IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)) Plaintiff and Respondent,))) v.)))) COREY RAY JOHNSON, et al.,)) Defendants and Appellants.))	No. S202790 (Kern County No. BF122135A-C)

On Appeal from a Judgment of
the Superior Court of the State of California
in and for the County of Kern

The Honorable Gary T. Friedman
Judge Presiding

APPELLANT JOSEPH DIXON'S ANSWER BRIEF ON THE MERITS

Joseph Shipp
Attorney at Law
Post Office Box 20347
Oakland, California 94620
State Bar No. 151439
(510) 530-9043
josephcshipp@aol.com

Counsel for Appellant by
Appointment of the Supreme Court.

TOPICAL INDEX

Page

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUE 1

STATEMENT OF APPEALABILITY 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 5

ARGUMENT 6

I. TO AVOID ABSURD REDUNDANCY AND GRAVE UNCONSTITUTIONAL VAGUENESS, AND TO EFFECT MANIFEST VOTER INTENT IN ENACTING A MORE SPECIFIC PROVISION, CALIFORNIA STATUTES CANNOT BE CONSTRUED TO AUTHORIZE A CHARGE OF CONSPIRACY TO ACTIVELY PARTICIPATE IN A CRIMINAL STREET GANG; JOINDER IN ARGUMENTS OF COAPPELLANTS 6

A. STANDARD OF REVIEW AND KEY PRINCIPLES OF STATUTORY CONSTRUCTION IN A CODE-CRIME STATE 6

B. CALIFORNIA STATUTES CANNOT BE CONSTRUED TO AUTHORIZE A CHARGE OF CONSPIRACY TO ACTIVELY PARTICIPATE IN A CRIMINAL STREET GANG, A REDUNDANT AND HOPELESSLY VAGUE GENERIC CONSPIRACY TO COMMIT A GENERIC CONSPIRACY WHICH VOTERS HAVE SUPPLANTED BY A MORE SPECIFIC PROVISION 9

C. JOINDER IN ARGUMENTS OF COAPPELLANTS 27

CONCLUSION 28

WORD COUNT CERTIFICATE

TABLE OF AUTHORITIES

Page(s)

CASES

In re Davis (1966) 242 Cal.App.2d 645 6

In re Harris (1989) 49 Cal.3d 131 7

Horwich v. *Superior Court* (1999) 21 Cal.4th 272 7

Iannelli v. *United States* (1975) 420 U.S. 770 22

Keeler v. *Superior Court* (1970) 2 Cal.3d 619 6

People v. *Albillar* (2010) 51 Cal.4th 47 13

People v. *Aston* (1985) 39 Cal.3d 481 7

People v. *Avery* (2002) 27 Cal.4th 49 8

People v. *Castaneda* (2000) 23 Cal.4th 743 14

People v. *Garrett* (2001) 92 Cal.App.4th 1417 7

People v. *Green* (1991) 227 Cal.App.3d 692). (. 7

People v. *Iniguez* (2002) 96 Cal.App.4th 75 20

People v. *Mesa* (2012) 54 Cal.4th 191 17

People v. *Prevost* (1998) 60 Cal.App.4th 1382 12

People v. *Rackley* (1995) 33 Cal.App.4th 1659 7

People v. *Robles* (2000) 23 Cal.4th 1106 8

People v. *Rodriguez* (2012) 55 Cal.4th 1125 . . . . . 14, 15, 19, 20, 21

People v. *Superior Court (Romero)* (1996) 13 Cal.4th 497 8

Salinas v. *United States* (1997) 522 U.S. 52 . . . . . 22, 23

Sedima v. *Imrex Co.* (1985) 473 U.S. 479 23

Shoban v. *Board of Trustees* (1969) 276 Cal.App.2d 534 6

State v. *Mendoza* (R.I. 2005) 889 A.2d 153 . . . . . 21, 22

United States v. *Brandao* (1st Cir. 2008) 539 F.3d 44 23

CONSTITUTIONAL PROVISIONS

Cal. Const., art. I, § 1, 7, 15, 16 13

U.S. Const., amends. I, V, VI, VIII, XIV 13

STATUTES

18 U.S.C. § 1962(c) 23

Pen. Code, § 6 6

Pen. Code, § 182 . . . . . 1, 3, 5, 10, 17, 19, 21, 24

Pen. Code, § 182.5 . . . . . 10, 15, 16, 24

Pen. Code, § 184 12

Pen. Code, § 186.22 . . . . . 2, 3, 5, 10, 12-14, 18, 25

Pen. Code, § 187, subd. (a) 2

Pen. Code, § 190.2, subd. (a)(3) 2

Pen. Code, § 246 3

Pen. Code, §§ 664, 187, subd. (a) 2

Pen. Code, § 1237, subd. (a) 2

Pen. Code, § 1259 6

Pen. Code, § 12021, subd. (a) 3

Pen. Code, § 12022.53, subds. (d), (e)(1) 2, 3

MISCELLANEOUS AUTHORITIES

CALCRIM No. 1400 . . . . . 14, 23

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent,	)
v.	)
COREY RAY JOHNSON, et al.,	)
Defendants and Appellants.	)

STATEMENT OF ISSUE

Broadly stated, the issue before this Court is whether state or federal law precludes a charge of conspiracy to actively participate in a criminal street gang under Penal Code sections 182 and 186.22, subd. (a) (at least in the case of an existing street gang).

STATEMENT OF APPEALABILITY

This is an appeal from a judgment which finally disposes of all issues between the parties. (Pen. Code, § 1237, subd. (a).)

STATEMENT OF THE CASE

Originally charged in a capital complaint (1 CT 150), appellant and codefendants Corey Johnson and David Lee were ultimately prosecuted on an amended indictment filed March 6, 2008 alleging special circumstance murder and other counts; the prosecution did not seek the death penalty. (1 CT 1-28.)

Codefendants Johnson and Lee, not appellant, were charged with a separate attempted murder under Count 1. (1 CT 1.) In Counts 2-11, appellant and codefendants were jointly charged with: three counts of premeditated murder (Pen. Code, § 187, subd. (a)) (Counts 2-4), each allegedly committed to aid a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(C)), with intentional discharge of a firearm causing injury by a gang principal (Pen. Code, § 12022.53, subds. (d), (e)(1)), and each with a multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) and an intentional gang murder special circumstance (Pen. Code, § 190.2, subd. (a)(22)); two counts of attempted murder (Pen. Code, §§ 664, 187,

subd. (a)) (Counts 5 and 7), each allegedly committed to aid a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(C)), with intentional discharge of a firearm causing injury by a gang principal (Pen. Code, § 12022.53, subds. (d), (e)(1)); two counts of ex-felon in possession of a firearm (Pen. Code, § 12021, subd. (a)) (Counts 6 and 10), each allegedly committed to aid a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)); one count of shooting at an occupied vehicle (Pen. Code, § 246) (Count 8) to aid a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(C)); one count of conspiracy to commit murder, assault with a firearm, robbery, and/or active gang participation (Pen. Code, § 182, subd. (a)(1)) (Count 9) to aid a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(C)); and one count of active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)) (Count 11). (1 CT 1-28.)

After requests for exhibits and a question regarding first versus second degree murder (9 CT 2521-2528), the jury found defendants guilty. (9 CT 2529-10 CT 2771; 63 RT 11514.) The jury found appellant guilty on Counts 2-11, found all murders to be in the first degree, found all offense related and prior conviction allegations to be true, and under Count 9 found conspiracy to commit first-degree murder and other crimes including active gang participation (along with various overt acts). (9 CT 2603-10 CT 2653; 10 CT 2678; 63 RT 11514; see also Slip Opn. of Court

of Appeal, pp. 296-300 [describing Count 9 conspiracy findings].)

The court later sentenced appellant to a prison term of three terms of life without parole (LWOP) plus 203 years to life plus 46 years as follows; this included a consecutive term of 50 years to life under Count 9 (25 to life for conspiracy to commit first-degree murder, doubled under the second-strike provision). (10 CT 2811-2828, 2843-2846; 6 RT 11623-11640.)

Appellant and his codefendants timely appealed. (10 CT 2866-2869.)

In the published portion of its decision, the Court of Appeal reversed the Count 9 conviction for conspiracy to actively participate in a criminal street gang on grounds such a charge is legislative barred and redundant perhaps to the point of unconstitutional vagueness and absurdity or impossibility; however, the Court affirmed the judgment in most other respects (including Count 9 based on other findings of conspiracy to commit murder). (Slip Opn., pp. 308-316, 328 & fn. 161.)

This Court granted respondent's petition for review on the published portion of the decision addressing the viability of a charge of conspiracy to actively participate in a criminal street gang.

STATEMENT OF THE FACTS

Similar to respondent's opening brief on the merits (RAOB 1-3), an extended recitation of the underlying facts is not necessary to resolve the issue on review. As respondent notes, defendants were charged with several crimes, including three murders and three attempted murders over a six month period, assertedly to aid a criminal street gang. (RAOB 1-3; Slip Opn., pp. 5-85 [Court of Appeal's factual summary].) As relevant here, Count 9 charged conspiracy (Pen. Code, § 182, subd. (a)(1)) to commit murder, assault with a firearm, robbery, and/or active gang participation (Pen. Code, § 186.22, subd. (a)). (1 CT 22-23; RAOB 2-3.) Count 9 alleged six fairly generic overt acts (i.e., presence with other defendants on several different dates and locations mostly corresponding to charged offenses); but the generic overt acts did not specify criminal acts beyond presence and several of the overt acts did not list appellant as being present. (RAOB 2-3; Slip Opn., pp. 296-300 [describing Count 9 conspiracy allegations and findings].)

ARGUMENT

I. TO AVOID ABSURD REDUNDANCY AND GRAVE UNCONSTITUTIONAL VAGUENESS, AND TO EFFECT MANIFEST VOTER INTENT IN ENACTING A MORE SPECIFIC PROVISION, CALIFORNIA STATUTES CANNOT BE CONSTRUED TO AUTHORIZE A CHARGE OF CONSPIRACY TO ACTIVELY PARTICIPATE IN A CRIMINAL STREET GANG; JOINDER IN ARGUMENTS OF COAPPELLANTS.

A. STANDARD OF REVIEW AND KEY PRINCIPLES OF STATUTORY CONSTRUCTION IN A CODE-CRIME STATE.

The construction of code sections and their application to undisputed facts presents questions of law which this Court reviews independently. (See, e.g., ***Shoban* v. *Board of Trustees*** (1969) 276 Cal.App.2d 534, 541; Pen. Code, § 1259.)

California is a code state and in the absence of legislative proscription of conduct, there is no crime. (Pen. Code, § 6; ***Keeler* v. *Superior Court*** (1970) 2 Cal.3d 619, 631-632.) To make it "a judicial function 'to explore such new fields of crime as they may appear from time to time' is wholly foreign to the American concept of criminal justice" and "raises very serious questions concerning the principle of separation of powers." (***In re Davis*** (1966) 242 Cal.App.2d 645, 655-656 & fn. 12 [cit. om.].)

The fundamental goal of statutory construction is to ascertain the intent of the legislature (or the voters), starting with the plain statutory language. (***People* v. *Aston*** (1985) 39 Cal.3d 481, 489.) Voters and legislators are presumed to be aware of existing law (including cases applying constitutional limitations upon punishing bare gang membership such as ***People* v. *Green*** (1991) 227 Cal.App.3d 692, 700). (***In re Harris*** (1989) 49 Cal.3d 131, 136; see also ***Horwich* v. *Superior Court*** (1999) 21 Cal.4th 272, 276-277.)

However, with both initiatives and statutes, it is voter or legislative intent that ultimately controls over literal language. (***People* v. *Garrett*** (2001) 92 Cal.App.4th 1417, 1422.) Thus, courts examine the entire structure of an enactment (here including both the gang provision and the generic conspiracy chapter), not just literal language in isolation; language that appears unambiguous on its face may be shown to have a latent ambiguity; if literal *or* latent ambiguities appear, courts will consider the results that flow from a particular construction; and, in the end, the courts will harmonize the provisions to best effect voter intent and avoid constitutional problems or absurdities in application. (***People* v. *Garrett***, *supra*, 92 Cal.App.4th at p. 1422; see also ***People* v. *Rackley*** (1995) 33 Cal.App.4th 1659, 1665-1667 [despite literal language of escape provision, legislature did not intend it to apply to juvenile escapes].)

Importantly, even if a statute is reasonably susceptible of two constructions, one of which raises serious constitutional concerns, the court will adopt the construction which avoids constitutional concerns, *even though other construction is equally reasonable*. (***People* v. *Superior Court (Romero)*** (1996) 13 Cal.4th 497, 509.)

Also importantly, it is settled that any true ambiguity in the meaning *or application* of statutory language, constitutional or not, must be resolved in favor of the defendant. (***People* v. *Avery*** (2002) 27 Cal.4th 49, 57-58.) Particularly in the absence of clear legislative history, this Court:

> ... construe[s] 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.) This 'protects the individual against *arbitrary discretion* by officials and judges and guards against judicial usurpation of the legislative function which would result from *enforcement of penalties when the legislative branch did not clearly prescribe them.*'

(***People* v. *Robles*** (2000) 23 Cal.4th 1106, 1115 [cit. om.] [emph. added].)

B. CALIFORNIA STATUTES CANNOT BE CONSTRUED TO AUTHORIZE A CHARGE OF CONSPIRACY TO ACTIVELY PARTICIPATE IN A CRIMINAL STREET GANG, A REDUNDANT AND HOPELESSLY VAGUE GENERIC CONSPIRACY TO COMMIT A GENERIC CONSPIRACY WHICH VOTERS HAVE SUPPLANTED BY A MORE SPECIFIC PROVISION.

Respondent at times incorrectly suggests active gang-participation requires assistance of felonious conduct that is *gang-related*, i.e., commission of a "gang crime." (RAOB 8, 23.) In fact, active gang participation is considerably more generic and is defined in terms similar to a generic conspiracy with a generic (non gang-related) overt act or target crime. Thus, respondent asks the court to apply one generic conspiracy on top of another. This is unpersuasive -- particularly in light of contrary voter treatment of this specific crime as part of the general conspiracy chapter and the patent differences between our active gang participation crime and RICO. California voters had every right and reason to tailor our specific conspiracy provision to our specific gang participation crime, not RICO. While voter-intent indicia may not be expansive in the ballot materials, the preponderance of legislative/voter intent and statutory construction principles show California has adopted two stricter more specific provisions (active gang participation and a specific conspiracy provision for that crime), not the RICO crime and generic RICO-conspiracy

provision urged by respondent.

The key problems with respondent's analysis are that it fails to recognize: the breadth of informal acts short of an express agreement that may show conspiracy (Pen. Code, § 182), resulting in real redundancy between the gravamen of both crimes at issue; the wide breadth of already generic acts and objects constituting active gang participation (Pen. Code, § 186.22, subd. (a)), already defined in terms similar to generic conspiracy, resulting in serious vagueness in applying this crime as a straight conspiracy; how voters and legislators would view the specific conspiracy provision (Pen. Code, § 182.5) enacted for the specific crime of active gang participation where it involves a specific felony; and the fact active gang participation (Pen. Code, § 186.22, subd. (a)) and section 182.5 are both carefully tailored provisions -- both quite strict and very different than RICO -- that are designed to avoid punishing mere gang membership or association.

Respondent's reliance on the RICO offense (a very different crime that requires the target felonies to be gang/enterprise-related) is also unpersuasive. The RICO and other federal offenses cited by respondent are much weaker indication of how our state opts to treat gang participation conspiracies than section 182.5 is; certainly, voters had good reason to treat our gang participation offense in terms of section 182.5, rather than the

straight conspiracy approach applied to the RICO offense.

Given the nature of our generic gang participation offense, unlike federal legislators, California voters have wisely enacted a narrower but strict conspiracy-punishment provision linked to specific felonies in lieu of the redundant, vague, and open-ended conspiracy charge urged by respondent. Allowance of respondent's generic conspiracy charge would open the door to tenuous bare-gang-association prosecutions of the most hapless hanger-ons of the most tenous gangs based on the most tenuous (inchoate) gang participation counts (more inchoate even than attempts); open the door to jurors hearing prejudicial gang evidence in many tenuous gang and accomplice liability cases (based on active gang participation counts, which are rarely severed); open the door to expansive untested hearsay under guise of ranging gang-conspiracy exceptions, as occurred here; and result in open-ended conspiracy charges that are very vague and confusing for jurors and courts alike to apply which voters never intended. And given the attempt and conspiracy charges already available to prosecutors for failed target crimes, not to mention the strict section 182.5 charge, no reason is apparent why the problematic open-ended conspiracy charge is needed.

Turning to respondent's arguments, respondent is correct that the existence of a gang and active participation in that gang do not always

require an express conspiracy agreement. (RAOB 12.) But the crime of conspiracy does not either. To the contrary, any circumstantial evidence suggesting a mutual tacit understanding to commit an unlawful design may show an agreement for purposes of conspiracy. (***People* v. *Prevost*** (1998) 60 Cal.App.4th 1382, 1399; see also Slip Opn., p. 310.) This well describes both active gang participation (Pen. Code, § 186.22, subd. (a)) and the existence of a criminal street gag (Pen. Code, § 186.22, subds. (e)-(f)). The conspiracy requirement of an overt act (Pen. Code, § 184) is likewise reflected, for the same reason, in *both* active gang participation and the very definition of a criminal street gang. (Pen. Code, § 186.22, subds. (a), (e)-(f).)

Against this background, the Court of Appeal correctly concludes appellant was effectively charged with conspiracy to actively participate in a conspiracy. (Slip Opn., pp. 313-314.) Absent any apparent intent to permit such a conspiracy charge, the California statutes must be harmonized in a manner that avoids such a redundant and unworkable absurdity. (Slip Opn., p. 314.) Further, the Court of Appeal's analysis correctly construes the statutes in this manner to avoid the problem of nonsensical redundancy that rises to the point of serious unconstitutional vagueness not to mention improper punishment of bare gang association, if our conspiracy-type gang participation charge is also charged as a conspiracy. (U.S. Const., amends.

I, V, VI, VIII, XIV; Cal. Const., art. I, § 1, 7, 15, 16; Slip Opn., p. 313, fn. 161.)

Moreover, contrary to respondent (RAOB 25), a charge of conspiracy to actively participate in a street gang (itself a conspiracy on more than one level) is indeed unconstitutionally vague and problematic in application. This is due to the wide swath of the generic objects and conspiracy-type overt acts involved in the crime of active gang participation. (Pen. Code, § 186.22, subd. (a).) It is simply unclear whether the overt act(s), conspiracy object(s), or intent of the deemed conspiracy here would relate to: knowing active participation in a criminal street gang (beyond nominal or passive involvement); versus the separate element of willful promotion, furtherance, or assistance of "any felonious conduct" by gang members. (Pen. Code, § 186.22, subd. (a); see also RAOB 19.) This is a serious problem and, importantly, it appears to be why voters enacted a more specific conspiracy provision focused on punishment for the specific felony (which need not be gang-related).

The fact that "any felonious conduct" need not be gang-related or specified in the charge only adds to the grave confusion and vagueness in application. (See ***People* v. *Albillar*** (2010) 51 Cal.4th 47, 54-59 [unlike subdivision (b) gang enhancement, legislature eliminated requirement that felonious conduct be gang-related or committed with specific intent to aid

gang for purposes of active gang participation under subdivision (a)].) Indeed, the language (at least according to respondent; RAOB 10) does not even expressly require intentional aiding and abetting of the felony (versus willful promotion or furtherance). (But see CALCRIM No. 1400; ***People*** **v.** ***Castaneda*** (2000) 23 Cal.4th 743, 750.) Thus, the door is open to expansive conspiracy theories based on no more than (1) knowing participation in a gang or (2) spontaneous furtherance of some purely personal unspecified crime by a member -- which do not really make out any conspiratorial agreement whatsoever.

Contrary to respondent, the fact the "felonious conduct" need not be limited to the primary activity or pattern crimes needed to make out the gang does not eliminate the core vagueness or redundancy: the gravamen of the crime is still directed to persons actively involved with a gang (i.e., a conspiracy), not just the commission of the secondary crime or a solo crime. (Pen. Code, § 186.22, subd. (a); see also ***People*** **v.** ***Rodriguez*** (2012) 55 Cal.4th 1125, 1132-1138 [while felonious conduct aided need not be gang-related, such conduct must be committed by at least two gang members, not just one acting alone, so as to establish some gang nexus; overall gang "context" and "potential due process concerns" about punishing bare gang membership militate in favor of construction requiring conduct by more than one gang member, especially where the subdivision (a) crime

need not be gang-related (unlike the subdivision (b) enhancement)].)

Clearly, the due process concerns noted in *Rodriguez* also counsel caution in accepting respondent's views favoring the most equivocal and expansive (if not largely tactical) conspiracy charges against the most tenuous gang hangers-on in the most tenuous cases. (Respondent's incorrect characterizations of the subdivision (a) felonies as gang-related also mirror the mischaracterizations contained in the decisions disapproved in *Rodriguez*. (See ***People* v. *Rodriguez***, *supra*, 55 Cal.4th at pp. 1136-1137.))

But even setting aside the constitutional concerns and redundancies, voter intent here in enacting a more specific (strict) conspiracy provision (which pointedly avoids risks of punishing mere membership by focusing on specific felonies) itself appears persuasive. Our gang participation offense is a "carefully structured" (***People* v. *Rodriguez***, *supra*, 55 Cal.4th at pp. 1136-1137) provision for active gang participants, focused on felonies committed by more than one member in a manner designed to avoid constitutional problems with punishing bare membership. So is the specific conspiracy provision (Pen. Code, § 182.5) addressed to this specific crime which voters have enacted. Our gang participation offense is very different from the federal RICO offense (or our subdivision (b) gang enhancement); our voter conspiracy provision is thus very different from the blanket

federal RICO conspiracy provision respondent relies upon too.

The fact California voters, unlike federal legislators, have enacted a narrower approach to addressing potential gang participation as conspiracies, which avoids the redundancy and vagueness and bare-association problems, strongly supports the Court of Appeal's view regarding voter/legislative intent and the language in our statutes. (Pen. Code, § 182.5; Slip Opn., pp. 315-316.) Federal legislators may have enacted a separate generic conspiracy crime for RICO cases. (RAOB 13.) California has not, and for good reason. In any event, voters would understand section 182.5, part of the *same general conspiracy chapter* as the general conspiracy provision section 182, as the way in which potential conspiracies to commit this specific crime are treated under our law. (Slip Opn., pp. 315-316.)

Section 182.5 is a specific strict statute, contained in the general conspiracy chapter, and addressed to a specific crime stated in the gang chapter. Voters, not just the Court of Appeal, would question how you can conspire to actively participate in a criminal street gang, an obvious form of conspiracy down to primary activity/pattern crime elements. Voters would read section 182.5 as a specific conspiracy provision designed to focus more clearly on punishment for the specific felony assisted, not on broader active gang participation that amounts to a conspiracy anyway. At

best the conspiracy provisions are ambiguous as to whether section 182 applies "notwithstanding" section 182.5; this is a true ambiguity which must be read in favor of the criminal defendant.

Voters enacted a strict provision allowing for active gang participation punishment under conspiracy principles even short of (1) an express agreement or (at least according to respondent) (2) adequate grounds to independently convict the defendant as an accessory to the specific felony (see RAOB 10; ***People* v. *Mesa*** (2012) 54 Cal.4th 191, 198). Voters would view this specific strict provision, part of the general conspiracy chapter, as the manner in which conspiracies to actively participate in a gang are treated. Voters would take this specific provision as strict gang punishment, but punishment tied to the specific underlying felony, not generic or failed gang participation. Noted by the Court of Appeal, the fact ballot materials told voters section 182.5 *expands* conspiracy liability further suggests voters would understand the generic conspiracy provision (Pen. Code, § 182) did not apply to this crime.

Moreover, voters would understand specific crimes may not succeed, warranting charges of conspiracy or attempt to commit that crime. Thus, prosecutors are free to charge active gang participation or attempt or conspiracy to commit the specific felony; if these charges fail, they are also free to charge the strict 182.5 offense; they can also charge the subdivision

(b) gang enhancement (Pen. Code, § 186.22, subd. (b)) if the defendant commits a gang-related felony to aid criminal conduct by gang members, but lacks knowledge of the gang's activities. But voters would hardly understand section 182.5 to endorse respondent's view (RAOB 8, 22-23) favoring open-ended conspiracy punishment for persons who are not really active in a gang; persons who lack knowledge of the gang's activities; or persons whose gang is not yet formed in terms of numbers of members or predicate acts.

This is a true and dangerous slippery slope which, unlike RICO conspiracies, casts a wide net over the most attenuated or unknowing hangers-on not involved in aiding *any* gang-related crime. You don't conspire to be in a conspiracy; you certainly don't conspire to become passively or unknowingly involved in a gang, or in a group that does not constitute a gang (yet). Where prosecutors can charge failed discrete felonies in so many other ways (even under section 182.5 short of true accessory liability for those felonies), we should have good reason before concluding voters authorized such reaching and risky conspiracy prosecutions of marginal gang hangers-on. The absence of an express *preclusion* of respondent's conspiracy charge in the generic conspiracy

section (Pen. Code, § 182) is not such a reason.[1]

In the face of so many other available options, respondent's view that disallowing a generic conspiracy charge is somehow absurd or hamstrings prosecutors is no more persuasive than like arguments raised in favor of a solo active gang participation charge in *Rodriguez*. (***People* v. *Rodriguez***, *supra*, 55 Cal.4th at pp. 1138-1139 & fn. 9 [lone perpetrator not liable for subdivision (a) felony is still punishable under subdivision (b) gang enhancement, as well as the underlying felony provision].) Indeed, the main benefits of the charge appear to be either (1) tactical (in cases like this) or (2) in allowing the most tenuous gang charges against the most hapless failed hangers-on involved in the most equivocal or failed crimes that are separately chargeable anyway. Equally important, respondent's urgings (RAOB 22-23) in favor of conspiracy charges against *insufficiently active* members (or failed/not-yet-established gangs) pose *even greater constitutional concerns* about potential punishment of bare gang membership (not to mention association prior to formation of a gang and vagueness issues here) than those found *central* to assessing legislative intent in

---

[1] Respondent suggests the active participation conspiracy charge is needed for cases where the specific felony does not ultimately occur. (RB 8, 23.) But prosecutors remain free to charge conspiracy to commit that felony, which as respondent acknowledges does not require completion of the target offense. (RB 8.)

Rodriguez. (***People* v. *Rodriguez***, *supra*, 55 Cal.4th at pp. 1133-1137 & fn. 7.)

Contrary to respondent, in the face of such a specific enactment as section 182.5 the fact the general conspiracy provision refers to conspiracy to commit "any crime" is no answer either. (See also ***People* v. *Iniguez*** (2002) 96 Cal.App.4th 75, 78-79 [the fact statutes refer to an attempt or conspiracy to commit "any" crime does not mean the statutes authorize crime of conspiracy to commit attempted murder; one does not conspire to commit a failed crime or an ineffectual act].) Similarly here, you don't conspire to become passively or unknowingly involved in a gang, much less a group that does not constitute a gang. Where voters have added conspiracy liability short of a conspiracy and discrete attempts and conspiracies are chargeable anyway, respondent's generic conspiracy charge adds nothing but confusion, the ability to inject gang evidence into trials, or the ability to charge the most tenuous of failed-gang or failed/passive-participation cases.[2]

---

[2] The Court of Appeal wisely declines to address the applicability of a conspiracy charge where no gang exists yet, limiting its discussion to cases involving an existing gang. (Slip Opn., p. 316, fn. 163.) Respondent, in contrast, urges a conspiracy charge may lie for persons who conspire to actively participate in a gang that does not exist yet. (RB 8.) Respondent also broadly urges the conspiracy crime could apply if any element of the gang crime were lacking (RB 8), but does not address whether the crime would be constitutional if the knowledge element of active gang

Although three persons were charged here, the fact the active participation offense (like generic conspiracy; Pen. Code, § 182, subd (a)) focuses on *collective participation of at least two persons* (***People* v. *Rodriguez***, *supra*, 55 Cal.4th at pp. 1139) likewise tends to support application of Wharton's Rule precluding the charging of such crimes as a redundant generic conspiracy. (See, e.g., ***State* v. *Mendoza*** (R.I. 2005) 889 A.2d 153, 160-161 & fn. 6.) Moreover, the relevance of Wharton's Rule as affording some guidance here is heightened by the facts: (1) the active gang participation offense: *already* focuses on broader conspiratorial activity (the same danger addressed by the general conspiracy provision); (2) but it does so in terms of discrete concerted crimes by at least two persons which can be as purely personal as buying drugs (crimes not necessarily posing broader societal risks); and (3) the parties involved in the conspiracy (RAOB 8) are typically the same ones charged for the

---

participation were lacking. This all well illustrates the dangers of respondent's position. While voter and legislative intent controls, to the extent the Court is free to consider practical and policy ramifications, appellant must ask why it is worth opening the door to so much confusion and potential unconstitutionality when so many other charges are available to prosecutors. If underlying failed felonies or section 182.5 can be charged anyway, what besides tactical advantages and conspiracy charges for the most equivocal, inactive, or failed hangers-on (or failed gangs) is gained? If an attempt or conspiracy to start a failed gang even needs to be chargeable, the Court of Appeal's analysis properly excludes this scenario from its analysis.

substantive offense. (See ***Iannelli* v. *United States*** (1975) 420 U.S. 770, 783-786.)

Certainly, unlike federal law and more explicit conspiracy provisions within specific laws, all indications here are that voters have *not* exempted the gang crime from this rule by providing a more specific conspiracy charge in lieu of generic conspiracy. (Cf. ***State* v. *Mendoza***, *supra*, 889 A.2d at p. 160, fn. 6 [laws which have been held to state exceptions to the rule].) At least, the cases addressing the Wharton Rule (a canon of construction applied where legislative intent is not clear) validate the Court of Appeal's focus on legislative intent underlying the generic conspiracy provision in the face of redundant application, despite its facial applicability to "any" crime. And the rule of lenity has much stronger application here to our ambiguous conspiracy chapter than it does to federal and state laws *explicitly* providing for generic conspiracy charges *within* the specific laws setting forth the substantive crime. (See, e.g., ***State* v. *Mendoza***, *supra*, 889 A.2d at p. 160, fn. 6; ***Salinas* v. *United States*** (1997) 522 U.S. 52, 62 [RICO].)

Finally, there are big differences between the RICO crime and our more generic crime of active gang participation that well explain why voters could opt against straight conspiracy treatment here. The RICO crime requires (1) participation in the "'*enterprise's* affairs'" and (2) doing so

through a pattern of racketeering activity. (18 U.S.C. § 1962(c) [emph. added]; ***Salinas* v. *United States***, *supra*, 522 U.S. at pp. 62-63; see also ***Sedima* v. *Imrex Co.*** (1985) 473 U.S. 479, 496-497, fn. 14 [defining pattern of racketeering activity].) In contrast, our crime refers to much more amorphous active participation (not defined in any way, much less in terms of a pattern of enterprise-related activity); the specific felonious conduct promoted can be any felony by gang members, no matter how purely personal in nature and whether gang-related or part of the enterprise or not; the discrete current felony can be a single felony, not a pattern of them; at least according to respondent (RAOB 10; but cf. CALCRIM No. 1400), the "willful" promotion of the felony need not even rise to the level of accomplice liability; and like the current felony, the predicate/pattern priors needed to make out a gang need not be gang-related either. (CALCRIM No. 1400; cf. ***United States* v. *Brandao*** (1st Cir. 2008) 539 F.3d 44, 53-56 [explaining how multiple required RICO pattern predicate offenses were all sufficiently linked to gang enterprise].) Apparently designed to cast a wider net of liability to catch persons who aid gangs short of proof they are liable for intentionally aiding *any* specific crime, or at least *any* specific gang-related crime, the California crime requires far less proof than a RICO violation. The California crime focuses on gangs, but in a generic manner far broader than discrete enterprise-related RICO

conspiracies.

These are big differences that make our broader California gang participation crime a lot closer to a generic conspiracy-type offense already, as compared to the more discrete RICO crime. There is a big difference between: participation in gang affairs *through* a pattern of multiple gang-related crimes (RICO); and generic "active participation" in a gang, coupled with promotion of *any* single non-gang related felony (e.g., an assault over a family dispute) committed by gang members. The latter California element is a generic *non*-enterprise-related actus reus that essentially serves as an overt act, confirming our active gang participation offense is much closer to a conspiracy-type offense than RICO is.

Defined in amorphous terms of generic participation with a single generic overt act/discrete felony that need not be gang-related, the California offense is already a lot closer to a conspiracy or inchoate liability than RICO is. Indeed, not only is a California gang and knowing participation in that gang, as defined, a species of generic conspiracy (especially where pattern/predicate crimes need not be gang-related); the active gang participation offense under subdivision (a), providing for a single pedestrian overt act (gang-related or not), is constructed in terms akin to generic conspiracy as well, apparently in order to enlarge liability like conspiracy (Pen. Code, § 182) and gang-participation conspiracy (Pen.

Code, § 182.5) both already do. Adding a generic section 182 conspiracy charge on top of two existing generic conspiracy-type/liability-expanding layers means voters authorized thrice redundancy and thrice vague and overbroad punishment of association. This is a big difference from RICO and it poses serious problems.

California voters could well opt in favor of punishing the specific felony under conspiracy principles, but against further treating failed generic "participation" in a gang, as amorphously provided in our statute in terms similar to conspiracy, as a separately chargeable redundant conspiracy. Unlike the Smith Act involving revolutionary organizations (RAOB 14), the active gang participation defendant need not even be a member of the organization. And unlike the foreign terrorist provision (RAOB 24), the specific acts of assistance for active gang participation only require the aiding of *any* felonious conduct by gang *members* (not the *gang*) (without specific intent to aid *the gang* (versus members) either). (Cf. Pen. Code, § 186.22, subd. (b) [for separate gang enhancement, current felony must be gang-related].)[3]

---

[3] Respondent at times also incorrectly suggests active gang participation requires assistance of felonious conduct committed "by the *gang*" (RB 25 emph. added]), not just gang members. In stating the elements of its conspiracy charge, respondent also refers to an agreement to commit a "*gang* crime" (RB 8 [emph. added]) even though (unlike the subdivision (b) enhancement) the felonious conduct here need not be gang-related. Once

In any event, our voters have wisely tied conspiracy to participate in a gang to the specific felony, not inchoate plots to participate passively or unknowingly in a gang, or something that is not even a gang. Courts should be loathe to infer such a broad conspiracy crime where, unlike federal law, none has been specifically enacted, and the extant specific voter enactment is pointedly to the contrary.

In sum, respondent can point to a few non-overlapping technical elements and the *absence* of any express statutory *preclusion* of the conspiracy charge in this context. In contrast, the Court of Appeal can point to serious redundancies to the point of absurdity and unconstitutional vagueness and overbreadth, as well as a specific voter provision more narrowly focused on specific felonies rather than a global active gang participation charge. Appellant adds the serious potential for substantive unfairness (indeed false convictions) if the charge is permitted, not to mention serious confusion in applying the charge. Moreover, prosecutors remain free to charge attempts or conspiracies to commit the specific "felonious" acts required for gang participation, not to mention the section 182.5 offense providing for liability even short of a provable conspiracy.

While prosecutors remain free to bring charges of inchoate crimes

---

again, the subdivision (a) active participation crime is considerably more generic than the subdivision (b) enhancement (or RICO).

for discrete felonies, voters have wisely treated conspiracy to commit active gang participation in terms of the specific felony and the punishment therefor, not the redundant global generic conspiracy charge urged by respondent, which amounts to a piling on of multiple generic conspiracies. California voters had every right and reason to tailor our specific conspiracy provision to our specific gang participation crime, not RICO.

For all the foregoing reasons, the judgment reversing Count 9 based on conspiracy to participate in a criminal street gang must be affirmed.

C. JOINDER IN ARGUMENTS OF COAPPELLANTS.

Appellant respectfully joins in all arguments, briefs, and motions presented or to be presented by coappellants in this case to the extent these matters inure to his benefit.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeal reversing Count 9 based on conspiracy to participate in a criminal street gang must be affirmed.

Respectfully Submitted,

Joseph Shipp
Counsel for Appellant

WORD COUNT CERTIFICATION

By my signature below and on the attached proof of service for this brief, I, Joseph Shipp, counsel for appellant, hereby certify, under penalty of perjury as specified in the proof of service appended hereto, that the body of the brief herein, exclusive of tables and appendices, contains 5477 words, as determined by the word count function of the word processing program used to prepare the brief.

Joseph Shipp
Counsel for Appellant

DECLARATION OF SERVICE

Re: *People* v. *Dixon* No. S202790

I, Joseph Shipp, declare that I am over 18 years of age, and not a party to the within cause; my employment address is Post Office Box 20347, Oakland, California 94620. I served a true copy of the attached: APPELLANT'S ANSWER BRIEF on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Brad Bristow
CCAP
2407 J St., Ste. 301
Sacramento, CA 95816

Office of the
Attorney General
P.O. Box 944255
Sacramento, CA 94244

Joseph Kevin Dixon T-28096
CSP-Sacramento
P.O. Box 290066
Represa, CA 95671-0066

Hon. Gary Friedman
Superior Court
1415 Truxton Ave.
Bakersfield, CA 93301

Susan D. Shors, Esq.
466 Green St., Ste. 300
San Francisco, CA 94133

Sharon Wrubel, Esq.
P.O. Box 1240
Pacific Palisades, CA 90272

James Faulkner, Esq.
1825 18th St.
Bakersfield, CA 93301

District Attorney
Attn: Cynthia Zimmer
1215 Truxton Ave.
Bakersfield, CA 93301

Fifth District Court of Appeal
2424 Ventura St.
Fresno, CA 93721

Each envelope was then, on January ___, 2013, sealed and deposited with the United States Postal Service at Oakland, California, in the County in which I am employed, with the first class postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed at Oakland, California, this ___ day of January 2013.

_____
Joseph Shipp
Declarant