IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SHAUN ALEXANDER MOORE, Defendant and Appellant.	No. H046446 (Santa Clara County Superior Court No. C1364062)

APPELLANT'S SUPPLEMENTAL BRIEF

Appeal from a Judgment of Conviction Imposed
The Honorable Julia Alloggiamento, Judge

SIXTH DISTRICT APPELLATE PROGRAM

Jonathan Grossman 154452
Staff Attorney
95 S. Market Street, Suite 570
San Jose, CA 95113
(408) 241-6171
fax: (408) 241-2877
jonathan@sdap.org

Attorney for Appellant
Shaun Alexander Moore

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IV. There was Insufficient Evidence Appellant Suffered a Prior Strike and Serious Felony Conviction.

In a court trial, it was found appellant's suffered a prior strike conviction and a prior serious felony conviction, and they were used to enhance his sentence. The prior was for participating in a gang (Pen. Code, § 186.22, subd. (a))[1] in 2001. The court in *People v. Strike* (Feb. 11, 2020, G056949) __ Cal.App.5th __ [2020 Cal.App. Lexis 108] held that a prior conviction for participating in a gang occurring before 2012 cannot serve as a prior strike or serious felony because the statute had been construed more broadly than it is now to include situations where the defendant acted alone. (*Id.* at pp. *8-9, citing *People v. Rodriguez* (2012) 55 Cal.4th 1125.) Under *People v.*

[1] Unless otherwise specified, all further statutory references are to the Penal Code.

Gallardo (2016) 4 Cal.5th 120, the court cannot look beyond the elements of the offense. (*Id.* at pp. *10-13.) Further, there were no facts in the record in this case that appellant acted with others when he suffered the prior conviction.

A. Background.

It was alleged in the amended information appellant committed charged with murder with personal use of a firearm leading to great bodily injury. (§§ 187, subd. (a), 12022.53, subd. (d).) It was also alleged he suffered a prior "strike" conviction (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)). (1CT 75-77.)

A jury found appellant guilty of first degree murder and found the conduct enhancement to be true. (3CT 541-544.) The court found the alleged prior convictions to be true. (3CT 550.)

The court sentenced appellant on October 26, 2018 to serve 80 years to life in prison. It imposed 25 years to life for murder, which was doubled because of the strike, and added 25 years to life for the firearms enhancement. A determinate term of five years was added because of the prior serious felony conviction. (3CT 591-594.)

The alleged prior strike and serious felony conviction was for participating in a criminal street gang under section 186.22, subdivision (a) (§ 186.22(a)). The prosecution presented at the court trial two exhibits, a current fingerprint card (ACT 36) and a

packet of material from the Department of Corrections and Rehabilitation (CDCR) which included a chronological history/movement history at CDCR (ACT 38-40), abstracts of judgment (ACT 41-44), fingerprint cards (ACT 45-50), and a photograph of the subject (ACT 51).

Relevant for this matter, an abstract of judgment from San Mateo County Superior Court case no. SC047967 stated Shawn Alexander Moore was convicted by plea on January 4, 2001 of sale of cocaine base (Heath & Saf. Code, § 11352) and participating in a gang (§ 186.22(a)), for which he was sentenced to serve five years in prison. (CT 41-42.)[2]

A fingerprint expert testified at the court trial and said appellant's fingerprints matched the ones from CDCR. (ART 7-12.) Appellant argued a violation of section 186.22(a) is not a strike because it is not a serious felony within the meaning of section 1192.7, subdivision (c)(28). (ART 17-18; 3CT 545-549.) The prosecution argued it was, relying on *People v. Jones* (2000) 47 Cal.4th 566, 573. (ART 18.) The court found it was a strike and a serious felony. (CT 550; ART 20-22.)

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[2] The other abstracts of judgment state Mr. Moore was convicted of illegal possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1)) in 2004 (CT 43), and possession for sale of cocaine base (former Health & Saf. Code, § 11351.5) in 2005 (CT 44). None of these convictions qualify as a prior strike or serious felony conviction.

B. After 2012, Section 186.22(a) can no Longer be committed Alone.[3]

Generally, a felony committed with a gang allegation is a serious felony and a strike. (§ 1192.7, subd. (c)(28) [a serious felony includes "any felony offense, which would also constitute a felony violation of Section 186.22"]; *Jones, supra,* 47 Cal.4th at p. 573; *People v. Ulloa* (2009) 175 Cal.App.4th 405, 410 ["[i]t is undisputed that the substantive offense of active participation in a street gang" in § 186.22(a) is a serious felony]; cf. *Ulloa,* at pp. 411-412 [a misdemeanor violation enhanced under § 186.22, subd. (d) is not a serious felony].)

"Although the elements of gang participation in section 186.22(a) have not changed since defendant pleaded guilty to the offense in 2007, our understanding of them has. At the time defendant entered his plea, an individual could be convicted of violating section 186.22(a) as a sole perpetrator." (*Strike, supra*, 2020 Cal.App. Lexis 108 at p. *2.) In 2012, "the California Supreme Court clarified section 186.22(a) is not violated by a gang member acting alone but is violated only when an active gang member commits a felony offense with one or more members of his or her gang. (*Rodriguez*, at pp. 1128, 1139 (plur. opn. of

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[3] Counsel acknowledges that much of the argument in this part is from the court's opinion in Strike, supra, 2020 Cal.App. Lexis 108, even when it is not cited directly.

Corrigan, J.); *id*. at p. 1139 (conc. opn. of Baxter, J.).)" (*Ibid.*)

The statutory language in section 186.22(a) has remained unchanged from the time of appellant's conviction in 2001. (*Strike, supra*, 2020 Cal.App. Lexis 108 at p. *7].) A gang crime exists when "[1] Any person who actively participates in any criminal street gang [2] with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and [3] who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . . " (§ 186.22(a).)

"What has changed is the interpretation of the third element of the gang participation offense – the requirement that the defendant 'willfully does an act that "promotes, furthers, or assists in any felonious criminal conduct by members of that gang." ' (*People v. Rodriguez, supra*, 55 Cal.4th at p. 1131 (plur. opn. of Corrigan, J.).)" (*Strike*, 2020 Cal.App. Lexis 108 at p.*8.) At the time of appellant's prior conviction, courts of appeal have held a gang member acting alone or with a non-gang member could be convicted of violating section 186.22(a). (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1308; *People v. Salcido* (2007) 149 Cal.App.4th 356, 368, both disapproved in *Rodriguez,* at p. 1137, fn. 8 (plur. opn. of Corrigan, J.).)

Though the court was fractured in *Rodriguez, supra,* 55 Cal.4th 1125, a majority held that a gang member acting alone

does not violate section 186.22(a). (*Id.* at p. 1128 (plur. opn. of Corrigan, J.); *id.* at p. 1139 (conc. opn. of Baxter, J.).) "Justice Corrigan wrote for a three-justice plurality with Justice Baxter concurring separately, and Justice Kennard wrote a three-justice dissent. Because there was no majority opinion, Justice Baxter's concurrence on grounds narrower than Justice Corrigan's plurality opinion represents the *Rodriguez* holding. (*Panetti v. Quarterman* (2007) 551 U.S. 930, 949.)" (*Strike, supra*, 2020 Cal.App. Lexis 108 at p. *8, fn. 5.) "Justice Baxter concurred in the plurality's conclusion that an active gang participant who commits a felony while acting alone is not guilty of violating section 186.22(a). (*Rodriguez*, at p. 1139 (conc. opn. of Baxter, J.).) *Rodriguez* clarified that section 186.22(a) punishes only 'gang members who act[ ] *in concert* with other gang members in committing a felony' (*Rodriguez*, at p. 1138 (plur. opn. of Corrigan, J.)) and that a defendant committing a felony with participants who are not gang members does not violate subdivision (a). (*Rodriguez*, at pp. 1138-1139 (plur. opn. of Corrigan, J.); *id.* at pp. 1139-1140 (conc. opn. of Baxter, J.).)" (*Id.* at pp. *8-9, emphasis in original; *People v. Vega* (2015) 236 Cal.App.4th 484, 504 [§ 186.22(a) requires "one of the people who engaged in the felonious conduct (in addition to defendant) must have belonged to the same gang in which defendant is an active

participant"]; *People v. Rios* (2013) 222 Cal.App.4th 542, 558-559.)

C. A Court Cannot Look Beyond the Fact of the Conviction.

The United States Supreme court has held that a defendant has a right under the Sixth and Fourteenth Amendments to the United States Constitution to a jury trial on any fact that increases the punishment for an offense. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 484.) There is an exception for prior convictions because there was a right to a jury trial when the prior case was prosecuted. (*Jones v. United States* (1999) 526 U.S. 227, 249.) "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi,* at p. 490.)

The Supreme Court has mandated that "fact of a prior conviction" shall be construed narrowly. A court may only undergo a categorical approach. A categorical approach means looking at the elements of the offense to see if it categorically qualifies; a court cannot look at the underlying facts of the offense. (*Mathis v. United States* (2016) 136 S.Ct. 2243, 2248, 2051-2053; *Descamps v. United States* (2013) 570 U.S. 254, 269-270.)

If an offense is "divisible," a court may undergo a modified categorical approach. (*Descamps, supra,* 570 U.S. at p. 257.) A

"divisible" offense is when a "statute sets out one or more elements of the offense in the alternative . . . . " (*Ibid.*) Because section 186.22(a) describes only one way of the committed crime, it is not a divisible offense.

The California Supreme Court adopted the categorical approach in *Mathis* and *Descamps* in determining if a prior conviction can be used to enhance a sentence. (*Gallardo, supra,* 4 Cal.5th at p. 138.) Therefore, the question is whether there was sufficient evidence of a prior conviction under the categorical approach.

D. There was Insufficient Evidence Appellant's Prior Conviction under Section 186.22(a) Qualified as a Serious Felony or Strike.

There was not substantial evidence appellant's 2001 conviction for the gang crime qualified as a prior serious felony or strike conviction. Due process under the Fourteenth Amendment requires every element proven beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) The court must ask, "after viewing the evidence in the light most favorable to the prosecution, [whether] *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, emphasis in original; *People v. Johnson* (1980) 26 Cal.3d 557, 577.)

As explained above, B, the elements of section 186.22(a) is

more narrow today than it was when appellant was convicted in 2001. He could have been convicted of the gang crime while acting alone, which no longer qualifies. Because the elements of the offense was broader when he was convicted than what qualifies today as a prior serious felony or a strike conviction, a 2001 conviction for violating section 186.22(a) is not categorically a prior serious felony or strike.

Even ignoring *Gallardo* and *Descamps*, there was insufficient evidence in the record of conviction appellant acted with others when he suffered the prior conviction. All there was in the record was an abstract of judgment that listed possession of cocaine base for sale and the gang crime. He was sentenced to serve five years in prison, assessed $200 in restitution fines, ordered to register as a gang member, and given gang conditions to follow. There was no indication that anyone else was involved in the crimes. (CT 41-42.)

E. The Prior Convictions Should be Stricken and the Matter Remanded for Resentencing Without the Priors.

Generally speaking, reversal of a true finding on a prior conviction allegation does not prevent retrial. (*Gallardo, supra,* 4 Cal.5th at p. 139; *Strike, supra,* 2020 Cal.App. Lexis 108 at p. *18.) However, "[t]he law neither does or requires idle acts." (Civ. Code, § 3532; see, e.g., *People v. Dunnahoo* (1984) 152 Cal.App.3d

561, 579 [the court was "unwilling to expend valuable judicial resources by engaging in idle gestures or merely adhering to ritualistic form"].) Because a 2001 conviction for violating section 186.22(a) does not categorically qualify as a prior serious felony or strike conviction, it cannot be one under any circumstance. A retrial would be an idle act. This Court should order that the prior strike and serious felony convictions be stricken and appellant be resentenced accordingly.

CONCLUSION

For the foregoing reasons appellant Shaun Alexander Moore respectfully requests that this Court to strike the prior serious felony and prior strike convictions and remand the matter for resentencing without them.

DATED: February 20, 2020

Respectfully submitted,
SIXTH DISTRICT APPELLATE PROGRAM

By: */s/ Jonathan Grossman*
Jonathan Grossman
Attorney for Appellant
Shaun Alexander Moore

CERTIFICATION OF WORD COUNT

I, Jonathan Grossman, certify that the attached APPELLANT'S SUPPLEMENTAL BRIEF contains 2227 words.

Executed under penalty of perjury at San Jose, California, on February 20, 2020.

/s/ Jonathan Grossman
Jonathan Grossman

DECLARATION OF SERVICE BY E-MAIL AND U.S. MAIL

Case Name: ***People v. Moore*** **Case No.: H046446**

I declare that I am over the age of 18, not a party to this action and my business address is 95 S. Market Street, Suite 570, San Jose, California 95113. On the date shown below, I served the within ***APPELLANT'S SUPPLEMENTAL BRIEF*** to the following parties hereinafter named by:

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Attorney General's Office
455 Golden Gate Ave., Ste. 11,000
San Francisco, CA 94102-7004
[attorney for respondent]
SFAGDocketing@doj.ca.gov

Court of Appeal
333 W. Santa Clara St.
Suite 1060, 10th Floor
San Jose, CA 95113
Sixth.District@jud.ca.gov

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Superior Court - Appeals
191 N. First Street
San Jose, CA 95110

District Attorney's Office
70 West Hedding, West Wing
San Jose, CA 95110

Shaun Moore, BH8167
Salinas Valley State Prison
P.O. Box 1050
Soledad, CA 93960

I declare under penalty of perjury the foregoing is true and correct. Executed this 20th day of February, 2020, at San Jose, California.

/s/ *Priscilla A. O'Harra*
Priscilla A. O'Harra