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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF SAN DIEGO – CENTRAL DIVISION**  
10



11 **CASE NO.: CD255884**

12 **DEFENDANT SHERBLY GORDON'S**  
13 **BENCH BRIEF ON PENAL CODE**  
14 **SECTION 182.5**

15 PEOPLE OF THE STATE OF CALIFORNIA,

16 Plaintiffs,

17 vs.

18 MAURICE CHAVARRY; ET AL.,

19 Defendants.

Judge: Hon. Jeffrey F. Fraser,  
Dept: **37**  
Date: 10/20/2014  
Time: 8:30 a.m.

Preliminary Examination: November 12, 2014  
Trial Date: None Set Yet

20 Here now comes the defendant, Sherbly Gordon (“Defendant” or “Sherbly”), by and  
21 through his attorney, Shawn Huston of the Office of Assigned Counsel, respectfully submitting  
22 the following *Defendant Sherbly Gordon’s Bench Brief On Penal Code Section 182.5* (“Gordon  
23 Brief”). The Gordon Brief describes the history of the Penal Codes section 182.5, how it has  
24 been treated by the courts, and the proper interpretation of the statute’s provisions in that context.

25 **I. STATEMENT OF THE CASE**

26 Penal Code section 182.5 has been on the books for over a decade but because the code is  
27 rarely used (Appendix C- Cases Citing To California Penal Code § 182.5), it is instructive to  
28 examine how the statute became law.

1           **a. In the Legislature**

2           In 1996, Bill AB 26 was introduced into the California State Assembly. Later, on January  
3 6, 1998, the California District Attorneys Association amended AB 26 to create Penal Code  
4 section 182.5 (“section 182.5”).<sup>1</sup> The wording of the proposed statute was very similar to the  
5 current code:

6           182.5. any person who actively participates in any criminal street gang, as  
7 defined in subdivision (f) of Section 186.22, with knowledge that its members  
8 engage in or have engaged in a pattern of criminal gang activity, as defined in  
9 subdivision (e) of Section 186.22, and who willfully promotes, furthers, assists, or  
10 benefits from any felonious criminal conduct by members of that gang is guilty of  
11 conspiracy to commit that felony and shall be punished as specified in subdivision  
12 (a) of Section 182. (Appendix A – January 6, 1998 Amendment to Add Penal  
13 Code Section 182.5 To Bill AB 26.)

14           The amendment ran into trouble right out of the gate from the independent legislative  
15 legal analyst “Analyst” or “Assembly Analyst”). First, the Analyst noted “The bill appears to  
16 state that the crime of active participation in a street gang constitutes a conspiracy to commit the  
17 crime of active participation in a street gang. Thus, by definition, under this bill active  
18 participation in a gang constitutes an agreement between two or more people to commit a specific  
19 crime and an overt act to commit the target crime. Decisions of the Court of Appeal have rejected  
20 arguments that gang participation constitutes a conspiracy.” (Appendix B – January 20, 1998 AB  
21 26 Bill – Bill Analysis, Page 2.)

22           Second, the Analyst noted that the code was vague and ambiguous. “The bill appears to  
23 define active participation as also necessarily establishing a conspiracy. (The problems with such  
24 a definition are discussed below.) ... Further, it is particularly difficult to determine what the  
25 statute seeks to accomplish. Thus, the statute is vague and ambiguous. Ambiguous statutes must  
26 be interpreted in favor of the defendant. (*McNally v. United States* (1987) 107 S.Ct. 2875.)  
27 Vague statutes are unconstitutional if they fail to give adequate notice of what the statute  
28 prohibits. (*Maynard v. Cartwright* (1988) 108 S.Ct. 1853; *People v. Soto* (1985) 171 Cal.App.3d  
1158.)” (Appendix B – January 20, 1998 AB 26 Bill – Bill Analysis, Page 3.)

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<sup>1</sup> The legislative history of Penal Code section 182.5 is provided here, not as an interpretive tool to divine the voters' intention, but rather to expose the constitutional flaws and weaknesses of the statute, by exploring the historical and analytical context of the prior attempt to codify the statute. (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (Cal. 2000) 24 Cal. 4th 537; *Robert L. v. Superior Court* (Cal. 2003) 30 Cal. 4th 894, 903.)

1 Third, the statute fails to specify when and how the defendant needs to benefit from the  
2 crime for the code to be tenable. “If the conspiracy is based upon a felony which the defendant  
3 supports, assists or benefits from, it could include conduct prior to the defendant's active  
4 participation in the gang... This benefit could certainly not establish a present conspiracy as a  
5 conspirator is not liable for acts committed by his or her co-conspirators prior to the time that he  
6 or she joined the conspiracy. (*People v. Marks* (1988) 45 Cal.3d 1335.)” (Appendix B – January  
7 20, 1998 AB 26 Bill – Bill Analysis, Page 3.)

8 Fourth, the Analyst warned that the code was missing key elements regarding agreement.  
9 “The conspiracy/gang provision in this bill appears to be lack the necessary element of a specific  
10 agreement ... While in many cases, gang members may actually agree to commit a certain,  
11 specific crime and then take action to commit such a crime, active participation in a gang cannot  
12 be said to conclusively establish such an agreement.” (Appendix B – January 20, 1998 AB 26  
13 Bill – Bill Analysis, Page 3.)

14 The Analyst’s fifth complaint was that he could not tell whether the intention of the code  
15 was “to render each gang member liable for every crime committed by a fellow gang member?”  
16 He also stated that the code was essentially the same as other conspiracy laws on the book and  
17 that “the defendant could not be punished for more than one offense and likely could not be  
18 convicted of more than one of (sic) offense. (Penal Code Section 654.)” (Appendix B – January  
19 20, 1998 AB 26 Bill – Bill Analysis, Page 3.)

20 Finally, the Analyst answered his own question by pointing out that the sponsor pushing  
21 section 182.5, the California District Attorneys Association (“CDAA”), had “conceded that gang  
22 participation cannot, alone establish a conspiracy... While CDAA would like to draft a RICO  
23 style law, it is unclear how that would be accomplished.” (Appendix B – January 20, 1998 AB 26  
24 Bill – Bill Analysis, Page 4.)

25 Faced with a host of questions, and no answers, the Analyst concluded, “It is suggested  
26 that the gang conspiracy provision be stricken from the bill.” (Appendix B – January 20, 1998  
27 AB 26 Bill – Bill Analysis, Page 3.) And that is exactly what happened. On April 17, 1997, the  
28

1 new version of AB 26 struck the section 182.5 provision in its entirety (the AB 26 Bill later died  
2 in the Assembly and never made it to the State Senate).<sup>2</sup>

3 **b. With The Voters.**

4 Undaunted, the sponsors of section 182.5 changed tactics. If they could not get the  
5 Legislature to pass their new law, they would take the matter to the electorate and hope that  
6 general populace of California would vote the law onto the books. And so, just two years later,  
7 Proposition 21 was presented to the voters, and in that Proposition was Penal Code section 182.5.  
8 The voters, not concerned, or likely even aware, of the construction and constitutional flaws  
9 inherent in section 182.5, eagerly embraced the Proposition's "tough-on-crime" platform. (*Fields*  
10 *v. Brown* (9th Cir. Cal. 2007) 503 F.3d 755, 81.) Consequently, in 2000, over 60% of the voters  
11 made Penal Code section 182.5 law. The wording of the code was exactly the same text as was  
12 originally presented to the more discerning Legislature, with two exceptions. First, the word  
13 "may" in the newer version replaced the word "shall" in the older version where the statute  
14 discussed punishment for violating the code. Second, the code's preamble adds the line  
15 "Notwithstanding subdivisions (a) or (b) of Section 182." Since Section 182(a) and (b) proscribe  
16 and define the traditional conspiracy law, this addition seems to be an attempt to address the  
17 concerns that while section 182.5 is called a conspiracy statute, the elements are very different  
18 from a traditional conspiracy. (Appendix D – Comparison And Contrast Of Conspiracy Statutes.)  
19 The statute, as it currently stands reads:

20 182.5. Notwithstanding subdivisions (a) or (b) of Section 182, any person who  
21 actively participates in any criminal street gang, as defined in subdivision (f) of  
22 Section 186.22, with knowledge that its members engage in or have engaged in a  
23 pattern of criminal gang activity, as defined in subdivision (e) of Section 186.22,  
24 and who willfully promotes, furthers, assists, or benefits from any felonious  
25 criminal conduct by members of that gang is guilty of conspiracy to commit that  
26 felony and may be punished as specified in subdivision (a) of Section 182. (Cal.  
27 Pen. Code § 182.5)

28 Curiously, despite being on the books as law for well over a decade, section 182.5  
received very little case treatment by the courts. One reason could be that Penal Code section

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<sup>2</sup>See the first request, of the concurrently filed *Defendant Sherbly Gordon's Request For Judicial Notice*, for the court to take judicial notice of the history of Bill AB 26.

1 186.22(a) (“section 186.22(a)”) was already law and was eerily similar to section 182.5, raising  
2 the specter of merger claims under Penal Code section 654. Section 186.22(a) states:

3 186.22.(a) Any person who actively participates in any criminal street gang with  
4 knowledge that its members engage in or have engaged in a pattern of criminal  
5 gang activity, and who willfully promotes, furthers, or assists in any felonious  
6 criminal conduct by members of that gang, shall be punished by imprisonment in a  
7 county jail for a period not to exceed one year, or by imprisonment in the state  
8 prison for 16 months, or two or three years. (Pen. Code § 186.22(a).)

9 Also, prosecutors were likely aware of the constitutional challenges awaiting them if they  
10 pursued crimes charged under section 182.5. Regardless of the reason, the legal landscape  
11 changed with the landmark Supreme Court ruling of *People v. Johnson* (2013) 57 Cal. 4<sup>th</sup> 250.

12 **c. The Supreme Court Maneuvers To Validate Section 182.5.**

13 In *Johnson*, defendants Corey Ray Johnson, Joseph Kevin Dixon, and David Lee, Jr., were  
14 part of a 200-member Bakersfield gang called the Country Boy Crips (“CBC”). Direct evidence  
15 linked all three defendants to several murders (DNA tests, the defendant’s cell phones and  
16 witnesses, all put the defendants at the scene of the crimes). A jury convicted all defendants of  
17 multiple counts and enhancements including three counts of first degree murder, two counts of  
18 attempted murder, shooting at an occupied vehicle, active gang participation, and conspiracy.  
19 The conspiracy count alleged each defendant had engaged in a conspiracy to commit the crime of  
20 gang participation. (*People v. Johnson* (2013) 57 Cal. 4<sup>th</sup> 250.)

21 The appellate court reversed on the conspiracy to commit gang participation (Cal Pen.  
22 Code § 186.22(a)) on the reasoning that, “a criminal street gang is, at its core, a form of  
23 conspiracy. This being the case, by charging defendants, in count nine, with conspiracy to  
24 actively participate in a criminal street gang the People essentially charged defendants with  
25 conspiracy to actively participate in a conspiracy.” (*People v. Johnson* (Cal. App. 5th Dist. 2012)  
26 205 Cal. App. 4th 594, 604.) The Appellate Court found that to be improper, but the State  
27 appealed their decision. The California Supreme Court granted review to decide whether, in fact,  
28 one may conspire to actively participate in a conspiracy. (*People v. Johnson* (2013) 57 Cal. 4<sup>th</sup>  
250.) (Appendix J – Full Text of *People v. Johnson* (2013) 57 Cal. 4th 250.)

29 In answering in the affirmative, the Court did not dispute the lower court assertion that  
30 Penal Code 186.22(a) was, by its very nature, “a species of conspiracy.” (*People v. Johnson* (Cal.  
31 App. 5th Dist. 2012) 205 Cal. App. 4th 594, 604.) Rather, the Court stated that there is historical

1 precedent of finding defendants culpable for conspiring to conspire. The Court stated that the  
2 Racketeer Influenced and Corrupt Organizations Act (RICO) and the Smith Act both criminalize  
3 conduct involving multiple participants and may involve predicate acts that are conspiracies to  
4 form the basis for a charge and eventual conviction of a conspiracy. (*People v. Johnson* (2013)  
5 57 Cal. 4<sup>th</sup> 250.)

6 Most importantly, in reaching that conclusion, the California Supreme Court discussed (by  
7 comparison and contrast) the elements and requirements of a traditional conspiracy with that of  
8 the gang participation conspiracy found in section 182.5. (Penal Code §§ 182, 182.5; *People v.*  
9 *Johnson* (2013) 57 Cal. 4<sup>th</sup> 250; Appendix D – Comparison And Contrast Of Conspiracy  
10 Statutes.) By explaining the proper way to interpret section 182.5, albeit in dicta<sup>3</sup>, the Court  
11 obliquely addressed most of the issues raised by the Assembly Analyst, with a bent towards  
12 approving section 182.5 as a legitimate statute.

13 The Court did not concur with the Assembly Analyst’s first point that mere active  
14 participation in a gang constitutes an agreement between two or more people to commit a specific  
15 crime and an overt act to commit the target crime. Section 186.22(a) requires that a defendant  
16 “must be an active gang participant with knowledge of other members' pattern of criminal gang  
17 activity” AND “agree to willfully promote, further, or assist gang members in the commission of  
18 an intended target felony;” section 182.5 would be the same except the defendant would also be  
19 culpable if he or she also just benefits from the crime's commission. (*People v. Johnson* (2013)  
20 57 Cal. 4<sup>th</sup> 250.) This conclusion also addresses the vague and ambiguous argument of the  
21 Assembly Analyst.

22 The code is specific, when the Court rules that to be guilty of conspiracy to commit a  
23 felony a defendant must “willfully” promote, further, assist, or benefit from that specific  
24 “intended target felony.” (*Ibid.*) In other words, the Code is not ambiguous if it seeks to punish  
25 active gang members that promote, further, assist, or benefit “from the commission of an intended  
26 target felony.” (*Ibid.*)

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27 <sup>3</sup> It is well settled that even if properly characterized as dictum, statements of the Supreme Court  
28 should be considered extremely persuasive especially “where it demonstrates a thorough analysis  
of the issue or reflects compelling logic.” (*United Steelworkers of America v. Board of Education*  
(1984) 162 Cal.App.3d 823, 835; *Graydon v. Pasadena Redevelopment Agency* (1980) 104  
Cal.App.3d 631, 643; *Smith v. County of L.A.* (1989) 214 Cal. App. 3d 266, 297.)

1 As to the timing and manner of the “benefits” clause of section 182.5, the Court stated that  
2 the section would only apply to “an active and knowing gang participant who acts with the  
3 required intent to promote, further,” assist, or benefit from the intended felony. (*Ibid.*)  
4 Additionally, the necessary intent must form, in the active gang member’s mind, before the  
5 conclusion of the conspiracy. The Court noted that all criminal activity exists along a continuum.  
6 At its conclusion is the commission of a completed crime, like murder. So, when interpreting  
7 conspiracy statutes, “conspiracy law attaches culpability at an earlier point along the continuum  
8 than attempt.” (*People v. Johnson* (2013) 57 Cal. 4<sup>th</sup> 250.)

9 The Supreme Court made short work of the fourth point raised by the Analyst regarding  
10 the agreement requirement. While a “traditional conspiracy requires both the specific intent to  
11 agree, and specific intent to commit a target crime. (citation omitted.) A 182.5 conspiracy does  
12 not require any prior agreement among the conspirators to promote, further, or assist in the  
13 commission of a particular target crime. Even without a prior agreement, an active and knowing  
14 gang participant who acts with the required intent to promote, further, or assist in the commission  
15 of a felony by other gang members can violate section 182.5. That act of assistance or promotion  
16 replaces the required prior agreement to commit a crime that is ordinarily at the heart of a  
17 traditional conspiracy.” (*People v. Johnson* (2013) 57 Cal. 4<sup>th</sup> 250.) So under section 182.5 there  
18 is no agreement requirement, but remember that the “specific intent” requirement remains. (*Ibid.*)

19 This last point also helps to answer the final issue raised by the analyst regarding whether  
20 the statute intends to hold every gang member culpable for every crime committed by a fellow  
21 gang member. Since the California Supreme Court has acknowledged that there is a “required  
22 intent” for section 182.5, a defendant can only be culpable for the felonies that he or she  
23 specifically promoted, furthered, assisted, or benefitted from, under that statute. (*People v.*  
24 *Johnson* (2013) 57 Cal. 4<sup>th</sup> 250.) Consequently, defendants could not be responsible for felonies  
25 they had no knowledge of and did not intend to promote, further, assist, or benefit from before the  
26 felonies were committed. Or can they? In charging the Defendant, the instant case, prosecutors  
27 are doing just that.

## 28 II. STATEMENT OF FACTS

Emboldened by the California Supreme Court decision in the *Johnson* (*Ibid.*) case, some  
prosecutors are intent on seeking the limits of Penal Code section 182.5. For example, the State,

1 in the instant case, has arrested almost a score of alleged gang members and charged them with  
2 multiple counts of criminal street gang conspiracy all under section 182.5. The State wants to  
3 hold these individuals responsible for multiple premeditated attempted murders, premeditated  
4 murders, and other felonious criminal activity.

5 The problem with the State's actions is that, for many of the defendants, there is no  
6 evidence directly linking the defendants to any of the alleged crimes. The State cannot prove  
7 these defendants intended to promote, further, assist or benefit from the specific alleged felonies  
8 before the felonies were committed. The State cannot even prove that some of the defendants  
9 even knew the crimes took place. Still the prosecutors insist that they do not have to prove those  
10 elements because, simply by being an active gang member, the defendants benefit from the  
11 charged crimes and are therefore, culpable for those felonies under their interpretation of section  
12 182.5. (Appendix I – Defendant Sherbly Interview Abstracts, Pages 8, 12, 31 34.)

### 13 **III. ISSUES BEING RAISED BY THE PARTIES**

14 There is no dispute that section 182.5 “expanded liability by creating a new kind of  
15 criminal conspiracy in the gang context.” (*People v. Johnson* (2013) 57 Cal. 4<sup>th</sup> 250.) The issue  
16 before the court is to what extent has this liability expanded to?

17 The prosecution has reversed course and no longer concedes “that gang participation  
18 cannot, alone establish a conspiracy.” (Appendix B – January 20, 1998 AB 26 Bill – Bill  
19 Analysis, Page 4.) To the contrary, the State now holds that active participation in a criminal  
20 street gang, makes that person liable for all the crimes of that gang, because all active gang  
21 member receive reputation “benefits from any felonious criminal conduct” of their fellow gang  
22 members. (Appendix I – Defendant Sherbly Interview Abstracts, Pages 8, 12, 31 34.)

23 The Defendant, for the reasons already stated (and argued more fully below), contends  
24 that section 182.5 applies only to an active gang participant with knowledge of other members'  
25 pattern of criminal gang activity AND who agrees to “willfully” promote, further, assist, or  
26 benefit from, gang members' commission of an intended target felony before the attempt stage.  
27 (Pen. Code § 182.5.) Because, section 182.5 is a conspiracy statute, the participant must form the  
28 intent to benefit from the intended target felony before the crime is attempted. (*Ibid.*) Straying  
from the Supreme Court's careful interpretation of the statute renders the code vague, ambiguous  
and unconstitutional.



1 IV. A SUMMARY OF THE ARGUMENTS

2 The State is intent on prosecuting section 182.5 offenses under the theory that the added  
3 clause “*or benefits from*” that distinguishes section 182.5 from section 186.22(a) makes a mere  
4 active gang member culpable for all the felonious crimes of the gang. However, before  
5 prosecutors can row to that shore, they have six insurmountable obstacles to overcome that are  
6 fatal to their theory.

7 a. State’s Theory Violates Constitutional Freedom Of Association Rights.

8 Our California Supreme Court starkly disagrees with the State’s theory and holds that  
9 “mere active and knowing participation in a criminal street gang is not a crime. (*People v.*  
10 *Rodriguez* (Cal. 2012) 55 Cal. 4th 1125, 1130-1131.) One reason is that the United States  
11 Supreme Court has held that mere association with a group cannot be punished, unless there is  
12 proof that the defendant knows of and intends to further its illegal aims. (*Scales v. United States*  
13 (1961) 367 U.S. 203, 229.) *Scales* “involved the Smith Act, which prohibited membership in a  
14 group advocating the violent overthrow of the government. The Court held that a person could  
15 not be convicted under the statute unless he had knowledge of the group's illegal advocacy and a  
16 specific intent to bring about violent overthrow. (*Holder v. Humanitarian Law Project* (U.S.  
2010) 561 U.S. 1, 39-40.)

17 Hence, even when Legislature has enacted laws “to seek the eradication of criminal  
18 activity by street gangs by focusing upon patterns of criminal gang activity and upon the  
19 organized nature of street gangs, which together, are the chief source of terror created by street  
20 gangs... the Legislature was careful to observe that “mere membership [in a gang] is not  
21 punishable under the bill. This bill imposes sanctions on active participation in the gang only  
22 when the defendant knows about and specifically intends to further the criminal activity; or where  
23 he knows of the criminal activity and willfully promotes, furthers, or assists it.” (Citation  
24 omitted.)” (*People v. Mesa* (Cal. 2012) 54 Cal. 4th 191, 196-197 – discussing section 186.22(a).)

25 If the State, in this case, is allowed to punish defendants merely for being active in a  
26 criminal street gang, serious due process concerns are raised. As *Scales* stated: “In our  
27 jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct  
28 can only be justified by reference to the relationship of that status or conduct to other concededly  
criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently

1 substantial to satisfy the concept of personal guilt in order to withstand attack under the Due  
2 Process Clause of the Fifth Amendment.” (*Scales v. United States* (1961) 367 U.S. 203, 229.)

3 For policy reasons, punishing active criminal street gang member for all the felonious  
4 crimes is improper because not all active criminal street gang members commit crimes or even  
5 understand the true nature of the organization they have joined. Most are young and don’t  
6 understand until too late what a gang is about. “The average age of youth gang members in about  
7 17 to 18 years” In Los Angeles, the “typical age range is 12 to 24.” (Appendix E – Department of  
8 Justice 1998 Juvenile Justice Bulletin, Page 2.) “8 percent of youth reported in a national survey  
9 that they had belonged to a gang at some point between the ages of 12 and 17.” (Appendix F –  
10 Department of Justice – Changing Course Preventing Gang Membership, Page 8.)

11 They join for many reasons that are not crime related. “Gang membership can enhance  
12 prestige or status among friends, especially girls and provide opportunities to be with them...  
13 Protection from other gangs and perceive general well-being are key factors...Feeling marginal,  
14 adolescents join gangs for social relationships that give them a sense of identity... gangs provide  
15 a way of solving social adjustment problems, particularly the trials and tribulations of  
16 adolescence. In some communities, youth are intensively recruited or coerced into gangs... A  
17 few are virtually born into gangs as a result of neighborhood traditions and their parents’ earlier  
18 (and perhaps continuing) gang participation or involvement in criminal activity.” (Appendix E –  
19 Department of Justice 1998 Juvenile Justice Bulletin, Page 5.)

20 Also, membership is fleeting. So while “a lot of kids are joining gangs,” “they don’t tend  
21 to stay very long. The majority drop out within a year.” (Appendix G – Department of Justice  
22 Gang Membership Prevention, Page 3.) So many gang members are just children trying to  
23 survive adolescence and they briefly experiment with being in a gang for social and safety  
24 reasons. Some kids, albeit gang members, are not planning to overthrow the government, do not  
25 pose a threat to national security and do not intend to commit felonies or benefit from them. (*Ibid*;  
26 *Holder v. Humanitarian Law Project* (U.S. 2010) 561 U.S. 1, 39-40.) “Unfortunately, few youths  
27 realize the hazards associated with gang involvement.” (Appendix H – Los Angeles Police  
28 Department – Why Young People Join Gangs.) Hence, mere gang membership is insufficient to  
satisfy the concept of personal guilt required by *Scales* and is not a crime. (*Scales v. United States* (1961) 367 U.S. 203, 229; *People v. Rodriguez* (Cal. 2012) 55 Cal. 4th 1125, 1130-1131.)

1           When interpreting the similar clause in section 186.22(a), and being “fully cognizant of  
2 the guilty knowledge and intent requirements the high court had articulated in *Scales*” the  
3 Legislature limited “liability to those who promote, further, or assist a specific felony committed  
4 by gang members and who know of the gang's pattern of criminal gang activity.” (*People v.*  
5 *Rodriguez* (Cal. 2012) 55 Cal. 4th 1125.) By creating this limitation, the courts have been able to  
6 reject defendants’ “claim that section 186.22(a) criminalized lawful association since the statute  
7 required that “a defendant ‘actively participate in a criminal street gang while also aiding and  
8 abetting a felony offense committed by the gang's members.” (*People v. Rodriguez* (Cal. 2012)  
9 55 Cal. 4th 1125, 1133-1135; *People v. Rodriguez* (Cal. 2012) 55 Cal. 4th 1125 .)

10           Likewise, when interpreting section 182.5, this Court should read that to be culpable, the  
11 active gang member must, having knowledge of the gang’s pattern of criminal activity, and  
12 specifically intend to benefit from the intended target felony in the same manner as a defendant  
13 must willfully promote, further, or assist an intended target felony in section 1826.22(a).  
14 Otherwise, the defendant’s due process rights under the Fifth Amendment will be violated.

15           **b. Prosecutor’s Interpretation Is Contrary To Similar Statute Interpretation Rules**

16           The verbiage and construction of section 182.5 and 186.22(a) are very similar. The  
17 provisions of section 186.22(a) have been thoroughly litigated. Over the years, the courts have  
18 found section 186.22(a) valid by interpreting the construction and clauses to survive  
19 constitutional challenges. Hence, when analyzing the similar clauses and phrases in section  
20 182.5, this court should see no reason to depart from the prior interpretations and rulings already  
21 made when section 186.22(a) was considered. (*People v. Dieck* (Cal. 2009) 46 Cal. 4th 934.)  
22 This is consistent with the rule that states “where legislature is aware of prior statutory  
23 construction and has not sought to alter that interpretation despite amending statute in other  
24 respects, prior construction may be presumed correct.” (*Hebert v. Fliegel* (9th Cir. Or. 1987) 813  
25 F.2d 999, 1001.)

26           In the past, the California Supreme Court has rejected the People's proposed interpretation  
27 of statutes that were inconsistent with that court’s prior construction of the statute. (*People v.*  
28 *Dieck* (Cal. 2009) 46 Cal. 4th 934.) Other courts have relied on prior construction determinations  
to accurately interpret the meaning of disputed phrases in other statutes. (*Trimble Navigation,*  
*LTD v. RHS, Inc.* (N.D. Cal. May 29, 2007) 2007 U.S. Dist. LEXIS 41267.) The prior

1 construction canon requires that “if a statute uses words or phrases that have already received  
2 authoritative construction by the jurisdiction's court of last resort . . . they are to be understood  
3 according to that construction.” (*Sachs v. Republic of Aus.* (9th Cir. Cal. 2013) 737 F.3d 584,  
4 598.)

5 Consequently, this Court should look closely at the similar provisions of section  
6 186.22(a), these require a finding that the active gang member also have specific intent to aid and  
7 abet the target offense, when deciding how to interpret the “benefits” clause of section 182.5  
8 “under the principle of statutory construction that legislation framed in the language of an earlier  
9 enactment on the same or an analogous subject that has been judicially construed is  
10 presumptively subject to a similar construction. (*Belridge Farms v. Agricultural Labor Relations*  
11 *Bd.* (1978) 21 Cal. 3d 551, 557; *Los Angeles Met. Transit Authority v. Brotherhood of Railroad*  
12 *Trainmen* (1960) 54 Cal. 2d 684, 688.)” (*Smukal v. Flightways Manufacturing, Inc.* (Cal. 2000)  
23 Cal. 4th 754, 766; *People v. Rodriguez* (Cal. 2012) 55 Cal. 4th 1125.)

13 **c. State’s Interpretation Renders the Statute Impermissibly Vague and Ambiguous**

14 Generally, to withstand a claim of facial vagueness based on due process considerations, a  
15 statute must satisfy two basic requirements:

16 First, a statute must be sufficiently definite to provide adequate notice of  
17 the conduct proscribed. A statute which either forbids or requires the doing of an  
18 act in terms so vague that people of common intelligence must necessarily guess at  
19 its meaning and differ as to its application, violates the first essential of due  
20 process of law. Because we assume that a person is free to steer between lawful  
and unlawful conduct, we insist that laws give the person of ordinary intelligence a  
reasonable opportunity to know what is prohibited, so that he or she may act  
accordingly. Vague laws may trap the innocent by not providing fair warning.

21 Second, a statute must provide sufficiently definite guidelines for the police  
22 in order to prevent arbitrary and discriminatory enforcement. A vague law  
23 impermissibly delegates basic policy matters to policemen, judges and juries for  
24 resolution on an ad hoc and subjective basis, with the attendant dangers of  
25 arbitrary and discriminatory application. Where the legislature fails to provide  
such minimal guidelines, a criminal statute may permit a standardless sweep that  
allows policemen, prosecutors, and juries to pursue their personal predilections.  
(*In re Alberto R.* (Cal. App. 4th Dist. 1991) 235 Cal. App. 3d 1309, 1315-1316.)

26 **i. Sufficient Notice.**

27 Accepting the State’s theory of the case would not give defendants sufficient notice that,  
28 under section 182.5, being an active gang member on Facebook would could make them liable for

1 murders and other crimes that they had no knowledge of. The State Analyst could not figure out,  
2 and it seems unlikely that the voters (when reading section 182.5) would agree with the State, that  
3 a fair reading of section 182.5 makes an active gang member culpable for all of the gang  
4 members' felonious conduct. "The court's objective in interpreting statutory language added by  
5 initiative is to ascertain the voters' intent." (*People v. De Porceri* (Cal. App. 6th Dist. 2003) 106  
6 Cal. App. 4th 60, 70.)

7 Such a reading would fail to give defendants notice that just by being an active gang  
8 member by posting Facebook messages, could make that person guilty of murders, attempted  
9 murders and other felonies. In this case, the Defendant could not see the relationship that the  
10 State is seeking to create and how that would make him liable for such horrible crimes. When he  
11 interviewed he was obviously confused, "Yeah but I didn't know me posting that shit on the  
12 internet was crime. If I knew that I would never did it... Come on show me some shit, because I  
13 didn't do nothing in my life... I just want to know what's really, what's up, because like I'm so,  
14 like my head is so spinning right now because I did the Facebook. I'm so confused, like 12, 14  
15 cases because me running my mouth... Okay so I was talking shit on Facebook, I understand that,  
16 but how do these cases belong to me. But did that prove me doing anything illegal though? I got  
17 nothing to do with none of this. None of this. Show me. I want to see. I want to know.... How  
18 that's a crime though?" (Appendix I – Defendant Sherbly Interview Abstracts, Pages 8, 12, 33,  
19 34.)

20 Most people of common intelligence would have difficulty guessing that section 182.5  
21 criminalizes mere active gang membership and the defense certainly does differ as to its  
22 application, and so the State's interpretation violates the first essential of due process of law.

#### 23 **ii. Arbitrary and Discriminatory Application.**

24 Further, the People's theory does (and already has) lead to "arbitrary and discriminatory  
25 enforcement." (*In re Alberto R.* (Cal. App. 4th Dist. 1991) 235 Cal. App. 3d 1309.) If all the  
26 State needs to prove is a crime and active membership in the gang, a defendant can be prosecuted  
27 on a proven crime by just an "expert's" opinion alone. First the "expert" would opine that the  
28 defendant is an active gang member and then postulate that all gang members benefit from the  
felonies of other gang members. With such a loose criterion, prosecution is impermissibly left to  
the personal predilections of law enforcement when enforcing the statute. (*Ibid.*)

1 For example, in the case at bar, of the almost twenty defendants, none are female. “More  
2 girls are involved in gangs than most people realize. Nationwide, the male-to-female ratio is  
3 approximately 2:1.” (Appendix F – Department of Justice – Changing Course Preventing Gang  
4 Membership, Page 8.) It appears that the prosecution in this case is selectively enforcing this  
5 statute against males and has chosen not to prosecute the female gang members of the 59 Brims  
6 gang. This is a classic hallmark of a vague and overbroad statute.

7 Also, there is no set standard or guideline as to what exact charges a defendant gang  
8 member will be charged with. In this case, when Sherbly was arrested, he was informed by the  
9 investigating officer that “the district attorney has already issued the charges and everything else  
10 in your case.” (Appendix I – Defendant Sherbly Interview Abstracts, Page 6.) “There are 12 to  
11 14 different cases that the district attorney has looked at and made their decision based on that,  
12 that’s where these charges come from. The district attorney takes those and they do what they  
13 want with them... I don’t know what the district attorney is actually going to charge you with.”  
14 (Appendix I – Defendant Sherbly Interview Abstracts, Pages 31, 17, 33.) So, even though the  
15 investigator knows the crimes that were the basis for the charges, he was left to guess what charges  
16 the prosecution was actually going to charge Sherbly with. It was likely difficult for him to inform  
17 Sherbly about the charges when the investigator concedes that Sherbly did not have “anything to  
18 do with that or knew anything or about it or anything else.” (Appendix I – Defendant Sherbly  
19 Interview Abstracts, Pages 34.)

20 Ironically, the Defendant pinpointed the problem when he stated, “If that the case you all  
21 should lock up everybody... you all have 50,000 people in here then.” (Appendix I – Defendant  
22 Sherbly Interview Abstracts, Pages 34.) Or, if the statute was applied evenly, every single active  
23 59 Brims in San Diego County should be in custody. Instead, disregarding due process, the  
24 prosecution has selectively, at its own discretion and whim, chosen to prosecute 18 individuals.  
25 However, if the prosecution must prove that a defendant, in advance of the crime, specifically  
26 intended to willfully promote, further, assist, or benefit from the target felony, then the statute is  
27 no longer vague and overbroad and the impermissible discretion is taken from the State.

### 28 **iii. Specific Intent To Benefit Is Required.**

As discussed above, to impose section 182.5, the California Supreme Court requires the  
defendant to act “with the required intent” to benefit from the target felony before the statute is

1 violated and the *Johnson* case did not strike this specific intent requirement that is also required in  
2 a traditional conspiracy statute. (*People v. Johnson* (2013) 57 Cal. 4<sup>th</sup> 250.)<sup>4</sup> “The inclusion of a  
3 “specific intent” in the terms of a statute will generally overcome any potential vagueness  
4 problem; persons of ordinary intelligence will not have to guess at the applicability of the  
5 statute.” (*In re Alberto R.* (Cal. App. 4th Dist. 1991) 235 Cal. App. 3d 1309, 1321-1324.)

6 Section 186.22(a) proscribes defendants who “willfully promotes, furthers, or assists in  
7 any felonious criminal conduct by members of that gang.” (Pen. Code § 1876.22(a).) Section  
8 182.5 proscribes defendants who “willfully promotes, furthers, assists, or benefits from any  
9 felonious criminal conduct by members of that gang.” (Pen. Code § 182.5.) The similarity of the  
10 relevant phrase in Penal Code section 186.22 with that employed in section 182.5, means that the  
11 phrases should be viewed as synonymous and interpreted exactly the same way. (*People v. Green*  
12 (Cal. App. 1st Dist. 1991) 227 Cal. App. 3d 692, 703.) The only difference between the two  
13 clauses is that an additional action, benefitting, is added to the list of actions that trigger the code.  
14 It is logical to conclude then that the required intent for all the actions in both clauses must be the  
15 same. The State has yet to explain how the intent of the fourth action (benefit) of the series  
16 should be any different from the prior three actions (promote, further, assist).

17 The Supreme Court acknowledges that the 186.22(a) clause “willfully promotes, furthers,  
18 or assists in any felonious criminal conduct” is the equivalent of and requires that the gang  
19 member aided and abetted the specific criminal offense committed by another gang member.  
20 (*People v. Carr* (Cal. App. 2d Dist. 2010) 190 Cal. App. 4th 475, 488; *People v. Rodriguez* (Cal.  
21 2012) 55 Cal. 4th 1125, 1135.)<sup>5</sup> Aiding and abetting carries the specific intent or purpose of  
22 committing, facilitating or encouraging commission of the crime. (*People v. Cooper* (1991) 53

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23 <sup>4</sup> General intent means that the “person must not only commit the prohibited act, but must do so  
24 with wrongful intent. A person acts with wrongful intent when he or she intentionally does a  
25 prohibited act. As a corollary to this principle, a defendant may present an accident defense  
26 based on a claim that he or she acted accidentally rather than with the intent required for the  
27 crime. (*People v. Mitchell* (Cal. App. 4th Dist. 2012) 209 Cal. App. 4th 1364, 1380-1381.)  
28 Hence, even if the Court adopts a general intent requirement for section 182.5, the defendant must  
still intentionally benefit from, and know of, the intended felony.

<sup>5</sup> Note that promotion under these statutes then is an act of aiding and abetting a specific intended  
crime, it is not the promotion of the gang by posting general boasts and disparaging comments on  
Facebook. (*People v. Castenada* (Cal. 2000) 23 Cal. 4th 743, 749-750)

1 Cal.3d 1158, 1164.) So, granting that a section 186.22(a) defendant must act "with knowledge of  
2 the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of  
3 encouraging or facilitating commission of an offense (*People v. Castenada* (Cal. 2000) 23 Cal.  
4 4th 743, 749-750), a section 182.5 defendant must have the same specific intent and knowledge to  
5 be culpable for benefitting from the intended target felony.

6 This conclusion is consistent with the RICO Act the State says section 182.5 seeks to  
7 emulate. A defendant's guilt to commit conspiracy under RICO "requires proof of mens rea  
8 essential for conviction of the substantive offense itself." (*United States v. Fry* (E.D. Cal. July  
9 24, 2007) 2007 U.S. Dist. LEXIS 53404, 9-10; see also *United States v. Biasucci* (1986) 479 U.S.  
10 827; *United States v. Blinder* (9th Cir. Nev. 1993) 10 F.3d 1468, 1477; *Eclectic Props. East, LLC*  
11 *v. Marcus & Millichap Co.* (9th Cir. Cal. 2014) 751 F.3d 990, 997-998 - there must be a showing  
12 of a specific intent.) To comply with due process and be consistent with prior similar  
13 construction Section 182.5 requires a specific intent to benefit from the target felony.

13 **d. The State's view would eviscerate clauses in Section 182.5**

14 It is well settled that courts should not read statutes in a way that would eviscerate an entire  
15 clause and/or an element of the code. (*Leicester v. Warner Bros.* (9th Cir. Cal. 2000) 232 F.3d  
16 1212, 1223; *United States v. Ortiz-Lopez* (9th Cir. Wash. 1994) 24 F.3d 53, 56; *Oakley, Inc. v.*  
17 *Nike, Inc.* (C.D. Cal. 2013) 988 F. Supp. 2d 1130, 1136; *California v. Kinder Morgan Energy*  
18 *Partners, L.P.* (S.D. Cal. Jan. 25, 2013) 2013 U.S. Dist. LEXIS 10503, 94-95; *Hughes v. United*  
19 *States* (N.D. Cal. 2000) 116 F. Supp. 2d 1145, 1152; *Intrex Corp. v. FMC Corp.* (N.D. Cal. Feb.  
20 15, 1996) 1996 U.S. Dist. LEXIS 1796, 20-21; *Am. Acad. of Pediatrics v. Lungren* (Cal. 1997) 16  
21 Cal. 4th 307, 438;

22 Expressed in another way, it is a fundamental canon of statutory construction that a statute  
23 should not be construed so as to render any of its provisions mere surplusage. The settled  
24 principle of statutory construction is that we must give effect to every word of the statute. (*Am.*  
25 *Tower Corp. v. City of San Diego* (9th Cir. Cal. Aug. 14, 2014) 2014 U.S. App. LEXIS 15641,  
26 22-23; *People v. Wesley* (Cal. App. 4th Dist. 1988) 198 Cal. App. 3d 519, 522-523 – surplusage is  
27 a result to be avoided; *People v. Womack* (Cal. App. 2d Dist. 1995) 40 Cal. App. 4th 926 –  
28 surplusage is repugnant to all rules of statutory construction; *Negrete-Ramirez v. Holder* (9th Cir.



1 2014) 741 F.3d 1047, 1053; *Williams v. Superior Court* (1993) 5 Cal.4th 337, 357; *People v.*  
2 *Cardwell* (Cal. App. 4th Dist. 2012) 203 Cal. App. 4th 876

3 If the intent of section 182.5 was to make active members of a criminal street game, with  
4 knowledge of the group's pattern of criminality, culpable for all felonies committed by the gang,  
5 the statute could simply have omitted the phrase, "and who willfully promotes, furthers, assists,  
6 or benefits from any felonious criminal conduct by members of that gang." But that is not what  
7 the statute says. Because we give significance to every word in the statute actually enacted to  
8 implement the code, there is a requirement that the defendant must knowingly and "willfully"  
9 benefit from the "felonious conduct" to be culpable in section 182.5. (*People v. Rodriguez* (Cal.  
10 2012) 55 Cal. 4th 1125, 1133-1135.)

11 In order for section 182.5 to have no clause, sentence, or word that is superfluous, void, or  
12 insignificant, the terms "willfully benefits from any felonious criminal conduct" must be more  
13 than what every member experiences as a person who actively participates in any criminal street  
14 gang. (*TRW Inc. v. Andrews* (U.S. 2001) 534 U.S. 19). Otherwise, this clause becomes a nullity  
15 and has no meaning.

16 **e. The State's definition of what it takes to benefit from a gang is incorrect.**

17 "Due to the organized nature of gangs, active gang participants may benefit from crimes  
18 committed by other gang members. When such benefits are proven along with the other elements  
19 of the statute, § 182.5 permits those benefitting gang participants to be convicted of conspiracy to  
20 commit the specific offense from which they benefitted." (*People v. Johnson* (2013) 57 Cal. 4th  
21 250, 253-254.) A key issue is what does it take to benefit from a criminal street gang?

22 The state takes the position that all active gang members benefit from the felonies  
23 committed by other gang members in their set "because when other gang members either go out  
24 and get involved and shootings, robberies, rapes, murders, whatever it happens to be and they're  
25 Brim and they put it out and they boast about it too, okay what happens there, it shows that first  
26 of all you all are tight. You back each other up. People know that you're going to be backed up by  
27 the rest of the set, you see what I'm saying, and then when you're out there automatically people  
28 are going to know you're Brim." (Appendix I – Defendant Sherbly Interview Abstracts, Page 9.)

However, even if true, this benefit is too general and tenuous to qualify as a provable  
benefit under section 182.5 for the following reasons.

1 First, weak inferences and hypotheticals with no evidence to show the defendant actually  
2 benefitted from a given crime is an improper opinion (*In re Frank S.* (2006) 141 Cal.App.4th  
3 1192.) To allow the expert to give an opinion “without any other substantial evidence opens the  
4 door for prosecutors to enhance many felonies as gang-related and extends the purpose of the  
5 statute beyond what the statute intended.” (*People v. Ochoa* (Cal. App. 4th Dist. 2009) 179 Cal.  
6 App. 4th 650, 659-660.) Thus, again, something more than an expert witness's unsubstantiated  
7 opinion that a crime was committed for the benefit of, at the direction of, or in association with  
8 any criminal street gang is required to justify a true finding on a gang case. (*Ibid.*)

9 Second, a related source of difficulty is the reputation gain that the State relies upon to  
10 satisfy the benefit clause of section 182.5 is too general, even if true, because it applies to all gang  
11 members. If applied unrealistically, this element could proscribe all gang activity -- and thus  
12 could effectively eviscerate the entire “benefits” clause. The fact that a particular act or decision  
13 has some remote roots in a hypothetical reputation gang to its members cannot be sufficient to  
14 hold all gang members liable for all the crimes of the gang. (*Hughes v. United States* (N.D. Cal.  
15 2000) 116 F. Supp. 2d 1145, 1152 – same principal applied to interpreting an element of the  
16 Federal Torts Claims Act.)

17 More fundamentally, such an interpretation would upset the balance required by the  
18 United States Supreme Court in *Scales* because it eliminates the nexus between a defendant's  
19 felonious conduct and gang activity that is required in sections 1822.6(a) and 182.5. Under the  
20 State's view, all that would be required to satisfy the benefit element of section 182.5 “would be  
21 expert testimony that commission of a felony by a gang member would embolden other gang  
22 members to commit felonies. However, it could be maintained that every time a gang member  
23 commits a felony, other members of the gang would be emboldened to commit felonies as well.  
24 Such testimony does little more than assert that the defendant is a gang member and that gangs,  
25 by definition, commit crimes as part of their primary activities.” (*People v. Rodriguez* (Cal.  
26 2012) 55 Cal. 4th 1125, 1137; *Scales v. United States* (1961) 367 U.S. 203.)

27 Consequently, this Court should require that the benefit that the defendant intended to  
28 benefit from the commission of the intended crime be more than just a general, remote,  
unsubstantiated, hypothetical boon. The benefit should be supported by evidence of a specific,  
articulable, and measurable advantage that the defendant received.

1           **f. The State’s Position Produces Absurd Results**

2           “In interpreting a statute, courts are obligated to “adopt a common sense construction over  
3 one leading to mischief or absurdity. (*In re Samano* (1995) 31 Cal.App.4th 984, 989.)” *In re*  
4 *Greg F.* (Cal. 2012) 55 Cal. 4th 393, 410.) The State’s position that section 182.5 criminalizes all  
5 active gang membership produces absurd results.

6           The closest legal theory to the State’s position is the felony murder rule. Under the  
7 felony-murder rule, a defendant who kills in the commission of an inherently dangerous felony  
8 not enumerated in section 189 is liable for second degree murder. (*People v. Bryant* (Cal. 2013)  
9 56 Cal. 4th 959, 966.) In other words, a defendant engaging in a dangerous felonious activity will  
10 be liable if his actions cause the death of another. Likewise, it appears the State is asserting that  
11 since active gang membership is inherently dangerous, the gang member should be liable for the  
12 harm that the gang causes to others. However, this sophistic argument is flawed because it  
13 attaches liability to crimes that the defendant might not even know took place. This produces  
absurd results.

14           For example, in the felony murder rule context, “to invoke the felony-murder doctrine  
15 when the killing is not committed by the defendant or by his accomplice could lead to absurd  
16 results. Thus, two men rob a grocery store and flee in opposite directions. The owner of the  
17 store follows one of the robbers and kills him. Neither robber may have fired a shot. Neither  
18 robber may have been armed with a deadly weapon. If the felony-murder doctrine applied,  
19 however, the surviving robber could be convicted of first degree murder even though he was  
20 captured by a policeman and placed under arrest at the time his accomplice was killed.” (*People*  
*v. Washington* (Cal. 1965) 62 Cal. 2d 777, 780-783 – citations omitted.)

21           That is why “California law has long required some logical connection between the  
22 felony and the act resulting in death, and rightly so; there must be a logical nexus, beyond mere  
23 coincidence of time and place, between the felony the parties were committing or attempting to  
24 commit and the act resulting in death.” (*People v. Cavitt* (Cal. 2004) 33 Cal. 4th 187, 199-201.)

25           This nexus requirement has been applied to gang conspiracies. The requirement of the  
26 specific intent and knowledge of the intended target provides “a nexus between the felonious  
27 conduct and gang activity that avoided the concerns raised in *Scales*.” (*People v. Rodriguez* (Cal.  
28 2012) 55 Cal. 4th 1125, 1135.)

1 Without this nexus between the active gang promotion and the felonious criminal conduct,  
2 a gang member would face charges for every single felony committed by that gang no matter  
3 where it took place. A defendant that is an active member of a gang in San Diego County is  
4 satisfying the first element of section 182.5. (*People v. Campbell* (1991) 230 Cal.App.3d 1432,  
5 1447.)<sup>6</sup> Hence that Defendant would be culpable for hundreds of crimes committed by that gang  
6 throughout the state and the country. Without the required nexus, it is immaterial that the  
7 defendant was in custody, intensive care, or in another country. These results are absurd and yet  
8 they are the circumstances that Sherbly faces in this case. Sherbly was a minor and in custody  
9 when many of the serious charges against him were committed. The State has no evidence that  
10 he was connected to any of the charges against him or even knew of the offenses until after the  
11 offense. And yet, he faces multiple life sentences and is being held liable as a murderer.

12 In *In re Alberto R.*, this fantastic result was literally called absurd by the court. The Court  
13 responded to the defendant's vagueness argument by saying, "**His anticipated scenarios of gang**  
14 **members being charged for crimes in the future for which they had no knowledge and in**  
15 **which they did not participate are absurd.** The Act must be read as a whole. Under section  
16 186.22, subdivision (a), no gang member will be prosecuted for a future offense unless that  
17 person "actively participates in any criminal street gang with knowledge that its members engage  
18 in or have engaged in a pattern of criminal gang activity, **and** who willfully promotes, furthers, or  
19 assists in any felonious criminal conduct by members of that gang.'" (*In re Alberto R.* (Cal. App.  
20 4th Dist. 1991) 235 Cal. App. 3d 1309, 1321-1324 – citation omitted – emphasis added.)

21 So too, section 182.5 must also be read as a whole. To avoid absurd results the Court  
22 should require a nexus between the active gang membership and the targeted felonious conduct.  
23 The defendant must willfully and specifically intend to benefit from the target felony.

## 24 V. CONCLUSION

25 The expansive effect of section 182.5 is limited and does not allow the extreme and  
26 unconstitutional interpretation the State is employing to charge Sherbly Gordon. Unless the State  
27 can prove that Gordon, in advance of their attempt, specifically intended to further, promote,  
28

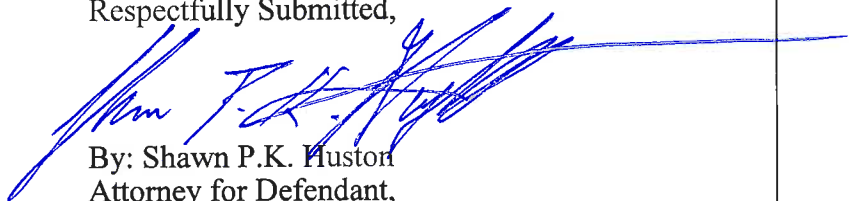
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<sup>6</sup> "So long as there is 'at least some act within a county preliminary to or requisite to the offense charged,' jurisdiction will fairly attach in that county. (*People v. Campbell* (1991) 230 Cal.App.3d 1432, 1447.) Or to state the matter another way, where the cause occurs in one county and the result in another, vicinage is proper in either of the counties. (*People v. Alvarado* (Cal. App. 4th Dist. 2006) 144 Cal. App. 4th 1146, 1152-1153 – citations omitted.)

1 assist or benefit from the intended target felony, he cannot be liable under section 182.5. (*People*  
2 *v. Johnson* (2013) 57 Cal. 4th 250.) The Court should also be wary of potential merger issues  
3 under Penal Code 654 if a defendant in convicted of gang related felonies and conspiracy statutes  
4 discussed in this brief. (*People v. Mesa* (2012) 54 Cal. 4th 191.)

5 Dated: October 20, 2014

Respectfully Submitted,



By: Shawn P.K. Huston  
Attorney for Defendant,  
Sherbly Gordon

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**PROOF OF SERVICE**

I, Shawn P.K. Huston, declare under penalty of perjury that:

- 1. I am a citizen of the United States and am employed in the County of San Diego. I am over the age of eighteen years and not a party to the within action. My business address is 2171 Ulric Street, Suite 205, San Diego, Ca 92111.
- 2. On the date set forth below, I caused the attached documents to wit: **DEFENDANT SHERBLY GORDON'S BENCH BRIEF ON PENAL CODE SECTION 182.5** and **DEFENDANT SHERBLY GORDON'S REQUEST FOR JUDICIAL NOTICE** to be served on the parties to this action as follows:

       **By Mail**

I placed a true copy thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed to the parties as set forth in C.C.P. section 1013(a), 2015.5.

       **By Federal Express**

I retained Federal Express to personally serve a true copy thereof on the parties as set forth in. C.C.P. section 1013(a), 2015.5.

       **By Facsimile Transmission**

A true copy thereof was sent via electronic transmission as a telephonic facsimile as set forth in C.C.P. section 1013(a), 2015.5. and C.R.C. section 2008.

  X   **By Personal Service**

I personally served a true copy thereof on the parties as set forth at C.C.P. section 1011, 2015.5.

       **By Clerks Mail Box**

I personally placed a true copy thereof, in the mail receptacle in the office of the Orange County Clerk which is designated for that Party(ies).

Executed on October 20, 2014 at San Diego, California.

By:

Shawn P.K. Huston

Served Party

**DISTRICT ATTORNEY'S OFFICE  
OF SAN DIEGO COUNTY**  
MAIN OFFICE – HALL OF JUSTICE  
330 W. Broadway  
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**SAN DIEGO COUNTY SUPERIOR COURT**  
CENTRAL COURTHOUSE  
220 West Broadway  
San Diego, CA 92101  
(619) 450-5400

**Appendix A**  
**January 6, 1998 Amendment To Add Penal Code Section 182.5 To Bill AB 26**

BILL NUMBER: AB 26            AMENDED  
 BILL TEXT

AMENDED IN ASSEMBLY    JANUARY 6, 1998  
 AMENDED IN ASSEMBLY    APRIL 17, 1997  
 AMENDED IN ASSEMBLY    FEBRUARY 12, 1997

INTRODUCED BY    Assembly Member Runner

DECEMBER 2, 1996

An act to amend ~~Section 707 of the Welfare and Institutions~~ Sections 182.22 and 629.52 of, and to add Section 182.5 to, the Penal Code, relating to juveniles.

LEGISLATIVE COUNSEL'S DIGEST

AB 26, as amended, Runner. Juveniles: criminal street gangs.

~~Under existing law, a minor who commits any of specified offenses when he or she is 16 years of age or older, and a minor 14 years of age, but not yet 16, who commits murder, as specified, is presumed not to be a fit and proper subject to be dealt with under the juvenile court law. The minor may be dealt with by the juvenile court only if it finds that he or she would be amenable to the care, treatment, and training program available through the juvenile court after evaluation of several factors.~~

~~This bill would apply that same presumption to a minor who committed a felony as part of criminal street gang activity when he or she was 14 years of age or older and make a conforming change. Because the bill would impose increased duties on local criminal justice systems that are equivalent to those imposed by the establishment of a new crime, the bill would impose a state-mandated local program.~~

*Existing law defines a criminal conspiracy and prescribes the punishment therefor.*

*This bill would make punishable as conspiracy any participation in a criminal street gang, as defined, with knowledge that its members engage in a pattern of gang activity if the participant willfully promotes, furthers, assists, or benefits from any felonious conduct by members of that gang. Because this bill would create a new crime, it would impose a state-mandated local program. The bill would increase the terms of imprisonment authorized for the commission of a felony for the benefit of, at the direction of, or in association with, a criminal street gang, and specify additional terms of imprisonment if the felony involved is a serious felony or violent felony, as defined, with specified felonies punishable by an indeterminate term of life imprisonment with a specified minimum term. The bill would also eliminate separate enhancements for felony intimidation of a witness or a victim of a violent felony accompanied by a credible threat of death or violence.*

*Existing law authorizes a judge, upon probable cause of specified criminal activity, to issue an ex parte order authorizing a wiretap, as specified.*

*This bill would add a felony violation of the criminal street gang conspiracy and related provisions added by the bill to the criminal activity for which a wiretap may be authorized.*



~~noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea which may already have been entered shall constitute evidence at the hearing.~~

~~SEC. 2.~~

SECTION 1. Section 182.5 is added to the Penal Code, to read:

182.5. 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 conduct by members of that gang, is guilty of conspiracy to commit that felony and shall be punished as specified in subdivision (a) of Section 182.

SEC. 2. Section 186.22 of the Penal Code is amended to read:

186.22. (a) 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.

(b) (1) Except as provided in ~~paragraph~~ paragraphs (4) and (5), 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, 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 by an additional term of ~~one, two, or three~~ two, three, or four years at the court's discretion, except that if the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.

(2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility, ~~the additional term shall be two, three, or four years, at the court's discretion~~ that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).

(3) The court shall order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its choice of sentence enhancements on the record at the time of the sentencing.

(4) Any person who is convicted of a felony enumerated in this paragraph 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, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under

**Appendix B**  
**January 20, 1998 AB 26 Bill – Bill Analysis**

BILL ANALYSIS

AB 26  
Page 1Date of Hearing: January 20, 1998  
Counsel: Jerome McGuireASSEMBLY COMMITTEE ON PUBLIC SAFETY  
Robert M. Hertzberg, Chair

AB 26 (Runner) - As Amended: January 12, 1998

FOR VOTE ONLY

SUMMARY : Provides that active participation in a criminal street gang establishes a conspiracy; allows for an ex-parte judicial order for electronic surveillance of gang crimes; and provides that the state, not the committing county, shall pay the cost of commitment of a minor to the California Youth Authority (CYA) for a gang offense.

- 1) Specifically provides that any person who "actively participates" in a criminal street gang, and who "promotes...assists or benefits from any felonious conduct by members of that gang, is guilty of conspiracy to commit that felony ...."
- 2) Adds gang crimes (those prosecuted under the Street Terrorism Enforcement Program Act) to the list of crime for which a superior court judge may issue an ex-parte order for electronic surveillance.
- 3) Provides that where any person is committed to CYA for the commission of a gang offense, the state must pay the entire cost of the commitment, and the county of commitment need bear no cost.

EXISTING LAW :

- 1) Provides that a conspiracy is an agreement between two or more persons with the specific intent to commit a certain crime and the commission of at least one act toward the agreed upon crime. ( People v. Horn (1974) 12 Cal.3d 290, 296; Feagles v. Superior Court (1970) 11 Cal.App.3d 735, 739.)
- 2) Provides generally that the punishment for a conspiracy to commit a particular crime is the same as the punishment for the target crime, but also provides four separate punishment provisions depending upon the target crime of the conspiracy. (Penal Code Section 182, subdivision (a).)
- 3) Provides that each conspirator is liable for every reasonably foreseeable crime or act committed by any other member of the conspiracy, including crimes not contemplated or even forbidden by the agreement. ( People v. Croy (1985) 41 Cal.3d 1, 12.)

AB 26  
Page 2

- 4) Provides, in an exception to the hearsay prohibition, that each conspirator is bound by the statements made by his or her co-conspirators in furtherance of the conspiracy. ( People v. Saling (1972) 7 Cal.3d 844, 852; Evidence Code Section 1223.)
- 5) Provides, pursuant to the Due Process Clause of the United States Constitution, that the prosecution must prove each element of a criminal offense beyond a reasonable doubt. ( In re Winship (1970) 397 U.S. 358, 374.)
- 6) Provides that proof of one element of a crime cannot mandatorily or necessarily establish another element of that crime or another crime. ( Sandstrom v. Montana (1979) 422 U.S. 510.)
- 7) Provides that any person who actively participates in a criminal street gang with the knowledge that its members engage 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, is guilty of an alternate felony/misdemeanor and shall be punished in the county jail for up to one year and/or a fine of up to \$2,000 or in the state prison for 16 months, 2 or 3 years, and/or a fine of up to \$10,000. (Penal Code Section 186.22, subdivision (a).)

- 8) Defines a "criminal street gang" as any association/organization/group of three or more people with a distinctive gang name or symbol, which, as a primary activity, engages in the commission of specified felonies and whose members have engaged in a pattern of criminal gang activity. (Penal Code Section 186.22, subdivision (h).)
- 9) Defines a "pattern of criminal gang activity" as the commission of, attempted commission of, or solicitation of, sustained juvenile petition for, or conviction of two or more of specified felonies, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons. (Penal Code Section 186.22, subdivision (c).)
- 10) Defines the gang-eligible felonies to be consistent with or similar to "serious" and "violent" felonies as defined in Penal Code Sections 1192.7 and 667.5, subdivision (b), respectively, and also including additional firearm-related crimes. (Penal Code Section 186.22, subdivision (e).)
- 11) Allows a specified law enforcement official to make an application to a specified judge for an order authorizing the interception of a wire, electronic digital pager, or electronic cellular telephone communication, pursuant to specific procedures. (Penal Code Section 629.50 et seq.)

AB 26  
Page 3

- 12) Requires that before a judge authorizes interception of this communication, he or she must find, among other things:
- a) There is probable cause to believe an individual has committed, is committing, or is about to commit a specified offense.
- b) There is probable cause to believe that particular communications concerning the specified offense will be obtained through the interception. (Penal Code Section 629.52.)
- 13) Authorizes interception of wire, pager or cellular communication-related to the following crimes:
- a) Importation or trafficking in large amounts (over 10 gallons or 3 pounds) of controlled substances;
- b) Murder, solicitation of murder, or a crime involving the use of a bomb; and,
- c) Conspiracy to commit one of these crimes. (Penal Code Section 629.52.)
- 14) Requires a judge who authorizes interception to state, among other things, the identity of the agency authorized to intercept the communications. (Penal Code Section 629.54.)

COMMENTS

- 1) The Court of Appeal Has Rejected Claims that Active Participation in a Street Gang Constitutes a Conspiracy . The bill appears to state that the crime of active participation in a street gang constitutes a conspiracy to commit the crime of active participation in a street gang. Thus, by definition, under this bill active participation in a gang constitutes an agreement between two or more people to commit a specific crime and an overt act to commit the target crime. Decisions of the Court of Appeal have rejected arguments that gang participation constitutes a conspiracy. The court explained: "Conspiracy, however, is a different breed of animal [than gang activity offenses]. Its gravamen is the agreement with others to commit an offense. (Citation) Section 186.22's gravamen is active participation in felonious criminal gang activity under certain defined circumstances. The enhancement of committing gang-related felony crimes can be committed without an agreement to first commit the crime; it can be committed merely on an aiding and abetting theory." ( In re Alberto R. (1991) 235 Cal.App.3d 1309, 1324.) Another case stated: " [S]ection 186.22 does not require any sort of agreement between gang members. The elements of conspiracy are not the same.... " ( People v. Gamez (1991) 235 Cal.App.3d 957, 979.)
- 2) The Gang Conspiracy Provisions are Vague and Ambiguous . A

AB 26  
Page 4

conspiracy necessarily includes a specific agreement to commit a specific crime and some overt action towards commission of that offense. Gang conspiracy provisions state that active participation in a criminal street gang, including assisting in or benefiting from felonious conduct, necessarily includes an agreement to commit "that" crime. The term "that crime" is ambiguous in this provision. The statute may refer to the crime of "active participation" in a criminal street gang, an offense defined in Penal Code Section 186.22, subdivision (a), and thus the bill appears to define active participation as also necessarily establishing a conspiracy. (The problems with such a definition are discussed below.) However, the statute also includes an element that the conspiracy defendant assist, promote or benefit from "any felonious conduct" by members of the gang. Thus, it appears that the bill could be interpreted to mean that the specific crime which the conspirators agree to commit is the felonious conduct which the defendant must aided or from which he or she benefited. Further, it is particularly difficult to determine what the statute seeks to accomplish. Thus, the statute is vague and ambiguous. Ambiguous statutes must be interpreted in favor of the defendant. (McNally v. United States (1987) 107 S.Ct. 2875.) Vague statutes are unconstitutional if they fail to give adequate notice of what the statute prohibits. (Maynard v. Cartwright (1988) 108 S.Ct. 1853; People v. Soto (1985) 171 Cal.App.3d 1158.)

- 3) A Conspiracy Conviction Based Upon a Crime That the Defendant Promotes, Assists or Benefits may be Untenable . If the conspiracy is based upon a felony which the defendant supports, assists or benefits from, it could include conduct prior to the defendant's active participation in the gang. For example, the defendant may enjoy the proceeds of prior gang activity by driving vehicles purchased with drug profits earned prior to actively participating in gang activity. This benefit could certainly not establish a present conspiracy as a conspirator is not liable for acts committed by his or her co-conspirators prior to the time that he or she joined the conspiracy. (People v. Marks (1988) 45 Cal.3d 1335.)
- 4) Gang Crimes and Conspiracy: Contrasts . Conspiracy is a more narrow crime than active participation in a gang. Conspiracy involves an agreement which includes the specific intent to commit a specific crime and at least one particular overt act towards the commission of the target crime. Nevertheless, once those narrow requirements are met, the liability for the conspirators encompasses every foreseeable act which may occur in the pursuit of the crime which the conspirators agreed to commit.

While active participation in a street gang is a wider offense than conspiracy, it generally has much more narrow consequences for the defendant than a conspiracy. That is, a participant in a gang cannot be held liable for a crime committed by a fellow gang member without proof that the gang member aided and abetted the crime. However, the law allows

AB 26  
Page 5

an enhancement where the defendant specifically intends that a crime benefit a criminal street gang.

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

- 5) Is the Intention of this Bill to Render Each Gang Member Liable for Every Crime Committed by a Fellow Gang Member ? If participation in a gang constitutes a conspiracy and the purpose of a gang is to commit crimes, a gang participant/conspirator is liable for the reasonably foreseeable consequence of participation in a gang - the commission of crimes by fellow gang members. If not, this provision has little or no effect, as the punishment for active participation in a criminal street gang is a standard wobbler offense and a conspiracy to actively participate in a

street gang would thus be punished as a standard wobbler. Under standard sentencing rules, since the acts which constitute active participation in a gang are the same as those which constitute the conspiracy, the defendant could not be punished for more than one offense and likely could not be convicted of more than one of offense. (Penal Code Section 654.)

6) The Sponsor has Conceded that Gang Participation Cannot, Alone, Establish

a Conspiracy . The California District Attorneys Association (CDAA) noted that the intention of the conspiracy provision is to apply federal-style racketeering (RICO) penalties in gang cases. However, RICO statutes are drafted in a different manner than the gang conspiracy provision in this bill. As the gang participation/conspiracy crime created by this bill does not require an agreement, it cannot legally establish a conspiracy. While CDAA would like to draft a RICO style law, it is unclear how that would be accomplished. It is suggested that the gang conspiracy provision be stricken from the bill.

7) Could the Bill Encourage Counties to Commit Minors to CYA in Gang-Related Cases, even Relatively Minor Cases, in Order to not Bear the Costs of Local Placement and Programs ? Requiring

the state to pay for CYA commitments in any gang-related case may encourage CYA commitments in relatively minor cases. CYA commitment costs in serious gang-related crimes are already

AB 26  
Page 6

borne by the state. The counties can avoid providing services to low-level offenders through this bill.

8) Arguments in Support . The California State Association of Counties (CSAC) states in relation to the bill's provision that the state shall bear all costs where a person is committed to the CYA for a gang offense: "CSAC is pleased to strongly support AB 26, relative to gang activity, as it was amended on January 6, 1998. SB 681 (Hurttt) imposed fees (currently up to \$35,000 per year) for juveniles sent by the court to the CYA. The intent of this law was to encourage counties to handle 'low level' and non-serious offenders at the local level in county programs and facilities and to stem the tide of CYA commitments. Counties have argued since the inception of this policy, referred to as the "sliding scale," that: (a) since it is the court and not the county that sentences a minor to CYA, it is unfair to hold the county general fund responsible for payment of fees; (b) not all counties have adequate resources to treat, punish and/or rehabilitate juvenile offenders; (c) sentencing decisions should not be made on the basis of budget constraints; and (d) many offenses considered 'low level' for purposes of charging counties are, in fact, violent and serious offenses.

AB 26 (Penal Code Section 186.22(h)) provides that a minor committed to CYA for an offense involving criminal gang activity shall be considered a serious offender under the provisions of the 'sliding scale' and thus the financial responsibility of the state. CSAC naturally supports legislation that increases the state's responsibility for CYA commitments. We agree that in all serious offenses there be no artificial cost barriers to be considered in sentencing."

9) Arguments in Opposition . The California Public Defenders Association argues, "Proposed Penal Code Section 182.5 is invalid in defining a conspiracy without the requirement of an agreement to commit a crime and overt acts toward the commission of that crime. Further, Penal Code Section 182.5 punishes conduct already punishable by different provisions of the Penal Code. Penal Code Section 186.22 punishes as an alternative felony/misdemeanor any person who actively engages in a gang with knowledge of the gang activities, and who willfully promotes the felonious purposes of the gang. A felony violation of Section 186.2 is punishable by 16 months, 2 years, or 3 years in state prison. Moreover, identical language contained within Section 182.5 can be found in Penal Code Section 12031, subdivision (a)(2)(C) to elevate the crime of possession of a firearm from a misdemeanor to a felony, also punishable by 16 months, 2 years, or 3 years in state prison.

Proposed Section 182.5 is but yet a third way to punish the same conduct already proscribed in the previous two sections. However, an alternative conviction under Section 182.5 does nothing to increase punishment. Although a defendant may be convicted of both a substantive crime and a conspiracy for the same conduct, that defendant may only be punished once pursuant to Section 654. Thus, this new crime is a pointless exercise in additional expense for the taxpayer."

AB 26  
Page 7

REGISTERED SUPPORT/OPPOSITION :

Support

Doris Tate Crime Victims Bureau

Opposition

American Civil Liberties Union  
California Public Defenders Association  
California Attorneys for Criminal Justice

Analysis prepared by : Jerome McGuire / apubs / (916) 445-3268

**Appendix C**  
**Cases Citing To California Penal Code § 182.5**



# APPENDIX C

## CASES CITING TO CALIFORNIA PENAL CODE § 182.5

**There are only eight cases that cite to California Penal Code Section § 182.5. Of those eight cases, only one is citable without restriction:**

*People v. Johnson* (Cal. 2013) 57 Cal. 4th 250

**OVERVIEW:** The California Supreme Court held that, when an active gang participant possessing the required knowledge and intent agreed with fellow gang members to commit a felony, he or she had also agreed to commit the gang participation offense. That agreement constituted conspiracy to commit the offense of active gang participation, and could be separately charged once a conspirator had committed an overt act. The plain language of both Pen. Code, §§ 182 and 186.22, subd. (a), reflected no legislative intent to preclude a conviction for a traditional conspiracy to commit the gang participation offense. The stated purposes of the California Street Terrorism Enforcement and Prevention Act were entirely consistent with recognizing the crime of conspiracy to commit the substantive gang participation offense. Defendants in the instant case were active gang members, well aware of each other's active status and the gang's pattern of criminal gang activity. Their agreement to commit the various shootings constituted an agreement to commit the gang participation offense and, once an overt act was performed, all the elements of conspiracy to violate § 186.22, subd. (a), were satisfied.

**The remaining seven cases that cite to California Penal Code Section 182.5 are either not citable at this time, or certified for only partial publication (but the arguments raised are treated without favor by the California Supreme Court):**

*People v. Elizalde* (Cal. App. 1st Dist. 2013) 222 Cal. App. 4th 351 (Cal. App. 1st Dist. 2013) **CASE NOT CITABLE—SUPERSEDED BY GRANT OF REVIEW.**

*People v. Johnson* (Cal. App. 5th Dist. 2012) 205 Cal. App. 4th 594 **SUPERSEDED (SEE PEOPLE V. JOHNSON (Cal. 2013) 57 Cal. 4th 250 ABOVE) - CERTIFIED FOR ONLY PARTIAL PUBLICATION.**

**OVERVIEW:** Defense counsel argued that because a gang was essentially a conspiracy, alleging conspiracy to actively participate in a gang amounted to charging conspiracy to participate in a conspiracy. The court observed that both conspiracy and active participation in a criminal street gang required at least a tacit understanding that those involved would work together to accomplish a shared

design. Moreover, Pen. Code, § 184, required the commission of an overt act and did not punish mere membership in the group. A criminal street gang thus was, at its core, a form of conspiracy. The court noted that some other statutes expressly allowed prosecution of conspiracy to violate their provisions despite the conspiratorial nature of the conduct involved. No such authorization was present in § 186.22, and Pen. Code, § 182.5, indicated that such prosecution was not allowed. Absent anything in the language of § 186.22 to suggest that the Legislature intended to allow prosecution for conspiracy to actively participate in a criminal street gang, the court concluded that a charge of conspiracy to actively participate in a criminal street gang was redundant and improper. **(NOTE: THE CALIFORNIA SUPREME COURT DISAGREED WITH THIS ANALYSIS.)**

*People v. Abasta* (Cal. App. 2d Dist. 2001) 92 Cal. App. 4th 896, 900 (Cal. App. 2d Dist. 2001) – **ANY REFERENCES TO PENAL CODE SECTION 182.5 ARE NOT CERTIFIED FOR PUBLICATION.**

*People v. Martinez* (Cal. App. 1st Dist. Feb. 11, 2013) 2013 Cal. App. Unpub. LEXIS 1072 - **THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION.**

*People v. Riley* (Cal. App. 2d Dist. May 3, 2010) 2010 Cal. App. Unpub. LEXIS 3202 - **THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION.**

*People V. Kyle E.* (Cal. App. 4th Dist. Sept. 14, 2005) 2005 Cal. App. Unpub. LEXIS 8287 - **NOT TO BE PUBLISHED IN OFFICIAL REPORTS.**

*In Re Rene O., Coming Under the Juvenile Court Law* (Cal. App. 6th Dist. Sept. 3, 2002) 2002 Cal. App. Unpub. LEXIS 8324 - **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

**Appendix D**  
**Comparison And Contrast Of Conspiracy Statutes**

# APPENDIX D

## COMPARISON AND CONTRAST OF CONSPIRACY STATUTES

California Penal Code section 182.5 created a new form of conspiracy that is distinct from the traditional understanding of the crime (See Penal Code section 182a) and also distinct from gang “conspiracy” as prohibited in California Penal Code Section 186.22(a) (See **Note Below**) in five significant ways. (*People v. Johnson* (Cal. 2013) 57 Cal. 4th 250 – parentheses added.) The following chart compares and contrasts Penal Code sections 182(a) 186.22(a), and 182.5:

|                       | <b>Traditional Conspiracy<br/>P.C. § 182(a)</b>  | <b>Gang “Conspiracy”<br/>Under P.C. § 186.22(a)</b>   | <b>Gang Conspiracy<br/>Under P. C. § 182.5</b>  |
|-----------------------|--|---|---|
| <b>1. Association</b> | Defendants need not have previously known each other, have any ongoing association, or plan to associate in any way beyond the commission of the substantive offense. ( <i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.) | The defendant cannot be a complete stranger to the gang. He or she must be an active gang participant with knowledge of other members' pattern of criminal gang activity. ( <i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)  | The defendant cannot be a complete stranger to the gang. He or she must be an active gang participant with knowledge of other members' pattern of criminal gang activity. ( <i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)  |
| <b>2. Atrocity</b>    | A traditional conspiracy encompasses an agreement to commit “any crime.” (§182(a)(1) .) Therefore, it is possible to conspire to commit a misdemeanor. ( <i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)                | A 186.22(A) “conspiracy” relates only to the commission of ANY felonious criminal conduct. (Pen. Code § 186.22(a); <i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)   | A 182.5 conspiracy relates only to the commission of ANY felony. ( <i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250 – ANY means the felony need not be gang related.)   |
| <b>3. Agreement</b>   | Traditional conspiracy requires both the specific intent to agree, <b>and</b> specific intent to commit a target crime. ( <i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)   | A 186.22(a) conspiracy does not require any prior <b>agreement</b> among the conspirators to promote, further, or assist in the commission of a particular target crime. Instead the act of assistance or promotion replaces the required prior <b>agreement</b> to commit a crime that is ordinarily at the heart of a | “A 182.5 conspiracy does not require any prior agreement among the conspirators to promote, further, or assist in the commission of a particular target crime... <b>That act of assistance or promotion replaces the required prior agreement</b> to commit a crime that is ordinarily at |

|                      |  |   |   |
|----------------------|--|---|---|
|                      |  | <p>traditional conspiracy. However, the defendant must still act “with the required intent to promote, further, or assist in the commission of a felony.” (<i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)</p> <p>“Thus, a person who violates section 186.22(a) has also aided and abetted a separate felony offense.” (<i>People v. Castenada</i> (Cal. 2000) 23 Cal. 4th 743, 749.) “A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.” (<i>People v. Delgado</i> (Cal. 2013) 56 Cal. 4th 480, 486.)</p> | <p>the heart of a traditional conspiracy.” (<i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)</p> <p>However, the defendant must still act “with the required intent to promote, further, assist, or benefit in the commission of a felony.” (<i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)</p> <p><b>BUT SEE SECTION 5 BELOW</b></p> |
| <b>4. Attachment</b> | <p>“Traditional conspiracy liability attaches once an overt act is committed.” (<i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)</p>                                   |   | <p>A 182.5 conspiracy requires the actual commission of felonious criminal conduct as either an attempt or a completed crime. (<i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)</p>   |
| <b>5. Ambit</b>      | <p>Traditional conspiracy’s ambit does not require gang membership or affiliation with a gang or intent to promote, further, assist or benefit a gang (or benefit from a</p> | <p>A 186.22(a) conspiracy’s ambit punishes only gang members who promote, further, or assist in the commission of a felony. (<i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)</p>   | <p>A 182.5 conspiracy brings within its ambit not only a gang member who promotes, furthers, or assists in the commission of a felony. It also embraces an active</p>   |

|  |                                     |  |   |
|--|-------------------------------------|--|---|
|  | <p>gang). (Pen. Code § 182(a).)</p> | <p><b>(NOTE: Cal Pen. Code § 186.22(a) is a conspiracy statute.</b> “A criminal street gang is, at its core, a form of conspiracy.” This being the case, charging conspiracy to actively participate in a criminal street gang under Cal Pen. Code § 186.22(a) is essentially charging a “conspiracy to actively participate in a conspiracy.” (<i>People v. Johnson</i> (Cal. App. 5th Dist. 2012) 205 Cal. App. 4th 594, 604.)</p> <p>The California Supreme Court did not dispute the lower court’s finding that Penal Code 186.22(a) was, by its very nature, “a species of conspiracy.” (<i>Ibid.</i>)</p> <p>Rather, the Court stated that there is historical precedent of finding defendants culpable for conspiring to conspire. The Court stated that the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Smith Act both criminalize conduct involving multiple participants and may involve predicate acts that are conspiracies to form the basis for a charge and eventual conviction of a conspiracy. (<i>People v. Johnson</i> (2013) 57 Cal. 4th 250.)</p> | <p>and knowing participant <b>who merely benefits</b> from the crime’s commission, even if he or she did not promote, further, or assist in the commission of that particular substantive offense. (<i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)</p> <p><b>(NOTE:</b> To “violate section 186.22(a) requires that a defendant be an active and knowing gang participant and agree to willfully promote, further, or assist gang members in the commission of an intended target felony.” (<i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)</p> <p>The only real difference between Penal Code section 186.22(a) and Penal Code section 182.5 is that Penal Code section 182.5 (a) adds the word “<i>benefits</i>” in regard to the target felony immediately after “<i>willfully promotes, furthers, assists</i>”. (Pen. Code § 182.5.) Hence it is logical that, to violate this statute, the defendant must, likewise, “agree to willfully” benefit from “the commission of an intended target felony.” (<i>People v. Johnson</i> (Cal. 2013) 57 Cal. 4th 250.)</p> |
|--|-------------------------------------|--|---|

### **Elements of Penal Code § 182(a) Criminal conspiracy**

1. An intentional agreement to commit the offense,
2. a specific intent that one or more conspirators will commit the elements of that offense, and
3. an overt act in furtherance of the conspiracy. (*People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Johnson* (Cal. 2013) 57 Cal. 4th 250.)

### **Elements of Active Participation in Criminal Street Gang Under Pen. Code, § 186.22(a)**

1. Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive;
2. knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and
3. the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. (*People v. Johnson* (Cal. 2013) 57 Cal. 4th 250.)

### **Elements of Active Participation in Criminal Street Gang Under Pen. Code, § 185.2(a)**

1. Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive;
2. knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and
3. willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang. (Cal Pen Code § 182.5; *People v. Johnson* (Cal. 2013) 57 Cal. 4th 250.)

### **Compare the text of California Penal Code Section 186.22(a):**

*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.*  
(Cal Pen Code § 186.22.)

### **With the text of California Penal Code Section 182.5:**

*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. (Cal Pen Code § 182.5.)*

**Appendix E**  
**Department Of Justice 1998 Juvenile Justice Bulletin**





# OJJDP

Shay Bilchik, Administrator

August 1998

## JUVENILE JUSTICE BULLETIN

# Youth Gangs: An Overview



**James C. Howell**

*The proliferation of youth gangs since 1980 has fueled the public's fear and magnified possible misconceptions about youth gangs. To address the mounting concern about youth gangs, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) has initiated the Youth Gang Series to delve into many of the key issues related to youth gangs. These issues include gang migration, gang growth, female involvement with gangs, homicide, drugs and violence, and the needs of communities and youth who live in the presence of youth gangs. This Bulletin, the first in the series, provides an overview of the problems that youth gangs pose, pinpoints the differences between youth gangs and adult criminal organizations, examines the risk factors that lead to youth gang membership, and presents promising strategies being used to curb youth gang involvement.*

## Introduction

The United States has seen rapid proliferation of youth gangs<sup>1</sup> since 1980. During this period, the number of cities with gang problems increased from an estimated 286 jurisdictions with more than 2,000 gangs and nearly 100,000 gang members in 1980 (Miller, 1992) to about 4,800 jurisdictions with more than 31,000 gangs and approximately 846,000 gang members in 1996 (Moore and Terrett, in press).<sup>2</sup> An 11-city survey of eighth graders found that 9

percent were currently gang members, and 17 percent said they had belonged to a gang at some point in their lives (Esbensen and Osgood, 1997).

Other studies reported comparable percentages and also showed that gang members were responsible for a large proportion of violent offenses. In the Rochester site of the OJJDP-funded Program of Research on the Causes and Correlates of Delinquency, gang members (30 percent of the sample) self-reported committing

<sup>1</sup>This overview relies on definitions of the term "youth gang" offered by the leading gang theorists and researchers. For the purposes of this review, a group must be involved in a pattern of criminal acts to be considered a youth gang. These groups are typically composed only of juveniles, but may include young adults in their membership. Prison gangs, ideological gangs, hate groups, and motorcycle gangs are not included. Likewise, gangs whose membership is restricted to adults and that do not have the characteristics of youth gangs are excluded (see Curry and Decker, 1998). **Unless otherwise noted, the term "gangs" refers to youth gangs.**

<sup>2</sup>Sheriff's departments were asked to report data only on unincorporated areas in an effort to reduce redundancies. Respondents were allowed to use their own definition of a gang, with the guidance that "youth gang" was defined as "a group of youths in the [respondent's] jurisdiction that the [respondent or other] responsible persons in the [respondent's] agency or community are willing to identify or classify as a 'gang'." Motorcycle gangs, hate or ideology groups, prison gangs, and adult gangs were excluded. See Moore (1997) and National Youth Gang Center (1997) for results of the 1995 National Youth Gang Survey.

## From the Administrator

Despite recent declines in juvenile crime, our Nation continues to face a youth gang problem. As part of our response to public concern about this problem, OJJDP has initiated the Youth Gang Series to explore key issues related to youth gangs. These issues include gang migration, female involvement with gangs, and the growth of gang activity related to homicide, drugs, and overall delinquency.

*Youth Gangs: An Overview*, the initial Bulletin in this series, brings together available knowledge on youth gangs by reviewing data and research. The author begins with a look at the history of youth gangs and their demographic characteristics. He then assesses the scope of the youth gang problem, including gang problems in juvenile detention and correctional facilities. A review of gang studies provides a clearer understanding of several issues. An extensive list of references is also included for further review.

The Bulletin makes a clear statement that a successful gang intervention and suppression strategy must build on services already in place in our communities to develop a comprehensive approach that will enhance the capacity of the juvenile justice system. The information provided here and in subsequent titles of this series will serve as a good starting point toward that end.

Shay Bilchik  
Administrator

68 percent of all violent offenses (Thornberry, 1998). In the Denver site, adolescent gang members (14 percent of the sample) self-reported committing 89 percent of all serious violent offenses (Huizinga, 1997). In another study, supported by OJJDP and several other agencies and organizations, adolescent gang members in Seattle (15 percent of the sample) self-reported involvement in 85 percent of robberies committed by the entire sample (Battin et al., 1998).

This Bulletin reviews data and research to consolidate available knowledge on youth gangs that are involved in criminal activity. Following a historical perspective, demographic information is presented. The scope of the problem is assessed, including gang problems in juvenile detention and correctional facilities. Several issues are then addressed by reviewing gang studies to provide a clearer understanding of youth gang problems. An extensive list of references is provided for further review.

## History of Youth Gangs

Youth gangs may have first appeared in Europe (Klein, 1996) or Mexico (Redfield, 1941; Rubel, 1965). No one is sure when or why they emerged in the United States. The earliest record of their appearance in the United States may have been as early as 1783, as the American Revolution ended (Sante, 1991; Sheldon, 1898). They may have emerged spontaneously from adolescent play groups or as a collective response to urban conditions in this country (Thrasher, 1927). Some suggest they first emerged following the Mexican migration to the Southwest after the Mexican Revolution in 1813 (Redfield, 1941; Rubel, 1965). They may have grown out of difficulties Mexican youth encountered with social and cultural adjustment to the American way of life under extremely poor conditions in the Southwest (Moore, 1978; Vigil, 1988). Gangs appear to have spread in New England in the early 1800's as the Industrial Revolution gained momentum in the first large cities in the United States: New York, Boston, and Philadelphia (Finestone, 1976; Sante, 1991; Spergel, 1995).

Gangs began to flourish in Chicago and other large cities during the industrial era, when immigration and population shifts reached peak levels (Finestone, 1976). Early in American history, gangs seem to have been most visible and most violent during periods of rapid population shifts. Their evolution has been characterized by an

ebb and flow pattern that "at any given time more closely resembles that of, say, influenza rather than blindness," as Miller (1992:51) has observed. The United States has seen four distinct periods of gang growth and peak activity: the late 1800's, the 1920's, the 1960's, and the 1990's (Curry and Decker, 1998). Gang proliferation, in other words, is not a constant.

In the modern era, youth gangs have been influenced by several trends. In the 1970's and 1980's, because of increased mobility and access to more lethal weapons, many gangs became more dangerous (Klein, 1995; Klein and Maxson, 1989; Miller, 1974, 1992; Spergel, 1995). Gang fights previously involving fists or brass knuckles increasingly involved guns. The growing availability of automobiles, coupled with the use of more lethal weapons, fueled the growth of drive-by shootings, a tactic that previously took the form of on-foot hit-and-run forays (Miller, 1966). Gangs of the 1980's and 1990's seem to have both more younger and more older members than before (Miller, 1992; Spergel, 1995), more members with prison records or ties to prison inmates (Hagedorn, 1988; Miller, 1992; Moore, 1990; Vigil, 1988), and more weapons of greater lethality (Block and Block, 1993; Miller, 1992; National Drug Intelligence Center, 1995). They are less concerned with territorial affiliations (Fagan, 1990; Klein, 1995), use alcohol and drugs more extensively (Decker and Van Winkle, 1996; Fagan, 1990; Thornberry, 1998), and are more involved in drug trafficking (Battin et al., 1998; Fagan, 1990; Miller, 1992; Taylor, 1989; Thornberry, 1998).

Some youth gangs appear to have been transformed into entrepreneurial organizations by the crack cocaine epidemic that began in the mid-1980's (Sanchez-Jankowski, 1991; Skolnick et al., 1988; Taylor, 1989). However, the extent to which they have become drug-trafficking organizations is unclear (Howell and Decker, in press). Some youth groups, many of which are not considered bona fide gangs, are not seriously involved in illegal activities and provide mainly social opportunities for their membership (Fagan, 1989; Vigil, 1988). Some gangs seldom use drugs and alcohol, and some have close community ties (Fagan, 1989; Sanchez-Jankowski, 1991; Vigil, 1988).

## Demographic Characteristics

The average age of youth gang members is about 17 to 18 years (Curry and

Decker, 1998), but tends to be older in cities in which gangs have been in existence longer, like Chicago and Los Angeles (Bobrowski, 1988; California Attorney General's Gang Unit, 1996; Klein, 1995; Spergel, 1995). The typical age range is 12 to 24. Although younger members are becoming more common, it is the older membership that has increased the most (Hagedorn, 1988; Moore, 1990; Spergel, 1995). Male gang members outnumber females by a wide margin (Miller, 1992; Moore, 1978), and this span is greater in late adolescence than in early adolescence (Bjerregaard and Smith, 1993; Esbensen and Huizinga, 1993; Moore and Hagedorn, 1996). Gangs vary in size by type of gang. Traditional (large, enduring, territorial) gangs average about 180 members, whereas specialty (e.g., drug trafficking) gangs average only about 25 members (Klein and Maxson, 1996). In large cities, some gangs number in the thousands and even tens of thousands (Block and Block, 1993; Spergel, 1995).

In the early 19th century, youth gangs in the United States were primarily Irish, Jewish, and Italian (Haskins, 1974; Sante, 1991). According to a recent national law enforcement survey, the ethnicity of gang members is 48 percent African-American, 43 percent Hispanic,<sup>3</sup> 5 percent white, and 4 percent Asian (Curry, 1996). However, student surveys show a much larger representation of white adolescents among gang members. In a survey of nearly 6,000 eighth graders in 11 sites (Esbensen and Osgood, 1997), 31 percent of the students who said they were gang members were African-American, 25 percent were Hispanic, 25 percent were white, 5 percent were Asian, and 15 percent were of other racial and ethnic groups.<sup>4</sup> Bursik and Grasmick (1993) point out that, despite the disproportionate representation of minority group members in studies as compared with white youth, "blacks and Hispanics have no special predisposition to gang membership. Rather, they simply are overrepresented in those areas most likely to lead to gang activity."

Miller (1974:220) notes that "observers of any given period tend to relate the characteristics of gangs to those of the particular ethnic groups prominent in the urban lower class during that period . . . , roughly, the more prevalent the lower-class

<sup>3</sup>Hispanic (Spanish-speaking) ethnic groups include Mexicans, Mexican-Americans, Latinos, and Puerto Ricans.

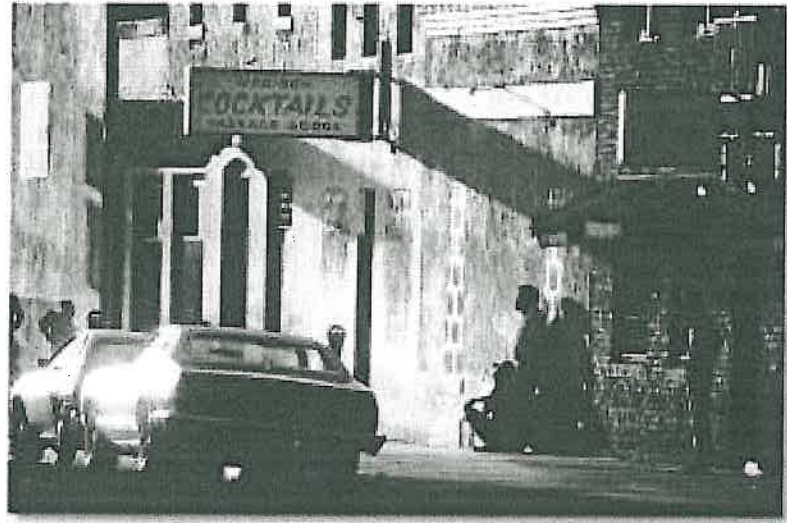
<sup>4</sup>Percentages total to 101 due to rounding.

## Community and Economy

A major source of variation in youth gang violence is found in relationships between the gang and the community. J.F. Short, Jr., contends that the concept of gangs used in gang research is too narrow, in that it does not take into account the relevance of gangs and gang membership in other social settings (personal communication to the author, April 24, 1996). First, the gang's relevance goes beyond its relationship to individual gang members. For example, gangs serve as carriers of community traditions and culture (Miller, 1958; Moore, 1978). Second, a youth's identification with a gang affects how others react to him or her. To illustrate, Esbensen and Huizinga (1993) found that negative labeling of gang members is linked to elevated offenses.

Much remains to be learned about the relationship between gangs and their neighborhoods or communities. Sanchez-Jankowski (1991) identified four factors that motivate gangs to make concerted efforts to establish ties with the community. First, the gang needs a "safe haven." Second, it needs a recruitment pool from which to draw its membership. Third, the community provides the gang with important information (e.g., on gangs in other parts of the city). Fourth, the gang needs the community ties for psychological reasons: "A bonding occurs between the gang and the community that builds a social adhesive that often takes a significant amount of time to completely dissolve" (Sanchez-Jankowski, 1991:201). These are important features of youth gangs. Sanchez-Jankowski (1991) has argued that community ambivalence toward gangs exists because many of the gang members are children of residents, the gangs often provide protection for residents, residents identify with gangs because of their own or relatives' prior involvement, and the gangs in some instances have become community institutions; personal interests (fear of too much policing, fear of too much gang activity) also figure in community perceptions of gangs.

Another reason for ambivalence toward, or acceptance of, gangs could be the changing economy. Recent gang theory has focused on the effects of the changing urban economy on gang-neighborhood dynamics (Bursik and Grasmick, 1993). The transition during the 1970's from a manufacturing to a service-based economy in the United States drastically changed economic conditions, reducing the demand for low-skilled workers in an increasingly



service-oriented, high-tech society, restricting their access to the labor market, and blocking their upward mobility, creating what Glasgow (1980) first called the underclass (see also Wilson, 1987, 1996). Fagan (1996) describes the underclass' plight as being permanently excluded from participating in mainstream labor market occupations. As a result, members of the underclass must rely on other economic alternatives: low-paying temporary jobs, part-time jobs in the secondary labor market, some form of welfare or dependence on friends and relatives, or involvement in drug trafficking and other profitable street crimes (Moore, 1988). Several gang researchers (Bursik and Grasmick, 1993; Decker, 1996; Hagedorn, 1988; Moore, 1978, 1985; Sullivan 1989; Vigil, 1988) have argued that crime, delinquency, gangs, and youth violence have increased in the 1980's and 1990's as a result of these postindustrial society conditions.

## Why Do Youth Join Gangs?

Decker and Van Winkle (1996) view joining youth gangs as consisting of both pulls and pushes. Pulls pertain to the attractiveness of the gang. Gang membership can enhance prestige or status among friends (Baccaglioni, 1993), especially girls (for boys) (Decker and Van Winkle, 1996), and provide opportunities to be with them (Slayton, Stephens, and MacKenna, 1993). Gangs provide other attractive opportunities such as the chance for excitement (Pennell et al., 1994) by selling drugs and making money (Decker and Van Winkle, 1996). Thus, many youth see themselves as making a rational

choice in deciding to join a gang: They see personal advantages to gang membership (Sanchez-Jankowski, 1991).

Social, economic, and cultural forces push many adolescents in the direction of gangs. Protection from other gangs and perceived general well-being are key factors (Baccaglioni, 1993; Decker and Van Winkle, 1996). As noted above, some researchers contend that the "underclass" (Wilson, 1987) status of minority youth serves to push them into gangs (Hagedorn, 1988; Moore, 1978; Taylor, 1989; Vigil, 1988). Feeling marginal, adolescents join gangs for social relationships that give them a sense of identity (Vigil and Long, 1990). For some youth, gangs provide a way of solving social adjustment problems, particularly the trials and tribulations of adolescence (Short and Strodbeck, 1965). In some communities, youth are intensively recruited or coerced into gangs (Johnstone, 1983). They seemingly have no choice. A few are virtually born into gangs as a result of neighborhood traditions and their parents' earlier (and perhaps continuing) gang participation or involvement in criminal activity (Moore, 1978).

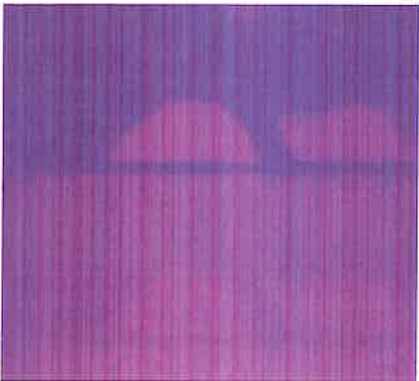
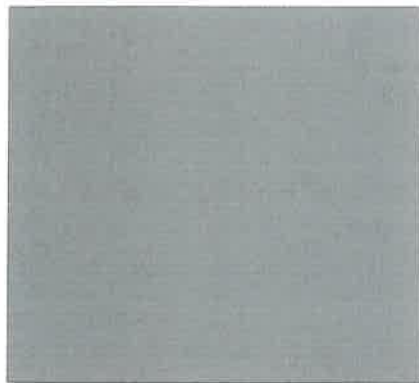
## Risk Factors for Gang Membership

Table 1 summarizes risk factors for youth gang membership that have been identified in studies using many types of research methods, including cross-sectional, longitudinal, and ethnographic (observational) studies. Examination of this table suggests that the present state of knowledge of risk factors for gang membership is not refined. Because so many risk factors have been identified,

**Appendix F**  
**Department Of Justice – Changing Course Preventing Gang Membership**

# CHANGING COURSE

## Preventing Gang Membership



intensive “*selected*” prevention programs are needed to reach youth who are most at risk of gang involvement.

To succeed, communities must first assess their gang problem and use that assessment to craft a continuum of responses that are communitywide in scope. These responses should involve the community in planning and delivering prevention and intervention programs and employ integrated outreach, support and services. A balanced approach that incorporates each of these components is most likely to have a significant impact.

This chapter draws on multiple data sources to provide a brief summary of the scope of youth gang problems in the United States. The second section considers the consequences of gang membership and calls attention to several issues of concern, particularly the enormous costs associated with gangs and criminal careers. The third section discusses the potential for gang-membership prevention activities. And, finally, the chapter concludes with a call for comprehensive, communitywide initiatives.

The gang problem in the United States persists, even though violent crime and property crime rates have dropped dramatically.<sup>5, 11</sup> An enduring concern for many large jurisdictions is the continued presence of gangs and gang activity, which are often associated with violence and serious crimes.<sup>1, 5</sup> About one-quarter of all homicides in cities with populations of 100,000 or more were gang-related in 2009.<sup>5, 12</sup> Gang activity and its associated violence remain significant components of the U.S. crime problem. It has been reasonably assumed that gang activity would follow the overall dramatic declines in violent crime nationally; however, the analyses provided in this report find overwhelming evidence to the contrary — that is, gang problems have continued at exceptional levels over the past decade despite the remarkable drop in crime overall.

Other data — regarding youth gangs, in particular — are equally compelling. In a 2010 national survey, 45 percent of high school students and 35 percent of middle school students said that there were gangs — or students who considered themselves to be part of a gang — in their school.<sup>2</sup>

Youth gangs are not a new phenomenon; they have been a serious crime problem in the United States since the early 19th century.<sup>5, 13</sup> However, as described below, key indicators of youth-gang activity clearly show the persistence of this social problem over the past decade. These indicators

include youth self-admission of gang membership and estimates of gang activity by knowledgeable observers of gangs, particularly law enforcement. Youth surveys are also a main source of information for gauging gang activity.

Although most youth never join a gang, 8 percent of youth reported in a national survey that they had belonged to a gang at some point between the ages of 12 and 17.<sup>4</sup> The proportion of youth that joins a gang during this age span is largest in high-crime areas and among high-risk youth in cities with gang problems. This proportion can vary considerably across cities — for example, 17 percent of youth in Denver, CO, and 32 percent in Rochester, NY, were members of a gang at some point during their teenage years.<sup>5</sup>

Assessments of patterns of gang membership and activity by racial and ethnic subgroups vary widely across data sources (official records vs. self-reports), locations, and how the questions are asked. Adrienne Freng and T.J. Taylor, in chapter 10, describe these patterns and the implications for prevention.

More girls are involved in gangs than most people realize. Nationwide, the male-to-female ratio is approximately 2:1 (11 percent of boys, 6 percent of girls).<sup>4</sup> However, in a nine-city survey published in 2008, researchers found that nearly identical proportions of girls and boys belonged to a gang — 9 percent of boys and 8 percent of girls.<sup>14</sup>

**Appendix G**  
**Department Of Justice – Gang Membership Prevention**

 U.S. Department of Justice, Office of Justice Programs; National Institute of Justice The Research, Development, and Evaluation Agency of the U.S. Department of Justice

U.S. Department of Justice, Office of Justice Programs National Institute of Justice The Research, Development, and Evaluation Agency of the U.S. Department of Justice

## Gang Membership Prevention

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- [Louis Tuthill, Social Science Analyst, Crime Control and Prevention Research Division, Office of Research and Evaluation, National Institute of Justice](#)
- [Gretchen C.F. Shappert, Project Safe Neighborhoods National Coordinator and Anti-Gang Coordinator, Executive Office for United States Attorneys, U.S. Department of Justice, Washington, D.C.](#)
- [James Buddy Howell, Senior Research Associate, National Youth Gang Center, Tallahassee, Fla.; Special Advisor, Life History Research Program, University of Pittsburgh](#)
- [Jorja Leap, Adjunct Associate Professor of Social Welfare, School of Public Affairs, University of California, Los Angeles](#)

**Louis Tuthill:** My name is Louis Tuthill. I'm a social science analyst for the Department of Justice, National Institute of Justice, and I am the gang person in the OJP.

I started at NIJ two years ago, and Phelan Wyrick, who spoke in an earlier session today, handed me this really cool project: to work with the Centers for Disease Control [and Prevention] on violence prevention to write a book on gangs that was focused at the practitioner. And so we got some of the best gang minds in the world to come around the table and talk about how do we reduce gang membership, looking at the home, looking at the community, looking at schools; and sometime next year, that publication will be out, but it's been quite an undertaking moving people who write for researchers to move that language to write for practitioners.

And Nancy Ritter, who works for the Department of Justice, National Institute of Justice, has been a great help to me and to this group in editing chapters and making sure that we can write to the practitioner audience.

I'm going to not talk very much longer. I want to introduce this great group of people who came out today to speak to you. To my immediate right is Buddy Howell. Buddy has been doing gang research since —

**James Buddy Howell:** '75.

**Tuthill:** 1975. I won't tell you how old I was then, Buddy.

**Howell:** Don't try.

[Laughter.]

**Tuthill:** And he ... at one time, there were two gang research centers. The Bureau of Justice Assistance had a gang center and OJJDP had a gang center, and in their great wisdom, they finally decided to merge these two gang centers together. And Buddy is the senior research associate at the National Gang Center.

To his right is Jorja Leap. Jorja works in my old neighborhood, Los Angeles. She has worked with Mayor Villaraigosa in reducing gang issues in the city of Los Angeles, and she is — an associate professor at UCLA? — associate professor at UCLA.

And to her right is somebody I'd like to introduce: Gretchen Shappert. She is the Project Safe Neighborhoods anti-gang coordinator for the Executive Office of U.S. Attorneys, and Gretchen is kind enough on an almost weekly basis to put up with me talking about science every day.

[Laughter.]

**Gretchen C.F. Shappert:** Daily, daily.

**Tuthill:** She has been great to work with as we move forward to try to put these initiatives and put science-based initiatives into reducing gang and gang violence.



of those samples — of the respondents reported gang activity in 2008. That's a lot of places, approximately 3,000 places in the United States, and in that student survey, as I said, 23 percent, so that's about one out of every five schools. And one out of 10 youth say that they belong to a gang, almost, in the National Longitudinal Survey of Youth.

And in high-risk areas, gang activity membership is higher. For example, 17 percent in Denver, 32 percent in Rochester — in those high-risk areas. So a lot of kids are joining gangs. They don't tend to stay very long. The majority drop out within a year, except in areas where there are inter generational gangs. So it's very important to pay attention to gang membership because of these prevalence data.

Back to our National Youth Gang Survey, I want to make a point about that, and that is, when you look at those subpopulation groups, this is cities over 50,000 here in the top line, and then the next group is suburban counties and then smaller cities under 25 ... between 25 and 50,000 population, and then rural counties. So you see a similar trend, except that the trend is much more pronounced in these smaller jurisdictions. Not much has changed in the largest cities. In fact, cities over 250,000 population report gangs every year, and they have for many years.

So, even though you may see some fluctuation in the outlying areas, gang activity remains a serious problem, and that's in the major cities. And that's where most of the gangs and gang members are located.

I want to contrast those two areas, the largest cities and then the smaller areas: suburban, small towns and rural areas. If we knew how gangs formed, we would be able to engage communities in prevention in those smaller jurisdictions. The gangs are largely inter generational in some large cities, not all but particularly in New York and Los Angeles and Chicago and several other cities now they're inter generational, but they've long been inter generational in those two. So that's a different pattern. The gangs are pretty stable there, but in those smaller areas, they are constantly developing, reforming, disappearing, and so it's hard to identify the gangs, and it's hard to get a handle on what they're doing.

If we knew more about how gangs form, that would help us an awful lot. We don't have much research in this area, but we know that they form at school among small groups of alienated, rebellious students that are alienated from school and from their families, and in communities, conflict groups; in public gathering places, play groups often develop into gangs and other groups that are in conflict. So that is something we need to pay attention to in our prevention effort, is where those gangs are forming, and to be able to separate the more persistent gangs from those that are unstable.

Only about — this is a rough estimate, very little research — but approximately one out of 10 gangs survives. Most of them in those small towns, rural areas, do not have the traction and the conditions, necessary conditions to survive, but I want to contrast that situation with these inter generational areas, such as Los Angeles. Here is brilliant research by Diego Vigil in a 1993 chapter he wrote on the established gangs, one of the best publications in the history of gang work, in my estimation.

He describes how kids get into an established gang and become a part of it, and I found these seven steps in that chapter. So it helps us to understand what we need to do to intervene with prevention and early intervention programs. Just think about this. Where there are established gangs in a community, before a kid gets to middle school where gangs begin to show up, kids in elementary school hear about those gangs in the community. They have a reputation. They're getting a lot of attention, and then when the kid arrives at middle school, he sees them, and it validates their existence: "Oh, they're for real. I need to pay attention."

Well, there are other cliques that the kid must cope with at school, and if this particular kid is vulnerable from family problems and alienated from the family and the school, then they're more likely to be drawn to a clique that can offer them some comfort and protection. So, when intergroup conflicts increase at school, then the kid notices that the gang seems to provide some protection.

Then Diego Vigil points out that maybe it's casual associations, a chance bonding. Say the kid is walking home from school, and the gang members are about to do some shoplifting, and he's been kind of hanging out with them on the schoolyard. So they say, "Oh, come along. Come along." And then he's become involved in criminal activity with the gang, and some bonding begins to take place.

So, fearing other groups in the schoolyard and in the community and then feeling this bond, then initiation is not far away for a lot of kids, so that's kind of a natural process. So we have to think about how to intervene in those steps to break that cycle, not an easy thing in those established areas, particularly because the gangs offer a lot of attractions.

Here are the major ones from the National Gang Resistance Education and Training Evaluation by Finn Esbensen and colleagues mainly and also from the Rochester study. For protection is the main reason. It's

**Appendix H**  
**Los Angeles Police Department – Why Young People Join Gangs**



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## Why Young People Join Gangs

Gang members join a gang by either committing a crime or undergoing an initiation procedure wherein they are beaten by fellow gang members to test their courage and fighting ability. Their motivations for joining the gang are varied, but usually fall within one of the following:

- **Identity or Recognition** - Being part of a gang allows the gang member to achieve a level of status he/she feels impossible outside the gang culture.
- **Protection** - many members join because they live in the gang area and are, therefore, subject to violence by rival gangs. Joining guarantees support in case of attack and retaliation for transgressions.
- **Fellowship and Brotherhood** - To the majority of gang members, the gang functions as an extension of the family and may provide companionship lacking in the gang member's home environment. Many older brothers and relatives belong, or have belonged to the gang.
- **Intimidation** - Some members are forced to join if their membership will contribute to the gang's criminal activity. Some join to intimidate others in the community not involved in gang activity.
- **Criminal Activity** - Some join a gang to engage in narcotics activity and benefit from the group's profits and protection.

Unfortunately, few youths realize the hazards associated with gang involvement. In many cases, parents are unaware of their children's gang activity and are unable to intervene until it's too late.

### INTERESTING FACTS

Venice Beach is the second largest tourist attraction in California, after Disneyland

The LAPD was established in 1869

The Los Angeles Police Academy was used for the 1932 Olympic Game's pistol and rifle competitions

The Los Angeles Police Academy remains a favorite of filmmakers, whose "Academy Arches" are recognizable around the world

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**Appendix I**  
**Defendant Sherbly Interview Abstracts**

**Sherbly Interview**  
**Case #CD255884**  
**Media #148**

Q: Want to come out?

A: Huh?

Q: Want to come out the cuffs?

A: Oh yeah.

Q: Stand up. Turn around and face the wall real quick. You left or right handed?

A: I'm right handed.

Q: Okay. I'm just going to loosen these up a little bit. Go ahead and grab a seat. Alright. What's your first name?

A: Sherbly Porter.

Q: Sherbly. What's your middle name?

A: Wayne.

Q: W-A-Y.

A: Yeah.

Q: What's your date of birth man?

A: May 11, 1985.

Q: Yesterday?

A: Yeah.

Q: What'd you do for your birthday?

A: Nothing.

Q: Nothing at all?

A: No.

Q: What's your phone number?

A: No.

Q: Okay. Let me ask you, do you straight up bang Brim or do you just claim Brim, there's a difference.

A: I straight up bang Brims.

Q: And you banged it the whole time?

A: Yeah.

Q: Serious? I mean because I'm just, the reason I ask is I know some people start off just kind of like hanging around and stuff like that, but I mean you just came in from the get go.

A: Since I've been little, yeah. For me I just, I go up there and hang out with some of the homies. Yeah I do that.

Q: Okay. Specifically, I mean have you ever put in any kind of work?

A: Not yet.

Q: What you mean not yet?

A: Nah I ain't put in work yet.

Q: Who do you run with in Brim, other than Baby Del? That's obvious.

A: That's it.

Q: No one else.

A: No.

Q: That's it. I mean who else do you talk to from Brim?

A: I talk to a couple people, but I don't run with nobody, I swear to god. I don't run with nobody.

Q: Okay. Like I said I see your name and stuff come out there, but like I said I don't know you. Obviously you do hang around Baby Del because he was down there tonight.

A: Yeah. So my warrant came out today?

Q: It's what's called a PC in public or probable cause in public. It's like a warrant. You can be arrested in public. It's just a warrant hasn't hit the system for you yet. They've got all the paperwork and everything else. The district attorney has already issues the charges and everything else in your case.

Q: To commit murder.

A: Commit murder.

Q: Commit murder.

A: On who?

Q: Amongst 5 9 Brim gang members.

A: They said I was trying to kill 5 9.

Q: No, no, no.

A: Oh I was. Explain this to me.

Q: Okay. So in other words somehow along the line of this.

A: Yeah.

Q: You benefit from that case or these multiple different cases where people either got killed, have attempted to kill them or been assaulted.

A: Stuff like this, I got nothing to do with this. This is good.

Q: It's actually not dude.

A: I got nothing to do with none of this. None of this. Show me. I want to see. I want to know.

Q: Okay let me ask you this, do you ever toss up Brims.

A: Yeah I toss up Brims.

Q: Okay, and you put that shit out there on the internet.

A: Yeah I do all that. Yeah I talk.

Q: You put up fuck Nappy Heads and everything else.

A: Yeah I talk. I do all that. That don't mean I got nothing to do with none of this.

Q: Okay why do you do, let me ask you this, straight out.

A: Because I'm holly.



Q: What you mean by holly?

A: Like I talk a lot. I talk good.

Q: Okay.

A: I ain't did none of that. I talk good. I might put on Facebook I do this and all that. Yeah I do.

Q: Let me ask you. Does everybody out there know that you're Brim?

A: Not every. Like on the internet, yeah.

Q: Okay on the internet. Do you think neighborhood knows you're Brim? If I was to take you right now and drop you off at the corner.

A: Yeah they would probably know me, yeah. They'd probably know me, yeah.

Q: 47 and corner. 47<sup>th</sup> and Market like this, would you make it home?

A: Hell nah. I got all this red on.

Q: That's what I'm saying, okay, and you're putting this stuff up there, fuck Nappy Heads, fuck West Coast, everything else out on the internet. You're boasting. You're putting yourself up like you're all that and a bag of chips on the internet for 5 9 Brim.

A: Yeah.

Q: So you're repping hard on the internet.

A: Yeah.

Q: So you benefit from being 5 9 Brim, you see what I'm saying, because people know that you are Brim. Brim carries a lot of weight on the streets.

A: Okay I understand, but what that, what all murder, what that got to do with me though.

Q: Because when other gang members either go out and get involved and shootings, robberies, rapes, murders, whatever it happens to be and they're Brim and they put it out and they boast about it too, okay what happens there, it shows that first of all you all are tight. You back each other up. People know that you're going to be backed up by the rest of the set, you see what I'm saying, and then when you're out there automatically people are going to know you're Brim, because like I said I couldn't throw you out at 30<sup>th</sup>. You see what I'm saying.

A: I'm not saying all that though. Like how did this, yeah I do.

Q: It doesn't mean that you're the person pulling the trigger, do you see what I'm saying. It's just

Q: You know what I'm saying, banging on them.

A: Yeah.

Q: Because throwing up is the same thing I see all the time.

A: Yeah.

Q: Okay when you do that, that creates friction and people start talking shit. Shit talking on the internet what does that lead to. Shit talking leads to shooting.

A: Yeah it do.

Q: Okay, that's what I'm saying. So when you're talking that smack.

A: So you're saying some of these shootings are all because of me.

Q: Not all because of, no, no, no I'm not trying to put all those. I am not about to try to put all this blame on you, okay, because that's not fair, but what I'm saying is when you go out and you talk that smack on the internet and create that drama, either it comes to you or then Brim goes back and retaliates for it. Okay you benefit from those actions either direction, do you see what I'm saying? It gives you clout because you're willing to step up and rep your set out there on the streets.

A: How that's a crime though?

Q: It is a crime because that's part of the conspiracy to commit these other crimes.

A: So for me going on Facebook, go on that, it can commit all these crimes and shit.

Q: It can be a part of it, yes. I'm not saying it's the whole thing, but it can be a portion of it.

A: Right. So that's why I'm here.

Q: That's the main reason why you're here right now.

A: So what's the evidence though? Okay my Facebook is open. You can see my Facebook. You're going to see my talking shit, pictures and all that.

Q: I know, but that's, let me ask you this straight up. Why do you that?

A: I don't know. I don't know. I just like the fame. I just do it. I just do it. I never did. I just do it.

Q: Are you ready to die for the set?

A: Nah. Hell nah. I just do it. I just do that. I just do that shit.

Q: Would you still bang Brim if four Nappy Heads walk up on you right now?

A: Yeah.

Q: So basically you're willing to die for the set then. Do you see what I'm saying?

A: Yeah but I didn't know me posting that shit on the internet was a crime. If I knew that I would have never did it. You gots to know.

Q: What I'm saying is that is part of the whole thing, because it instigates what's going on, okay. So therein if Nappy Head does roll on, Nappy Head or West Coast.

A: Yeah.

Q: Rolls on Brim, Brim we know is going to roll back. Brim is not a weak set.

A: Right.

Q: No one's ever going to look at Brim and say they're a bunch of punks.

A: Right.

Q: Nobody will.

A: Right.

Q: If they did what would happen? Seriously?

A: Shit might happen.

Q: I guarantee shit's going to happen.

A: So what case am I involved in?

Q: Well I believe it's a total, it's either 12 or about 14 cases of where you're going to be ultimately included into those cases.

A: 12. I didn't do no, fuck. Come on show me some shit, because I didn't do nothing in my life. Can you all show me evidence of me even holding a gun or anything? My handprints on any guns. Like what's really going on. 14 what.

Q: Yeah.

A: Because of me being on Facebook. Because of me being on Facebook I got cases.

and they shoot somebody and they shoot somebody that got nothing to do with me. That's how they feel. I don't tell nobody to shoot nobody.

Q: When you're out there openly challenging other people on the set.

A: I don't even know who's like that man. Damn.

Q: That's what I'm saying. When you're out there openly telling and challenging.

A: If I knew it was that I wouldn't be posting this if I knew all that. What the fuck. Are you serious? So what all do they go on me?

Q: I don't know everything that they have on you.

A: Well what they told you.

Q: I'm the one that's actually walking in here. What I get is I get this thing where I got to go out and they say go find you and arrest you and then what's his name, Baby Del, he's got a warrant. So they're like go, go, go pick up Baby Del, okay. That's, I'm somewhere in the middle and what people don't understand is my job I don't actually issue cases. I go out and try to get as many facts as I possibly can. The district attorney takes those and they do what they want with them.

A: So what facts do you got on me then?

Q: I told you man the internet.

A: Okay what else?

Q: That's all they need.

A: So that's all you all got is my internet and that's it.

Q: Well there are other things. I mean. Okay let me ask you this, let me ask you this.

A: You need to be straight up with me.

Q: No I'm going to, I'm going to. I'm going to ask you straight out. It should be in this one here.

A: I want to know like what's really going on.

Q: This is. I'm serious dude it's actually.

A: It's actually what?

Q: It's not in that one. Let's talk about this.

Q: Not all of them, because there's a whole lot of them we're not including in this whole thing.

A: Not including me.

Q: No, no, no I'm saying there's a whole bunch of shootings that we're not including and a whole bunch of people aren't getting included in this.

A: Right.

Q: Okay, but the problem of it is when you get out there and you create all that drama on the internet that's what happens, that's why we're here, okay, because whether you realize it or not, which I know you do, you benefit from being out there putting out Brim all day long. Brim strong all day.

A: Man if I knew all this man I wouldn't have posted none of this shit on Facebook man. Get in trouble like this for talking my mouth. Man.

Q: But you have to agree sometimes running your mouth causes trouble.

A: Yeah but now I'm going to be in jail for like, I ain't worry about that. I didn't even know. I ain't worry about that, like I don't know else is going on. I don't like no surprises. What else?

Q: Well there's, I can't really say it's a surprise because I won't be a surprise when everything comes together and it all gets laid out and then at that point the district attorney is going to explain exactly what the charges are and what the cases are, okay.

A: So how many cases do I got right now.

Q: I'm not lying to you, I don't know. I know the number is somewhere between 12 and 14. I don't know specifics.

A: I got 12 to 14 murder cases.

Q: No there ain't 12 to 14 murder cases out there, okay, but there are 12 to 14 different cases that the district attorney has looked at and made their decision based on that, that's where these charges come from.

A: These charges come from me on Facebook.

Q: No the charges come from the cases. Okay the charges come from the cases. The thing of it is you bolster your position by talking about yourself being Brim and calling out other people and other sets all the time. It's almost the same thing, going back to that thing where Baby Del got caught up. The case that he's got the warrant for, right.

A: Right.

A: Yeah.

Q: Why did it heat up so bad between Brim and Coast?

A: I don't know. It was.

Q: I can't say that I personally have seen you toss up fuck West Coast, you know what I'm saying. I've seen a lot of fuck Nappy Head, but not West Coast, and that's why I'm curious what's going on out there.

A: Oh man I don't.

Q: Because we're hearing it's going to get hot.

A: It might. It might. So that's why you all came and got me. I just want to know what's really, what's up, because like I'm so, like my head is so spinning right now because I did the Facebook. I'm like so confused, like 12, 14 cases because me running my mouth. Like you \_\_\_\_\_ (42:31), but like why, what does that have to do with me. Okay I was talking shit on Facebook, I understand that, but how do these cases belong to me?

Q: Because you're part of Brim. Because you are part of Brim and you're out there challenging all these other sets. It's not just for me to see, it's for the world to see on the internet.

A: So since I'm the only one.

Q: Baby Del is sitting in a car right now for doing the same thing.

A: So Baby Del.

Q: He's going to be up here talking to me in five, ten minutes too. He may not be as curious because he's already been through the loops for exactly what he did.

A: Right. So you're trying to say me and Baby Del for 14 total \_\_\_\_\_ (43:12).

Q: I don't know what he's, I don't everything that he's getting charged with, and I'm telling you, I'm being honest. I know that right now you have two charges. Two charges, that's it.

A: Okay, what is it?

Q: Okay that's the conspiracy and street gang allegation. I don't know what district attorney is actually going to charge you with. That's what I'm saying.

A: The gang \_\_\_\_\_ (43:32) I never heard that charge before. Like what is?

Q: Street gang allegation, 186.22B. I know you've heard about 186.22 A or B, street gang. In

other words if you're out there and you're part of a set.

A: Yeah.

Q: And something that you're doing either promotes, furthers or assists in the set there's the benefit, association or at the direction of. There's two different charges. There's benefit and association with or at the direction of. In a lot of your photographs you're out there with other homies in association with when you're tossing this shit up. Okay. That actually shows you're out there with the homies and you're willing to say fuck Nappy Head or whatever together.

A: But did that prove me doing anything illegal though?

Q: Well the thing of it is we know, we know from cases that we've investigated that cases start from shit talking on the internet. It doesn't mean that that's specifically you, no, but do you do that and can that cause that? Yes it can.

A: Yeah I do talk shit on the internet. Yes I do.

Q: But then go back to the other sections, promote, further and assist, which by you out there banging Brim and showing and repping all the time it shows that you're promoting your gang. Does that further the gang? Yeah, because you're out there with the homies associating and doing other stuff, and it looks like.

A: If that's the case you all should lock up everybody. Right or wrong? Right or wrong, though.

Q: Okay.

A: Keep it 100, right or wrong, because everybody, you all have 50,000 people in here then.

Q: We can only do one at a time.

A: You feel me?

Q: Do you see what I'm saying and unfortunately because of stuff that happened in the past with Paris in June, June 19, 2013, I can tell you the time and the date, because of where that starts right there that's where it happened. It starts, that's one of the dates that we're looking at. The other thing that goes back is really it kind of kicked off when Fat Ocean got killed.

A: I was in jail.

Q: I know. I'm not saying you had anything to do with that or knew anything or about it or anything else. When you came back out on the streets though I'm sure you heard about it. You probably heard about it when you were in custody.

A: Yeah I did. Yeah I did.

Q: No and I'm going to tell you right now I don't think you're the king of Brims.

A: I know I'm not.

Q: Okay.

A: I know I'm not.

Q: I don't.

A: So you all are wasting your time with me.

Q: Do you follow orders when you're out there?

A: Where, in the streets?

Q: Yeah.

A: I do.

Q: Let me ask you right now, if the big homie came up here and told you, he said get your ass.

A: I don't got no big homies. That's me personally. I don't listen to them. I don't got no big homie. I don't go nobody.

Q: No big homies.

A: No.

Q: None at all.

A: None of them. I run my own program. That's why everybody like me now, I run my own program.

Q: That's, that can get you hemmed up too though, you know what I'm saying.

A: I run my own program.

Q: Let me ask you this, where are you from?

A: What?

Q: Where are you from, because you ain't? What I'm saying is you're not old enough to Tiny Hit Squad.

A: I'm not Hit Squad. I'm not Tiny Hit Squad, I'm not Young Hit Squad, I ain't none of that.



**Appendix J**  
**Full Text of *People v. Johnson* (2013) 57 Cal. 4<sup>th</sup> 250**

**THE PEOPLE, Plaintiff and Respondent, v. COREY RAY JOHNSON, Defendant and Appellant. THE PEOPLE, Plaintiff and Respondent, v. JOSEPH KEVIN DIXON, Defendant and Appellant. THE PEOPLE, Plaintiff and Respondent, v. DAVID LEE, JR., Defendant and Appellant.**

S202790

**SUPREME COURT OF CALIFORNIA**

*57 Cal. 4th 250; 303 P.3d 379; 159 Cal. Rptr. 3d 70; 2013 Cal. LEXIS 6012*

July 18, 2013, Filed

**SUBSEQUENT HISTORY:** Reported at *People v. Johnson*, 2013 Cal. LEXIS 7372 (Cal., July 18, 2013)

**PRIOR HISTORY:**

Superior Court of Kern County, Nos. BF122135A, BF122135B & BF122135C, Gary T. Friedman, Judge. Court of Appeal, Fifth Appellate District, No. F057736. *People v. Johnson*, 205 Cal. App. 4th 594, 140 Cal. Rptr. 3d 711, 2012 Cal. App. LEXIS 499 (Cal. App. 5th Dist., 2012)

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

Defendants were convicted of multiple offenses, including three counts of first degree murder with multiple-murder and gang-murder special circumstances, two counts of attempted murder, active gang participation, and conspiracy. (Superior Court of Kern County, Nos. BF122135A, BF122135B and BF122135C, Gary T. Friedman, Judge.) The Court of Appeal, Fifth Dist., No. F057736, held that conspiracy to actively participate in a criminal street gang did not qualify as a crime. It affirmed the conspiracy convictions, however, because each was also based on the valid theory of conspiracy to commit murder.

The Supreme Court reversed the Court of Appeal's judgment and remanded the case for further proceedings. The court held that, when an active gang participant possessing the required knowledge and intent agrees with fellow gang members to commit a felony, he or she has also agreed to commit the gang participation offense. That agreement constitutes conspiracy to commit the offense of active gang participation, and may be separately charged once a conspirator has committed an overt act. The plain language of both *Pen. Code*, §§ 182 and 186.22, *subd. (a)*, reflects no legislative intent to preclude a conviction for a traditional conspiracy to commit the gang participation offense. While § 186.22, *subd. (a)*, makes no reference to the conspiracy statute, neither do

statutes outlawing murder or robbery. Such mention is unnecessary because § 182, *subd. (a)(1)*, expressly encompasses the agreement to commit "any crime." The stated purposes of the California Street Terrorism Enforcement and Prevention Act are entirely consistent with recognizing the crime of conspiracy to commit the substantive gang participation offense. A contrary legislative intent cannot be inferred from the electorate's enactment of *Pen. Code*, § 182.5, which expanded liability by creating a new kind of criminal conspiracy in the gang context. Defendants in the instant case were active gang members, well aware of each other's active [\*251] status and the gang's pattern of criminal gang activity. Their agreement to commit the various shootings constituted an agreement to commit the gang participation offense and, once an overt act was performed, all the elements of conspiracy to violate § 186.22, *subd. (a)*, were satisfied. (Opinion by Corrigan, J., expressing the unanimous view of the court.)

**COUNSEL:** Susan D. Shors, under appointment by the Supreme Court, for Defendant and Appellant Corey Ray Johnson.

Joseph Shipp, under appointment by the Supreme Court, for Defendant and Appellant Joseph Kevin Dixon.

Sharon G. Wrubel, under appointment by the Supreme Court, for Defendant and Appellant David Lee, Jr.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Susan Lee, Acting Solicitor General, Donald E. de Nicola, Deputy State Solicitor General, Michael P. Farrell, Assistant Attorney General, Brian G. Smiley and Laura Wetzel Simpton, Deputy Attorneys General, for Plaintiff and Respondent.

**JUDGES:** Opinion by Corrigan, J., expressing the unanimous view of the court.

**OPINION BY:** Corrigan

## OPINION

[\*\*74] [\*\*383] **CORRIGAN, J.**--We granted review to decide whether one may conspire to actively participate in a criminal street gang.<sup>1</sup> One can. When an active gang participant possessing the required knowledge and intent agrees with fellow gang members to commit a felony, he has also agreed to commit the gang participation offense. That agreement constitutes conspiracy to commit the offense of active gang participation, and may be separately charged once a conspirator has committed an overt act.

<sup>1</sup> *Penal Code sections 182, 186.22, subdivision (a)* (hereafter *section 186.22(a)*, the gang participation offense, or active gang participation). Subsequent statutory references will be to the Penal Code unless noted.

[\*256]

## I. BACKGROUND

Defendants Corey Ray Johnson, Joseph Kevin Dixon, and David Lee, Jr., were part of a 200-member Bakersfield gang called the Country Boy Crips (CBC). CBC's rival gangs included the Eastside Crips and the Bloods. Dupree Jackson, a [\*\*75] CBC member, testified for the prosecution under a grant of immunity. He was defendant Johnson's cousin and sold drugs for the gang. He described the gang's structure and the different roles members filled. Some sold drugs. Some patrolled the boundaries of the gang's territory to keep out enemies and outsiders. Some would "hang out," and some were "pretty boys" who brought women into the gang. Others would "ride with the guns" to seek out and kill enemies. Defendant Johnson sold drugs and was also a shooter for the gang with the moniker "Little Rifleman." Defendant Dixon was considered a gang leader because he had been to prison and had family ties to the gang. Defendant Lee would sell drugs, obtain cars, and drive for and "ride" with other gang members.

Testimony of several witnesses established that between March and August 2007, defendants were involved in various retaliatory shootings against perceived rivals. On March 21, 2007, members of the Bloods shot Lee. He and Johnson retaliated by shooting Bloods member Edwin McGowan. Lee was fired upon again the following day. All three defendants were then involved in a retaliatory shooting on April 19, 2007, outside an apartment in Eastside Crips territory. Vanessa Alcala and James Wallace, neither of whom was a gang member, were killed during the incident. Ms. Alcala was pregnant. Anthony Lyons was also shot but survived. On August 9, 2007, a fellow CBC member was shot and killed. Defendants and Jackson identified the shooter, armed

themselves, and drove to the home of the shooter's father. They intended to retaliate but were scared away when a car drove by. Two days later, Johnson, accompanied by Dixon and Lee, shot Adrian Bonner, a Bloods associate, paralyzing him. Jackson related statements Johnson and Dixon made about the shootings.

Johnson's girlfriend, Sara Augustin, also testified under a grant of immunity. She recounted various statements Lee and Johnson made about their involvement in the shootings. DNA testing of clothing found near the apartment shooting scene was linked to defendants, primarily to Johnson. Cell phone records reflected Dixon's and Lee's cell phones were at the location of the various shootings and were used to call each other or other CBC members before and after the events. Various witnesses gave descriptions of the participants that matched all three defendants.

The jury convicted all defendants of three counts of first degree murder with multiple-murder and gang-murder special circumstances, two counts of [\*257] attempted murder, shooting at an occupied vehicle, active gang participation, and conspiracy,<sup>2</sup> as well as various enhancements.<sup>3</sup> Conspiracy was charged as a single count against each defendant. [\*\*384] That count alleged each had engaged in conspiracy to commit felony assault, robbery, murder, and gang participation. The jury found each defendant guilty of conspiracy as charged. All defendants received three terms of life without the possibility of parole for the murder counts. Dixon received an additional term of 238 years to life, while Johnson and Lee received additional [\*\*76] terms of 196 years to life. Those terms included a term of 25 years to life for conspiracy as to Johnson and Lee, and 50 years to life as to Dixon (25 years to life, doubled under the "Three Strikes" law).

<sup>2</sup> *Sections 187, subdivision (a), 190.2, subdivision (a)(3), (22), 664/187, 246, 186.22, subdivision (a), 182, subdivision (a)(1), 186.22, subdivision (b)(1), 12022.53, subdivisions (d), (e)(1).*

<sup>3</sup> Johnson and Lee were additionally convicted of the attempted murder of McGowan and related enhancements. Dixon was additionally convicted of two counts of being a felon with a firearm (former § 12021, *subd. (a)(1)*) with a gang enhancement. Dixon was also found to have a prior serious felony conviction and served a prior prison term. (§§ 667.5, *subd. (b)*, 1170.12.)

As relevant here, the Court of Appeal held that conspiracy to actively participate in a criminal street gang did not qualify as a crime. It affirmed the conspiracy convictions, however, because each was also based on the valid theory of conspiracy to commit murder. We granted the Attorney General's petition for review.

## II. DISCUSSION

### A. The Law of Conspiracy

(1) Section 182 prohibits a conspiracy by two or more people to "commit any crime." (§ 182, *subd. (a)(1)*.) "A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." (*People v. Morante* (1999) 20 Cal.4th 403, 416 [84 Cal. Rptr. 2d 665, 975 P.2d 1071] (*Morante*); see § 184; see also *People v. Homick* (2012) 55 Cal.4th 816, 870 [150 Cal. Rptr. 3d 1, 289 P.3d 791] (*Homick*).) "[T]he law of attempt and conspiracy covers inchoate crimes and allows intervention before" the underlying crime has been completed. (*People v. Perez* (2005) 35 Cal.4th 1219, 1232 [29 Cal. Rptr. 3d 423, 113 P.3d 100].)

(2) Criminal activity exists along a continuum. At its conclusion is the commission of a completed crime, like murder. The principle of attempt [\*258] recognizes that some measure of criminal culpability may attach before a defendant actually completes the intended crime. Thus, a person who tries to commit a crime but who fails, or is foiled, may still be convicted of an attempt to commit that crime. Yet, attempt still involves both *mens rea* and *actus reus*. "An attempt to commit a crime consists of ... a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) To ensure that attempt principles do not punish a guilty mental state alone, an act toward the completion of the crime is required before an attempt will be recognized. "When a defendant acts with the requisite specific intent, that is, with the intent to engage in the conduct and/or bring about the consequences proscribed by the attempted crime [citation], and performs an act that 'go[es] beyond mere preparation ... and ... show[s] that the perpetrator is putting his or her plan into action' [citation], the defendant may be convicted of criminal attempt." (*People v. Toledo* (2001) 26 Cal.4th 221, 230 [109 Cal. Rptr. 2d 315, 26 P.3d 1051], *fn. omitted*, quoting *People v. Kipp* (1998) 18 Cal.4th 349, 376 [75 Cal. Rptr. 2d 716, 956 P.2d 1169].) For example, if a person decides to commit murder but does nothing more, he has committed no crime. If he buys a gun and plans the shooting, but does no more, he will not be guilty of attempt. But if he goes beyond preparation and planning and does an act sufficiently close to completing the crime, like rushing up to his intended victim with the gun drawn, that act may constitute an attempt to commit murder.<sup>4</sup>

4 See, e.g., *People v. Anderson* (1934) 1 Cal.2d 687, 690 [37 P.2d 67] ("Defendant's conduct in concealing the gun on his person and going to the general vicinity of the Curran theater with intent to commit robbery may ... be classified as mere acts of preparation but when he 'walked in there [Curran Theater entrance] about two feet from the grill' and 'pulled out the gun' and 'was just going to put it up in the cage when it went off', we are satisfied that his conduct passed far beyond the preparatory stage and constituted direct and positive overt acts that would have reasonably tended toward the perpetration of the robbery ... "); *People v. Morales* (1992) 5 Cal.App.4th 917, 927 [7 Cal. Rptr. 2d 358] (substantial evidence of attempted murder where the defendant "loaded his gun, drove to his victim's neighborhood, and finally hid in a position that would give him a clear shot at [the victim] if [the victim] left by the front door").

[\*\*385] [\*\*\*77] Conspiracy law attaches culpability at an earlier point along the continuum than attempt. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." (*Iannelli v. United States* (1975) 420 U.S. 770, 777 [43 L. Ed. 2d 616, 95 S. Ct. 1284] (*Iannelli*); see *Homick, supra*, 55 Cal.4th at p. 870; *People v. Marsh* (1962) 58 Cal.2d 732, 743 [26 Cal. Rptr. 300, 376 P.2d 300].) Conspiracy separately punishes not the completed crime, or even its attempt. The crime of conspiracy punishes the agreement itself and "does not require the commission of the substantive offense that is the object of the conspiracy." (*People v. Swain* (1996) 12 Cal.4th 593, 599 [49 Cal. Rptr. 2d 390, 909 P.2d 994].) "Traditionally the law [\*259] has considered conspiracy and the completed substantive offense to be separate crimes." (*Iannelli, supra*, 420 U.S. at p. 777.)

(3) Under our statute, an agreement to commit a crime, by itself, does not complete the crime of conspiracy. The commission of an overt act in furtherance of the agreement is also required. "No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement ... ." (§ 184.) "[A]n overt act is an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime." [Citations.]" (*People v. Zamora* (1976) 18 Cal.3d 538, 549, *fn. 8* [134 Cal. Rptr. 784, 557 P.2d 75].) One purpose of the overt act requirement "is 'to show that an indictable conspiracy exists' because 'evil thoughts alone cannot constitute a criminal offense.' [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1131 [108 Cal. Rptr. 2d 436, 25 P.3d

641].) The overt act requirement also "provide[s] a *locus penitentiae*--an opportunity for the conspirators to reconsider, terminate the agreement, and thereby avoid punishment for the conspiracy." (*Zamora, supra*, 18 Cal.3d at p. 549, fn. 8; see *Russo, supra*, 25 Cal.4th at p. 1131; *Morante, supra*, 20 Cal.4th at p. 416, fn. 4.) Once one of the conspirators has performed an overt act in furtherance of the agreement, "the association becomes an active force, it is the agreement, not the overt act, which is punishable. Hence the overt act need not amount to a criminal attempt and it need not be criminal in itself." (*People v. George (1968)* 257 Cal. App. 2d 805, 808 [65 Cal. Rptr. 368], italics omitted; see *People v. Hoyos (2007)* 41 Cal.4th 872, 915 [63 Cal. Rptr. 3d 1, 162 P.3d 528], overruled on another ground in *People v. McKinnon (2011)* 52 Cal.4th 610, 641 [130 Cal. Rptr. 3d 590, 259 P.3d 1186].)

#### B. Conspiracy to Commit Active Gang Participation a Valid Offense

(4) "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 [\*\*\*78] 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)*.)" (*People v. Rodriguez (2012)* 55 Cal.4th 1125, 1130 [150 Cal. Rptr. 3d 533, 290 P.3d 1143] (*Rodriguez*)). A criminal street gang is defined as "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 [enumerated offenses], having a common name or common identifying sign or symbol, [\*260] and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, *subd. (f)*.) A pattern of criminal gang activity is "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more [enumerated offenses] ... ." (§ 186.22, *subd. (e)*.)

[\*\*386] (5) The Attorney General argues conspiracy to commit active gang participation comes within the plain language of *sections 182* and *186.22(a)*. Recognizing such an offense would be neither contrary to legislative intent nor violative of due process. In evaluating this claim, "[w]e begin with the familiar canon that, when construing statutes, our goal is ' ' to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose

of the law.' " ' [Citation.]" (*People v. Albillar (2010)* 51 Cal.4th 47, 54-55 [119 Cal. Rptr. 3d 415, 244 P.3d 1062] (*Albillar*)). " 'When interpreting statutes, we begin with the plain, commonsense meaning of the language used by the Legislature. [Citation.] If the language is unambiguous, the plain meaning controls.' [Citation.]" (*Rodriguez, supra*, 55 Cal.4th at p. 1131.)

Nothing in the plain language of either *section 182* or *186.22(a)* supports the Court of Appeal's holding. The offense of conspiracy to "commit any crime" was included in the original 1872 Penal Code. When the Legislature added *section 186.22* in 1989 (Stats. 1989, ch. 930, § 5.1, p. 3253), it expressed no intention to preclude a conviction for a conspiracy to commit the crime of active gang participation. Entering its 15th decade since enactment, *section 182* continues to prohibit a conspiracy to commit "any crime." (§ 182, *subd. (a)(1)*.)

Concluding that one can conspire to actively participate in a gang is fully consistent with the underlying purposes of *section 186.22(a)*. That provision is part of the California Street Terrorism Enforcement and Prevention Act (STEP Act) (*Pen. Code, § 186.20 et seq.*). "Underlying the STEP Act was the Legislature's recognition that 'California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.' (*Pen. Code, § 186.21*.) The act's express purpose was 'to seek the eradication of criminal activity by street gangs.' (*Ibid.*)" (*People v. Gardeley (1996)* 14 Cal.4th 605, 609 [59 Cal. Rptr. 2d 356, 927 P.2d 713]; see *Rodriguez, supra*, 55 Cal.4th at p. 1129.) In concluding the felonious conduct underlying the gang participation offense need not be gang related, we observed in *Albillar*: "Gang members tend to protect and avenge their associates. Crimes committed by gang members, whether or not they are gang related or committed for the benefit of the gang, thus pose dangers to the public and difficulties for law enforcement not generally present when a crime is committed by someone [\*261] with no gang affiliation. 'These activities, both individually [\*\*\*79] and collectively, present a clear and present danger to public order and safety ... .' (*Pen. Code, § 186.21*.)" (*Albillar, supra*, 51 Cal.4th at p. 55.) Recognizing conspiracy to commit active gang participation as a valid offense furthers these purposes by affording prosecutors additional charging options in gang cases, and making additional punishment available.

The Court of Appeal found a contrary intent expressed in *section 182.5*, a different statute enacted by voters as part of Proposition 21. *Section 182.5* defines the following conduct as a type of conspiracy: "Notwithstanding *subdivisions (a)* or *(b)* of *Section 182*, any person who actively participates in any criminal street gang,

57 Cal. 4th 250, \*; 303 P.3d 379, \*\*;  
159 Cal. Rptr. 3d 70, \*\*\*; 2013 Cal. LEXIS 6012

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*." The Legislative Analyst's comments appeared in the ballot pamphlet, and stated that the measure would "expand[] the law on conspiracy to include gang-related activities." (Ballot Pamp., Primary Elec. (Mar. 7, 2000) analysis of Prop. 21 by Legis. Analyst, p. 46, italics added.) The Court of Appeal concluded that "this is 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." In this the court erred. Its interpretation would rely on the language of the ballot statement to *limit* [\*\*387] existing law when the intended effect of the measure was to *expand* the law to encompass gang-related activities more broadly.

(6) *Section 182.5* created a new form of conspiracy that is distinct from the traditional understanding of the crime in five significant ways. First, under traditional conspiracy principles, when two or more defendants conspire to commit a substantive offense, they need not have previously known each other, have any ongoing association, or plan to associate in any way beyond the commission of the substantive offense.<sup>5</sup> Traditional conspiracy, then, encompasses a stand-alone agreement by former strangers to commit a single [\*262] crime. In order to violate *section 182.5* and, thus, commit a "182.5 conspiracy," a defendant cannot be a complete stranger to the gang. He or she must be an active [\*\*388] gang participant with knowledge of other members' pattern of criminal gang activity.

<sup>5</sup> See *U.S. v. Feinberg* (7th Cir. 1941) 123 F.2d 425, 427 ("Since there was a general plan in which all of the defendants participated, it is immaterial when any of the parties entered or whether some of those participating were strangers to each other, [citation]; they were all engaged in a common unlawful purpose and each and all contributed their part to the criminal conspiracy."); cf. *In re Nathaniel C.* (1991) 228 Cal. App. 3d 990, 1000 [279 Cal. Rptr. 236] ("When a conspiracy has formed, and a stranger to the conspiracy then associates himself with the conspirators, and with knowledge of the conspiracy joins the others in committing overt acts in furtherance of the unlawful purpose, then he is guilty as a member of the conspiracy.").

Second, a traditional conspiracy encompasses an agreement to commit "any crime." (§ 182, *subd. (a)(1)*.) Therefore, it is possible to conspire to commit a misdemeanor. (See *People v. Proctor* (1993) 18 Cal.App.4th 1055, 1061 [22 Cal. Rptr. 2d 888] [noting a conspiracy to commit a misdemeanor under § 182 constitutes a "wobbler"]; cf. *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1400-1402 [71 Cal. Rptr. 2d 487] [conspiracy to commit a [\*\*\*80] misdemeanor governed by the three-year statute of limitations for felonies].) A 182.5 conspiracy relates only to the commission of a felony.

(7) Third, traditional conspiracy requires both the specific intent to agree, and specific intent to commit a target crime. (*Morante, supra*, 20 Cal.4th at p. 416.) A 182.5 conspiracy does not require any prior agreement among the conspirators to promote, further, or assist in the commission of a particular target crime. Even without a prior agreement, an active and knowing gang participant who acts with the required intent to promote, further, or assist in the commission of a felony by other gang members can violate *section 182.5*. That act of assistance or promotion replaces the required prior agreement to commit a crime that is ordinarily at the heart of a traditional conspiracy.

Fourth, traditional conspiracy liability attaches once an overt act is committed. A 182.5 conspiracy requires the actual commission of felonious criminal conduct as either an attempt or a completed crime.

Fifth, *section 182.5* brings within its ambit not only a gang member who promotes, furthers, or assists in the commission of a felony. It also embraces an active and knowing participant who merely *benefits* from the crime's commission, even if he or she did not promote, further, or assist in the commission of that particular substantive offense. This constitutes a substantial expansion of a traditional conspiracy application. The "one who benefits" provision recognizes that gang activities both individually and collectively endanger the public and contribute to the perpetuation of the gang members' continued association for criminal purposes. Due to the organized nature of gangs, active gang participants may benefit from crimes committed by other gang members. When such benefits are proven along with the other elements of the statute, *section 182.5* permits those benefiting gang participants to be convicted of conspiracy to commit the specific offense from which they benefitted. [\*263]

The creation of a new basis for conspiracy liability under *section 182.5* does not reflect a legislative intent to *preclude* the use of *section 186.22(a)* as an object of a traditional conspiracy under *section 182*. Indeed, *sections 182* and *182.5* are quite different provisions covering different kinds of conduct. If evidence reflects that an

57 Cal. 4th 250, \*; 303 P.3d 379, \*\*;  
159 Cal. Rptr. 3d 70, \*\*\*; 2013 Cal. LEXIS 6012

active and knowing gang participant, acting with the required intent, agrees with other gang members to commit a felony, and an overt act in furtherance of the plan has been committed, a prosecutor may charge a traditional conspiracy to commit the gang participation offense under *section 182*, even if the target offense is not ultimately committed. Rather than expressing an intent to limit the scope of *section 182*, the enactment of *section 182.5* provided prosecutors additional flexibility in charging a different kind of conspiracy, consistent with the Legislative Analyst's statement that the new provision "expand[ed] the law on conspiracy to include gang-related activities." (Ballot Pamp., Primary Elec., *supra*, analysis of Prop. 21 by Legis. Analyst, p. 46.)

The Court of Appeal suggested in a footnote that its decision would be the same whether a conspiracy to commit the gang participation offense was viewed as "an absurd redundancy" that results in unconstitutional vagueness" or a "conclusive legal falsehood." Recognizing such an offense would result in neither. The Attorney General points to analogous federal statutes, such as the Racketeer Influenced and Corrupt Organizations Act (RICO) (*18 U.S.C. § 1961 et seq.*), [\*\*\*81] which criminalizes the maintenance of a group engaging in racketeering activity, including the commission of various felonies such as murder, robbery, and extortion. Likewise, the Smith Act (*18 U.S.C. § 2385*) criminalizes the organization of a group advocating the violent overthrow of the government. Both criminalize conduct involving multiple participants and may involve predicate conspiracies. Both recognize, as a separate offense, a conspiracy to violate its provisions. (See *18 U.S.C. § 1962(d)* [RICO conspiracy]; *18 U.S.C. § 2385* [Smith Act]; *U.S. v. Fernandez* (*9th Cir. 2004*) *388 F.3d 1199, 1259* ["It is a well-established principle of RICO law ... that predicate racketeering acts that are themselves conspiracies may form the basis for a charge and eventual conviction of conspiracy under *§ 1962(d)*."].)

(8) Defendants contend recognizing the crime of conspiracy to commit the gang participation offense would be illogical. They argue that because conspiracy requires an agreement to commit every element of the target offense, and active gang participation requires knowledge of the gang's pattern of criminal gang activity, conspiracy to commit active gang participation would absurdly require that conspirators "agree" to have such knowledge. Defendants misconstrue the requirements of *section 182, subdivision (a)*. "A conviction of conspiracy requires proof that the defendant and [\*264] another person had the specific intent to agree or conspire to commit an offense, *as well as the specific intent to commit the elements of that offense*, together with proof of the commission of an overt act ... ." (*Morante, supra*, *20 Cal.4th at p. 416*, italics added; see *People v. Jurado*

(*2006*) *38 Cal.4th 72, 120* [*41 Cal. Rptr. 3d 319, 131 P.3d 400*].) Conspirators must agree to the commission of a criminal act. They also have to possess certain kinds of knowledge and criminal intent. In other words, they agree to the act while possessing a given mens rea. It would be imprecise to say that they "agree" to have a certain knowledge or mental state. Instead, to satisfy the elements of traditional conspiracy, they agree to an act, and they do so while possessing the required mental state.

Further, they need not *expressly* agree at all: "To 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* (*2006*) *143 Cal.App.4th 1009, 1025* [*49 Cal. Rptr. 3d 765*], italics added.) As explained below, defendants' agreement to commit the various gang shootings here exhibited their intent not only to commit those particular shootings, but also to actively participate in their gang.

Defendants' analogy to *People v. Iniguez* (*2002*) *96 Cal.App.4th 75* [*116 Cal. Rptr. 2d 634*] is inapt. The court there held that one could not conspire to commit attempted murder "because the crime of attempted murder requires a specific intent to actually commit the murder, while the agreement underlying the conspiracy pleaded to contemplated no more [\*\*\*389] than an ineffectual act." (*Id. at p. 79*.) Stated another way, under a traditional conspiracy approach, one cannot conspire to *try* to commit a crime. An agreement to commit a crime is required, even if nothing more than an overt act is ultimately done. By contrast, the conspiracy to commit the gang participation offense does not contemplate an agreement to commit an ineffectual act. Under the traditional application of *section 182*, a conspiracy [\*\*\*82] to violate *section 186.22(a)* requires that a defendant be an active and knowing gang participant and agree to willfully promote, further, or assist gang members in the commission of an intended target felony. Unlike *Iniguez*, there is no logical impossibility or absurdity in recognizing the crime of conspiracy to actively participate in a gang.

Defendants argue the so-called Wharton's Rule should preclude recognition of conspiracy to commit gang participation. The rule "owes its name to Francis Wharton, whose treatise on criminal law identified the doctrine and [\*265] its fundamental rationale ... ." (*Iannelli, supra*, *420 U.S. at p. 773*.) The rule states, "Where the cooperation of two or more persons is necessary to the commission of the substantive crime, and there is no ingredient of an alleged conspiracy that is not present in the substantive crime, then the persons neces-

57 Cal. 4th 250, \*; 303 P.3d 379, \*\*;  
159 Cal. Rptr. 3d 70, \*\*\*; 2013 Cal. LEXIS 6012

sarily involved cannot be charged with conspiracy to commit the substantive offense and also with the substantive crime itself." (*People v. Mayers* (1980) 110 Cal. App. 3d 809, 815 [168 Cal. Rptr. 252]; see *People v. Lee* (2006) 136 Cal.App.4th 522, 530 [38 Cal. Rptr. 3d 927].) Classically, Wharton's Rule applies to crimes that an individual could not commit acting alone. Wharton's Rule "has current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary." (*Iannelli, supra*, 420 U.S. at p. 782.) "[T]he Rule is essentially an aid to the determination of legislative intent [and] must defer to a discernible legislative judgment." (*Id.* at p. 786.)

The presumption of Wharton's Rule has no application here. "The classic Wharton's Rule offenses--adultery, incest, bigamy, duelling--are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than on society at large. [Citation.] Finally, the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert. It cannot, for example, readily be assumed that an agreement to commit an offense of this nature will produce agreements to engage in a more general pattern of criminal conduct." (*Iannelli, supra*, 420 U.S. at pp. 782-784, fns. omitted.) *Iannelli* concluded Wharton's Rule had no application to the federal gambling statute at issue there: "The conduct proscribed by [18 United States Code section 1955] is significantly different from the offenses to which the Rule traditionally has been applied. Unlike the consequences of the classic Wharton's Rule offenses, the harm attendant upon the commission of the substantive offense is not restricted to the parties to the agreement. Large-scale gambling activities seek to elicit the participation of additional persons--the bettors--who are parties neither to the conspiracy nor to the substantive offense that results from it. Moreover, the parties prosecuted for the conspiracy need not be the same persons who are prosecuted for commission of the substantive offense. An endeavor as complex as a large-scale gambling enterprise might involve persons who have played appreciably different roles, and whose level of culpability varies significantly. ... Nor can it fairly be maintained that agreements to enter into large-scale gambling activities are not likely to generate additional agreements to engage in other criminal endeavors." (*Iannelli, supra*, 420 U.S. at p. 784.) [\*266]

[\*\*\*83] Similar reasoning applies here. The immediate harm flowing from the gang participation offense is not limited to its participants. Indeed, an integral

component of a *criminal* street gang is to commit felonies against others. (See § 186.22, *subd.* (f).) Like the large-scale gambling operation at issue in *Iannelli*, a criminal street gang also [\*\*\*390] involves a network of participants with different roles and varying kinds of involvement. The gang at issue here had over 200 members who performed diverse functions. Further, it cannot be said that active gang participation is not likely to generate additional criminal agreements. To the contrary, the gang structure makes such agreements much easier and more likely. These circumstances provide no justification for applying the presumption of Wharton's Rule. (See *U.S. v. Nascimento* (1st Cir. 2007) 491 F.3d 25, 48-49 [rejecting application of Wharton's Rule to a RICO conspiracy]; *U.S. v. Marino* (1st Cir. 2002) 277 F.3d 11, 39 [same]; see also *U.S. v. McNair* (11th Cir. 2010) 605 F.3d 1152, 1215-1216 [rejecting application of Wharton's Rule to a conspiracy to violate the federal bribery statute]; *U.S. v. Ruhbayan* (4th Cir. 2005) 406 F.3d 292, 300-301 [rejecting application of Wharton's Rule to a conspiracy to commit witness tampering and suborning perjury].)

#### C. Elements of the Offense and Application to this Case

As noted, a conspiracy requires an intentional agreement to commit the offense, a specific intent that one or more conspirators will commit the elements of that offense, and an overt act in furtherance of the conspiracy. (*Morante, supra*, 20 Cal.4th at p. 416.) The gang participation offense requires (1) participation in a gang that is more than nominal or passive, (2) knowledge of the gang's pattern of criminal gang activity, and (3) the willful promotion, furtherance, or assistance in felonious conduct by gang members. (*Rodriguez, supra*, 55 Cal.4th at p. 1130.)

(9) A conspiracy to commit the gang participation offense may be committed, as here, by already-active gang participants. "The gist of the crime of conspiracy ... is the agreement or confederation of the conspirators to commit one or more unlawful acts ... ." (*Braverman v. United States* (1942) 317 U.S. 49, 53 [87 L. Ed. 23, 63 S. Ct. 99].) "[W]hen a single agreement to commit one or more substantive crimes is evidenced by an overt act, ... the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects." (*Ibid.*) "A single agreement to commit several crimes constitutes one conspiracy." (*United States v. Broce* (1989) 488 U.S. 563, 570-571 [102 L. Ed. 2d 927, 109 S. Ct. 757].) " 'One agreement gives rise to only a single offense, despite any multiplicity of objects.' " (*People v. Lopez* (1994) 21 Cal.App.4th 1551, 1557 [26 Cal. Rptr. 2d 741].) [\*267]

The evidence established that defendants were active participants in CBC. Dixon was a gang leader. Johnson,



"Little Rifleman," was a shooter and drug dealer for the gang. Lee sold drugs, obtained cars, and participated in gang shootings. There was also little question from defendants' conduct that they had the requisite knowledge of CBC's pattern of criminal gang activity, having committed much of it themselves. In this context, defendants agreed to commit various retaliatory shootings against rival gang members. Under these circumstances, once defendants agreed to commit a specific crime, for example, shooting a rival in retaliation, the agreement constituted a conspiracy to [\*\*\*84] commit murder and assault. The agreement could also constitute a conspiracy to commit the conduct required to complete the gang participation offense. The agreement exhibited defendants' intent to commit all of the elements of substantive gang participation. Their agreement, coupled with their manifest participation in, and knowledge of, the gang's activities, constituted an agreement to further, promote or assist the felonious act of shooting rival gang members. Their agreement promoted commission of the shootings, making them more likely. Thus, just as a single agreement to kill someone with a firearm would encompass a conspiracy to commit both murder and assault with a firearm, a single agreement among active gang participants to commit a shooting with other gang members would additionally encompass a conspiracy to commit the gang participation offense. The conspiracy was completed once one of them committed an overt act toward the shooting.

#### D. Conclusion

(10) The plain language of both *sections 182 and 186.22(a)* reflects no legislative intent to [\*\*391] preclude a conviction for a traditional conspiracy to commit the gang participation offense. While *section 186.22(a)* makes no reference to the conspiracy statute, neither do statutes outlawing murder or robbery. Such mention is unnecessary because *section 182, subdivision (a)(1)* expressly encompasses the agreement to commit "any crime." The stated purposes of the STEP Act are entirely consistent with recognizing the crime of conspiracy to commit the substantive gang participation offense. A contrary legislative intent cannot be inferred from the electorate's enactment of *section 182.5*, which expanded liability by creating a new kind of criminal conspiracy in the gang context. Defendants were active gang members, well aware of each other's active status and the gang's pattern of criminal gang activity. Their agreement to commit the various shootings here constituted an agreement to commit the gang participation offense and, once an overt act was performed, all the elements of conspiracy to violate *section 186.22(a)* were satisfied. [\*268]

#### III. DISPOSITION

We reverse the Court of Appeal's judgment and remand for further proceedings consistent with this opinion.

Cantil-Sakauye, C. J., Kennard, J., Baxter, J., Werdegar, J., Chin, J., and Liu, J., concurred.