

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CRISTIAN RENTERIA,

Defendant and Appellant.

Case No. S266854

Court of Appeal
No. F076973

Super. Ct. No.
VCF304654

**AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE
PUBLIC DEFENDER IN SUPPORT OF APPELLANT
RENERIA**

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INTEREST OF AMICUS

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases and has been instructed by the Legislature to “engage in ... efforts for the purpose of improving the quality of indigent defense.” (Gov. Code, § 15420, subd. (b).) Further, OSPD is “authorized to appear as a friend of the court ...” (Gov. Code, § 15423.) OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been convicted of crimes.

The Court has granted review to decide the following question: “When a member of a criminal street gang acts alone in committing a felony, what evidence will suffice to establish the felony was ‘committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members?’” The question requires interpretation of the Street Terrorism Enforcement and Prevention Act (STEP Act), which sets forth crimes and enhancements that apply to defendants who act on the behalf of groups deemed to be criminal street gangs. (§ 186.20, et seq.¹)

How this law has been enforced raises serious concerns. Even as the prison population in California decreased by 38,000 from 2011 to 2019, the use of gang enhancements in prison sentences

¹ All citations are to the Penal Code unless stated otherwise.

increased by almost 40 percent. (Assem. Bill No. 333 (2021-2022 reg. sess.) § 2 [findings and declarations] (AB 333).) Coinciding with its increased use, sentencing under the STEP Act has also been racially skewed. According to the California Department of Corrections and Rehabilitation’s statistics, 92 percent of all those imprisoned with a gang enhancement are Black or Latino. (Cal. Law Revision Com., Commission on Revision of the Penal Code, Annual Report and Recommendations (2020) p. 44 (“Commission” and “Commission Report”).)² In Los Angeles County, remarkably, the disparities are even more severe: 98 percent of those against whom gang enhancements are imposed are persons of color. (*Ibid.*)

The Legislature, recognizing the flaws and racially disparate outcomes, has constricted the scope of the law. However, additional clarity concerning how the STEP Act applies to lone actors is needed. OSPD offers below a framework for interpreting the STEP Act in line with its stated purposes and reflective of the need to carefully limit its application.

² Cal. Law Revision Com., Commission on Revision of the Penal Code, Annual Report and Recommendations (2020) http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf, as of Nov. 17, 2021

INTRODUCTION

The Commission and the Legislature have both identified flaws in how the gang enhancement has been enforced, and, in 2021, took action to address them. In AB 333, the Legislature, at the urging of the Commission, narrowed the definition of a “criminal street gang” and altered certain language in the enhancement to limit its use. (AB 333, § 3.) While these changes seek to cure the overbroad and discriminatory use of the statute, they do not answer the question on which this Court granted review: how the statute applies to a lone actor. The structure of the gang enhancement and existing caselaw still raise difficult interpretive questions about what the prosecution must show when it seeks to apply the statute to a purported gang member who commits a crime alone. Thus, despite recent changes, the issues in this case remain open, and resolving them remains vital. This Court should decide them.

The STEP Act in effect at the time of appellant’s trial applied a sentencing enhancement for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1), et. seq.)³

³ The language of the gang enhancement remains largely the same after the passage of AB 333. One possible effect of the amendments—the removal of the word “any” from the phrase any “criminal conduct”—is discussed below at page 43. The language from the STEP Act in effect at the time of appellant’s trial is used in this brief unless otherwise noted.

Thus, as this Court made clear in *People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (“*Albillar*”), the statute has two prongs:

1. The defendant committed a felony for the benefit of, at the direction of, or in association with a criminal street **gang**;

AND,

2. The defendant committed the felony with the specific intent to promote, further, or assist in any criminal conduct by **gang members**.

The parties and amicus agree that the gang enhancement *can* apply to gang members who act alone. The parties’ briefs discuss a series of prior opinions in which courts found the enhancement did or did not apply to a lone actor, depending on the specific facts in those cases. But no court has distilled these decisions into a general rule or coherent set of principles. This brief surveys the meaning and purpose of the individual prongs of the gang enhancement and proposes a simple, unified framework for applying them in lone-actor cases.

The need for a distinct rule for lone-actor cases is manifest. Courts (and juries) run into a key definitional difficulty when prosecutors charge a gang enhancement against a person who acted alone: gangs are groups. The statutes that combat them are designed to fight group criminality. (§ 186.21 [stating that the STEP Act was meant to target the patterns of criminal activity and organized nature of gangs].) The statute’s core logic is stretched when it is applied to a lone actor. In these cases, the jury’s job is not as clear-cut as inferring the defendant’s intent from the fact that he or she acted with other gang members. Although the elements

themselves do not change, the method of proof must account for the fact that the defendant acted alone, and perhaps entirely independently. Failing to acknowledge the difficulty of proving these elements in lone-actor cases has created a flawed jurisprudence and overbroad application of the enhancement provisions.

The solution lies in the statute's plain language. The statute's words, principles of statutory construction, and prior precedent together compel two clarifications to the two prongs of the enhancement: 1) the prosecution must prove that the lone actor committed a felony with the intent or purpose to benefit a gang; and 2) the prosecution must prove that the lone actor committed the crime to advance another specific offense that will be committed by fellow members.

ARGUMENT

I. THE CHANGES MADE BY AB 333 STRENGTHEN THE CLAIMS RAISED HERE BUT GUIDANCE FROM THIS COURT REGARDING LONE ACTORS CHARGED WITH A GANG ENHANCEMENT REMAINS VITAL BECAUSE AB 333 DID NOT CHANGE THE FUNDAMENTAL STRUCTURE OF THE GANG ENHANCEMENT

While this appeal was pending, the Commission on the Revision of the Penal Code recommended broad changes to the STEP Act to prevent its overuse and discriminatory enforcement. In response, the Legislature passed AB 333, which went into effect on January 1, 2022. This amendment changed the definition of “criminal street gang,” narrowed the definition of “benefit” required to prove the gang enhancement, and required bifurcation of gang allegations. The changes made to the gang enhancement support the claims raised in this brief, but do not alter the underlying structure of the enhancement itself. Thus, the issues before the Court in this appeal remain vital.

In February 2021, the Commission issued its first annual report, which included recommendations to “limit gang enhancements to the most dangerous offenses.” (Commission Report, *supra*, p. 43.) The report documented the racially disparate impact of gang laws. (*Id.* at p. 44.) To remedy these problems, the Commission recommended, among other things, that the definition of street gang be changed to include only organized, violent groups; and that the law “require direct evidence of current and active gang involvement and violence, and limit expert witness testimony.” (*Id.* at p. 44.)

The Legislature addressed these recommendations in AB 333, known as the “STEP Forward Act of 2021.” (AB 333 (2021-2022 reg. sess.) § 2 [findings and declarations].) The statute begins with a statement of findings and declarations that largely mirror the Commission’s report. (*Id.* at § 2.) The Legislature further found that the gang enhancement statute had criminalized whole neighborhoods and social networks; that gang labeling negatively impacted defendants at all stages of the criminal justice system; that groups had been labeled as gangs despite a lack of organizational structure; and that gang enhancements had not been shown to reduce crime or violence. (*Id.* at § 2.)

Based on these findings, AB 333 made changes throughout the STEP Act. Each change either sought to narrow the definition of street gang or to ensure that the defendant could not be punished unless the crime aided the gang directly. The STEP Forward Act:

- Changed the definition of “criminal street gang” so that it now requires proof of an *organized* association or group that *collectively* engages in a pattern of criminal gang activity (§ 186.22, subd. (f));
- Required that the crimes that make up the pattern of criminal gang activity “commonly benefited” the gang and that the common benefit be “more than reputational” (§ 186.22, subd. (e));
- Defined the words benefit, promote, further, or assist to require proof of a common benefit to members of a gang that is more than reputational, and laid out concrete forms of that benefit, including financial gain or retaliation (§ 186.22, subd. (g)); and,
- In the second prong of the gang enhancement, replaced “any criminal conduct” with simply “criminal conduct” (§ 186.22, subd. (b)).

With these changes, AB 333 limited the scope of the gang enhancement and required more concrete proof that the defendant's crime was tied both to the gang and to gang crimes by members. For instance, in cases where the prosecutor alleges that the defendant sought to "benefit" a gang, AB 333 now requires that the benefit be "more than reputational." Committing a crime to boost the gang's reputation for violence no longer suffices to prove the first prong. And in removing the word "any" from the second prong of the enhancement, AB 333 confirmed that a defendant may not aid his own acts. It confirmed the argument made in section III.B below that the gang enhancement does not apply to those who commit a crime untethered from crimes of other gang members.

But these amendments do not affect the overall structure of the gang enhancement. Even after the STEP Forward Act, there remain two prongs that require separate proof and that point to different aspects of the defendant's conduct. (§ 186.22, subd. (b).) The defendant's current crime must still connect the "gang" and "criminal activity by gang members." (*Ibid.*) And the gang enhancement may still apply to lone actors, gang members who commit crimes by themselves.

For this reason, the question on which this Court granted review remains vital. Lower courts still need guidance on the interplay between the two prongs in lone-actor cases. Thus, amicus asks the Court to address all of these initial issues, along with the questions of retroactivity raised in the parties' supplemental briefing.

II. THE FIRST PRONG OF THE GANG ENHANCEMENT REQUIRES PROOF BEYOND A REASONABLE DOUBT THAT THE LONE-ACTOR DEFENDANT COMMITTED THE CRIME WITH THE INTENT OR PURPOSE TO BENEFIT THE GANG

This Court considered the evidence required to prove the gang enhancement true beyond a reasonable doubt in *Albillar*, *supra*, 51 Cal.4th at pp. 59-68. The case involved crimes committed by multiple actors, but section 186.22, subdivision (b)(1) does not on its face differentiate between multiple actors and lone actors—the elements that the prosecution must prove are the same as to both. *Albillar*'s analysis tracks the language of the statute, dividing the enhancement into two prongs, one focused on the gang, and the other focused on gang members. (*Ibid.*) As straightforward as the language of the statute and the analysis of *Albillar* appear, both prongs present problematic issues when applied in lone-actor cases. Regarding the first prong, the caselaw lacks a clear definition of the mental state required to prove the first prong as to a lone actor. Courts have disclaimed the need to prove a defendant acted with a particular mental state when the crime was committed in association with a gang, a scenario that arises in multi-actor cases. (See e.g., *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 (“*Morales*”).) But in lone-actor cases, lower appellate courts often employ conclusory analyses that make it difficult to discern what mental state requirement they are applying. This shortcoming is illustrated by the opinion below. This Court should clarify the mental state requirements of the first prong in lone-actor cases.

- A. Because of the differing evidentiary backdrops in multi-actor and lone-actor cases, a multi-actor case does not require proof of a mental state because the prosecution need not prove that the crime was committed “for the benefit of” a gang if it proves that the crime was committed “in association with” or “at the direction of” a gang.**

Section 186.22, subdivision (b)(1), worded in the disjunctive, provides three alternatives for establishing the first prong. (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484; see also *Albillar*, *supra*, 51 Cal.4th at pp. 59-60.) “The offense may be committed (1) for the benefit of a gang; (2) at the direction of a gang; or (3) in association with a gang.” (*People v. Weddington*, *supra*, 246 Cal.App.4th at p. 484; § 186.22, subd. (b)(1).)

The Court of Appeal here held the prosecution presented sufficient evidence of the “for the benefit” alternative to prove the first prong of the gang enhancement as to appellant. (Opn., pp. 14-15.) The analysis of the facts to support the benefit alternative is a single paragraph that begins, “[the gang expert] testified concerning how the charged crimes benefited the Sureño criminal street gang, even if they were not committed against rival gang members” and concludes that, “[v]iewed as a whole, the evidence was sufficient to establish the first prong of the gang enhancement.” (Opn, p. 15.) The opinion leaves unclear whether the prosecution must prove that a defendant committed the crime *to benefit the gang* or merely that the crime *did benefit the gang*. The lack of a clear statement of the mens rea requirement leaves the discussion of the facts without a guidepost. Because of this failure, the opinion adds to a recognized, ongoing problem in gang cases: the proliferation of gang expert

testimony that any criminal act, especially a violent one, benefits the gang even when there is no evidence that the defendant intended to do so. (See, e.g., *People v. Perez* (2017) 18 Cal.App.5th 598, 610 (“*Perez*”) [rejecting gang expert’s testimony that essentially any shooting by a gang member is gang related because the violence enhances the gang’s reputation for violence, and collecting cases rejecting “such a sweeping generalization”].)

The mens rea required by the first prong as applied to a lone actor has not been squarely addressed by this Court. It is necessary to clarify this issue because of the different evidentiary backdrops in multi-actor and lone-actor gang cases. In the context of the gang enhancement, “the typical close case is one in which one gang member, acting alone, commits a crime.” (*Morales, supra*, 112 Cal.App.4th at p. 1198; see also *People v. Leon* (2008) 161 Cal.App.4th 149, 162; accord, *People v. Rios* (2013) 222 Cal.App.4th 542, 574 (“*Rios*”).) This is because, in many cases where a gang enhancement is found true, there is evidence that the crime was committed in concert by multiple gang members, thus satisfying the “in association with” alternative of the first prong.

Moreover, in such multi-actor cases, the same evidence will generally also satisfy the second prong: “if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*Albillar, supra*, 51 Cal.4th at p. 68; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) In other words, when multiple actors are involved, the

evidence of a joint crime can prove both prongs. But in lone-actor cases, no such inference can be made.

Without evidence that a defendant committed the crime in concert with other gang members, the “in association with” alternative of the first prong does not apply. (Cf. *Albillar, supra*, 51 Cal.4th at p. 62 [the “defendants came together *as gang members* to attack [the victim], and, thus, . . . they committed these crimes in association with the gang”].) The “at the direction of” alternative is also inapplicable because it similarly requires multiple actors. (See, e.g., *People v. Kopp* (2019) 38 Cal.App.5th 47, 71, review granted Nov. 13, 2019, S257844 [finding substantial evidence that conspiracy to commit murder was committed at the direction of a gang because order came from Mexican Mafia shot caller who told defendant to relay order to kill target].) This leaves the prosecution with only one option to prove the gang enhancement in lone-actor cases: that the crime was “committed for the benefit of . . . any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).)

The narrower path to a true finding on the gang enhancement in lone-actor cases makes, or *should* make, proving the enhancement more difficult. In a multi-actor case, the prosecution can prove that the crime was gang related under the association alternative by *direct* evidence of how the crime was committed and will not have to present additional evidence that the defendants intended to benefit the gang. (*Morales, supra*, 112 Cal.App.4th at p. 1198 [holding in a multi-actor case where association was proven,

“specific intent to *benefit* the gang is not required. What is required is [prong 2] the ‘specific intent to promote, further, or assist in any criminal conduct by gang members’”]; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 424, disapproved on another ground in *People v. Valencia* (2021) 11 Cal.5th 818, 835, [same].) If the prosecution does seek to prove a benefit in a multi-actor case, the evidence that supports the association alternative is also circumstantial evidence that the crime was committed “for the benefit of” the gang. (See *Albillar, supra*, 51 Cal.4th at pp. 63-64.) Thus, *Albillar* found the “for the benefit” alternative supported by the fact that the crimes were committed by three gang members and the victim was aware of two defendants’ membership. (*Ibid.*) This Court noted the gang expert’s testimony that a violent crime by three gang members elevates the reputation of the individuals, and the overall entity benefits from the “reputation to be a violent, aggressive gang . . .” (*Id.* at p. 63; but see, § 186.22, subd. (g) [AB 333 amended STEP Act to limit the use of reputational theories: “benefit . . . means to provide a common benefit to members of a gang where the common benefit is more than reputational”].)

In lone-actor cases, however, the prosecution cannot rely on group action. The prosecution must prove both prongs of the enhancement, and the only way to do so is to present circumstantial evidence of the defendant’s mental state. (See *People v. Miranda* (2011) 192 Cal.App.4th 398, 411 [“There is rarely direct evidence that a crime was committed for the benefit of a gang”]; *Rios, supra*, 222 Cal.App.4th at pp. 567-568, quoting *People v. Pre* (2004) 117 Cal.App.4th 413, 420 [“as to the specific intent prong, . . . [i]ntent is

rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense”].)

B. In lone-actor cases, the “for the benefit” alternative is the only applicable alternative, and it requires the prosecution to prove the defendant committed the crime with a particular mental state—the purpose or intent to benefit a gang.

Following *Albillar*, courts began to refer to the prongs as “the gang-related prong” and the “specific intent prong.” (See, e.g. *Rios*, *supra*, 222 Cal.App.4th at p. 564 [citing *Albillar*, “the prosecution must prove that the underlying crime was ‘committed for the benefit of, at the direction of, or in association with any criminal street gang’ (the gang-related prong), ‘with the specific intent to promote, further, or assist in any criminal conduct by gang members’ (the specific intent prong)].) While useful shorthand, to the extent the designations “gang-related prong” and “specific intent prong” suggest that a showing of intent is not required to prove the first prong as to a lone actor, it is a misnomer. In a lone-actor case the gang-related prong also requires a showing of intent—that the defendant committed the crime with the purpose or intent to benefit the gang. (See *People v. Rivera* (2019) 7 Cal.5th 306, 332 (“*Rivera*”) [“A reasonable jury could infer from this evidence that [the lone-actor defendant] specifically intended the murder to benefit and promote the gang”].) But this Court has not explicitly held this, and it is not always clear from lower court opinions, including the opinion below.

The phrase—“committed for the benefit”—is not defined in the statute. “When interpreting statutes, we begin with the plain, commonsense meaning of the language used by the Legislature. [Citation.] If the language is unambiguous, the plain meaning controls.” (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519.) The phrase “committed for the benefit of . . . any criminal street gang” is unambiguous. The plain meaning of the statute’s words supports the conclusion that, to establish this element, the prosecution must prove that the crime was committed with the purpose or intent to benefit a gang. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919 [a statute’s words are “giv[en] . . . their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent”]; *People v. Traylor* (2009) 46 Cal.4th 1205, 1212 [“If the language of the statute is not ambiguous, the plain meaning controls. . .”]; accord *Albillar, supra*, 51 Cal.4th at pp. 54-55; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1131-1133 (plur. opn of Corrigan, J.) (“*Rodriguez*”).)

A “benefit” is “something that produces good or helpful results or effects or that promotes well-being.”⁴ The preposition “for” connects the words “committed” and “the benefit of . . . any criminal street gang.” It serves as a function word to indicate that the

⁴ “Benefit” Merriam-Webster.com (2022) <https://www.merriam-webster.com/dictionary/benefit?src=search-dict-box>, as of Feb. 7, 2022.

purpose or intended goal of the commission of the offense must be to benefit the gang. (See, e.g., *Lawson v. Fortis Ins. Co.* (3d Cir. 2002) 301 F.3d 159, 165 [“[t]he word ‘for’ connotes intent”]; *Reich v. Compton* (3d Cir. 1995) 57 F.3d 270, 279 [“for the benefit” must be construed to “require[] proof of a subjective intent to benefit”].)

This Court recently highlighted the difference between general intent and specific intent crimes. It explained that “general criminal intent” means that “the defendant intentionally d[id] the act which constitutes the crime,’ [and] the government need not prove his precise purpose for doing it.” (*People v. Fontenot* (2019) 8 Cal.5th 57, 66 (“*Fontenot*”), citing *People v. Bailey* (2012) 54 Cal.4th 740, 749.) A specific intent crime, however, requires a showing of “a conscious design or purpose” in addition to the intentional commission of a criminal act. (*Id.* at p. 66, citing *People v. Pool* (1865) 27 Cal. 572, 585 [defining “specific intent” as a “design or purpose” of achieving a particular—usually harmful—end].) The difference, this Court explained succinctly, “is the distinction between (i) merely committing a physical act intentionally and (ii) engaging in goal-oriented, purposive thinking.” (*Fontenot, supra*, 8 Cal.5th at pp. 66-67.) The words “committed for the benefit . . . of any criminal street gang” mean engaging in the goal-oriented thinking of committing a crime for the purpose of benefitting a gang.

A statute need not include the words “purpose,” “intent,” or “specific intent,” to convey that a mental state beyond the mere intentional commission of an act is required. *People v. Hering* (1999) 20 Cal.4th 440 (*Hering*) is instructive on this point. The defendant was charged with unlawfully offering a “rebate . . . or other

consideration ... as inducement” for referring patients, and the Court was called on to decide whether the statute required a specific mental state beyond the mere intent to commit the acts. This Court cautioned against “rote application” in interpreting statutes. (*Id.* at p. 445.) It recognized that to understand the statutory language describing criminal conduct it was necessary to consider “any express or implied reference to mental state.” (*Id.* at p. 445, emphasis added.) Although the statute did not include language that typically denotes specific intent crimes, like “with the intent” to achieve or “for the purpose of” achieving some further act, this Court concluded nevertheless that “to offer some form of consideration as inducement for referrals does connote an ‘intent to . . . achieve some additional consequence.’” (*Id.* at pp. 446-447.)

The preposition “for” used by the Legislature in the benefit alternative to the first prong of the gang enhancement is therefore an intent requirement. To commit a crime *for the benefit of* a gang means more than being a gang member and committing a crime and more than that the crime benefitted the gang whether the defendant intended this consequence or not. This language requires that the crime was committed with the additional purpose or intent that the act benefit a criminal street gang.

Although this Court has not directly addressed what mental state is required by the benefit alternative to the first prong in a lone-actor case, opinions by this Court support the conclusion that purpose or intent to benefit the gang is required. While admittedly not holdings on the issue, two opinions show that the plain meaning of the language “committed for the benefit of” a gang requires a

showing that the defendant had the purpose or intent to benefit the gang, not simply that the crime may have benefitted the gang in some way. As previously noted, in *Rivera*, a lone-actor case in which the defendant shot and killed a police officer, this Court concluded that “[a] reasonable jury could infer from [the] evidence that [the defendant] specifically intended the murder to benefit and promote the gang.” (*Rivera, supra*, 7 Cal.5th at p. 332.)

In *People v. Sanchez* (2016) 63 Cal.4th 665, also a lone-actor gang case, after announcing a reversal in the proper use of expert hearsay evidence, this Court turned to the question of whether the inadmissible hearsay evidence at issue was harmless. (*Id.* at pp. 698-699.) This Court rejected the argument that non-hearsay evidence that the defendant was arrested in gang territory with drugs in saleable quantities and a weapon was itself sufficient to support the gang enhancement. In doing so, the Court explained, “[a] drug dealer may possess drugs in saleable quantities, along with a firearm for protection, regardless of any gang affiliation, and *without an intent to aid* anyone but himself.” (*Id.* at p. 699, emphasis added.) Like the *Rivera* opinion, *Sanchez* did not directly address the question of the mental state required by the benefit alternative, but the opinion’s language, nevertheless, strongly suggests that, in a lone-actor case, the prosecution must prove a defendant committed the crime with the purpose or intent to benefit the gang.⁵

⁵ Respondent has tacitly conceded the point. Respondent agrees that a true finding as to a gang enhancement hinges on the defendant’s intent. (See Answer Brief, pp. 7-8, 11, 37.) In discussing

C. The Court of Appeal opinion leaves unclear what mental state is required to prove the “for the benefit” alternative in a lone-actor case.

Returning to the present case, the Court of Appeal’s opinion leaves unclear whether the court determined sufficient evidence supported the “for the benefit” alternative either 1) because the evidence proved the gang would have benefitted in some way from the crime; or 2) because the evidence proved that appellant committed the crime with the intent to achieve that benefit for the gang. (See Opn., p. 15 [“[the gang expert] testified concerning how the charged crimes benefited the Sureño criminal street gang, even if they were not committed against rival gang members”].) Notably, in reaching its result, the opinion does not cite any cases involving lone actors to support its holding.

Both the mental state required and the evidence with which it can be proven are muddled in the Court of Appeal’s opinion. As an initial matter, the gang expert’s testimony “concerning how the charged crimes benefited the Sureño criminal street gang, even if they were not committed against rival gang members,” runs afoul of the new requirement following AB 333 that “benefit . . . means to provide a common benefit to members of a gang where the common benefit is more than reputational.” (§ 186.22, subd. (g).)

the use of gang expert testimony in *Albillar*, Respondent states, “Because the expert opinion, when viewed with the other evidence, supported the inference that the defendants’ actions benefitted their gang, the jury could infer that they intended that benefit, and sufficient evidence supported the benefit prong of the gang enhancement.” (Answer Brief, p. 27.)

But even setting aside AB 333, the evidence below simply does not support the first prong's mental state requirements for lone-actor cases. Events witnessed leading up to the shooting indicated there was gang activity in the neighborhood (see, e.g., Opn., p. 3, [neighbor testified he heard "SUR, trece" being shouted]) and perhaps that the defendant was the victim of a gang harassment or violence (see Opn., p. 6 [appellant told gang expert "he 'got hit up' and heard a noise like a shotgun, and he ran"]). But nothing about the shooting itself supports an inference that it was committed to benefit the gang as opposed to being a personal dispute between the shooter and his target. The shooter was not heard to call out a gang slur or otherwise identify himself or his gang. (See Conc. & Dis. Opn. of Smith, J., p. 14 [gang expert incorrectly "assumed that *the shooter* shouted SUR trece *when* he committed the shootings, and, based on that assumption, opined that the shootings benefitted the Sureño gang"].) And there was no evidence to support that another *gang member* was present to witness the crime to report back to the gang for the participants to receive credit. (See *Perez, supra*, 18 Cal.App.5th at p. 610 ["glaring absence of evidence connecting the shooting to a gang, other than the mere fact the perpetrator was a gang member, leaves the evidence woefully short of the sufficiency needed to sustain the enhancement"].) Indeed, the resident of the house upon which the defendant fired, Jack. D., was not even a gang member.

The tenuous evidence cited by the court tying Jack D.'s house to the rival gang is the discovery of a weapon in Jack D.'s garage, and a gang expert's testimony that two of Jack D.'s grandsons "lived

at or were associated with the house” and the gang expert had seen one of these grandsons “associating with” Norteños. (Opn., pp. 12, 15; see Conc. & Dis. Opn. of Smith, J., p. 13 [“[t]he [trial] court agreed [expert’s] hypothetical was inaccurate to the extent it represented [Jack D.’s house] [was] associated with Norteño gang activity”].) Again, these facts do nothing to prove the grandsons were the owners of the weapon or the target of the shooting. And even if it did, there was no substantial evidence that the grandsons were even gang members: one had merely been seen “associating with” gang members. This evidence fails to prove that appellant believed that anyone in Jack D.’s household was in fact a member of a rival gang, or that these individuals were responsible for the earlier attack or threats against him, or that appellant was retaliating for these prior acts, much less acting to benefit his own gang, in shooting at the house.

The evidence of a connection between the alleged prior assault and the shootings at Jack D. and Harvey’s houses was speculative and insubstantial. There was a break in time and location between when the “pop” was heard in the field and when Jack D.’s house was shot at. (Opn., p. 4.) The Court of Appeal reasoned that the jurors could have inferred that appellant lied about where he was “hit up” based on him lying about where his girlfriend lived and not wanting to put himself at the scene. (Opn., p. 15.) But even assuming the defendant was lying about the location of the prior assault, there is no evidence that appellant was aware that Jack D.’s house was associated with “Northerners” or that the sawed-off shotgun was associated with that gang or the defendant being “hit up” earlier.

(See Conc. & Dis. Opn. of Smith, J., p. 16 [“Not only did the evidence not show that the earlier incident occurred ‘minutes’ before the shootings, but the record did not disclose substantial evidence to connect the earlier incident to the shootings.”].) Accordingly, there was insufficient evidence to prove that appellant committed the shooting for the benefit of a gang, as required to establish the first prong of the gang enhancement. (See *Rios, supra*, 222 Cal.App.4th at p. 564 [“A trier of fact may rely on inferences to support a conviction only if those inferences are ‘of such substantiality that a reasonable trier of fact could determine beyond a reasonable doubt’ that the inferred facts are true.”]; see also *Perez, supra*, 18 Cal.App.5th at p. 607; cf. *People v. Prunty* (2015) 62 Cal.4th 59, 67 [defendant identified as a Norteño, claimed membership in a particular Norteño subset, and had “uttered gang slurs and invoked ‘Norte’ *when* shooting a perceived rival gang member,” italics added].)

“The gang enhancement can be applied to a lone actor; however, appellate courts have—with increasing frequency—reversed gang enhancements for insufficient evidence when the defendant did not commit the underlying crime in concert with other gang members.” (*People v. Soriano* (2021) 65 Cal.App.5th 278, 285 [collecting cases].) This Court must clarify the mental state required for the first prong of the enhancement to provide guidance to prosecutors, trial courts, and lower appellate courts and to prevent the racially disparate over-charging of gang enhancements against lone actors.

III. THE SECOND PRONG OF THE GANG ENHANCEMENT REQUIRES PROOF THAT THE LONE-ACTOR DEFENDANT HAD THE MENTAL STATE OF AN AIDER AND ABETTOR: THEY INTENDED THEIR CRIME TO ASSIST OTHER GANG MEMBERS TO COMMIT ANOTHER SPECIFIC OFFENSE

The second prong—requiring “specific intent to promote, further, or assist in any criminal conduct by gang members” — focuses on how the defendant’s offense relates to crimes committed by members of the gang. To discern the meaning of this requirement, the Court should consider the words used in the statute and prior interpretations of those words in related statutes, all with a view to carrying out the law’s purpose. These principles lead to the following conclusion: the second prong requires proof that the defendant committed their crime with a mental state like that of an aider and abettor, in that they intend to facilitate a specific crime that gang members would commit. In practice, if the defendant is alone, this means they must intend their crime to facilitate some *other* specific crime committed by a gang member.

A. The second prong describes a mental state akin to aiding and abetting.

The meaning of the second prong can be determined by applying common rules of statutory construction. The goal of statutory construction “is to determine the Legislature’s intent so as to effectuate the law’s purpose.” (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141.) The Court must start with the plain meaning of the statute because it is “the most reliable indicator of legislative intent.” (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) The meaning

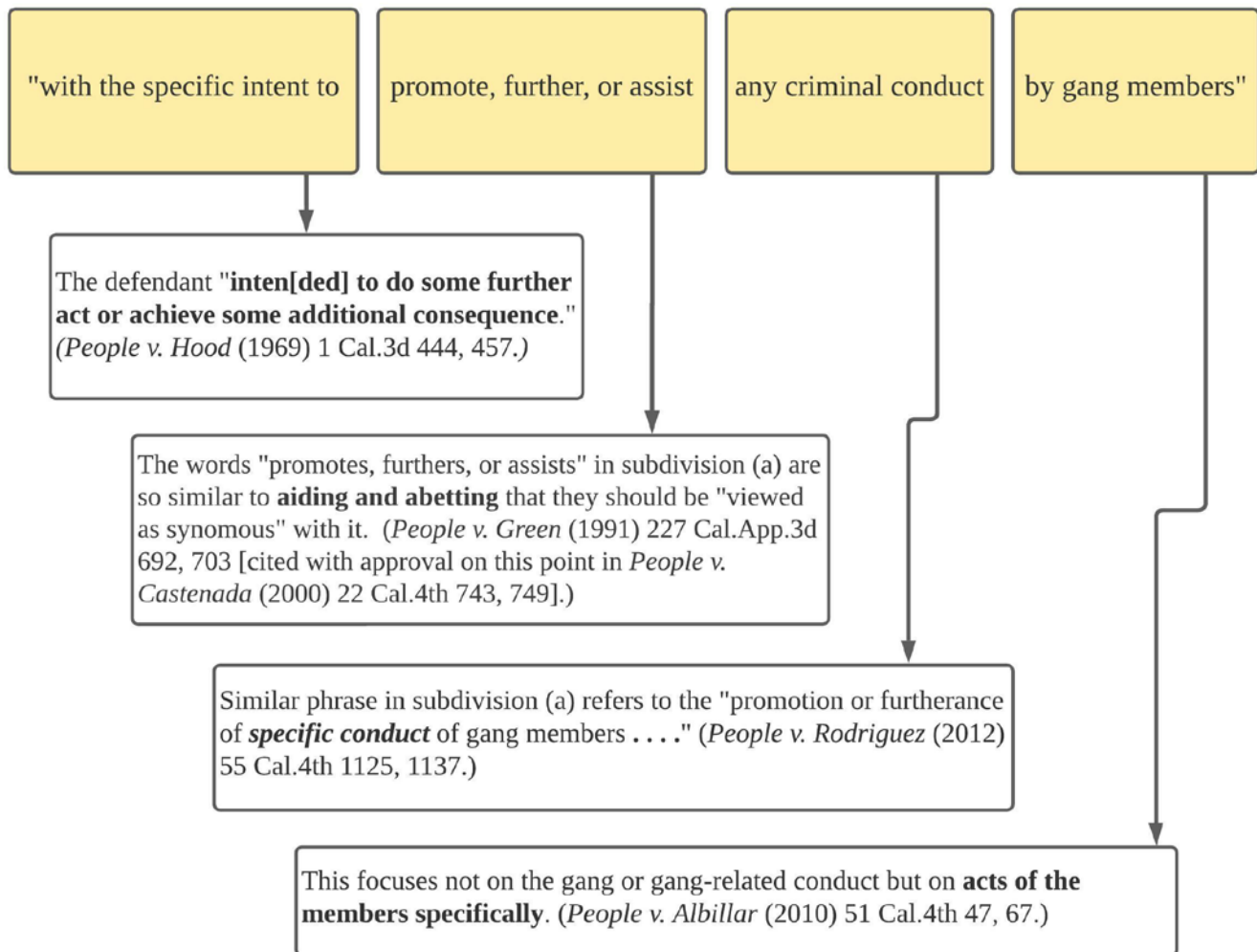
of statutory phrases may be discerned from their use in related statutes: “[o]ne of the fundamental rules of statutory construction is that interrelated statutory provisions should be harmonized and that, to that end, the same word or phrase should be given the same meaning within the interrelated provisions of the law.” (*People v. Elliott* (1993) 14 Cal.App.4th 1633, 1641, fn. 7.) In short, if a court has already interpreted words in a related statute, that interpretation should guide the Court’s analysis.

The second prong of the gang enhancement requires proof that the defendant acted: “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).)

These words mean that the defendant must commit the current offense with a mind to assisting some other persons who are gang members to commit a crime. They describe a mental state akin to that of an aider and abettor. This will be spelled out below, but the following graphic summarizes how courts have construed these words:

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The Legislature used the words “specific intent” in the first phrase, and in doing so it drew on the long chain of cases interpreting the words. The phrase means that the defendant commits a crime “inten[ding] to do some further act or achieve some additional consequence.” (*People v. Hood* (1969) 1 Cal.3d 444, 457; see *Fontenot, supra*, 8 Cal.5th at pp. 66-67 [specific intent refers to “goal-oriented, purposive thinking”].) When this phrase is included in a criminal statute, it means that the prosecutor must prove not just that the defendant acted intentionally but also that he or she had a specific goal in mind, something beyond the act itself.

The next two phrases explain what the defendant’s goal must be: he or she must specifically intend to “promote, further, or assist any criminal conduct ...” (§ 186.22, subd. (b).) These words also draw on a long chain of prior law, this time describing the concept of aiding and abetting. A person aids and abets a crime when they act with the intent to help the perpetrator commit it. (*People v. Beeman* (1984) 35 Cal.3d 547.) Courts have used each of the words in the second prong to describe aiding and abetting. An aider and abettor is one who “promotes” another’s crime, or one who “furthers” that crime, or one who “assists” it. (*Id.* at pp. 557, 560 [using each of these words to describe aiding and abetting liability].) These words all mean essentially the same thing: that the defendant seeks by their action to help another engage in criminal conduct.

The Court has already held that these words in the STEP Act draw on the law of aiding and abetting. *People v. Castenada* analyzed section 186.22, subdivision (a), which creates a substantive offense that applies when an active participant in a street gang willfully “*promotes, furthers, or assists in any felonious criminal conduct*” by members of the gang. (*People v. Castenada* (2000) 23 Cal.4th 743, 749, 752, italics added (“*Castenada*”).) As can be seen, the provision uses the same verbs as the enhancement, but in a different tense. *Castenada* explained that “every person incurring criminal liability under section 186.22(a) has aided and abetted a separate felony offense committed by gang members.” (*Ibid.*) The Court cited *People v. Green*, which had held that the words in section 186.22 are so similar to words used to describe aiding and abetting that they should be treated as “synonymous” with it. (*Id.* at

p. 749⁶, citing *People v. Green* (1991) 227 Cal.App.3d 692, 703-704.)

A person liable under section 186.22 would “also have to be criminally liable as an aider and abettor to any specific crime committed by a member or members of a criminal street gang.”

(*People v. Green, supra*, 227 Cal.App.3d at p. 704.)

When the same words used in subdivision (a) appear again one sentence later, in subdivision (b), common rules of statutory construction suggest that they should mean the same thing. (*People v. Partee* (2020) 8 Cal.5th 860, 868-869 [holding that a phrase used in section 32 must be construed to have the same meaning as in section 31].) They refer to assistance provided with the intent to help another person commit a crime—to aiding and abetting.

This Court recognized as much in *People v. Gardeley* (1996) 14 Cal.4th 605, 624, fn. 10, when it upheld the gang enhancement against a constitutional challenge. The Court reasoned that the enhancement does not punish defendants merely for the acts of their associates. Instead, it “increases the punishment for a defendant who committed a felony *to aid or abet* criminal conduct of a group ..., and who acted with the specific intent to do so.” (*Ibid.*, italics added.)

The key difference between the subdivision (a) substantive offense and the subdivision (b) enhancement is that the substantive offense describes a completed act of aiding and abetting, while the

⁶ *Castenada* overruled *Green* on another point relating to the definition of the phrase “active participant.” (*Castenada, supra*, 23 Cal.4th at p. 752.) However, as noted, it cited with approval *Green*’s holding that connected section 186.22, subdivision (a) to aiding and abetting law. (*Id.* at p. 749.)

enhancement requires only an intent to aid and abet. In other words, the second prong echoes the *mental state* of aiding and abetting. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1132 [aiding and abetting requires a specific intent to aid the perpetrator].)

The Court has also construed the phrase “any felonious criminal conduct” in section 186.22, subdivision (a) in keeping with aiding and abetting law. It has held that this phrase requires that the defendant intend to facilitate a *specific, identifiable crime*. In *People v. Rodriguez*, the Court held that the substantive gang offense required proof that at least two members engaged in the crime at issue. (*Rodriguez, supra*, 55 Cal.4th at p. 1132 (plur. opn. of Corrigan, J.).⁷) The dissent urged a different result, pointing to the phrase “any felonious criminal conduct” and suggesting that it required only that the defendant “emboldens fellow gang members to commit other, unspecified crimes in the future and, thus, advances the gang’s overall felonious purpose.” (*Id.* at p. 1137 [internal quotations omitted].) Under the dissent’s reading of the statute, a defendant could achieve the required result alone, and without any specific crime having been facilitated.

But the majority of justices rejected this interpretation because it would have been inconsistent with cases like *Castenada*, which required proof that the defendant assisted a “specific felony.”

⁷ The concurrence in *Rodriguez* expressly agreed with the plurality’s statutory analysis. (*Rodriguez, supra*, 55 Cal.4th at pp. 1139-1140 (conc. opn. of Baxter, J.). In fact, the concurring justice wrote separately to state that the court could resolve the issue without resort to constitutional principles and based solely on the statutory analysis, which is described here. (*Ibid.*)

(*Rodriguez, supra*, 55 Cal.4th at p. 1137 (plur. opn. of Corrigan, J.)) It also would have rendered the phrase essentially void because “*every time* a gang member commits a felony, other members of the gang would be emboldened to commit felonies as well.” (*Ibid.*) Proving this element of the statute by showing a mere emboldening of non-specific crimes would do “little more than assert that the defendant is a gang member and that gangs, by definition, commit crimes as part of their primary activities.” (*Ibid.*) Thus, the Court rejected the claim that the prosecution could prove the defendant abets “any felonious criminal conduct” by gang members by merely emboldening nonspecific crimes. (*Ibid.*)

Rodriguez’s holding comported with the broader law of aiding and abetting, which has always required proof that the defendant intended to facilitate a specific crime. For instance, *People v. Prettyman* held that the prosecution could not prove aiding and abetting “based on the jury’s generalized belief that the defendant intended to assist and/or encourage unspecified ‘nefarious’ conduct.” (*People v. Prettyman* (1996) 14 Cal.4th 248, 268.) Because the substantive gang offense mirrors the law of aiding and abetting, it should likewise require that a defendant “promote, further, or assist” a *specific* crime.

Thus, when a court considers what evidence is required to substantiate the gang enhancement, it should also require evidence that the defendant specifically intended to assist, not general criminality, but a specific offense. AB 333 amplifies this principle. A key purpose of the statute was to require that prosecutors prove gang enhancements with evidence that ties the defendant to the

gang more concretely and less abstractly. (AB 333, § 2 (g) [“As a result of lax standards, STEP Act enhancements are ubiquitous.”].) This led, for instance, to the requirement that the benefit to the gang be more than reputational. (§ 186.22, subd. (g).) The second prong, as read here, grows out of the same understanding that gang enhancements should apply only where the defendant’s acts demonstrate a concrete connection to a gang and its crimes.

The final requirement of the second prong is to specify the persons whom the defendant must intend to aid. The enhancement applies only if the defendant seeks to facilitate specific crimes committed by “gang members.” (§ 186.22, subd. (b)(1).) This language is meaningful. It requires that the defendant set out to assist a particular set of persons. (*Albillar, supra*, 51 Cal.4th at p. 67.)

Giving specific meaning to the term “members” is important because the STEP Act—and gang experts—describe several different classes of persons affiliated with a gang. The statute itself describes some individuals as “active participants,” or persons who need not be true members but who participate in the gang’s activities. (§ 186.22, subd. (j).) The STEP Act also describes a class of persons as “associates,” who also might not be members but who participate in the gang sufficiently to be included in shared gang databases. (§ 186.34, subd. (a)(2).) Gang officers often describe persons as “wannabes” (*People v. Ortega* (2006) 145 Cal.App.4th 1344, 1357), affiliates (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1355), or gang sympathizers (*People v. Ramirez* (2016) 244 Cal.App.4th 800, 819). For instance, the opinion here states that the

gang expert described the grandson of the homeowner whose house was shot at by the defendant not as a member, but as an individual “associating with” a street gang. (Opn., p. 12.) The gang enhancement excludes all of these as objects of the defendant’s assistance.

The defendant may be punished more harshly only if he or she commits a crime to aid and abet the crimes of the more limited class of persons who are “members.” (§ 186.22, subd. (b).) The limitation was deliberate. Early versions of the STEP Act referred to “members or participants.” (Sen. Bill No. 1555 (1987-1988 Reg. Sess.) as amended May 22, 1987, § 1, pp. 10-11.) But when the Legislature finalized the STEP Act, it eliminated the words “or participants” from the substantive offense and gang enhancement. (Sen. Bill No. 1555 (1987-1988 Reg. Sess.) as amended June 23, 1987, § 1, pp. 5-6.) With this change, the Legislature drew a sharper line between the categories of persons associated with the gang, and it established that the enhancement may apply only when the defendant seeks to promote the crimes of the subset of persons deemed to be members. (*Albillar, supra*, 51 Cal.4th at p. 57 [holding that the deletions of phrases from § 186.22 during the legislative process were “significant indicia of legislative intent”].)

While this Court has not defined the term “member,” its plain meaning implies a connection to the gang that is close and lasting. A “member” must be distinct from mere associates or individuals who

have simply been participants in gang activity without becoming members of the gang. (Cf. § 186.22, subd. (j); § 186.34, subd. (a)(2).)⁸

When the language used in the statute is read together, the requirements of second prong are evident: proof that defendants committed their current offense to aid and abet a specific crime that will be committed by members of the gang.

B. When a gang member commits a crime alone, his intent to facilitate must point to *another* specific crime, outside the current offense.

When defendants commit a crime with other gang members, their intent to help gang members commit a crime can be inferred more easily. After all, they act with other members at the time of the offense. This was the case in *Albillar*, where the Court found that the specific intent to assist gang members commit a crime was established by a rape in concert by members of the same gang. (*Albillar, supra*, 51 Cal.4th at p. 68.) Each defendant’s intent to facilitate other gang members’ crimes could be inferred from the fact that members all assisted one another in the current offense. (*Ibid.*)

For a gang member acting alone, however, there is no inference to be drawn from acts in concert. (See *In re Daniel C., supra*, 195 Cal.App.4th at p. 1361 [distinguishing *Albillar* because the defendant committed the offense alone, and thus the court could

⁸ Notably, the STEP Act also requires proof that “members,” rather than other participants, have committed the crimes that form the pattern of criminal activity, which is a key element of the definition of “criminal street gang.” (§ 186.22, subd. (f).) Without proof of the acts of this core subgroup, the group would not qualify as a gang at all.

not infer a specific intent to assist other members involved in the crime].) The Court of Appeal noted this in *People v. Rios*, which found insufficient evidence of the second prong where the defendant possessed a stolen car and a gun when alone. (*Rios, supra*, 222 Cal.App.4th at p. 563.) Because there were no other members assisting one another in the offense, the fact of the crime alone could not establish that the defendant had the intent to assist other members.⁹ (*Ibid.*) *Rios* thus recognized that the way the intent is proven must change when the defendant acts by himself, and it held that the facts presented in that case fell short. (*Id.* at pp. 574-575.)

The analysis laid out in this brief shows what must be proven in lone-actor cases. In addition to proving the first prong—that the defendant committed the current offense to benefit the gang—the prosecution must also prove that the defendant intended the current offense to facilitate some *other* specific offense by gang members.

How that might be proven will vary with the facts of each case, but the Court of Appeal opinion here serves as an example of errors that can arise in applying the gang enhancement to a lone actor.

⁹ As *Rios* noted, this Court held in *Rodriguez* that a person could be subject to a gang enhancement if they committed a crime alone. (*Rodriguez, supra*, 55 Cal.4th at 1138.) The enhancement focuses on the person’s specific intent to facilitate a crime, which is a mental state the defendant could exhibit even when acting alone. (*Id.* at p. 1138 (plur. opn.) and 1141, (conc. opn. of Baxter, J.) [noting that the enhancement differs from the substantive offense in that it describes a culpable mental state].) The question addressed here is what evidence is sufficient to prove that specific intent.

The Court of Appeal held that the second prong was proven because the jury could infer that, by shooting at two houses, appellant meant to assist his own crimes. The opinion states that appellant shot at Jack D.'s house and then shot at the house next door when a dog barked. (Opn., p. 4.) The opinion held that each shooting was subject to the gang enhancement on the theory that appellant set out to "further" his own criminal conduct. (*Id.* at p. 16.) The court cited *People v. Hill* (2006) 142 Cal.App.4th 770, 774 (*Hill*), which held that the enhancement applied to a lone-acting gang member convicted of criminal threats because that crime was, in itself, the crime the defendant furthered. This reasoning contains two errors. First, it ignores the words of the second prong, which require proof that the defendant intended to aid the crimes of "gang members." The use of the plural shows that the second prong cannot be proven if the defendant seeks only to help his own crimes. (Cf., *People v. Rodriguez, supra*, 55 Cal.4th at p. 1132 (plur. opn. of Corrigan, J.) [holding that the word "members" in section 186.22, subdivision (a) requires proof of two gang members acting together].¹⁰) The opinion here erred in suggesting that, in either shooting, appellant could have furthered his own conduct.

Second, and more fundamentally, the reasoning ignores the principles of aiding and abetting on which section 186.22 is textually

¹⁰ In the substantive offense, the word "members" is the object of the defendant's actual assistance, leading the Court to hold that the multiple actors must be involved in the current offense. (*Ibid.*) By contrast, in the gang enhancement, the word "members" is the object of the defendant's intent, and so his intent must be to assist more than just himself.

founded. The suggestion that appellant could “promote, further, or assist” his own crime embraces the same illogic as would a holding that he could aid and abet himself. (*U.S. v. Castillo-Felix* (9th Cir. 1976) 539 F.2d 9, 12, fn. 2 [“it seems axiomatic that defendant could not aid and abet himself”].) The connection between aiding and abetting law and the gang enhancement grows out of their common goal of punishing joint criminal activity. (§ 186.21 [the goal of the STEP Act was to focus on “patterns of criminal gang activity and upon the organized nature of street gangs”].) Courts do not advance the purpose of the STEP Act by applying it to cases where the defendant does not intend joint criminality; nor do such cases prove the second prong of the gang enhancement.

Similarly, both the court here and the court in *Hill* misconstrued the word “any” in the phrase “any criminal conduct.” (Opn., p. 16; *Hill, supra*, 142 Cal.App.4th at p. 774.) They read it to mean that the prosecution must be permitted to prove the enhancement with the facts of the current offense in every case—that the prosecution is never required to show that the defendant’s intent pointed to another specific offense. (*Ibid.*) This is wrong. The phrase “promote, further, or assist” carries its own meaning and force. The word “any” permitted the prosecution to prove that facilitation by relying on the current crime in *multi*-actor cases, where other actors were simultaneously committing their own crimes. It ensured that the prosecution was not required to prove that the defendant intended some other offense, if the facts of the current case proved the second prong. (*Albillar, supra*, 51 Cal.4th at pp. 66-67.) But the word “any” did not relieve the prosecution of its

duty to prove that a defendant intended to facilitate criminal conduct by “gang members.” That duty exists even if the facts of the current offense do not establish it because the defendant acted alone. The court here and in *Hill*, though, read the word “any” as if it negated the prosecutor’s duty to prove that the defendant set out to help gang members commit a crime.

Even if the word “any” permitted the prosecutor to rely on a lone actor’s intent to further his own crime, the law has now changed. AB 333 removed the word “any” from the phrase “any criminal conduct.” (AB 333, Stats. 2021, Ch. 699, Sec. 3. Effective January 1, 2022.) Because courts such as *Hill* placed such heavy emphasis on the word “any,” its removal is significant. The effect on cases with multiple gang members need not be decided in this appeal. At a minimum, the removal of the word “any” undermines those lone-actor cases, such as the opinion below, that relied on it to punish defendants for facilitating their own crimes.

It has never been sufficient proof of the second prong that one can promote, further, or assist their own crime through the current offense simply because that crime was retaliatory or motivated by gang loyalties—in the sense that all retaliatory crime increases the general reputation of the gang for violence. (Cf. Opn. at p. 16.) The Court of Appeal found it significant that appellant’s shooting at a rival’s house in retaliation for an assault could be a “means of recouping respect for himself and for the Sureño gang.” (Opn., p. 16.) But this inference, even if it proved that the crime was gang-related as required by the first prong, would not show that the defendant specifically intended to further crimes by gang members. The

evidence of a retaliatory purpose to “recoup respect for ... the gang” does not prove the intent described by the second prong.

Moreover, AB 333 added further requirements to the second prong. (AB 333, Stats. 2021, Ch. 699, Sec. 3.) Newly enacted subdivision (g) of section 186.22 requires proof at both prongs that the defendant acted to provide a “common benefit” to gang members, beyond merely elevating the gang’s reputation. (*Ibid.*) Thus, after AB 333, a lone-acting member’s intent as to the current crime must be to provide a concrete benefit to gang members as part of the first prong. And his act of aiding and abetting, described by the second prong, must also be motivated by the desire to provide a “common benefit” to gang members. In other words, he must intend to aid and abet a future crime for the purpose of benefiting the gang, not its reputation. (*Ibid.*) The court here cited no evidence from which a jury could find this added intent.

It is also not sufficient to establish the second prong that the current offense was intended merely to “further[] ... [the] gang’s reputation and control of contested territory ...”, as the court here suggested. (Opn., p. 16.) The court stops short of explaining how the factors it cites could support the required inference that the defendant intended to facilitate a *crime* by gang members. Securing reputation and turf are not crimes in themselves, and the opinion points to no evidence of specific crimes that would be facilitated by the defendant’s “securing” of this turf through shooting at a non-gang members’ house. The court here held that the defendant “facilitate[ed] future crimes committed by himself and his fellow gang members.” (Opn., p. 16. [citing *People v. Vazquez* (2009) 178

Cal.App.4th 347, 353].) It did not say which crimes, or how. If the specific intent to facilitate a crime could be proven with evidence that the defendant created a mere atmosphere of criminality, then the element would be proven every time a gang member commits a crime. (See *Rodriguez, supra*, 55 Cal.4th at p. 1137 (plur. opn. of Corrigan, J.) [rejecting claim that section 186.22, subdivision (a) is proven when a defendant “emboldens” gang members to commit unspecified crimes because that would be true “*every time* a gang member commits a felony”].)

These problems all stem from the Court of Appeal’s failure to recognize the connection between the gang enhancement and established principles of joint criminality. As discussed above, this Court has turned repeatedly to the language of aiding and abetting to understand the STEP Act. It did so in one of its first cases addressing the gang enhancement. (*People v. Gardeley, supra*, 14 Cal.4th at p. 624, fn. 10.) The proof required then becomes clear: the prosecution must show that the defendant specifically intended the current crime to assist other members to commit other specific crimes. This also requires a showing that the defendant knew that members of his gang would commit the crime in question because “[o]ne cannot intend to help someone do something without knowing what that person meant to do.” (*People v. Mendoza, supra*, 18 Cal.4th at p. 1131.) In most cases, the proof would be circumstantial, meaning that the jury could not find the enhancement true unless the *only* reasonable inference to be drawn from the evidence was that the defendant had the required mental state. (*People v. Canizales* (2019) 7 Cal.5th 591, 606 [A “jury ... cannot find guilt

based on circumstantial evidence when that evidence supports a reasonable conclusion that the defendant is not guilty.”].)

The evidence in this case did not meet that standard because it showed no specific crime that the defendant set out to assist. Amicus asks the Court to recognize the failure of proof and to hold that the second prong requires a showing that the lone-acting gang member intended his current offense to facilitate another specific crime by his fellow gang members.

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CONCLUSION

For the reasons stated above, amicus asks the Court to hold that a prosecutor who charges a gang enhancement against a gang member who acted alone must prove that the defendant intended both to benefit the gang as a whole and to aid and abet other members in committing a target offense. This reading of the statute comports with the legislative purpose of the STEP Act, the plain meaning of the statute's language, and the way this Court has previously interpreted the words used in the gang enhancement. Moreover, this reading ensures that gang enforcement goes as far as the Legislature intended, but not further. It ensures harsh punishment is meted out carefully. And so, it comports with the intentions of the Legislature that created the STEP Act and the Legislature that recently sought to rein it in.

Dated: February 7, 2022

Respectfully submitted,

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/s/
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CERTIFICATE OF COUNSEL

I, Hassan Gorguinpour, have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated word count, I certify that this brief is 10,242 words in length, excluding the tables and this certificate.

Dated: February 7, 2022

Respectfully submitted,

/s/

HASSAN GORGUINPOUR
Supervising Deputy State
Public Defender

DECLARATION OF SERVICE

Case Name: ***People v. Renteria***
Case Number: **Supreme Court Case No. S266854
Tulare County Superior Court No.
VCF304654
5DCA Case No. F076973**

I, **Christopher Gonzalez**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95820. I served a true copy of the following document:

**AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE
PUBLIC DEFENDER IN SUPPORT OF APPELLANT
CRISTIAN RENTERIA**

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Hon. Kathryn Montejano
Judge of the Superior Court
Tulare County Judicial District
Department 10
221 S. Mooney, #209
Visalia, CA 93291

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **February 7, 2022**, at Sacramento County, CA.

Christopher
Gonzalez

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CHRISTOPHER GONZALEZ

STATE OF CALIFORNIA
Supreme Court of California

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Case Name: **PEOPLE v.
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Gorguinpour, Hassan (230401)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm