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September 29, 2014

Frederick K. Ohlrich
Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

SUPREME COURT
FILED

SEP 30 2014

RE: **S202921, *People v. Le et al.***
Supplemental Reply Brief

Frank A. McGuire Clerk

Dear Mr. Ohlrich:

Deputy

On August 27, 2014, the Court directed the parties to file supplemental letter briefs. Each side complied by the September 19, 2014 deadline. The Court also permitted each side to file a reply brief by October 3, 2014.

The Court requested the parties address the question “whether the People adequately met their pleading burden by generically pleading the Penal Code section 186.22 enhancement under subdivision (b)(1) without greater specificity as to whether the People sought enhancement under subsection (b)(1)(A), (b)(1)(B), or (b)(1)(C) of that section, and whether, in light of such generic pleading, the People should be estopped from relying or permitted to rely at sentencing on subdivision (b)(1)(B) of section 186.22. (Pen. Code, § 1170.1, subd. (e); *People v. Mancebo* (2002) 27 Cal.4th 735 [*Mancebo*].)”

In our initial supplemental letter brief, the People demonstrated that we adequately met our pleading burden by simply alleging the gang enhancement under Penal Code¹ section 186.22, subdivision (b)(1) (§ 186.22(b)(1)) without the need to further allege either subparagraph (B) or (C) of section 186(b)(1). It appears defendant Yang largely agrees.

The People’s position is that pleading the gang enhancement “generically” under section 186.22(b)(1) satisfied both constitutional due process and statutory requirements, without implicating the type of error found in *Mancebo*. Part of the People’s rationale for not requiring further specification in the accusatory pleading beyond alleging the gang

¹ All statutory references are to the Penal Code unless otherwise specified.

enhancement under section 186.22(b)(1) is that the People cannot know prior to the jury verdict whether a charged enhancement, such as gun use under section 12022.5, will be found true. In addition, other variables outside the control of the prosecution, such as what term of imprisonment might be selected by the sentencing judge, impact whether the prosecution will seek sentencing for the gang enhancement under subparagraph (A), (B) or (C) of section 186.22(b)(1). All this assumes that the trial judge has the legal authority to structure the defendant's sentence to obtain the maximum term of imprisonment by imposing both a gang enhancement at the base level (subparagraph (A)) or serious felony level (subparagraph (B)) and a gun-use enhancement under section 12022.5, without violating the Court's holding in *People v. Rodriguez* (2009) 47 Cal.4th 501 (*Rodriguez*). Of course, that is the key issue in this People's appeal and has been fully briefed by the parties.

Defendant Yang's argument is simply that the holding in *Rodriguez* leaves the sentencing judge with no choice as to which subparagraph prison term must be imposed for the gang enhancement under section 186.22(b)(1). As in his original briefing, defendant Yang maintains that if a gun-use enhancement is found true under section 12022.5, the judge is mandated by *Rodriguez* to stay sentencing on that allegation and, instead, impose sentencing for the gang enhancement as a violent felony under subparagraph (C) of section 186.22(b)(1). Defendant repeats this argument as the basis for claiming the People are estopped to argue for sentencing under subparagraph (B) of section 186.22(b)(1). While doing so, however, defendant Yang adds a new label – “constitutional separation of powers.”² The People are satisfied that our briefing on the merits sets forth the legal justification for the sentencing discretion which we believe judges retain under *Rodriguez*.

Alternatively, defendant Yang appears to concede that, should the Court adopt the People's main argument regarding the scope of a judge's sentencing authority under *Rodriguez*, no further notice beyond alleging section 186.22(b)(1) was necessary in this case. “As long as all the facts that ultimately define a crime as serious or violent are pled, either as elements of the crime, or attached to a crime through additional enhancement allegations, a defendant is on notice of how long the gang enhancement's additional term could be.” (Def't. Yang's Supp. Letter Brief, p. 3, 1st full para.) This mirrors the People's argument that no further notice is required to impose sentencing under subparagraph (B) of section 186.22 because the underlying offense of violating section 245, subdivision (b), is a serious felony as a matter of law under section 1192.7, subdivision (c)(31).

² Defendant Yang makes no further legal analysis and cites no legal authority for claiming a separation of powers violation. The Court “need not consider on appeal mere contentions of error unaccompanied by legal argument.” (*People v. Earp* (1999) 20 Cal.4th 826, 884.)

In sum, the Court requested supplemental briefing on whether the People adequately pleaded and proved that defendant Yang was subject to sentencing for count 4 under section 186.22(b)(1)(B). There does not appear to be any dispute that the defendant had adequate notice of this potential under the applicable statutory requirements (i.e. § 1170, subd. (e)) and under principles of due process (*Mancebo*). Thus, there is no basis to find the People are estopped from seeking additional punishment for the gang enhancement under section 182.22(b)(1)(B). The San Diego County District Attorney's Office, on behalf of the People of the State of California, therefore, respectfully requests the Court remand defendant Yang's case for resentencing on count 4.

Respectfully submitted,

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By:



CRAIG E. FISHER

Deputy District Attorney

SBN 95337

**Supreme Court
No. S202921**

**Court of Appeal
No. D057392**

**Superior Court No.
SCD212126**

PROOF OF SERVICE

I am a citizen of the United States and a resident of San Diego County. I am over 18 years and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On September 29, 2014 a member of our office caused to be delivered **via Federal Express overnight delivery** the original and 13 copies of the attached **SUPPLEMENTAL REPLY BRIEF** for filing with the Supreme Court of the State of California at:

California Supreme Court
The State Building
350 McAllister Street, Room 1295
San Francisco, California 94102

and I placed a true and correct copy thereof in the U.S. Mail to:

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Tel: (541) 273-8738
Attorney for Down George Yang

The Honorable Charles G. Rogers
Judge of the Superior Court
C/O Appellate Division
San Diego Superior Court
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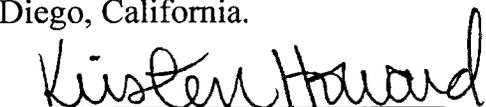
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Fourth Appellate District, Division One
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San Diego, California 92101

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

Executed on September 29, 2014 at San Diego, California.


Kristen Howard