S202790

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

Court of Appeal, Fifth Appellate District, Case No. F057736

Kern County Superior Court, Case Nos. BF122135A, BF122135B & BF122135C
Honorable Gary T. Friedman, Judge

APPELLANT DAVID LEE, JR.'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Is there a valid crime of conspiracy under Penal Code section 182 to commit the crime of active participation in a criminal street gang in violation of Penal Code section 186.22, subdivision (a)?

STATEMENT OF THE CASE

Trial Court Proceedings

Pursuant to a multi-count indictment, appellant David Lee, Jr. (appellant) and co-appellant Corey Johnson (Johnson) were convicted in

count 1 of attempted murder on or about March 21, 2007.[1] Appellant, Johnson and co-appellant Joseph Dixon (Dixon) were convicted in counts 1-8 of various crimes, including three counts of special-circumstance murder, occurring on or about April 19, 2007, with gang enhancements sustained under Penal Code section 186.22, subdivision (b) (§ 186.22 (b)).[2]

In count 9, appellants were found guilty under section 182, subdivision (a)(1) of one count of conspiracy, alleged to have occurred between about March 2, and August 22, 2007, to commit four crimes: assault with a firearm; first degree murder; robbery; and participation in a criminal street gang in violation of section 186.22, subdivision (a) (§ 186.22, subd. (a)). (1 C.T. 21-23.) The same six overt acts were alleged as to each target crime of the conspiracy, covering the period March 21, to August 18, 2007, and consisting mainly of the presence of at least one of the defendants at various locations and covering primarily the three shooting incidents underlying the charges in this case. (1 C.T. 22-23.) The jury returned separate verdicts on conspiracy to commit each target crime, and as to appellant, the same overt acts were sustained as to each target crime with one exception. In addition, an enhancement under section 186.22 (b) was found on count 9 as to the conspiracy target crimes of assault with a firearm, murder and robbery. (10 C.T. 2738, 2753, 2761.)

During trial, evidence was admitted against appellant, including coconspirators' statements and extensive evidence of Johnson's criminal activities, although unrelated to appellant and there was no evidence appellant knew of these activities, under the broad charge in count 9 of conspiracy to violate section 186.22 (a). (30 R.T. 5353-5354; 31 R.T. 5429-

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[1] The indictment is at 1 C.T. 1-28.

[2] Subsequent section references are to the Penal Code unless otherwise indicated.

5444.) The instruction covering the charge of conspiracy to violate section 186.22 (a) defined "felonious criminal conduct," an element of section 186.22 (a), as including murder, shooting at an occupied vehicle, robbery, sale of narcotics, and/or assault with a firearm. (9 C.T. 2484.)

In count 10, Dixon alone was found guilty of a firearm offense. In count 11, appellants were also found guilty of active participation in a criminal street gang (§ 186.22, subd. (a)). (10 C.T. 2768-2780.)

On the murder convictions, appellant was sentenced to three consecutive terms of life imprisonment without the possibility of parole, plus 25 years to life, and on the other counts, to additional terms. On count 9, appellant was sentenced to a consecutive term of 25 years to life based on the charge of conspiracy to commit murder, the target conspiracy offense carrying the longest punishment. (10 C.T. 2860-2864; 63 R.T. 11721-11730; Court of Appeal's typed opinion (Opn.), p. 300.)

Proceedings on Appeal

In the published portion of its opinion, the Court of Appeal reversed the convictions on count 9 of conspiracy to violate section 186.22 (a) based on the invalidity of this charge and of conspiracy to commit robbery on another basis not relevant here. Except for minor sentencing corrections, the Court otherwise affirmed the judgment. (Opn., pp. 328-329.)

With regard to the conviction on count 9 of conspiracy to violate section 186.22 (a), the Court of Appeal stated that based on the definition and nature of a criminal street gang, which has as one of its chief occupations the commission of crimes, and the active participation requirement of section 186.22 (a), that when an active participant committed a crime, there was "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., p. 312.) The Court found that a criminal street gang is "at its core, a form of

conspiracy," and that a charge of conspiracy to actively participate in a criminal street gang is essentially a charge of conspiracy to actively participate in a conspiracy. (Opn., pp. 312-313.) The Court held the conspiracy offense to be redundant, stated it was aware of no other case where a defendant had been charged with a conspiracy to violate section 186.22 (a), and found that section 186.22 (a) was unlike two federal statutes, the Racketeer Influenced and Corrupt Organizations Act (RICO; 18 U.S.C. § 1961 et seq.) and the Smith Act (18 U.S.C. § 2385), which contained express congressional intent to allow a prosecution for conspiracy to violate their provisions. (Opn., pp. 913-914.) The Court held that nothing suggested the Legislature intended to allow a charge of conspiracy to violate section 186.22 (a), and that absent such intent and because of the judicial requirements to harmonize statutes and avoid interpretations leading to absurd results, a charge of conspiracy to violate section 186.22 (a) was legally invalid. (Opn., pp. 314-315.) The Court further found that the voters' enactment of section 182.5 supported the Court's holding. (Opn., p. 315-316.) The Court noted that the error in charging conspiracy to violate section 186.22 (a) resulted in "some evidence that otherwise would have been limited to one or two of the defendants or as to purpose — or that might not have come in at all — was admitted against all defendants or for an unlimited purpose due to the existence of the conspiracy charge." (Opn., p. 309.)

This Court granted respondent's petition for review of the issue of the validity of a charge of conspiracy under section 182 to violate section 186.22 (a).

STATEMENT OF FACTS

The Court of Appeal's opinion, pages 5-85, sets forth the evidence at trial, which covered the convictions of crimes arising from separate shooting incidents on March 21, and August 9, and 11, 2007, which were found to have been perpetrated by the Country Boy Crips, a criminal street gang. A summary of this evidence is not necessary to resolve the issue on review.

SUMMARY OF ARGUMENT

The Court of Appeal correctly held there is no valid crime of conspiracy under section 182, the general conspiracy statute, to violate section 186.22 (a).[3] An analysis of section 182 as applied to the elements of section 186.22 (a) and of legislative intent in enacting section 186.22 (a), as well as an analysis of the significance of section 182.5, and harmonizing sections 182, 182.5 and 186.22 (a) to avoid unreasonable results, shows the invalidity of the posited crime of conspiracy to violate section 186.22 (a).

To violate section 186.22 (a), a person must actively participate in a criminal street gang, must have knowledge of the gang's pattern of criminal activity and must aid and abet felonious criminal conduct committed in concert by members of the gang. Subsumed within section 186.22 (a) is a violation of a discrete felony, which itself is subject to a conspiracy prosecution under section 182. Adding another layer of conspiracy under section 182--a conspiracy to violate section 186.22 (a)--is redundant and leads to unreasonable results.

Not every felony is subject to prosecution under section 182. Where the felony is inconsistent with a conspiracy prosecution or leads to illogical or unreasonable results, there is no crime of conspiracy to commit that

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[3] Appellant sometimes refers to section 186.22 (a) as the "gang participation" offense or statute.

felony. Because a criminal street gang is, at its core, an ongoing conspiracy to commit crime, an active participant of a gang who has the requisite knowledge of the gang's criminal activities and who joins in felonious criminal conduct committed by gang members is acting, at a minimum, with a tacit agreement to commit that conduct and thus, conspiratorially. Applying section 182 to section 186.22 (a), instead of to the underlying felony, results in a redundant, nonsensical crime.

Conspiracy principles do not fit with the active participation and knowledge elements of section 186.22 (a), which are what distinguish the posited conspiracy to violate section 186.22 (a) from a conspiracy to violate the underlying felony that is an element of section 186.22 (a). Section 182 requires an agreement to commit all the elements of an offense, and it is uncertain and incomprehensible how this requirement would apply to the active participation and knowledge elements of the gang participation statute. This is true whether or not a violation of section 186.22 (a) is technically itself a conspiracy in all cases, and whether or not respondent can think up some examples where the posited conspiracy and section 186.22 (a) might not duplicate one another. (See Respondent's Opening Brief on the Merits (ROBM), pp. 4, 8-9.) In any case, the examples cited by respondent are strained and erroneous and only demonstrate the invalidity of the posited conspiracy to violate section 186.22 (a).

Respondent describes its view of a conspiracy to violate section 186.22 (a), but respondent's description is a skewed, incomplete application of section 182 to the gang participation statute. (ROBM, pp. 4, 8.) Failing to recognize that the gravamen of section 186.22 (a) is active participation in a criminal street gang, respondent conflates this element of section 186.22 (a) with the element of felonious criminal conduct and ignores the knowledge element altogether.

The Legislature did not intend that section 182 be applied to the gang participation statute because the Legislature acted so comprehensively to cover the subject of criminal street gangs in 186.22 (a), including their collective actions, and because the posited crime of conspiracy to violate section 186.22 (a) is redundant, problematic and serves no legitimate purpose. A charge of conspiracy to violate the discrete felony within section 186.22 (a), in contrast to the posited conspiracy to violate section 186.22 (a), is consistent with conspiracy principles. The People do not have to prove an agreement regarding the active participation and knowledge elements of section 186.22 (a), and the defendant's punishment will be at least equal to the punishment for the posited conspiracy, and in most cases will be substantially longer and additionally be subject to a gang enhancement (§ 186.22 (b)).

The enactment of specific conspiracy provisions in RICO and the Smith Act does not validate a conspiracy charge under section 182 to violate section 186.22 (a). These acts differ substantially from section 186.22 (a), and the most that can be said is that Congress wanted conspiracy prosecutions as to the substantive provisions of these acts, while the California Legislature did nothing similar regarding section 186.22 (a).

Any doubt about the validity of a charge of conspiracy to violate section 186.22 (a) is resolved by section 182.5. Section 182.5 includes all the elements of section 186.22 (a) and treats a violation of section 186.22 (a) as a conspiracy to commit the discrete felony within section 186.22 (a). The enactment of section 182.5 shows voter intent that the gang participation statute be viewed as a conspiracy in and of itself, the ends of which is the commission of a specific felony. Section 182.5 is the only reasonable manner in which to apply conspiracy principles to section 186.22 (a), that is, as a conspiracy to violate the underlying felony. This leaves the People with the option of proceeding under section 182.5, or

charging a conspiracy under section 182 to commit the underlying felony with a gang allegation under section 186.22 (b). Either way, the defendant's punishment will never be less, and usually substantially longer, than for the posited crime of conspiracy to violate section 186.22 (a).

Although section 186.22 (a) was enacted in 1989, no appellate case, other than appellant's case, indicates that a conspiracy has ever been charged under section 182 to violate section 186.22 (a), despite the many appellate cases regarding gangs and their crimes. This is understandable. Because section 186.22 (a) is conspiratorial at its core, applying section 182 to this statute creates a redundant conspiracy that serves no purpose and is nonsensical and incomprehensible, particularly as applied to the active participation and knowledge elements of section 186.22 (a). Since the enactment of section 182.5, the invalidity of the posited conspiracy to violate the gang participation statute is even more apparent. The only valid conspiracy charge covering a violation of section 186.22 (a) is under section 182.5, although the People have the option of charging a conspiracy to violate the underlying felony within section 186.22 (a) and add a gang enhancement allegation (§ 186.22 (b)).

The posited conspiracy is a phantom, invalid crime, and charging it in appellant's case was an anomaly. The crime is also unconstitutionally vague because of the incomprehensibility of applying conspiracy requirements to section 186.22 (a).

This Court should affirm the Court of Appeal's holding that there is no valid crime of conspiracy under section 182 to violate section 186.22 (a).

ARGUMENT

I.

THE CRIME OF CONSPIRACY UNDER SECTION 182 DOES NOT APPLY TO SECTION 186.22 (a) BECAUSE A VIOLATION OF SECTION 186.22 (a) IS CONSPIRATORIAL IN NATURE, AND THE POSITED CONSPIRACY IS A REDUNDANT, NONSENSICAL CRIME, WHICH WAS NEVER INTENDED BY THE LEGISLATURE

A. Introduction

A criminal street gang is an ongoing criminal conspiracy, and a violation of section 186.22 (a) is conspiratorial in nature, there being at a minimum, a tacit agreement by active participants in the gang to commit felonies. An active gang participant who participates in a felony collectively committed by gang members, as required by section 186.22 (a), is essentially committing a conspiracy. As a result, applying section 182 to section 186.22 (a), rather than to the underlying "felonious criminal conduct" element of section 186.22 (a), creates a redundancy and is problematic and nonsensical. This is true whether or not section 186.22 (a) is technically a conspiracy.

The Legislature did not intend that section 182 be applied to section 186.22 (a), because section 186.22 is already a comprehensive statute covering collective gang actions, and doing so serves no purpose. If an active gang participant agrees to commit the felony underlying section 186.22 (a), he or she is subject to prosecution for conspiracy to commit that felony. With this conspiracy charge, the People do not have to prove an agreement to commit the active participation and knowledge elements of section 186.22 (a), yet, the defendant is subject to at least the same punishment, and usually longer punishment, than the punishment for the posited conspiracy to violate section 186.22.

Congress's enactment of conspiracy provisions in RICO and the Smith Act does not show the intent of the California Legislature, which did not act similarly regarding section 186.22 (a), or show that a conspiracy under section 182 to violate section 186.22 (a) is a cognizable offense under California law.

B. Standard of Review and Principles of Statutory Construction

A reviewing court applies an independent standard of review when the meaning of a statute or statutes is at issue. (See *People v. Jones* (2001) 25 Cal.4th 98, 103, 108.)

In interpreting a statute, the reviewing court's fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose, and the court begins by examining the statute's words, but does not review them in isolation from the substance of the statute and the statutory framework as a whole. (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Extrinsic sources may be used, including legislative history, to select the construction that comports must closely with the apparent intent and purpose of the Legislature and to avoid an interpretation leading to absurd results. (*In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1404-1405.) "If the words in the statute do not, by themselves, provide a reliable indicator of legislative intent, `[s]tatutory ambiguities often may be resolved by examining the context in which the language appears and adopting the construction which best serves to harmonize the statute internally and with related statutes. [Citation.]' [Citation.]" (*People v. Arias* (2008) 45 Cal.4th 169, 177.) The court may "reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results. [Citation.]" (*Simpson Strong-Tie Co, Inc. v. Gore* (2010) 49 Cal.4th 12, 27.) If there are two alternative interpretations of a statute, the one leading to more reasonable results will be followed, and if there are two reasonable

interpretations, the one more favorable to the defendant will normally be followed. (*People v. Arias, supra,* 45 Cal.4th at p. 177.)

C. Section 186.22 (a) Is Based on Collective Action by Members of a Criminal Organization, and Its Core Is Conspiratorial

1. The Elements of Section 186.22 (a)

In 1989, the Legislature enacted the California Street Terrorism Enforcement and Prevention Act (STEP Act) in sections 186.20 et seq. (Added by Stats. 1989, c. 930, § 5.1, operative Jan. 1, 1993.) Section 186.22 (a), which was part of the STEP Act, states:

> Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished 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.

Section 186.22 (a) has never been amended, other than to substitute "16 months, or two or three years" for "one, two, or three years" as the prescribed sentence. (Stats. 1994, c. 47 (S.B. 480), § 1, eff. April 19, 1994.)

In *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*), this Court described the elements of section 186.22 (a) as follows:

> The elements of the gang participation offense in section 186.22(a) are: First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.] A person who is not a member of a gang, but who actively participates in the gang, can be guilty of violating section 186.22(a). (§ 186.22, subd. (i).)

"The gravamen of. . . section 186.22 (a) is active participation in a criminal street gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 55

(*Albillar*).) The legislative history of section 186.22 (a), as set forth in *People v. Castenada* (2000) 23 Cal.4th 743, 750 (*Castenada*), shows that this statute was not written to impose liability on someone who was only peripherally involved with a criminal street gang or a casual gang member, but required active participation in the gang, rather than mere membership.

The Legislature enacted section 186.22 (a) with due process requirements in mind, as elucidated in *Scales v. United States* (1961) 367 U.S. 203, 748-749 [81 S.Ct. 1469, 6 L.Ed.2d 782] (*Scales*), "that a person convicted for active membership in a criminal organization must entertain `guilty knowledge and intent' of the organization's criminal purposes." (*Castenada, supra,* 23 Cal.4th at p. 749.) "This explains why the Legislature expressly required in section 186.22 (a) that a defendant not only "actively participates" in a criminal street gang. . . but also that the defendant does so with `knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and that the defendant `willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.'" (*Ibid.*)

To violate section 186.22 (a), a defendant must know of the gang's criminal purposes and activities, but not the particular crimes committed by the gang. "Criminal punishment based on active participation in a criminal gang requires knowledge of the gang's illegal purposes." (*People v. Carr* (2010) 190 Cal.App.4th 475, 488.) Section 186.22 (a)'s requirement that the defendant have knowledge that members of the gang "engage in or have engaged in a pattern of criminal gang activity" correlates with the requirements described in *Scales, supra,* 367 U.S. at p. 228, of guilty knowledge and intent of the organization's criminal purposes, but this "does not require a defendant's subjective knowledge of particular crimes committed by gang members." (*Id.* at p. 488, fn. 13.)

To violate section 186.22 (a), the defendant must be an active participant in the gang at the time he "willfully promotes, furthers, or assists" felonious criminal conduct, because section 186.22 (a) uses the present tense of a defendant "who actively participates" in a criminal street gang. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509; see also *People v. Loeun* (1997) 17 Cal.4th 1, 11 [verb tense used by the Legislature is significant in construing statutes].)

In *Rodriguez, supra,* 55 Cal.4th at p. 1132, this Court concluded that the third element of section 186.22 (a), which covers a defendant "who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang," is not satisfied when a gang member commits a felony while acting alone. This Court held:

> [A] defendant must willfully advance, encourage, contribute to, or help *members* of his gang commit felonious criminal conduct. The plain meaning of section 186.22 (a) requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member. (See § 186.22, subd. (i).)

(*Ibid.*)

There is no requirement that the felony be gang-related to satisfy section 186.22 (a). (*Albillar, supra,* 51 Cal.4th at pp. 55-56; *Rodriguez, supra,* 55 Cal.4th a p. 1133.) However, "the Legislature sought to punish gang members who act *in concert* with other gang members in committing a felony. . . . (Emphasis original.)" (*Rodriguez, supra,* 55 Cal.4th at p. 1138.) "[S]ection 186.22 (a) reflects the Legislature's carefully structured endeavor to punish active participants for commission of criminal acts done *collectively* with gang members. (Emphasis original.)" (*Id.* at p. 1139.)

Thus, a defendant violates section 186.22 (a) only if the defendant is an active participant in a criminal street gang, the defendant knows of the

gang's illegal activities and purposes and the defendant commits or aids and abets a felony collectively committed by gang members.

2. The Elements of Section 182

Section 182 includes within its coverage two or more persons who conspire to commit any crime. (§ 182, subd. (a)(1).) "Conspiracy is an inchoate crime. [Citation.] It does not require the commission of the substantive offense that is the object of the conspiracy. [Citation.] `As an inchoate crime, conspiracy fixes the point of legal intervention at [the time of] agreement to commit a crime,' and `thus reaches further back into preparatory conduct than attempt....' [Citation.]" (*People v. Swain* (1996) 12 Cal.4th 593, 599.)

The elements of conspiracy are: 1) an agreement by two or more persons to commit an offense; 2) the specific intent to agree to commit the offense; 3) the specific intent to commit the elements of the offense; and 4) the commission of an overt act by one or more parties to the agreement to further the conspiracy. (§ 184; *People v. Swain, supra,* 12 Cal.4th at p. 600; *People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1024.)

"The essence of the crime of conspiracy is the `evil' or `corrupt' agreement to do an unlawful act." (*People v. Marsh* (1962) 58 Cal.2d 732, 743.) However, "[t]o prove an agreement, it is not necessary to establish the parties met and expressly agreed; rather, `a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design.' [Citation.]" (*People v. Vu, supra,* 143 Cal.App.4th at p. 1025.) As explained in *People v. McManis* (1954) 122 Cal.App.2d 891, 899-900, disapproved on another ground in *People v. Cox* (2000) 23 Cal.4th 665, 675:

> It is sufficient if [the parties] in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. It may result from the acts of the conspirators in carrying out a common purpose to achieve an unlawful end. [Citations.] A conspiracy may also result from actions of parties showing an intent to carry out a common purpose to violate the law and it is not necessary to prove an actual agreement to work together in performance of the unlawful acts. The existence of the assent of minds which is involved in the conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from the proof of facts and circumstances which, taken together, apparently indicate that they are mere parts of the same complete whole. [Citations.]

"Therefore, a conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citation.]" (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) Although mere association does not prove a conspiracy, an entirely different situation arises when the conspiracy is already in existence and acts are committed to accomplish its illegal purpose. (*People v. Moran* (1958) 166 Cal.App.2d 410, 415.)

3. The Requirements of a Conspiracy Are Essentially Met by Section 186.22 (a)

A 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 participates in a felony collectively committed by members of the gang has entered into an agreement with gang members to commit the felony, whether the agreement is explicit or tacit. The active gang participant must know of the gang's criminal activities and purposes. (*People v. Carr, supra,* 190 Cal.App.4th at p. 488.)

A criminal street gang by statutory definition is an organization of individuals intent on crime. "`[C]riminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated [in specified provisions of subdivision (e)], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) For crime to be a primary activity, "the commission of one or more of the statutorily enumerated crimes [must be] one of the group's `chief' or `principal' occupations." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)

"The definition of a criminal street gang. . . . specifically apprises an individual that it is not mere association with others, but association with others for the purpose of committing crime, where the association's very existence is founded upon the commission of crime, that is prohibited." (*People v. Gamez* (1991) 235 Cal.App.3d 957, 972-973 (*Gamez*), overruled on other grounds in *People v. Gardeley* (1996) 14 Cal.4th 605, 624, fn. 10.) "[S]ection 186.22 does not punish association with a group of individuals who, in a separate capacity, may commit crimes. Rather, it requires that one of the primary activities of the group or association itself be the commission of crime. (*Gamez, supra,* 235 Cal.App.3d at p. 971.) "It is not the association with other individuals *alone* which section 186.22 addresses, but the association with others *for the purpose of promoting, furthering or assisting them in the commission of crime.*" (*Ibid*; emphasis original.)

By its nature, a criminal street gang is an agreement to commit felonies, and an active participant in a criminal street gang has at a minimum, a tacit understanding to engage in felonious criminal conduct

with members of the gang. One cannot be an active participant in an "organization, association, or group," particularly one having the commission of crime as a primary goal, without an implicit or explicit agreement on the part of both the individual and that group.

"A conspiracy is not necessarily a single event which unalterably takes place at a particular point in time when the participants reach a formal agreement; it may be flexible, occurring over a period of time and changing in response to changed circumstances." (*People v. Jones* (1986) 180 Cal.App.3d 509, 517.)

As the Court of Appeal stated in its opinion, page 312:

> 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, association, or group 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.

When an active gang participant acts in concert with gang members to commit a felony, as required by section 186.22 (a), the defendant is acting pursuant to an ongoing agreement by two or more persons to commit crime, as required by section 182. The second conspiracy requirement of the specific intent to agree to commit the offense is also met by the defendant's tacit understanding that a primary purpose of the gang is to commit felonious criminal conduct, such that when the defendant participates in a collective crime by gang members, the defendant necessarily and implicitly has formed an agreement to commit that offense with gang members. The gang context and mindset inform the nature of the defendant's understanding and specific intent when he joins with gang members to commit a felony.

The third conspiracy requirement of the specific intent to commit the elements of the felony is satisfied within section 186.22 (a)'s requirement that the defendant at least aid and abet a felony collectively committed by gang members. One cannot aid and abet a particular felony without the specific intent that the crime's elements be committed. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131.) There must be proof that the defendant acted "with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citations.]" (*People v. Beeman* (1984) 35Cal.3d 547, 560.)

The fourth conspiracy requirement of an overt act by a party to the agreement to further the conspiracy is satisfied by the requirement of section 186.22 (a) that gang members aid and abet the underlying felonious criminal conduct.

All the requirements of a conspiracy are met in a violation of section 186.22 itself. There is a clear agreement with the gang or gang members to commit felonies. The intent requirement for both intending to form the agreement and intending to commit the crime are met because an individual must know of the gang's pattern of criminal activity and criminal purposes while willfully promoting, furthering or assisting felonious conduct. There is also a clear overt act in committing the felony.

Thus, the crime of active participation in a criminal street gang, as defined in section 186.22 (a), meets the definition of a conspiracy, the ends of which must be a specific felony or felonies, rather than active participation in a criminal street gang itself. As concluded by the Court of Appeal, "a criminal street gang is, at its core, a form of conspiracy. This being the case, by charging defendants in count nine with conspiracy to actively participate in a criminal street gang, the People essentially charged

defendants with conspiracy to actively participate in a conspiracy." (Opn., pp. 312-313.)

Respondent argues that the Court of Appeal's conclusion is erroneous because the "felonious criminal conduct" element of section 186.22 (a) need not also qualify as one of the primary criminal activities included in the definition of a criminal street gang. (RBOM, pp. 11-12.) The primary activity requirement safeguards that section 186.22 reaches the type of group warranting coverage by the STEP Act, but the Legislature in enacting section 186.22 was concerned with a criminal street gang's commission of other felonies as well. Subdivision (a) of section 186.22 shows concern with gang members committing any felonious criminal conduct together, and subdivision (b) does not restrict its enhancement terms to only felonies that are the primary activity of the gang. The Court of Appeal was correct in concluding that a criminal street gang itself is, at its core, a form of conspiracy and that when an active participant in a gang commits a felony in concert with gang members, the crime is conspiratorial in nature.

Respondent also argues that section 186.22, subdivision (f), which defines a criminal street gang, does not *expressly* require an agreement to commit the enumerated offenses, and an active gang participant may know of the gang's primary criminal activities, but only participate in other felonies and thus not be a coconspirator to the gang's primary activities. (RBOM, p. 12.) This overly technical parsing of section 186.22 ignores the reality that an individual who is an active participant in a criminal street gang will have at least a tacit, mutual understanding with members of the gang to further the gang's criminal activities, or as stated by the Court of Appeal, "to work together to accomplish that shared design." (Opn. P. 312.)

Respondent further argues that the gang participation statute can be violated without committing a conspiracy because a defendant may be an

active participant who spontaneously aids or abets a fellow gang member's felonious conduct, and that aiding and abetting a crime does not require previously entering into a conspiracy to commit it. (RBOM, pp. 9-10.) Although aiding and abetting some crimes may occur spontaneously, section 186.22 (a) requires more--that the defendant be an active participant in a criminal street gang and that the defendant know of the gang's criminal activities and purposes at the time the defendant participates in a felony collectively committed by members of the gang. The gang mindset of committing felonies shows a tacit agreement to do so, which is not akin to two non-gang members just spontaneously committing a crime.

Respondent argues it has long been settled that a violation of section 186.22 does not require an agreement between gang members and cites *Gamez, supra,* 235 Cal.App.3d at p. 979, and *In re Alberto R.* (1991) 235 Cal.App.3d 1309, 1324. (RBOB, p. 9.) These two cases do not stand for the proposition that an agreement is not implicit in a violation of section 186.22 (a), and no case has so held. The statements made in these two cases regarding conspiracy principles were not with reference to section 186.22 (a), but section 186.22 (b).[4]

In *Gamez, supra,* 235 Cal.App.3d at pp. 974, 978-979, where the defendant was not charged with a violation of section 186.22 (a), he argued there was insufficient evidence to find he had the intent required by section

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[4] Subdivision (b)(1) provides in pertinent part:

> [A]ny 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows. . . .

186.22 (b), based on conspiracy case law requiring an agreement. It was in this context that the court stated section 186.22 does not require an agreement among gang members. (*Ibid.*) Subdivision (b) of section 186.22 is much different from subdivision (a) and does not require the defendant to be an active participant in a criminal street gang who has knowledge of the gang's criminal purposes and activities. Subdivision (b) punishes "completely separate conduct." (*Id.* at p. 974.)

In *In re Alberto R., supra,* 235 Cal.App.3d at p. 1324, the juvenile contended that the gang enhancement of section 186.22 (b) denied him equal protection of the laws because the enhancement was in the same category as the crime of conspiracy, but without the same safeguards. In this context, the court rejected the claim and held the enhancement could be committed without an agreement to commit the crime and merely by aiding and abetting. (*Ibid.*) However again, section 186.22 (b) does not require that the defendant be an active participant in a gang and have knowledge of the gang's criminal activities and purposes when participating in a felony collectively committed by gang members.

Respondent argues that *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*) implicitly supports respondent's position. (RBOM, p. 10.) *Mesa* holds that section 654 prohibits punishing a defendant both for a conviction of section 186.22 (a) and a felony where that felony is the only felonious criminal conduct underlying the conviction of section 186.22 (a), because both convictions are based on the same act. *Mesa* has no implications for the issue before this Court, and to the extent respondent is arguing that a defendant can violate section 186.22 (a) without at least aiding and abetting felonious criminal conduct, *Rodriguez,* 55 Cal.4th at pp. 1132, 1138-1139, holds to the contrary.

D. The Posited Crime of Conspiracy to Violate Section 186.22 (a) Is a Nonsensical, Incomprehensible Crime

Whether or not a violation of section 186.22 (a) is technically a crime of conspiracy in all cases, applying section 182 to section 186.22 (a) as a target crime makes little sense because conspiracy principles do not fit with the active participation and knowledge elements of section 186.22 (a).

Respondent argues that section 182 does not exempt any criminal offense from being the target crime of a conspiracy. (RBOM, p. 8.) Although literally section 182, subsection (a)(1) covers two or more persons who conspire to commit "any crime," not all crimes are subject to conspiracy prosecution under section 182. Where the posited target crime is inconsistent with a conspiracy prosecution or leads to illogical or unreasonable results, there is no crime of conspiracy to commit the crime. (See *People v. Iniguez* (2002) 96 Cal.App.4th 75, 77-79 [conspiracy to commit attempted murder is a legal falsehood because an element of attempted murder is an ineffectual act, and a person conspiring to commit murder does not agree to commit an ineffectual act]; *People v. Swain, supra,* 123 Cal.4th at pp. 601-602 [there is no crime of conspiracy to commit implied malice murder, which does not require intent to kill, because conspiracy to commit murder requires intent to kill].) In addition, where the seemingly plain language of a statute in application reveals ambiguities not apparently foreseen by the Legislature and not answered by the statute's legislative history, the courts search for a reasonable construction and may "reject a construction that, while arguably consistent with the section's language, is almost certainly not what the Legislature intended." (*In re Reeves* (2005) 35 Cal.4th 765, 776.)

In determining whether the posited crime of conspiracy to violate section 186.22 (a) is a valid crime under California law, the elements of section 186.22 (a) must be considered to determine if a conspiracy

prosecution is consistent with those elements because a conspiracy requires the prosecution to "'show not only that the conspirators intended to agree *but also that they intended to commit the elements of that offense*.' [Citation.]" (*People v. Swain, supra*, 12 Cal.4th at p. 600, emphasis original.) Section 186.22 (a) is not the usual substantive crime to which section 182 can be applied, such as robbery, where the crime does not contain elements regarding the status of the perpetrator and particularly not the status vis-a-vis a criminal group.

The first element of section 186.22 (a), the gravamen of the offense, is active participation in a criminal street gang. (*Rodriguez, supra,* 123 Cal.4th at p. 1130; *Albillar, supra,* 51 Cal.4th at p. 55.) Active participation typically is shown by such evidence as the defendant's gang tattoos and clothing, other gang indicia, self-admission of gang membership, and past gang associations and actions supporting the gang, although the charged crimes may be used as well. (See, e.g., *People v. Ferraez* (2003) 112 Cal.App.4th 925, 928; *Castenada, supra,* 23 Cal.4th at pp. 752-753.)

Applying conspiracy principles under section 182 to this element, which respondent basically ignores, is problematic and uncertain. Does the requirement that two or more persons conspire to violate section 186.22 (a) require that two or more persons who are not active participants already in a gang agree to become active participants, or is it sufficient that one person who is already an active participant obtains the agreement of another person to become an active participant in the gang? What if all the participants in a crime or an intended crime have long been active participants in the gang? It would seem that because the gravamen of the gang participation statute is active participation in a criminal street gang, that two persons who are not active participants would have to agree to become active participants for there to be a conspiracy as to this element of section 186.22 (a), but this is

not clear. Respondent skirts over the active participation element of section 186.22 (a) and does not attempt to show how conspiracy principles would apply to it.

It is even more difficult and problematic to try to apply conspiracy principles to the second element of section 186.22 (a)--knowledge that the gang's members engage or have engaged in a pattern of criminal gang activity. (*Rodriguez, supra,* 123 Cal.4th at p. 1130.) Knowledge is a personal matter, and it is unclear how two persons would agree to gain knowledge of a gang's pattern of criminal gang activity. Do they, for example, agree that they are going to learn what crimes a gang is committing? There has to be some level of reality to the supposed crime of conspiring to actively participate in a gang.

The third element of the gang participation offense is committing or aiding and abetting a felony collectively committed by at least two gang members. (*Rodriguez, supra,* 123 Cal.4th at p. 1130.) Two persons can conspire to commit or to aid and abet the underlying felony within a violation of section186.22 (a), but section 186.22 (a) requires more--that at least two gang members commit the offense and that the defendant, an active participant in the gang, knows of the criminal activities and purposes of the gang and joins in the offense. As stated *infra*, the defendant is acting pursuant to a tacit agreement to commit crime.

What the posited crime of conspiracy to violate section 186.22 (a) additionally would require is an agreement to actively participate in a criminal street gang and to have knowledge of the gang's pattern of criminal gang activity, but it is it unknown and uncertain how an agreement to commit these elements would occur and be proven. There is a reason that, although section 186.22 (a) was enacted in 1989, a conspiracy to violate this statute has not been reportedly charged in other cases. This supposed crime does not make sense.

Respondent states that a conspiracy to violate section 186.22 (a), plainly understood, 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." (ROBM, p. 8.) Respondent's reference to a "gang crime" is apparently to the gang participation offense. (See RBOM, p. 1, fn. 1.)

Respondent's posited description of the offense of conspiracy to violate section 186.22 (a) is a skewed and incomplete application of the conspiracy statute to the offense of active participation in a criminal street gang. Respondent fails to recognize that the gravamen of section 186.22 (a) is active participation in a criminal street gang. Respondent conflates the element of active participation with the element of felonious criminal conduct and ignores the knowledge element of the statute. Conspiracy principles must be applied to each element of section 186.22 (a).

As set forth *infra*, applying conspiracy principles to the active participation and knowledge elements is problematic and uncertain. It is also unclear what would constitute an overt act in this posited conspiracy. Must an overt act pertain to the active participation element of section 186.22 (a), or is it sufficient if the overt act pertains only to the agreement to commit felonious criminal conduct? If the overt act only need relate to active participation in the gang, then the conspiracy seems so attenuated to any actual criminal activity that the crime seems to become non-criminal. (Cf. *People v. Iniguez, supra,* 96 Cal.App.4th at pp. 77-79.)

Respondent argues that a conspiracy to violate section 186.22 (a) can be committed without violating section 186.22 (a) and gives two examples.

(RBOM, p. 8.) The first example is "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." (RBOB, p. 8.) Appellant understands this to be an argument that a defendant can conspire to actively participate in a criminal street gang that does not meet the definition of a criminal street gang. (See § 186.22, subd. (e) & (f).) This example is fallacious because section 186.22 (a) requires that a criminal street gang already exist. The statute expressly covers a "person who actively participates in any criminal street gang" and presupposes the gang's existence. A coconspirator would have to agree to actively participate in an existing criminal street gang. The gang participation statute has nothing to do with the *formation* of a gang. In addition, section 186.22 (a) requires an active participant to have "knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity," which also presupposes an existing criminal street gang.

Respondent's second example is "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." (ROBM, p. 8.) This example is also fallacious. Although a person can conspire to commit felonious criminal conduct and not succeed, the gravamen of section 186.22 (a) is active participation in a gang, and if a person forms the necessary agreement with another person to actively participate in a gang and to commit or aid and abet a collective felony with gang members, these agreements would show a sufficient commitment to the gang to establish active participation. Active participation means only "involvement with a criminal street gang that is more than nominal or passive." (*Castenada, supra,* 23 Cal.4th at p, 747.) It is hard to conceive how in the gang context, a person could agree to become an active gang participant and to commit a felony with gang

members and ever be too passive to be an active gang participant. If a person conspires to commit the felonious criminal conduct in section 186.22 (a), but is unsuccessful, the person is guilty of conspiring to commit the target felony, and there is no reason for charging the offense additionally as a conspiracy to violate section 186.22 (a). (See Argument I, E, *post.*)

Respondent's examples of crimes that would constitute conspiring to violate section 186.22 (a), while not violating section 186.22 (a) itself, prove the difficulty of articulating what this conspiracy crime would even look like and highlight the dangers of charging a defendant with conspiracy to violate section 186.22 (a). If respondent is correct, such a charge could be used to circumvent the elements of what constitutes a criminal street gang and could be used to prosecute a person who had some association with gang members, but who never actively participated in the gang or a felony.

Even if the posited crime of conspiracy to violate section 186.22 (a) and a violation of section 186.22 (a) are not always duplicative, and whether or not a violation of section 186.22 (a) in all cases is a conspiracy, there is still the significant problem that section 182 is inconsistent with key elements of section 186.22 (a).

E. The Legislature Did Not Intend That Section 182 Be Applied to Section 186.22 (a) As the Target of a Conspiracy

1. The STEP Act Itself Comprehensively Covers Crimes Collectively Committed by Active Gang Participants and Gang-Related Crimes

Because a criminal street gang is at its core a conspiracy to commit crime, and the STEP Act comprehensively covers collective crimes by active gang participants and gang-related crimes, it is unlikely that the Legislature intended or envisioned that section 182 be applied to section

186.22 (a). Nothing in the STEP Act itself or in the legislative history of section 186.22 (a), which appellant has reviewed, mentions this possibility.

When enacting the STEP Act, the Legislature stated concern in section 186.21 over "violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." Citing that there were nearly 600 criminal street gangs in California, the Legislature stated the purpose behind the STEP Act in pertinent part as follows: "It is the intent of the Legislature in enacting this chapter 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." This purpose manifests concern with the collective actions of gangs.

The provisions of section 186.22 were written with this concern of collective action in mind. Subdivision (a) covers active participation in a criminal street gang and committing a felony collectively with gang members as a substantive crime, and subdivision (b) provides for a sentence 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."[5]

In every instance, a violation of section 186.22 (a) requires collective action by gang members in committing a felony. (*Rodriguez, supra,* 55 Cal.4th at pp. 1132, 1138-1139.) Subdivision (b) applies "when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*Albillar, supra,* 51 Cal.4th at p. 68.)

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[5] Subdivision (b) of section 186.22 was enacted at the same time as subdivision (a). (Added by Stats. 1988, c. 1242, § 1; Stats. 1988, c. 1256, § 1.)

Although a defendant may violate subdivision (b) by committing a felony alone, the defendant would have to be specifically intending to aid criminal conduct by gang members and be acting for the benefit of, at the direction of, or in association with the gang. (§ 186.22 (b).)

Piling on a charge of conspiracy to violate section 186.22 (a), which is already a collective crime by gang members, seems far from Legislative intent. It becomes even clearer that this was not the intent when examining whether such a conspiracy charge serves any purpose.

2. No Legitimate Purpose Is Served by Applying Section 182 to Section 186.22 (a)

Subsumed within the posited conspiracy to violate section 186.22 (a) is a conspiracy to commit "felonious criminal conduct," a felony. Because a conspiracy to violate section 186.22 (a) would require an agreement to commit the elements of section 186.22 (a), a coconspirator would have to agree to commit the felony element of section 186.22 (a). (See *People v. Swain, supra*, 12 Cal.4th at p. 600.) The jury instructions in appellant's case defined "felonious criminal conduct" for both a violation of section 186.22 (a) and a conspiracy to violate section 186.22 (a) as "committing or attempting to commit any of the following crimes: Murder, possession of a firearm by a felon (as to defendant Joseph Dixon, only), shooting at an occupied vehicle, robbery, sales of illegal narcotics, assault with a firearm and/or conspiracy (other than conspiracy to commit a violation of Penal code section 186.22(a)." (9 C.T. 2484.)[6]

"[T]he essence of the crime of conspiracy is the agreement, and thus it is the number of the agreements (not the number of the victims or number

[6] The instruction is erroneous because there is no crime of conspiracy to attempt to commit a crime (see *People v. Iniguez, supra,* 96 Cal.App.4th at pp. 77-79), and including conspiracy as a target of the conspiracy is nonsensical.

of statutes violated) that determine the number of the conspiracies. As the United States Supreme Court stated long ago: `The gist of the crime of conspiracy ... is the agreement or confederation of the conspirators to commit one or more unlawful acts....' [Citation.] `"The conspiracy is the crime and that is one, however diverse its objects."' [Citation.]" (*People v. Meneses* (2008) 165 Cal.App.4th 1648, 1669-1670.) Just because there is an agreement to engage in criminal conduct that may violate multiple penal statutes does not mean there is more than one agreement. (*Ibid.*) In appellant's case, the People proceeded on the basis that there was only one agreement.

There is no reason for the Legislature to have intended section 182 to be applied to section 186.22 (a), when included within this supposed crime of conspiracy is a conspiracy to commit a specific felony, which is easier to prove and usually results in longer punishment for the defendant. A charge of conspiracy to violate section 186.22 (a) increases the elements the prosecution must prove over what is needed to prove a conspiracy to commit the specific felony, because the prosecution must also prove additional agreements regarding the active participation and knowledge elements of section 186.22 (a), assuming it can even be determined how these elements mesh with a crime of conspiracy.

The punishment for the offense of conspiracy is the same as for the target offense of the conspiracy. (§ 182, subd. (a) [other than a conspiracy to commit a crime against certain governmental officials, conspiracy is "punishable in the same manner and to the same extent as is provided for the punishment of that felony"].) Section 186.22 (a) prescribes a sentence of "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."

Most felonies carry considerably longer sentences than the maximum of three years specified in section 186.22 (a).[7]

Furthermore, a conspiracy to commit a felony is subject to a gang enhancement under section 186.22 (b), which adds additional punishment. (See, e.g., *People v. Vu, supra,* 143 Cal.App.4th at pp. 1012-1013 [gang enhancement on conspiracy to commit murder]; *People v. Fiu* (2008) 165 Cal.App.4th 360, 367 [gang enhancement on conspiracy to commit aggravated assault].) This additional punishment may be substantial. (See § 186.22, subd. (b).) In most cases if the defendant was an active participant in a gang and committed a felony collectively with gang members, the defendant would be subject to the enhancement. "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. [Citation.]" (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.)

Finally, and most importantly, the Legislature cannot have intended that a conspiracy to commit a felony by gang members be prosecuted as a conspiracy to violate section 186.22 (a), as opposed to a conspiracy to commit the underlying felony, because of the nonsensical nature of the former conspiracy. As previously noted, the essence of a conspiracy is an agreement, and although one may conspire to commit a target felony with gang members, it is an incomprehensible fiction to propose that anyone conspires to actively participate in a gang and to have knowledge of the gang's pattern of criminal gang activity.

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[7] The only felony that appellant is aware of that carries a shorter punishment is an attempt to commit a felony that has a sentence range of 16 months, two or three years. (See § 664 [the punishment for attempt is one-half the prescribed time for the felony].) However, there is no valid crime of conspiracy to attempt to commit a crime. (See *People v. Iniguez , supra,* 96 Cal.App.4th at pp. 77-79.)

In view of the comprehensiveness of the STEP Act, which covers collective actions by members of a criminal organization, the absence of any legitimate purpose for the posited conspiracy to violate section 186.22 (a), and the nonsensical nature of a conspiracy to violate section186.22 (a), the Legislature did not intend that section 182 be applied to the gang participation statute as the target of a conspiracy. Had the Legislature wanted conspiracy principles to apply, it would have enacted them in the STEP Act.

The posited application of section 182 to section 186.22 (a) should be rejected for the more traditional and logical one, especially since only one conspiracy may be charged on the basis of an agreement to commit a particularly felony. The only valid charge is a conspiracy to commit the underlying felony within section 186.22 (a) or a prosecution pursuant to section 182.5, discussed in Argument II, *post*, which imposes the same punishment as for the underlying felony.

F. The Enactment of Specific Conspiracy Provisions in RICO and the Smith Act Does Not Show That a Conspiracy to Violate Section 186.22 (a) Is a Valid Crime or That the California Legislature Intended Section 182 to Be Applied to Section 186.22 (a)

Respondent argues that RICO and the Smith Act are analogous to section 186.22 (a), and their conspiracy provisions bolster respondent's view that a charge under section 182 to violate section 186.22 (a) is a valid crime under California law. (RBOM, pp. 13-15.) The Court of Appeal found that the specific conspiracy provisions in these acts showed clear intent to allow prosecution of conspiracy to violate the acts' substantive provisions "despite the conspiratorial nature of the conduct and organizations at which those statutes are aimed." (Opn., p. 314.) The Court concluded that even if the Legislature could properly criminalize conspiracy to violate section 186.22 (a), nothing suggested the Legislature intended to do so by means of section 182. (Opn., p. 314.) The court held:

"Absent such intent, and in light of the fact we are required to harmonize statutes both internally and with each other to the extent possible, and to avoid interpretations leading to absurd results. . . , we conclude a defendant cannot properly be charged with conspiracy" to violate section 186.22 (a). (Opn., pp. 314-315.)

Respondent argues the Court of Appeal is incorrect because section 182 covers a conspiracy to commit any crime without exception and the broad purpose behind section 186.22 (a) supports a charge of conspiracy to violate section 186.22 (a) and ensures that section 186.22 (a) is as tightly woven as RICO "to trap even the smallest fish." (RBOM, pp.14-15.) Respondent is mistaken that a conspiracy to commit any crime without exception is permissible, and the Legislature would never have intended such a redundant, unreasonable and incomprehensible crime as the posited conspiracy. (See Argument I, D and E, *infra*.) Further, the voters by enacting section 182.5 have stated how a conspiracy prosecution is to work where section 186.22 (a) is violated. (See Argument II, *post*.)

RICO and the Smith Act are not analogous to section 186.22 (a) and provide no insight into the issue at hand. The most that can be said from the enactment of their conspiracy provisions is that Congress wanted conspiracy prosecutions to be available under these acts. The California Legislature did nothing similar in the STEP Act, although when enacting section 186.22, the Legislature was very cognizant of the Smith Act. (See *Castaneda, supra,* 23 Cal.4th at p. 748.)

RICO's participation provision provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." (18 U.S.C. § 1962, subd. (c).) RICO'S conspiracy provision makes it

"unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." (18 U.S.C. § 1962, subd. (d).) When RICO was enacted in 1970, it included the conspiracy provision. (Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.)[8]

RICO's participation provision differs fundamentally from section 186.22 (a) because RICO does not require a defendant to participate in *a criminal organization*, only to participate in an organization that affects interstate commerce through a pattern of racketeering activity.[9] RICO covers both legitimate and criminal enterprises. (*United States v. Turkette* (1981) 452 U.S. 576, 580-581[101 S.Ct. 2524, 69 L.Ed.2d 246].) Furthermore, RICO does not require collective action by members of a criminal organization. RICO's participation provision can be violated by one person acting alone. (*Salinas v. United States* (1997) 522 U.S. 52, 65 [118 S.Ct. 469, 139 L.Ed.2d 352]; *United States v. Rone* (9th Cir. 1979) 598 F.2d 564, 570.) "The statutory definition of [the participation] offense does not contain an element of agreement or concerted activity." (*United States v. Ohlson* (9th Cir. 1977) 552 F.2d 1347, 1349.)

In contrast, the gravamen of section 186.22 (a) is active participation in a criminal street gang (*People v. Albillar, supra,* 51 Cal.4th at p. 55), which by definition is an "ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities" the commission of enumerated felonies. (§ 186.22, subd.

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[8] At that time, the general federal conspiracy statute (18 U.S.C. § 371) and its predecessor statute had been in effect for decades and covered two or more persons conspiring to commit any offense against the United States. (June 25, 1948, c. 645, 62 Stat. 701; see also *Haas v. Henkel* (1909) 216 U.S. 462, 471[20 S.Ct. 249, 54 L.Ed. 569].)

[9] A pattern of racketeering activity requires the defendant to commit at least two crimes that are designated as racketeering activity. (18 U.S.C. § 1961 (1) & (5).)

(f).) In addition, section 186.22 (a) requires gang members to commit a felony in concert. (*Rodriguez, supra,* 55 Cal.4th at pp. 1132, 1138-1139.)

Respondent states that the "enterprise" at issue under RICO may be a criminal street gang. (RBOM, p. 13.) This does not change the fundamental difference between a RICO substantive violation, which can be committed by one person acting alone and through an organization that need not be criminal, to commit crime, and a violation of section 186.22 (a), which is to actively participate in a criminal organization and collectively commit a felony with members of that organization.

Citing *United States v. Brandao* (1st Cir. 2008) 539 F.3d 44, 51, which quotes from another case, respondent argues that both the substantive and conspiracy RICO offenses ensure that the "RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise" and that a charge of conspiracy to violate section 186.22 (a) ensures the same net to trap the smallest fish. (RBOM, pp. 13-15.) The analogy does not work because section 186.22 (a) is a much different statute from RICO and the quoted language refers to RICO's requirement of mere association with the enterprise. (See *United States v. Elliot* (5th Cir. 1978) 571 F.2d 880, 903.)

Thus, RICO's conspiracy provision does not show that a conspiracy charge under section 182 to violate section 186.22 (a) is proper. Furthermore, the enactment of a specific conspiracy provision in RICO shows unmistakable Congressional intent to maintain a distinction between conspiracy and the substantive RICO offenses (*United States v. Ohlson, supra,* 552 F.2d at p. 1349), but the California Legislature did not act similarly to enact a specific conspiracy provision in the STEP Act.

The Smith Act is no more analogous to section 186.22 (a) than is RICO. The Smith Act is a wide-ranging statute with very different substantive offenses and a focus on personal action, including advising and

circulating material advocating the overthrow or destruction of the federal or state government, not collective action by members of a group. (18 U.S.C. § 2385, 2nd and 3rd par.)[10] Respondent asserts that the third paragraph of the Smith Act prohibits active membership in any group that advocates the overthrow of the government. (RBOM, p. 14.) This paragraph covers organizing a group advocating the overthrow of the government and includes "[w]hoever. . . becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof. . . ." Paragraph 3, however, does not require collective action by members of the group. Thus, the Smith Act is not analogous to section 186.22 (a), which requires an active gang participant to commit a felony collectively with gang members, and to the extent the Smith Act requires collective action, Congress made it clear that conspiracy principles should apply by enacting a specific conspiracy provision in the Act.

RICO and the Smith Act do not contain substantive crimes analogous to section 186.22 (a), so these acts do not show that using section 182 to charge a conspiracy to violate section 186.22 (a) is permissible. To the extent these federal acts penalize conspiratorial conduct and organizations, Congress's enactment of specific conspiracy provisions in the acts says nothing about whether the Legislature intended section 182 to apply to section 186.22 (a), or whether such a conspiracy is a cognizable offense under California law.

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[10] The Smith Act's conspiracy provision covers two or more persons who conspire to commit any offense named in the statute. (18 U.S.C., § 2385, 4th par.)

II.

THE ENACTMENT OF SECTION 182.5 SHOWS THAT A VIOLATION OF SECTION 186.22 (a) IS ESSENTIALLY A CONSPIRACY TO COMMIT A DISCRETE FELONY AND THAT THE CORRECT CONSPIRACY CHARGE COVERING A VIOLATION OF SECTION 186.22 (a) IS A CONSPIRACY TO COMMIT THAT DISCRETE FELONY

In interpreting a voter initiative, the appellate courts apply the same principles that govern interpretation of a statute, giving the statute's words their ordinary meaning and construing the statutory language "'in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.]'" (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) The primary purpose is to ascertain and effectuate voter intent. (*Ibid.*) The analyses and arguments in the official ballot pamphlet for the election at which an initiative was adopted are considered in determining this intent. (*People v. Hernandez* (2003) 30 Cal.4th 835, 866, disapproved on other grounds in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.) The electorate is deemed to be aware of existing laws at the time it enacts a new law and is conclusively presumed to have enacted the law in light of existing laws directly bearing on the new law. (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1067.)

In 2000, the voters enacted section 182.5 as part of Proposition 21. (Initiative Measure (Prop. 21, § 3, approved Mar. 7, 2000, eff. Mar. 8, 2000).) Section 182.5, entitled "Participation in criminal street gang," provides:

> Notwithstanding subdivisions (a) or (b) of Section 182, 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.

Respondent argues that section 182.5's plain meaning and legislative history refute the Court of Appeal's opinion that the enactment of section 182.5 supports the view that there is no valid crime of conspiracy under section 182 to violate section 186.22 (a). (RBOM, pp. 16-22.) On the contrary, section 182.5 manifests that a violation of section 186.22 (a) is conspiratorial in nature and should be treated as a conspiracy to commit the felony element of section 186.22 (a).

The elements of section 182.5 and section 186.22 (a) are identical,[11] except that section 182.5 adds "benefits from" to "willfully promotes, furthers or assists in any felonious criminal conduct" as an alternative to participating in a felony committed by gang members.[12] The punishment under section 182.5 is for a conspiracy to commit the underlying felony in section 186.22 (a).

Section 182.5 treats section 186.22 (a) as a conspiracy to commit the underlying felony and implicitly recognizes that a violation of section 186.22 (a) is inherently a conspiracy. Section 182.5 prescribes that the

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[11] Identical words in statutes relating to the same subject are generally construed as having the same meaning. (*People v. Contreras* (1997) 55 Cal.App.4th 760, 764.)

[12] Whether section 182.5 will withstand constitutional challenge, particularly the "benefits" language, which appears to punish mere associational conduct, is questionable. (See DeVries, *Guilt by Association: Proposition 21's Gang Conspiracy Law Will Increase Youth Violence in California* (2002) 37 U.S.F.L. Rev. 191, 212-214.) Respondent argues section 182.5 is constitutional, but emphasizes that the statute's constitutionality is not before this Court and is relevant only in determining whether there is a valid crime of conspiracy under section 182 to violate section 186.22 (a). (ROBM, pp. 23-25.) Appellant agrees that the constitutionality of section 182.5 is not at issue.

conspiracy be treated and punished as a conspiracy to commit the underlying felony. This makes sense in view of the difficulty of even applying conspiracy requirements to the active participation and knowledge elements of section 186.22 (a). (See Argument I, D, *infra.*)

It is worth noting that Proposition 21 also enacted section 186.26, subdivision (a), which covers recruiting or soliciting another person to actively participate in a gang, a subject closely connected to obtaining an agreement to actively participate in a gang. Section 186.26, subdivision (a) provides:

> Any person who solicits or recruits another to actively participate in a criminal street gang, as defined in subdivision (f) of Section 186.22, with the intent that the person solicited or recruited participate in a pattern of criminal street gang activity, as defined in subdivision (e) of Section 186.22, or with the intent that the person solicited or recruited promote, further, or assist in any felonious conduct by members of the criminal street gang, shall be punished by imprisonment in the state prison for 16 months, or two or three years.

(Added by Initiative Measure (Prop. 21, § 6, approved March 7, 2000, eff. March 8, 2000.)[13] At the same time this statute was enacted, the electorate enacted section 182.5, which treats and punishes active gang participation as a conspiracy to commit the felony underlying a violation of section 186.22 (a).

The voters' ballot pamphlet for Proposition 21 supports the Court of Appeal's opinion that enactment of section 182.5 implicitly recognizes that

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[13]The analysis of Proposition 21 by the Legislative Analyst in the voters' ballot pamphlet, states that the measure "makes it easier to prosecute crimes related to gang recruitment...." (Ballot Pamp., Primary Elec. (March 7, 2000), Analysis by the Legislative Analyst, p. 46.) The analysis is included in Respondent's Motion for Judicial Notice as Exhibit A. In 2001, the Legislature made technical and non-substantive changes to the statute. (Amended by Stats. 2001, c. 854 (S.B. 205), § 23.)

section 182 is not applicable to section 186.22 (a). The analysis of Proposition 21 by the Legislative Analyst includes in the summary of the gang provisions of Proposition 21 that the measure "expands the law on conspiracy to include gang-related activities...." (Ballot Pamp., Primary Elec. (March 7, 2000), Analysis by the Legislative Analyst, p. 46; see Exhibit A to Respondent's Motion of Judicial Notice.) This expresses that the existing law on conspiracy, section 182, did not already include gang-related activities and that a special statute was needed. As stated by the Court of Appeal, the expansion language was "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., pp. 315-316.)

Respondent argues that section 182.5 expanded conspiracy liability regarding gangs only by adding the "benefits" provision to the aiding and abetting elements of section 186.22 (a) and that section 182.5 was expanding section 182 as applied to section 186.22 (a) in this regard only. (RBOM, p. 17.) However, there was no reason for the electorate to think that section 182 already applied to section 186.22 (a), because no reported case law showed this application of section 182. In addition, if section 182.5 had been intended only to add the "benefits" provision, it would have been far simpler to add the provision to section 186.22 (a), rather than creating section 182.5, a whole new, largely duplicative conspiracy statute. Further, the ballot pamphlet states that Proposition 21"expands the law on conspiracy to include gang-related activities," not that the law on conspiracy covering gang-related activities is being expanded.

Respondent tries to use the history of an Assembly bill, which included language identical to section 182.5, but was rejected in 1998, and an analysis of the bill submitted to the Assembly Committee on Public Safety as showing that the initial drafter of section 182.5 implicitly

recognized that a traditional conspiracy to commit a gang crime is a valid charge. (RBOM, pp. 18-22.) Because the electorate had no knowledge of the analysis when enacting section 182.5, the analysis did not reflect the electorate's intent. The analysis is thus irrelevant.[14]

In *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903-904 (*Robert L.*), this Court, which was interpreting a different provision of Proposition 21, held that statements in a voter ballot pamphlet may be relevant to the voters' intent, but that statements made by drafters of previously failed legislative efforts regarding the same statute are never relevant as reflecting the intent of the electorate unless it is clear that the voters were aware of the drafters' intent. Respondent acknowledges this, but argues, based on in *Robert L., supra,* 30 Cal.4th at p. 904, that courts may interpret an initiative in its historical context and argues that this should be done in appellant's case by using the failed legislative history of section 182.5. (RBOB, pp. 21-22.) This is not the type of historical context relevant in interpreting an initiative measure. In *Robert L., supra,* 30 Cal.4th at p. 904, this Court noted that it used historical context in an earlier case to interpret a proposition prohibiting discrimination or preference on the basis of race and other group status in public employment, education or contracting, but the historical context was 150 years of "'the appropriate role of government concerning questions of race.'" The Court stated it had never strayed from the principle that "'legislative antecedents' 'not directly presented to the voters. . . are not relevant to our inquiry.'" (*Id.* at pp. 904-905.)

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[14] The legislative history and analysis of the failed bill are in Exhibit B of Respondent's Motion for Judicial Notice. However, this material is not a proper subject for judicial notice, as judicial notice may not be taken of any material that is irrelevant to the issue on appeal. (*People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6.)

To the extent the writer of the analysis of the proposed section 182.5 believed section 182 could be used to charge a conspiracy to violate section 186.22 (a) or that section 186.22 (a) does not require a conspiratorial agreement, the writer's opinion is not reflective of whether the Legislature, when it enacted section 186.22 (a) a decade earlier in 1988, intended section 186.22 (a) to be subject to section 182. As stated in Argument I, E *infra,* nothing in section 186.22 (a)'s legislative history shows legislative intent to apply section 182 to section 186.22 (a), and doing so serves no legitimate purpose.

The meaning of section 182.5's prefatory clause--"Notwithstanding subdivisions (a) or (b) of Section 182"--is unclear, but was likely intended to mean that the People need not proceed under section 182 to establish liability for a conspiracy to commit a discrete felony where the People can prove a violation of section 186.22 (a) as to that felony. This is consistent with the view that section 186.22 (a) is at its core a conspiracy. A "notwithstanding" clause is a "`term of art´ [that] expresses a legislative intent `to have the specific statute control despite the existence of other law which might otherwise govern.´ [Citation.] Moreover, where two statutes addressing the same subject are irreconcilable, the later in time will prevail over the earlier. [Citations.]" (*People v. Franklin* (1997) 57 Cal.App.4th 68, 74; see also *People v. Campos* (2011) 196 Cal.App.4th 438, 452-453 [specific and later enacted statute indicates intent that the specific statute control despite other law that might otherwise govern.)

It is extremely unlikely that the "notwithstanding" clause was intended to mean that section 182 could be applied directly to section 186.22 (a), given that the voters would not have thought section 182 was being used in this manner and the significant problems with applying section 182 to section 186.22 (a). In any case, any ambiguity regarding the "notwithstanding" clause should be interpreted in appellant's favor. When

the language of a penal law is reasonably susceptible of two interpretations, the courts construe the law "'as favorably to criminal defendants as reasonably permitted by the statutory language and circumstances of the application of the particular law at issue.' [Citations]" (*People v. Robles* (2000) 23 Cal.4th 1106, 1115.)

Appellant's analysis recognizes that a violation of section 186.22 (a) is conspiratorial in nature and that conspiracy principles do not fit with the first two elements of section 186.22 (a), active participation and knowledge. The specificity with which section 182.5 was enacted in order to cover a violation of section 186.22 (a) as a conspiracy to commit the underlying felony shows recognition that conspiracy principles apply only to the underlying felony collectively committed by gang members. In addition, it would make little sense for there to be two different schemes covering the subjects of active gang participation and conspiracy, one under section 182.5 and the other applying section 182 to section 186.22 (a). This is particularly true because section 182.5 does not require proof of a *conspiracy* to actively participate in a gang and proscribes that the punishment is that for the target felony, whereas the punishment for the purported crime of conspiracy to violate section 186.22 (a) is limited to the 16-2-3 triad of that statute, regardless of the severity of the target offense.

The voters' enactment of section 182.5 evidences intent that violating section 186.22 should be treated as a conspiracy in and of itself, the ends of which is the commission of a specific felony. The only proper conspiracy charge covering the defendant's active gang participation is under section 182.5.

III.

THE POSITED CRIME OF CONSPIRACY UNDER SECTION 182 TO VIOLATE SECTION 186.22 (a) IS UNCONSTITUTIONALLY VAGUE

Although the Court of Appeal's ruling was not based on vagueness grounds, the Court acknowledged appellant's vagueness argument, queried whether an argument also could be made that the posited conspiracy was a legal falsehood and then stated, "Our conclusions remain the same by whatever means we reach them." (Opn., p. 313, fn. 161.) Respondent argues that a charge of conspiracy to violate section 186.22 (a) is not unconstitutionally vague because appellants had clear notice that their conduct violated the elements of the posited conspiracy. (ROBM, pp. 25-27.) Appellants had notice of the meaning of a violation of section 186.22 (a), but not of the meaning of a conspiracy to violate this statute.

The charge of conspiracy to participate in a criminal street gang, rather than to commit a specific felony, creates such interpretative problems and is so problematic that no reasonable person could figure out how to apply the law, resulting in unconstitutional vagueness under the Fifth and Fourteenth Amendments and article I, section 7 of the California Constitution. "Under both Constitutions, due process of law in this context requires two elements: a criminal statute must `"be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt."' [Citations.]" (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567.)

"`A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.' [Citation.]" (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 143.) A law must notify a person of

ordinary intelligence what conduct is prohibited in a way that he or she can reasonably understand. (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1152; *People v. Superior Court (Elder)* (1988) 201 Cal.App.3d 1061, 1069).

No person of ordinary intelligence could understand the application of section 182 to section 186.22 (a), nor is there "any reasonable and practical construction" to this specific application. In addition, this posited conspiracy is too indefinite to prove a standard for ascertainment of guilt.

For the same reasons that a conspiracy to violate section 186.22 (a) makes little sense, given the conspiratorial core of section 186.22 (a), and the problems in applying conspiracy principles to section 186.22 (a)'s active participation and knowledge elements, the posited conspiracy is incomprehensible and unconstitutionally vague. (See Argument I, C and D, *infra*.)

Respondent argues that the plain meaning of a conspiracy under section 182 to violate section 186.22 (a) is obvious, but respondent then fails to recognize that this posited conspiracy would require an agreement to commit all the elements of section 186.22 (a), including the active participation and knowledge elements. If lawyers cannot figure out and accurately portray what a conspiracy to violate section 186.22 (a) entails, an ordinary person will be unable to do so.

Respondent states that the felonies appellants committed required advanced planning and coordination. (RBOM, p. 26.) While this may show a conspiracy to commit these specific felonies, it is completely unclear what it means to agree to commit the active participation and knowledge elements of section 186.22 (a), particularly where the defendants are long-standing active gang participants. Respondent conflates an agreement to commit specific felonies with an agreement to violate section 186.22 (a).

If not invalided on other grounds, a conspiracy to violate section 186.22 should be declared void for vagueness.

IV.

APPELLANT JOINS IN CO-APPELLANTS' ARGUMENTS

Pursuant to rule 8.200 (a)(5) of the California Rules of Court, appellant joins in his co-appellants' arguments.

CONCLUSION

Based on the foregoing, this Court should affirm the holding of the Court of Appeal that there is no valid crime of conspiracy under section 182 to violate section 186.22 (a).

Dated: March 4, 2013

Respectfully submitted,

Sharon G. Wrubel

SHARON G. WRUBEL
Attorney for Appellant David Lee, Jr.

CERTIFICATE OF WORD COUNT

I, Sharon G. Wrubel, counsel for appellant David Lee, Jr., certify under penalty of perjury that brief contains 13,830 words, as counted by Microsoft Word.

Executed on March 4, 2013, at Pacific Palisades, California.

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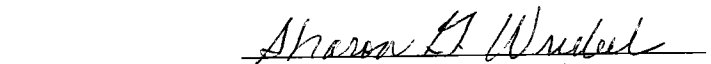

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DECLARATION OF SERVICE

People v. Corey Ray Johnson et al. **Case No. S202790**

I, Sharon G. Wrubel, declare: I am over 18 years of age, employed in the County of Los Angeles, California, and am not a party to the subject action. My business address is: Post Office Box 1240, Pacific Palisades, CA 90272. On March 4, 2013, I served the within Appellant David Lee, Jr.'s Answer Brief on the Merits by placing a true copy thereof in a sealed envelope with postage prepaid, in the United Sates mail in Pacific Palisades, California, addressed as follows:

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