told her, and showed her his gang tattoo. She had also seen him throw up gang signs and yell the gang's name at another gang while driving. Amanda couldn't remember if Anthony or Alex said anything about SouthSide Chiques, though Alex told Amanda he'd been jumped in the gang when he was younger. Appellant's nickname was Sneaky, Anthony was Spanky, and Alex was Monstro, or "monster" in Spanish. (RT 1:127-132, 2:374, 2:383-384)

On December 29th, appellant called Amanda to hang out with him, Anthony and Carol; appellant and Carol were dating. Appellant and Anthony picked up Amanda

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[2] Given the scope of review, only facts relative to the gang allegations are set forth.

around 6 p.m., then met Carol at a liquor store. Afterwards, they got Alex and went to their friend Adriana's house. Carol was fourteen at the time, Adriana sixteen. At Adriana's, the group stayed outside for about an hour; at some point, appellant suggested to Amanda that they have a "foursome."Amanda thought appellant was joking, and laughed it off. (RT 1:133-138, 1:203-204, 1:207-212, 1:222-224, 2:297-298, 2:324, 2:373)

The six friends bought beer, and drove to the co-defendants' one-bedroom apartment in Thousand Oaks. While in the car, Anthony kissed Amanda. Alex and appellant's godmother was home when they arrived, but left a few minutes later. The co-defendants started drinking. When Alex went to shower, appellant and Carol went into the bedroom. Anthony and Amanda stayed in the living room with Adriana. Anthony and Amanda were kissing, Amanda sitting on Anthony's lap. (RT 1:139-143, 1:186, 1:189, 1:197, 1:207-208, 1:213, 1:216, 1:221, 1:224, 2:332, 2:366) About fifteen minutes later, Carol came out of the bedroom, crying. Amanda asked what happened, and Carol said nothing happened. Amanda, Carol, and Adriana talked in the hallway, but Carol did not say she'd been sexually assaulted. A few minutes later, the group decided to leave. Alex was driving, appellant sitting in the front. Amanda and Anthony sat in the back with Carol and Adriana. Carol was dropped off, then Adriana. Amanda thought she was to be taken home next, but someone wanted to stop back at the apartment to use the bathroom. Appellant asked Amanda to call Carol and see how she was doing. Amanda called, asked

Carol what was wrong, Carol accused Amanda of being with appellant, and hung up. Amanda called her back, and Carol said that appellant had sex with her, she told him to stop, and he didn't. Amanda told Carol that she was on her way home. She then went into the apartment, waiting in the patio. (RT 1:143-148, 1:216-222, 1:225-238, 2:303-304, 2:307, 2:322, 2:332, 2:335-339, 2:343-344, 2:385)

Appellant suggested they go to the back room to talk about Carol. They did, sitting on the bed. Appellant said he had sex with Carol, including oral sex. When she told him to stop, he stopped right away. After Amanda took off her hair tie, appellant played with her hair, then pulled her backwards onto the bed. Appellant kissed Amanda: she was "okay with that." He took off her pants, which was all right as well. (RT 1:148-1:153, 1:190-191, 1:239-249, 2:251-253, 2:344-349, 2:376-378) Alex and Anthony then opened the door and asked if they could "get in." Amanda yelled "no" and "get out." Appellant got off Amanda, Anthony grabbed one of her legs, appellant took the other, and Alex got on top of her. Holding Amanda's hands above her head with his forearm, Alex put his finger into her vagina, then put his penis in her vagina. Amanda screamed "no," "get off me," and tried to close her legs. She did not want to have sex with him, Anthony, or, by that point, appellant. (RT 1:154-159, 2:258-270, 2:340-341-343)

Alex took his penis out of Amanda; she did not think he ejaculated. Next, Anthony got on top of Amanda. He was wearing boxers, and she could see a tattoo above his knee. Amanda slapped Anthony. Anthony said, "You don't even know what you just did,"

which Amanda took as a threat. Anthony bit Amanda's upper thigh and shoulder, put his fingers into her vagina and tried to kiss her. Amanda tried to push Anthony away as he put his penis in her vagina; appellant and Alex stood in the doorway, watching and giggling. Anthony took his penis out of Amanda and left the room. She didn't think he ejaculated. (RT 1:159-167, 2:271-275, 2:303, 2:326-328) Amanda tried to get up, but appellant pushed her back down and got on top of her. She told him to get off her, he put his fingers in her vagina, then penetrated her with his penis. Amanda gave up fighting. Appellant took out his penis, ejaculated on Amanda's stomach, and left the room. After a few seconds, Amanda got up, cleaned herself, and dressed. She went onto the patio and smoked a cigarette; the three co-defendants were in the living room. Appellant asked Amanda what was wrong. When Alex came onto the patio and tried to grab her breasts, appellant suggested they take Amanda home. Everyone got into the car, dropping Amanda off at her apartment complex parking lot. (RT 1:167-172, 1:216, 2:276-286, 2:301, 2:330, 2:350-353, 2:380, 2:384-385) No one said anything about the gang, or mentioned the gang's name, before, during, or after the assaults. (RT 2:270-271, 2:279, 2:302-303)

Amanda walked to a nearby park and cried. She stayed there for hours, thinking about what happened, returning home about 3:30 a.m.. Her mother, sisters and brothers were asleep. After telling her mother she was home, Amanda went into her room. Her older brother was there, and they argued. Amanda did not tell her mother or brother what

happened. Later that night, she called Carol, and told her she'd been raped. The next day, Amanda was sore and bruised. She told her mother she'd bumped into something. She told her little sister Alexandria that she was making out with appellant, getting ready to have sex, and was raped by Alex, Albert and Anthony. (RT 1:172-175, 2:282, 2:286-294, 2:304-305, 2:307, 2:349-350, 2:353-357, 2:372, 2:385-386, 2:443-446, 2:449-467)

On December 31, Amanda had plans to go to a party in Oxnard with Carol. Susie, a mutual friend, was at Carol's when Amanda arrived. Amanda told Susie what had happened. The party was at the house of a friend of the defendants. Amanda saw appellant go by the house in a car. They didn't speak. Amanda then saw Anthony: he said hi, and hugged her. She told Carol "let's go," and they left. (RT 1:175-178, 2:292-293, 2:414) Between December 29th and January 4th, Amanda called appellant's cell phone two or three times; Anthony usually answered. Amanda testified she called to talk to Carol, or to see if Carol was there, and did not want to talk to appellant or Anthony. (RT 2:387)

On January 4, 2005, Jazmin Sarabia called Amanda. Jazmin said that if Amanda reported the crime, Amanda and her family could be hurt. Amanda became scared, and decided to tell her family what happened; the police were subsequently contacted. (RT 1:178-184, 2:293-295, 2:311-312, 2:357, 2:366-371, 2:401-405, 2:415-440)

Denise Obuszewski is a senior deputy sheriff with the Ventura County Sheriff's Department. In December 2004, Obuszewski interviewed Carol M., the named victim in count 4, on January 10, 2005: Carol said Amanda called her on December 30, 2005,

asking, "What would you do if I had told you I was gang raped?" Amanda refused to elaborate, and Carol called Jazmin to find out what happened. When Carol called Amanda back, Amanda said she'd had sex with Alex, appellant, and Anthony, but only sex with one of them was consensual. Amanda did not say which one. Carol said Amanda orally copulated appellant, but did not know where that took place. (RT 3:561-566)

Obuszewski interviewed Amanda and consulted with a gang expert about the SouthSide Chiques prior to obtaining a search warrant. She searched the defendants' apartment on January 5th; members of the gang unit were at the scene, conducting a probationary search. (RT 3:567-568) An identification card for Alex was found in the bedroom, along with a telephone and address list in a K-Swiss shoe box. Four miscellaneous papers with drawings and gang graffiti, were recovered from the dining room table, along with papers bearing appellant's name; a disposable camera was seized and photographs, depicting the co-defendants, were developed from the film. Clothes in the bedroom closet were photographed, as was a T-shirt in the hamper. The clothes bore the SouthSide moniker, "Sox."[3] The bedroom contained prescription pill bottles and other items with the names of all three co-defendants. (RT 3:582-593)

Gang Evidence

Detective Neail Holland is the Oxnard Police Department's leading gang expert. (RT

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[3] Amanda told the detective that Anthony was wearing a black T-shirt marked "SOX" the night of her assault. (RT 3:592)

3:594-600, 3:657-658, 4:676-677, 4:679-680) According to Det. Holland, there are fifteen gangs and about 2,000 gang members in the Oxnard area, the majority of which are Hispanic. The SouthSide Chiques is a multi-generational Hispanic male, turf-oriented gang which began in the 1960s in the Escalon area of Oxnard. The gang migrated to the Southwinds neighborhood in the 1980s, and became the SouthSide Chiques. At the time of trial, there were more than 150 Southside members. The gang's criminal activities are not geographically limited, the gang is always violent and brutal, victimizing anyone who disrespects them. The gang does not have a chain of command, but is very tight-knit, operating according to its concepts of respect, reputation and status. Status is earned by representing the gang favorably, wearing gang clothing, bearing gang tattoos, associating with other gang members, committing crimes, supporting other gang members, and protecting gang turf. The SouthSide Chiques uses the term "SouthSide" in writings, graffiti and tattoos: variants include SOX, for South Oxnard, SSCH, for SouthSide Chiques, and combinations of X, 3, and 13, such as SSX3CH, SSX13CH. "SickSide" is an affectionate nickname, indicating the gang's brutality. White Sox jerseys are worn, as well as other clothes with the SOX logo and K-Swiss shoes, with the double-S logo. "South Pole" logo clothing may be worn, or the San Diego Chargers number 55 jersey, as well as a Raiders jersey, due to a long-standing gang alliance. (RT 3:600-605, 4:680-681)

There are various ways to become a gang member. Someone may be born into the gang by living in the neighborhood or having family members already in the gang;

someone may be "crimed" into the gang by committing a crime for the benefit of the gang members, or "jumped in," a timed event in which the prospective member defends himself against being beaten by three or four gang members for about thirty seconds. The most common means of leaving the SouthSide Chiques is to distance oneself geographically and to reduce contact with other gang members. (RT 3:606-607, 4:688-689, 4:691-693)

"Doing work" means contributing to the growth of the gang, typically by committing crimes for the gang with other gang members. Respect is very valuable to a gang member: gang members want to achieve the highest level of respect possible within their group by doing work or doing "missions," preying on rival gangs. Gang members exploit intimidation to further gang interests; gang members communicate only about gang activities. (RT 3:607-611, 4:685-686, 4:689-690) Crimes committed by SouthSide Chiques include felony assault, assault with a deadly weapon, attempted homicide, auto theft, felony vandalism, and drug trafficking. Victims are rival gangs, community residents, residents outside the community, family members, associates, and fellow members of the gang. (RT 3:611) There is a pattern of criminal activity by SouthSide Chiques, as defined by Penal Code section 186.22. People's Exhibit Nos 18, 19, 20, 21, and 22 were certified copies of criminal convictions of three other individuals who were SouthSide Chiques members at the time they committed their felony offenses. (RT 3:632-636, 4:669-671)

Det. Holland testified that the writing in People's Exhibit No. 8A— "SURX111"

and "SOX" written in pen—is consistent with SouthSide gang script. "X111" is the Roman numeral thirteen; the number thirteen is significant because the thirteenth letter of the alphabet is M, which represents, in gang parlance, the Mexican Mafia. The Mexican Mafia is a prison gang with ultimate control, or attempted control over all southern gangs. Because the Mexican Mafia controls Southern California gangs, and SouthSide Chiques is a Southern California gang, use of 13 is a means of paying respect to the Mexican Mafia. Other gang writing on People's Exhibit No. 8 includes "SSCH," "SOXNARD," "Sneakie," "SS13C," "SSXCH." Other exhibits depict "South," written upside down, "SSX3CH," "CH," and "Sur" (short for "Sureno," or south). There is a photo of a hand sign: a 1 with one hand, a 3 with the other. (RT 3:613-615) Monikers are gang nicknames; hand signs are representations of gang letters, used to pay respect to the gang and intimidate others. SouthSide Chiques' most common hand sign is making an "S" with each hand, or a "CH" next to an "S." The exhibits include photos of people wearing White Sox shirts, White Sox hats, "Southside" shirts, "South Pole" shirts, a Raiders hat, a Raiders cap, a black shirt marked "Oxnard 805," a black shirt marked "Gangster Nation/SouthSide," someone with three fingers extended, a "CH" hand display, multiple hand displays of the letter "S." There is a boy wearing a White Sox jersey, and a young boy displaying two "S"s. There is something marked in memory of a fellow gang member who committed suicide. All of these items, recovered in the search of the co-defendants' apartment, are consistent with gang membership; each of the co-defendant appear in

various photographs. One photo depicts Anthony with Gabriel Madrigal and Juvencio Alarcon, other SouthSide Chiques, wearing gang clothing. (RT 3:616-619, 3:620-625) A seized phone list contained SouthSide gang member names/monikers. "Sneakie" is appellant's moniker. (RT 3:625-626, 3:640)

It is common for brothers to be gang members, and common for fathers to have sons display SouthSide indicia. The gang bond is stronger than the family bond; gang members act contrary to "normal human beings." (RT 3:619, 4:687) Gang members commit crimes together because co-perpetration increases the likelihood of success; serves as training for newer gang members; allows the gang members to multi-task or handle contingencies; provides a gang witness, bolstering the participants' gang status between themselves, and in the larger gang. (RT 3:626-632, 3:643-644)

Det. Holland identified numerous incidents occurring between 1998 and 2005 where police documented the defendants' SouthSide association/conduct, including instances of association, admissions of affiliation, involvement in gang-motivated crime, dressing in gang attire, bearing gang tattoos, and displaying hand signs. (RT 4:694-695) In Det. Holland's opinion, all were active members of the SouthSide Chiques on December 29, 2004, and each was aware of SouthSide's pattern of criminal activity. (RT 4:636-644, 4:660, 4:678, 4:681, 4:690, 4:700-701)

Given a hypothetical detailing the facts of the case as attested to by Amanda, Det. Holland opined the charged crimes would be committed for the benefit of, at the direction

of, or in association with, a criminal street gang because three SouthSide Chiques members came together for the purpose of committing a violent crime. By working together, they outnumbered the victim, dividing the "labor in restraining the victim," standing by the door, "possibly preventing escape," and by "mentally containing the victim, three against one, perhaps." The crime was done "in association" because all participants were SouthSide Chiques; each individual derived a benefit from the offense as each was a witness to the other's crimes, and each assisted in the completion of the offense. As each individual's status is elevated, the gang as a whole benefits by increasing community fear/intimidation: the crime would be reported (via media and word of mouth) as committed by three SouthSide Chiques members. (RT 3:645-651, 3:656, 3:658-659, 4:668, 4:693-694)

Not every crime done by a criminal street gang member is necessarily done to further or promote the gang interests, or done in association with the gang. If the hypothetical was changed so the girl had consensual sex with at least two, and probably three, of the men, and there was no mention of the gang that night, and she recalled no gang paraphernalia, words or signs, and one of the men she had sex with was her best friend's boyfriend, which embarrassed her, then Det. Holland would not think the crime was a gang crime. (RT 4:672-675) Det. Holland testified that Hispanic street gangs don't like sex offenses. Rape is frowned upon: if someone was convicted of rape, he would lose status in the gang. A gang member who raped someone would not announce it to the

gang, but would instead claim that law enforcement was fabricating the allegations "to protect their position." There is no evidence the co-defendants' status was elevated because of the rape; the charged events were gang crimes because they were done for the benefit of the individual gang members involved, and done in association with these gang members. (RT 4:677, 4:696-699, 4:702)

Defense Case

At the time of trial, Suzy Cortez was fourteen years old. Suzy was going to go to the New Year's Eve party with Carol and Amanda; she went to Carol's house, where Amanda told her that she and Carol were at appellant and Alex's house, and that she wanted to have sex with appellant and Alex. Amanda felt bad about having sex with appellant because Carol liked him. (RT 4:738-741, 4:751)

Camerina Lopez was fourteen at trial, and former best friends with Amanda's sister Alexandria. Amanda told Camerina that she went to an apartment with Carol and all three men "just dragged her in a room and like raped her" while Carol was in the house. Camerina thinks Amanda's a liar. Camerina sent Alexandria a MySpace message that said, "Damn, you are a drunky shit. As one of your friends is shit. Whoops. Never mind. What a friend you got. Fuck. Don't worry, bitch, your name won't come out of my mouth. You say it's a ho's name, and I don't like hos... So just let you know, you see a fat bitch. Let me tell you something, so get over it, bitch." (RT 4:753-761)

Jazmin Sarabia was sixteen at the time of trial, and had known Amanda for three

years, and the co-defendants for two; Jazmin and Amanda were no longer friends. On December 29, 2004, Amanda called Jazmin in Chicago, and said she had been in the bedroom having sex with Anthony when appellant came into the room. Amanda said she then went into the living room, and watched a movie with, and had intercourse with, Alex. Amanda told Jazmin she didn't do anything with appellant. Jazmin thought Amanda was bragging given that Amanda said she wanted to do it again because she had a crush on Anthony. (RT 4:762-764, 4:766-769, 4:778-779)

Jazmin's boyfriend is Mario Lerma; Mario is a member of SouthSide Chiques. Jazmin knows the co-defendants are also in SouthSide Chiques, though they haven't told her so. (RT 4:769-772, 4:777-778) Jazmin is no longer friends with Amanda; their last contact was a call in January 2005. Jazmin confronted Amanda about her story, asking if she'd lied. Amanda denied saying she'd been raped, and seemed surprised, asking, "Why would I say something like that?" Jazmin has never threatened Amanda or her family. (RT 4:775-782, 4:786-787)

Rebuttal

Amanda's mother, Karen Kay Morales, does not know any of the co-defendants. She knows Carol and Jazmin. On December 29, 2004, Amanda told Morales she was going to spend the night at Carol's, but came home between 3:00 and 4:00 a.m., telling Morales she was home. This was very unusual. Amanda's curfew is 10 o'clock. Morales noticed Amanda was having trouble walking, and looked as if she was in pain, though she

was trying to act normally. Amanda gave no sign of being upset; she had not been crying. (RT 4:789-793, 4:801-804, 4:809-810, 4:813-816)

A week later, on January 5th, Amanda told Morales what happened. Morales asked Amanda what her role was in the situation. Due to a series of threatening telephone calls by Jazmin and Carol the day before, Amanda was very upset and worried about the safety of her family. Because of caller I.D, Morales knew that Jazmin left a threat on the answering service, and had called at least twice on the land line; she did not know how many times Jazmin called her cell phone. The next time Jazmin called, Morales told her that Amanda didn't live there anymore and not to call again. Morales also had her phone disconnected. (RT 4:794-800, 4:802, 4:805-812, 4:816-817) Morales did not know that her daughter had previously spent time with appellant or Alex. (RT 4:801, 4:816)

ARGUMENT

I.

THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S PENAL CODE SECTION 186.22, SUBDIVISION (A) CONVICTION AS THERE IS NO NEXUS BETWEEN APPELLANT'S GANG STATUS AND THE COMMITTED OFFENSES

Since the passage of the STEP Act in 1988 [Street Terrorism Enforcement and Prevention Act], this Court has repeatedly addressed the scope of its provisions, including clarifying the definition of "criminal street gang," setting the parameters for "pattern of criminal activity" and "primary activities," and interpreting "active participation." (*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.) As the Court has cut through the statutory and linguistic "thicket" (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 319) of the anti-gang laws, the lodestar appears to be the existence of a reasonable nexus between gang status and criminal offense. For without this nexus, Penal Code section 186.22 *et seq.* would fall unteathered into constitutional overreaching. (*People v. Gardeley* (1997) 14 Cal.4th 605, 623-624.) The answer to the first question in petitioner's case—whether there was sufficient evidence to sustain his section 186.22, subdivision (a) conviction—hinges upon whether the requisite nexus may be provided by the fact of the gang status in itself, or whether subdivision (a) requires some connection between that status and the target offense. In keeping with the Court's prior decisions, a defendant's gang membership needs to be

related to his felonious conduct so that subdivision (a) cannot be used to create an improper status offense. (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 623-624.) As there was no such nexus in appellant's case, his conviction may not stand. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.)

As set forth by the Court in *People v. Lamas* (2007) 42 Cal.4th 516, section 186.22, subdivision (a) has three elements: (1) active (not nominal or passive) participation in a street gang; (2) knowledge that the gang members engage in/have engaged in criminal activity; and (3) willfully promoting, furthering, or assisting "in any felonious conduct by members of that gang." (*Id.*, at p. 184.) The third element has been interpreted to apply both to felonious conduct on the part of the defendant and to felonious conduct by others with the defendant's assistance. (*People v. Salcido* (2007) 149 Cal.App.4th 356, 368 [defendant gang member was direct perpetrator of weapons offenses]; *People v. Ferrarez* (2003) 112 Cal.App.4th 925, 931 [jury could conclude defendant gang member planned to sell drugs for benefit of gang].) Though the Court has yet to directly address whether this felonious conduct must be gang-related, the statutes' animus and plain construction dictate that it must. (*C.f.*, *Roberto L. v. Superior Court* (2003) 30 Cal.4th 894, 906-907 ["Proposition 21 sought to tackle, in 'dramatic' fashion, the onerous problem of gang violence and gang crime.'" "[T]he ballot materials clearly how that the voters intended to dramatically increase the punishment for *all* gang-related crime."].) A conclusion buttressed by this Court's previous decisions:

The defendant in *People v. Briceno* (2004) 34 Cal.4th 451, spent Christmas Day 2000 with another gang member, robbing four people at gunpoint in four separate instances. The Court held that the list of serious felonies set forth in Penal Code section 1192.7, subdivision (c)(28), included both the substantive offense of violating section 186.22, subdivision (a) as well as any felony committed for the benefit of a gang as defined by subdivision (b). (*People v. Briceno*, *supra*, 34 Cal.4th at p. 456.) Justice Moreno, writing for the Court, recounted the legislative history of Proposition 21 [the Gang Violence and Juvenile Crime Prevention Act of 1998], which significantly changed the provisions of the STEP Act, as well as the Court's other opinions interpreting other provisions of Proposition 21,[4] concluding that Proposition 21 represented the voters' intent "to dramatically increase the penalties for all *gang-related* felony offenses." (*Id.*, at p. 462, emphasis added.) Adding its own emphasis, the Court in its opinion quoted the ballot pamphlet: "'Criminal street gangs and gang-related violence pose a significant threat to public safety and the health of many of our communities. ... *Gang-related crimes* pose a unique threat to the public because of gang members' organization and solidarity. *Gang-related felonies* should result in severe penalties.'" (*People v. Briceno*, *supra*, 34 Cal.4th at p. 462, quoting Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (b), p. 119.) By passing Proposition 21, the voters manifestly intended

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[4] (*People v. Montes* (2003) 31 Cal.4th 350, 352 [Alternative penalty provisions of subdivision (b)(5) apply only to offenses where underlying felony carries life sentence]; *Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 907 [subdivision (d) alternate penalty provision not limited to wobblers].)

to provide extra punishment for "all gang-related" offenses (*People v. Briceno*, *supra*, 34 Cal.4th at p. 462), an intent wholly in keeping with the intent of the STEP Act itself. (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 609-610.)

The legislative history of the STEP Act has been exhaustively chronicled by courts wending their way through its provisions. In *People v. Gardeley*, *supra*, 14 Cal.4th 605, Justice Kennard, writing for the Court, pinpointed the legislative purpose as "'the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs. (*Id.*, at pp. 609-610, quoting Pen. Code §186.21.) Though the gang-relationship of the "any felony" clause to the "active participation" requirement has never been explicitly mandated by the Court, it has been virtually presumed as part of the "willfully promoting" element. (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469 ["Participation in felonious conduct in association with, or for the benefit of a gang is one of the elements necessary to prove the substantive gang crime described by section 186.22(a)."]; *People v. Robles* (2000) 23 Cal.4th 1106, 1115.) As Justice Kennard wrote in *People v. Castenada*, *supra*, 23 Cal.4th at p. 752:

> By linking criminal liability to a defendant's criminal conduct in furtherance of a street gang, section 186.22(a) reaches only those street gang participants whose gang involvement is, by definition, "more than nominal or passive."

The key here is the Court's use of the word *linking*—liability under subdivision (a) can only be imposed if the felony committed is "in furtherance of" a street gang. Subdivision (a) "'is a substantive offense whose gravamen is the participation in the gang itself....

[T]he focus of the street terrorism statute is upon the defendant's objective to promote, further or assist *the gang* in its felonious conduct....'" (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436, quoting *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467-1468, emphasis added.)

For it is this link between gang membership and felonious conduct that keeps subdivision (a) from unconstitutional vagueness and arbitrary and discriminatory enforcement. (*Ibid.*; *Chicago v. Morales* (1999) 527 U.S. 41, 56-58.) Absent such a connection, any crime, no matter how unrelated to a defendant's gang status, could serve in the hands of zealous authorities as the basis for a conviction for violating the substantive anti-gang statute. For example, a gang member who failed to register as a sex offender could also be charged as committing the crime of gang participation, as could someone who married under false pretenses or who abandoned a child under the age of fourteen. All felonies, all capable of commission by gang members, all difficult to imagine as violating the spirit or intent of the STEP Act. Scenarios wherein gang members are punished for gang participation for committing extra-gang crimes, *i.e.*, offenses that don't contribute to any pernicious pattern of gang activity, are patently not what this Court, other courts, or the electorate imagined was targeted by the anti-gang laws. As one appellate court noted relative to subdivision (b), expert testimony that knife possession by a gang member inherently benefited the gang "without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and

extends the purpose of the statute beyond what the Legislature intended." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199; *see generally*, *Herbert Hawkins Realtors, Inc. v. Milheiser* (1983) 140 Cal.App.3rd 334, 338 ["statutes must be construed in a reasonable and common sense manner..."].)

Too, this need for a nexus harmonizes subdivision (a) with subdivision (b) insofar as the substantive gang crime punishes active gang participation—manifest in the commission of a felony, while the enhancement then reaches anyone, including the non-gang member or inactive gang member who facilitates the commission of a gang crime. (*In re Ramon T.* (1997) 57 Cal.App.4th 201, 206-207.) In other words, both prongs of the statute address the legislative goal of quashing gang crime. (*Woods v. Young* (1991) 53 Cal.3d 315, 323 ["'Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible.'"].) Were there no such nexus, subdivision (a) would become an anomalous and constitutionally overreaching attempt to simply tack the substantive gang offense to whatever other felony happened to be on hand, thereby criminalizing "mere" gang membership (*contra*, *People v. Castenada*, *supra*, 23 Cal.4th at p. 747; *People v. Gardeley*, *supra*, 14 Cal.4th at p. 623), while granting prosecutors free reign to introduce irrelevant and prejudicial gang evidence (*c.f.*, *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611["[i]solated criminal conduct" insufficient to establish gang's primary activities as criminal]). Without a link between status and conduct, subdivision (a) would become a dragnet for transgressing gang

members by becoming a stock back-up charge to whatever target felony was alleged. Absurdly, it would then be possible to convict someone under subdivision (a) without proving any predicate felony by interpreting "felonious conduct" as proof of conduct that nominally qualifies as a felony rather than proof beyond a reasonable doubt that a charged felony occurred. For if "felonious conduct" intentionally refers to something other than a predicate (completed) felony, then it is not unreasonable to assume a lesser standard of proof applies, such as clear and convincing evidence, much like a lesser standard of proof applies in other situations requiring proof of an "offense" rather than proof of a crime. (*See e.g.*, *People v. Carpenter* (1997) 15 Cal.4th 312, 380-382; *People v. Lopez* (2007) 156 Cal.App.4th 1291, 1299), or where proof of another crime—by a preponderance of evidence—may be used as proof of another fact, such as motive or intent. (*People v. Lindberg* (2008) 45 Cal.4th 1, 34-35.)

But the Court has been careful to hone to the gang-related statutory animus in other interpretations of the anti-gang provisions. For example, in *People v. Lamas*, *supra*, 42 Cal.4th 516, the Court reframed its prior holding in *People v. Robles*, *supra*, 23 Cal.4th 1106, in which the Court held that a misdemeanor violation of section 12031, subdivision (a)(1), carrying a loaded firearm in public, could not be elevated to a felony under subdivision (1)(2)(C) based on an allegation that the defendant was an active participant in a criminal street gang, absent evidence of the other requirements of section 186.22, subdivision (a)—to wit, knowledge of a pattern of criminal gang activity and furthering

felonious conduct by gang members. (*People v. Robles*, *supra*, 23 Cal.4th at p. 1115; *People v. Lamas*, *supra*, 42 Cal.4th at pp. 106-107.) The *Lamas* trial court had instructed the jury that the misdemeanor weapon offense satisfied the furthering felonious conduct element of subdivision (a); the appellate court affirmed, and this Court reversed, finding the instruction incorrect under *Robles*, and reversible under *Chapman v. California* (1967) 386 U.S. 18, 24, because the defendant was acquitted of the only other felony charge, and there was no evidence that he knew of other members' felonious conduct. (*People v. Lamas*, *supra*, 42 Cal.4th at p. 186.) Without a link between status-knowledge or status-conduct, the statute was not doing its prophylactic job of discouraging gang-related offenses, or its remedial task of punishing a pattern of gang crimes. The Court's underlying logic was plain: absent a palpable relation between gang status and current offense, what is being censured is simply the fact of status itself.

By way of comparison, Penal Code section 12021 makes being an ex-felon in possession of a gun a felony. The legislature has decided that armed ex-felons pose *in se* risk to public safety---the armed ex felon being a self-explanatory (and perhaps self-fulfilling) danger. Contrarily, the gang member may be felonious in ways that have nothing to do with his gang status and do not contribute a jot to the type of organized violence the anti-gang laws aim to quell. (*People v. Superior Court (Johnson)* (2004) 120 Cal.App.4th 950, 956-957 [substantive STEP Act aimed at crimes "that could terrorize a community when committed as part of a pattern by an organized group."].) So that in *In*

re Jorge G. (2004) 117 Cal.App.4th 931, the Fifth District applied the limiting adjective "criminal" to the "gang" registration requirement of section 186.30, subdivision (b)(3) to effectuate "the voters' intent... to take steps to control 'criminal street gangs.'" (*Id.*, at pp. 940-941; *accord, People v. Martinez* (2004) 116 Cal.App.4th 753, 761 ["a crime may not be found gang related within the meaning of section 186.30 based solely upon the defendant's criminal history and gang affiliations."].) 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. There would be no need for the qualifying "in furtherance" language, for no more would be needed. But more—"in furtherance"—was needed. And more is needed because the evil sought to be redressed is the proliferation of "*gang-related*" offenses, not just gang member's general criminality. As always, the plain meaning, the ordinary meaning, of the language of the law governs. (*People v. Loeun*, *supra*, 17 Cal.4th at pp. 8-9.)

In this sense, part of the drafting elegance of subdivision (a) is that it refuses to anticipate, via legislative enumeration, what kind of felonies might be committed in furtherance of the gang—again, it is not the act that counts, but its motivation. Using the previous examples, it may well be that a gang member could, in orchestrating a fraudulent marriage or failing to register as a sex offender, further his gang's agenda by, say,

camouflaging the member's identity or whereabouts. The link thus established, the substantive gang offense thus committed, and liability under subdivision (a) properly assigned. Too-simply put, subdivision (a) is a separate substantive offense because the predicate felony is committed under the auspices of a gang relationship.

It is this understanding of the statute which has led the Court to hold that evidence of either past or present section 186.22, subdivision (e) enumerated offenses was "not necessarily" sufficient to prove the group's primary activities, as this could improperly include "occasional commission" of the listed crimes. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at pp. 323-324 [expert testimony may also suffice].) Rather, sufficient proof "might consist of evidence that the group's members *consistently and repeatedly*" committed these crimes, a standard that, again, lets the stress fall on the pattern of gang criminality that is the law's concern. (*Ibid.*, emphasis added.) Patterns are "a combination of qualities, acts, tendencies, etc., forming a consistent or characteristic arrangement." (http://dictionary.reference.com/browse/pattern.) Patterns are formed by links.

And it is the link of active participation to felonious conduct that undergirds the fundamental constitutional requirement of "personal guilt" which this Court has insisted be part of the interpretation/application of the STEP Act and its progeny. (*People v. Castenada*, *supra*, 23 Cal.4th at p. 748.) As the United States Supreme Court stated almost half a century ago:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that

> status or conduct to other concededly criminal activity ... that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

(*Scales v. United States* (1961) 367 U.S. 203, 224-225, quoted in *People v. Castenada*, *supra*, 23 Cal.4th at p. 748.) The "relationship of that status" to other criminal activity is what is wanting here: there was no connection between appellant's gang membership and the gang rape that took place: *i.e.*, while it was a gang rape, it was not a "gang" gang rape.[5]

The familiar test to determine sufficiency of the evidence is "whether, on the entire record, a rational trier of fact could find appellant guilty beyond a reasonable doubt." (*People v. Johnson*, *supra*, 26 Cal.3rd at pp. 576-577.) The record is to be reviewed "'in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Abliez* (2007) 41 Cal.4th 472, 504, quoting *People v. Johnson*, *supra*, 26 Cal.3rd at pp. 578; *see also*, *People v. Wilson* (2008) 44 Cal.4th 753, 806.) Substantial evidence must support each essential element underlying the verdict: "'it is not enough for the respondent simply to point to 'some' evidence supporting the finding.'" (*People v. Johnson*, *supra*, 26 Cal.3rd at p. 577, quoting *People v. Bassett* (1968) 69 Cal.2nd 122,

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[5] As memorably put by the trial court in declining to exclude the searching officer's gang testimony, "[T]hat's not to say that I don't think you're walking on not even a thin slice of ham when it comes to this gang allegation. In the Court's opinion I haven't heard any evidence so far at all that supports your conclusion that whatever happened here happened for the benefit of or

138.) Nor does a "50 percent probability" of an element constitute substantial evidence. If the facts as proven equally support two inconsistent interpretations, the judgment goes against the party bearing the burden of proof as a matter of law. (*People v. Allen* (1985) 165 Cal.App.3rd 616, 626, citing *Pennsylvania R. Co v. Chamberlain* (1933) 288 U.S. 333, 339.) Evidence that fails to meet this substantive standard violates the Due Process Clause of the Fourteenth Amendment and article I, § 15 of the California Constitution. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *People v. Johnson*, *supra*, 26 Cal.3rd at pp. 575-578.)

The victim testified that she knew appellant was an active member of the SouthSide Chiques: he'd told her as much, and she'd seen him throw gang signs at a group of people while driving. (RT 1:127-132, 2:374, 2:383-384) She also testified none of the defendants said anything about the gang, or mentioned the gang's name, before, during, or after the assault, that nothing that was said which made her think the defendants' gang was being invoked, and that she was not scared of the defendants before the assault. (RT 1:130, 2:270-271, 2:302-303, 3:470)

The State's gang expert testified that the SouthSide Chiques had a qualifying pattern of criminal activity, was a tight-knit organization, and that the single most important thing to the gang was status. He testified SouthSide ran on "the concept of respect, reputation and status...." Gang members want to achieve "the highest level of

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the direction of or whatever, a street gang. (RT 3:575)

respect" within the group, and members earn status by favorably representing the gang, both imagistically, such as wearing gang clothes and bearing gang tattoos, and practically, through "doing work," *i.e.* "contributing in some fashion to the positive direction of the gang... most often [...] referring to committing crimes for the gang." Reduction in gang status is "one of the most important things in a gang member's mind." Status reduction occurs when the gang is disrespected. (RT 3:604-605, 3:607-609) Status works from the bottom up: the individual commits a crime with other gang members; as his comrades are favorably impressed, they elevate his status in the larger gang by spreading the good word. (RT 3:626-628) The detective also testified that sex crimes are disapproved of in Latino gang culture. If a gang member was accused of rape, he would claim the accusation was false. If convicted, he would lose status within the gang. (RT 4:696-697, 4:702)

Given this testimony, there is insufficient evidence to sustain appellant's section 186.22, subdivision (a) conviction as there was no evidence the crime was related in any way to the SouthSide Chiques. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 806.) It is worth noting in this regard that after Amanda testified that there was nothing about the assault that invoked the defendants' gang status, there was no further mention of SouthSide until the police witnesses began to testify. At this point, the gang's violent history and turf-oriented ideology, its rivalries and alliances, its induction and quitting process, its members' qualifying violent felonies, and its respect for, and allegiance to, the nefarious

Mexican Mafia,[6] was admitted. (RT 3:600-602, 3:607, 611, 3:613-614, 3:633-635, 3:643) But to what purpose? Certainly not as evidence that the rape was gang-related in the usual sense. On this point, the prosecutor argued that the offenses were gang-related simply by virtue of being committed by three gang members. A procedural, versus a substantive, connection. But this argument ignores the independent relationship between the defendants, their wholly extra-gang rationale for acting in concert. And even though the detective testified that gang ties are stronger than family ties (RT 3:619), the bond between these brothers and their cousin led them to join together in a crime that put their gang status—the thing that matters most to a SouthSide member, one of the organizing tenets of the gang, the way the gang is honored and represented, and the loss of which is the member's primary concern—in jeopardy.

And finally, admission of such highly prejudicial evidence without legitimate basis rendered appellant's trial fundamentally unfair in violation of his federal right to due process. (*Estelle v McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439.) In order to prevail on such a claim, there can be no permissible inferences the jury could have drawn from the evidence, *i.e.*, the jury must have used the evidence for an improper purpose. (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2nd 918, 920.) In this case, the gang evidence was only relevant to the gang allegations; without the gang allegations none of the gang evidence was relevant, or admissible. But what the gang

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[6] An exceptionally prejudicial reference, particularly pointless in the context of this case. (*People v. Ayala* (2000) 23 Cal.4th 225, 276-277.)

evidence lacked in probity, it made up for in prejudice. As one lower court stated, "where, as here, the trial is infused with gang evidence, it is simply not possible to assess the fairness of the trial in its absence… . Legions of cases and other legal authorities have recognized the prejudicial effect of gang evidence upon jurors. [citations]." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 231.) By using the anti-gang statutes to infuse a date rape case with every damning bit of gang violence and anti-gang sentiment, the State here turned the STEP Act on its head: it is not the conduct of committing a gang crime that is to be punished, it is the status of being in a gang while committing a crime.

"'In the case of a voters' imitative statute… we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.'" (*Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 909, quoting *Hodges v. Superior Court* (1999) 21 Cal.4th109, 114.) Unless this Court definitively states that there must be a link between the felony committed and the defendant's gang status for conviction under section 186.22, subdivision (a), the electorate will get much more. (*Contra*, *People v. Gardeley*, *supra*, 14 Cal.4th at p. 623.)

II.

THE PENAL CODE SECTION 186.22(B) ENHANCMENTS MUST BE REVERSED AS THERE IS INSUFFICIENT EVIDENCE THAT THE UNDERLYING OFFENSES BENEFITED THE RELEVANT CRIMINAL STREET GANG

Section 186.22, subdivision (b)(1) enhances the sentence for an underlying felony when that felony is "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members...." As previously stated, the crimes here did not further or promote the SouthSide Chiques insofar as it was flatly attested that there was no overt relationship between the rapes and the gang, and that sex offenses are considered antithetical to SouthSide's ideology and detrimental to an individual member's status within the gang. Thus, there was no evidence that these rapes were gang-related in the usual sense. (*Supra*, at pp. 29-31.) To avoid this failure of proof, the State proceeded by way of more circuitous routes. The first was a kind of Rube Goldberg schematic in which the three defendants (a) committed the charged offenses while (b) active members of the SouthSide Chiques. Despite (c) the SouthSide Chiques' condemnation of such offenses, commission of which would (d) lead to loss of status within the gang and (e) damage the gang's reputation relative to other Latino street gangs, the defendants' crimes could (f) potentially gain media notoriety, infamy that would then (g) benefit SouthSide as a "violent, aggressive gang that stops at nothing and does not care or anyone's humanity." (RT 3:648-649, 4:721) The alternate argument was that the three defendants acted as a

band of brothers who needed no larger gang: by committing the acts in concert, they were "in association," and their offenses properly enhanced. (RT 5:890, 5:897) Otherwise articulated, the individual sexual benefit each of the defendants received by raping the victim, and their ability to brag to one other about the exploit, elevated their status between them, thereby benefiting the gang because the three were the gang for purposes of the target offense. (RT 575-576, 3:646-650, 4:721, 5:895-897) Taking these in turn:

The first scenario, in which the SouthSide Chiques benefit because all criminality benefits a criminal street gang is problematic as it means that any crime committed by a gang member may be enhanced for promoting the gang because it is a crime. This turns subdivision (b) into something of a strict liability scenario: gang member + crime = crime for benefit of gang. But this is not the law as practically understood by its enforcers. As noted, Det. Holland testified as to the general benefits of gang members working together in general to commit crimes, including confidence-boosting, multi-tasking, and bearing witness to the larger gang about their confederates' positive exploits. (RT 3:626-628, 3:647) And when given a hypothetical in which the defendants' were described only as members of the SouthSide Chiques—omitting their family relationship, and their prior encounters with the victim—the detective opined that the rape was done for the benefit of/at the direction of/in association with the gang because the defendants were "all active participants in SouthSide Chiques." (RT 3:645-648)

This loosely comports with the Fourth District's opinion in *People v. Morales*

(2003) 112 Cal.App.4th 1176, 1198, in which the gang expert testified that the fact that three gang members acted together to commit the charged robberies meant the crime was committed "in association with" gang members in satisfaction of the statute. This was true even though the witness did not testify that the defendants had the specific intent to promote or further criminal conduct by the gang by these robberies. If all crimes committed by gang members acting in association are gang crimes *per se*, then these were gang crimes for purposes of the enhancement. "If all men are mortal, then Socrates, being a man, is mortal." (*Ibid.*) But this is like believing that the criminal activities of the Aryan Brotherhood are promoted if three of its members were to help Mexican nationals illegally enter the United States. Although the crimes would be anathema to the Brotherhood's rules and beliefs,[7] the gang's overall reputation for criminality would still be enhanced based purely on the illicit nature of the underlying offenses, and subdivision (b) properly applied.

However, when given an alternative hypothetical in which the defendants were identified as relatives, the victim having had consensual sex with at least two of them, and with no mention of the gang during the evening, the detective opined the crime was not

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[7] The Aryan Brotherhood is a White supremacist prison gang; as attested to in a number of cases, White supremacist gangs believe the White race is superior, non-Whites are subhuman, and absolute fidelity is owed to fellow White supremacists. (*See e.g.*, *People v. Lindberg*, *supra*, 45 Cal.4th at pp. 42, 46.) According to evidence given in *People v. Schmaus* (2003) 109 Cal.App.4th 846, 850-851, one of the Aryan Brotherhood's rules is "not tolerating—and indeed, killing—inmates involved in sex offenses such as child molestation and rape." In this, the Aryan Brotherhood is in philosophic accord with Latino street gangs, according to the expert who testified in appellant's case.

done under the auspices of the gang. (RT 4:674-675) What the detective's difference of opinion reflects is the common sense notion that "[e]xcept in *West Side Story*, gang members do not move in lock-step formation" (*Mitchell v. Prunty* (1997) 107 F.3rd 1337, 1342), and that subdivision (b) aims at specially punishing crimes committed to promote the gang. The "assistance" language being not an alternative route to guilt, one less harder to prove because it comes with its own presumed intent, but one which, like the benefit/promote language, is designed to punish actions that strengthen the gang *qua* gang.

Similarly, in *United States v. Garcia* (9th Cir. 1998) 151 F.3rd 1243, the federal appellate court found insufficient evidence to support the defendant's conviction for conspiracy to assault with a dangerous weapon based on the prosecutor's theory that "by agreeing to become a member of a gang, [defendant] implicitly agreed to support his fellow gang members in violent confrontations." (*Id.*, at p. 1245.) A "basic agreement" to back up fellow gang members "at most establishes one of the characteristics of gangs but not a specific objective of a particular gang, let alone a specific agreement on the part of its members to accomplish an illegal objective." (*Id.*, at p. 1246.) Quoting an earlier appellate opinion, the *Garcia* court noted that allowing gang membership to serve as such evidence invited "absurd results" by making any gang member liable for another member's act at any time "'so long as the act was predicated on 'the common purpose of "'fighting the enemy."'" (*Ibid.*, quoting *Mitchell v. Prunty*, *supra*, 107 F.3rd at p. 1341,

overruled on other grounds, *Santamaria v. Horsley* (1998) 133 F.3rd 1242, 1248.) But the larger problem is that using the general gang practice of supporting one another in a confrontation provides readymade proof of joint intent, which "smacks of guilt by association." (*Mitchell v. Prunty*, *supra*, 107 F.3rd at p. 1342.) "This is contrary to fundamental principles of our justice system. '[T]here can be no conviction for guilt by association.'" (*United States v. Garcia*, *supra*, 151 F.3rd at p. 1246, quoting *Melchor-Lopez* (9th Cir. 1980) 627 F.2nd 886, 891.)

In sum, there was plenty of evidence that the defendants were members of the SouthSide Chiques, ample evidence that the SouthSide Chiques had a pattern of criminal activity, and opinion evidence that the defendants knew of their gang's criminality. (RT 3:632-636, 4:669-671) What was lacking was any evidence that the activities of these defendants were committed to promote the gang, to further the gang, or to assist each other *as gang members*. Put another way: "The expert's testimony was singularly silent on what criminal activity of *the gang* was furthered or intended to be furthered" by the sex offenses here. (*Garcia v. Carey* (9th Cir. 2005) 305 F.3rd 1099, 1103, emphasis added [without more, testimony concerning "turf-orientation" of gang insufficient to establish that robbery was committed to facilitate other gang crimes].)

And there is no version of a "subset" or mini-gang that supports the imposition of the enhancement here: gangs are not Russian nesting dolls in which each set of three serves as synecdoche for the whole. In *People v. Williams* (2008) 167 Cal.App.4th 983,

the defendant was convicted of murdering a woman and being an active participant in a criminal street gang; the gang enhancement was found true. The defendant argued that he was an active participant in Small Town Peckerwoods only, and thus, the criminal activities of other Peckerwood gangs could not be considered as evidence against him. The expert witness testified that based on name and White supremacist ideology, Small Town Peckerwoods was a faction of the larger Peckerwood gang. The Fifth District reversed the gang conviction and finding, holding that having a similar name and beliefs were not in themselves enough to allow the status of the larger group to be attributed to the smaller: "some sort of collaborative activities or collective organized structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization." (*Id.*, at pp. 987-988.) By this same token, appellant, his twin brother and his cousin cannot be considered to have acted as a working subset of the SouthSide Chiques simply because the three were members of SouthSide. Going outside the rules of the gang means going rogue; going rogue means going outside the gang. By their crimes, the defendants distanced themselves from their gang—their crimes cannot be enhanced by virtue or vice of their gang membership. (*Compare*, *People v. Ortega* (2006) 145 Cal.App.4th 1344,1357 ["No evidence indicated the goals and activities of a particular subset were not shared by the others."].) The section 186.22, subdivision (b) enhancement must be reversed. (*People v. Williams*, *supra*, 167 Cal.App.4th at pp. 978-988.)

CONCLUSION

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

Dated: December 11, 2008

Respectfully submitted,

VANESSA PLACE
Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ALBERT A. ALBILLAR, Defendant and Appellant.	)	Crim. No. S163905 (Court of Appeal No. B194358 Sup. Ct. No. 2005044985)

CERTIFICATION

Pursuant to California Rules of Court, rule 8.504, I certify that this brief on the merits was prepared on a computer using Microsoft Word, and that, according to that program, contains 10,610 words.

Vanessa Place
Attorney for Petitioner

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 December 11, 2008, I served the within

BRIEF ON THE MERITS

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 11th day of December, 2008 at Los Angeles, California.

Vanessa Place