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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOE RODRIGUEZ, JR.,

Defendant and Appellant.

Case No. S187680

Third Appellate District, Case No. C060227
Yuba County Superior Court, Case No. CRF07288
The Honorable James L. Curry, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

ISSUE PRESENTED

Can a person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity be guilty of violating Penal Code[1] section 186.22, subdivision (a)—active participation in a criminal street gang—when he or she, acting alone, is the direct perpetrator of felonious criminal conduct?

INTRODUCTION

A jury convicted appellant of being an active participant in a criminal street gang (§ 186.22, subd. (a) [hereinafter "§ 186.22(a)"] and attempted robbery (§§ 664/211), and found true the allegation that the attempted robbery was committed for the benefit of the gang (§ 186.22, subd. (b)(1) [hereinafter "§186.22(b)(1)"]. Prior to sentencing, the trial court granted appellant's motion for a new trial pursuant to section 1181, subdivision 6 on the § 186.22(b)(1) gang allegation and the prosecutor elected not to retry the allegation. Appellant was then sentenced to state prison.

Appellant appealed to the Third District Court of Appeal. Two justices of the three justice panel reversed appellant's conviction for active participation in a criminal street gang (§ 186.22(a)), finding that the crime does not apply to an active participant in a criminal street gang ("active participant")[2] who is the sole perpetrator of felonious criminal conduct. In reaching their conclusion, the majority disagreed with three published court of appeal cases that had reached the opposite conclusion (*People v. Ngoun* (2001) 88 Cal.App.4th 432, review denied July 7, 2001, S097592 ("*Ngoun*"); *People v. Salcido* (2007) 149 Cal.App.4th 356, review denied

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[1] All further undesignated statutory references are to the Penal Code.

[2] Throughout this brief, respondent will use the shorthand "active participant" to refer to a person who "actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity."

July 11, 2007, S152686 ("*Salcido*"); *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1301-1308, review denied March 10, 2010, S179000 ("*Sanchez*")). The dissenting justice disagreed with the majority's conclusion and believed the published cases previously addressing the issue were correctly decided.

The majority's decision should be rejected. In reaching its conclusion, the majority: treats dictum in *People v. Castenada* (2000) 23 Cal.4th 743 ("*Castenada*") as binding; misreads the facts of *Castenada*; incorrectly concludes that "It makes no sense to say that a person has promoted or furthered his own criminal conduct"; and adopts an interpretation that leads to absurd results which are inconsistent with the Legislature's intent in enacting section 186.22(a).

STATEMENT OF THE CASE

Appellant, an active participant in the Norteño street gang,[3] attempted to rob the victim while visiting his sister in Marysville. The facts surrounding offense, which, unless otherwise indicated, are taken from the majority's decision, are summarized as follows: On May 10, 2007, the victim, Stanley Olsen, stepped out of his truck and onto the street. He heard a person behind him say something that he did not fully hear. He turned and saw appellant, whom he did not recognize, coming up to him. Olsen asked appellant if he knew him, and appellant said, "You eye fuck me, nigger, and I'll kill you." (1 RT[4] 138.)

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[3] As noted by the dissent, "there is no dispute that substantial evidence supports the conclusion [appellant] actively participated in a criminal street gang (the Norteños) with knowledge that its members engage in a pattern of criminal gang activity." (Dis. opn. of Sims, J. at pp. 2-3.)

[4] "RT" refers to the Reporter's Transcript.

Olsen stood his ground and appellant came up to him so that the two men's chests were touching. Appellant then demanded money from Olson, saying "'Give me your fucking money,'" and telling him he would "fuck [him] up." (1 RT 138.) Olson told appellant he "didn't have time for this" and said appellant "needed to get away from" him. Appellant then punched Olson in the jaw and the two men went to the ground and fought. Olson was able to get up, and appellant fled to an apartment where he was later found hiding under a bed and arrested.

During the booking process, appellant admitted he was an active member of the Norteño gang. He had the word "northern" tattooed on the back of his left triceps and the word "warrior" on his right. (1 RT 189-190, 238.) He had the letter "N" with the number "1" on one side and the number "4" tattooed on his chest, along with the phrase "Only God can judge me," an Aztec warrior, and skulls—all symbols associated with the Norteño gang. (1 RT 189, 191-193.) Across his back, he had his last name tattooed in red and black ink—his gang's colors. (1 RT 191-192, 238.) He also had red shoelaces in his shoes and was wearing a black belt. (1 RT 238, 242; 2 RT 329, 353-355.)

Two gang experts testified that robbery, among other crimes, was a primary activity of the Norteño gang, and—based on a hypothetical mirroring the facts of the case—both opined that the attempted robbery of Olson was committed for the benefit of the gang. (1 RT 196-201; 2 RT 356-364.)

A jury found appellant guilty of attempted robbery (Count 1; §§ 664/211) and being an active participant in a criminal street gang (Count 3; § 186.22(a)) and found true the allegation that the attempted robbery was

committed for the benefit of a criminal street gang (§ 186.22(b)(1)).[5] (1 CT[6] 118, 127-129; maj. opn. of Blease, J.[7] at pp. 2-3.) The court found true the allegations that appellant had suffered a prior "strike" conviction (§ 667, subds. (b)-(i) and § 1170.12, subds. (a)-(d))—specifically, a 2000 robbery conviction (§§ 211/212.5)—and had served a prior prison term (§ 667.5, subd. (b)).[8] (1 CT 40-43, 119; maj. opn. at p. 3, fn. 3.)

Prior to sentencing, appellant retained new counsel who filed a new trial motion pursuant to section 1181, subdivision 6.[9] (1 CT 145, 151-180; maj. opn. at p. 3.) In the motion, appellant made two arguments, the first of which was that "The Prosecution Failed to Prove the Gang Enhancement By Substantial Evidence."[10] (1 CT 158-174.) Appellant argued his motion should be granted because there was insufficient evidence to support the "'Criminal Street Gang' component" of the enhancement (1 CT 159-164)

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[5] Count 2 of the amended information charged appellant with assaulting the victim with a deadly weapon. (1 CT 41.) The court granted the prosecutor's motion to dismiss this count prior to the jury being sworn, and trial proceeded on Counts 1 and 3. (1 CT 105.)

[6] "CT" refers to the Clerk's Transcript.

[7] Further citations to the majority's opinion will be designated "maj. opn."

[8] Appellant waived his right to a jury trial on these allegations. (1 CT 113.)

[9] Section 1181 provides in pertinent part as follows:

> When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:
>
> [¶]...[¶]
>
> 6. When the verdict or finding is contrary to law or evidence. . . .

[10] Appellant's second argument, which is not relevant to the issue before the Court, was that: "Defendant Received Constitutionally Ineffective Assistance of Counsel." (1 CT 174-178.)

and to show that the attempted robbery was "Committed for the Benefit of, and With the Specific Intent to Promote the Gang."[11] (1 CT 164-173.) Appellant also argued that "The [gang] Expert's Opinion Testimony Constituted Improper Profile Evidence Which does not Amount to Substantial Evidence Supporting the Gang Enhancement," and concluded that "[f]or all the reasons stated, the gang enhancement finding must be set aside." (1 CT 173-174.) The prosecutor addressed these arguments in his response (1 CT 183-208), and appellant addressed the prosecutor's response in his reply (1 CT 210-215). Appellant did not move for a new trial on Count 3 (§ 186.22(a)).[12]

On August 21, 2008, the motion was heard. (2 RT 500-502.) Without argument from either side, the court granted appellant's motion for new trial on the section 186.22(b)(1) gang allegation alleged with Count 1, stating that:

> The Court's convinced there is insufficient evidence for that finding to stand. It's beyond a reasonable doubt that [appellant] is a member of a gang, the Norteños; that he was active. There is no evidence beyond that to support the gang enhancement. There's nothing about the crime that connects it to the activities of the gang other than the expert's statement that robbery is one of the crimes Norteños commit. The cases that I've read say there's got to be something more than gang membership and/or association.

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[11] These are both components of the 186.22(b)(1) gang enhancement, not the substantive crime of active participation set forth in section 186.22(a). (See *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1334.)

[12] Even if appellant's motion could somehow be construed to apply to his section 186.22(a) conviction, at no time did he argue that a new trial should be granted with regard to that count because section 186.22(a) does not apply to an active participant who, when acting alone, is the direct perpetrator of felonious criminal conduct.

> In this case, we have no evidence that the area where the crime was committed had anything to do with gang territory, gang turf. There was speculation from the experts that maybe [appellant's] tattoos at least, in part, may have been visible, although the victim saw no tattoos. There was no gang language used during the attack. There were no gang signs. There is simply nothing beyond the fact that he is a gang member that would support that finding, and the Court will, in fact, grant [appellant's] motion for a new trial as to the gang enhancement.

(2 RT 501.) The court then asked the prosecutor whether he intended to retry the gang allegation and the prosecutor indicated he did not.[13]

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[13] In its introduction, the majority acknowledges that the trial court granted appellant's motion for new trial on the enhancement. However, in its analysis of the issue under review, it states that the trial court "dismissed the enhancement allegation for insufficient evidence." (Maj. opn. at p. 15.) The majority also states that "On appeal [appellant] contends this evidentiary hiatus also required the trial court to dismiss his conviction of the substantive, subdivision (a), criminal street gang offense for lack of substantial supporting evidence. . . . We agree." (Maj. opn. at p. 4.) It seems the majority is confusing the granting of a motion for judgment of acquittal for insufficient evidence pursuant to section 1118.1—a motion that was never made in this case—with the granting of a motion for new trial, as the granting of a new trial motion does not constitute a finding of insufficient evidence and cannot result in dismissal. (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 132-134.) Rather, a court grants a motion for new trial when it finds the verdict is "'contrary to the ... evidence.'" (*Id.* at p. 133.) "In doing so, the judge acts as a 13th juror who is a 'holdout' for acquittal. Thus, the granting of a section 1181(6) motion is the equivalent of a mistrial caused by a hung jury." (*Ibid.*) It is not equivalent to a finding of insufficient evidence under section 1118.1, is not an acquittal, and does not bar retrial on double jeopardy grounds. (*Ibid.*) Further, a court does not, and indeed cannot, "dismiss" a charge when it grants a new trial motion. Instead, it has three options. "'(1) It can set aside the verdict of conviction and grant the defendant a new trial; (2) it can deny the motion and enter judgment on the verdict reached by the jury; or (3) it can modify the verdict either to a lesser degree of the crime reflected in the jury verdict or to a lesser included offense of that crime as specified by [section 1181(6)].' [Citation.]" (*Ibid.*)

(continued...)

(2 RT 501-502.) After appellant's counsel indicated she was prepared to proceed with sentencing, the court sentenced appellant to eight years and four months in state prison. (Maj. opn. at p. 3, fn. 3.) Appellant's counsel never gave any indication that she had moved for a new trial on the substantive gang count, did not ask the court why it did not rule on any such motion, and never sought a final ruling on any such motion.

On appeal, appellant claimed "The Trial Court Erred In Failing To Grant A New Trial On Count 3." (AOB[14] 18-26.) In its Respondent's Brief, the People argued that by not moving for a new trial on Count 3 in the trial court, appellant had forfeited the issue.[15] (RB[16] 11-16.) Out of an abundance of caution, respondent also noted that appellant's claim could not fairly be construed as the separate, distinct argument that there was insufficient evidence to support the conviction, an issue entirely separate

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(...continued)

In this case, the court did not "dismiss[] the enhancement allegation for insufficient evidence." (Maj. opn. at 15.) Rather, the court, sitting as the "13th juror," was not "convinced that the charges have been proven beyond a reasonable doubt," and thus found that the jury's true finding on the enhancement was, in its opinion, contrary to the evidence. It was the prosecutor who then elected not to seek to retry the enhancement after the court granted the new trial motion. (2 RT 501-502.)

[14] "AOB" refers to the Appellant's Opening Brief.

[15] The majority misinterpreted respondent's argument in this regard. The majority construed respondent's argument to be that appellant was precluded from challenging the sufficiency of the evidence supporting his section 186.22(a) conviction because he did not move for a new trial on that charge in the trial court. (Maj. opn. at p. 12-13.) Respondent did not—and would not—make such an argument. Respondent argued that appellant's failure to seek a new trial on his section 186.22(a) conviction in the trial court precluded him on appeal from challenging the trial court's non-existent denial of the alleged motion. (RB at 11-16 [see argument heading: "Because Appellant Did Not Move For a New Trial on Count 3 Below, the Court Did Not, and Indeed Could Not, Err in Denying Such a Motion."].)

[16] "RB" refers to the People's Respondent's Brief.

and apart—and analyzed under different standards—from whether the trial court abused its discretion in denying the alleged new trial motion. (RB 16-18.) In his reply brief, appellant confirmed that his argument was what he said it was—that the trial court had abused its discretion when it denied his alleged new trial motion on Count 3—and acknowledged that his trial counsel had done "a very poor job of presenting the issue." (ARB[17] 1-2.)

Despite the foregoing, the court of appeal construed appellant's argument to be that there was insufficient evidence to support his conviction because a person cannot be guilty of violating section 186.22(a) unless they aid and abet felonious criminal conduct committed by another gang member.[18] As will be discussed in more detail *post*, the two justice

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[17] "ARB" refers to the Appellant's Reply Brief.

[18] The court of appeal construed appellant's argument as follows: "Defendant contends the trial court should have dismissed his conviction of the substantive gang offense defined by section 186.22, subdivision (a), for insufficiency of the evidence to show that he participated in a felony with other gang members." (Maj. opn. at 14.) In rejecting respondent's "argument" that appellant had not even raised a sufficiency of the evidence claim in his opening brief—something appellant confirmed he had not done in his reply brief—the court of appeal stated that "[Appellant] clearly argues that the trial court should have 'dismissed the charge' for insufficient evidence." (Maj. opn. at 13-14.) The opinion appears to quote from sub-heading "C" of appellant's opening brief in which he stated, "The Court Should Have Granted a New Trial on Count III and Dismissed the Charge[.]" (AOB 22.) The court of appeal suggests the phrase "Dismissed the Charge" in this heading "suffices to apprise us of [appellant's] contention and his analysis of the evidence adduced at trial." (Maj. opn. at 14.) The court of appeal reached this conclusion despite the fact that appellant: did not move for entry of judgment of acquittal for insufficient evidence pursuant to section 1118.1 on the substantive gang count; never moved for a new trial on the substantive gang count; argued in his new trial motion that there was insufficient evidence to support elements of the gang enhancement that are not contained in the substantive gang crime; did not argue in either his new trial motion or his opening brief that section 186.22(a) cannot be violated when an active participant, acting alone, is the (continued...)

majority agreed with their interpretation of appellant's "argument," finding that the crime does not apply to an active participant who is the sole perpetrator of felonious criminal conduct.

In reaching their conclusion, the majority found that *Ngoun*, *supra*, 88 Cal.App.4th 432, *Salcido*, *supra*, 149 Cal.App.4th 356, and *Sanchez*, *supra*, 179 Cal.App.4th 1297, 1301-1308, were all wrongly decided. In so doing, the majority concluded that *Castenada*—a case in which this Court addressed the meaning of the phrase "actively participates"[19] in section 186.22(a)—had correctly interpreted the language in section 186.22(a) to mean that one must aid and abet felonious criminal conduct in order to be guilty of violating the section. It found that the court in *Ngoun* "wholly misse[d] . . . the grammar of the statute" in its analysis, and opined that the CALCRIM drafters erred in amending CALCRIM No. 1400 to include liability for those who directly commit a felony. The majority based its conclusion on a literal, plural reading of the word "members[,]" finding that the statute "requires perforce that there be more than one participant[,]" and stating that "[i]t makes no sense to say that a person has promoted or furthered his own criminal conduct." (Maj. opn. at p. 5.)

In addition, faced with the facts in *Castenada*, which involved two co-perpetrators committing a robbery in concert, and in seeming contradiction

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(...continued)
direct perpetrator of felonious criminal conduct; did not once cite to *Castenada*, *supra*, 23 Cal.4th 743, the case the majority twice characterized as "the leading case" on the issue (maj. opn. at 4, 18); did not cite to *Sanchez*, *supra*, 179 Cal.App.4th 1297, 1301-1308; did not mention that *Sanchez*, *Ngoun*, *supra*, 88 Cal.App.4th 432, and *Salcido*, *supra*, 149 Cal.App.4th 356, had all rejected the argument that an active participant could not be guilty of violating section 186.22(a) when acting alone; and made no mention of *Ngoun*, *Salcido*, and *Sanchez* being incorrectly decided.

[19] A phrase not at issue here.

to its conclusion that section 186.22(a) only applies to aiders and abettors, the majority found "that perpetrators may come within the language of section 186.22(a)." (Maj. opn. at p. 21.) This is true, the majority concluded, because the facts of "*Castenada* do[] not rule out perpetrators who act in criminal conduct with other gang members[,]" and because "'[t]he dividing line between actual perpetrator and the aider and abettor is often blurred.'" (Maj. opn. at pp. 21-22.)

The dissent disagreed with the majority's conclusion, pointing out that:

> By insisting on the literal, plural definition of "members," the majority would preclude a conviction for active participation in a criminal street gang (§ 186.22(a)) where the leader of the Norteños, acting entirely alone, got into his car and drove into Sureño territory, shot and killed several Sureños, and pinned notes to their shirts reading, "Norteños Rule."

(Dis. opn. of Sims, J.[20] at pp. 5-6.) The dissent stated:

> In light of the purposes of the Street Terrorism Enforcement and Prevention Act, quoted above, I cannot believe the Legislature intended such an absurd result. "We must . . . give the [statutory] provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. [Citation.]" [Citations.]

(Dis. opn. at p. 6.) The dissent argued that the word "members" should not be given its literal, plural meaning, pointing out that:

> Section 7 provides in pertinent part, "Words used in [the [Penal Code] [*sic*] in the present tense include the future as well as the present . . . the singular number includes the plural, and the plural the singular . . . ." Subdivision 16 of section 7 further counsels that "Words and phrases must be construed according

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[20] Further citations to the dissent's opinion will be designated as "dis. opn."

> to the context . . . ." By these rules, "members" can mean "member." It should.

(Dis. opn. at p. 4.) The dissent agreed that the majority was correct in finding that one cannot "assist" himself, but pointed out that the majority was wrong about the "meaning of the words 'promotes [or] furthers . . . in any felonious criminal conduct.' Someone can 'promote' or 'further' felonious criminal conduct by committing the offense himself, without the participation of others." (Dis. opn. at p. 7.)

The dissent quoted extensively from *Ngoun*, *Salcido*, and *Sanchez*, and pointed out that the statements in *Castenada* relied upon by the majority were dictum. (Dis. opn. at pp. 1-9.)

Respondent petitioned this Court for review of the majority's decision, and this Court granted the request.

SUMMARY OF ARGUMENT

In 2001, *Ngoun* held "that Penal Code section 186.22 applies to the perpetrator, as well as to aiders and abettors, of criminal gang felonies." (*Ngoun*, *supra*, 88 Cal.App.4th at p. 434.) With the exception of the majority in the instant case, each court to consider the issue after *Ngoun*, as well as the dissent here, has agreed with *Ngoun*'s finding. (*Salcido*, *supra*, 149 Cal.App.4th 356; *Sanchez*, *supra*, 179 Cal.App.4th 1297; dis. opn.; *People v. Cabrera* (2010) 191 Cal.App.4th 276 ("*Cabrera*").[21])

The majority disagreed with the finding of these courts. The majority's decision is flawed. First, the majority treats as binding the statements in *Castenada* equating the promote/further/assist element of section 186.22(a) to aiding and abetting. However, as each court to consider the issue has found, these statements are dictum and do not compel the decision reached by the majority. (*Ngoun*, *supra*, 88 Cal.App.4th at p. 437; *Salcido*, *supra*, 149 Cal.App.4th at pp. 367, 369; *Sanchez*, *supra*, 179 Cal.App.4th at p. 1307; *Cabrera*, *supra*, 191 Cal.App.4th at p. 284; dis. opn at pp. 8-9.)

Next, the majority misreads the facts of *Castenada*, erroneously believing that Castenada's co-perpetrator was described as a gang member. Based on this erroneous reading, the majority concludes that "*Castenada* does not rule out perpetrators who act in concert with other gang members, as shown by the facts of the case." (Maj. opn. at p. 22.) Castenada's co-perpetrator was not, however, described as a gang member. Thus, if the facts of *Castenada* show anything it is that—as the court of appeal found in *Sanchez*—an active participant who engages in felonious criminal conduct

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[21] *Cabrera* was decided after the majority's decision and rejected its finding.

with a person who has not been identified as a gang member falls under section 186.22(a)'s purview.

Next, the majority incorrectly concludes that "[i]t makes no sense to say that a person has promoted or furthered his own criminal conduct." After analyzing the intent of the statute and the meaning of the words "promote" and "further," the *Ngoun* court correctly reached the opposite conclusion, a finding that has been followed by the dissent and other courts. (*Ngoun*, *supra*, 88 Cal.App.4th at p. 436; *Sanchez*, *supra*, 179 Cal.App.4th at p. 1307 ["a gang member who perpetrates a felony by definition also promotes and furthers that same felony."]; dis. opn. at p. 7 ["[T]he majority are wrong about the meaning of the words 'promotes [or] furthers . . . in any felonious criminal conduct.' Someone can 'promote' or 'further' felonious criminal conduct by committing the offense himself, without the participation or aid of others."].)

Next, the majority's decision leads to several absurd results. The most glaring of these is that under its interpretation the lone active participant who shoots a rival would not be guilty of violating the section, while the active participant who aided and abetted the shooter by loaning him his gun to carry out the crime would be. As the *Ngoun* court observed, "Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity[.]" (*Ngoun*, *supra*, 88 Cal.App.4th at p. 436.)

Finally, the majority's decision is inconsistent with the intent of the statute as evidence in both the Legislative's findings in section 186.21 and the history surround the statute's enactment.

ARGUMENT

I. SECTION 186.22(A) APPLIES TO AN ACTIVE PARTICIPANT WHO, ACTING ALONE, IS THE DIRECT PERPETRATOR OF FELONIOUS CRIMINAL CONDUCT

In 2001, the *Ngoun* court found that an active participant can be guilty of violating section 186.22(a) when he or she, acting alone, is the direct perpetrator of felonious criminal conduct. That finding was reaffirmed in 2007 by the *Salcido* court, in 2009 by the *Sanchez* court, and in 2010 by the dissent and the court of appeal in *Cabrera*, *supra*, 191 Cal.App.4th 276. The majority's conclusion that these cases are wrongly decided is erroneous. The majority treats dictum in *Castenada* as binding; misreads the facts of *Castenada*; incorrectly concludes that "[i]t makes no sense to say that a person has promoted or furthered his own criminal conduct"; and adopts an interpretation that leads to absurd results which are inconsistent with the Legislature's intent.

A. Section 186.22(a)

"In 1988, the Legislature enacted the California Street Terrorism Enforcement and Prevention Act (the STEP Act). (§ 186.20 et seq.) 'The impetus behind the STEP Act ... was the Legislature's recognition that "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. These activities, both individually and collectively, present a clear and present danger to the public order and safety and are not constitutionally protected." (§ 186.21.)' (*People v. Montes* (2003) 31 Cal.4th 350, 354.)" (*People v. Hernandez* (2004) 33 Cal. 4th 1040, 1047.)

Section 186.22(a) provides as follows:

> Any person who actively participates in any criminal street gang with knowledge that its members engage in or have

> engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, [is guilty of a misdemeanor or felony].

"The gravamen of the substantive offense set forth in section 186.22(a) is active participation in a criminal street gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 55 ("*Albillar*").) "[T]he legislature determined that the elements of the gang offense are (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's member engage in or have engaged in a pattern of criminal activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.]" (*Id.* at p. 56.)

The statute's "promotes, furthers, or assists" element targets "felonious criminal conduct, not felonious gang-related conduct." (*Albillar*, *supra*, 51 Cal.4th at p. 55, see *id.* at pp. 51, 54-59.) Thus, "[t]he provision criminalizes active participation in a criminal street gang by a person who has the requisite knowledge and who 'willfully promotes, furthers, or assists in *any* felonious criminal conduct by members of that gang.' (§ 186.22(a), italics added.)" (*Id.* at p. 55.)

B. Relevant case law

This Court's decision in *Castenada* has played a central role in the analysis of the issue presented here. The case was first relied on by defendants challenging their section 186.22(a) convictions and ultimately by the majority in the case at bench.

In *Castenada*, this Court addressed the meaning of the phrase "actively participates" in section 186.22(a). At issue was whether that phrase requires the prosecution to show that a defendant held a position of leadership in the gang or whether it is sufficient if the evidence establishes that the defendant's involvement with the gang is more than nominal or

passive.[22] (*Id.* at pp. 745-746.) In analyzing that specific issue, the Court made several statements upon which the majority relied for its conclusion that section 186.22(a) does not apply to an active participant who is the sole perpetrator of felonious criminal conduct.

In discussing whether section 186.22(a) met the due process requirement that criminal liability rest on personal guilt as set forth by the United States Supreme Court in *Scales* v. *United States* (1961) 367 U.S. 203, 228, the Court stated:

> As we mentioned earlier, the high court in *Scales*, *supra*, 367 U.S. 203, 228, held that the Smith Act ["a federal law that prohibited knowingly holding membership in an organization advocating the violent overthrow of the United States government" (*Castenada*, *supra*, 23 Cal.4th at p. 748)] satisfied the due process requirement of personal guilt by requiring proof of a defendant's active membership in a subversive organization with knowledge of and an intent to further its goals. Here, section 186.22(a) limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members, as the Court of Appeal in [*People v.*] *Green* [(1991)] 227 Cal.App.3d 692, 703-704, acknowledged. (*Ibid.* [anyone violating § 186.22(a) "would also ... be criminally liable as an aider and abettor to any specific crime" committed by the gang's members]; see generally *People v. Beeman* (1984) 35 Cal.3d 547, 560 [defining an aider and abettor as one who acts "with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of" an offense (italics omitted)].)

(*Castenada*, *supra*, 23 Cal.4th at pp. 749-750, parallel citations omitted.)

The Court rejected Castenada's claim that the sponsors' of Assembly Bill No. 2013—the legislation that enacted section 186.22(a)—response to a question posed by an opponent to the legislation indicated that the phrase

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[22] This Court concluded that the latter was sufficient.

"actively participates" reflected an intent to limit the section to someone who devoted all or a substantial portion of their time to the gang and had a leadership position in the gang, stating:

> The sponsors' reply appears to state (albeit not with great clarity) what we have concluded here: a person liable under section 186.22(a) must aid and abet a separate felony offense committed by gang members. In that way, as the bill's proponents stressed, section 186.22(a) "goes beyond the active membership test in *Scales*," which allowed the criminal conviction of anyone holding active membership in a subversive organization, without requiring that the member aid and abet any particular criminal offense committed by other members.

(*Id.* at p. 750.)

The Court considered and rejected Castenada's argument that the Legislature must have intended to incorporate the jury instruction definition of "active membership" quoted by the high court in a footnote in *Scales*—which described an active member of the Communist Party as one who "'devoted all, or a substantial part, of his time and efforts to the Party'"—stating:

> We reject defendant's argument. As we have explained, section 186.22(a) imposes criminal liability not for lawful association, but only when a defendant "actively participates" in a criminal street gang while also aiding and abetting a felony offense committed by the gang's members.

(*Castenada*, *supra*, 23 Cal.4th at pp. 750-751.)

Finally, in discussing the "fair warning rule"—which prohibits the enforcement of a statute that is so vague it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits . . . [and] may authorize and even encourage arbitrary and discriminatory enforcement" (*Chicago v. Morales* (1999) 527 U.S. 41, 56)—the Court stated:

> We have pointed out that, giving the words "actively" and "participates" their usual and ordinary meaning, a person

> "actively participates in any criminal street gang," within the meaning of section 186.22(a), by "involvement with a criminal street gang that is more than nominal or passive." (See *ante*, pp. 746-747.) As the United States Supreme Court observed in *Scales*, *supra*, 367 U.S. 203, 223, "[t]he distinction between 'active' and 'nominal' membership is well understood in common parlance." Moreover, as we have explained, every person incurring criminal liability under section 186.22(a) has aided and abetted a separate felony offense committed by gang members. (See *ante*, p. 749.) 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."

(*Castenada*, *supra*, 23 Cal.4th at p. 752, parallel citations omitted.)

Seizing on the aiding and abetting language in *Castenada*, the defendant in *Ngoun*, a Fifth District Court of Appeal case, argued there was insufficient evidence to support his conviction for having violated section 186.22(a) because the section only applied to one who aids and abets felonious criminal conduct, not to direct perpetrators like himself. (*Ngoun*, *supra*, 88 Cal.App.4th at pp. 434-435.)

In *Ngoun*, the defendant was convicted of, inter alia, second degree murder, two assaults with a firearm, and active participation, and the jury found true the allegations that the murder and assaults were committed for the benefit of a gang. (*Ngoun*, *supra*, 88 Cal.App.4th at pp. 433-434.) While the statement of facts in *Ngoun* was not published (*Ngoun*, *supra*, 88 Cal.App.4th at p. 434), the court summarized the facts in its analysis of the issue before it as follows:

> Appellant was an active gang member who went with other Modesto Hit Squad members to a party where he knew other rival gang members would be. He went armed in anticipation of a confrontation and asked a fellow gang member to "watch his back." During the party there was a conflict between members of the two gangs. Appellant was "disrespected" by members of Oak Street Posse. He fired into a crowd of people which

included members of the rival gang, including those with whom he had had an adversarial encounter earlier in the evening.

(*Id.* at p. 437.) The court noted that "[i]t is undisputed that, if the evidence proved any criminal conduct by appellant, it was only as the *perpetrator* of the murder of Ken Martinez and the assaults on the other unnamed victims." (*Id.* at p. 435, original italics.)

The court began its analysis by reviewing the legislative history of the STEP Act and stated that:

> Given the objective and intent of subdivision (a), we find good reasons not to construe section 186.22, subdivision (a), in the restricted manner advocated by appellant and instead to conclude that this subdivision applies to the perpetrator of felonious gang-related criminal conduct[23] as well as to the aider and abettor.

(*Ngoun, supra*, 88 Cal.App.4th at p. 436.) In undertaking a statutory construction analysis, the court stated:

> Under the language of subdivision (a), liability attaches to a gang member[24] who "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." (§ 186.22, subd. (a).) In common usage, "promote" means to contribute to the progress or growth of; "further" means to help the progress of; and "assist" means to give aid or support. (Webster's New College Dict. (1995) pp. 885, 454, 68.) The literal meanings of these critical words squares with the expressed purposes of the lawmakers. *An active gang member who directly perpetrates a gang-related offense "contributes" to*

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[23] As noted, in *Albillar, supra*, 51 Cal.4th 47, this Court found that the "felonious criminal conduct" that is promoted, furthered, or assisted does not have to be gang related. (*Id.* at pp. 51, 54-59.)

[24] Respondent notes that section 186.22(a) imposes liability on those who "actively participate[] in any criminal street gang." Thus, a person who is not a member of a gang but who actively participates in the gang can be guilty of violating section 186.22(a). (§ 186.22, subd. (i); see *Castenada, supra*, 23 Cal.4th at pp. 747, 753; *People v. Robles* (2000) 23 Cal.4th 1106, 1114, fn. 4.)

the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity[.]

(*Id.* at p. 436, italics added.) The court addressed *Castenada,* stating:

> The real difficulty here lies in the standard CALJIC jury instruction. The instruction is probably founded upon *People v. Castenada*, *supra*, 23 Cal.4th 743, 750, where the court "concluded ... [that]: a person liable under section 186.22(a) *must aid and abet* a separate felony offense committed by gang members. In that way, as the bill's proponents stressed, section 186.22(a) 'goes beyond the active membership test in *Scales*,' which allowed the criminal conviction of anyone holding active membership in a subversive organization, without requiring that the member aid and abet any particular criminal offense committed by other members." (Italics added.)

(*Id.* at p. 437.) The court concluded that:

> As we read *Castenada*, it does not stand for the proposition that only an aider and abettor is subject to liability under section 186.22, subdivision (a) and, for the reasons we have expressed, it would be a misconstruction of the statutory language and a perversion of the legislative intent to read the subdivision in such a narrow manner.

(*Id.* at p. 437.) The court went on to suggest that the CALJIC committee review the instruction with the aim of revising it in light of its opinion (*ibid.*), which the committee apparently did (*Salcido*, *supra*, 149 Cal.App.4th at p. 370 [noting that, apparently as a result of the court's suggestion in *Ngoun*, "CALJIC No. 6.50 [which sets forth the elements of the crime of active participation] was changed to clarify that direct participation in gang-related crime, as well as aiding and abetting, falls within the scope of section 186.22, subdivision (a)."].)

The Fifth District again addressed the issue six years later in *People v. Salcido*, *supra*, 149 Cal.App.4th 356. In *Salcido*, the defendant—a gang member—was the direct perpetrator of felonies committed on two separate occasions. (*Id.* at pp. 359-360, 361-362.) In April 2005, he was found to be in possession of concealed weapons, a dirk or dagger (§ 12020, subd. (a)(4)) and a billy club (§ 12020, subd. (a)(1)). (*Id.* at pp. 359-360.) In September 2005, he drove a stolen car while possessing a loaded, concealed firearm and brass knuckles (§§ 496d, subd. (a); 12025, subd. (a)(1); 12031, subd. (a)(1); 12020, subd. (a)(1)). (*Id.* at pp. 359-360.) In addition, he was convicted of two counts of active participation in a gang (§ 186.22(a)), one count for the April offense and one for September, and the jury found true allegations that each weapons-related crime was committed for the benefit of a criminal street gang (§186.22, subd. (b)(1)). (*Id.* at p. 359.) On each occasion, Salcido was in the company of a fellow gang member, but there was no evidence that the gang member participated in his crimes. (*Id.* at pp. 361-368, 368.)

While CALJIC No. 6.50 reflected the court of appeal's holding in *Ngoun* at the time of Salcido's trial, CALCRIM No. 1400—the standard instruction on active participation—did not. (*Salcido*, *supra*, 149 Cal.App.4th at p. 370.) With regard to the promote/further/assist element of section 186.22(a), it stated, "The People must prove that: [¶] . . . [¶] 3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang." (*Salcido*, *supra*, 149 Cal.App.4th at p. 364, fn. 3.) Accordingly, the trial court "'synthesized'" CALCRIM No. 1400 and CALJIC No. 6.50, so that with regard to the third element of the crime (the promote/further/assist element), the jury was instructed that "the people must prove that [¶] . . . [¶] "the defendant willfully promoted, furthered or assisted *by either directly and actively committing a felony offense or aiding and abetting* felonious criminal conduct by members of

that gang."[25] (*Id.* at p. 366, original italics.) "[T]he instruction omitted the following portion of CALCRIM No. 1400: 'To prove that the defendant willfully assisted, furthered, or promoted a crime, the People must prove that: [¶] 1. A member of the gang committed the crime; [¶] 2. The defendant knew that the gang member intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the commission of the crime.'" (*Ibid.*)

Relying on the statement in *Castenada* that "a person liable under section 186.22(a) must aid and abet a separate felony offense committed by gang members[,]" Salcido argued "that the trial court should have instructed the jury that a person cannot be guilty of street terrorism [(i.e., active participation)] unless he or she aids and abets 'a separate felony offense' in addition to an underlying gang-related felony offense." (*Salcido, supra*, 149 Cal.App.4th at pp. 359, 366-367.)

In rejecting the claim, the court noted that the statement from *Castenada* relied upon by Salcido was "often misinterpreted" and stated that:

> [w]hen read in context . . . it is part of the Supreme Court's explanation that section 186.22, subdivision (a), avoids punishing mere association with a disfavored organization and satisfies the due process requirement of personal guilt (see *Scales v. United States* (1961) 367 U.S. 203) by criminalizing gang membership only where the defendant bears individual culpability for "a separate felony offense committed by gang members." (*Castenada, supra*, 23 Cal.4th at pp. 749-751.) In

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[25] The instruction further informed the jury that "[f]elonious criminal conduct means committing or attempting to commit" any of the other substantive crimes of which Salcido was charged. (*Salcido, supra*, 149 Cal.App.4th at p. 364, fn. 3.)

> other words, because section 186.22, subdivision (a), "limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity" (*Castenada*, *supra*, at p. 749), anyone who violates the statute must be more than a passive gang associate. He or she "'would also ... be criminally liable as an aider and abettor to [the] specific crime' committed by the gang's members ... ." (*Ibid.*)

(*Salcido*, *supra*, 149 Cal.App.4th at p. 367, parallel citations omitted.)

The court went on to point out that in *Ngoun* it had found that section 186.22(a) applied to direct perpetrators as well as aiders and abettors, reiterated its ruling in *Ngoun*, and rejected Salcido's attempt to distinguish *Ngoun*. (*Salcido*, *supra*, 149 Cal.App.4th at pp. 367-368, 369.) In so doing, the court rejected Salcido's assertion that section 186.22(a) "imposes liability on perpetrators only if they commit the crime in concert with other gang members."[26] (*Id.* at p. 368)

The court concluded by pointing out that the problem arose in *Salcido* because—despite its holding in *Ngoun* and the CALJIC committee's subsequent modification to CALJIC No. 6.50—CALCRIM No. 1400 continued to "define[] the elements of 'willfully assist[ing], further[ing], or promot[ing] a crime' only in terms of the defendant acting as an aider and abettor[,]" and did not include direct perpetrators. (*Salcido*, *supra*, 149 Cal.App.4th at pp. 369-370.) Accordingly, the court suggested the CALCRIM committee review and revise CALCRIM No. 1400 as the CALJIC committee had with CALJIC No. 6.50. (*Id.* at p. 370.) The CALCRIM committee subsequently modified the instruction. (See CALCRIM No. 1400 (Winter 2010 ed.) & "Authority" note thereto ["Applies to Both Perpetrator and Aider and Abettor. *People v. Ngoun*

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[26] A position the majority adopts here.

(2001) 88 Cal.App.4th 432, 436; *People v. Castenada* (2000) 23 Cal.4th 743, 749–750."], parallel citations omitted.)

The issue was next addressed in 2009 by Division Two of the Court of Appeal, Fourth Appellate District in *Sanchez, supra*, 179 Cal.App.4th 709. In *Sanchez*, the defendant—a gang member—and his cousin—who was not a gang member—robbed two female employees of a pizza parlor while acting in concert. (*Id.* at pp. 1301-1304.) Sanchez was convicted of two counts of robbery and the jury found true the allegation that he personally used a firearm during the commission of the offense. (*Id.* at p. 1301.) He was also convicted of active participation (§ 186.22(a)); however, the jury found the gang enhancement allegations (§ 186.22(b)) alleged in connection with the robbery counts to be not true. (*Ibid.*)

On appeal, Sanchez contended there was insufficient evidence that he promoted, furthered, or assisted in any felonious criminal conduct by gang members. (*Sanchez, supra*, 179 Cal.App.4th at pp. 1301-1302, 1305.) As did the defendants in *Ngoun* and *Salcido*, Sanchez relied on the language in *Castenada* equating the promote/further/assist element to aiding and abetting to argue that section 186.22(a) only applied to an active participant who aided and abetted felonious criminal conduct by gang members and did not apply to a gang member such as himself who directly perpetrates felonious criminal conduct. (*Id.* at p. 1306.)

In rejecting the claim, the court extensively discussed and quoted *Ngoun* and pointed out that any statements in *Castenada* regarding aiding and abetting were dictum. (*Sanchez, supra*, 179 Cal.App.4th at pp. 1306-1307.) Specifically, the court stated:

> [A]s the *Ngoun* court noted, in *Castenada* itself, the Supreme Court was not actually called upon to decide whether evidence that the defendant perpetrated a felony could be sufficient to satisfy the promote/further/assist element. [¶] For precisely that reason, however, the language in *Castenada* equating the

> promote/further/assist element to aiding and abetting was dictum. On the other hand, the reasoning of *Ngoun*, which was *not* dictum, is compelling—a gang member who perpetrates a felony by definition also promotes and furthers that same felony. Thus, we do not believe that *Castenada* required the *Ngoun* court to come to any different conclusion.

(*Id.* at p. 1307, original italics.) The court also noted that "a different—although related" argument to the one presented in *Ngoun* was "lurking" in the case before it. (*Id.* at p. 1307.) The court stated: "The promote/further/assist element requires that the defendant 'promote[ ], further[ ], or assist[ ] in any felonious criminal conduct by [gang] *members* . . . .' (Pen. Code, § 186.22, subd. (a), italics added.) One could argue that this element cannot be satisfied by evidence that the defendant perpetrated a felony alone or with nongang members[.]" (*Ibid.*) The court went on to note that the issue had been "squarely" presented and rejected in *Salcido* and adopted the reasoning set forth therein. (*Id.* at pp. 1307-1309.)

These cases all correctly analyzed the issue and properly concluded that an active participant who is the sole perpetrator of felonious criminal conduct—or who acts in concert with either a gang member or a non-gang member—is guilty of violating section 186.22(a). These cases were followed by the dissent in the instant case and the *Cabrera* court—whose analyses will be discussed below. The majority, however, disagreed.

C. The Majority's Decision and the Flaws Therein

Despite the holdings in *Ngoun*, *Salcido*, and *Sanchez*—and despite the CALJIC and CALCRIM committees' modification to CALJIC No. 6.50 and CALCRIM No. 1400 in light of those cases—the majority held that section 186.22(a) does not apply to an active participant who is the sole perpetrator of felonious criminal conduct. The majority believes the statute's application is limited to an active participant who aids and abets another gang member's or members' felonious criminal conduct and an

active participant who directly perpetrates felonious criminal conduct while acting in concert with another gang member. In reaching its decision, the majority treats the dictum in *Castenada* as binding; misreads the facts of *Castenada*; incorrectly concludes that "[i]t makes no sense to say that a person has promoted or furthered his own criminal conduct"; and adopts an interpretation that leads to absurd results which are inconsistent with the Legislature's intent.

1. The majority relies significantly on dictum in *Castenada*

As did the defendants in *Ngoun*, *Salcido*, *Sanchez*, and *Cabrera*, the majority relies in large part on the language in *Castenada*—what it terms "[t]he leading case"[27]—equating the promote/further/assist element in section 186.22(a) to aiding and abetting to conclude that the section does not apply to an active participant who is the sole perpetrator of felonious criminal conduct. (Maj. opn. at pp. 4-6, 18-23.) The majority sets forth the reasoning behind its decision as follows:

> It is not sufficient for conviction under subdivision (a), that the defendant knowingly and actively participate in gang activities. The defendant must promote, further or aid in the commission of a separate felony offense "by members of *that* gang," i.e., the gang in which he is an active participant. (Italics added.) The leading case is *People v. Castenada* (2000) 23 Cal.4th 743 (*Castenada*). The court said: "[S]ection 186.22(a) limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also aided and abetted a *separate* felony offense committed by gang members . . . ." (*Id.* at p. 749, italics added.) This includes, on the facts in *Castenada*, the

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[27] It is not entirely clear what the majority means when it refers to *Castenada*—which dealt with the meaning of the phrase "actively participates" in section 186.22(a)—as the "leading case" since, unlike *Ngoun*, *Salcido*, and *Sanchez*, it did not address the issue presented here.

> perpetration of a felony in concert with other members of a gang. (*Id.* at p. 745.) *Castenada* precisely reads the grammar of subdivision (a). "[To] assist[] in any felonious criminal conduct by members of that gang" is to aid and abet its commission. It requires perforce that there be more than one participant. The same is true of furthering or promoting criminal conduct by others. "[To] promote[or] further[] . . . felonious criminal conduct by members of [a] gang" requires that the perpetrator promote or further a "specific felony" (as *Castenada* says) of other members of the gang. It makes no sense to say that a person has promoted or furthered his own criminal conduct. The subdivision is not satisfied by an intention to promote, further or assist a gang in its primary activities, including the criminal offenses it customarily engages in. That is a matter that is covered by the enhancement provision of subdivision (b)(1), as to which the trial court granted a new trial.

(Maj. opn. at pp. 4-5, fn. omitted; see also maj. opn. at pp. 18-21.) As the courts in *Ngoun*, *Salcido*, *Sanchez*, and *Cabrera*, and the dissent, have all concluded, the language in *Castenada* relied upon by the majority is dictum, and is not dispositive of the issue presented here. (*Ngoun*, *supra*, 88 Cal.App.4th at p. 437; *Salcido*, *supra*, 149 Cal.App.4th at pp. 367, 369; *Sanchez*, *supra*, 179 Cal.App.4th at p. 1307; *Cabrera*, *supra*, 191 Cal.App.4th at p. 284; dis. opn. at pp. 8-9.)

In discussing the aiding and abetting language in *Castenada*, the *Ngoun* court stated, "As we read *Castenada*, it does not stand for the proposition that only an aider and abettor is subject to liability under section 186.22, subdivision (a) and, for the reasons we have expressed, it would be a misconstruction of the statutory language and a perversion of the legislative intent to read the subdivision in such a narrow manner." (*Ngoun*, *supra*, 88 Cal.App.4th at p. 437.)

The court in *Salcido* referred to the aiding and abetting language in *Castenada* as "often misinterpreted" and rejected the defendant's reliance on it. (*Salcido*, *supra*, 149 Cal.App.4th at pp. 367-370.)

The *Sanchez* court stated:

> [A]s the court noted . . . in *Castenada*, there the defendant "d[id] not contest . . . that through the robbery and attempted robbery . . . , he 'promote[d], further[ed], or assist[ed]' felonious criminal conduct of [a] gang in violation of [Penal Code] section 186.22(a)." (*People v. Castenada*, *supra*, 23 Cal.4th at p. 753.) Hence, as the *Ngoun* court noted, in *Castenada* itself, the Supreme Court was not actually called upon to decide whether evidence that the defendant perpetrated a felony could be sufficient to satisfy the promote/further/assist element.
>
> For precisely that reason, however, the language in *Castenada* equating the promote/further/assist element to aiding and abetting was dictum. On the other hand, the reasoning of *Ngoun*, which was not dictum, is compelling—a gang member who perpetrates a felony by definition also promotes and furthers that same felony. Thus, we do not believe that *Castenada* required the *Ngoun* court to come to any different conclusion.

(*Sanchez*, *supra*, 179 Cal.App.4th at p. 1307, parallel citations omitted.)

In rejecting the majority's argument that its construction of section 186.22(a) was compelled by *Castenada*, the dissent quoted *Sanchez* as set forth above and concluded that "*Castenada* . . . does not compel the result reached by the majority." (Dis. opn. at pp. 8-9.)

Cabrera, the most recent case to discuss the issue, reached the same conclusion. It observed, "Defendant . . . relies on *People v. Castenada* (2000) 23 Cal.4th 743, which ruled the STEP Act satisfied due process because it did not make mere membership in a gang a crime but required a defendant actively participate in a gang with knowledge of its pattern of criminal conduct and willfully further, assist, or promote felonious criminal activity by gang members. (*People v. Castenada*, *supra*, 23 Cal.4th at p. 749.) *Castenada* stated that 'a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members . . . .' (*Ibid.*) This language is dictum, however, because in *Castenada* whether section 186.22, subdivision (a) was satisfied when

defendant himself perpetrated a felony was not at issue." (*Cabrera*, *supra*, 191 Cal.App.4th at p. 284, parallel citations omitted; see also *Albillar*, *supra*, 51 Cal.4th at p. 58 [noting that the statement "'every person incurring criminal liability under section 186.22(a) has aided and abetted a separate felony offense committed by gang members[]'" was "unnecessary to our decision [in *Castenada*]."].)

These courts have all correctly analyzed the issue. "*Castenada* . . . does not compel the result reached by the majority[]" (dis. opn. at p. 9), and "it would be a misconstruction of the statutory language and a perversion of the legislative intent to read the subdivision in such a narrow manner[]" (*Ngoun*, *supra*, 88 Cal.App.4th at p. 437).

The majority, however, dismisses the findings of these courts, stating:

> Subsequent Court of Appeal cases say or suggest that *Castenada* is not limited to concerted action by members of a gang in the commission of a separate felony, that subdivision (a) also applies to the sole perpetrator of an offense by a gang member without the criminal involvement of others who are gang members. (*People v. Ngoun* (2001) 88 Cal.App.4th 432 (*Ngoun*); *People v. Salcido* (2007) 149 Cal.App.4th 356 (*Salcido*).) *Salcido* reasons that in each of these two cases "'[t]he evidence supports a reasonable inference that the [crimes] were *intended* by appellant to promote, further and assist the gang in its primary activities - the commission of criminal acts and the maintenance of gang respect.'" (149 Cal.App.4th at p. 368; italics added.) A recent case, *People v. Sanchez* (2009) 179 Cal.App.4th 1297, follows these cases.
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> In singling out the element of intention, a term that does not appear in subdivision (a), *Salcido* not only departs from the language of subdivision (a), and *Castenada*'s straightforward reading of it, but replaces the third element of subdivision (a) with the third element of subdivision (b), the gang enhancement provision. The manifest difference is between aiding gang members in the commission of a separate crime and intending generally to aid the gang *in its primary activities*.

> *Castenada* rejected *Salcido*'s view. "As we have explained, section 186.22(a) imposes criminal liability not for lawful association, but only when a defendant 'actively participates' in a criminal street gang while also aiding and abetting a felony offense committed by the gang's members." (23 Cal.4th at pp. 750-751.)

(Maj. opn. at pp. 5-6; see also *id.* at pp. 22-25.)

In making these comments, the majority misreads *Ngoun* and *Salcido*. At the time of these cases, both courts believed that section 186.22(a) required the "felonious criminal conduct" furthered or promoted by a sole perpetrator be "gang-related."[28] (*Ngoun*, *supra*, 88 Cal.App.4th at p. 436 ["[T]his subdivision applies to the perpetrator of felonious *gang-related* criminal conduct as well as to the aider and abettor."], italics added; *Salcido*, *supra*, 149 Cal.App.4th at p. 368 [quoting from *Ngoun* on this point].) In *Ngoun*—where the defendant was the direct perpetrator of the crimes—the court found there was sufficient evidence to show that Ngoun's crimes were gang-related because the "evidence supports a reasonable inference that the murder of Kevin Martinez and the assaults committed on the unidentified victims were intended by appellant to promote, further and assist the gang in its primary activities-the commission of criminal acts and the maintenance of gang respect." (*Ngoun*, *supra*, at p. 436.)

Salcido—which also involved a defendant who was the direct perpetrator of crimes—followed *Ngoun*'s analysis in this regard and found that there was sufficient evidence to show that the crimes were gang-related because "'[t]he evidence support[ed] a reasonable inference that the

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[28] As noted, this Court recently held that section 186.22(a) does not "include an unwritten requirement that the 'felonious criminal conduct' that is promoted, furthered, or assisted be gang related[.]" (*Albillar*, *supra*, 51 Cal.4th at pp. 51, 54-59.)

[crimes] were intended by appellant to promote, further and assist the gang in its primary activities-the commission of criminal acts and the maintenance of gang respect.' (*Ibid.*)" (*Salcido*, *supra*, 149 Cal.App.4th at p. 368, citing to *Ngoun*, *supra*, 88 Cal.App.4th at p. 437.) It stated:

> Salcido asserts that subdivision (a) imposes liability on perpetrators only if they commit the crime in concert with other gang members. In *Ngoun*, however, we placed no limitation on our holding. To the contrary, we concluded that the subdivision "applies to the perpetrator of felonious *gang-related* criminal conduct as well as to the aider and abettor." (*Ngoun*, *supra*, 88 Cal.App.4th at p. 436.) Even though in *Ngoun* other gang members were present when the crimes were committed, it is uncertain whether they participated in the crimes. (*Id.* at p. 437.) Here, Salcido was accompanied by known gang members on both occasions, although there was no evidence they participated in Salcido's crimes. In each case, however, "[t]he evidence supports a reasonable inference that the [crimes] were intended by appellant to promote, further and assist the gang in its primary activities-the commission of criminal acts and the maintenance of gang respect." (*Ibid.*)

(*Ibid.*, parallel citations omitted, italics added.) In other words, the *Salcido* court found that even though Salcido was the sole perpetrator of felonious criminal conduct, and there was no evidence that fellow gang members participated in his crimes, the evidence was sufficient to show that his crimes were gang-related because the evidence supported a reasonable inference that, through his crimes, Salcido intended to promote, further, and assist the gang in its primary activities.

The majority misreads *Salcido* when it states that the court "replace[d] the third element of subdivision (a) with the third element of subdivision (b)"[29] and their finding in this regard is odd for several reasons.

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[29] Section 186.22, subdivision (b)(1) provides that:

(continued...)

First, it is odd given the *Salcido* court's detailed, and correct, recitation of the elements of section 186.22(a) and the jury instructions setting forth those elements. (*Salcido*, *supra*, 149 Cal.App.4th at pp. 363-366, 369-370.) It is hard to image that a court of appeal would accurately set forth the elements of a crime, only to later confuse those elements with elements of an enhancement.

Second, it is odd because even if the *Salcido* court was intending to "replace[] the third element of subdivision (a) with the third element of subdivision (b), the gang enhancement provision[,]" it did not actually do so. (Maj. opn. at pp. 6, 23-24.) Initially, this Court has suggested that the section 186.22, subdivision (b)(1) enhancement has two elements, not three as the majority suggests. (See *Albillar*, *supra*, 51 Cal.4th at pp. 51, 59-68 [discussing the two "prongs" of section 186.22, subd. (b)(1)]; *People v. Gardeley* (1996) 14 Cal.4th 605, 615-616; see also CALCRIM No. 1401 (Winter 2010 ed.) [setting forth two elements]; CALJIC No. 17.24.2 (Fall 2010 ed.) [same].) In any event, the third element of the enhancement as identified by the majority is "with the specific intent to promote, further, or assist in any criminal conduct by criminal street gang members." (Maj. opn. at p. 17.) However, this is not the element that the *Salcido* court allegedly "replaced" the third element of the substantive gang crime with. In *Salcido* (which was quoting *Ngoun*) the court stated the evidence was sufficient to show that Salcido's crimes were "'intended by appellant to

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(...continued)

> [A]ny person who is convicted of a felony 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished[.]

promote, further and assist the gang in its primary activities[.]'" (*Salcido*, *supra*, 149 Cal.App.4th at p. 368.) The "primary activities" language is not part of what the majority has identified as the third element of the gang enhancement. The phrase "primary activities" is part of the third element of the definition of "criminal street gang" set forth in section 186.22, subdivision (f). (*People v. Loeun* (1997) 17 Cal.4th 1, 8.) Thus, if the majority is right, the *Salcido* court did not merely "replace[] the third element of subdivision (a) with the third element of subdivision (b)" (maj. opn. at p. 6); it created a hybrid element loosely composed of parts of the third element of subdivision (b)(1) and parts of the third element of the definition of "criminal street gang" found in section 186.22, subdivision (f).

The court in *Cabrera* correctly interpreted the context of *Salcido*'s analysis in this regard as relating to whether the crime had a nexus to the gang. In *Cabrera*, the defendant—a gang member who committed a carjacking (§ 215, subd. (a)) with a non-gang member and was convicted, inter alia, of the carjacking and of violating section 186.22(a)—argued that while the language of section 186.22(a) did not require it, due process required the prosecution to prove that the crime he committed have some connection to the gang. (*Cabrera*, *supra*, 191 Cal.App.4th at pp. 283-284.) The court rejected this argument, stating; "[T]here is no constitutional issue. [The prosecution's gang expert] testified that, based on conversations he had with gang members, stolen cars are used to commit other crimes. This shields members from easy identification because they are not using their own cars and thereby promotes gang activity, thus connecting the crime with [Cabrera's gang]. And such was the case in *People v. Salcido*, *supra*, 149 Cal.App.4th 356, 360-361, *where the*

defendant's crimes were some of the gang's primary activities."[30] (*Id.* at p. 285, parallel citation omitted, italics added.) In other words, the court found that there was a nexus to the gang because Cabrera's crimes "were some of the gang's primary activities." (*Ibid.*) Like the courts in *Ngoun* and *Salcido*, in reaching this conclusion, the court did not "replace[] the third element of subdivision (a) with the third element of subdivision (b), the gang enhancement provision." (Maj. opn. at p. 6.)

Based on their misreading of *Salcido*, the majority also state that "*Castenada* rejected *Salcido*'s view." This also is not the case. *Castenada* was decided in 2000, seven years before *Salcido*. In addition, as the majority acknowledge, in *Castenada* this Court addressed the meaning of the phrase "actively participates," a phrase not at issue here. (*Castenada, supra*, 23 Cal.4th at pp. 745-746; maj. opn. at p. 18.) Respondent does not see how—either temporally or logically—it could be said that a case decided seven years before *Salcido* that dealt with a different issue "rejected *Salcido*'s view."

As the foregoing makes clear, the majority has misread *Salcido*. *Salcido* did not "depart from the language of subdivision (a)" and did not "replace[] the third element of subdivision (a) with the third element of subdivision (b), the gang enhancement provision." (Maj. opn. at pp. 6, 23-24.)

The majority—referring to the language in *Castenada* equating the promote/further/assist element in section 186.22(a) to aiding and abetting—next complains that "*Salcido* does not explain why it can ignore a Supreme Court construction of a statute merely because it sets a standard in excess of that required by the United States Constitution." (Maj. opn. at p. 24.) The

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[30] *Cabrera* was decided before this Court issued its decision in *Albillar*.

answer is that *Salcido* did not "ignore" the language in *Castenada* for the reason suggested by the majority. Instead, as the dissent and every court of appeal to consider the issue other than the majority have found, the *Salcido* court concluded the language was dictum and not controlling on this point.

2. The majority misreads the facts of *Castenada*

The majority finds that, based on the facts of *Castenada*, gang members who are co-perpetrators acting in concert fall under section 186.22(a)'s purview. However, the majority misreads *Castenada* as Castenada's co-participants were never described as gang members. Thus, if anything, the facts of *Castenada* stand for the proposition that section 186.22(a) applies to a gang member who acts in concert with a person who has not been identified as a gang member.[31]

In support of its conclusion that "*Castenada* does not rule out perpetrators who act in concert *with other gang members*, as shown by the facts of the case[,]" the majority quotes the following facts from *Castenada* and includes the footnote after the word "companions" in the first sentence:

> "On the evening of October 16, 1995, Juan Venegas and Pimienta Castillo left a Pizza Loca restaurant in Santa Ana and were walking on nearby Sullivan Street when defendant and two companions[32] began to follow them. Defendant pointed a handgun at Venegas and demanded money, while one of his companions made a similar demand of Castillo. Both victims said they had no money. Defendant then took Venegas's watch and tried to pull a gold chain off his neck. When Venegas broke away and screamed for help, defendant and his companions fled." (*Castenada*, *supra*, 23 Cal.4th at p. 745.)

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[31] In this regard, *Castenada* is factually similar to *Sanchez*. In both cases, a gang member robbed two victims while acting in concert with a non-gang member. As set forth *ante*, *Sanchez* concluded that section 186.22(a) applies to the gang member in this situation.

[32] Elsewhere described as gang members. (*Castenada*, *supra*, 23 Cal.4th at p. 753.)

(Maj. opn. at p. 22.)

However, in *Castenada*, the people accompanying Castenada are referred to as "two companions." (*Castenada*, *supra*, 23 Cal.4th at p. 745.) At page 753 of *Castenada*—the page the majority cites for its statement that Castenada's companions were "[e]lsewhere described as gang members[]" (maj. opn. at p. 22, fn. 11)—this Court said that Castenada was "armed with a handgun and in the company of two others." (*Castenada*, *supra*, 23 Cal.4th at p. 753.) While this Court noted that the gang expert "described the crime as typical of those committed by Goldenwest gang members to put local residents on notice of the gang's control of the neighborhood[]" (*ibid.*), nowhere did the opinion say the two unidentified companions were gang members.

Because the evidence in *Castenada* did not establish that Castenada was acting in concert with gang members, the facts of that case do not support the majority's finding that it is only when a gang member acts in concert with another gang member that liability under section 186.22(a) attaches. Indeed, what the facts establish, if anything, is that a gang member who undertakes in felonious criminal conduct while acting in concert with a person who has not been identified as a gang member is guilty of violating section 186.22(a) as *Sanchez* found. Further, the *Ngoun* court correctly relied on the facts of *Castenada* to support their decision, stating that:

> Indirect support for our view is found in the case law. Several reported opinions have involved a defendant convicted both as a perpetrator of a substantive felony and as a gang member under section 186.22, subdivision (a) based upon the same felony. In *People v. Herrera*, *supra*, 70 Cal.App.4th 1456, the defendant was convicted of murder as the perpetrator and also of a violation of section 186.22, subdivision (a) based upon the murder. Similar dual convictions were involved in *People v. Castenada*, *supra*, 23 Cal.4th 743, *People v. Funes* (1994) 23 Cal.App.4th 1506, 1516; and *People v. Smith* (1993) 21

> Cal.App.4th 342. Although we recognize that the contention advanced by appellant here was not raised in any of these cases, all of these convictions were affirmed without mention of the issue.

(*Ngoun*, *supra*, 88 Cal.App.4th at p. 437, parallel citations omitted.)[33]

As the foregoing makes clear, the majority has misread the facts of *Castenada*, the facts of which actually support the holdings of the dissent and the other courts of appeal to have considered the issue.

3. The majority incorrectly concludes that "[i]t makes no sense to say that a person has promoted or furthered his own criminal conduct"

In large part, the majority's argument comes down to its statement that, "[i]t makes no sense to say that a person has promoted or furthered his own criminal conduct." (Maj. opn. at p. 5.) However, as explained by the *Ngoun* court when first addressing the issue:

> Given the objective and intent of subdivision (a), we find good reasons not to construe section 186.22[(a)], in the restricted manner advocated by appellant and instead to conclude that this subdivision applies to the perpetrator of felonious gang-related criminal conduct as well as to the aider and abettor. Courts should give statutory words their plain or literal meaning unless that meaning is inconsistent with the legislative intent apparent in the statute. [Citations.] Under the language of subdivision (a), liability attaches to a gang member who "willfully promotes, furthers, or assists in any felonious criminal conduct by

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[33] The *Sanchez* court disagreed with *Ngoun*'s characterization of *Castenada* in this regard, finding that while Castenada was the direct perpetrator of the robbery of Venegas, "he was arguably only an aider and abettor to the attempted robbery of Castillo. To put it another way, there was substantial evidence that the defendant *had* aided and abetted a felony." (*Sanchez*, *supra*, 179 Cal.App.4th at pp. 1306-1307.) While this may be true, since it was not established that Castenada's unidentified co-perpetrator was a gang member, the evidence did not establish that Castenada aided or abetted—or was a co-participant to—a felony committed by a member of his gang.

> members of that gang." (§ 186.22[(a)].) In common usage, "promote" means to contribute to the progress or growth of; "further" means to help the progress of; and "assist" means to give aid or support. (Webster's New College Dict. (1995) pp. 885, 454, 68.) The literal meanings of these critical words squares with the expressed purposes of the lawmakers. An active gang member who directly perpetrates a gang-related offense "contributes" to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct.

(*Ngoun, supra,* 88 Cal.App.4th at p. 436.) The *Ngoun* court's interpretation and explanation of the words "promote" and "further" has—with the exception of the majority—been followed by every court that has addressed the issue as well as the dissent. (*Salcido, supra*, 149 Cal.App.4th at pp. 367-368; *Sanchez, supra*, 179 Cal.App.4th at pp. 1306-1307; dis. opn. at p. 7; *Cabrera, supra*, 191 Cal.App.4th at p. 284.) As accurately noted by the dissent, "[T]he majority are wrong about the meaning of the words 'promotes [or] furthers . . . in any felonious criminal conduct.' Someone can 'promote' or 'further' felonious criminal conduct by committing the offense himself, without the participation or aid of others." (Dis. opn. at p. 7.) As noted by the *Sanchez* court, "a gang member who perpetrates a felony by definition also promotes and furthers that same felony." (*Sanchez, supra*, 179 Cal.App.4th at p. 1307.)

The majority criticizes *Ngoun*'s analysis, stating,

> What *Ngoun* wholly misses is the grammar of the statute. The terms "promote[], further[], or assist[]" modify the phrase "felonious criminal conduct by members of that gang," which *Castenada* says refers to "a *specific* felony committed by gang members . . . ." (*Castenada, supra*, 23 Cal.4th. [*sic*] at p. 749, italics added.) The reference to "by members of that gang," does not refer to the kinds of offenses which the gang may customarily commit. Thus, to assist in the commission of an offense, i.e., to aid and abet its commission, requires perforce that there be more than one participant. The same is true of promoting or furthering the criminal conduct of others. It makes

> no sense to say that a person has promoted or furthered his own criminal conduct.

(Maj. opn. at pp. 20-21, fn. omitted.) The majority's criticism is flawed in many respects. First, it is not entirely clear what the majority means when it says that "*Ngoun* wholly misses the grammar of the statute." (Maj. opn. at p. 20.) It seems to suggest that the *Ngoun* court either mistakenly believed that the terms "promote[], further[], or assist[]" modify a phrase other than "felonious criminal conduct by members of that gang," or that it believed that the phrase "by members of that gang" referred to the kinds of offenses which the gang may customarily commit. Respondent can find nothing in the *Ngoun* opinion to support either of these contentions.

A significant part of the majority's criticism seems to come down to its erroneous belief that the statute effectively reads, "willfully promotes, furthers, or assists in any felonious criminal conduct by *other* members of that gang." (Maj. opn. at p. 5 ["'[To] promote[or] further[] . . . felonious criminal conduct by members of [a] gang' requires that the perpetrator promote or further a 'specific felony' (as *Castenada* says) of *other* members of the gang."].)

In reaching this erroneous conclusion, the majority begins by citing to *Castenada* for the proposition that the phrase "felonious criminal conduct by members of that gang" means 'a *specific* felony committed by gang members . . . .' (*Castenada, supra*, 23 Cal.4th. [*sic*] at p. 749, italics added.)" (Maj. opn. at p. 20.) It then focuses on the term "assist" in section 186.22(a) and concludes that "to assist in the commission of an offense, i.e., to aid and abet its commission, requires perforce that there be more that one participant." (Maj. opn. at pp. 20-21.)

The majority is right about the term "assist." As the dissent notes—and as respondent acknowledged at oral argument—"Someone does not 'assist' himself." (Dis. opn. at p. 7; maj. opn. at p. 5, fn. 5.) However, the

majority goes on to make the unsupported and erroneous conclusion that, "The same is true of promoting and furthering the criminal conduct of *others*. '[To] promote[or] further[] . . . felonious criminal conduct by members of [a] gang' requires that the perpetrator promote or further a 'specific felony' (as *Castenada* says) of *other* members of the gang. It makes no sense to say that a person has promoted or furthered his own criminal conduct." (Maj. opn. at p. 5, italics added; see maj. opn. at p. 21.)

The mistakes the majority makes in this regard are twofold. First, section 186.22(a) does not say that one must promote, further, or assist felonious criminal conduct committed by *other* members of the gang. Second, as *Ngoun*, *Salcido*, *Sanchez*, *Cabrera* and the dissent all correctly conclude, an active participant who is a gang member and engages in felonious criminal conduct has promoted and furthered felonious criminal by a member of the gang, himself. (*Sanchez*, *supra*, 179 Cal.App.4th at p. 1307 ["a gang member who perpetrates a felony by definition also promotes and furthers that same felony."]; dis. opn. at p. 7 ["Someone can 'promote' or 'further' felonious criminal conduct by committing the offense himself without the participation of aid or others."]; *Ngoun*, *supra*, 88 Cal.App.4th at p. 436; *Cabrera*, *supra*, 191 Cal.App.4th at pp. 284-286 [citing *Salcido* and the dissent with approval on this point].)

As set forth by the dissent, "Section 7 provides in pertinent part, 'words used in [the Penal Code] in the present tense include the future as well as the present . . . the singular number include the plural, and *the plural the singular* . . . .' Subdivision 16 of section 7 further counsels that 'Words and phrases must be construed according to the context . . . .' By these rules, 'members' can mean 'member.' It should." (Dis. opn. at p. 4, original italics.) Here, appellant promoted and furthered felonious criminal conduct by a member of the gang, himself, not members of the gang. However, given the intent of the statute as set forth by the Legislature in

section 186.21, "the grammar of section 186.22(a) does not preclude giving the term 'members' a singular construction in accordance with the rule of section 7." (Dis. opn. at p. 8.) "By these rules, 'members' can mean 'member.' It should." (Dis. opn. at p. 4.)

4. The majority's interpretation of the statue leads to absurd results

Not only is the majority wrong about the meaning of the words "promote" and "further," but its interpretation of the statute leads to absurd results.

As noted, section 186.22(a) is a part of the STEP Act (§ 186.20 et seq.). Section 186.21 of that Act provides in pertinent part:

> The Legislature . . . 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. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected. 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 in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.

As noted by the dissent, the majority's interpretation of section 186.22(a) "would preclude a conviction for active participation in a criminal street gang (§ 186.22(a)) where the leader of the Norteños, acting entirely alone, got into his car and drove into Sureño territory, shot and killed several Sureños, and pinned notes to their shirts reading, 'Norteños Rule.'" (Dis. opn. at pp. 5-6.) As the dissent notes, "In light of the purpose

of the Street Terrorism Enforcement and Prevention Act . . . I cannot believe the Legislature intended such an absurd result. 'We must give . . . the [statutory] provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. [Citation.]' (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744, quoting *Marshall M. v. Superior Court* (1999) 75 Cal.App.4th 48, 55.)" (Dis. opn. at p. 6.) The absurdity of the majority's decision, however, goes even further.

Following the dissent's example, assume that prior to going on his shooting spree the leader of the Norteños approached an active participant, told him of his plan, and asked to borrow his gun to carry it out. Under the majority's interpretation of section 186.22(a), the active participant—who aided and abetted the leader by providing him with his gun—would be guilty of violating section 186.22(a) as he aided and abetted "felonious criminal conduct by members of that gang." However, the leader, who was the sole perpetrator of the crime, would not be guilty because he did not aid or abet felonious criminal conduct by other members of the gang and was not a co-perpetrator acting in concert.

This is exactly the point the *Ngoun* court made. Like the example set forth above, in *Ngoun* it was "undisputed that, if the evidence proved any criminal conduct by [Ngoun], it was only as the *perpetrator* of the murder of Kevin Martinez and the assaults on the other unnamed victims." (*Ngoun, supra*, 88 Cal.App.4th at p. 435, original italics; see *Salcido, supra*, 149 Cal.App.4th at p. 367) There was, however, evidence that Ngoun went to the party where the shootings occurred along with fellow gang members and that he was "armed in anticipation of a confrontation and asked a fellow gang member to 'watch his back.'" (*Ngoun, supra*, at p. 437.) Thus, there was evidence that fellow gang members aided and abetted Ngoun.

(See *Sanchez*, *supra*, 179 Cal.App.4th at p. 1307 ["The [*Ngoun*] court's discussion [of the facts] . . . indicates that, while the defendant was the direct perpetrator of murder and aggravated assault, he was aided and abetted by at least one other gang member."]; but see *Salcido*, *supra*, at p. 368 ["Even though in *Ngoun* other gang members were present when the crimes were committed, it is uncertain whether they participated in the crimes. [Citation.]"].) Because he was the sole perpetrator and did not aid or abet anyone, Ngoun argued on appeal that there was "insufficient evidence to support [his] conviction [for violating section 186.22(a)] because there was no proof [he] *aided or abetted* a felonious act actually committed by another gang member." (*Ngoun*, *supra*, at p. 434, original italics; see *Salcido*, *supra*, at p. 367.)

The *Ngoun* court rejected this argument, pointing out its absurdity given the intent of the statute. The court stated: "An active gang member who directly perpetrates a gang-related offense 'contributes' to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct. Faced with the words the legislators chose, we cannot rationally ascribe to them the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity." (*Ngoun*, *supra*, 88 Cal.App.4th at p. 436; see also *Salcido*, *supra*, 149 Cal.App.4th at pp. 367-368 [citing *Ngoun* with approval on this point]; *Sanchez*, *supra*, 179 Cal.App.4th at p. 1306 [same]; dis. opn. at pp. 5-6 [same]; *Cabrera*, *supra*, 191 Cal.App.4th at p. 284 [same].)

The majority, however, embraces the argument advocated by the defendant in *Ngoun*. It would reach the absurd result that a gang member who is the sole perpetrator of felonious criminal conduct can never be

found guilty of violating section 186.22(a), while the active participant who aids and abets that gang member can. This absurd result should not stand.

In addition, "[b]y insisting on the literal, plural definition of 'members'" (dis. opn. at p. 5), the majority's reading of the statue leads to the absurd conclusion that an active participant must either aid or abet felonious criminal conduct committed by at least two other gang members or must be a co-perpetrator acting in concert with at least two other gang members. The majority state; "'[To] promote[or] further[] . . . felonious criminal conduct by members of [a] gang' requires that the perpetrator promote or further a 'specific' felony (as *Castenada* says) of other *members* of the gang. It makes no sense to say that a person has promoted or furthered his own criminal conduct." (Maj. opn. at p. 5, italics added; see also *id.* at p. 18 [section 186.22(a) "requires that the defendant promote, further, or assist separate 'felonious criminal conduct *by* members of *that* gang,' the gang in which the defendant is an active participant"], original italics; *id.* at p. 21.) Given the majority's conclusion that the term "members" excludes the person being charged with violating section 186.22(a) and instead refers to other members of the gang, it would appear that a defendant who aided or abetted, or acted in concert with, one other gang member would not be guilty of violating the statue—since he did not aid or abet or act in concert with *members*—while a defendant who aided or abetted or acted in concert with two or more gang members would be guilty. This absurd result should not stand.

5. The majority's interpretation is inconsistent with the Legislature's intent in enacting section 186.22(a)

It is apparent that in enacting section 186.22(a), the Legislature intended to target the active participant who was the sole perpetrator of felonious criminal conduct and not just the active participant who aided or

abetted felonious criminal conduct committed by other members of the gang. This is clear not only from the Legislative findings set forth in section 186.21 which are discussed *ante*, but from the Legislative Counsel's Digest, a proper source to determine the intent of the Legislature. (*Shelton v. City of Westminster* (1982) 138 Cal.App.3d 610, 614.)

The Digest notes, "Under existing law, there are no provisions which specifically make the commission of criminal offenses by individuals who are members of street gangs a separate and distinctly punished offense[.]" (Legis. Counsel's Dig., Assem. Bill No. 2013 (1987-1988 Reg. Sess.) Stats. 1988 ch. 1242.) This statement evidences the Legislature's intent to create in section 186.22(a) a crime which punished an active participant who engaged in felonious criminal conduct separately from any punishment he or she would receive for the underlying felonious criminal conduct itself. There is no indication that the Legislature intended to create a crime that was limited to those gang members who aided or abetted another member's criminal conduct. Indeed, if it had intended to limit section 186.22(a) to active participants who aid or abet a specific felony committed by other members of the gang, it would have used the term "aid or abet"—a term it knows how to use—rather than "promote[,] further[,] or assist[]." (See, e.g., § 209, subdivision (a) ["Any person who . . . kidnaps . . . another person . . . with intent to hold or detain . . . that person for ransom . . . or any person who aids or abets any such act, is guilty of a felony"].)

By using the words "promote[,] further[,] or assist[]" rather than "aid or abet," as well as using the phrase "felonious criminal conduct" rather than "a felony," it is clear the Legislature wanted the statute's reach to be broad so that it applied to: the direct perpetrator; the aider or abettor; the accessory after the fact (see *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467-1468 [section 186.22(a) "would allow convictions against both the person who pulls the trigger in a drive-by murder and the gang member

who later conceals the weapon, even though the latter member never had the specific intent to kill."]); and to the member who promoted or furthered "felonious criminal conduct"—rather than a specific felony—by telling active participants to generally put in work for the gang (i.e., to commit crimes for the gang), but who would not be an aider or abettor to any specific felony committed by the active participants because he or she would neither know what specific crimes the active participants were going to commit nor have the specific intent to aid or abet those particular crimes.

Further, the Legislature was aware of *Ngoun* in 2001 and the statute was amended in 2005, 2006, 2009, and 2010. (See West's 2011 cumulative pocket part to Penal Code sections 1 to 186.99 (Volume 47) page 238.) Despite these amendments, however, no change was made to section 186.22(a) in light of the holdings in *Ngoun*, *Salcido*, and *Sanchez*. This indicates that those courts properly interpreted section 186.22(a) and the Legislature's intent in enacting it. Had they not, the Legislature would have presumably amended the section to make it clear it applied only to aiders and abettors or active participants who were co-perpetrators acting in concert with other gang members.

CONCLUSION

Accordingly, respondent respectfully requests that the court of appeal's judgment be reversed.

Dated: March 14, 2011

Respectfully submitted,

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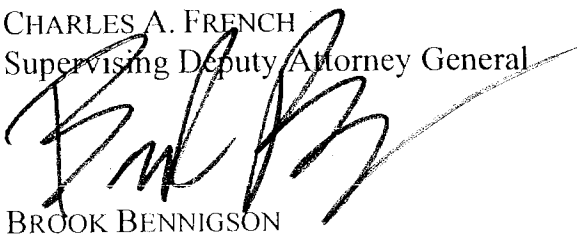

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 13,022 words.

Dated: March 14, 2011

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rodriguez** No.: **S187680**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 14, 2011, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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Clerk of the Superior Court
Yuba County Courthouse
215 Fifth Street, Suite 200
Marysville, CA 95901

Court of Appeal,
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814-4719

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 14, 2011, at Sacramento, California.

_____
Declarant

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