IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	) Supreme Court No.) **S187680**)
	) Court of Appeal No.
v.	) F057147)
JOE RODRIGUEZ, JR., Defendant and Appellant.	) Superior Court No.) CRF07288))

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Yuba County Superior Court, Honorable James L. Curry, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Court No.
Plaintiff and Respondent,	) **S187680**
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v.	) F057147
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JOE RODRIGUEZ, JR.,	) Superior Court No.
Defendant and Appellant.	) CRF07288
	)
	)

Court of Appeal, Third Appellate District
Yuba County Superior Court, Honorable James L. Curry, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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 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?

RESPONDENT'S CONTENTION

Section 186.22(a) applies to an active participant who, acting alone, is the direct perpetrator of felonious criminal conduct.

APPELLANT'S CONTENTION

Section 186.22(a) does not apply to an active participant who, acting alone, is the direct perpetrator of felonious criminal conduct.

STATEMENT OF THE CASE

A jury found appellant guilty of attempted robbery (Count 1; Pen. Code,[1] §§ 664, 211) with an allegation the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)) and of active participation in a criminal street gang (Count 3; § 186.22, subd. (a)).[2] (1 CT[3] 40-43, 118, 127-129; 2 RT 468-469.) Appellant waived his right to a jury trial and the court found true the allegations that appellant had suffered a strike (§§ 667, subds. (a)-(d), 1170.12, subds. (b), (c)) and had served a prior prison term (§ 667.5, subd. (b)). (1 CT 113, 119.)

Appellant filed a new trial motion pursuant to section 1181, subdivision 6. (1 CT 151-180 [defense motion], 183-209 [prosecution opposition], 210-215 [defense reply].) The trial court granted the new trial motion as to the section 186.22, subdivision (b) allegation on Count 1, explaining:

> The Court's convinced there is insufficient evidence for that finding to stand. It's beyond a reasonable doubt that Mr. Rodriguez 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.

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

[2]On the prosecution's motion, the court dismissed Count 2, assault with a deadly weapon, i.e., hands (§ 245, subd. (a)(1)) with a gang benefit allegation (§ 186.22, subd. (b)) after trial began. (1 CT 105.)

[3]"CT" stands for the clerk's transcript. "RT" stands for the reporter's transcript.

> The cases that I've read say there's got to be something more than gang membership and/or association.
>
> 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 Mr. Rodriguez'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 the Defendant's motion for a new trial as to the gang enhancement. (1 CT 242.)

The prosecution announced it would not refile the allegation. (1 CT 234, 243.)

The court sentenced appellant to eight years, four months in state prison. (1 CT 235-236, 238-239, 245.)

Appellant appealed. (1 CT 250.) The Court of Appeal reversed the gang participation conviction (Count 3) for insufficient evidence. (Typed opn., p. 32.) Following the People's petition for review, this Court granted review.

STATEMENT OF FACTS

Around 10:30 p.m. on May 27, 2007, Stanley Olsen was unlocking his truck on East 22nd Street in Marysville in Yuba County, when he heard someone say something to him. (1 RT 137, 143.) He turned and saw appellant coming toward him. (1 RT 138, 273-274.) Appellant was wearing jeans and a white t-shirt that covered his arms to five inches below the shoulder. (1 RT 145.) Not recognizing appellant, Olsen asked appellant if Olsen knew him, and appellant said, "You eye fuck me, nigger, and I'll kill you." (1 RT 138.) Appellant approached Olsen until the two men's chests were touching. (1 RT 138.) Appellant said, "Give me your fucking money" and said he would "fuck [him] up." (1 RT 138, 147-148.) Olsen told appellant to get away, appellant punched him in the jaw, and they grappled, falling to the ground with appellant on top. (1 RT 138-139.) Appellant punched Olsen in the head and back as he got up. Olsen ran, telling a friend to call police. (1 RT 139.) Appellant was pulled into a nearby apartment by a woman, and, shortly thereafter, police found appellant hiding under a bed in that apartment, where appellant's girlfriend lived. (1 RT 146, 265, 269-271, 284.)

Appellant had tattoos associated with the Norteño gang and other tattoos in the Norteño colors of red and black on his chest and the back tricep area of his upper arms. (1 RT 187-190.) There was no evidence that Olsen saw the tattoos on the backs of appellant's arms or that appellant

made any reference to any gang or flashed any gang signs during the offense. (2 RT 369-370.)

When booked, appellant indicated he might have a problem with Sureño inmates and admitted he was a Norteño gang member from Woodland. (1 CT 225-226, 234-238.)

Gang expert Allan Garza of the Yuba County Sheriff's Department testified to facts showing Norteños in Yuba County were a criminal street gang. (1 RT 174-178, 180-184.) Based upon appellant's tattoos and several police contacts in 1995 and 1999, apparently in Yolo County, where appellant was seen wearing gang colors and clothing and displaying gang signs, and appellant's admission at the time of booking that he was a Norteño gang member from Woodland who might have a problem with Sureño inmates, Garza opined that appellant was an active Norteño gang member. (1 RT 190-195.)

Based on a hypothetical question reflecting the facts of the case, as well as his opinion that some part of one of appellant's tattoos ("Northern Warrior") would be visible if he were wearing a t-shirt, Garza opined the attempted robbery was committed for the benefit of the gang because it proved to fellow gang members that appellant was willing to commit crimes for the gang, it installed fear of the gang in others, and it made it easier for gang members to commit and get away with crimes. (1 RT 196-200.) Even if the tattoo were not visible, the attempted robbery was still

committed for the benefit of the gang because it would build status within the gang and because it meant appellant could commit other crimes for the gang. (1 RT 210-211.) Garza had never heard of a person participating in a gang who did not commit crimes. (1 RT 219.) He had never heard of a validated gang member committing a crime for his own personal motive or satisfaction. (1 RT 222.)

Marysville Police Sergeant Christian Sachs also testified to facts showing that the Norteños in Yuba County were a criminal street gang. Based on appellant's tattoos, his earlier admission to gang membership during a booking process in Woodland, his red shoelaces, his red cigarette lighter, and Woodland police records from 1995 to 1999 that appellant had admitted his Norteño membership and had been seen in the company of other gang members, Sachs opined that appellant was an active member of the Norteño gang. (2 CT 342-346, 344-347, 348-351, 353-355.) Based on a hypothetical question reflecting the facts of this case, Sachs also opined that the attempted robbery was committed for the benefit of the gang because it intimidated the public, made the public afraid and threatened retribution, and intimidated actual and potential witnesses to crime. (2 RT 356-360.)

Although the officers' testimony assumed the Norteño gang in Marysville, Yuba County, was connected with the Norteño gang in Woodland, Yolo County, there was no testimony that the Yolo County

Norteños were a subset of the Yuba County Norteños. (1 RT 177, 178, 179, 184, 2 RT 306, 325, 330, 344.) Garza did not know whether appellant belonged to a subset of the Norteños in the Yuba-Sutter area. (1 RT 207.) Garza opined it was possible a Norteño member in the Yuba-Sutter area knew what was going on with subsets in another county. (1 RT 204.)

ARGUMENTS

I.

SECTION 186.22(A) DOES NOT APPLY TO AN ACTIVE PARTICIPANT WHO, ACTING ALONE, IS THE DIRECT PERPETRATOR OF FELONIOUS CRIMINAL CONDUCT.

A. Introduction, Proceedings Below, And Standard Of Review.

Section 186.22, subdivision (a) (hereafter "§ 186.22(a)" or "gang participation") punishes "[a]ny 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* . . . ." Specifically at issue here is the meaning of the italicized phrase "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang."

Appellant was convicted in Count 1 of robbery with an enhancement that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b) (hereafter "§ 186.22(b)" or "gang-benefit enhancement"). (1 CT 118, 127; 2 RT 468.) In Count 3, appellant was also convicted of the substantive offense of active participation in a criminal street gang (§ 186.22(a)), based on the robbery offense. (1 CT 118, 128; 2 RT 468.) The trial court granted appellant's motion for a new trial on the gang-benefit enhancement as to Count 1, and the prosecution elected not to retry the

allegation. (1 CT 242.) On appeal, appellant maintained that the evidence the trial court found lacking when it granted a new trial on the gang-benefit enhancement -- no substantial evidence connecting the robbery to the gang -- was also insufficient to sustain a conviction of the substantive gang participation offense.[4] (Typed opn., p. 14; Appellant's Opening Brief ("AOB") 18-26.)

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[4]Respondent confined its arguments to procedural forfeiture and did not address the merits of appellant's substantive claims on appeal. (Typed opn., p. 13, fn. 7; Respondent's Brief ("RB") 11-18.) Respondent did not petition for review on this issue and, in this Court, respondent has merely referenced its forfeiture argument historically, in footnotes in the Statement of the Case (Respondent's Opening Brief on the Merits ("RBOM") 7, fn. 15, 8-9, fn. 18), has not argued the matter in its Summary of Argument or Argument sections, and has not cited any legal authority in support of argument, all of which indicate respondent has abandoned this issue. (*Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 160 [court need not consider issues discussed only in a footnote]; *In re Keisha T.* (1995) 38 Cal.App.4th 220, 237, fn. 7 ["We interpret this casual treatment as reflecting . . . lack of reliance on this argument"]; *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [point asserted without argument or authority need not be discussed by reviewing court].)

The constitutional sufficiency of the issue was indeed raised below. Appellant plainly raised the issue of whether appellant promoted felonious criminal conduct on two grounds: first, that the trial court erred in denying the new trial motion and, second, that there was constitutionally insufficient evidence under the Fourteenth Amendment to the United States Constitution (AOB 21-22, citing *People v. Steele* (2002) 27 Cal.4th 1230, 1249-1250 [constitutional challenge to sufficiency of the evidence]; *People v. Kraft* (2000) 23 Cal.4th 978, 1053 [same, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578]; *People v. Bolin* (1998) 18 Cal.4th 297, 331 [same, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320 [99 S.Ct. 2781, 61 L.Ed.2d 560]]). Appellant requested reversal with no retrial under the Fifth and Fourteenth Amendments, the remedy for an appellate reversal on grounds of evidentiary insufficiency. (AOB 26, citing *Burks v. United States* (1978) 437 U.S. 1, 17-18 [98 S.Ct. 2141, 57 L.Ed.2d 1].) Contrary to respondent's earlier claim, a defendant does not waive his right to a

The Court of Appeal concluded that there was constitutionally insufficient evidence to support the gang participation offense. (Typed opn., p. 14.) It held that section 186.22(a) imposes criminal liability for active participation in a criminal street gang only where the defendant is aiding and abetting a felony offense committed by the gang's members. (Typed opn., p. 6, citing *People v. Castenada* (2000) 23 Cal.4th 743, 752 ("*Castenada*").) The court found the phrase "promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang" requires that the perpetrator aid and abet a specific felony by other members of his gang, which requires perforce that there be more than one participant. (Typed opn., p. 5.)

Respondent argues that the Court of Appeal's decision is wrong because the opinion treats as binding this Court's statements in *Castenada*, *supra*, 23 Cal.4th 743, it misreads the facts of *Castenada*, it incorrectly concludes that a person cannot promote or further his own criminal conduct, and it leads to absurd results, while maintaining respondent's

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judgment of acquittal on the basis of evidentiary insufficiency by moving for a new trial. (*Ibid.*; see also *People v. Rodriguez* (1998) 17 Cal.4th 253, 262 [most complete challenge to sufficiency is demand for trial].) Where "the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal" based on the Double Jeopardy Clause. (*Burks v. United States*, *supra*, 437 U.S. at p. 18; *People v. Pierce* (1979) 24 Cal.3d 199, 210 [insufficient evidence tantamount to verdict of acquittal, where retrial would be barred, so new trial also improper after equivalent decision on appeal].)

position is consistent with the legislative intent. (Respondent's Opening Brief on the Merits ("RBOM") 12-13, 14.) Respondent contends the phrase at issue is applicable to an active gang participant "when he or she, acting alone, is the direct perpetrator of felonious criminal conduct." (RBOM 14, citing *People v. Ngoun* (2001) 88 Cal.App.4th 432 ("*Ngoun*"), *People v. Salcido* (2007) 149 Cal.App.4th 356 ("*Salcido*"), and *People v. Sanchez* ("*Sanchez*") (2009) 179 Cal.App.4th 1297.[5]) Respondent never provides its actual construction of the phrase, but does offer three broad applications of it. First, respondent argues it is applicable to an active gang participant "when he or she, acting alone, is the direct perpetrator of felonious criminal conduct." (RBOM 14.) Second, respondent indicates 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)." (RBOM 25.) Third, respondent also argues section 186.22(a) applies to:

> the direct perpetrator; the aider or abettor; the accessory after the fact [citation]; 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

[5]Respondent also relies upon *People v. Cabrera* (S189414) formerly at 191 Cal.App.4th 276 (RBOM 12, 27-29), review granted March 23, 2011, after respondent filed its brief, with briefing deferred pending resolution of the instant case. This case can no longer be cited.

were going to commit nor have the specific intent to aid or abet those particular crimes. (RBOM 45-46.)

None of these applications is proper, as will be explained, and respondent's position is wrong, as is its criticism of the Court of Appeal's decision.

Where the meaning of a statute is at issue, a reviewing court applies an independent standard of review. (*People v. Jones* (2001) 25 Cal.4th 98, 108.) Issues of statutory construction are subject to de novo review. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.) While a reviewing court does not rewrite legislation to conform to a presumed intent (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633), the primary purpose of statutory construction is a determination and effectuation of the purpose of the law as enacted. (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) Further canons of statutory construction will be set forth where appropriate.

B. Section 186.22(a) Imposes Criminal Liability For An Active Participant In A Criminal Street Gang Only When The Defendant Aids Or Abets A Felony By Other Members Of His Gang.

The California Street Terrorism Enforcement and Prevention Act of 1988 ("STEP Act"; §§ 186.20-186.33) created both substantive offenses and sentence enhancements for gang-related activity. (Sen. Bill No. 1555 (1987-1988 Reg. Sess.) Stats. 1988 ch. 1256; Assem. Bill No. 2013 (1987-

1988 Reg. Sess.) Stats. 1988 ch. 1242.[6]) Section 186.22(b) applied a conduct enhancement to an underlying substantive offense, when the offense was committed for the benefit of the gang ("gang-benefit enhancement") and will be discussed, *post*. Section 186.22(a) established the substantive offense of active participation in a criminal street gang ("gang participation") and provides:

> 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* shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years. (§ 186.22(a), emphasis added.)

The italicized portion of section 186.22(a) is at issue here, specifically, whether one "who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang" encompasses an active gang participant in a criminal street gang who acts alone as the direct perpetrator of felonious criminal conduct. A direct perpetrator, acting alone, cannot commit a gang participation offense because the plain

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[6]Two almost identical bills (Assem. Bill No. 2013 and Sen. Bill No. 1555) resulted in the STEP Act, with the major difference between the two bills being Senate Bill No. 1555's inclusion of civil forfeiture proceedings. (Sen. Bill No. 1555, Leg. Counsel's Rep. to Governor on Enrolled Bill, dated September 28, 1988 [sic].) When two statutes dealing with the same subject conflict, the most recently enacted one expresses the Legislature's will and governs any conflicts between the two. (*In re Thierry S.* (1977) 19 Cal.3d 727, 744; Gov. Code, § 9605.) Both bills were signed by the governor on September 23, 1988, and the provisions of Senate Bill No. 1555, the later chaptered bill, controls where conflicts exist.

language of the statute requires the defendant aid and abet a specific felony by a member of his gang, a construction supported by case law, the language of aiding and abetting law, and legislative intent.

In construing a statute, a reviewing court ascertains and effectuates the Legislature's intent. (*People v. Albillar* (2010) 51 Cal.4th 47, 54-55 ("*Albillar*"); *People v. Loeun* (1997) 17 Cal.4th 1, 8-9 ("*Loeun*").) Respondent has not proffered its understanding of the legislative intent behind section 186.22(a). Section 186.21, which introduces section 186.22 and other gang-related provisions as a whole, acknowledges the danger to public order and safety posed by criminal street gangs, stating in pertinent part:

> 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 criminal street gangs, which together, are the chief source of terror created by street gangs. (§ 186.21.)

Specifically, section 186.22(a) "created a substantive offense for active participation in a criminal street gang; before its enactment, no law authorized the punishment of a gang member for gang membership irrespective of the punishment imposed upon the principal for the gang crime itself." (*Ngoun*, *supra*, 88 Cal.App.4th at p. 435, citing *In re Alberto R.* (1991) 235 Cal.App.3d 1309, 1318.) This Court has found that section 186.22(a) "target[s] the scourge of gang members committing any crimes *together* and not merely those that are gang related" (*Albillar*, *supra*, 51

Cal.4th at pp. 55-56, original emphasis omitted, emphasis added), which comports with the legislative intent both to respond to the increasing criminal street gang violence throughout the state and to concentrate on the group nature of criminal street gangs. Thus, the intent behind section 186.22(a) is to punish active gang participants committing crimes with other gang members. This intent does not clarify whether the Legislature intended to punish direct perpetrators acting alone as gang participants. Further intent must be ascertained from the statutory language.

The statutory language is the most reliable indicator of the Legislature's intent because it is the language of the statute itself that has successfully braved the legislative gauntlet. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238.) This Court looks to the words of the statute, giving them their usual and ordinary meanings, in context. (*Castenada*, *supra*, 23 Cal.4th at p. 747; *Albillar*, *supra*, 51 Cal.4th at p. 55.) If there is no ambiguity in the language, the plain meaning controls. (*Ibid.*) If the statutory language is susceptible to more than one reasonable construction, the reviewing court can look to legislative history to assist in ascertaining legislative intent. (*People v. Robles* (2000) 23 Cal.4th 1106, 1111.)

"Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." (2A Singer & Singer, Sutherland Statutory Construction (7th ed. 2007) § 45:2,

The problem of ambiguity, p. 13; see also *Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1495.) None of the appellate courts which have looked at section 186.22(a), including the Court of Appeal here, have found the phrase at issue ambiguous, nor does respondent contend it is. Appellant agrees the language is straightforward and susceptible of only one meaning, that accorded it by the Court of Appeal in the instant case.

The plain language of section 186.22(a) should be afforded its plain meaning. It is helpful to look first at parts of the phrase at issue -- "who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . ." -- to see how this Court or other courts have thus far construed its meaning. "[A]ny felonious criminal conduct by members of that gang" has been judicially construed. The "felonious criminal conduct" must be the commission of, or attempted commission of, a specific felony. (*People v. Green* (1991) 227 Cal.App.3d 692, 704 ("*Green*"), overruled on other grounds in *Castenada, supra*, 23 Cal.4th 743; see CALCRIM No. 1400 ["*Felonious criminal conduct* means committing or attempting to commit [any of] the following crime[s]: _____________ , *<insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, promoted or directly committed>*.) In *Green, supra*, 227 Cal.App.3d 692, the court found the conduct must be "clearly felonious" conduct to eliminate doubts as to its constitutionality, stating that, if the phrase:

> means commission of an offense amounting to a felony, it contains superfluous language. If, however, it contemplates something less than the commission of an offense amounting to a felony, it makes criminal the promotion, furtherance or assistance of conduct, which is not itself criminal. Such a construction would impinge on protected conduct. (*Id.* at p. 704.)

The conduct that is promoted, furthered, or assisted, then, must be a "separate" and "specific felony offense committed by gang members." (*Castenada*, *supra*, 23 Cal.4th at p. 749; see *id.* at p. 752 [finding § 186.22(a) accords with due process because of its "plainly worded requirements -- criminal knowledge, willful promotion of *a felony*, and active participation in a criminal street gang"], emphasis added; see also *Lamas*, *supra*, 42 Cal.4th at p. 524 [actual conduct promoted must be a felony, not a misdemeanor under § 12031(a)(1) elevated to a felony by operation of § 186.22(a)].) Thus, based on the requirement that the "felonious criminal conduct" be a specific felony, "felonious criminal conduct is not the "pattern of gang activity" described in section 186.22, subdivision (f), i.e., the commission of two or more enumerated predicate offenses.

The specific felony need not be gang-related; it can be *any* felony. (*Albillar*, *supra*, 51 Cal.4th at pp. 54-55.) In *Albillar*, three members of the same gang had raped a 15-year-old girl. (51 Cal.4th at pp. 52-53.) On appeal, the defendants argued that the gang participation offense contained an implied requirement that the felonious criminal conduct be gang related

and that there was no evidence that the criminal conduct being promoted, furthered, or assisted was gang related. (*Id.* at p. 54.) Relying upon the plain meaning of the phrase who "willfully promotes, furthers, or assists in *any* felonious criminal conduct by members of that gang," this Court found the statute did not target felonious gang-related conduct, but any felony conduct. (*Id.* at p. 55, emphasis original.) The specific felony need not be one of the predicate offenses listed in section 186.22, subdivision (f). (*Salcido, supra,* 149 Cal.App. at p. 369.)

Finally, the phrase "by members of that gang" has been partially construed in *Green, supra,* 227 Cal.App.3d 692.[7] The term "member," the *Green* court found, was a term of ordinary meaning requiring no further definition and had been judicially defined as a relationship between a person and an organization that is not accidental, artificial or unconsciously in appearance only. (*Id.* at p. 699.) Section 186.22(a) "target[s] the scourge of gang *members* committing any crimes *together* and not merely those that are gang related." (*Albillar, supra,* 51 Cal.4th at pp. 55-56, original emphasis omitted, emphasis added.) Thus, the specific felony

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[7]As to the proof requirements for "[a]ny person who actively participates in any criminal street gang" found earlier in section 186.22(a), "it is not necessary to prove that the person is a member of the criminal street gang." (§ 186.22, subd. (i); see also *In re Jose P.* (2003) 106 Cal.App.4th 458, 466 [defendant need not be a gang member to violate § 186.22(a)].) "Active participation in the criminal street gang is all that is required." (§ 186.22, subd. (i).)

being promoted, furthered, or assisted in must be committed by fellow gang members.

So now to the rest of the phrase. Turning to the plain language of the verbs in the phrase at issue, "promote, further or assist in" all mean to help do something, to aid, to encourage. "The necessity of looking to a standard dictionary to ascertain the usual meaning of a word does not make the word ambiguous." (2A Sutherland Statutory Construction, *supra*, § 46:2, Literal meaning, pp. 162-163, citing *Stamm Theatres, Inc. v. Hartford Casualty Ins. Co.* (2001) 93 Cal.App.4th 531, 539.) Indeed, the ordinary sense of the word is to be found in its dictionary definition. (*Ibid.*) To assist is "[t]o help, aid: a. a person in doing something" or "c. an action, process, or result." (1 The Oxford English Dict. (2d. ed. 1989) p. 715, col. 2.) The Court of Appeal found that "[to] assist [] in any felonious criminal conduct by members of that gang" is to aid and abet the conduct, which by its nature requires more than one participant (typed opn., p. 5), which respondent concedes (RBOM 39-40) and with which the dissenting opinion agrees (typed opn., p. 7, dis. opn. of Sims, J. ["Someone does not 'assist' himself"]).

The remaining verbs, "promote" and "further," all share the same meaning -- to help to do something, to assist. To promote means to "[f]urther the growth, development, progress, or establishment of (anything); to help forward (a process or result); to further, advance,

encourage." (12 The Oxford English Dict., *supra*, p. 616, col., 3.) To further means "[t]o help forward, assist (usually things; less frequently persons); to promote, favour (an action or movement)." (6 The Oxford English Dict., *supra*, p. 285, col. 2.) The rules of grammar can be referenced in statutory construction. (*Busching v. Superior Court* (1974) 12 Cal.3d 44, 52.) The direct object of these transitive or action verbs, promote and further, is "any felonious conduct," i.e., the felonious conduct is what is promoted or furthered. The prepositional phrase, "by members of that gang," indicates who performs the felonious conduct. Thus, as the Court of Appeal explained, the phrase means that the defendant must promote or further -- must help forward, further, advance, encourage or assist -- a specific felony committed by members of his gang. (Typed opn., p. 20, emphasis added.) In essence, the definitions of promote or further mean the same as that of "assist in."

Respondent's construction of the statute is awkward and tortured, assuming that the Legislature chose this circumlocution, assigning criminal liability for an active participant acting alone by describing him as one "who willfully helped forward, furthered, advanced, encouraged or assisted his own felonious criminal conduct by a member of the gang, including himself." (See RBOM 40.) Respondent criticized the Court of Appeal's statement that "[i]t makes no sense to say that a person has promoted or furthered his own criminal conduct" (RBOM 37-38), but has failed to

explain why the Legislature would choose such unnatural and cumbersome sentence structure and word choices to convey the meaning respondent advocates. Although the Court of Appeal focused on the illogic of promoting, furthering, or assisting in one's own conduct (typed opn., p. 5), that is just another way of saying that the only rational construction based on the plain meaning rule does not logically encompass direct perpetrators acting alone. One does not further the development of one's own conduct, one does not encourage one's own conduct, one does not actively support one's own conduct, and one does not help forward one's own conduct, any more than one assists in one's own conduct. One does, on the other hand, further the development of, encourage, support, help forward the activities of another, the rational construction. Thus, the plain meaning of assist, further, and promote -- all of which are merely different ways of saying the same thing -- supports the Court of Appeal's construction of section 186.22(a) as not encompassing direct perpetrators acting alone.

In *Ngoun, supra,* 88 Cal.App.4th 432, the court looked at the literal meaning of the words, "promote," "further," and "assist in" and found those meanings-- to help, aid, or contribute to the progress of -- squared with the expressed purposes of the statute. (*Id.* at p. 436.) The court held that "[a]n 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 or abets or who is otherwise connected to

such conduct." (*Ibid.*) *Ngoun* is not persuasive. Because the offense being promoted, furthered, or assisted in is "a specific felony committed by gang members (*Castenada, supra*, 23 Cal.4th at p. 749), not merely the pattern of the kinds of offenses customarily committed by the gang, the promotion or furtherance must be of the specific felony, and, because it makes no sense to promote or further one's own conduct, more than one participant is required, which means a direct perpetrator acting alone cannot violate section 186.22(a). (Typed opn., p. 21.) Again, the construction advocated by *Ngoun* and respondent is not rational, but convoluted and strained.

The Court of Appeal looked at this Court's guidance in *Castenada, supra,* 23 Cal.4th 743, in which this Court had examined what the phrase "actively participates" means in section 186.22(a). (*Id.* at p. 745.) Respondent argues at some length that the requirement of aiding and abetting expressed in *Castenada* is dicta which should not have been followed. (RBOM 26-35.) Dicta consists of "[i]ncidental statements or conclusions not necessary to the decision" and thus not regarded as authority. (*Simmons v. Superior Court* (1959) 52 Cal.3d 373, 378; *Bunch v. Coachella Valley Water Dist.* (1989) 214 Cal.App.3d 203, 212 ["general observations, unnecessary to the decision]; see also, *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157.) The language in *Castaneda* is not dicta, but ratio decidendi, as this Court upheld the constitutionality of the statute by describing elements the Legislature had

provided as necessary to prove a violation of section 186.22(a), exceeding the federal due process requirements. (*Castenada*, *supra*, 23 Cal.4th at p. 749.)

Recently, in *Albillar*, *supra*, 51 Cal.4th 47, Justice Baxter, writing for the majority, rather surprisingly stated that this Court in *Castenada* had merely added language, unnecessary to its decision, that "every person incurring criminal liability under section 186.22(a) has aided and abetted a separate felony offense committed by gang members. [Citation.] 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.'" (*Id.* at p. 58, citing *Castenada*, *supra*, 23 Cal.4th at p. 752.) However, a careful reading of *Castenada* shows that the language about aiding and abetting was part and parcel of the court's reasoning.

In *Castenada*, *supra*, 23 Cal.4th 743, this Court first noted that the Legislature enacted section 186.22(a) while cognizant of *Scales v. United States* (1961) 367 U.S. 203 [81 S.Ct. 1469, 6 L.Ed.2d 782] ("*Scales*"), which held that the state cannot punish mere association with a group unless there is proof the defendant knew of its illegal aims and intends to further them. (23 Cal.4th at p. 749.) The Legislature complied with *Scales* and the due process requirement of personal guilt by requiring not only that the defendant actively participates but also that he know of the gang's

illegal activities and "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." (23 Cal.4th at p. 749.) No less than three separate times in *Castenada*, this Court expressed the latter requirement as aiding and abetting a separate felony offense, first in finding that section 186.22(a) satisfied due process because it limited 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 *Green*, *supr*a, 227 Cal.App.3d 692, 703-703, acknowledged. (*Ibid.* [anyone violating § 196.22(a) "would also . . . be criminal 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 [199 Cal.Rptr. 60, 674 P.2d 1318] [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)].) (23 Cal.4th at p. 749.)

Second, in rejecting the defendant's argument that an active participant must devote all or a substantial part of his time and efforts to the gang, this Court stated:

> 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.)

Third, this court held:

> 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." (23 Cal.4th at p. 752.)

The three very specific references to aiding and abetting by this Court were not dicta, but were integral to its examination of section 186.22(a) to determine what elements the Legislature relied upon to comply with due process and support the Court of Appeal's reliance on this Court's language. Even if not binding, this Court's initial construction of the statute is certainly persuasive.

At least two justices of this Court read *Castenada* precisely the same way in a subsequent case. In *People v. Robles*, *supra*, 23 Cal.4th 1106, this Court found that section 12031, subdivision (a)(2)(C), which makes it a felony for an active participant in a criminal street gang to carry a loaded firearm in public, incorporated all of the elements of section 186.22(a) into the offense, including the third element of "willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang." (*Id.* at p. 1115.) In dissent, Justice Baxter, joined by Justice Brown, argued that section 12031, subdivision (a)(2)(C) incorporated only the element of active participation, not the third element, which Justice Baxter read as "the targeted gang members also must be found guilty of

aiding and abetting a separate felony offense by other gang members as required for a section 186.22(a) violation" (*id.* at p. 1119, (dis. opn. of Baxter, J.)) and "proof of (3) aiding and abetting some other felony offense by gang members" (*id.* at p. 1119, fn. 5, (dis. opn. of Baxter, J.)).

The pattern jury instructions in both CALJIC and CALCRIM reflected this same understanding of *Castenada* and section 186.22(a) for many years. Published jury instructions are "not themselves the law, and are not authority to establish legal propositions or precedent." (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.) "At most, when they are accurate, . . . they restate the law. (*Ibid.*) For many years, CALJIC No. 6.50 and CALCRIM No. 1400 restated the law under *Castenada* and *Green* as requiring proof that the defendant had aided and abetted another gang member in committing a felony. (CALJIC No. 6.50 (1991 rev.) ["4. That person aided and abetted [a] member[s] of that gang in committing the crime[s] of ______"]; CALCRIM No. 1400 (Jan. 2006 rev.) p. 885 [" 4. The defendant's words or conduct did in fact aid and abet the commission of the crime"].) It was not until long after *Ngoun* was published in 2001 that either instruction was revised to add direct and active commission of the felony offense. (CALJIC No. 6.50 (Jan. 2005 ed.) p. 236; CALCRIM No. 1400 (Fall 2007 ed.) p. 983.)

Appellant's construction avoids surplusage. A court must "giv[e] significance to every word, phrase, sentence, and part of an act in pursuance

of the legislative purpose." (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [accord].) "A cardinal rule of construction is that construction making some words surplusage is to be avoided." (*People v. Gilbert* (1969) 1 Cal.3d 475, 480.) As discussed, *ante*, the specific felony offense that is promoted, furthered, or assisted in need not be gang-related; it can be any felony. (*Albillar*, *supra*, 51 Cal.4th at pp. 55-56.) If there is no requirement the felonious conduct be gang-related, then the phrase "any felonious criminal conduct by members of that gang" is surplusage unless it requires the defendant aid or abet another gang member in the commission of the underlying felony. The phrase is merely surplusage if it means nothing more than "commits a felony." If the Legislature had wanted to write a statute applicable to any person who commits a felony, it knows how to do so, as demonstrated by various statutes. (See, e.g., § 422.75, subds. (a), (b) [enhancement for defendant "who commits a felony that is a hate crime"]; § 186.22(b)(1) ["any person who is convicted of a felony"]; § 12022.1, subd. (e) ["if the person is convicted of a felony"] § 667, subd. (b) ["those who commit a felony"].) Had the Legislature intended solely to punish any active gang participant who commits a felony, it could have drafted the statute to say so.

Respondent's construction is flawed, in part because it reads back into section 186.22(a) a requirement that, where a defendant is not the

direct perpetrator, the prosecution prove the defendant is a gang member. As to the active participant requirement, "it is not necessary to prove that the person is a member of the criminal street gang." (§ 186.22, subd. (i); see also *In re Jose P., supra,* 106 Cal.App.4th at p. 466.) However, under respondent's construction, the prosecution would need to prove that appellant was a gang member for purposes of showing that he furthered felonious conduct by a member of the gang, himself.

Respondent's construction, which advocates culpability under section 186.22(a) when a defendant acts in concert with a non-gang member (RBOM 25), is also defective because it reads out of section 186.22(a) the requirement the conduct being promoted, furthered, or assisted in be "by a member of that gang." The conduct need not be gang-related, but it must be conduct by a member of the defendant's own gang. As explained earlier, the later chaptered bill, Senate Bill No. 1555 controlled where there were differences between it and Assembly Bill No. 2013. Assembly Bill No. 2013 used the language "any felonious criminal conduct by gang members." (Assem. Bill No. 2013 (1987-1988 Reg. Sess.) Stats. 1988, ch. 1242, p. 3, § 186.22(a).) The language of "by a member of that gang" prevailed. The word "that" in the phrase "by members of that gang" is used as a demonstrative adjective, "[i]ndicating or identifying a person or thing either as being pointed out of as having just been mentioned." (2 The New Shorter Oxford English Dict. (3d ed. 1993) p.

3268, col. 3.) This evidences an intent that the conduct the members of the gang in which the defendant is an active participant commit the felony. (*Castenada, supra*, 23 Cal.4th at p. 749.)

Respondent's construction is also untenable because it contradicts this Court's construction of "felonious criminal conduct" as a specific felony. Respondent argues that the Legislature meant to include "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 . . . ." (RBOM 46.) In other words, respondent maintains that section 186.22(a) includes active participants who further or promote generalized felony conduct, not a specific felony, by other gang members. This approach has been rejected by this Court.

Furthermore, the Court of Appeal's approach is confirmed by the fact that the language of section 186.22(a) is the language of aiding and abetting. This Court has looked to the use of a term in other statutory and decisional law in order to construe that term in a given statute. (*People v. Belton* (1979) 23 Cal.3d 516, 524 [looking to statutes and case law to determine meaning of "testimony" in § 1111]; see also § 7(16) [words and phrases that have a peculiar and appropriate meaning in law must be construed according to such meaning].) One aids and abets a crime when,

with knowledge of the perpetrator's unlawful purpose, one, "by act or advice aids, promotes, encourages or instigates the commission of the crime" with the specific intent to do so. (*People v. Beeman* (1984) 35 Cal.3d 547, 561; CALCRIM No. 401 ["Someone aids and abets a crime if he or she knows of the perpetrators unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."].) As defined, *infra*, to assist, to promote, and to further mean to advance, to encourage, to assist, to aid. In *Green, supra*, 227 Cal.App.3d 743, the court found the phrase "willfully promotes, furthers, or assists in any felonious criminal conduct" common and similar to other phrases in the criminal law, i.e., to those defining an aider and abettor, one who "with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime." (*Green, supra*, 227 Cal.App.3d at p. 703, citing CALJIC No. 3.01 which restated common law principles.) The court reasoned:

> The similarity of the relevant phrase in Penal Code section 186.22 with that employed in determining if a person is an aider and abettor means, we think, that the phrases should be viewed as synonymous. As the Attorney General concedes, for a person to be criminally liable under Penal Code section 186.22, he or she would also have to be criminally liable as an aider and abettor to any specific crime committed by a member or members of a criminal street gang. (*Green, supra*, 227 Cal.App.3d at pp. 703-704.)

For purposes of aiding and abetting crime, "[t]o 'aid' is to assist or help another," and to abet in its legal sense means "to encourage, advise or instigate the commission of a crime." (1 Wharton's Crim. Law (15th ed. 1993) Parties, § 29, In general, p. 181; see *People v. Demes* (1963) 220 Cal.App.2d 423, 432 [aid perpetrator by acts or encourage by words or gestures], disapproved on other grounds in *People v. Collie* (1981) 30 Cal.3d 43, 64, fn. 19.) Thus, to assist, to promote, and to further, convey the same meanings as the words of aiding and abetting -- aiding and encouraging.

Courts have a duty to construe statutes harmoniously where that can reasonably be done. (2A Sutherland Statutory Construction, *supra*, § 53.1, pp. 549-550.) The Court of Appeal looked at the relationship between section 186.22(a) and subdivision (b) of the same statute. Section 186.22(b) applied a conduct enhancement to an underlying substantive offense, when the offense was committed for the benefit of the gang ("gang-benefit enhancement"):

> Except as provided in paragraphs (4) and (5), any 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" receives additional specified punishment. (§ 186.22(b).)

As explained by the Court of Appeal, the subdivisions define different aspects of criminal gang involvement. (Typed opn., p. 17.) Section 186.22(a) requires the existence of a criminal street gang, active participation by the defendant in the criminal street gang, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity, and perpetration or willful promotion, furthering, or assisting of felonious criminal conduct by members of that gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 523; *In re Lincoln J.* (1990) 223 Cal.App.3d 322, 327.) In addition to the existence of a criminal street gang, the gang-benefit enhancement also has three elements: first, conviction of a predicate felony; second, that was committed for the benefit of, at the direction of, or in association with a criminal street gang; and, third, that was committed with the specific intent to promote, further or assist in any criminal conduct by criminal street gang members. (§ 186.22(b)(1).)

The Court of Appeal found that the gang-benefit enhancement's purpose is to enhance sentence of a predicate felony "committed both to benefit a criminal street gang and with the intent to promote, further, or assist any criminal conduct by its members. (Typed opn., pp. 17-18.) On the other hand, the court found that the substantive offense of active participation "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." (Typed opn., p. 18, citing § 186.22,

subd. (a), emphasis in opinion.) Thus, the court reasoned, "[t]he operative distinction is the difference between the aiding and abetting of felonious conduct by gang members and the intention to do so." (Typed opn., p. 18.) In *Salcido, supra,* 149 Cal.App.4th 356, the court interpreted *Ngoun* to eliminate participation by gang members in the criminal conduct as an element of the offense. (149 Cal.App.4th at pp. 368-369.) This interpretation resulted in the erroneous replacement of the third element of section 186.22(a) -- actual participation as a principal in the felonious conduct of members of the gang -- with the third element of subdivision (b)(1) -- a general intent to promote any criminal conduct by gang members. This construction erroneously conflates the distinction between the two subdivisions, promoting or furthering a felony with the intent to promote or further illegal conduct.

The result of the plain meaning rule's application to a statute can be harsh or unjust or even mistaken, as long as it is not absurd. (2A Sutherland Statutory Construction, *supra*, 46:1, The plain meaning rule, p. 157.) Respondent argues that the Court of Appeal's interpretation of the statute leads to absurd results. (RBOM 41-44.) In reality, the results pointed to by respondent merely show that the statute does not sweep all gang-related offenses into its ambit, a result that may be uneven, even unjust, but not ridiculous. Respondent posits 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." (RBOM 43-44.) However, as the Court of Appeal explained, when two or more persons commit a crime together, direct perpetrators will most frequently fall within section 186.22(a), because both a perpetrator and aider/abettor generally act in part as an actual perpetrator and in part as an aider/abettor, with the line between the two blurred. (Typed opn., p. 21, citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1120; see also *People v. Mouton* (1993) 15 Cal.App.4th 1313, 1321-1325 [defendant can be guilty as both principal and accessory where evidence shows distinct and independent actions supporting each crime].) As this Court has stated, "[i]t is often an oversimplification to describe one person as the actual perpetrator and the other as the aider and abettor." (*People v. McCoy, supra,* 25 Cal.4th at p. 1120; *People v. Calhoun* (2007) 40 Cal.4th 398, 403.) Where a direct perpetrator acts in part as a perpetrator and in part as an aider and abettor, the direct perpetrator will be punished under section 186.22(a).

Nor does a gang-motivated direct perpetrator acting alone go unpunished. When there is only one perpetrator, if he acts for the benefit of the gang and to generally promote criminal conduct by criminal street gang members, he is not only convicted of the underlying felony but his punishment for that offense is enhanced under section 186.22(b)(1). The dissent in the Court of Appeal advances an in-terrorum example (typed

opn., pp.-5-6 (dis. opn. of Sims, J.), which respondent cites as well (RBOM 41). In that example, a gang leader, acting alone, shoots and kills several opposing gang members under circumstances where it is clear he did so for gang-related reasons. In that example, not only could the leader be convicted of the underlying murders, but also he could have his punishment enhanced under section 186.22(b). More significantly, the gang leader would no doubt be incarcerated for life, as he could receive several consecutive life-without-the-possibility-of-parole sentences (§ 190, subd. (a)(3) [multiple murders] or (a)(22) [active participant in criminal street gang with murder carried out to further the gang's activities], along with several consecutive 25-years-to-life enhancements for discharge of a gun causing death (§ 12022.53, subd. (d)). The ready availability of existing punishment for direct perpetrators may have led legislators not to be concerned about whether a consecutive eight month sentence or even an imposed but stayed sentence (see Argument II, *infra* [application of § 654 to § 186.22(a)) would be imposed on direct perpetrators. This approach is consistent with the legislative intent behind section 186.22(a) which concentrated on the group nature of criminal street gangs (§ 186.21), was motivated by the knowledge that "no law authorized the punishment of a gang member for gang membership irrespective of the punishment imposed upon the principal for the gang crime itself" (*Ngoun*, *supra*, 88 Cal.App.4th at p. 435, citing *In re Alberto R.*, supra, 235 Cal.App.3d at p. 1318), and

targeted "gang members committing any crimes together" (*Albillar, supra,* 51 Cal.4th at pp. 55-56).

The court in *Ngoun, supra,* 88 Cal.App.4th 432 expressed concern that the Legislature could not have intended 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. 437.) However, such an approach is not illogical. Various substantive offense provisions are in place to punish more culpable direct perpetrators who act alone, and, as explained above, the Legislature could have been targeting with section 186.22(a) gang participants less directly involved.

Respondent next argues that the Court of Appeal misread the facts of *Castenada* when it found that "gang members who are co-perpetrators acting in concert fall under section 186.22(a)'s purview" and claims that the facts of *Castenada* "actually support the holdings of the dissent and the other courts of appeal to have considered the issue." (RBOM pp. 35-37.) The Court of Appeal did not rely on *Castenada*'s facts as support for its reasoning, but merely used those facts as an illustration of a fact pattern where a direct perpetrator could be convicted. (Typed opn., pp. 12-13 ["perpetrators may come within the language of section 186.22, subdivision (a)," noting blurred line between perpetrators and aiders and abettors, citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1120]; see also typed opn., pp. 21-22.) The facts in *Castenada* related to the issue here are not clearly set

out in the decision (the defendant and two companions, impliedly, but not expressly identified as, fellow gang members, robbed two victims) because this Court in *Castenada* court was not considering the issue here. (See also *Sanchez*, *supra*, 179 Cal.App.4th at pp. 1306-1307 [understanding the defendant in *Castenada* to be a perpetrator of one offense and an aider and abettor of another].) The Court of Appeal did not rely upon the facts of *Castenada* to bolster its reasoning or decision, for a good reason. Cases are not authority for propositions not considered therein. (*People v. Toro* (1989) 47 Cal.3d 966, 978, fn. 7.)

Despite that well-settled maxim, respondent attempts to rely upon the facts of other cases to support its position. (RBOM 36-37, citing *Ngoun*, *supra*, 88 Cal.App.4th at p. 437 [citing *People v. Herrera* (1999) 70 Cal.App.4th 1456; *Castenada*, *supra*, 23 Cal.4th 743, *People v. Funes* (1994) 23 Cal.App.4th 1506; *People v. Smith* (1993) 21 Cal.App.4th 342 and claiming the facts of those cases provided indirect support for its reasoning and decision because, in each, a defendant had been convicted as direct perpetrator of substantive felony and of active gang participation based on same felony, with all convictions affirmed without mention of issue].) Again, cases are not authority for propositions not considered therein, and all that the cases cited in *Ngoun*, including *Castenada*, establish is that the issue raised here was not raised in those cases. This irrelevant argument diverts attention from the main issue.

Respondent argues that its interpretation is consistent with the legislative intent behind section 186.22(a), citing section 186.21 and "the Legislative Counsel's Digest." (RBOM 44-46.) As set forth earlier, section 186.21 acknowledged the danger to public order and safety posed by criminal street gangs and indicated an intent to eradicate criminals street gang activity by focusing on its patterns and its organized nature. (§ 186.21.) This intent comports with this Court's pronouncement that section 186.22(a) "target[s] the scourge of gang members committing any crimes *together* and not merely those that are gang related." (*Albillar*, *supra*, 51 Cal.4th at pp. 55-56, original emphasis omitted, emphasis added.) Otherwise, section 186.21 demonstrates only a general intent to solve the problem of gangs but sheds no light on *how* the Legislature wanted to do so, i.e., whether it intended with section 186.22(a) to encompass direct perpetrators acting alone.

Respondent cites the comment in the Legislative Counsel's Digest that "[u]nder 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." (RBOM 45, citing Legis. Counsel's Dig., Assem. Bill No. 2013 (1987-1988 Reg. Sess.) Stats.

1988 ch. 1242.[8]) Respondent claims this language "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." (RBOM 45.) Appellant agrees the Legislative Counsel's Digest is relevant as to intent (although not binding) and entitled to great weight, as it is reasonable to presume the Legislature acted with the intent and meaning expressed in the digest. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169.) However, respondent has cited to the Legislative Counsel's Digest for Assembly Bill No. 2013, not to Senate Bill No. 1555, which, as noted in footnote 6, *ante*, is controlling as to any differences between the two bills because it was the later chaptered bill. The Legislative Counsel's Digest for the controlling bill, Senate Bill No. 1555 states that, "[u]nder existing law, there are no special provisions for the punishment of crimes committed by members of street gangs." (Legis. Counsel's Digest, Sen. Bill No. 1555 (1987-1988 Reg. Sess.) Stats. 1988, ch. 1256.) However, because both bills were almost identical, and the Legislature passed them both around the same time, any difference between the two comments is probably insignificant. Both comments in both digests indicate that the Legislature wanted to

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[8]Respondent has not provided a copy of the digest it is referencing to this Court or to appellant, nor has respondent asked this Court to take judicial notice of the particular version of the digest at issue.

create several substantive gang-related offenses that had previously not existed, but neither comment in either digest sheds any light on whether the Legislature intended to punish a direct perpetrator acting alone or only an aider and abettor as an active participant. The fact the Legislature wanted to create several substantive gang-related offenses does not shed light on the meaning of the language in section 186.22(a). Respondent's interpretation of the comment -- that the Legislature intended to punish gang participation separately from the underlying substantive offense -- does not prove that the Legislature wanted to punish direct perpetrators acting alone.

Respondent also comments that "[t]here 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." (RBOM 45.) The meaning of a statute should be gleaned from what the Legislature said, not from what legislators may have intended to say but failed to articulate. The language of a penal statute, not some intent never conveyed, must impart meaning to those against whom it is aimed and to those who enforce it to avoid vagueness and due process violations. (U.S. Const., 5th, 14th Amends.; *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 [92 S.Ct. 2294, 33 L.Ed.2d 222]; Cal. Const., art. I, § 7; *People v. Heitzman* (1994) 9 Cal.4th 189, 199.) Here, there are very clear indications the Legislature intended to create a crime limited to those who aided and

abetted another gang member's conduct -- the statutory language reflecting aiding and abetting and the actions by other gang members. The language is always the most reliable indication of the Legislature's intent (*Loeun, supra,* 17 Cal.4th at pp. 8-9; *People v. Gardeley, supra,* 14 Cal.4th at p. 621) because the language "has successfully braved the legislative gauntlet." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc., supra,* 6 Cal.App.4th at p. 1238.)

Although the absence of ambiguity dispenses with a need to review the legislative history, a reviewing court may look to determine whether the legislative history is consistent with the plain language construction the court has employed. (*Albillar, supra*, 51 Cal.4th at p. 56.) The various reports on the bill prepared for the Senate and Assembly committees do not discuss the language at issue here or its application. To the degree an author's statements about pending legislation constitute "a reiteration of legislative discussion and events leading to the adoption of proposed amendments rather than merely an expression of personal opinion, they are entitled to consideration. (*California Teachers Assn. v. San Diego Community College Dist., supra,* 28 Cal.3d at p. 700; see also *Carter v. California Department of Veterans' Affairs* (2006) 38 Cal.4th 914, 928-929 ["Where an author's statements appear to be part of the debate on the legislation and were communicated to other legislators, we can regard them as evidence of legislative intent"].) In a statement to the Senate Judiciary

Committee on May 10, 1988, Assemblywoman Gwen Moore, author of Assembly Bill 2013, stated that the bill made it

> a separate offense for a person to actively participate in a criminal street gang and assist in any felonious conduct by the gang with knowledge that it has engaged in a pattern of criminal activity. This will ensure that persons who hand the weapons to other gang members or who drive the vehicle for a shooting will be punished for what they can not help but know will be involvement in serious criminal activity. (Author's Statement to Senate Judiciary Committee dated May 10, 1988, p. 1, Assem. Bill No. 2013 (1987-1988 Reg. Sess.) Stats. 1988, ch. 1242, emphasis original.)

Similarly, at the Senate Third Reading, Assemblywoman Moore reiterated that the statute made "a separate offense for a person to actively participate in a criminal street gang and assist in any felonious criminal conduct by the gang with knowledge that it has engaged in a pattern of criminal activity," providing again the example of those providing weapons and driving a car. (Author's Statement to Senate Third Reading, August 31, 1988, p. 1, Assem. Bill No. 2013 (1987-1988 Reg. Sess.) Stats. 1988, ch. 1242.) A letter from Assemblywoman Moore to the Chairman of the Senate Committee on Appropriations again explained the bill made "it a separate crime to for [sic] a person who knows about a gang's pattern of criminal activity to actively participate in the gang and assist in commission [sic] of any felony . . . ." (Author's Letter to Chairman of Senate Committee on Appropriations, August 18, 1988, p. 1, Assem. Bill No. 2013 (1987-1988 Reg. Sess.) Stats. 1988, ch. 1242.) These explanations of the

substantive offense of gang participation show the Legislature was criminalizing assistance in the commission of a felony by the gang, not punishing the direct sole perpetrator of such felonies, a legislative intent consistent with the Court of Appeal's construction of the statute.

Lastly, respondent relies upon the fact that the Legislature amended section 186.22 in 2005, 2006, 2009, and 2010, but, although presumed aware of the holdings of *Ngoun*, *Salcido*, and *Sanchez*, did not alter the language of section 186.22(a). (RBOM 46.) Although respondent cites no authority for this proposition, re-enactment of a phrase already construed in decisions can imply legislative approval of prior judicial interpretation. (*People v. Escobar* (1992) 3 Cal.4th 740, 750-751.) Legislative inaction is a "weak reed upon which to lean" because something more than mere silence is required before acquiescence becomes implied legislation. (*Id.* at p. 951.) However, in 1991, long before *Ngoun* was decided in 2001, *Green*, *supra*, Cal.App.4th 227 held that the phrase "willfully promotes, furthers, or assists in any felonious criminal conduct" was synonymous with aiding an abetting a specific crime committed by another gang member (*id.* at p. 704), so the same lack of affirmative disapproval upon which respondent relies applies to appellant's construction, but the Legislature has simply not expressly or impliedly endorsed either position. Section 186.22 was specifically amended in reaction to part of *Green*'s holding as to active participation (*id.* at pp. 699-700 [definition of active

participation]; § 186.22, subd. (i) [active participation under § 186.22(a) does not require membership or devotion of all or substantial part of time to criminal street gang]; see Pen. Code with Evid. Code and Selected Penal Provisions of Other Codes (LexisNexis 2011) § 186.22, 2000 Notes [subd. (i) added to disapprove of reasoning in *Green* that person must devote all or substantial portion of time to gang under subd. (a)]), yet no action has been undertaken for over 20 years to amend section 186.22(a) as to the phrase at issue here. After 2001, when *Ngoun* was published, the on-going split of authority between its holding and that of *Green* has negated any probativeness as to subsequent re-enactments of section 186.22(a) by the Legislature.

C. Because There Was Constitutionally Insufficient Proof Appellant Promoted, Furthered, Or Assisted In Felonious Criminal Conduct By Norteño Gang Members, The Court Of Appeal's Reversal Of Appellant's Conviction Must Be Affirmed.

If this Court affirms the Court of Appeal's construction of section 186.22(a), it should also affirm the Court of Appeal's reversal of the active gang participation conviction. Even were this Court to adopt respondent's construction of section 186.22(a) (or another construction), however, there is constitutionally insufficient evidence to uphold the conviction. (U.S. Const., 5th, 14th Amends.; *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 319-320; *Burks v. United States*, *supra*, 437 U.S. at pp. 17-18; *People v. Johnson, supra,* 26 Cal.3d at p. 578.) This Court should remand the matter

to the Court of Appeal for an opportunity for briefing of the sufficiency issue in accord with any construction arrived at by this Court other than the one adopted in the Court of Appeal. Alternatively, this Court should examine the evidence to determine if it was constitutionally sufficient.

No evidence was introduced that appellant shouted any gang slogans or flashed any gang signs. (2 RT 369-370.) He was dressed in a white-t-shirt and jeans, not in Norteño gang attire or colors (black and red). (1 RT 145, 187-190.) None of his tattoos were seen by the victim, although one gang expert testified that the bottom of the Northern Warrior tattoo on the upper bicep would have been visible. (1 RT 145, 187-190, 2 RT 369-370.) No other Norteño gang members were present. Although the officers' testimony assumed the Norteño gang in Marysville, Yuba County, was connected with appellant's Norteño gang in Woodland, Yolo County, there was no testimony the Yolo County Norteños were a subset of the Yuba County Norteños. (1 RT 177, 178, 179, 184, 2 RT 306, 325, 330, 344.) Garza did not know whether appellant belonged to a subset of the Norteños in the Yuba-Sutter area. (1 RT 207.)

As the trial court stated in granting a new trial motion as to the gang-benefit enhancement, "[t]here is simply nothing beyond the fact that he is a gang member that would support that finding." (See *People v. Frank* (2006) 141 Cal.App.4th 1192, 1199.) Under any construction of section 186.22(a), the evidence was constitutionally insufficient.

D. Conclusion.

This Court should affirm the decision of the Court of Appeal.

II.

WERE THIS COURT TO REVERSE THE COURT OF APPEAL'S DECISION, THE CASE SHOULD BE REMANDED TO THE COURT OF APPEAL FOR A DETERMINATION AS TO WHETHER SENTENCE ON THE ACTIVE PARTICIPATION CONVICTION SHOULD HAVE BEEN STAYED PURSUANT TO SECTION 654.

The trial court sentenced appellant to 16 months as to the active participation conviction, consecutive to the sentence as to the attempted robbery conviction. On appeal, appellant contended that the court should have stayed sentence pursuant to section 654 and that, if consecutive sentences were appropriate, the court failed to state reasons for imposing consecutive sentences. (AOB 43-47.) The court erred, because it should have stayed sentence under section 654, which bars imposition of separate sentences for both active gang participation and crimes proving the element of promotion of felonious criminal conduct by fellow gang members.[9] The appellate court reversed the active gang participation conviction, so it did not reach the sentencing issue for that count. Were this Court to reverse the

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[9]This Court has granted review on the question "Does Penal Code section 654 bar imposition of separate sentences for the offense of active participation in a criminal street gang in violation of Penal Code section 186.22, subdivision (a), and for the crimes used to prove one element of that offense -- that the defendant have promoted, furthered, and assisted felonious criminal conduct by members of that gang?" in *People v. Mesa*, previously at 186 Cal.App.4th 773, review granted October 27, 2010 (S185688).

appellate court's decision, this Court should remand the matter for consideration of the section 654 issue as well as the consecutive sentencing issue.

Section 654 prohibits multiple punishment for an indivisible course of conduct even though it violates more than one statute. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Whether a course of conduct is indivisible depends on the intent and objective of the actor. (*People v. Evers* (1992) 10 Cal.App.4th 588, 602; *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.) "If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) A determination that the defendant entertained multiple criminal objectives is a factual question and will be upheld on appeal if supported by substantial evidence. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) The application of section 654 "turns on the defendant's objective in violating" multiple statutory provisions. (*People v. Britt* (2004) 32 Cal.4th 944, 952.)

Section 654 bars punishment where, as here, a defendant has been convicted of both a crime that requires as one of its elements the intentional commission of an underlying offense and the underlying offense itself. (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1315.) Where, as here, a defendant has been convicted of active participation in a criminal street gang and underlying criminal conduct, he can be punished for the

underlying criminal conduct but can not be punished separately for gang participation. (*Id.* at p. 1316; cf. *People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1468 [§ 654 never precludes multiple punishment for both gang participation and the underlying felony]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935 [accord]; *In re Jose P.* (2003) 106 Cal.App.4th 458, 470-471 [accord].)

Here, the jury was instructed that "[f]elonious criminal conduct includes Penal Code Section 664/211." (1 CT 140 [CALJIC No. 6.50.) The only way the jury could have found appellant guilty of active gang participation was to find he committed the underlying offense of attempted robbery, as to which he was also sentenced. Appellant cannot be separately punished for gang participation given the sentence for attempted robbery. Were this Court to reverse the Court of Appeal's decision, this Court should remand the case to the Court of Appeal for consideration of the section 654 issue.

CONCLUSION

For the reasons given herein, this Court should affirm the decision of the Court of Appeal. In the alternative, if this Court reverses the decision, this Court should nonetheless remand the matter to the Court of Appeal for consideration in the first instance of the sentencing issue on the gang participation conviction.

Date: May 16, 2011 Respectfully submitted,

/s/

Diane Nichols
Attorney for Defendant and Appellant

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), I hereby certify the number of words in Appellant's Answer Brief on the Merits is 11,932, based on the calculation of the computer program used to prepare this brief. The applicable word-count limit is 14,000.

Dated: May 16, 2011 /s/

Diane Nichols

DECLARATION OF SERVICE

PEOPLE OF THE STATE OF CALIFORNIA v. **JOE RODRIGUEZ, JR.**	SUPREME COURT NO. **S187680** COURT OF APPEAL NO. **C060227**

The undersigned declares: I am an attorney duly licensed to practice in the State of California and am not a party to the subject cause. My business address is P.O. Box 2194, Grass Valley, California 95945-2194. I served the attached **APPELLANT'S ANSWER BRIEF ON THE MERITS** by placing a true and correct copy thereof in a separate envelope for each addressee named hereafter, addressed as follows:

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

Yuba County Superior Court
FOR DELIVERY TO:
Hon. James L. Curry
215 Fifth Street, Suite 200
Marysville CA 95901

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Central California Appellate Program
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Sacramento CA 95816-4736

Joe Rodriguez, Jr.
P-70505
P.O. Box 107
Tehachapi CA 93581

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Grass Valley, California on May 16, 2011.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Grass Valley, California on May 16, 2011.

/s/

Diane Nichols