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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **COREY RAY JOHNSON et al.,** Defendants and Appellants.	Case No. S202790

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

SUPREME COURT
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Respondent offers this Reply to the Answer Briefs filed by defendants Joseph Dixon, David Lee, Jr., and Corey Ray Johnson. In it, respondent addresses any new or significant arguments raised in the Answer Briefs. For all other matters not specifically addressed herein, respondent relies upon the arguments and authority presented in the Opening Brief on the Merits.

ARGUMENT

CONSPIRACY TO COMMIT A GANG CRIME IS A STATUTORILY VALID OFFENSE THAT SATISFIES DUE PROCESS

As noted in the Opening Brief on the Merits (ROBM 1, fn. 1), respondent used—and continues to use—the shorthand term of "*gang crime*" to refer to the substantive offense created by subdivision (a) of Penal Code section 186.22. That gang crime is defined as (1) active participation in a criminal street gang, (2) with knowledge of the gang members' pattern of criminal activity, and (3) willful promotion, furtherance or assistance of any felonious criminal conduct by members of that gang. (*People v. Mesa* (2012) 54 Cal.4th 191, 197.) In using this shorthand, which was originally employed by this Court in *Mesa* (*id.* at 196), respondent does not "ignore" or "conflate" the first two elements (LAB 23-25); nor does respondent suggest that the third element must be gang-related (DAOB 9, 25, fn. 3). Instead, this convenient terminology recognizes that a violation of section 186.22(a) requires not only the defendant's active participation in a known street gang but also the defendant's furtherance of felonious conduct by members of that gang. (Pen. Code, § 186.22, subd. (a); *Mesa*, at pp. 196-197.)

As argued in the Opening Brief on the Merits, Penal Code sections 182 and 186.22 cumulatively apply to proscribe, as a separate offense, conspiracy to commit a gang crime. As is plain from those provisions, a person is guilty of this offense if (1) he intentionally enters into an

agreement with another person to commit a gang crime by actively participating in a known criminal street gang while promoting felonious conduct by its members, (2) he specifically intends to commit the gang crime at the time of entering into the agreement, and (3) either he or another party to the agreement commits an overt act in furtherance of the conspiracy. (Pen. Code, §§ 182, 186.22, subd.(a).) Conspiracy to commit a gang crime and the target gang crime are not duplicative offenses, as each may be committed without necessarily committing the other. Moreover, recognition of conspiracy to commit a gang crime as an independent offense is not barred by any statute, including Penal Code section 182.5. Finally, the elements for the offense of conspiracy to commit a gang crime are plainly understandable in accordance with due process. Accordingly, contrary to the Court of Appeal decision (Opn. at 308), this offense constitutes a valid crime. (ROBM 5-27.)

A. Gang Crime Is Not a Conspiracy

All three defendants cite to this Court's recent decision of *People v. Rodriguez* (2012) 55 Cal.4th 1125, which was decided after respondent filed the Opening Brief on the Merits, to support their position that a gang crime "essentially" constitutes a conspiracy by requiring an agreement among its members to engage in felonious criminal conduct, thereby rendering a conspiracy to commit a gang crime a redundant offense. (LAB 15-18; JAB 9-10; DAB 14-15, 19.) Respondent entirely disagrees with this interpretation.

In *Rodriguez*, this Court determined that the "plain meaning of [Penal Code] 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." (*People v. Rodriguez, supra*, 55 Cal.4th at p. 1132.) Thus, a gang member who commits a felony while acting

alone does not also commit a gang crime under section 186.22(a), even if the underlying felony "emboldens fellow gang members to commit other, unspecified crimes in the future...." (*Id.* at p. 1137.) As support for its conclusion, this Court observed that the Legislature intended section 186.22(a) "to punish gang members who acted *in concert* with other gang members in committing a felony regardless of whether such felony was gang-related." (*Id.* at p. 1138, emphasis in original.) In other words, "section 186.22(a) reflects the Legislature's carefully structured endeavor to punish active participants for commission of criminal acts done *collectively* with gang members." (*Id.* at p. 1139, emphasis in original.)

Significantly, *Rodriguez* does not transform a gang crime into a conspiracy offense merely because its commission requires the participation of two or more gang members engaged in felonious conduct. Under *Rodriguez,* the defendant need only "know[ ] about and specifically intend[ ] to further the criminal activity" of those gang members. (*People v. Rodriguez*, *supra*, 55 Cal.4th at p. 1135.) A defendant may satisfy these requirements, which are tantamount to aiding and abetting, without also entering into an agreement beforehand, as required for conspiracy. (See Pen. Code, § 182 [defining conspiracy].) This distinction is important because, as this Court held long ago, "One may aid or abet in the commission of a crime without having previously entered into a conspiracy to commit it." (*People v. Durham* (1969) 70 Cal.2d 171, 181.) Consequently, *Rodriguez* cannot be construed to engraft a new element onto Penal Code section 186.22(a) that would require an advance agreement between the defendant and at least one other gang member to engage in felonious criminal conduct. Thus, a gang crime is not equivalent to a conspiracy.

In a related vein, defendant Johnson asserts that "active participation plus knowledge of the gang's primary criminal activities" constitutes an

"implicit agreement to commit future crimes," and thereby transforms a gang crime into a conspiracy. (JAB 9-10.) Defendant Lee similarly contends that these elements of a gang crime "essentially" constitute a conspiracy. (LAOB 15-21.) But, by this reasoning, every active participant in a known street gang would be guilty as a coconspirator for every criminal offense committed by its members, even if the participant had no advance knowledge of that particular offense. Such a result cannot be squared with the conspiracy statute, which requires the defendant's specific intent to agree to a particular offense, as well as the defendant's specific intent that the agreed-upon offense actually occur. (Pen. Code, § 182; *People v. Cortez* (1998) 18 Cal.4th 1223, 1232.) By comparison, a gang crime does not require any such prior agreement to commit the felonious criminal conduct, nor any specific intent that the felonious conduct actually occur. (Pen. Code, § 186.22, subd. (a); *People v. Rodriguez*, *supra*, 55 Cal.4th at pp. 1132-1133.) Instead, a gang crime merely requires the defendant's knowledge of the gang members' criminal activity and a specific intent to further that criminal activity. (*People v. Rodriguez*, *supra*, at 1135.) Far from conducting an "overly technical parsing" of the statutory language (LAB 19), respondent simply construes these statutes as written.

Defendant Dixon alternatively suggests that the offense of conspiracy does not actually require an agreement, only a "mutual tacit understanding to commit an unlawful design," which he contends is equivalent to the gang crime elements of active participation and knowledge. (DAB 11-12.) However, as this Court aptly noted, "the very crux[ ] of a criminal conspiracy is the evil or corrupt agreement." (*People v. Homick* (2012) 55 Cal.4th 816, 870.) While the agreement for a conspiracy need not be express, the agreement itself must actually exist. (Pen. Code, § 182; CALCRIM No. 415.) By comparison, a gang crime does not require the

existence of any agreement, whether express or implied, to commit felonious conduct. (Pen. Code, § 186.22, subd. (a); CALCRIM No. 1400.) Accordingly, these two offenses are not duplicative.

B. Conspiracy Statute Applies to Gang Crime Offense

Penal Code section 182 defines a conspiracy as "two or more persons" who "conspire" to commit "any crime." (Pen. Code, § 182, subd. (a)(1).) This Court has held that "the words 'any crime' should include all crimes—whether felonies or misdemeanors—which are known to the law of this state, and whether defined and made punishable by the Penal Code or by any other law or statute of the state." (*Doble v. Superior Court* (1925) 197 Cal. 556, 565.) Consequently, the conspiracy statute includes a gang crime as defined and made punishable by Penal Code section 186.22(a).

Defendant Lee claims that a gang crime must be exempted from the scope of the general conspiracy statute because Penal Code section 186.22 is a "comprehensive statute" intended to "supplant" all others. (LAB 27-32.) Respondent acknowledges that, under the *Williamson* rule of judicial interpretation, "if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute." (*People v. Murphy* (2011) 52 Cal.4th 81, 86 [citing *In re Williamson* (1954) 43 Cal.2d 651, 654].) On the other hand, "if the more general statute contains an element that is not contained in the special statute and that element would not commonly occur in the context of a violation of the special statute," then the *Williamson* rule does not apply. (*Murphy*, at p. 87.) Nonetheless, "[i]f it appears from the entire context that a violation of the 'special' statute will necessarily or commonly result in a violation of the 'general' statute, the *Williamson* rule may apply even though the elements of the general statute are not mirrored on the face of the special statute." (*Ibid.*)

Lee's claim fails under the *Williamson* rule. Both the "general" conspiracy statute (Pen. Code, § 182) and the "specific" gang crime statute (Pen. Code, § 186.22(a)) contain different elements not found in the other. Conspiracy requires a prior agreement to commit a particular offense, with specific intent to commit that offense, and the commission of an overt act by any member of the conspiracy. (Pen. Code, § 182.) A gang crime, however, requires the defendant's own active participation in a gang, with knowledge of the gang's pattern of criminal activity, and willful furtherance of another members' felonious criminal conduct. (Pen. Code, § 186.22, subd. (a).) Given these different elements for both offenses, a violation of one will not commonly result in a violation of the other. (See, e.g., *People v. McCall* (2013) ___ Cal.Rptr.3d ___, 2013 WL 1140380, *6 [*Williamson* rule inapplicable to general felony statute prohibiting unauthorized practice of medicine and specific misdemeanor statute prohibiting unlicensed midwife]; *People v. Powers* (2004) 117 Cal.App.4th 291, 298 [*Williamson* rule inapplicable to general felony statute prohibiting filing false instrument and specific misdemeanor statute requiring accurate record of fishing activities]; *People v. Chardon* (1999) 77 Cal.App.4th 205, 214 [*Williamson* rule inapplicable to general felony statute prohibiting false impersonation and specific misdemeanor statute prohibiting false representation to arresting peace officer].)

Moreover, the specific offense of conspiracy to commit a gang crime requires the defendant's agreement to knowingly and actively participate in a criminal street gang while furthering other members' felonious conduct, with the specific intent that this gang crime actually take place, and the commission of an overt act in furtherance. (Pen. Code, §§ 182, 186.22, subd. (a).) This offense may occur without the commission of a gang crime, such as where the gang itself is not yet established with the requisite number of predicate acts or members, or where the defendant's own

participation in the gang is insufficient, or where the defendant did not personally further the commission of the agreed-upon felonious conduct.[1] Similarly, this offense does not necessarily occur whenever a gang crime is committed, such as where the active participant spontaneously aids and abets his fellow gang members' felonious conduct without any prior agreement to do so. Given the entirely different elements and contexts for each of these offenses, the *Williamson* rule simply does not apply. (See *People v. Murphy*, *supra*, 52 Cal.4th at pp. 86-87 [explaining rule generally].) In other words, "the overlap between" these offenses "is not significant enough to support a conclusion that the Legislature intended" the specific statute "to preclude prosecutions under" the more general one. (*People v. Chardon*, *supra*, 77 Cal.App.4th at p. 214.)

Citing *People v. Swain* (1996) 12 Cal.4th 593, defendant Lee argues that a gang crime must be exempted from the conspiracy statute because the requisite mental states are patently inconsistent. (LAB 22-23, 29.) In *Swain*, this Court reversed a defendant's conviction of conspiracy to commit second-degree murder based upon an implied-malice theory because "it would be *illogical* to conclude one can be found guilty of conspiring to commit murder" when the death was never actually intended, but merely occurred during the defendant's reckless commission of a dangerous act. (*Swain*, at p. 603, emphasis in original.) Defendants Lee

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[1] Contrary to defendant Dixon's assertion (DAB 20, fn. 2), respondent does not contend that an individual may be guilty of conspiracy to commit a substantive gang crime even if he lacks any knowledge of the organization's criminal activity. Rather, as discussed *infra*, the defendant must be aware that the gang either has engaged in a pattern of criminal activity or, if the gang is not yet formed, will engage in such activity after its formation. Thus, a defendant is not guilty of conspiracy to commit a gang crime if he unwittingly believes the organization is a legitimate enterprise.

and Dixon similarly cite to *People v. Iniquez* (2002) 96 Cal.App.4th 75, 79, which reversed a defendant's conviction of conspiracy to commit attempted murder because "[n]o one can simultaneously intend to do and not do the same act, here the actual commission of a murder." (LAB 22, 29, fn. 6, 31, fn. 7; DAB 20.)

Notably, neither *Swain* nor *Iniguez* relied upon a statutory interpretation of the conspiracy statute to invalidate the conviction. Both cases implicitly assumed that the conspiracy statute did, in fact, reach the target offense (i.e., second-degree murder and attempted murder). The result of applying the target offense to the conspiracy statute, however, was found to be logically invalid only because of the patently inconsistent specific intents. (*People v. Swain*, *supra*, 12 Cal.4th at p. 603; *People v. Iniguez*, *supra*, 96 Cal.App.4th at p. 79.)

By comparison, no such logical inconsistency inheres to the specific intents required for conspiracy to commit a gang crime. It is not impossible for an individual to specifically intend to enter into an agreement to become a knowing and active participant in a street gang who will assist other gang members engage in felonious conduct, while also specifically intending to actually become a knowing and active participant in a gang who will assist fellow gang members engage in felonious conduct. (Pen. Code, §§ 182, 186.22, subd. (a).) Thus, *Swain* and *Iniguez* are entirely distinguishable.

Indeed, the requisite intent for conspiracy to commit a gang crime is akin to the federal conspiracy RICO violation under 18 U.S.C. § 1962(d), which has been upheld as a constitutionally valid offense. (*Salinas v. United States* (1997) 522 U.S. 52, 64-65.) A conspiracy offense to violate RICO consists of the following three elements:

> First: A conspiracy or agreement...existed between two or more persons to participate in the affairs of an enterprise that affected interstate commerce through a pattern of racketeering activity;

> Second: that defendant deliberately joined or became a member of the conspiracy or agreement with knowledge of its purpose[;] and
>
> Third: the defendant agreed that someone, not necessarily the defendant, would commit at least two of the racketeering acts detailed in the indictment.

(*United States v. Harris* (10th Cir. 2012) 695 F.3d 1125, 1131.) The "existence of an enterprise is not an element of § 1962(d) conspiracy to commit a substantive RICO violation." (*Id.* at pp. 1131-1132.) Just like a conspiracy to commit a gang crime under Penal Code sections 182 and 186.22, the federal RICO conspiracy offense similarly requires the defendant's intentional agreement to actively participate in a criminal organization, knowing that the organization either is, or will become, involved in criminal activities.

Defendant Dixon invokes Wharton's Rule to prohibit a charge of conspiracy to commit a gang crime. (DAB 21-22.) Under this rule, which is not constitutionally-compelled, "[a]n agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." (*Iannelli v. United States* (1975) 420 U.S. 770, 773, fn. 5.) But this rule of statutory construction, which has yet to be formally adopted by this Court, would not apply when, as even the Court of Appeal below recognized, "three or more persons are involved." (Opn. 313, fn. 162.) Because all three defendants in this case were charged with conspiracy to commit a gang crime, Wharton's Rule has no relevance whatsoever. (See *People v. Lee* (2006) 136 Cal.App.4th 522, fn. 7 [recognizing "exception" to Wharton's Rule "where one of the actors joins with third persons on his side of the transaction"].)

C. Penal Code Section 182.5 Supports Validity of Conspiracy to Commit a Gang Crime

All three defendants cite to Penal Code section 182.5 as support for their position that the conspiracy statute may not apply to a gang crime. (DAB 17; JAB 12-13; LAB 39-39.) But the language of section 182.5, passed by the electorate in 2000 as part of Proposition 21, actually bolsters respondent's contrary interpretation.

Penal Code Section 182.5 provides,

> *Notwithstanding subdivisions (a) or (b) of Section 182*, 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, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony and may be punished as specified in subdivision (a) of section 182.

(Pen. Code, § 182.5, emphasis added.) The italicized language is significant because it implicitly recognizes that the general conspiracy statute already applies to the proscribed behavior that includes a gang crime under Penal Code section 186.22(a). (See *Stone Street Capital, LLC v. Cal. State Lottery Com'm* (2008) 165 Cal.App.4th 109, 121, fn. 6 [generally recognizing that "notwithstanding" statutory language is "very comprehensive" and "signals a broad application overriding all other code sections unless it is specifically modified by use of a term applying to only to a particular code section or phrase"].) Thus, the statutory language of section 182.5 supports respondent's view that the general conspiracy statute applies to a substantive gang crime offense.

Lee insists otherwise based upon a statement from the Legislative Analyst in the ballot materials for Proposition 21. (LAB 39-40.) According to that statement, the ballot 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; Ex. A to Respondent's Motion of Judicial Notice, emphasis added.) Lee emphasizes the Analyst's use of the verb "to include" as confirmation that the law on conspiracy must have previously excluded the gang crime created by Penal Code section 186.22(a). (LAB 39.) This interpretation, however, ignores the Analyst's use of the phrase "*gang-related activities*," which plainly encompasses conduct well beyond section 186.22(a). (See, e.g., *People v. Albillar* (2010) 51 Cal.4th 47, 59 [confirming that felonious conduct for gang crime need not be "gang related"]; see also *In re Jorge G.* (2004) 117 Cal.App.4th 931, 941 [interpreting "gang-related crimes" for registration required by Pen. Code, § 186.30, subd. (b)(3), to include, at a minimum, all crimes committed for benefit of or in association with a criminal street gang].) Consequently, as explained in the Opening Brief on the Merits, the Analyst's comment actually signifies that Penal Code section 182.5 expanded conspiracy liability by creating a broader version of vicarious liability for knowing and active participants in a criminal street gang, who either aid or benefit from any felony committed by fellow members, even without any prior agreement to do so. (ROBM 16-25.)

In any event, the Analyst's statement in 2000 may not be applied retroactively to rewrite the elements of the previously-existing statutory offense created by Penal Code sections 182 and 186.22(a). "The Legislative Analyst's comments, like other materials presented to the voters, 'may be helpful but are not conclusive in determining the probable meaning of initiative language.'" (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 580.) Such comments are certainly less helpful when determining the probable meaning of other statutes already enacted by the Legislature. (See *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800-801 [explaining that "the *legislative* history ... could, as a matter of logic, reflect only the *Legislature*'s intent," which "would not

provide…any guidance as to *the voters*' subsequent intent" when approving its "constitutional counterpart" by ballot measure].) While courts generally "presume the voters understood the state of the law at the time they voted on [a] Proposition [ ], there is no corresponding presumption that the Legislative Analyst understood the state of the law or practice." (*Arden Carmichael, Inc. v. County of Sacramento* (2000) 79 Cal.App.4th 1070, 1076.) Accordingly, any "incorrect information provided by the Legislative Analyst" that appears in the ballot must be disregarded in favor of the "plain meaning" of the provision. (*Ibid.*; see also *Delaney*, at pp. 802-803 ["Statutory intent is an aid to resolving ambiguity in statutes, not an excuse to rewrite them"].) Because the plain meaning of sections 182, 182.5, and 186.22 all support respondent's view that conspiracy to commit a gang crime is a statutorily valid offense, any contrary suggestion by the Analyst must be dismissed.

D. Penal Code Section 186.26 Supports Validity of Conspiracy to Commit a Gang Crime

Defendant Lee notes that Proposition 21 also created, in addition to Penal Code section 182.5, a provision in Penal Code section 186.26 that makes it a felony to solicit or recruit another person to become an active participant in a criminal street gang. (LAB 39.) Section 186.26, which has since been technically revised, provides in relevant part:

> 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 (c) 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.

(Pen. Code, § 186.26, subd. (a).)

Penal Code section 186.26 implicitly confirms the validity of a charge of conspiracy to commit a gang crime. Solicitation, like conspiracy, requires proof of the defendant's specific intent to commit the underlying offense. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 825.) The solicitation offense is complete once the defendant communicates that intent to another person, whereas conspiracy additionally requires an agreement between the defendant and the other person, plus the commission of an overt act. (*Ibid.*) Accordingly, a defendant is guilty of solicitation under section 186.26 if he urges another person to join a criminal street gang in order to assist felonious conduct by its members. But, if that other person actually agrees and then commits an overt act, they are both guilty of conspiracy to commit a gang crime under Penal Code sections 182 and 186.22(a).

California law prohibits only the solicitation of certain enumerated offenses, including perjury, robbery, rape, and murder. (Pen. Code, § 653f, subds. (a)-(f); CALCRIM No. 441.) This list does not include a gang crime as defined by Penal Code section 186.22(a). Consequently, absent the electorate's adoption of Penal Code section 186.26, solicitation to commit a gang crime would remain unpunished.

By comparison, California's broad conspiracy statute includes all crimes, including a gang crime. (Pen. Code, §§ 182, 186.22, subd. (a).) As a result, there was no need for the electorate to adopt a similarly specific statute for conspiracy to commit a gang crime.

Finally, the solicitation offense of Penal Code section 186.26 does not render the related offense of conspiracy to commit a gang crime somehow redundant or ineffectual. The latter ensures criminal culpability for a willing recipient of the recruiter's proposal. Accordingly, section 186.26 bolsters respondent's view that conspiracy to commit a gang crime is a statutorily valid offense.

E. Fair Notice of Elements Satisfy Due Process

All three defendants maintain that a charge of conspiracy to commit a gang crime is too vague and amorphous to satisfy due process. (DAB 13-15, 26; JAB 9-15; LAB 44-45.) But, as explained in the Opening Brief on the Merits (ROBM 25-27), this offense plainly consists of the following elements: (1) the defendant actually agreed with another person to commit a gang crime by actively participating in a known criminal street gang to assist felonious conduct by its members, (2) the defendant specifically intended to commit this gang crime at the time of entering the agreement, and (3) either the defendant or another party to the agreement committed an overt act in furtherance of the conspiracy. (Pen. Code, §§ 182, 186.22, subd. (a); CALCRIM Nos. 415 & 1400.) These elements, "as applied to the particular facts at issue" in this case, wherein all three defendants jointly committed escalating violent offenses directed at rival gangs according to an elaborate plan, unequivocally "provide a person of ordinary intelligence fair notice of what is prohibited...." (*Holder v. Humanitarian Law Project* (2010) ___ U.S. ___, 130 S.Ct. 2705, 2718-2719.)

Defendant Johnson contends that "no substantial legal or social purpose is served by creating the crime of conspiracy to participate in a street gang." (JAB 15.) But "[c]ourts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature." (*Professional Engineers v. Dept. of Transportation* (1997) 15 Cal.4th 543, 593.) Rather, "it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation." (*Ibid.*)

In any event, criminalizing conspiracy to commit a gang crime *does* serve an important purpose. Given the public-safety crisis caused by gangs, which embolden their members to commit crimes that terrorize law-abiding citizens in their own communities (Pen. Code, § 186.21), this conspiracy offense helps ensure that California's gang "net" is woven tightly "to trap

even the smallest fish…." (*United States v. Brandao* (1st Cir. 2008) 539 F.3d 44, 53.) These "small fish" includes persons who agree to form a new criminal street gang, or who agree to join an established gang but either are not yet active participants or have not yet assisted any felonious conduct. Because these persons are acting pursuant to an agreement with other willing participants to commit criminal acts, yet they would otherwise escape culpability under California's other gang statutes, the offense of conspiracy to commit a gang crime effectively promotes public safety.

Finally, defendant Dixon suggests that a defendant may not be convicted of conspiracy to commit a gang crime if that defendant is not a sufficiently active participant for purposes of a gang crime because doing so would unconstitutionally punish "bare gang membership…." (DAB 19, 25.) However, Dixon may not challenge the constitutionality of a statute to "imaginary cases" when his own conduct was "clearly proscribed" by it. (*Holder v. Humanitarian Law Project*, *supra*, 130 S.Ct. at p. 2719.) Furthermore, this Court has already concluded that an active participant need not even be a member of a gang for a gang crime conviction to satisfy due process because this offense additionally requires the defendant's furtherance of felonious conduct by fellow members. (*People v. Castenada* (2000) 23 Cal.4th 743, 747 [defining "actively participates" as "meaning involvement with a criminal street gang that is more than nominal or passive"].)

And, regardless of whether the defendant qualifies as an active participant or formal member, he may be found guilty of conspiring to commit a gang crime only if he specifically and knowingly agreed with another person to actively participate in a gang to assist felonious conduct by its members, with the specific intent to actually become an active participant in a gang to assist felonious conduct by its members, and an overt act is committed in furtherance of this agreement. (Pen. Code,

§§ 182, 186.22, subd. (a).) These elements amply satisfy the constitutional requirement of guilt based upon personal conduct rather than mere association with a criminal organization. (See *Scales v. United States* (1961) 367 U.S. 203, 220-230 [rejecting constitutional bar to punishing a defendant who is an active member in a criminal enterprise, so long as the defendant actually knows of the group's criminal nature and specifically intents to promote its criminal purpose].)

Overall, the valid criminal offense of conspiracy to commit a gang crime, as plainly defined by Penal Code sections 182 and 186.22(a), satisfies all constitutional concerns.

CONCLUSION

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

Dated: April 16, 2013

Respectfully submitted,

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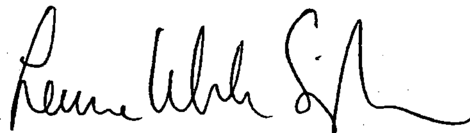

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** uses a 13-point Times New Roman font and contains 4,685 words.

Dated: April 17, 2013

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY U.S. MAIL

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

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

On April 17, 2013, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 17, 2013, at Sacramento, California.

____
Declarant

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