

STUCK IN THE THICKET: Struggling with Interpretation and Application of California's Anti-Gang STEP Act

by Martin Baker*

I. INTRODUCTION

California's Street Terrorism Enforcement and Prevention Act (Penal Code Sections 186.20 *et seq.*) was enacted in 1988 in response to a perceived "state of crisis . . . caused by violent street gangs" throughout the state.¹ Since its enactment, courts and practitioners have struggled repeatedly to properly interpret and apply key provisions of the Act.

The California Supreme Court has addressed various aspects of the Act on eleven occasions.² In the seventh of those cases, *People v. Sengpadychith*,³ a frustrated Court began its opinion as follows:

Step by step, this court continues its struggle through the thicket of statutory construction issues presented by the California Street Terrorism and Prevention Act of 1988, also known as the STEP Act.⁴

In the five years since *Sengpadychith* was decided, the lower courts have remained in disarray on several crucial aspects of the Act, and the Supreme Court has

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¹ CAL. PEN. CODE § 186.21 (West 2006).

² *People v. Gardeley*, 927 P.2d 713 (Cal. 1996); *People v. Loeun*, 947 P.2d 1313 (Cal. 1997); *People v. Zermeno*, 986 P.2d 196 (Cal. 1999); *People v. Jefferson*, 980 P.2d 441 (Cal. 1999); *People v. Robles*, 5 P.3d 176 (Cal. 2000); *People v. Castaneda*, 3 P.3d 278 (Cal. 2000); *People v. Sengpadychith*, 27 P.3d 739 (Cal. 2001); *People v. Garcia*, 52 P.3d 648 (Cal. 2002); *People v. Montes*, 73 P.3d 489 (Cal. 2003); *Robert L. v. Superior Court*, 69 P.3d 951 (Cal. 2003); *People v. Briceno*, 99 P.3d 1007 (Cal. 2004); *People v. Hernandez*, 94 P.3d 1080 (Cal. 2004); *People v. Lopez*, 103 P.3d 270 (Cal. 2005).

³ 27 P.3d 739 (Cal. 2001).

⁴ *Sengpadychith* at 741.

only briefly and cursorily revisited the “thicket.”⁵ Many of the problems at the root of the widespread confusion amongst the Appellate Courts, however, seem soluble through a common sense application of related case law and basic principles of statutory construction.

II. THE KEY PROVISIONS OF THE STEP ACT

The two most widely used provisions of the STEP Act are Penal Code sections 186.22(a) and 186.22(b). Subdivision (a)—the “substantive gang charge”—criminalizes criminal street gang membership rising to the level of “active participation,” while subdivision (b)—the “gang enhancement”—increases penalties for felonies committed with the intent to facilitate criminal gang activity.⁶

⁵ Except for *Hernandez*, all of the post-Sengpadychith Supreme Court opinions have been solely concerned with clarifying the somewhat complex sentencing provisions of Penal Code section 186.22: *People v. Garcia*, 52 P.3d 648 (Cal. 2002) (the extension of a personal use firearm enhancement, under section 12022.53(e)(1) to aiders and abettors, convicted of gang related felonies under section 186.22(b) does not require a conviction of the direct perpetrator); *People v. Montes*, 73 P.3d 489 (Cal. 2003) (alternate sentencing provision in section 186.22(b)(5) provides for increased punishment when the underlying non-gang related felony carries a life penalty); *Robert L. v. Superior Court*, ___ P.3d ___ (Cal. 2003) (section 186.22(d) is neither a sentence enhancement nor a substantive offense, but an alternate sentencing provision allowing gang-related misdemeanors to be sentenced as felonies); *People v. Briceno*, ___ P.3d ___ (Cal. 2004) (felonies enhanced under section 186.22(b) are “serious felonies” within the meaning of Penal Code section 1192.7); *People v. Hernandez*, 94 P.3d 1080 (Cal. 2004) (the trial court is permitted, but not required, to bifurcate the section 186.22(b) gang enhancement); *People v. Lopez*, 103 P.3d 270 (Cal. 2005) (violent felonies punishable by life are not subject to the 10 year 186.22(b) enhancement).

⁶ A sustained enhancement adds two to four years to the punishment for most felonies, five years for “serious” felonies, ten years for “violent” felonies, and increases to life the punishment for certain crimes such as witness intimidation and carjacking. CAL. PEN. CODE § 186.22(a) (West 2006).

III. “CRIMINAL STREET GANG”: DEFINITIONAL PROBLEMS

A. The Existence of the Criminal Street Gang

Proof of either the substantive charge or the enhancement depends on the prosecution first proving the existence and nature of the criminal street gang in question.⁷

“Criminal street gang” is defined in section 186.22(f) as

any ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.⁸

The definitional problems with this requirement have largely revolved around the following phrases from the statute:

- “any ongoing organization”
- “one of its primary activities”
- “pattern of criminal gang activity”
- “whose members”

B. “Any Ongoing Organization”: Umbrellas, Caravans, Cliques and Factions

In Northern California alone, there are hundreds of Hispanic street gangs, each gang having anywhere from a handful to a hundreds of members.⁹ The gangs’

⁷ See *In re Nathaniel C.*, 279 Cal.Rptr. 236, 245. (1991) (“It is incumbent upon the prosecution in seeking an enhancement under section 18.22, subdivision (b), to prove through competent evidence the elements of a ‘criminal street gang’ as set out in the statute”).

⁸ CAL. PEN. CODE § 186.22(f) (West 2006).

⁹ Bill Valentine, *GANG INTELLIGENCE MANUAL: IDENTIFYING AND UNDERSTANDING MODERN-DAY VIOLENT GANGS IN THE UNITED STATES* (Paladin Press 1995), at p.23. “The Hispanic street gangs in Northern California (. . . north of Bakersfield) number in the hundreds The gangs may have as few as five or six members or hundreds.”

membership is fluid, the gangs' names change, and gangs migrate throughout the state.¹⁰ Thus, the transitory nature and changing membership of these neighborhood gangs can make it difficult to prove that members of a specific, named gang have committed crimes with the requisite frequency and consistency for the gang to meet the statutory definition of a criminal street gang.

The nature of Californian Hispanic street gangs in particular raises unique problems of pleading and proof. Almost all Californian Hispanic street gangs fall into one of two categories: *norteno* and *sureno*;¹¹ *norteno* gangs are predominant in Northern California, while *sureno* gangs are predominant in Southern California.¹² The *norteno* gangs tend to wear red and display the number 14 (for the letter "N").¹³ The *sureno* gangs wear blue and display the number 13 (for the letter "M" for Mexican Mafia—the reputed prison gang predecessor and now current ally of *sureno* gangs).¹⁴ Although the numerous gangs on each side share common philosophies (dominance over encroaching or potentially encroaching gangs from the opposite side), as well as similar color

¹⁰ See *Gangs; A Community Response*, California Attorney General's Office Crime and Violence Prevention Center (June 2003), at p.7 ("[G]angs identify themselves by a name derived from a street, neighborhood or housing project where they are based Gang names can change as the gang's activities or membership does"); also THE DISPATCHER, Association for Los Angeles Deputy Sheriffs, 1999, at p.42 (detailing migratory trends of youth gangs). Available at <http://www.alads.org/alads2/dispmag.pdf>.

¹¹ See Bill Valentine, GANG INTELLIGENCE MANUAL: IDENTIFYING AND UNDERSTANDING MODERN-DAY VIOLENT GANGS IN THE UNITED STATES (Paladin Press 1995), at pp.20-24.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

preferences and symbols, few of the neighborhood gangs on each side engage in any coordinated collaborative enterprises.¹⁵

Many of these small gangs adopt neighborhood-specific names, such as the “Barrio North Side” gang¹⁶ or the “Kilbreth Street Norteno”¹⁷ gang. The significance of the upper case “N” in “Kilbreth Street Norteno” is that the gang’s members have created a proper name for a (lower case “n”) *norteno* gang, *i.e.*, a gang whose members share the Californian Hispanic “northerner” philosophy.

Despite the discrete and apparently autonomous nature of these numerous, small Hispanic “neighborhood” gangs, prosecutors frequently elect to charge defendants as active participants in, or facilitating the criminal activities of, simply, “the Nortenos,” or “the Surenos.” The reason for this is obvious; there are thousands of *sureno* and *norteno* gang members in California,¹⁸ and if every neighborhood gang can be shown to be nothing more than a subordinate “set” or “clique” forming just a tiny part of a vast unitary “Sureno Gang” or “Norteno Gang,” the task of proving the existence of the gang becomes a hundred times easier when a complaint alleges participation in, or facilitation of criminal activity by “the Surenos” or “the Nortenos.”

¹⁵ NATIONAL GANG THREAT ASSESSMENT, National Alliance of Gang Investigators Associations (2005), at p.8 (quoting Sergeant Wes McBride).

¹⁶ See *People v. Valdez*, 68 Cal.Rptr.2d 135, 140 (1997).

¹⁷ See *In re Jose P.*, 130 Cal.Rptr.2d 810 (2003).

¹⁸ See *National Drug Intelligence Center California Northern and Eastern Districts Drug Threat Assessment* (January 2001) (“the California Department of Justice estimates there could be as many as 170,000 Hispanic gang members in California, ranging in age from 14 to 41”). Available at <http://www.justice.gov/ndic/pubs/653/meth.htm>.

The doubtful existence of a vast unitary “Norteno” or “Sureno” gang overseeing hundreds of smaller “sub-gangs” was first addressed on appeal in *People v. Valdez*.¹⁹ Mr. Valdez was one of a number of youths gathered together from various *norteno* gangs for the one-time purpose of attacking some *sureno* gang members.²⁰ The *Valdez* court held that the group could not be proven to be a street gang by resort to evidence of prior activities drawn from the entire population of *norteno* gang members, because—according to the testimony of the gang expert at trial—“Norteno and Sureno are not the names of gangs.”²¹ The group was neither a *norteno* gang, nor was it part of a greater “Norteno gang”; instead, it was merely a “caravan” of *nortenos* taken from seven different *norteno* gangs.²²

In contrast, the prosecution gang expert in *In re Jose P.*²³ testified at trial that various Salinas area *norteno* gangs were, in fact, “cliques or factions within the larger Norteno gang”²⁴ and that the cliques were “loyal to one another and to the larger Norteno street gang.”²⁵ The appellant in *In re Jose P.* cited *People v. Valdez*²⁶ for the proposition that “evidence of gang activity must be specific to a particular local street gang, not to the

¹⁹ 68 Cal.Rptr.2d 135 (1997).

²⁰ *Id.* at 138, 140.

²¹ *Id.* at 143.

²² *Id.* at 143.

²³ 130 Cal.Rptr.2d 810 (2003).

²⁴ *Id.* at 813.

²⁵ *Id.* at 813.

²⁶ 68 Cal.Rptr.2d 135 (1997).

larger Norteno organization.”²⁷ The *Jose P.* court, however, held that expert testimony in one case does not necessarily apply to another, and that in this case the expert testified that there was indeed one unitary Norteno gang, of which the Salinas area *norteno* gangs were merely subordinate “subgroups.”²⁸

Although law enforcement experts consistently testify at trial that the terms “Norteno” and “Sureno” are the names of vast unitary gangs, rather than adjectives used to describe discrete small gangs with similar *raison d’etre*, no published texts support the law enforcement position. In fact, the few reputable published materials addressing the composition of Californian Hispanic street gangs soundly contradict the view that Norteno and Sureno are two huge unitary gangs. For example, Sergeant Wes McBride—president of the California Gang Investigators Association—wrote in the 1999 edition of the *Dispatcher*:

A common misunderstanding is that these two movements [*norteno* and *sureno*] are in fact two large gangs controlling California. In fact, they are only street gangs from divergent geographical locations that have adopted opposing philosophical divisions that exist in many states between northern and southern regions.²⁹

Sergeant McBride’s view, while apparently not shared by many testifying officers, *is* shared by the National Alliance of Gang Investigators Associations. The NAGIA’s 2005 National Gang Threat Assessment report noted the following:

²⁷ *Id.* at 816.

²⁸ *Id.* at 813, 816.

²⁹ THE DISPATCHER, Association for Los Angeles Deputy Sheriffs, 1999, at p.42. Available at <http://www.alads.org/alads2/dispmag.pdf>. Ironically, the resumes of many of the law enforcement officers who testify contrary to Sergeant McBride’s view are dominated by training seminars conducted by Sergeant McBride and the California Gang Investigators Association.

. . . Surenos (Southerners) and Nortenos (Northerners) [are] umbrella terms for Hispanic street gangs in California [] used to distinguish whether the gang is from the northern or southern part of the state³⁰

Sureno, or Sur 13, is a banner under which most southern California Hispanic gangs gather³¹

[T]he term *norteno* is used to describe an entire *category* of California street gangs³²

[J]ust as Sureno gangs are not aligned with each other, Norteno gangs are not necessarily aligned with other Nortenos.³³

Furthermore, in the law-enforcement oriented “Gang Intelligence Manual,” Bill Valentine observed that “[Sur-13 and Norte-14] are generic terms only. There are hundreds of active Sureno gangs that regard each other as enemies, just as there are Norteno gangs that do.”³⁴

If it is true, as reported in the NAGIA’s 2005 National Gang Threat Assessment, that “the terms *nortenos* and *surenos* are no longer sufficient to describe California street gangs,”³⁵ then it is also no longer sufficient to *charge* California street gang members as simply “Nortenos” or “Surenos.”

³⁰ NATIONAL GANG THREAT ASSESSMENT, National Alliance of Gang Investigators Associations (2005), at p.8.

³¹ *Id.* at 31 (quoting Sergeant Wes McBride).

³² *Id.* at 32 (emphasis added).

³³ *Id.* at 8.

³⁴ Bill Valentine, GANG INTELLIGENCE MANUAL: IDENTIFYING AND UNDERSTANDING MODERN-DAY VIOLENT GANGS IN THE UNITED STATES (Paladin Press 1995), at p.23.

³⁵ NATIONAL GANG THREAT ASSESSMENT, National Alliance of Gang Investigators Associations (2005), at p.8.

C. “Pattern of Criminal Gang Activity”: Predicate Acts

To prove the existence of the gang, it must be shown that “the gang’s members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”³⁶ This “pattern” must be shown by proof of

the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [thirty specified “enumerated”] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons.³⁷

The enumerated offenses include many “serious”³⁸ and “violent”³⁹ felonies, as well as ordinarily less serious offenses, such as grand theft and felony vandalism.⁴⁰ To meet the statutory requirements of number (two or more) and timing (within three years of each other), prosecutors typically use the charged offense as the most recent, and one

³⁶ CAL. PEN. CODE § 186.22(f) (West 2006).

³⁷ CAL. PEN. CODE § 186.22(e) (West 2006).

³⁸ Within the meaning of California Penal Code section 1192.7(c).

³⁹ Within the meaning of California Penal Code section 667.5(c).

⁴⁰ The complete list of offenses enumerated in the Act reads as follows:

(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury . . . (2) Robbery . . . (3) Unlawful homicide or manslaughter . . . (4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances . . . (5) Shooting at an inhabited dwelling or occupied motor vehicle . . . (6) Discharging . . . a firearm from a motor vehicle . . . (7) Arson . . . (8) The intimidation of witnesses and victims . . . (9) Grand theft . . . (10) Grand theft of any firearm, vehicle, trailer, or vessel . . . (11) Burglary . . . (12) Rape . . . (13) Looting . . . (14) Money laundering . . . ; (15) Kidnapping . . . (16) Mayhem . . . (17) Aggravated mayhem . . . (18) Torture . . . (19) Felony extortion . . . (20) Felony vandalism . . . (21) Carjacking . . . (22) The sale, delivery, or transfer of a firearm, as defined in Section 12072 (23) Possession of a pistol, revolver, or other [concealed firearm] . . . (24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422 (25) Theft and unlawful taking or driving of a vehicle, as defined in section 10851 of the Vehicle Code (26) Felony theft of an access card or account information, as defined in Section 484e (27) Counterfeiting, designing, using, attempting to use an access card, as defined in Section 484f (28) Felony fraudulent use of an access card or account information, as defined in Section 484g (29) Unlawful use of personal identifying information to obtain credit, goods, services, or medical information, as defined in Section 530.5 (30) Wrongfully obtaining Department of Motor Vehicles documentation, as defined in Section 529.7. CAL. PEN. CODE § 186.22(e) (West 2006).

or more predicate offenses (*i.e.*, offenses of a type enumerated in the Act) committed by the defendant or other gang members resulting in convictions⁴¹ and having occurred within the preceding three years.

Although the charged offense and only one prior will suffice as a “pattern of criminal gang activity,”⁴² prosecutors frequently allege more. One reason is that, should the defendant be acquitted of the offense supporting the gang enhancement, there would then need to be a minimum *two prior* predicate acts proven in order to convict on the substantive gang charge. Also, a litany of prior gang offenses serves the additional purposes of proving that the gang has as one of its primary activities the commission of one or more of the enumerated crimes,⁴³ and that the defendant had knowledge of the gang’s criminal activities.⁴⁴

Two problems arise out of the “pattern” requirement. One is purely interpretational, while the other concerns the use of expert witnesses’ testimony at trial. Although the statutory language appears clear; “*whose members* individually or collectively engage in or have engaged in a pattern of criminal gang activity,”⁴⁵ the Courts of Appeal have held that the predicate acts need not be gang related, nor do the people committing the predicate offenses need to be gang members *at the time of the*

⁴¹ It is not necessary to prove that the predicate acts resulted in convictions. *See People v. Zermeno*, 986 P.2d 196, 198 fn 2 (Cal. 1999).

⁴² *People v. Gardeley*, 927 P.2d 713, 725 (Cal. 1996);

⁴³ Required under Penal Code sections 186.22(a) and (b) to prove the existence of the gang. (See next section.)

⁴⁴ Required under Penal Code section 186.22(a) to prove active participation in a criminal street gang. (See section IV, *infra*.)

⁴⁵ CAL. PEN. CODE § 186.22(f) (West 2006) (emphasis added).

*acts' commission.*⁴⁶ Can the existence of a gang really be proven by evidence of non-gang-related crimes committed *years* before the perpetrator even considers joining the gang? Surely this is not what the *Augborne* court meant to say.

Prosecution “experts”—who are not usually qualified as experts in legislative history—further abuse the “predicate acts” requirement at trial by confidently asserting that the enumerated crimes were selected because the Legislature deemed them to be “gang crimes.” This is simply not so. Nevertheless, trial courts invariably allow prosecution gang experts to improperly imply, by characterizing the statutorily enumerated offenses as *per se* “gang crimes,” that street gang members are more prone to commit those offenses than other groups or individuals.

D. “One of its Primary Activities”: How Criminal Are Criminal Street Gangs?

To prove the existence of the gang, the prosecution must also prove that the gang has “as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e).”⁴⁷

“Primary” is defined by the American Heritage Dictionary as “first or highest in rank, quality or importance.”⁴⁸ If the statute said “as *its primary activity*” then there would be no difficulty in applying that definition. The problem is that the statute says “*one of its primary activities*,”⁴⁹ defying the commonly understood definition of “primary” as the first or highest in rank, quality or importance. So, how can *several* activities be *first* or *highest* in rank, quality or importance? In 2001, thirteen years after

⁴⁶ See *People v. Augborne*, 128 Cal.Rptr.2d 258, 264 (2002).

⁴⁷ CAL. PEN. CODE § 186.22(f) (West 2006).

⁴⁸ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fourth Edition (Houghton Mifflin 2000).

⁴⁹ CAL. PEN. CODE § 186.22(f) (West 2006) (emphasis added).

the enactment of the STEP Act, the California Supreme Court addressed the definitional issue of “primary activities” in *People v. Sengpadychith*.⁵⁰ The Court looked to Webster’s International Dictionary and found that Webster’s listed “chief” and “principal” as synonyms.⁵¹ But instead of attempting to solve the conundrum of multiple “primary” activities, the Court proceeded to ratify the grammatical contradiction in the statute with more word abuse of the exact same kind by stating that “*one of its primary activities*”⁵² means the same as “*one of its ‘chief’ or ‘principal’ occupations.*”⁵³

Not only did the Supreme Court compound the problem of multiple primary activities during its foray into the linguistic thicket of the STEP Act, courtesy of *Sengpadychith*,⁵⁴ but it also took the following muddled stab at providing a clearer standard for *frequency* of primary activities:

Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in *Gardeley*. [Citation] There, a police gang expert testified that the gang . . . was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on “his personal investigation of hundreds of crimes committed by gang members,” together with information from colleagues in his own police department and in other law enforcement agencies.⁵⁵

⁵⁰ 27 P.3d 739 (Cal. 2001).

⁵¹ *Sengpadychith* at 744 (citing WEBSTER’S INTERNAT. DICT. (2d ed. 1942)).

⁵² CAL. PEN. CODE § 186.22(f) (West 2006) (emphasis added).

⁵³ *Sengpadychith* at 744 (emphasis added).

⁵⁴ *People v. Sengpadychith*, 27 P.3d 739 (Cal. 2001).

⁵⁵ *Sengpadychith* at 744 (emphasis in original).

The first sentence alone *might* have gone some way toward clarifying what kind of evidence proves that the commission of enumerated crimes is one of the gang's primary activities, had the Court said "must" and not "might." But even if *some* value were assigned to that first sentence by reading "might" as "must" (or even, "should"), that value is diminished, if not negated entirely, by the second sentence, which appears to suggest that expert testimony can prove primary activities in a way that falls short of the *consistent* and *repeated* commission of enumerated acts. Nevertheless, the Court's use of italics in the first sentence certainly implies that the Court placed *some* importance on the "consistently and repeatedly" phrase, and presumably did not intend to lessen that importance by allowing proof by a different means of a lesser degree of activity than "consistent[] and repeated[]" commission of enumerated crimes. The most reasonable interpretation of this part of the *Sengpadychith* opinion, therefore, is that the "primary activities" element *must* be proven by evidence that the gang's members *consistently and repeatedly* committed enumerated acts, and that the same standard *may* be met by evidence presented in the form of expert testimony, as occurred in *Gardeley*.⁵⁶ Any other reading of this passage would essentially render it useless in its entirety.

Implicit in the "primary activities" requirement is the notion that gangs must be, at the very least, *more* criminally active than society at large. No matter how tempting it is to assume that popular preconceptions about gangs are true, high levels of criminality among gangs must still be demonstrated reliably at trial to prove this requirement. The question is how? In practice, gang experts routinely present a list of gang crimes which have occurred in the county in recent years and then proceed to state that based on their

⁵⁶ *People v. Gardeley*, 927 P.2d 713 (Cal. 1996).

experience investigating gang crime, the primary activities of Gang X are the commission of this crime, that crime, and the other crime—all enumerated in the statute.⁵⁷ This kind of conclusory anecdotal evidence—impressive as it is to a jury—tells us nothing about the *per capita* crime rate of gang members versus non-gang members without any accompanying information as to the percentage of gang members among the local population, and local crime rates among gang members versus the general population, or among other groups or organizations.

In *People v. Gamez* (1991),⁵⁸ the defendant claimed that the statutory definition of criminal street gang could easily encompass such organizations as the Los Angeles Police Department.⁵⁹ The Court of Appeal countered that, although members of the LAPD may have committed the requisite number of predicate offenses,⁶⁰ the commission of those offenses was not a “primary activity” of the department because the crimes were committed by LAPD officers acting in a separate capacity, albeit while on duty.⁶¹ The *Gamez* court’s conclusion seemed to be based on the capacity of the perpetrators of the enumerated crimes, rather than the rank, quality or importance ascribed to the conduct. However, when the Supreme Court visited the primary activities issue a decade later in

⁵⁷ CAL. PEN. CODE § 186.22(e) (West 2006). As of 2005, twenty-five offenses were enumerated. The list was commonly referred to in gang officers’ vernacular as “the dirty twenty-five.” Not surprisingly, since its recent expansion to thirty crimes, it is now referred to even *more* commonly as “the dirty thirty.”

⁵⁸ 286 Cal.Rptr. 894 (1991).

⁵⁹ *Gamez* at 901.

⁶⁰ The *Gamez* opinion somewhat portentously predated the Los Angeles Police Department “Rampart Scandal,” wherein LAPD anti-gang CRASH Unit officers were convicted of several serious felonies, including bank robbery and theft of seized cocaine. See *Rampart Scandal Timeline* at <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/cron.html>.

⁶¹ *Gamez* at 901.

Sengpadychith,⁶² it appeared to cite *Gamez* for the proposition that organizations such as the LAPD are not criminal street gangs because enumerated offenses are committed by members only on an “occasional” basis.⁶³

If the LAPD is not a criminal street gang because its members appear to commit enumerated crimes only occasionally, couldn't the same be said for *norteno* and *sureno* street gangs, absent any evidence to the contrary? Despite popular preconceptions of gangs consisting of hordes of marauding superpredators,⁶⁴ the reality, according to one expert, is that gang life is “a very dull life. For the most part, gang members do very little—sleep, get up late, hang around, brag a lot, eat again, drink, hang around some more.”⁶⁵

Even if it *can* be proven that a disproportionate number of crimes *are* committed by gang members, that fact would not necessarily prove a causal relationship between gangs and crime. If already delinquent youths join gangs and continue to commit crimes at the same level as if they had not joined the gang, then a distinction can be made between the primary activity of the gang, and the primary activities of its members.⁶⁶

⁶² 27 P.3d 739 (Cal. 2001).

⁶³ *Sengpadychith* at 744.

⁶⁴ See John J. DiIulio Jr., *The Coming of the Superpredators*, THE WEEKLY STANDARD, November 27, 1995, at p.23 (predicting the taking over of America by tens of thousands of “severely morally impoverished juvenile super-predators” who “fear neither the stigma of arrest nor the pain of imprisonment” and “live by the meanest code of the meanest streets”).

⁶⁵ M.W. Klein, THE AMERICAN STREET GANG, (Oxford University Press 1995), at p.11.

⁶⁶ See Finn-Aage Esbensen, *Preventing Adolescent Gang Involvement*, Juvenile Justice Bulletin, September 2000, U.S. Department of Justice Office of Justice Programs Office of Juvenile Justice and Delinquency Prevention, at pp.5-6. Esbensen noted that research suggested that “while the gang environment facilitates delinquency, gang members are already delinquent prior to joining the gang.” Esbensen also noted, however, that “rates of delinquency increase dramatically during the period of gang membership.” See also James C. Howell, *Youth Gangs: An Overview*, Juvenile Justice Bulletin, August 1998, U.S. Department of Justice Office of Justice Programs Office of Juvenile Justice and Delinquency Prevention. A 1997 survey

Unlike the “pattern of criminal gang activity” requirement, which must be proven by evidence of “*members* individually or collectively” committing enumerated offenses,⁶⁷ the “primary activities” requirement must be proven by evidence of “*its [i.e., the gang’s]* primary activities [being] the commission of one or more of the [enumerated] criminal acts.”⁶⁸

The notion that Hispanic street gangs may merely provide an attractive means of association for the independently criminally minded is supported by the available statistical data. In 2000, Hispanics made up 12.5 percent of the United States’ population,⁶⁹ and 49 percent of the nation’s street gang membership.⁷⁰ Thus, Hispanics were more than six times more likely to be in a gang than non-Hispanics. Based on the foregoing, if gang membership substantially contributes to criminality (rather than *vice versa*), then one would expect to find noticeably disproportionate Hispanic *per capita* crime rates, especially in regions with a large Hispanic population. However, one recent sampling of local inmates broken down by race tends to refute this assumption. During late May of 2006, the male population detained in Stanislaus County’s Modesto Men’s Jail and Public Safety Center was divided between 45 percent Hispanic and 55 percent

of Denver, Colorado youth found that the 14% of teenagers who claimed to be gang members were responsible for 89% of all serious violent juvenile offenses.

⁶⁷ CAL. PEN. CODE § 186.22(f) (West 2006) (emphasis added).

⁶⁸ CAL. PEN. CODE § 186.22(f) (West 2006) (emphasis added).

⁶⁹ Elizabeth M. Grieco & Rachel C. Cassidy, *Overview of Race and Hispanic Origin, Census 2000 Brief*, U.S. Census Bureau (March 2000).

⁷⁰ Arlen Egley Jr. & Aline K. Major, *National Youth Gang Survey 2001*, United States Department of Justice.

non-Hispanic.⁷¹ In Stanislaus County generally, males between ages 18 and 40 were divided at that time between approximately 42 percent Hispanic and 58 percent non-Hispanic.⁷²

The closeness of the in-custody and out-of-custody figures indicates that Hispanic males as a class are negligibly more criminal than non-Hispanic males. This in-custody racial parity further shows that the reputed high level of gang membership amongst Hispanics has little impact on the overall Hispanic *per capita* crime rate. Rather, a disproportionate representation of gang members within a proportionately represented Hispanic in-custody population would indicate that instead of gang formation causing increased criminality, as popularly believed, the opposite may be true; gang members are already predisposed toward criminal activity, and an individual's membership within a gang has little impact upon his continuing criminality.

In light of the wealth of statistical information available, and the conclusions that can be drawn from it, courts deserve more than the anecdotal evidence deemed sufficient in *Gardeley* to prove “primary activities.”⁷³ Instead of police officers' lurid recitations of highlights from the gang unit's water cooler, courts and juries should be hearing more meaningful testimony from social scientists and demographers as to the relationship between gang membership/formation and crime—especially when it is likely that while gang members might be delinquently oriented, the existence of the gang has little to do with their levels of criminality.

⁷¹ Based on daily jail rosters provided in response to *subpoena duces tecum* in *People v. Torres*, Stanislaus County Superior Court case # 1092534.

⁷² Based on California Department of Finance Demographic Research Unit estimates, available at http://www.dof.ca.gov/HTML/DEMOGRAP/DRU_datafiles/Race/RaceData_2000-2050.htm.

⁷³ *People v. Gardeley*, 927 P.2d 713 (Cal. 1996).

IV. “ACTIVE PARTICIPATION”: WHAT IS A GANG MEMBER?

Active participation in a criminal street gang in violation of Penal Code section 186.22(a) is punishable as a felony or as a misdemeanor.⁷⁴ A felony conviction under section 186.22(a) counts as a “strike” under California’s Three Strikes Law⁷⁵ and carries a maximum punishment of three years in state prison.⁷⁶

Subdivision (a)—the “substantive gang charge”—proscribes active participation “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 conduct by members of that gang . . .”⁷⁷

Relying on the United States Supreme Court case of *Scales v. United States*,⁷⁸ the California Supreme Court in *People v. Castaneda*⁷⁹ held that subdivision (a) required that the defendant was more than a nominal or passive member, the defendant had knowledge of the gang’s members’ involvement in a pattern of criminal gang activity, and that the defendant willfully promoted, furthered, or assisted in criminal conduct by gang members.⁸⁰ The *Castaneda* court held that “willful promot[ion], further[ance], or

⁷⁴ A crime punishable as a felony *or* a misdemeanor is commonly known as a “wobbler.”

⁷⁵ As a “serious felony” within the meaning of California Penal Code section 1192.7(c).

⁷⁶ Like many felonies, the mitigated term is sixteen months, the mid term is two years, and the aggravated term is three years. See CAL. PEN. CODE § 186.22(a) (West 2006).

⁷⁷ CAL. PEN. CODE § 186.22(a) (West 2006).

⁷⁸ 367 U.S. 203 (1961).

⁷⁹ 3 P.3d 278 (Cal. 2000).

⁸⁰ *Castaneda* at 284-285.

assist[ance] in criminal gang conduct” was equivalent to “aid[ing] and abet[ting] a separate felony offense committed by gang members.”⁸¹

Despite the clear language of the *Castaneda* opinion, lower courts have since held that the promotion/furtherance/assistance prong may be satisfied by a defendant committing the charged offense⁸² (as opposed to a “separate offense”⁸³) alone or as a direct perpetrator⁸⁴ (as opposed to “aiding and abetting”⁸⁵). In *People v. Ngoun*,⁸⁶ the Fifth District Court of Appeal recognized that the “gravamen of [the substantive offense] is the participation in the gang itself”⁸⁷ (citing *People v. Herrera*⁸⁸), but went on to state that someone acting alone could satisfy the promotion/furtherance/assistance prong because “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 or abets or who is otherwise connected to such conduct.”⁸⁹

What the *Ngoun* court missed, despite its reference to *Herrera*,⁹⁰ is that inherent in the concept of “participation” in a gang is interaction or collaboration with other gang members, hence the unambiguous requirement in *Castaneda* that the defendant be proven

⁸¹ *Castaneda* at 283.

⁸² *People v. McMahon*, 31 Cal.Rptr.3d 256 (2005).

⁸³ *Castaneda* at 283.

⁸⁴ *People v. Ngoun*, 105 Cal.Rptr.2d 837, 839-840 (2001).

⁸⁵ *Castaneda* at 283.

⁸⁶ 105 Cal.Rptr.2d 837, 839-840 (2001).

⁸⁷ *Ngoun* at 839.

⁸⁸ 83 Cal.Rptr.2d 307 (1999).

⁸⁹ *Ngoun* at 839-840.

⁹⁰ 83 Cal.Rptr.2d 307 (1999)

to have *aided and abetted other gang members* on a *separate* occasion.⁹¹ The Court of Appeal in *Ngoun* concluded its opinion by inviting the CALJIC committee to abandon its paraphrasing of *Castaneda*'s "aid and abet" language and revise it to conform with the *Ngoun* "direct perpetration" holding.⁹²

Just recently, in *People v. Lamas*,⁹³ the Fourth District Court of Appeal, citing *Ngoun*, similarly held that direct perpetration of the charged offense by a gang member would be sufficient to meet the promote/further/assist requirement of section 186.22(a), dismissing the "aid and abet a separate felony" language of *Castaneda* as "an oft-misinterpreted snippet . . . ripped from its context."⁹⁴

Five years after the *Ngoun* court's invitation to conform the relevant jury instruction to its holding, such a change has yet to occur. CALCRIM 1400 (the recent successor to CALJIC 6.50) retains the "aid and abet" language of *Castaneda*⁹⁵ and does not mention direct perpetration.⁹⁶

As well as the confusion amongst lower courts as to what the Supreme Court really meant when it said when it said that a defendant "must aid and abet a separate

⁹¹ *Castaneda* at 283.

⁹² *Ngoun* at 840.

⁹³ *Cal.Rptr.3d* (June 20, 2006).

⁹⁴ *Lamas* at *.

⁹⁵ *Castaneda* at 283.

⁹⁶ See CALCRIM 1400, "Active Participation in Criminal Street Gang" (Judicial Council of California 2006) ("To prove that the defendant is guilty of this crime the People must prove that . . . [a] member of the gang committed the crime . . . , the defendant knew the gang member intended to commit the crime . . . , the gang member intended to aid and abet the gang member in committing the crime [and] the defendant's words or conduct did in fact aid and abet the commission of the crime").

felony offense committed by gang members”⁹⁷ to be convicted under 186.22(a), there remains a far more serious unresolved interpretational problem: the meaning of “gang member,” a term peppered throughout the STEP Act, yet undefined anywhere in the Penal Code.

Under the STEP Act, a criminal street gang is an organization “whose *members* individually or collectively engage in or have engaged in a pattern of criminal gang activity.”⁹⁸ To be convicted of violating section 186.22(a), a defendant must have “knowledge that [the gang’s] *members* engage in or have engaged in a pattern of criminal gang activity”⁹⁹ and must “willfully promote[], further[] or assist[] in any felonious conduct by *members of that gang*.”¹⁰⁰ To sustain a penalty enhancement under section 186.22(b), a defendant must commit a felony with “the specific intent to promote, further, or assist in any criminal conduct by *gang members*.”¹⁰¹

The enactment of the STEP Act in 1988 was not the first time that the term “gang member” had been used in a penal statute without definition. Sixty-seven years ago, in *Lanzetta v. New Jersey*,¹⁰² the defendant challenged as constitutionally vague a 1934 New Jersey law punishing “any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons”¹⁰³ The United States

⁹⁷ *People v. Castaneda*, 3 P.3d 278, 283 (Cal. 2000).

⁹⁸ CAL. PEN. CODE § 186.22(f) (West 2006) (emphasis added).

⁹⁹ CAL. PEN. CODE § 186.22(a) (West 2006) (emphasis added).

¹⁰⁰ CAL. PEN. CODE § 186.22(a) (West 2006) (emphasis added).

¹⁰¹ CAL. PEN. CODE § 186.22(b)(1) (West 2006) (emphasis added).

¹⁰² 306 U.S. 451 (1939).

¹⁰³ *Lanzetta* at 452.

Supreme Court held that the statute violated due process because its terms were “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.”¹⁰⁴ One of the unconstitutionally vague terms in the statute was the term “known to be a member.”¹⁰⁵ The Supreme Court found two problems with this term; one was whether the word “known” required actual membership or whether reputed membership was sufficient,¹⁰⁶ the other problem with the term was that the statute failed to indicate “what constitutes membership or how one may join” a gang.¹⁰⁷

The STEP Act’s abundant use of the undefined term “gang member” was attacked for vagueness in the 1991 case of *People v. Green*.¹⁰⁸ Notwithstanding the fatal constitutional problems that the United States Supreme Court had found with the same undefined term over half a century earlier, the *Green* court declared that “member” and “membership” were “terms of ordinary meaning and require[d] no further definition.”¹⁰⁹ Further, declared the *Green* court, “member” had been judicially defined by the United State Supreme Court in *Galvan v. Press*¹¹⁰ as a person “bear[ing] a relationship to an organization that is not accidental, artificial or unconsciously in appearance only.”¹¹¹

¹⁰⁴ *Lanzetta* at 453, 457-458 (citing *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)).

¹⁰⁵ *Lanzetta* at 452.

¹⁰⁶ *Lanzetta* at 458.

¹⁰⁷ *Lanzetta* at 458.

¹⁰⁸ 278 Cal.Rptr. 140 (1991).

¹⁰⁹ *People v. Green*, 278 Cal.Rptr. 140, __ (1991) (citing *In re De La O*, 59 Cal.2d 128 (1963)).

¹¹⁰ 347 U.S. 522 (1954).

¹¹¹ *Green* at 145 (citing *Galvan v. Press* 347 U.S. 522, 528 (1954)).

What the *Green* court failed to appreciate was that while the term “member” might not require further definition, “gang member” *might*.

In *Galvan v. Press*,¹¹² the Supreme Court held that aliens could be deported under the Internal Security Act of 1950 if they had become members of the Communist Party.¹¹³ All that was required was that the alien was “aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will.”¹¹⁴ There was no need to show that the alien knew of the Party’s advocacy of the violent overthrow of the United States Government.¹¹⁵ Thus, the issue in *Galvan*—like *Scales* and unlike *Lanzetta*—was not the *method* of acquiring membership, but the *depth* of membership, once acquired.

Distinguishing *Lanzetta*, the *Green* court noted that, unlike the New Jersey law, the STEP Act did not use the term “known” and therefore the STEP Act’s references to “gang members” referred to *actual* gang members.¹¹⁶ The fact that the STEP Act, like the New Jersey statute in *Lanzetta*, fails to indicate how one might join a gang had, according to the *Green* court, been resolved by cases such as *Scales* “which also involved [a statute] failing to specify those acts by which a person might be deemed a member.”¹¹⁷ The *Green* court’s reference to *Scales* is unhelpful in that *Scales*, like *Galvan*, turned on the issue of the *depth* of the defendant’s membership, not the *method* of acquiring

¹¹² 347 U.S. 522 (1954).

¹¹³ *Galvan* at 525.

¹¹⁴ *Galvan* at 528.

¹¹⁵ *Galvan* at 530.

¹¹⁶ *People v. Green*, 278 Cal.Rptr. 140, 146 (1991)

¹¹⁷ *Green* at 146.

membership, something which was recognized in *Lanzetta* as the first step in defining membership of a street gang—a type of organization which, unlike the Communist Party and most other political organizations, does not collect a membership fee or hand out membership cards.¹¹⁸

In *People v. Englebrecht*,¹¹⁹ the Court of Appeal faced a similar challenge to that raised in *Lanzetta* and *Green*, but in the context of a civil injunction enjoining “members” of the Posole street gang from engaging in certain collective activities amounting to a public nuisance.¹²⁰ The *Englebrecht* court rejected the defendant’s argument that “gang member” should be considered synonymous with “active participant” as defined in *Green* as one who “devotes all, or a substantial part of his time and efforts to the gang,”¹²¹ as well as the prosecution’s argument that the court should adopt as a judicial definition the criteria used by law enforcement to validate and document youths as “gang members.”¹²² Instead, the *Englebrecht* court defined “gang member” as an “active gang member,” *i.e.*, one who meets a similar definition of “active participant” under section 186.22(a) except that, in the context of a civil injunction, the gang has as its primary activities the acts constituting the public nuisance, and instead of engaging in a pattern of criminal activity,

¹¹⁸ See *Gangs; A Community Response*, California Attorney General’s Office Crime and Violence Prevention Center (June 2003), at p.28 (describing how gang members are “jumped in” to a gang by submitting to a gang beating. Other methods of acquiring membership include “sponsorship” by an existing member, or completion of a criminal “assignment”).

¹¹⁹ 106 Cal.Rptr.2d 738 (2001).

¹²⁰ *Englebrecht* at 742.

¹²¹ *Englebrecht* at 753.

¹²² *Id.* At the time of the *Englebrecht* case, the California Department of Justice Gang Task Force classified as an active gang member anyone meeting two or more of the following criteria: (1) Subject admits being a member of the gang (2) Subject has tattoos, clothing, etc., that are only associated with certain gangs (3) Subject has been arrested while participating with a known gang (4) Information that places the subject with a gang has been obtained by a reliable informant (5) Close association with known gang members has been confirmed. See *Englebrecht* at 753.

the gang's members engage in the acts constituting the public nuisance.¹²³ Also, “[t]he participation must be more than nominal, passive, inactive or purely technical.”¹²⁴ Thus, the *Englebrecht* “active gang member” formulation fell somewhere between the non-criminal “inactive” or “passive” member and the criminal “active participant.”

A version of the *Englebrecht* “active member” definition would, at first glance, seem appropriate in the context of the STEP Act. Unfortunately, such a definition compels infinite regression, ultimately rendering it unusable; for example, if a gang member is defined as somebody who has associated in some way with another gang member, then at some point in history there has to be an immaculately conceived gang member, *i.e.*, a person who became a gang member *without* any association with an existing gang member.

The *Green* court may have been correct when it stated that “member” is a term of ordinary meaning requiring no further definition, but as long as gangs do not hand out membership cards, the term “gang member” remains just as vulnerable to diverse definitions today as it did sixty-seven years ago in *Lanzetta*.¹²⁵ Therefore, the entire STEP Act likely violates due process because its terms are not “sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.”¹²⁶

¹²³ *Englebrecht* at 756.

¹²⁴ *Id.*

¹²⁵ *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

¹²⁶ *Lanzetta* at 453.

V. THE ENHANCEMENT: FACILITATING WHAT, WHOM AND WHEN?

Penal Code section 186.22(b) provides for enhanced penalties for defendants proven to have committed felonies “for the benefit of, at the direction of, or in association with a criminal street gang,” and “with the specific intent to promote, further, or assist in any criminal conduct by gang members.”¹²⁷

Although the language of the enhancement statute—“promote, further, or assist in any criminal conduct by gang members”—appears almost identical to the “willfully promotes, furthers or assists in any felonious conduct by members of that gang” language of subdivision (a) (the substantive “active participation” charge), the two provisions have been interpreted somewhat differently. While the language in the (a) count refers to *aiding and abetting a felony* committed by gang members,¹²⁸ the almost identical language in the (b) enhancement refers (at least, according to the Ninth Circuit Court of Appeals) to “facilitation”¹²⁹ of “*any criminal conduct* by gang members.”¹³⁰

Until recently, the primary problem with the enhancement (apart from the lack of a statutory definition for the term “gang member”) has been one of attenuation; exactly *how much* of a nexus must be shown between the charged act and the facilitated criminal gang conduct? In *People v. Ferraez*,¹³¹ the defendant was a member of a gang and was

¹²⁷ CAL. PEN. CODE § 186.22(b) (West 2006).

¹²⁸ At least according the California Supreme Court in *People v. Castaneda*, 3 P.3d 278, 283 (Cal. 2000) . *But see* *People v. Ngoun*, 105 Cal.Rptr.2d 837, 839-840 (2001); *People v. Lamas*, *Cal.Rptr.3d* (June 20, 2006).

¹²⁹ *See Garcia v. Carey*, 395 F.3d 1099 (9th Cir. 2005).

¹³⁰ CAL. PEN. CODE § 186.22(b) (West 2006) (emphasis added).

¹³¹ 5 Cal.Rptr.3d 640 (2003).

selling drugs in a gang neighborhood with permission from the gang.¹³² Although it could be said that the defendant committed the offense “in association with a criminal street gang” by seeking the gang’s approval, there appeared to be no direct or circumstantial evidence that the defendant intended to “promote, further, or assist in any criminal conduct by gang members”; rather, the defendant appeared to be selling drugs purely for personal profit.¹³³ This evidentiary deficit was easily remedied, however, by the testimony of the prosecution gang expert who testified to the effect that gang members typically sell drugs to raise money for criminal gang activity or to enhance the gang’s criminal reputation, therefore *this* gang member defendant intended just that.¹³⁴ Despite the faulty logic of this syllogism—akin to “most pets are cats; I have a pet dog; therefore my dog is a cat”—the court had no problem relying on the expert’s opinion to prove the ultimate issue of the defendant’s intent to facilitate criminal conduct by the gang.¹³⁵

As well as the all-purpose “enhancing the gang’s reputation” theory, prosecution experts also employ the equally versatile “protecting turf” theory to “prove” that an apparently self-serving crime was actually committed to facilitate gang activity. The “turf” theory, however, was soundly rejected by the Ninth Circuit in *Garcia v. Carey*.¹³⁶ In *Garcia*, the defendant proudly announced his gang affiliation while robbing his victim

¹³² *Ferraez* at 645-646.

¹³³ *Ferraez* at 645.

¹³⁴ *Ferraez* at 643-644.

¹³⁵ *Ferraez* at 645-646. *But see* *People v. Killebrew*, 126 Cal.Rptr.2d 876 (2002) (holding that it is generally improper for an expert to offer an opinion as to the ultimate issue of the defendant’s specific intent to further criminal gang activity).

¹³⁶ 395 F.3d 1099 (9th Cir. 2005).

in a busy liquor store.¹³⁷ The defendant was assisted by two other gang members.¹³⁸ At trial, the prosecution gang expert testified that the robbery occurred on Garcia’s gang’s “turf,” and that the gang was “turf oriented.”¹³⁹ The Ninth Circuit Court of Appeals held that the evidence was insufficient to support an inference that Mr. Garcia robbed his victim “with the specific intent to facilitate other criminal conduct by the gang.”¹⁴⁰ The court noted that there was nothing in the record connecting the “‘turf-oriented nature’ of the gang” with the commission of that robbery, nor was there any evidence that protection of turf enabled any other kind of criminal activity of the gang; the expert’s testimony was “singularly silent on what criminal activity of the gang was furthered or intended to be furthered by the robbery”¹⁴¹

Not only have state courts disagreed with the Ninth Circuit’s requirement of an articulable nexus between the charged offense and specific criminal gang activity, but the Second District Court of Appeal’s recent decision in *People v. Romero*¹⁴² conflicted with *Garcia* on another important aspect of the enhancement provision, holding that subdivision (b) “does not require intent to further criminal conduct *beyond the charged crime*.”¹⁴³

¹³⁷ *Garcia* at 1101.

¹³⁸ *Garcia* at 1101.

¹³⁹ *Garcia* at 1101-02.

¹⁴⁰ *Garcia* at 1103.

¹⁴¹ *Id.*

¹⁴² 43 Cal.Rptr.3d 862 (2006).

¹⁴³ *Romero* at 864 (emphasis added).

In *Romero*, two gang members, Mr. Romero and Mr. Moreno, were convicted of murder, with a sustained enhancement under section 186.22(b).

The *Romero* court reasoned, contrary to *Garcia*, that the “any criminal conduct” language of the statute could be applied to contemporaneous conduct of another gang member committing the same offense;¹⁴⁴ each defendant acted in association with the gang and had the specific intent to assist in criminal gang conduct simply by virtue of assisting the other in the commission of the charged offense, even if the charged offense was not otherwise gang-related. The *Romero* court cited *People v. Morales*¹⁴⁵ in support of the position that when there is sufficient evidence that a defendant intended to commit a crime in association with other gang members, “it is fairly inferable that he intended to assist criminal conduct by his fellow gang members.”¹⁴⁶

The *Romero* court’s interpretation of subdivision (b) creates the potential for unjust and absurd results.¹⁴⁷ What if Mr. Moreno were not a gang member? Mr. Moreno would then be the only one out of the two defendants actually assisting a gang member, thus freeing Mr. Romero—the gang member—of liability under the enhancement, and imposing liability instead upon Mr. Moreno—the non-gang member. The only way around this unjust and absurd result would be to construe the holding of *Romero* to mean that one gang member can meet the “assist[ing] in any criminal conduct by gang members” element of the enhancement by assisting in *his own* commission of *any* crime as a gang member. Such an interpretation would avoid the potential absurdity of a non-

¹⁴⁴ *Romero* at 865.

¹⁴⁵ *People v. Morales*, 5 Cal.Rptr.3d 615 (2003).

¹⁴⁶ *Romero* at 866 (citing *People v. Morales*, 5 Cal.Rptr.3d 615 (2003)).

¹⁴⁷ *See Campbell v. Zolin*, 39 Cal.Rptr.2d 348, 352 (1995) (“A statute must be construed so as to avoid an unjust and absurd result”).

gang member facing greater liability than a gang member for the same conduct, and would be in conformity with the *Ngoun* and *Lamas* courts' application of the "promote, further, or assist" language of the subdivision (a) substantive count to lone gang members committing *any* crime. However, this interpretation of the "promote, further, or assist" language—*i.e.*, that a lone gang member could be subjected to additional punishment when committing a self-serving crime, simply by virtue of his unrelated gang affiliation—would appear to unconstitutionally punish mere membership in a gang when applied to the (b) enhancement.¹⁴⁸

The *Romero* court purported to cite *People v. Morales*¹⁴⁹ in support of its position that crimes committed by multiple gang members presumptively satisfy all the requirements of the enhancement. However, such reliance on *Morales* was somewhat selective. The *Morales* court offered the following caveat, consistent with the notion that gang members (even when acting together) *can* commit self-serving crimes not intended to facilitate criminal gang conduct: "[I]t is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang."¹⁵⁰

The "frolic and detour" exception posited by the *Morales* court in dicta is something that should not be shoved into oblivion by *Ferraez*, *Romero*, and their inevitable progeny; despite attempts by the courts to validate the flawed logic of prosecution gang experts, it always has been and always will be entirely possible for gang

¹⁴⁸ See *Scales v. United States*, 367 U.S. 203 (1961); *People v. Castaneda*, 3 P.3d 278 (Cal. 2000).

¹⁴⁹ 5 Cal.Rptr.3d 615 (2003).

¹⁵⁰ *Morales* at 632. See also *Garcia v. Carey*, 395 F.3d 1099 (9th Cir. 2005) (defendant must promote, further, or assist in other criminal activity of the gang apart from the charged crime); *People v. Martinez*, 10 Cal.Rptr.3d 751 (2004) (a crime may not be found gang related based solely upon the defendant's gang affiliations); *In re Frank S.* *Cal.Rptr.3d* (5th Dist., Aug. 1, 2006) (crimes may not be found to be gang-related based solely upon a perpetrator's gang affiliations).

members, acting alone *or in groups*, to commit self-serving crimes without *any* intent to facilitate criminal gang activity. And it remains the prosecution’s burden to prove with competent evidence that *the charged offense*—not that particular *type* of offense, when committed by a gang member—was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members.

VI. CONCLUSION: A WAY OUT OF THE THICKET?

The uniqueness of gang culture, the linguistic shoddiness of a statute cobbled together in a hasty response to a gang “crisis,” and the puzzling judicial interpretations of the STEP Act’s provisions by confused and frustrated courts have rendered the Act virtually impossible to apply in a fair and consistent manner.

The growing problems of interpretation, as shown by the continuing divergence of appellate opinions, can likely be solved only by a radical redrafting of the statute. By far the largest flaw in the Act is the conspicuous lack of a definition of “gang member.” An amendment to the statute to add a simple definition comparable to those used by law enforcement agencies when documenting gang members on the street would easily suffice.¹⁵¹ Also, the disagreement among appellate courts as to whether direct perpetration or only aiding and abetting satisfies the “assistance” prong of the substantive charge, and whether the enhancement requires facilitation of *other* criminal gang activity, could be resolved by resort to codification of the holdings of the higher courts, specifically the holding of *Castaneda* as to “aiding and abetting,” and the holding of *Garcia v. Carey* as to “*other* criminal gang activity.”

¹⁵¹ Definitions of “gang member” based on law enforcement models are incorporated into anti-gang statutes in Arizona, Florida, South Dakota, and Tennessee. Law enforcement classifications are typically based on the subject meeting two or more out of five to seven criteria such as self-admission, gang tattoos, prior adjudication for a gang offense, etc. (See fn 122 *supra*.)

Eighteen years after the enactment of the STEP Act, there is still a dire need for comprehensible legislative and judicial standards in the war against gangs. The recurring disagreement among the appellate courts is sufficient evidence that some of the state's brightest legal scholars remain at odds as to the "plain meaning" of the statute.

As the gang crisis continues to grow, so does the need for clear legal standards to assist in the effort to quell that crisis. It is not too late for courts and the legislature to map a way out of the thicket.