

S202790

SUPREME COURT
FILED

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NO. S202790

Frank A. McGuire Clerk

Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA)	
)	
Plaintiff and Respondent,)	DCA No. F057736
)	
vs.)	Kern County
)	No. BF122135A-C
COREY RAY JOHNSON, et. al.)	
)	
Defendants and Appellants)	
)	

APPELLANT JOHNSON'S ANSWER BRIEF ON THE MERITS

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By Appointment of Court of Appeal

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APPELLANT JOHNSON'S ANSWER BRIEF ON THE MERITS

ISSUE PRESENTED

1. Whether the Court of Appeal correctly held there can be no crime of conspiracy to commit the offense of active participation in a criminal street gang in violation of Penal Code sections 182 and 186.22, subdivision (a).¹

¹All subsequent statutory references are to the Penal Code unless otherwise indicated.

STATEMENT OF THE CASE

This Court granted review of a partially published decision by the California Court of Appeal, Fifth Appellate District, reversing in part and affirming in part the judgment of the Superior Court of Kern County, Judge Gary Friedman.

Appellant was convicted by a jury of three counts of attempted murder, three counts of special circumstances murder, shooting at an occupied vehicle, conspiracy, and active gang participation, with enhancements for firearm discharge and gang benefit. (I-CT at 1-27; IX-CT at 2521, 2529-2602.) The charges arose from a series of shootings in Bakersfield from March through August 2007 in separate incidents. Edwin McGowan was injured in a “walk-up” shooting on Inyo and Monterey Streets in the Canal area. (XIV-RT 2079, 2083, 2115; XVI-RT 2356, 2370.) Multiple shots were fired at a blue and white van on Deborah Street. (XIII-RT 1907-1911.) James Wallace, Vanessa Acala and her fetus were killed in a walk-up shooting on McNew Court. (XVI-RT 2535-2537, 2800-2804, 2816, 2819, 2889; XXIII-RT 4009.) Adrian Bonner was injured in a shooting as he sat in his car at a red light on South Real Road. (XXVII-RT 4684-4687.) Police officers testified that all three defendants were active

members of the Country Boy Crips street gang. (LV-RT 9961-10029.)

Appellant was sentenced to three terms of life without parole plus 196 years to life in prison. (X-CT at 2811-2818, 2837-2840; LXII-RT 11640-11653.)

On April 26, 2012, the Court of Appeal reversed the judgment on count nine as based upon conspiracy to commit and to participate actively in a criminal street gang. The Court of Appeal modified the sentence on the three attempted murder counts to a determinate term of seven years in prison on each count, exclusive of any enhancements. The Court of Appeal directed the trial court to amend the sentencing minutes and abstract of judgment to include the notation that liability for victim restitution imposed pursuant to section 1202.4, subdivision (f) is joint and several. The remainder of the judgment was affirmed. Appellants' petition for rehearing was denied May 24, 2012. This court granted respondent's petition for review on August 8, 2012.

ARGUMENT

I.

THE CHARGE OF CONSPIRACY TO VIOLATE THE SUBSTANTIVE STREET GANG PARTICIPATION STATUTE WAS UNCONSTITUTIONALLY VAGUE AND THERE IS NO CRIME IN CALIFORNIA DEFINED BY A CONSPIRACY TO COMMIT A CONSPIRACY-BASED CRIME

A. STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

1. Standard of Review

The standard of review has been succinctly stated by Presiding

Justice Perluss:

Issues of statutory interpretation are questions of law subject to our independent or de novo review. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311, 93 Cal.Rptr.3d 559, 207 P.3d 20; *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432, 101 Cal.Rptr.2d 200, 11 P.3d 956; see *California Veterinary Medical Assn. v. City of West Hollywood* (2007) 152 Cal.App.4th 536, 546, 61 Cal.Rptr.3d 318.) " The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But ' [i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' [Citations.] Thus, ' [t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.] Finally, we do not construe statutes in isolation, but rather read every statute ' with reference to the entire scheme of law of which it is part so that the whole may

be harmonized and retain effectiveness.' " (*People v. Pieters* (1991) 52 Cal.3d 894, 898– 899, 276 Cal.Rptr. 918, 802 P.2d 420.)

(*Babalola v. Superior Court (People)* (2011) 192 Cal.App.4th 948, 956; *see generally* §1259.)

2. Summary of Argument

The Court of Appeal held that a charge of conspiracy to commit the substantive gang participation crime defined by section 186.22, subdivision (a) was legislatively invalid and unconstitutionally vague. (Slip.op at 308-316.) This Court should uphold the ruling because the substantive gang crime is an inchoate crime, itself effectively prohibiting conspiracy among gang participants, and a charge of conspiring to commit a conspiracy is unconstitutionally vague. The redundant charge was prejudicial and resulted in otherwise inadmissible evidence being presented to the jury without limitation as to its use.

B. THE COURT OF APPEAL OPINION

After setting forth the elements of conspiracy under section 182 and the substantive street gang crime of section 186.22, subdivision (a), the Court of Appeal pointed out that before one can actively participate in a street gang, the gang itself must already exist, as defined by section 186.22, subdivision (f). The court emphasized the requirement that a gang be three or more persons who individually or collectively engage in or have engaged in a pattern of criminal gang activity. (Typed opinion at 311.) The listed gang crime must be one of the group's chief activities, not just a crime committed occasionally. Although section 186.22 does not expressly require that there be an agreement to commit a listed gang crime, "we fail to see how there could be an organization, association, or group of individuals having as one of its chief or principal occupations the commission of one or more of these 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." (Typed opinion at 312.)

The Court of Appeal emphasized that because mere membership in a group cannot be penalized, the substantive street gang crime requires a

defendant's active participation with the knowledge that the members commit specified crimes. (Typed opinion at 312.) This serves a purpose similar to that of the overt act requirement in conspiracy under section 184. (Typed opinion at 312.) Both gangs and conspiracies pose a greater danger to the public than does an individual perpetrator. (Typed opinion at 312 at fn. 160.) For this reason, the Court of Appeal concluded that "a criminal street gang is, at its core, a form of conspiracy." (Typed opinion at 312.) As such, charging a defendant with a conspiracy to commit a gang crime was essentially a charge of conspiracy to commit a conspiracy. (Typed opinion at 313.)

No other published case reflects such a charge. (Typed opinion at 313.) The Court of Appeal noted that the federal RICO statutes provide for the crime of conspiring to commit a racketeering crime under that act, which seems to be as redundant as conspiring to commit the substantive gang crime. (Typed opinion at 313.) Similarly, the federal Smith Act provides for the crime of conspiring to commit a conspiracy to overthrow the government. (Typed opinion at 314.) The Court of Appeal concluded that Congress expressly intended to allow such redundant federal charges, but that there was no such evidence that the California Legislature so intended under the general conspiracy statute, section 182. (Typed opinion

at 314.) In order to harmonize the conspiracy and the substantive gang crime statutes and avoid absurd results, the Court of Appeal concluded a defendant cannot be properly charged with conspiracy to violate section 186.22, subdivision (a). (Typed opinion at 314-315.)

The Court of Appeal looked at Proposition 21, which created section 182.5 in 2000 and provided that a defendant participating in a street gang may be deemed guilty of a conspiracy to commit the target listed felony and punished under section 182. (Typed opinion at 315.) The ballot materials for that proposition did not discuss the topic of conspiracy, save to state that the resulting statute would expand the law of conspiracy to include gang-related activities. (Typed opinion at 315.) The Court of Appeal found this was “implicit recognition that the general conspiracy statute could not be applied to section 186.22, subdivision (a) because a criminal street gang itself was a species of conspiracy.” (Typed opinion at 315-316.)

The Court of Appeal reversed the conviction and vacated the overt acts findings for conspiracy to commit the substantive street gang crime, but upheld the convictions on Count 9 as based on the alternative charge of conspiracy to commit murder. (Typed opinion at 316.)

C. THE CHARGED CRIME OF CONSPIRING TO COMMIT THE
SUBSTANTIVE STREET GANG CRIME WAS
UNCONSTITUTIONALLY DUPLICATIVE AND VAGUE

Respondent urges that there is no impediment to charging a defendant with conspiring to commit the substantive gang participation crime because a defendant can conspire to commit the substantive street gang participation crime without actually committing that crime and may also commit the active street gang participation crime alone, without conspiring to do so with another person. (ROBM at 8-10.) Respondent emphasizes that a defendant could commit the substantive street gang participation crime by spontaneously aiding and abetting a gang member's felony, which would not include a prior agreement to so act and therefore not be a conspiracy. (ROBM at 9.)

Respondent has missed the point. Because section 186.22 applies to any person who actively participates in a street gang with the knowledge that the gang's members engage in a pattern of criminal activity, the participant by definition has agreed to be part of the ongoing criminal activity from the very start. One's active participation in the gang in combination with one's knowledge of the gang's ongoing criminal activities functions as an implicit agreement to commit future crimes. A majority of

this Court has now found in *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1135-1139, that a gang member acting alone does not violate section 186.22, subdivision (a).

Respondent urges that the substantive gang crime is not essentially a conspiracy because the felonious conduct element need not include one of the listed primary activities defining a gang. (ROBM at 11.) Because the substantive gang crime can be committed by furthering any felony, even one not gang-related, respondent argues there is no agreement equivalent to a conspiracy. (ROBM at 12.) Again, this argument ignores the most basic elements of the street gang crime, that active participation plus knowledge of the gang's primary criminal activities is itself the original agreement, not the eventual target crime committed by the defendant or others. This is at the core of the conspiracy-related conduct within *every* violation of section 186.22, subdivision (a).

Respondent points to federal statutory schemes that can be the basis for additional conspiracy charges - RICO and the Smith Act - and asserts they are analogous to California's STEP Act. (ROBM at 13-15.) Respondent disagreed with the Court of Appeal's conclusion that the federal statutory schemes are distinguishable from the STEP act based on Congress' expressed intent to provide a separate conspiracy component for

each. (ROBM at 14-15.) Respondent urges that because the federal statutes allow conspiracy charges to be filed regarding RICO and Smith Act offenses, it is not “absurd” to do so and the double charging could lead to more efficient law enforcement. (ROBM at 15.)

Appellants’ position is that the notion of a crime defined as a conspiracy to commit a conspiracy is absurd and redundant so that a reasonable person in California would not know what conduct was prohibited by such a crime. (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567.) Unlike the federal laws which specifically allow for the charge of a conspiracy to violate the provisions of the RICO statutes and the Smith Act, there is no such statutory provision connected to the STEP Act. In sharp contrast, section 182.5 specifically allows a charge of conspiring to commit any felony committed by the members of that gang, not a charge of conspiring to violate section 186.22, subdivision (a) itself. As pointed out by the Court of Appeal, had California’s legislative body/electorate intended to allow for the creation of a redundant crime of conspiracy to commit a violation of section 186.22, subdivision (a), that could have been done within section 182.5 and was not.

Although respondent urges it is absolutely forbidden for an appellate court to write in a legislative intent that does not exist, respondent also

avers that the “plain statutory language and clear legislative intent” show that conspiracy charges would be appropriate here – without pointing to any such “plain language” or “clear legislative intent.” (ROBM at 15.)

Respondent’s own inconsistency demonstrates the faulty premise of its argument.

Respondent asserts that contrary to the understanding of the Court of Appeal, the electorate intended to expand vicarious liability for gang participants by enacting Penal Code section 182.5. (ROBM at 16-24.) Both respondent and the Court of Appeal relied upon the same ballot pamphlet language that Proposition 21 would “expand[] the law on conspiracy to include gang-related activities.” (ROBM at 17.) While the Court of Appeal correctly found this language meant section 186.22 already functioned to proscribe conspiracy to engage in gang-related activities and only expanded the conspiracy to encompass the agreement to commit crimes (Typed opinion at 315), respondent urges the same language shows conspiracy liability was expanded to provide broader vicarious liability for active participants who aided or benefitted from any felony committed by other gang members. (ROBM at 17.) The language cited simply does not expressly or impliedly support respondent’s position in any fashion.

Respondent also points to language in legislative intent materials

pertaining to a prior version of section 182.5 (one never passed by the legislature) which respondent states purported to create a new crime of conspiracy to participate in a street gang. (ROBM at 18.) The analysis provided in the legislative materials reflected the lawmaker's belief that the proposed statute's vague terminology and lack of a requirement of an agreement rendered it open to constitutional challenge. (ROBM at 19.) Even if the material could be deemed to show the drafter's intent to create a separate gang conspiracy crime, there is no legally recognized mechanism for somehow grafting that legislative intent onto the intent of the *electorate* voting later on Proposition 21. All the material really shows is that a legislator tried and failed to pass a constitutionally suspect statute which was partially incorporated into a larger scheme later passed by the electorate. The constitutionality of the statute is not thereby proved in any way, nor is the intent of electorate established.

Respondent states that defendants had the fair notice of the crime charged, as required by due process, through the plain language of the elements of sections 182 and 186.22, subdivision (a). (ROBM at 25-27.) Insofar as the statutes themselves do not provide for the charge of conspiracy to commit a violation of section 186.22, subdivision (a), respondent's claim must fail.

Conspiracy is punished because the agreement to join others in committing/facilitating a target crime plus one overt act increases the danger that the target crime will be successfully committed. As explained in one article:

The mental states cannot be identical to those required for completed crimes and completed attempts, for the defendant committing an inchoate crime is aware or believes that there is still time to desist and renounce. That awareness or belief is at least one qualitative distinction between the mental states of completed and inchoate crimes.

(Alexander & Kessler, *Mens Rea and Inchoate Crimes* JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Vol. 87, No. 4 (Summer, 1997) pp. 1138, 1139.)

A conspiracy to participate actively in a gang is no different from the substantive crime of active gang participation. Once the agreement is made and an overt act committed, the substantive crime itself has been committed.

Inchoate crimes, however, contemplate future completed crimes, crimes that have not yet occurred. In an inchoate crime, the defendant's purpose is to bring about a future crime, and that purpose can be internally and externally conditional in all sorts of ways.

(Alexander & Kessler, *supra*, pg 1142.)

The purpose of criminalizing conspiracy is that the agreement to act with others is itself more dangerous to society than one person's intent to commit a crime. (*Krulwitch v. United States* (1949) 336 U.S. 440,

448-449 (*concurring opn.* of Jackson, J.) In this case, the idea that appellants conspired to participate actively in a gang did not in any way increase the dangerousness of the underlying crime of gang participation because group participation in a gang is already punishable and involves no greater danger to the public.

If conspiracy is to be a crime separate from solicitation and cognate crimes that are premised upon encouraging others, it must be because [the defendant], in agreeing with others that he will commit the crime, has increased the risk of his own criminality. Agreeing would be the culpable act that unjustifiably increases the danger to the victims of the contemplated crimes.

(Alexander & Kessler, *supra*, pg 1179.)

As such, no substantial legal or social purpose is served by creating the crime of conspiracy to participate in a street gang. Appellant respectfully requests that the Court of Appeal ruling be upheld.

NOTICE OF JOINDER AND CONCLUSION

Appellant Johnson joins any argument that may inure to his benefit raised by his co-appellants in their briefs. For the reasons expressed herein and in the briefs filed by all the appellants, Mr. Johnson urges this Court to uphold the ruling of the Court of Appeal.

Respectfully submitted,

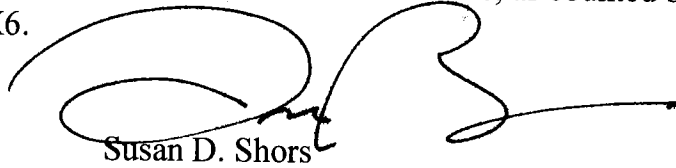
A handwritten signature in black ink, appearing to read 'Susan D. Shors', written over a horizontal line.

Susan D. Shors
Attorney for Appellant Johnson

Date: February 14, 2013

CERTIFICATION OF WORD COUNT

I certify that this Answer Brief contains 3331 words, as counted by WordPerfect version X6.



Susan D. Shors

PROOF OF SERVICE

I am a citizen of the United States and am employed in the City and County of San Francisco. I am over the age of 18 years and am not a party to the within action. My business address is 466 Green Street, Suite 300 , San Francisco, California. On the date specified below, I served the following:

APPELLANT'S ANSWER ON THE MERITS

on the interested parties by placing a true and correct copy thereof in a sealed envelope with postage prepaid thereon and placing the same in an United States Postal Service Mail Box addressed as follows:

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I declare under the penalty of perjury that the foregoing is true and correct. Executed this _____ day of February, 2013.
