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

REPLY BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
CHARLES A. FRENCH
Supervising Deputy Attorney General
BROOK BENNIGSON
Deputy Attorney General
State Bar No. 184203
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-5687
Fax: (916) 324-2960
Email: Brook.Bennigson@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

COURT RULES

OTHER AUTHORITIES

I. PENAL CODE[1] SECTION 186.22, SUBDIVISION(A) APPLIES TO AN ACTIVE PARTICIPANT WHO, ACTING ALONE, IS THE DIRECT PERPETRATOR OF FELONIOUS CRIMINAL CONDUCT

Appellant argues that an active participant[2] who is the sole perpetrator of felonious criminal conduct cannot be guilty of violating section 186.22, subdivision (a)[3] (hereinafter "186.22(a)")—active participation in a gang—"because the plain 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." (AB[4] 14-15.) Appellant's arguments contain numerous flaws.

A. The Words "Promote" and "Further" Do Not Mean "To Assist In"

Appellant states that "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." (AB 20.) Thus, after examining the dictionary definition of each of the three words, he concludes that "the definitions of promote or further mean the same as that of 'assist in'." (AB 21; AB 20 ["The . . . verbs, 'promote' and 'further' . . . share the same meaning - - to help to do something, to assist"], 22 ["assist, further, and promote . . . are merely

---

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

[2] As in the opening 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."

[3] Section 186.22(a) provides that:

> 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[.]

[4] "AB" refers to appellant's answer brief.

different ways of saying the same thing"].) He argues that because the words mean the same thing—to assist in—and because a person cannot assist himself, the majority was correct in concluding that section 186.22(a) does not impose criminal liability on an active participant who is the sole perpetrator of a felony. (AB 22.) This claim lacks merit.

The words "promote" and "further" do not mean "to assist in." As set forth in *People v. Ngoun* (2001) 88 Cal.App.4th 432 ("*Ngoun*"): "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 meaning 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 with such conduct." (*Id.* at p. 436.)

Appellant criticizes *Nguon*, adopting the majority's argument that "[i]t makes no sense to say that a person has promoted or furthered his own criminal conduct." (Maj. opn. of Blease, J.[5] at p. 21; AB 23, citing to maj. opn. at p. 21.) As respondent pointed out in its opening brief, the majority's conclusion in this regard was wrong. (OBM[6] 37-41.) "[A] gang member who perpetrates a felony by definition also promotes and furthers that same felony." (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1307 ("*Sanchez*"); dis. opn. of Sims, J.[7] at p. 7 ["Someone can 'promote' or 'further' felonious criminal conduct by committing the offense himself"].)

---

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

[6] "OBM" refers to respondent's opening brief on the merits.

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

In addition, appellant's construction overlooks several tenants of statutory construction—tenants that he acknowledges (AB 27-28)—namely that in ascertaining the Legislature's intent, a court "consider[s] portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, *giving 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, italics added), and that "'[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, citing *Watkins v. Real Estate Comr.* (1960) 182 Cal.App.2d 397, 400).

Here, if the words "furthers" and "promotes" mean the same thing as "assists in, " section 186.22(a) would effectively read, "and who willfully [assists in], [assists in], or assists in any felonious criminal conduct by members of that gang[.]" As is evident, this interpretation does not give significance to the words "promotes" and "furthers" and renders those words surplusage. Quite simply, if the Legislature had intended to limit liability to an active participant who assists in felonious criminal conduct, it would not have included the words "furthers" and "promotes" in section 186.22(a).

B. The Aiding and Abetting Language in *People v. Castenada* (2000) 23 Cal.4th 743 ("*Castenada*") Is Dictum

In *Castenada*, this Court addressed the meaning of the phrase "actively participates" in section 186.22(a). The Court framed the issue as follows: "To prove that a defendant 'actively participates' in a gang, must the prosecution show that the defendant held a leadership position in the gang? Or is it sufficient if the evidence establishes that the defendant's involvement with the gang is more than nominal or passive?" (*Castenada*, *supra*, 23 Cal.4th at p. 745.) As set forth in detail by the parties (see OBM

15-18, 26-35; AB 25-26), as well as the courts of appeal, in analyzing the specific issue presented in *Castenada*, this Court, in various contexts, made statements suggesting that a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members. (*Castenada*, *supra*, at pp. 749-752.) As set forth in respondent's opening brief, these statements were dictum. (OBM 26-35.)

Appellant disagrees, arguing the statements were not dictum and instead were ratio decidendi. (AB 24-27.) This is not the case, as every published case to consider the issue, as well as the dissent, has found. (*Ngoun*, *supra*, 88 Cal.App.4th at p. 437; *People v. Salcido* (2007) 149 Cal.App.4th 356, 367, 369 ("*Salcido*"); *Sanchez*, *supra*, 179 Cal.App.4th at p. 1307; dis. opn. at pp. 8-9.) Indeed, this Court recently confirmed that the aiding and abetting language in *Castenada* was "unnecessary to [its] decision[,]" stating:

> Although unnecessary to our decision [in *Castenada*], we added: "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.'" (*People v. Castenada*, *supra*, at p. 752.)

(*People v. Albillar* (2010) 51 Cal.4th 47, 58, parallel citations omitted ("*Albillar*").)[8]

In addition, the fact that this Court did not reverse Castenada's conviction shows that the statements were dictum. This is so because, as

---

[8] Appellant argues the Court erred in making this statement and that "a careful reading of *Castenada* shows that the language about aiding and abetting was part and parcel of the [C]ourt's reasoning." (AB 24.) Respondent simply disagrees.

set forth in the opening brief (OBM 35-37), the facts in *Castenada* did not establish that Castenada aided, abetted, or acted in concert with gang members. Thus, if the statements in *Castenada* suggesting that a person who violates section 186.22(a) has also aided and abetted a felony offense committed by gang members were ratio decidendi and not dictum, this Court would not have affirmed Castenada's conviction.

Finally, appellant's argument overlooks a tenant of statutory construction—a construction that he relies on (AB 38)—namely that "'"It is axiomatic that cases are not authority for propositions not considered."'" [Citations.]" (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127.) As appellant acknowledges (AB 38), this Court did not consider whether the "promotes, furthers, or assists" language in section 186.22(a) meant that an active participant must aid or abet felonious criminal conduct committed by another gang member in *Castenada*. Thus, the case is not authority for that proposition.

C. The "Promotes, Furthers, Or Assists" Language in Section 186.22(a) Does Not Mean Aiding Or Abetting

Appellant argues that even if the aiding and abetting language in *Castenada* is not binding, it is still persuasive, and that "the language of section 186.22(a) is the language of aiding and abetting." (AB 26, 30-32.) Respondent disagrees.

In *Castenada*, this Court discussed 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. (See *Castenada*, *supra*, 23 Cal.4th at pp. 747-750.) In its discussion, it stated:

> 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 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, italics added.)

In *People v. Green* (1991) 227 Cal.App.3d 692 ("*Green*"), the case cited by this Court in *Castenada*, the court of appeal addressed the defendant's claims that section 186.22(a) was "so vague as to fail to provide notice of the conduct it intends to prescribe, permitting arbitrary enforcement" and that the "vagueness of the statute's provisions permit it to be construed to cover protected conduct, i.e., that its uncertainty renders it unconstitutionally overbroad." (*Id.* at p. 695.) In addressing the "promotes, furthers, assists" language, the court stated:

> Penal Code section 186.22 imposes no criminal liability unless a defendant "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." Similar phrases are not uncommon in the criminal law. CALJIC No. 3.01, restating common law principles, defines an aider and abettor of a crime as a person 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." 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.

(*Green*, *supra*, 227 Cal.App.3d at p. 703, fn. omitted.) In a footnote, the court noted that the language in CALJIC No. 3.01 emanated from this

Court's holding in *People v. Beeman* (1984) 35 Cal.3d 547, 560 and quoted therefrom. (*Green, supra*, 227 Cal.App.3d at p. 703, fn. 5.)

The *Green* court's less than certain finding that the phrase "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang[]" in 186.22(a) was similar to, and therefore should be viewed synonymously with, the phrase "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"—and thus limited liability to aiders and abettors—was incorrect and failed to give significance to the specific words the Legislature used.

As set forth above, in ascertaining the Legislature's intent a court "consider[s] portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." (*Curle v. Superior Court, supra,* 24 Cal.4th at p. 1063.) In section 186.22(a), the Legislature chose to use the specific words "promotes, furthers, or assists" rather than the specific terms associated with aiding and abetting as the *Green* court implicitly acknowledged. In so doing, it is clear they did not want to limit section 186.22(a) to aiders or abettors and instead wanted to reach conduct that was broader than aiding and abetting.

Initially, had the Legislature intended to limit liability to an aider or abettor, it would have used the language of aiding and abetting—"committing, or . . . encouraging or facilitating" (*Castenada, supra*, 23 Cal.4th at pp. 749-750, citing *People v. Beeman, supra*, 35 Cal.3d at p. 560) and/or "aids, promotes, encourages or instigates" (CALJIC No. 3.01)—or just used the phrase "aids or abets," something it knows how to do (see, e.g., §§ 31, 187, subd. (b)(3), 190.2, subds. (c) & (d), 190.25, subd. (b), 209, subd. (a), 210, 286, subds. (d)(1), (2), & (3), 286, subd. (g), 288a, subd. (d)(1), 498, subd. (b), 502.7, subd. (a), 550, 597.5, subd. (a)(3), 597b, subds.

(a), (b) & (d), 653aa, subd. (f), 673, 2652.) By not using these terms, it is evident that "promotes, furthers, or assists" means something other than just aiding or abetting.

As explained in respondent's opening brief (OBM 45-46), by using the words "promotes, furthers, or assists" rather than "aids or abets," as well as using the phrase "felonious criminal conduct" rather than "a felony," it is clear the Legislature wanted section 186.22(a)'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 the active participant who promoted or furthered "felonious criminal conduct"—rather than a specific felony—by telling active participants to "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 an active participant because he or she would neither know what specific crimes the active participant was going to commit nor have the specific intent to aid or abet those particular crimes.[9]

---

[9] Appellant argues that respondent's construction is "untenable" in this regard "because it contradicts this Court's construction of 'felonious criminal conduct' as a specific felony." (AB 30.) Appellant misunderstands respondent's argument in part, as well as the statements from this Court and the court of appeal in *Green*. In *Green*, the court noted that if the phrase "felonious criminal conduct" "contemplates something less than the commission of 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." (*Green*, *supra*, 227 Cal.App.3d at p. 704.) Thus, the court "construed the provision to cover only conduct which is clearly felonious, i.e., conduct which amounts to the commission of an offense punishable by imprisonment in state prison."

(continued...)

This interpretation is consistent with the Legislature's findings 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 [and whose] activities, both individually and collectively, present a clear and present danger to public order and safety"; and their intent in enacting the STEP Act in order to "seek the eradication of criminal activity by street gangs[.]" (§ 186.21.) The *Green* court's less than certain finding that the phrase "promotes, furthers, or assists" was similar to and, thus,

---

(...continued)
(*Ibid.*) In *Castenada*, this Court stated, "section 186.22(a) limits liability to those who promote, further, or assist a specific felony committed by gang members[.]" (*Castenada*, *supra*, 23 Cal.4th at p. 749.)

As set forth above, an active participant who promotes, furthers, or assists in any felonious criminal conduct by members of the gang, but who has not aided or abetted a felony, is guilty of violating section 186.22(a). For example, a leader tells three subordinates the gang needs money and says it is time for them to "put in work" (i.e., commit crimes) to get it. He gives no further instructions. Subordinate 1 robs a liquor store clerk. Subordinate 2 sells methamphetamine. Subordinate 3 embezzles $5,000 from his employer. All give the proceeds to the gang. In these instances, the leader has not aided or abetted any of the three crimes because he did not have the specific intent to commit the robbery, sell methamphetamine, or embezzle. He has, however, promoted and furthered felonious criminal conduct in each instance and, thus, could be charged with, and found guilty of, three counts of violating section 186.22(a). Of course in order to prove that the conduct the leader promoted was felonious, it would be necessary to prove the actual, specific felony committed by each subordinate.

There is, however, a scenario in which liability would arise in the absence of a completed felony, namely, when a leader tells a subordinate to commit a robbery or other crime that is clearly felonious. In this instance, even if the subordinate never had any intention of completing the robbery—if, for example, the subordinate was an informant or undercover officer who never intended to commit the robbery—the leader would still be guilty of violating section 186.22(a) because he promoted felonious criminal conduct.

synonymous with the phrase "gives aid or encouragement" from *People v. Beeman*, *supra*, 35 Cal.3d at p. 560 and the phrase "aids, promotes, encourages, or instigates" from CALJIC NO. 3.01 failed to give significance to every word in the phrase and to effectuate the Legislature's purpose and intent.

D. "Promotes, Furthers, Or Assists" Means More Than "Commits a Felony"

Appellant argues that under respondent's interpretation the phrase "promotes, furthers, or assists in any felonious criminal conduct by members of that gang" is surplusage because "it means nothing more than 'commits a felony'." (AB 28.) As set forth above, however, the phrase means much more than "commits a felony" and includes: the direct perpetrator who commits a felony; the aider or abettor; the accessory after the fact; and the active participant who promotes or furthers "felonious criminal conduct"—rather than a specific felony—by telling active participants to "put in work" for the gang, but who would not be an aider or abettor to any specific crimes.

Appellant also complains that "[r]espondent'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." (AB 28-29.) Respondent's construction is not flawed in this regard. As has always been the case, where the defendant is not the direct perpetrator—e.g., where he or she is an aider or abettor—it would be necessary to prove the person he or she aided or abetted was a member of the gang.

Appellant also seems to argue that an active participant who engages in felonious criminal conduct while acting in concert with a non-gang member cannot be guilty of violating section 186.22(a). (AB 29-30.) This too is not the case. Just as a gang member who commits a felony while

acting alone incurs liability under section 186.22(a) so too does a gang member who commits a felony while acting in concert with a non-gang member. (*Sanchez*, *supra*, 179 Cal.App.4th at p. 1297; *Castenada*, *supra*, 23 Cal.4th 743.)

E. *Salcido*, *supra*, 149 Cal.App.4th 356 Did Not Replace the Third Element of Section 186.22(a) with the Third Element of Section 186.22(b)(1)

After noting that courts have a duty to construe statutes harmoniously when that can be reasonably done, appellant summarizes the majority's discussion of sections 186.22(a) and (b)(1). (AB 32-33.) Appellant then sets forth the majority's erroneous finding that the court in *Salcido*, *supra*, 149 Cal.App.4th 356 replaced the third element of section 186.22(a) with the third element of section 186.22(b)(1). (AB 34.) As set forth in the opening brief (OBM 29-34), the *Salcido* court did not replace the third element of section 186.22(a) with the third element of section 186.22(b)(1) and the majority's conclusion in this regard was erroneous.

F. The Majority's Decision Leads to Absurd Results

In its opening brief, respondent noted the absurd results which flow from the majority's decision. (OBM 41-44.) In particular, respondent pointed out that under the majority's interpretation, an active participant who shot a rival gang member would not be guilty of violating section 186.22(a), while the active participant who aided the shooter by providing him with a gun to carry out the crime would. (OBM 42.) In response, appellant, citing to the majority's opinion, seems to argue that the shooter would be guilty of violating section 186.22(a) because "when two or more persons commit a crime together, direct perpetrators will most frequently fall within 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." (AB 35, citing to maj. opn. at p. 21.)

Appellant seems to overlook the fact that the majority made this observation during its discussion regarding co-perpetrators acting in concert, as opposed to the situation in respondent's hypothetical where a sole perpetrator is aided or abetted prior to committing his crime.

Appellant then argues that it is not absurd to punish an aider or abettor but not the sole perpetrator because "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." (AOB 37.) This argument makes no sense as it would result in the aider or abettor being punished more harshly than the direct perpetrator. For example, the active participant who aids or abets a first degree murder committed by a gang member would be guilty of that murder and of violating section 186.22(a). The gang member who committed the murder, however, would only be guilty of first degree murder. As stated by the court of appeal in *Ngoun*, "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].)

G. The Majority Relied on an Erroneous Reading of the Facts in *Castenada*

As set forth in the opening brief (OBM 9-10, 35-37), the majority, faced with the facts in *Castenada*, which involved two co-perpetrators

committing a robbery in concert, and in seeming contradiction to its conclusion that section 186.22(a) only applies to aiders and abettors, found "that perpetrators may come within the language of section 186.22(a)." (Maj. opn. at p. 21.) The majority concluded this was true 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.)

As noted by respondent, the majority misread the facts of *Castenada* which never identified Castenada's unidentified co-perpetrators as gang members. (OBM 35-37.) In response, appellant argues the majority "did not rely upon the facts of *Castenada* to bolster its reasoning or decision[.]" (AB 37-38.) Respondent simply disagrees.

In reaching its conclusion, the majority stated, "'a person who violates section 186.22(a) has also aided and abetted a *separate* felony offense committed by gang members . . . .' ([*Castenada*, *supra*,] at p. 749, italics added.) This includes, *on the facts in Castenada*, the perpetration of a felony in concert with other members of a gang. (*Id.* at p. 745.)" (Maj. opn. at p. 5, second italics added.) The majority later reiterated its reliance on the facts, stating, "*Castenada* does not rule out perpetrators who act in criminal concert with other gang members, *as shown by the facts of the case*." (Maj. opn. at p. 22, italics added.) It then went on to summarize the facts of the case, erroneously describing Castenada's unidentified co-perpetrators as gang members. (Maj. opn. at p. 22 & fn. 11.)

As the foregoing makes clear, there is no question that the majority relied on the facts of *Castenada* to support its finding.

H. The Majority's Interpretation Is Inconsistent with the Legislature's Intent in Enacting Section 186.22(a)

In its opening brief, respondent cited to the Legislative Counsel Digest for Assembly Bill 2013 which states, "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[.]"[10] (Legis. Counsel's Dig., Assem. Bill No. 2013, 4 Stats 1988 (1987-1988 Reg. Sess.) Summary Dig., p. 414[11]; see also *In re Alberto R.* (1991) 235 Cal.App.3d 1309, 1318 ["The legislative materials concerning the Act . . . recognized there was no existing law which made the commission of criminal offenses by individual members of street gangs separate and distinctly punished offenses[.]"].) Appellant argues this comment does not shed "any light on whether the Legislature intended to

---

[10] Appellant initially criticizes respondent for citing to the Legislative Counsel's Digest for Assembly Bill 2013 ("AB 2013"), rather than the Digest from Senate Bill 1555 ("SB 1555") which was chaptered after AB 2013. (AB 40.) Almost immediately thereafter, however, appellant states, "because both bills [AB 2013 and SB 1555] are almost identical, and the Legislature passed them both around the same time, any difference between the two comments is probably insignificant." (AB 40.) Respondent notes that this Court cited approvingly to the legislative history for AB 2013 in *Castenada.* (*Castenada*, *supra*, 23 Cal.4th at pp. 749-750.) Appellant also suggests that respondent has not proffered its understanding of the legislative intent behind section 186.22(a). This is not the case. The intent is set forth throughout the respondent's opening brief and the cases cited therein.

[11] Appellant correctly points out that respondent did not ask the Court to take judicial notice of the Digest for AB 2013. (AB 40, fn. 8.) To the extent appellant is suggesting that respondent was remise in failing to do so, he is wrong. "A request for judicial notice of published material is unnecessary. Citation to the material is sufficient. (See *Stop Youth Addiction v. Lucky Stores, Inc.*, [(1988)] 17 Cal.4th 553, 571, fn. 9.)" (*Quelimane Co. v. Stewart Title Guaranty Co.*, (1998) 19 Cal.4th 26, 46, fn. 9, parallel citations omitted; see also *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 440, fn. 18.)

punish a direct perpetrator acting alone or only an aider and abettor[.]" (AB 41.) Respondent disagrees. This statement evidences the Legislature's intent to create a crime which punishes an individual active participant who engaged in felonious criminal conduct separately from any punishment he or she would receive for committing the underlying felonious criminal conduct itself. It certainly contains no indication that the Legislature intended to limit liability only to active participants who aided or abetted felonious criminal conduct.[12]

I. This Court's Statement In *Albillar* That "There Is Nothing Absurd in Targeting the Scourge of Gang Members Committing Any Crimes Together and Not Merely Those That Are Gang Related" Does Not Mean the Felonious Criminal Conduct "Being Promoted, Further, Or Assisted in Must Be Committed by Fellow Gang Members"

In *Albillar*, this Court found that the plain language of section 186.22(a) targeted felonious criminal conduct, not felonious gang related conduct. (*Albillar*, *supra*, 51 Cal.4th at p. 55.) After so doing, it noted that judicial construction of an unambiguous statute was only appropriate when "literal interpretation would yield absurd results. [Citation.]" (*Ibid.*) It

---

[12] Appellant has asked this Court to take judicial notice of three documents that are purportedly from the author of AB 2013: exhibit A, a letter from California Assemblywoman Gwen Moore to California State Senator Robert Presley; exhibit B, an "Author's Statement to Senate Third Reading, August 31, 1988, Assembly Bill No. 2013"; and exhibit C, an "Author's Statement to Senate Judiciary Committee dated May 10, 1988, Assembly Bill No. 2013[.]" Appellant argues the statements in these documents support his argument that the Legislature did not intended for 186.22(a) to apply to the sole perpetrator. (AB 42-44.) Respondent has opposed this request as the documents are not authenticated. (*Quelimane Co. v. Stewart Title Guaranty Co., supra,* 19 Cal.4th 26 at p. 46, fn. 9.) Thus, this portion of appellant's argument should be disregarded. In any event, "the views of individual legislators as to the meaning of a statute rarely, if ever, are relevant" to determining legislative intent. (*Ibid.*)

then found, "there is nothing absurd in targeting the scourge of gang members committing *any* crimes together and not merely those that are gang related." (*Ibid.*, original italics.) Appellant argues that this sentence establishes that "the intent behind section 186.22(a) is to punish active gang participants committing crimes with other gang members" and that the felonious criminal conduct "being promoted, further, or assisted in must be committed by fellow gang members." (AB 16, 19-20.)

This is not the case. This sentence addressed whether it was absurd to target gang members who engage in any felonious criminal conduct not just gang related felonious conduct. It did not address the issue presented here.[13] In addition, the statement was made in the context of the facts of the case which involved three gang members acting together. The statement, which is presented in the answer brief without context and with altered emphasis, does not support appellant's assertion.

II. SUFFICIENT EVIDENCE SUPPORTS APPELLANT'S CONVICTION

Appellant argues that if this Court finds the majority was incorrect, it should either remand the matter to the court of appeal "for an opportunity for briefing on the sufficiency issue in accord with any construction arrived at by the Court[,]" or, alternatively, should examine the evidence itself in order to determine if it was constitutionally sufficient. (AB 46.) Neither is necessary.

---

[13] Indeed, the Court's finding in this regard applies equally to the sole active participant who engages in felonious criminal conduct because there is nothing absurd about targeting the scourge of gang members committing *any* crimes *alone* and not merely those that are gang related. (See § 186.21 ["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. . . ."].)

Section 186.22(a) contains three elements, the third of which is at issue in this case. The first two elements require that: (1) a person actively participate in any criminal street gang; and that (2) he or she have knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity. (§ 186.22(a).) It is unquestionable that these elements are supported by sufficient evidence. As the trial court noted when granting appellant's new trial motion on the gang enhancement (§ 186.22, subd. (b)(1)), "It's beyond a reasonable doubt that [appellant] is a member of a gang, the Norteños; that he was active." (2 RT 501.) As stated 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. at pp 2-3.) Since the issue before the Court relates only to the third element of the crime, nothing in the Court's decision would impact these findings.

The third element of the crime is "and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang[.]" (§ 186.22(a).) It is undisputed that sufficient evidence supports appellant's attempted robbery conviction. Thus, should this Court find that the third element is satisfied when an active participant, acting alone, directly perpetrates felonious criminal conduct, there is sufficient evidence to support appellant's conviction. Accordingly, if the Court makes this finding there would be no need to remand the case or to reexamine the evidence.

Appellant seems to suggest that remand or reexamination would be necessary: because—he alleges—there was no evidence that he shouted gang slogans, flashed gang signs or that the victim saw his tattoos; because there was no testimony that the Yolo County Norteños were a subset of the Yuba County Norteños; and because one of the gang experts did not know

whether he belonged to a subset of the Norteños in the Yuba-Sutter area. (AB 46.) Appellant does not explain how or why these alleged deficiencies could theoretically render the evidence supporting the third element of section 186.22(a) insufficient in light of the Court's potentially ruling against him in this case.[14]

III. APPELLANT DID NOT ARGUE THE SENTENCE ON HIS GANG PARTICIPATION CONVICTION SHOULD HAVE BEEN STAYED PURSUANT TO SECTION 654 IN THE COURT OF APPEAL; THEREFORE, THE CASE SHOULD NOT BE REMANDED FOR THE COURT OF APPEAL TO CONSIDER THAT ISSUE

Appellant suggests that if this Court reverses the majority's decision the case should be remanded to the court of appeal for consideration of an issue he claims he raised on appeal but was not addressed in light of the majority's reversal. (AB 48-50.) Specifically, he claims that in the court of appeal he argued that sentence on the active participation count should have been stayed pursuant to section 654. (AB 48-50.) He did not, however, raise this claim. Rather, he argued that "The Trial Court Abused Its Discretion by Imposing a Consecutive Sentence on Count III [the active participation count] Without Stating Reasons." (AOB[15] 43-47; ARB[16] 6 ["The Court Failed to State Reasons for Imposing a Consecutive Term on Count III and the Error Was Not Harmless"].) Because appellant did not

---

[14]Respondent assumes that were the case to be remanded or reexamined, any sufficiency of the evidence argument would be limited to one which directly flowed from this Court's decision as opposed to new arguments that could have been raised by appellant in his opening brief to the court of appeal but were not.

[15] "AOB" refers to appellant's opening brief.

[16] "ARB" refers to the reply brief appellant filed in the court of appeal.

raise the section 654 issue on appeal, it would be improper to remand the case for the court of appeal to consider it.[17]

Nor can it be claimed that the argument appellant actually raised could somehow be construed as the separate, distinct argument that section 654 bars the imposition of separate sentences for the offense of active participation in a criminal street gang in violation of 186.22(a) and for the crimes used to prove the "promotes, furthers, or assists" element of that offense, an issue currently pending before this Court in *People v. Mesa*, review granted October 27, 2010, S185688.

The California Rules of Court and case law require that each point raised in a brief be supported by argument and meaningful legal analysis. The California Rules of Court set out certain requirements for briefs. Among other requirements, a brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority" and "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(B), (C).) Further, "[t]o demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and

---

[17] It appears that appellant is, in effect, asking the Court to make the judicial finding that he raised the section 654 issue in the court of appeal, thereby enlarging the issues he raised on appeal. This is evident from the fact that he requests the matter be remanded to specifically address the section 654 issue. (AB 50.) Respondent believes this request is atypical, that the Court will normally remand a case to the court of appeal to address any unresolved issues on its own, and that the subject is not usually briefed. Further, it is unclear why appellant addresses the merits of his section 654 argument (AB 49-50) since the merits have no bearing on whether he raised the issue in the court of appeal and he did not seek, nor did the Court grant, review on this ground. Indeed, the fact that he feels it necessary to address the merits here clearly indicates he did not do so in the court of appeal.

citations to facts in the record that support the claim of error." (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

Appellant did not comply with any of these requirements. His heading made no mention of a section 654 issue, and he did not cite to or mention any of the cases dealing with whether section 654 applies to a person convicted of violating section 186.22(a) in his argument.[18] (See, e.g., *People v. Herrera*, *supra*, 70 Cal.App.4th at pp. 1465-1468; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1502; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935; *In re Jose P.* (2003) 106 Cal.App.4th 458, 471; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1032-1034.) Further, respondent addressed the issue actually raised in its respondent's brief (RB[19] 35-38), and appellant gave no indication that respondent misinterpreted his argument or missed a section 654 argument in his reply brief (ARB 6).

Because appellant did not raise the section 654 issue on appeal, it would be improper to remand the case for the court of appeal to consider that issue.

---

[18] The only references appellant made to section 654 were when he mentioned in " The Relevant Facts" section that the probation officer had recommended sentence on count III be stayed pursuant to section 654 (AOB 44), when in "The Standard of Review Section" he stated "[a] lack of objection by defense counsel does not waive a Penal Code section 654 issue[,]" and when, in the middle of his argument that "[t]the trial court failed to comply with the rules of court in imposing a consecutive term on Count III, and utterly failed to make any findings or state and reasons for imposing consecutive terms[,]" he set forth two general principles regarding section 654 (that the section precludes multiple punishment for a single act or omission, or an indivisible course of conduct and that if all the offenses were merely incidental to one objective and the defendant harbored a single intent he may only be punished once) (AOB 46).

[19] "RB" refers to the respondent's brief filed in the court of appeal.

The only issue that may potentially warrant remand in this matter is the issue appellant actually raised—whether the trial court abused its discretion by imposing a consecutive sentence on the active participation count without stating reasons—as the court of appeal did not address this issue in light of its reversal. However, remand is unnecessary because, as set forth in argument V of the respondent's brief, which respondent incorporates by reference herein, appellant forfeited the claim by not objecting to the trial court's failure to state its reasons for deciding to impose consecutive sentences (*People v. Davis* (1995) 10 Cal.4th 463, 551-552). (RB 35.) Further, even if not forfeited, remand is unnecessary because, in light of appellant's egregious record, "[i]t is inconceivable that the trial court would impose a different sentence if [the Court] were to remand for resentencing[]" (*People v. Champion* (1995) 9 Cal.4th 879, 934 [remand for resentencing not required after trial court failed to state reasons for imposing consecutive sentence where probation report identified 10 factors in aggravation and none in mitigation], disapproved on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860). (RB 35-38.) Nor can appellant show he received ineffective assistance of counsel based on counsel's failure to object. This is because even if counsel had objected the court would have imposed the same sentence in light of appellant's record. Thus, appellant was not prejudiced by the alleged deficiency.

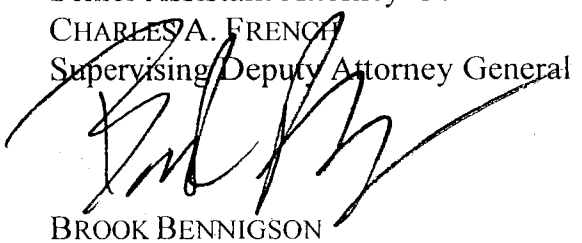
CONCLUSION

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

Dated: June 23, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
CHARLES A. FRENCH
Supervising Deputy Attorney General



BROOK BENNIGSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

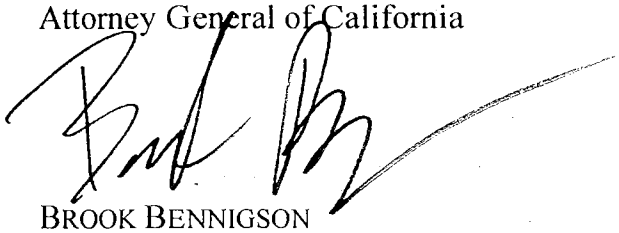
SA2011300256
31285348.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 5,310 words.

Dated: June 23, 2011

KAMALA D. HARRIS
Attorney General of California



BROOK BENNIGSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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 June 24, 2011, I served the attached **REPLY 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:

Diane Nichols
Attorney at Law
P.O. Box 2194
Grass Valley, CA 95945-2194
(Attorney for Appellant)
(2 copies)

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

Honorable Patrick J. McGrath
Yuba County District Attorney
Courthouse
215 Fifth Street
Marysville, CA 95901

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

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 June 24, 2011, at Sacramento, California.

_____
Declarant

SA2011300256
31274600.doc