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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

COREY RAY JOHNSON et al.,

Defendants and Appellants.

Case No. S202790

Fifth Appellate District, Case No. F057736
Kern County Superior Court, Case Nos. BF122135A, BF122135B & BF122135C
The Honorable Gary T. Friedman, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
SUSAN LEE
Acting Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General
LAURA WETZEL SIMPTON
Deputy Attorney General
State Bar No. 197674
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-3674
Fax: (916) 324-2960
Email: Laura.Simpton@doj.ca.gov
Attorneys for Respondent

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ISSUE PRESENTED

Whether a charge of conspiracy to commit a gang crime,[1] as plainly defined by Penal Code sections 182 and 186.22, subdivision (a), constitutes a per se invalid offense that is implicitly barred by statutory and constitutional law?

STATEMENT OF THE CASE

Defendants Corey Ray Johnson, Joseph Kevin Dixon, and David Lee, Jr., were members of the "Country Boy Crips" criminal street gang in Bakersfield. Over a six-month period, the threesome committed escalating violent offenses directed at two rival gangs, the "Bloods" and the "Eastside Crips." The defendants' crime spree ultimately resulted in three premeditated murders, whose victims included a pregnant mother and her unborn child, and three attempted murders. (Opn. at 5-85.)

On March 21, 2007, Lee drove Johnson over to an apartment complex on Monterey Street, where Johnson ran up to Blood member Edwin McGown and shot him three times. (Opn. at 5-7.) Johnson then ran back to Lee's waiting car, and the two fled the area. (*Ibid.*) The next night on March 22, Lee and Johnson were standing on Deborah Street, near a home frequented by Bloods, when Lee was shot in the arm. (Opn. at 7-9.) Less than a month later on April 19, Lee drove Johnson and Dixon to McNew Court, where Eastside Crip members frequently congregated. (Opn. at 9-21.) Johnson stashed his jacket with Dixon's cell phone beneath a parked

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[1] Throughout this brief, respondent uses the shorthand "*gang crime*" to refer to the substantive offense created by subdivision (a) of Penal Code section 186.22. This terminology, which appears in *People v. Mesa* (2012) 54 Cal.4th 191, 196, appropriately emphasizes that a violation of subdivision (a), requires not only the defendant's active participation in the gang, but also the defendant's promotion, furtherance, or assistance of any felonious conduct by members of that gang. (Pen. Code, § 186.22, subd. (a).)

car. (*Ibid.*) Immediately thereafter, Johnson and Dixon walked up to a group that included some Eastside Crip members, and both defendants started shooting. (*Ibid.*) Anthony Lyons was struck once, and James Wallace, Vanessa Alcala, and Baby Alcala were fatally injured. (*Ibid.*) Johnson and Dixon fled the area with Lee as their getaway driver. (*Ibid.*) Several months later on August 9, 2007, Johnson, Dixon, and Lee drove around together, while armed, searching for a rival gang member whom they suspected of killing another Country Boy Crip. (*Ibid.*) On August 11, 2007, Lee drove Johnson and Dixon in a red Corolla along South Real Road, in pursuit of Adrian Bonner, who was associated with the Bloods and had previously dated Lee's girlfriend. (Opn. at 22-30.) When Lee caught up to Bonner, Johnson rolled down the window and fired at least once, striking Bonner in the chest and leaving him paralyzed for life. (*Ibid.*)

All three defendants were indicted in 2008 on multiple counts of special-circumstance murder, attempted murder, and other related offenses with gang enhancements (i.e., Pen. Code, §§ 186.22, subd. (b), 187, 190.2, subd. (a)(3), (a)(2), 664/187, 246). (10CT 2768-2780.) Count 9 alternatively charged the defendants with conspiracy to commit a murder and/or assault with a firearm and/or a robbery and/or a gang crime (i.e., Pen. Code §§ 182, 186.22, subd. (a), 187, subd. (a)(1), 245, subd. (a)(2)). (1CT 21-23.) The following six overt acts were alleged in support of count 9: (1) Johnson and/or Lee were present near Monterey Street on March 21, 2007; (2) Johnson and/or Lee were present on Deborah Street on March 22, 2007; (3) Johnson and/or Lee and/or Dixon were present at McNew Court on April 19, 2007; (4) Johnson left clothing near McNew Court on April 19, 2007; (5) Johnson and/or Lee and/or Dixon were present in a red automobile on South Real Road on August 11, 2007; and (6) Johnson and/or Lee and/or Dixon were together in a motor vehicle on

August 9, 2007. (1CT 22-23.) Count 11 also charged the defendants with a gang crime (Pen. Code, § 186.22, subd. (a)). (1CT 26.)

Following a joint jury trial that lasted over four months, all three defendants were found guilty as charged. (10CT 2768-2780.) As a result, the trial court sentenced each of the defendants to three consecutive LWOP terms for the murders, plus additional terms for the remaining convictions. (10CT 2837-2848.) As for count 9, the trial court imposed a consecutive indeterminate term of 25 years to life for each defendant, based upon the first alternative charge of conspiracy to commit murder. (1CT 2837-2848.) Thereafter, all three defendants appealed. (10CT 2866, 2868-2869.)

In a partially published opinion, a three-justice panel of the Fifth District Court of Appeal unanimously reversed the defendants' conviction on count 9 for conspiracy to commit a gang crime (Pen. Code, §§ 182, 186.22, subd. (a)). The appellate court concluded, as a matter of first impression, that this offense was impermissibly "redundant" because a gang crime is "at its core, a form of conspiracy." (Opn. at 312.) In the court's view, the duplicative charge was not authorized by statute and was implicitly prohibited by Penal Code section 182.5, which "expanded conspiracy liability to include gang-related activities." (Opn. at 315.) The court therefore concluded that the charge was legislatively invalid. (Opn. at 308-316.) The court noted, but did not resolve, the defendants' claim that the charge also was unconstitutionally void for vagueness. (Opn. at 308, 313, fn. 161.) Except for a few minor sentencing corrections, the court otherwise affirmed the judgment. (Opn. at 328-329.)[2]

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[2] The appellate court also reversed the alternative conviction on count 9 for conspiracy to commit robbery because of the absence of any supporting overt act. (Opn. at 296-300.) Respondent conceded this issue on appeal and does not dispute this aspect of the court's ruling.

SUMMARY OF ARGUMENT

The appellate court erroneously concluded that a charge of conspiracy to commit a gang crime is per se invalid. To the contrary, Penal Code sections 182 and 186.22, subdivision (a), plainly provide that a defendant is guilty of conspiracy to commit a gang crime if he (1) enters into an agreement with another person to commit a gang crime by actively participating in a gang while promoting felonious conduct by its members, (2) specifically intends to commit the gang crime at the time of entering into the agreement, and either (3) he or another party to the agreement commits an overt act in furtherance of the conspiracy.

A gang crime and conspiracy to commit a gang crime are not duplicative. A defendant may conspire to commit a gang crime without actually committing a gang crime, such as where the gang has not yet been formed or the contemplated felonious conduct does not ultimately occur. Similarly, a defendant may commit a gang crime without also conspiring to commit a gang crime, such as where the defendant alone perpetrates the felonious conduct. Federal statutes, such as conspiracy to violate RICO, confirm the legislative and constitutional permissibility of imposing liability for conspiracy even where the substantive target offense necessarily involves a group of individuals.

Moreover, despite the appellate court's contrary view, the validity of a charge of conspiracy to commit a gang crime is not undermined by Penal Code section 182.5. That statute creates an expansive new form of vicarious liability for active participants in a gang, which cannot be reasonably construed as a legislative attempt to exempt gang crimes from traditional conspiracy liability.

Finally, the plainly understandable statutory elements for conspiracy to commit a gang crime provided fair notice, in accordance with due process, that the defendants' conduct fell within its scope.

Accordingly, the appellate court's contrary conclusion must be reversed and the defendants' alternative conviction on count 9 for conspiracy to commit a gang crime must be reinstated.

ARGUMENT

I. A CHARGE OF CONSPIRACY TO COMMIT A GANG CRIME IS A STATUTORILY VALID OFFENSE THAT SATISFIES DUE PROCESS

Based upon its interpretation of Penal Code sections 182 and 186.22, subdivision (a), the Fifth District Court of Appeal concluded that a charge of conspiracy to commit a gang crime constitutes a duplicative offense that is legislatively barred and possibly void for vagueness. (Opn. at 308-316.) As explained below, however, this charge is entirely proper under statutory and constitutional law.

A. Penal Code Sections 182 and 186.22 Plainly Criminalize Conspiracy to Commit a Gang Crime

When construing statutes, the court must "ascertain the intent of the enacting legislative body" in order to "adopt the construction that best effectuates the purpose of the law." (*People v. Albillar* (2010) 51 Cal.4th 47, 54-55.) To that end, the court "first examine[s] the words of the statute, 'giving them 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." (*Id.* at p. 55.) "If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Ibid.*) In that case, "Judicial construction of unambiguous statutes is appropriate only when literal interpretation would yield absurd results." (*Ibid.*) Otherwise, if "the statutory language may reasonably be given more than one interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and

the statutory scheme encompassing the statute." (*People v. King* (2006) 38 Cal.4th 617, 622.)

In 1988, the Legislature enacted the California Street Terrorism and Enforcement and Prevention ("STEP") Act. (Pen. Code, § 186.20 et seq.) The STEP Act officially recognized the "state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." (Pen. Code, § 186.21.) These unlawful activities "present a clear and present danger to public order and safety." (*Ibid.*) Thus, the STEP Act was expressly intended "to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs." (*Ibid.*)

To that end, the STEP Act created a substantive "gang crime" defined by Penal Code section 186.22, subdivision (a). (*People v. Mesa*, *supra*, 54 Cal.4th at p. 196.) Subdivision (a) specifically provides that:

> Any person who actively participates in a criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

(Pen. Code, § 186.22, subd. (a).)

In this context, the phrase "actively participates" means "involvement with a criminal street gang that is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) Subdivision (f), in turn, defines a "criminal street gang" as any group of three or more persons whose "primary activities" include at least one of the statutorily enumerated offenses, including assault, robbery, drug sales, grand theft, money

laundering, carjacking, or murder, and "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Pen. Code, § 186.22, subd. (f).) Subdivision (e) defines a "pattern of criminal gang activity" as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated offenses, within a specified timeframe, "on separate occasions, or by two or more persons." (Pen. Code, § 186.22, subd. (e).) The predicate offenses establishing a pattern of criminal gang activity may include the underlying felonious conduct charged against the defendant or any other offense committed by the defendant on a separate occasion. (*People v. Tran* (2011) 51 Cal.4th 1040, 1046.) Finally, the "felonious criminal conduct" promoted by the defendant need not be gang-related. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 56.)

Overall, the gang crime created by subdivision (a) of Penal Code section 186.22 consists of the following three elements: (1) "active participation in a criminal street gang, in the sense of participation that is more than nominal or passive," (2) "knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity," and (3) the willful promotion, furtherance, or assistance "in any felonious criminal conduct by members of that gang." (*People v. Mesa*, *supra*, 54 Cal.4th at p. 197.)

By comparison, Penal Code section 182 defines the traditional offense of conspiracy. It specifically prohibits "two or more persons" from conspiring "[t]o commit any crime." (Pen. Code, § 182, subd. (a)(1).) The elements for conspiracy consist of an agreement between the defendant and at least one other person to commit a criminal offense, entered into with the specific intent to commit that criminal offense, together with the commission of an overt act in furtherance of the conspiracy. (*People v.*

Jurado (2006) 38 Cal.4th 72, 120.) Conspiracy "is an inchoate crime that does not require the commission of the substantive target offense that is the object of the conspiracy." (*People v. Cortez* (1998) 18 Cal.4th 1223, 1229.) Significantly, Penal Code section 182 does not exempt any criminal offense from being the object of a conspiracy.

Plainly understood, the offense of conspiracy to commit a gang crime consists of the following elements: (1) the defendant enters into an agreement with another person to commit a gang crime by actively participating in a criminal street gang while promoting felonious conduct by a gang member, (2) the defendant specifically intends to commit the gang crime at the time of entering into the agreement, and (3) the defendant or another to the agreement commits an overt act in furtherance of the conspiracy. (Pen. Code, §§ 182, 186.22.)

1. Conspiracy without gang crime

These offenses are not duplicative. For example, a defendant may conspire to commit a gang crime, without actually committing a gang crime, such as where a new gang is being formed and the requisite number of predicate offenses have not been committed, or where only two members have agreed to join. Indeed, the appellate court expressly declined to opine on the validity of a conspiracy charge in this hypothetical scenario. (Opn. at 316, fn. 163.) A conspiracy may also occur without the commission of a gang crime where the defendant agrees to commit a gang crime even though his participation in the gang is not sufficiently active, or where the contemplated felonious conduct does not ultimately occur. Essentially, any time one of the elements for a gang crime is lacking, the defendant may still be guilty of conspiracy to commit a gang crime. (See *People v. Cortez*, *supra*, 18 Cal.4th at p. 1229 [noting that conspiracy does not require completion of substantive target offense].)

2. Gang crime without conspiracy

Similarly, a defendant may commit a gang crime, without also entering into a conspiracy to do so, whenever a prior agreement is lacking. For example, a defendant may be guilty of a gang crime, but not conspiracy, if he is an active participant who spontaneously aids or abets a fellow gang member's felonious conduct. (See *People v. Durham* (1969) 70 Cal.2d 171, 181 ["One may aid or abet in the commission of a crime without having previously entered into a conspiracy to commit it"].) Indeed, it has been long settled that a violation Penal Code "section 186.22 does not require any sort of agreement between gang members." (*People v. Gamez* (1991) 235 Cal.App.3d 957, 979, overruled on other grounds in *People v. Gardeley* (1996) 14 Cal.4th 605; see also *In re Alberto R.* (1991) 235 Cal.App.3d 1309, 1324 [explaining that "enhancement of committing gang-related felony crimes can be committed without an agreement to first commit the crime; it can be committed merely on an aiding and abetting theory"].) In other words, the elements for a gang crime and conspiracy "are not the same...." (*People v. Gamez*, *supra*, at 979.) Accordingly, a gang crime may be committed without a conspiracy.

In *People v. Rodriguez* (S187680), this Court is currently considering whether an active participant in a street gang may be guilty of a gang crime if he acts alone as the sole perpetrator of the felonious criminal conduct. Several appellate courts have already answered this issue affirmatively. (See *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1308; *People v. Salcido* (2007) 149 Cal.App.4th 356, 369-370; *People v. Ngoun* (2001) 88 Cal.App.4th 432, 435.) If this Court agrees, then it provides yet another instance wherein a gang crime may be committed without a conspiracy because the defendant necessarily did not enter into any agreement with anyone. But even if this Court disagrees, a defendant may still commit a gang crime, without conspiring to do so, by spontaneously aiding the

felonious conduct of a fellow gang member. Accordingly, regardless of the result in *Rodriguez*, the two offenses are not redundant.

Respondent's position is implicitly supported by *People v. Mesa*, *supra*, 54 Cal.4th 191, which held that Penal Code section 654 bars the imposition of sentence for a gang crime conviction if the underlying criminal conduct was already punished as a separate felony conviction. (*People v. Mesa*, *supra*, 54 Cal.4th at p. 195.) This Court recognized that its holding

> would simply limit punishment for the [gang crime] offense to circumstances in which the defendant's willful promotion, furtherance, or assistance of felonious conduct by a gang member was not also the basis for convicting the defendant of a separate offense—for example, *when there are sufficient grounds to convict a defendant under section 186.22, subdivision (a), but insufficient grounds to independently convict the defendant as an accessory.*

(*Id.* at p. 198, emphasis added.) In other words, a defendant may be found guilty of a gang crime and punished accordingly, even if he is not guilty of the underlying felonious conduct, not even as an accomplice. (See Pen. Code, § 32 [defining accessory].) Thus, *Mesa*'s reasoning supports respondent's view that a defendant may be guilty of a gang crime without also being guilty of conspiracy to commit a gang crime.

Accordingly, while a gang crime and a conspiracy to commit a gang crime may often overlap, they are not duplicative offenses as each may be separately committed without the other.

3. Gang crime itself does not require agreement

The appellate court below erroneously disagreed with respondent's position by finding that conspiracy to commit a gang crime under Penal Code sections 182 and 186.22 "essentially" amounted to an invalid "conspiracy to actively participate in a conspiracy" because "a criminal street gang is, at its core, a form of conspiracy." (Opn. at 312.) In reaching

this conclusion, the appellate court relied upon subdivision (f) of section 186.22, which defines a "criminal street gang" as an organization whose "primary activities" include at least one of the criminal acts enumerated in subdivision (e), and "whose members individually or collectively engage in a pattern of criminal gang activity." Subdivision (e), in turn, lists 28 felonies, including robbery, rape, grand theft, felony vandalism, and carrying a loaded firearm. (Pen. Code, § 186.22, subd. (e)(1)-(25), (31)-(33).) From this statutory language, the appellate court reasoned that:

> Although section 186.22, subdivision (f) does not expressly require the existence of an agreement to commit any of the crimes enumerated in subdivision (e) of the statute, we fail to see how there could be an organization...of individuals having as one of its chief or principal occupations the commission of one or more of those crimes, without at least a tacit, mutual understanding that committing such crime(s) is the group's common purpose and that its members will work together to accomplish that shared design.

(Opn. at 312.) In other words, there must be a conspiracy among gang members to commit the primary criminal activities of their gang. The appellate court therefore concluded that a charge of conspiracy to commit a gang crime is "redundant." (Opn. at 313.)

However, the appellate court's conclusion is fundamentally flawed for two equally important reasons. First, the appellate court failed to recognize that the "felonious criminal conduct" element under subdivision (a) of section 186.22 need not also qualify as one of the "primary criminal activities" that defines the gang. Subdivision (a) unambiguously includes "*any* felonious criminal conduct," which may not even be gang-related. (Pen. Code, § 186.22, subd. (a), italics added; *People v. Albillar*, *supra*, 51 Cal.4th at p. 54 [interpreting phrase].) By comparison, only 28 types of felony offenses may qualify as the gang's primary activity. (Pen. Code, § 186.22, subd. (e)(1)-(25), (31)-(33).) These enumerated offenses omit,

for instance, simple possession of a controlled substance (Health & Saf. Code, § 11350), pimping a minor (Pen. Code, § 266i), and lewd conduct with a child (Pen. Code, § 288, subd. (a)). (Pen. Code, § 186.22, subd. (e)(1)-(25), (31)-(33).) Thus, a defendant may actively participate in a criminal street gang by furthering the felonious criminal conduct of, for example, pimping a minor, even though that particular felony is not one of the gang's primary criminal activities.

Second, as even the appellate court recognized, "subdivision (f) does *not* expressly require the existence of *an agreement* to commit any of the crimes enumerated in subdivision (e)...." (Opn. at 313, italics added.) By comparison, an agreement is a key element for the offense of conspiracy. (Pen. Code, § 182.) While the requisite agreement for a conspiracy need not be formal or express, the parties still must have "positively or tacitly [come] to a mutual understanding to accomplish the act and unlawful design." (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1025.) Given this elementary difference, a defendant may know about the gang's primary criminal activity, but only participate in the gang by furthering some other felonious criminal conduct, without ever agreeing to the commission of the primary criminal activity. (Pen. Code, § 186.22, subd. (a).) In that case, the defendant is not guilty as a coconspirator to the gang's primary activities, but he is still guilty of a gang crime.

For these reasons, the appellate court erroneously concluded that conspiracy to commit a gang crime is a redundant offense. (See *People v. Durham*, *supra*, 70 Cal.2d at p. 181 ["One may aid or abet in the commission of a crime without having previously entered into a conspiracy to commit it"]; *People v. Gamez*, *supra*, 235 Cal.App.3d at p. 979 ["section 186.22 does not require any sort of agreement between gang members"].)

B. Analogous Federal Conspiracy Statutes

Respondent's position is bolstered by analogous federal statutes. Under the Racketeer Influenced and Corrupt Organizations Act (RICO), it is a crime for any person to conduct "an enterprise" through a "pattern of racketeering activity," which consists of at least two "predicate acts" involving, inter alia, murder, gambling, robbery, bribery, or dealing in a controlled substance. (18 U.S.C. §§ 1961(a)(A), 1962(c).) RICO separately criminalizes any conspiracy to violate these substantive provisions, and it redefines such a conspiracy to omit any element of an overt act. (18 U.S.C. § 1962(d).) The "enterprise" at issue may be a criminal street gang. (See, e.g., *United States v. Palacios* (4th Cir. 2012) 677 F.3d 234, 249-250 [upholding RICO conspiracy conviction where enterprise was criminal street gang]; *United States v. Martinez* (9th Cir. 2011) 657 F.3d 811, 816 [upholding RICO conspiracy conviction where enterprise was criminal street gang and defendant was aspiring member].)

Thus, a substantive violation of RICO consists of the defendant's commission of two predicate acts, whereas a conspiracy RICO violation only consists of the defendant's agreement to further or facilitate the criminal endeavor, even if the defendant did not agree to the commission of either predicate act and no overt acts occurred. (*Salinas v. United States* (1997) 522 U.S. 52, 62, 65.) The Supreme Court validated this conspiracy offense, even though "in most instances" a substantive violation "will be conducted by more than one person or entity; and this in turn may make it somewhat difficult to determine just where the enterprise ends and the conspiracy beings..." (*Ibid.*) Stated differently, the substantive RICO offense and conspiracy RICO offense are valid, despite their frequent overlap, in order to ensure that the "RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise." (*United States v. Brandao* (1st Cir. 2008) 539 F.3d 44, 53 [quoting *United States v.*

Elliott (5th Cir. 1978) 571 F.2d 880, 903, internal quotation marks omitted].)

Similarly, the Smith Act prohibits active membership in any group that advocates the violent overthrow of the government. (18 U.S.C. § 2385, 3rd par.) It also prohibits any conspiracy to violate its substantive provisions. (18 U.S.C. § 2385, 5th par.) The Supreme Court upheld the Smith Act against multiple constitutional challenges, including vagueness. (*Scales v. United States* (1961) 367 U.S. 203, 220-230.) In doing so, the Court recognized that "there is no great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy, many of whose participants are unknown or not before the court." (*Id.* at p. 227, fn. 18.) Nonetheless, a "member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatsoever." (*Id.* at p. 228.) Thus, despite their strong similarities, the two Smith Act offenses are valid.

The appellate court below acknowledged the validity of both conspiracy violations under RICO and the Smith Act. (Opn. at 314.) However, the court distinguished their validity on the basis of their statutory creation by "clearly expressed congressional intent," which it found lacking for a conspiracy violation of a gang crime under Penal Code sections 182 and 186.22, subdivision (a). (Opn. at 314.) "Absent such intent," the court deemed any charge of conspiracy to commit a gang crime to be per se invalid in order "to avoid interpretations leading to absurd results." (Opn. at 314-315.) Respondent entirely disagrees.

As previously noted, Penal Code section 182 expressly prohibits a conspiracy to commit "*any* crime" without exception, and Penal Code section 186.22 was enacted with the expressed intent "to seek the

eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together are the chief source of terror created by street gangs." (Pen. Code, § 186.21.) Consequently, a charge of conspiracy to commit a gang crime ensures that California's gang "net" is woven just as tightly as RICO "to trap even the smallest fish...." (*United States v. Brandao*, *supra*, 539 F.3d at p. 53 [describing RICO conspiracy charge].) This result is no more "absurd" than the analogous federal conspiracy offenses that have been upheld by the Supreme Court. Indeed, it would be "absurd" to carve out this particular basis of criminal culpability in light of the plain statutory language and clear legislative intent.

Thus, the appellate court erred when it deemed any charge of conspiracy to commit a gang crime to be an invalid offense. (See, e.g., *People v. Kelly* (2010) 47 Cal.4th 1008, 1047-1048 [noting that "a court should speak as narrowly as possible and resort to invalidation of a statute only if doing so is necessary" because it is presumptively valid]; *Cahoon v. Governing Bd. of Ventura Unified School Dist.* (2009) 171 Cal.App.4th 381, 387 [advising that "except in the most extreme cases where legislative intent and the underlying purpose are at odds with the plain language of the statute, an appellate court should exercise judicial restraint, stay its hand, and refrain from rewriting a statute to find an intent not expressed by the Legislature"]; see also *Salinas v. United States*, *supra*, 522 U.S. at p. 59 [recognizing that "no rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope"].)

C. Penal Code Section 182.5 Does Not Exempt Gang Crimes from Traditional Conspiracy Liability

This conclusion is not altered by Penal Code section 182.5, which the appellate court also cited as support for its position. (Opn. 315-316.) Section 182.5 provides:

> Notwithstanding subdivisions (a) or (b) of Section 182 [defining conspiracy], any person who actively participates in any criminal street gang, as defined in subdivision (f) of Section 186.22, with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, as defined in subdivision (e) of Section 186.22, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony and may be punished as specified in subdivision (a) of Section 182.

(Pen. Code, § 182.5.) Except for the addition of a benefits theory of culpability, section 182.5 mirrors the requirements for committing a gang crime under Penal Code section 186.22, subdivision (a). Thus, section 182.5 deems any defendant who commits a gang crime, or who is an active participant in a gang and also benefits from a felony committed by fellow gang members, to be guilty of conspiracy to commit that felony, which is then punishable according to traditional conspiracy principles. Although the appellate court viewed section 182.5 as implicit confirmation that a gang crime may not be the object of a traditional conspiracy, its plain meaning and legislative history reveal otherwise.

1. Legislative History of Penal Code section 182.5

Penal Code section 182.5 was enacted by California's voters in 2000 as part of Proposition 21's comprehensive initiative measure which "made many changes to laws pertaining to juvenile offenders and gang-related crimes." (*People v. Brookfield* (2009) 47 Cal.4th 583, 588.) As explained in the statewide ballot, "Criminal street gangs have become more violent,

bolder, and better organized in recent years." (Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (a)-(b), p. 119.)[3] "Gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity." (*Id.*, § 2, subd. (h), p. 119.) "Dramatic changes are needed in the way we treat juvenile criminals, criminal street gangs, and the confidentiality of the juvenile records of violent offenders if we are to avoid the predicted, unprecedented surge in juvenile and gang violence." (*Id.*, § 2, subd. (k), p. 119.) The ballot additionally noted that, among its many provisions, Proposition 21 "makes it easier to prosecute crimes related to gang recruitment [and] *expands the law on conspiracy to include gang-related activities*...." (*Id.*, analysis of Prop. 21, p. 46, italics added.)

The appellate court relied upon this italicized phrase as "an implicit recognition that the general conspiracy statute could not be applied to section 186.22, subdivision (a), because a criminal street gang was itself a species of conspiracy." (Opn. at 315-316.) By the court's reasoning, conspiracy liability may be expanded only if it previously did not apply to active gang participants. Not so. As explained below, Penal Code section 182.5 actually expanded conspiracy liability by creating a broader version of vicarious liability for active participants in a criminal street gang, who know of the gang's criminal activities, and who aid or benefit from any felony committed by fellow members.[4]

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[3] This material may be found at http://primary2000.sos.ca.gov/VoterGuide/. This material is also included in Exhibit A of Respondent's Motion for Judicial Notice.

[4] Respondent relies upon this new legal theory in this proceeding. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1075 fn. 4 ["Although a party generally may not change his or her theory of the case on appeal, when a claim presents only a question of law a reviewing court may permit

(continued...)

Although ultimately passed by voters in 2000, the text of Penal Code section 182.5 originally appeared before the legislature in 1998 as an amendment to Assembly Bill No. 26, which aimed to impose harsher punishment for gangs and juveniles because of their increasing threat to public safety. (Assem. Amend. to Assem. Bill No. 26 (1997-1998 Reg. Sess.) Jan. 6, 1998, p. 2.)[5] Among its many provisions, AB 26 sought to "create a new crime" that would "make punishable as conspiracy any participation in a criminal street gang, as defined, with knowledge that its members engage in a pattern of gang activity if the participant willfully promotes, furthers, assists, or benefits from any felonious conduct by members of that gang." (*Id.* at pp. 2, 11.) This language is virtually identical to the current text of Penal Code section 182.5.

The analysis by the Assembly Committee on Public Safety recognized that, under then-existing law, "active participation" in a criminal street gang, as defined by Penal Code section 186.22, did not constitute a conspiracy because no agreement was required. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 26 (1997-1998 Reg. Sess.) Jan. 16,

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(...continued)
a change in theory"].) Respondent previously asserted before the appellate court that section 182.5 merely confirmed the application of traditional conspiracy sentencing liability for gang members. (See Respondent's Brief at pages 247 through 248.) Appellant raised this issue for the first time in the appellate court and, consequently, no discussion by either party was submitted to the trial court. (See Lee's Opening Brief at 117 through 125.)

[5] This material, which is included in Exhibit B of Respondent's Motion for Judicial Notice, may also be found at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0001-0050/ab_26_bill_19980106_amended_asm.html.

1998, p. 3.)[6] The analysis warned that deeming such conduct nevertheless to be a conspiracy rendered the proposed new crime unconstitutionally "vague and ambiguous." (*Id.* at p. 4.) As it explained,

> The conspiracy/gang provision in this bill appear[s] to [ ] lack the necessary element of a specific agreement and, instead, assume that evidence which might be used to attempt to prove a specific agreement—evidence that fellow gang members commit crimes in common—necessarily establishes the agreement as a matter of law. While in many cases, gang members may actually agree to commit a certain, specific crime and then take action to commit such a crime, active participation in a gang cannot be said to conclusively establish such an agreement. The law requires that the prosecution must establish each element beyond a reasonable doubt. (*In re Winship*, *supra*, 397 U.S. 358.) A statute cannot validly be written to conclusively presume [ ] an element of an offense. (*Sandstrom v. Montana*, *supra*, 422 U.S. 510.)

(*Id.* at p. 5.)

The analysis also questioned whether the object of the deemed conspiracy was (1) the underlying felonious conduct or (2) the substantive gang crime itself. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 26 (1997-1998 Reg. Sess.) Jan. 16, 1998, pp. 4-5.) If the former, then the proposed new crime would expansively render an active participant liable as a coconspirator for every reasonably anticipated felony committed by his fellow gang members. (*Id.* at 5.) If the latter, then the analysis opined that "this provision has little or no effect, as the punishment for active participation in a criminal street gang is a standard wobbler offense and *a conspiracy to actively participate in a street gang would thus be punished as a standard wobbler*." (*Ibid.*, emphasis added.) Accordingly,

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[6] This material, which is included in Exhibit B of Respondent's Motion for Judicial Notice, may also be found at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_00010050/ab_26_cfa_19980116_164422_asm_comm.html.

the analysis implicitly recognized that a traditional conspiracy may include a gang crime as its objective.

Within the analysis, the bill's sponsor noted its intent for "the conspiracy provision [ ] to apply federal-style racketeering (RICO) penalties in gang cases." (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 26 (1997-1998 Reg. Sess.) Jan. 16, 1998, p. 5.) The sponsor further confirmed that "the gang participation/conspiracy crime created by this bill does not require an agreement." (*Ibid.*) Notably, the bill's sponsor was identified as the California District Attorneys Association, who also endorsed Proposition 21. (*Ibid.*; Ballot Pamp., Primary Elec. (Mar. 7, 2000) argument in favor of Prop. 21, p. 48.)

Shortly after this analysis, AB 26 was amended to delete all provisions concerning the new conspiracy/gang crime under Penal Code section 182.5. (Assem. Amend. to Assem. Bill No. 26 (1997-1998 Reg. Sess.) Jan. 26, 1998.)[7] Further amendments and revisions ensued, none of which sought to revive the deleted aspects of section 182.5. (Assem. Amend to Assem. Bill No. 26 (1997-1998 Reg. Sess.) Jan. 28, 1998;[8] Sen. Amend to Assem. Bill No. 26 (1997-1998 Reg. Sess.) Feb. 23, 1998.[9]) The

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[7] This material, which is included in Exhibit B of Respondent's Motion for Judicial Notice, may also be found at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0001-0050/ab_26_bill_19980126_amended_asm.html.

[8] This material, which is included in Exhibit B of Respondent's Motion for Judicial Notice, may also be found at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0001-0050/ab_26_bill_19980128_amended_asm.html.

[9] This material, which is included in Exhibit B of Respondent's Motion for Judicial Notice, may also be found at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0001-0050/ab_26_bill_19980223_amended_sen.html.

bill ultimately died in committee. (Complete Bill History of A.B. No. 26 (1997-1998 Reg. Sess.).)[10] Its content resurfaced two years later in Proposition 21, which was overwhelmingly passed by 62 percent of California voters as part of a comprehensive scheme to toughen criminal laws for gangs and juveniles. (See Nieves, Evelyn, *The 2000 Campaign: California*, N.Y. Times, Mar. 9, 2000, at A27 [detailing voter support statistics]; Venise Wagner, *Crime Measures Rack Up Big Wins*, S.F. Examiner, Mar. 8, 2000, at A23 [same].)

This legislative history is important. It reveals the intent by the original drafter of Penal Code section 182.5 to create a new and much broader crime that would render active participants criminally liable for any felonious conduct committed by their fellow gang members. It also reveals the drafter's desire to apply federal RICO principles to California gangs. Finally, it implicitly recognizes that a traditional conspiracy to commit a gang crime is a valid charge, even though its application may have "little or no effect."

Respondent acknowledges that, when interpreting a voter initiative, the "opinion of drafters or legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate....." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 904.) Nonetheless, courts may still "discern and thereby effectuate the voters' intention [ ] by interpreting [the initiative's] language in its historical context." (*Ibid.*) Consequently, even though the failed legislative history surrounding Penal Code section 182.5 was not included in the ballot

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[10] This material, which is included in Exhibit B of Respondent's Motion for Judicial Notice, may also be found at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0001-0050/ab_26_bill_19981130_history.html.

materials for Proposition 21, it may still be considered in order to "place our debate" about the meaning of that initiative "in its '*relevant analytical context.*'" (*Ibid.*, italics added.) Respondent submits that the "analytical context" contained in the failed legislative history of section 182.5 is especially relevant, given its detailed consistency with the broadly-phrased ballot materials of Proposition 21. (See Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (a)-(b) & (k), p. 119; Ballot Pamp., Primary Elec. (Mar. 7, 2000) analysis of Prop. 21, p. 46 [noting that initiative "makes it easier to prosecute crimes related to gang recruitment [and] expands the law on conspiracy to include gang-related activities"].)

2. Plain meaning of Penal Code section 182.5

Given this historical lineage, it would be incongruous to interpret Penal Code section 182.5 as an impediment to charging a traditional conspiracy to commit a gang crime under Penal Code sections 182 and 186.22, subdivision (a). Instead, the plain language of section 182.5 should be applied to impose a broad form of coconspirator liability upon any active participant in a criminal street gang, who knows of that gang's pattern of criminal activity, and who also promotes, furthers, assists, or benefits from any felony committed by fellow gang members. This offense plainly and intentionally does not include any requirement of an agreement between the active participant and the fellow gang members to commit the underlying felony.

Viewed in this manner, Penal Code section 182.5 reaches well beyond a gang crime, since Penal Code section 186.22, subdivision (a), does not include mere beneficiaries of the felonious conduct. Section 182.5 also reaches beyond traditional conspiracy principles, since Penal Code section 182 requires an agreement to commit the object criminal offense along with a specific intent. Nonetheless, section 182.5 does not reach those instances where a defendant agrees to become an active participant in a gang but

either he lacks the requisite participation or the gang lacks the requisite number of members or predicate acts. Section 182.5 also does not reach those instances where the felonious conduct contemplated by the active gang participants does not actually occur. As discussed above, these latter examples would still be punishable as a conspiracy to commit a gang crime, even though sections 182.5 and 186.22 would not apply. Accordingly, section 182.5 is not duplicative of a traditional charge under sections 182 and 186.22, subdivision (a). (See *Blockburger v. United States* (1932) 284 U.S. 299, 305 [permitting separate punishment for two offenses based upon the same act or transaction so long as "each statutory provision requires proof of an additional fact which the other does not"].)

3. Constitutionality of Penal Code section 182.5

Admittedly, the legislative analyst doubted the constitutionality of Penal Code section 182.5 absent an element requiring an agreement among the gang members to commit the specific felonious conduct. Nonetheless, "[s]ubstantive due process allows lawmakers broad power to select the elements of crimes...." (*People v. McCall* (2004) 32 Cal.4th 175, 189.) Consequently, courts "should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes." (*McMillan v. Pennsylvania* (1986) 477 U.S. 79, 86.) Indeed, the Supreme Court has already upheld the creation of an expansive form of conspiracy liability that omits any element of an overt act. (*Salinas v. United States*, *supra*, 522 U.S. at pp. 62-65.) The California voters are similarly entitled to create an expansive type of vicarious liability for active participants in a gang, who know of the gang's criminal activities, and who aid or benefit from the commission of any felony committed by fellow gang members.

Respondent emphasizes that Penal Code section 182.5 does not impose criminal penalties for "mere membership" in a group. (*Scales v. United States*, *supra*, 367 U.S. at pp. 220-222 [discussing Smith Act].)

Rather, it requires the defendant's active participation in a group, with knowledge of that group's criminal activities, along with the defendant's aid or benefit from a felony committed by members of that group. These additional requirements for a conviction under section 182.5 ensure that the defendant's "guilt is personal" and based upon a "sufficiently substantial" relationship between the defendant's participation in the gang and the felonious conduct committed by fellow gang members in accordance with due process. (*Id.* at pp. 225-226.) Indeed, as the Supreme Court remarked,

> we can perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act.

(*Id.* at pp. 226-227 [discussing Smith Act].)

In this regard, Penal Code section 182.5 is akin to 18 U.S.C. § 2339B, which creates a federal crime for knowingly providing, or attempting or conspiring to provide, material support or resources to any foreign terrorist organization. (*Holder v. Humanitarian Law Project* (2010) ___ U.S. ___, 130 S.Ct. 2705, 2720.) The requisite support may include noncriminal activities such as "instruction on resolving disputes through international law" or "teaching [the organization] how to petition for humanitarian relief...." (*Id.* at pp. 2720-2721.) A violation of this federal statute is punishable by up to 15 years imprisonment or, if the death of any person results, life imprisonment. (18 U.S.C. § 2339B(a)(1).) Significantly, § 2339B requires only "knowledge about the organization's connection to terrorism, not specific intent to further the organizations' terrorist activities." (*Law Project*, *supra*, at p. 2720.) The absence of any specific intent element did not render this federal crime constitutionally infirm, as "the knowledge requirement of the statute [ ] reduces any potential for

vagueness...." (*Ibid.*) Like § 2339B, Penal Code section 182.5 also requires knowledge of the gang's criminal activities, in addition to the defendant's active participation in the gang and his assistance or benefit from felonious conduct committed by the gang. Accordingly, just like § 2339B, section 182.5 is constitutionally valid.

Regardless, respondent emphasizes that the precise contours and constitutionality of Penal Code section 182.5 are not presently before this Court. All that matters here is that this statute cannot be construed as an indication of the electorate's intent to preclude a charge of conspiracy to commit a gang crime under Penal Code sections 182 and 186.22. Accordingly, the appellate court's contrary construction was erroneous.

D. Fair Notice of Conspiracy to Commit a Gang Crime Satisfies Vagueness Doctrine

Although the appellate court did not resolve the issue, a charge of conspiracy to commit a gang crime is not unconstitutionally void for vagueness. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." (*Holder v. Humanitarian Law Project*, *supra*, 1360 S.Ct. at p. 2718; see also *People v. Morgan* (2007) 42 Cal.4th 593, 605 [applying same standard].) The statute is considered "as applied to the particular facts at issue, for [a criminal defendant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." (*Law Project*, at p. 2719.) A "more stringent vagueness test should apply" if the statute infringes upon "the right of free speech or of association...." (*Ibid.*) Nonetheless, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." (*Ibid.*) Indeed, there is a "strong presumption that legislative enactments 'must be

upheld unless their unconstitutionality clearly, positively, and unmistakably appears." (*Morgan*, at p. 605.)

Here, the defendants had clear notice that their actions violated the statutory elements of conspiracy to commit a gang crime. As previously explained, this offense plainly prohibits any person from entering into an agreement to commit a gang crime, with the intent to commit the gang crime, and the commission of an overt act in furtherance of the conspiracy. (Pen. Code, §§ 182; 186.22, subd. (a).)

This offense clearly applied to the defendants' conduct. Specifically, all three defendants were active participants in the same gang, who together committed escalating violent offenses directed at rival gangs, including an attempted murder on Monterey Street, three first-degree murders and an attempted murder on McNew Court, and another attempted murder on South Real Road.[11] All of these offenses required advance planning and coordination—in other words, an agreement to actively participate in a criminal street gang by promoting felonious conduct. The defendants specifically intended to commit this offense when entering into this agreement, as evidenced by its actual commission. The defendants also performed the following six overt acts in furtherance of this agreement: (#1) Johnson and Lee were present on Monterey Street during McGown's attempted murder; (#2) Johnson and Lee were present on Deborah Street when Lee was shot; (#3) Johnson, Lee, and Dixon were present at McNew Court during the murders and attempted murder; (#4) Johnson left clothing near McNew Court; (#5) Johnson, Lee, and Dixon were in a red car on South Real Road during Bonner's attempted murder; and (#6) Johnson, Lee, and Dixon were in a car looking for a rival gang member suspected of

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[11] For a detailed factual summary of these offenses with citations to the record, see Respondent's Brief at pages 5 through 55.

murdering one of their own. (9CT 2579-2585 [Johnson]; 9CT 2652-10CT 2658 [Dixon]; 10CT 2739-2745 [Lee].)

Thus, a reasonable person would know that the defendants' conduct squarely fell within the prohibited scope of the charged offense of conspiracy to commit a gang crime. Their claim of constitutional vagueness must therefore fail. (See *Holder v. Humanitarian Law Project*, *supra*, 130 S.Ct. at pp. 2720-2722 [rejecting vagueness challenge where defendants' conduct clearly fell within prohibited scope, even if hypothetic situations might "straddle the boundary"].) This is true even if "there may be difficulty in determining whether some marginal or hypothetical act is covered by its language." (*People v. Morgan*, *supra*, 42 Cal.4th at p. 606.)

In sum, Penal Code sections 182 and 186.22, subdivision (a), plainly and constitutionally define a valid criminal offense of conspiracy to commit a gang crime. This criminal offense is neither duplicative nor vague, and its creation is implicitly supported by analogous federal statutes as well as Penal Code section 182.5. Accordingly, the appellate court's contrary conclusion must be reversed.

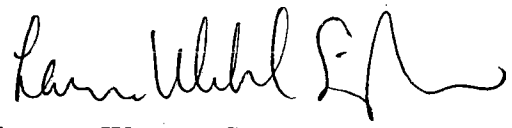
CONCLUSION

For the foregoing reasons, respondent respectfully asks this Court to reverse the appellate court's erroneous ruling and reinstate the defendants' conviction on count 9 for conspiracy to commit a gang crime.

Dated: November 1, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
SUSAN LEE
Acting Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BRIAN G. SMILEY
Supervising Deputy Attorney General



LAURA WETZEL SIMPTON
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF** uses a 13-point Times New Roman font and contains 7,727 words.

Dated: November 1, 2012

KAMALA D. HARRIS
Attorney General of California

LAURA WETZEL SIMPTON
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Johnson et al.** No.: **S202790**

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

On November 1, 2012, I served the attached **RESPONDENT'S OPENING BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Susan D. Shors
Attorney at Law
466 Green Street, Suite 300
San Francisco, CA 94133
(Counsel for appellant Johnson - 2 copies)

Joseph C. Shipp
Attorney at Law
P.O. Box 20347
Oakland, CA 94620
(Counsel for appellant Dixon - 2 copies)

Sharon G. Wrubel
Attorney at Law
P.O. Box 1240
Pacific Palisades, CA 90272
(Counsel for appellant Lee - 2 copies)

Honorable Lisa Green
Kern County District Attorney
1215 Truxtun Avenue, 4th Floor
Bakersfield, CA 93301

Kern County Clerk
Kern County Superior Court
1415 Truxtun Avenue, Suite 212
Bakersfield, CA 93301

Charlene Ynson, Clerk/Administrator
Court of Appeal, Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

Central California Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 1, 2012, at Sacramento, California.

_____
Declarant