

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

THE PEOPLE,)
)
)
 Plaintiff and Respondent,)
)
)
 vs.)
)
)
 ZACHERY PRUNTY,)
)
)
 Defendant and Appellant.)

No. S210234

Sacramento County
Sup.Ct. No 10F07981

**SUPREME COURT
FILED**

SEP 30 2013

Frank A. McGuire Clerk

Appeal from the Sacramento County Superior Court
Honorable Marjorie Koller, Judge

Deputy

APPELLANT'S OPENING BRIEF ON THE MERITS

After Decision by the Court of Appeal
Third Appellate District, Appeal No. C071065
Filed March 26, 2013

Susan K. Shaler
State Bar No. 115762
Professional Law Corporation
991 Lomas Santa Fe Dr., Ste C, #112
Solana Beach, CA 92075
Telephone: 858.259.6737
Fax: 858.345.166

Attorney for Appellant
ZACHERY PRUNTY

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After Decision by the Court of Appeal
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ISSUE BEFORE THE COURT ON GRANT OF REVIEW

On June 26, 2013, this Court granted review of the following issue:

“Is evidence of a collaborative or organizational nexus required before multiple subsets of the Norteños can be treated as a whole for the purpose of determining whether a group constitutes a criminal street gang within the meaning of Penal Code^[1] section 186.22, subdivision (f)?”

¹ All future statutory references are to the Penal Code unless otherwise noted.

INTRODUCTION

This Court once again faces the task of analyzing the “thicket of statutory construction issues presented by the California Street Terrorism Enforcement and Prevention Act of 1988” (STEP Act). (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 319; (Stats. 1988, ch. 1242, § 1, pp. 4127-4129.) This case is about applying the STEP Act’s definition of “criminal street gang” to the realities of the Norteños gang and Norteños subset gangs. The Norteños gang is large, now nationwide, and has multiple subsets. Members of those Norteños subsets routinely identify themselves by expressly claiming allegiance to the smaller subset. For example, appellant claimed the Detroit Boulevard Norteños. There was evidence presented about six different Norteños subsets. Each subset in this case had a name that included the word Norteños, e.g., the Varrío Diamonds Norteños.

Members of subset gangs may, or may not, share ideologies, bylaws, organization, or joint operations. There was no evidence in this case of shared ideology, association, planning, cooperation, or the like. Instead, the evidence involved general information about the larger Norteños gang, and separate, unrelated information about six different Norteños subsets. There was rivalry among the Norteños subsets, including rivalry so severe that

members of one Norteños subset killed a member of a different Norteños subset. The commonality among the Norteños subsets was limited to including “Norteños” as part of each subset’s full name, some use of the color red, and an animosity toward Sureños gang members.

Existing authorities discussing gang subsets need clarification from this Court to ensure due process concerns of adequate notice and prevention of arbitrary enforcement are satisfied. *People v. Williams* (2008) 167 Cal.App.4th 983, 988, did this by expressly requiring a nexus among the subsets, or between the subset and the larger gang. *Williams* held a shared ideology was not enough. Rather, there had to be evidence of collaborative activities or collective organizational structure among the subsets and the set. Earlier, *In re Jose P.* (2003) 106 Cal.App.4th 458, 468, and *People v. Ortega* (2007) 145 Cal.App.4th 1344, 1357, affirmed by citing evidence of collaborative activities or organizational structure - - that the subsets were loyal to each other, loyal to the larger gang, followed the same bylaws, or worked together in concert to commit crimes. This is required by due process. Clarifying that this nexus is required would not unduly increase the amount, or type, of evidence the prosecution must present in a gang case. Evidence of nexus already is routinely presented in this type of case.

Such evidence was presented in *Williams, In re Jose P.*, and *Ortega* (although *Williams* concluded the evidence was insufficient).

STATEMENT OF THE CASE

An amended information filed on February 6, 2012, alleged appellant Zachery Prunty was 14 years old or older (Welf. & Inst. Code, § 707, subd. (d)(2)(B)) when he committed two violations of the Penal Code. Count 1 alleged Zachery committed attempted murder (§§ 664, 187, subd. (a)), personally used a firearm, and caused great bodily injury (§ 12022.53, subds. (b), (c), (d)). Count 2 alleged Zachery committed an assault with a firearm, personally used a firearm, and inflicted great bodily harm. (§§ 245, subd. (a)(2), 12022.7, subd. (a).) (1CT 81-82.) The amended information also alleged Zachery committed each offense to benefit the Norteños² criminal street gang. (§ 186.22, subd. (b)(1).) (1CT 81-82.)

Trial commenced on February 6, 2012, and trial testimony began on February 8, 2012. (1RT 33; 1CT 5.) On February 16, 2012, a jury found Zachery not guilty of attempted murder, but guilty of the lesser included offense of attempted voluntary manslaughter; guilty of assault with a firearm; and all enhancement allegations true. (1CT 244-251.)

² For continuity, appellant refers to the Norteños gang and its subsets in the plural throughout.

On April 13, 2012, the trial court sentenced Zachery on count 1 to three years, plus two 10-year enhancements for the gang and firearm allegations; and on count 2, to a consecutive one year term, plus enhancements of three years and four months each for the personal injury and gang allegations. The total sentence was 30 years and eight months. (2RT 414-415; 2CT 309.) The court imposed restitution fines of \$3,000 (§ 1202.4), a stayed a \$3,000 parole revocation fine (§ 1202.45), an \$80 court operations assessment (§ 1465.8), and a facility fee of \$60. (2RT 416; 2CT 310.) The court awarded appellant 494 days of actual time credits and conduct time of 74 days for a total of 568 days. (2RT 415; 2CT 310.)

Appellant timely filed a notice of appeal on May 2, 2012. (2CT 311.) On March 26, 2013, the Court of Appeal, Third Appellate District, affirmed the judgment. On April 26, 2013, Zachery petitioned for review to exhaust state remedies. On June 26, 2013, this Court granted review.

STATEMENT OF FACTS

A. EVIDENCE OF ATTEMPTED VOLUNTARY MANSLAUGHTER AND ASSAULT WITH A FIREARM.

On November 25, 2010, Zachery was the target of a shooting. The following day, Zachery armed himself with a .38 caliber revolver. (1CT 127.) Zachery and his friend Emilio Chacon saw Gustavo Manzo, Ivonne Aguilar, and Ivonne's younger brothers Santiago and Armando walk toward

the entrance of a Panda Express restaurant in Sacramento. (1RT 35-36, 54-55, 73, 96, 154.) Zachery and Emilio had been drinking cheap brandy earlier in the evening. (1CT 173.)

Zachery saw Manzo, who wore a Los Angeles cap and black clothing consistent with the Sureños gang. (1RT 154.) Zachery, who admitted membership in the Detroit Boulevard Norteños, a subset of the Norteños gang (1CT 141), called Manzo a “skrap.” Zachery asked Manzo where he was from. (1RT 43, 60-61, 98, 110; 1CT 165-167.) “Skrap” was a derogatory term for a Sureño gang member. (1RT 109.) Manzo responded by calling Zachery a “buster,” a derogatory term for Norteños. Manzo told Zachery to have some respect. (1RT 66, 78, 98-99; 1CT 165-166.)

Zachery and Manzo argued. Ivonne Aguilar yelled at Zachery, calling him a “little buster.” (1RT 38-39, 58; 1CT 169.) Armando and Santiago Aguilar, realized something bad could occur, and ran toward the entrance of the restaurant. (1RT 66.) Manzo was older and larger than Zachery. (1RT 95-96, 114; 1CT 165.) Manzo was about 22 to 24 feet from Zachery. (1RT 80-81.)

Initially, there was merely an oral argument, during which Zachery and Emilio backed away from Manzo. Then Manzo called after them, “why

are you backing out?” (1RT 113, 138; 1CT 167.) Both Manzo and Ivonne Aguilar continued to berate Zachery and Emilio, telling them to keep walking before they got “fucked up.” (1CT 169-171.) Manzo stepped towards Zachery, who, fearing an attack, fired his gun. (1RT 68, 80.) One shot hit Manzo in the lower buttock. (1RT 101-102.) Santiago Aguilar ducked behind a rock, but was hit in the leg with a second bullet. (1RT 40.)

After the shooting, the police searched Zachery’s residence. Police found a gun under his mattress. (1RT 159.) The police questioned Zachery in a recorded interview that was played to the jury. (1RT 202; 1CT 117-187.) Zachery admitted membership in the Detroit Boulevard Norteños gang, and that he had carried a gun on November 26, 2010. (1CT 141, 145.) Zachery explained he obtained the gun because some other gangs had been shooting at them. (1CT 146.) Just the night before Zachery was fired upon during a drive-by committed by a different gang. (1CT 146-147.)

B. GANG EVIDENCE.

Detective John Sample of the Sacramento Police Department testified as the gang expert. (1RT 206 [trial court accepted Sample as expert].) The Norteños were an Hispanic criminal street gang active in Sacramento and throughout California. (1RT 209.) There were about 1,500 local members. (1RT 209.) There were many subsets of Norteños based on

different neighborhoods. Members claimed different neighborhoods. (1RT 209.) The Norteños did not claim a specific area of Sacramento. Instead, the Norteños gang was dispersed throughout Sacramento, from north to south, depending on the particular subsets of Norteños. (1RT 209.) The Sureños, another Hispanic criminal street gang, were the primary rival enemies of the Norteños. (1RT 210, 234.)

The current Hispanic criminal street gangs originated in the California prison system in the late 1960's and early 1970's. (1RT 234.) Back then, the Mexican Mafia was one of the strongest prison gangs, and it victimized Mexican prisoners who were not part of the gang. (2RT 234.) Non-Mexican Mafia prisoners formed their own gang, known as Nuestra Familia. (1RT 235.) The Mexican Mafia, or Sureños, used the color blue, and associated with the number 13 because "m" was the thirteenth letter of the alphabet. (2RT 235.) Nuestra Familia, or Norteños, used the color red, and associated with the number 14 because "n" was the fourteenth letter of the alphabet. (2RT 235.) Over time, the rivalry between the two Hispanic prison gangs extended beyond the prison system. (2T 235.) The dividing line between the Sureños and Norteños was geographic, approximately located at Bakersfield. (1RT 235.)

Sample interviewed Zachery in connection with the charged offenses. The interview was recorded, and the recording was played for the jury. (1RT 202; Exhibit 19.) Zachery claimed the Detroit Boulevard Norteños. (1RT 208; 1CT 141.) Sample considered items seized from Zachery's home, including a manila envelope. (1RT 217; Exhibit 7.) The envelope had Jordan Lujan's name on them, and did not bear Zachery's name. (1RT 237-237.) The envelope contained red writing, including "7600 DTB," "DB," "Norte," "fuck a Skrap," "D Bully," and "XIV." (1RT 217-219.) Sample concluded these were references to Detroit Boulevard Norteños, and that "skrap" was a derogatory name for Sureños that meant sewer rat or city dweller. (1RT 219-220.) Zachery had cloth belts with the letters "D" and "N," which Sample concluded stood for Detroit and Norte, or Norteño, respectively. (1RT 220; Exhibit 5A, 5C.)

Sample opined Zachery was a Norteños gang member. (1RT 216, 222-223.) Of 11 criteria used by local law enforcement to validate gang membership, Zachery met six of the criteria. (1RT 215-216.) Sample's opinion was based on Zachery's admission, his actions in the current offenses, possession of Norteños graffiti, his clothing and hairstyle, law enforcement reports validating Zachery as a member, and his prior contacts with law enforcement. (1RT 222-225.)

Sample opined that Emilio Chacon was a Norteños gang member. (1RT 225-226.) He also concluded Manzo was probably a Sureños member even though Manzo never admitted gang membership. (1RT 225-228.) Sample opined a shooting under the facts and circumstances of the charged shooting was gang related. (1RT 231-232.)

ARGUMENT

I

EVIDENCE OF A COLLABORATIVE OR ORGANIZATIONAL NEXUS IS REQUIRED BEFORE MULTIPLE SUBSETS OF THE NORTEÑOS CAN BE TREATED AS A WHOLE FOR THE PURPOSE OF DETERMINING WHETHER A GROUP CONSTITUTES A CRIMINAL STREET GANG WITHIN THE MEANING OF PENAL CODE SECTION 186.22, SUBDIVISION (F), OTHERWISE A VIOLATION OF STATE AND FEDERAL DUE PROCESS RESULTS.

A. OVERVIEW OF ARGUMENT.

The jury found Zachery committed the offenses for the benefit of a criminal street gang under section 186.22, subdivision (b)(1). That subdivision sets forth two prongs. The first relates to the nature of the crime, requiring that its commission be for the benefit of, at the direction of, or in association with a criminal street gang. The second prong relates to the defendant's state of mind, and requires the defendant have the specific intent to promote, further, or assist in criminal conduct by the gang.

(*People v. Albillar* (2010) 51 Cal.4th 47, 64-65; *People v. Gardeley* (1996) 14 Cal.4th 605, 623.) The prosecution presented evidence about the Norteños gang and six Norteños subsets. There was no substantial evidence connecting the various Norteños subsets *in any way* except by name - - either to each other, or to the larger gang. Therefore, the finding that Zachery committed the offenses for the benefit of, at the direction of, or in association with any criminal street gang” is not supported by substantial evidence that meets the due process requirements of the Fifth and Fourteenth Amendments. (*Jackson v. Virginia* (1979) 443 U.S. 307, 313-314 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

Section 186.22, subdivision (f) defines four requisite components for a “criminal street gang:” (1) “any ongoing organization, association, or group of three or more persons, whether formal or informal;” (2) “having as one of its primary activities the commission of one or more of the criminal [offenses identified in] subdivision (e);” (3) “having a common name or common identifying sign or symbol;” and (4) “whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

This Court’s task of analyzing the “thicket of statutory construction issues” in section 186.22 is complicated by the absence of any definition in

the STEP Act of gang membership even though there is a general definition of “criminal street gang.” (See *People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 319.) Law enforcement agencies and the courts were left to, and did, identify factors that inform the question of membership. *People v. Green* (1991) 227 Cal.App.3d 692, concluded “member” and “membership” were “terms of ordinary meaning and required no further definition.” (*Id.* at p. 699, overruled on other grounds in *People v. Castenada* (2000) 23 Cal.4th 743, 752.) As a result, there can be a broad application of the concept of membership, along with the broad application of the concept of a criminal street gang, such as the one the Court of Appeal below embraced.

This Court’s task also is complicated by the STEP Act’s expansion to cover more offenses, more groups, and more people. For example, when the STEP Act was first enacted, the offenses that could constitute a “pattern of criminal gang activity” numbered only seven. The intent was to make STEP Act prosecutions “very difficult to prove except in the most egregious cases.” (Cal. Senate Comm. on Judiciary Bill Analysis: AB 2013, Record No. 29069, 1987-1988 Reg. Sess. (1988) at 4.) The number of pattern gang offenses today has more than quadrupled. Section 186.22, subdivision (e), now contains 33 offenses.

The Court's task is further complicated by the STEP Act's disproportionate application to young males, who are typically Hispanic or Black, and who are typically from low income neighborhoods. The youths spend time in their neighborhoods, which often have high density gang activity, and with their families and friends, who may associate culturally with a particular gang. This was the situation in the instant case: 14-year old Zachery Prunty's companion Emilio Chacon followed his family's generational association with the Norteños. Emilio claimed the Franklin Boulevard Norteños subset. His mother bore Norteños tattoos, had prior association with the Norteños, and the Chacon home prominently displayed a photograph of Norteños gang members.

The prosecution presented evidence of six Norteños criminal street gang subsets. There was no evidence presented that explained a gang subset. In common parlance, "subset" is defined as "a set each of whose elements is an element of an inclusive set," or "division, portion." (<http://www.merriam-webster.com/dictionary/subset>.) The Merriam-Webster dictionary provides the following examples for the use of the word "subset:" "The set {1,2,3} is a subset of the set {1,2,3,4,5}," and, "Only a small subset of the patients in the study experienced these side effects." Both examples demonstrate that a set is both larger, *and different from*, any

subset. In the dictionary example the first set contains 4 and 5; whereas the subset 1, 2, and 3, does not. What this set and subset have in common is limited only to the numbers 1, 2, and 3. The numbers 4 and 5 are not connected to the subset, and do not define the subset. The second set consists of patients who participated in a study. Within that set, there is a subset of patients who did not experience side effects, and another, smaller subset of patients who had side effects. What the patients in the set have in common is participation in the study, but patients with side effects did not share the results of patients without side effects. Thus, subsets by their nature and definition are different from the larger set, and other subsets of the larger set.

The Norteños gang has multiple subsets, some of which are in constant rivalry with one another. Thus, the mere fact the full gang name of a subset may contain the word “Norteños” does not make the gangs one in the same, or even connected to one another. In an injunction case against Sureños, Justice Chin wrote, “the Sureño street gangs at issue in this case have fluid membership, no organizational structure, and no express purpose except perhaps to compete with members of rival Norteño gangs. The fact that many Sureño gang members commit crimes . . . does not establish that the gangs have crime as a universal purpose, primary activity, or condition

of membership. The Sureño gangs might have some subdivisions that are criminally inclined and others that are not. Obviously, courts cannot enjoin all Mexican-Americans because some Mexican-Americans contribute to the nuisance” (*People v. ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1130 (conc. & dis. opn. of Chin, J.)) The same is true here. The joint use of the name Norteños, and a shared rivalry with Sureños, does not make all Norteños subsets a whole for purposes of section 186.22, subdivision (f).

This Court should interpret “criminal street gangs” in a way that prevents punishing all Mexican-Americans who associate with some Hispanic gang, however loosely connected to another Hispanic gang using a similar name. To this end, *People v. Williams* (2008) 167 Cal.App.4th 983, 988, got it right by requiring a showing of shared, collaborative activities, or collective organizational structure among subset gangs. These subsets, *by their own terms*, define themselves as different gangs from one another. They do this typically by claiming a distinct neighborhood. The *Williams* court did what courts are supposed to do: scrutinize and interpret statutes to ensure they meet constitutional requirements. (*People v. Castenada, supra*, 23 Cal.4th at pp. 747-748 [whether the STEP Act met federal due process]; *Delaney v. Superior Court (Kopetman)* (1990) 50 Cal.3d 785, 805-806 [whether “reporters shield act” met federal constitutional right to fair trial].)

This is the correct approach, and avoids due process problems of either a lack of notice, or arbitrary enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 358 [103 S.Ct. 1855, 75 L.Ed.2d 903] [explaining void-for-vagueness doctrine requires penal statute to define the criminal offense so that (1) ordinary people can understand what conduct is prohibited, and (2) in a way that does not encourage arbitrary/discriminatory enforcement].)

People v. Williams, supra, 167 Cal.App.4th 983, correctly required that sufficient evidence of these four elements must be “something more than a shared ideology or philosophy, or a name.” (*Id.* at p. 988.) Substantial evidence under *Williams* required, “some sort of collaborative activities or collective organizational structure . . .” (*Ibid.*) What *Williams* required is no more than the statute itself. There must be a connection between the first two elements and the fourth element of section 186.22 subdivision (f). The “ongoing . . . group,” with a “primary purpose” of committing crimes, must be the same group “whose members engage in . . . a pattern of criminal gang activity.” (See also *People v. Sengpadychith, supra*, 26 Cal.4th at pp. 323-324, discussed *post.*) To interpret subdivision (f) otherwise would violate due process, and remove “personal guilt” altogether. (See *People v. Castenada* (2000) 23 Cal.4th 743, 748,

discussing *Scales v. United States* (1961) 367 U.S. 203, 224-225 [81 S.Ct. 146, 96 L.Ed.2d 782] [“In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . , that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.”].)

B. COURTS OF APPEAL’S DECISIONS ON CRIMINAL STREET GANG SUBSETS PREVIOUSLY HELD EXPLICITLY, OR IMPLICITLY, THAT A NEXUS BETWEEN SUBSET GANGS AND THE LARGER GANG MUST BE DEMONSTRATED BEFORE THE GANGS ARE DEEMED A SINGLE GANG FOR PURPOSES OF THE STEP ACT.

The Fifth and Third Appellate Districts have issued published decisions addressing the application of section 186.22 to criminal street gang subsets. The Fifth Appellate District expressly required a nexus between a subset gang and the larger gang. The Third Appellate District’s opinions implicitly required a nexus by relying on evidence showing a nexus to affirm against insufficiency of evidence challenges. These published opinions, in *Williams*, *In re Jose P.*, and *Ortega*, did not go far enough in clearly articulating the nexus required between subsets and sets.

Further, the holding in the previously published³ decision by the Third Appellate District in Zachery's case departed from these earlier decisions, and cannot be reconciled. Appellant will discuss each.

1. PEOPLE V. WILLIAMS (2008) 167 CAL.APP.4TH 983.

People v. Williams, supra, 167 Cal.App.4th 983, considered a situation similar to the instant case. At issue in *Williams* was the larger Peckerwoods gang, and a subset known as the Small Town Peckerwoods. The defendant conceded he was a member of the Small Town Peckerwoods gang. At trial, the gang expert opined the Small Town Peckerwoods were a subset of the larger Peckerwoods gang. (*Id.* at pp. 987-988.) The expert testified the Small Town Peckerwoods and the Peckerwoods shared the same ideology. Both believed in white pride or white supremacist ideology. (*Id.* at p. 988.) Both groups responded to “shot-callers” who received orders from a higher authority in prison. (*Ibid.*) The defendant had a “Peckerwood” tattoo. (*Ibid.*) His former co-defendant identified himself to law enforcement as a “Peckerwood,” and had a poem entitled “Peckerwood Soldiers” discussing Peckerwoods in prison. (*Ibid.*) The gang expert also testified:

³ The decision was previously published as *People v. Prunty* (2013) 214 Cal.App.4th 1110, and depublished by this Court's grant of review.

Peckerwoods are not typically organized like other criminal street gangs, however; for the most part, they have no constitution, and are a looser organization with a less well-defined rank structure. Peckerwood groups get together more for bragging than for strategizing, and one group of Peckerwoods will not necessarily know what another group is doing.

(*Ibid.*)

Thus, in *Williams*, unlike appellant's case, there was evidence of shared ideology and belief in white supremacist ideology, and evidence that both the set and the subset received and followed orders from a higher authority in prison. There was no equivalent evidence in appellant's case about the Norteños and the Norteños subsets. Even so, in *Williams*, the Fifth District Court of Appeal concluded the evidence was insufficient. The Court held, "In our view, something more than a shared ideology or philosophy, or a name that contains the same word, must be shown before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang. Instead, some sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization. There was no such showing here." (*People v. Williams, supra*, 167 Cal.App.4th at p. 988.)

2. IN RE JOSE P. (2003) 106 CAL.APP.4TH 458.

In re Jose P., *supra*, 106 Cal.App.4th 458, considered the challenge to the sufficiency of the evidence to show the minor defendant was associated with the Norteños. The case involved evidence about the Norteños and two Norteños subsets. The gang expert testified the Norteños street gang was an ongoing organization with around 600 members or associates in Salinas, and there were separate cliques or factions within the larger Norteños gang. (*Id.* at p. 463.) Those subgroups included the Santa Rita and Salinas East Market Street (SEM) gangs. (*Ibid.*) The expert testified Santa Rita and SEM “were loyal to each other and to the larger Norteño[s] street gang.” (*Ibid.*) The expert also testified that, “all Norteño[s] gangs follow the same bylaws as the Norteño[s] prison gangs.” (*Ibid.*) The minor in *In re Jose P.* also had been observed in the company of Norteños, SEM, and Santa Rita gang members. (*Id.* at p. 468.) The minor told law enforcement, “if his fellow gang members had asked him to do something, he would not be a chicken.” (*Ibid.*) The minor’s girlfriend wrote in her diary about the minor, making repeated references to the Norteños. Her family received a note from the Norteños trying to dissuade testimony against the minor. (*Ibid.*) The defendant in *In re Jose P.* had

spent time with members from other Norteños subsets and the larger Norteños gang on “several occasions.” (*Ibid.*)

The Third District Court of Appeal concluded the evidence was sufficient to show the minor’s offense was committed for the benefit of the Norteños. While the Court of Appeal likened the gang evidence in *In re Jose P.* to the gang evidence presented against Zachery, there was a huge difference. In appellant’s case, there was no evidence all Norteños gangs followed the same bylaws. There was no evidence the Norteños subsets were loyal to the larger Norteños street gang.

3. PEOPLE V. ORTEGA (2007) 145 CAL.APP.4TH 1344.

In *People v. Ortega, supra*, 145 Cal.App.4th 1344, the Third Appellate District concluded evidence was sufficient to prove the defendant belonged to the Norteños gang even though the Norteños had numerous subsets. *Ortega* did not involve specific evidence of different subsets as did appellant’s case below. The evidence was that, in Sacramento, the Norteños membership was in the thousands, and there were 20 to 25 Norteños subsets operating. In *Ortega*, the defendant argued, “there was insufficient evidence to sustain a finding of the existence of a criminal street gang because the gang to which the prosecution’s expert testified was the Norteño gang, and the term ‘Norteño’ [wa]s merely the geographical

identity of a number of local gangs with similar characteristics, but [wa]s not itself an entity.” (*Id.* at p. 1355.) The Third District Court of Appeal rejected the argument. The Court of Appeal concluded the prosecution’s gang expert testimony showed there were thousands of documented Norteño gang members in Sacramento, and 20 to 25 Norteños subsets. (*Id.* at p. 1356.) The evidence showed Norteños had commonly used symbols (e.g., the letter “N,” Roman numeral IV, “catorce” (Spanish for 14), and the color red). (*Ibid.*) Some of the Norteños’ primary activities included murder, assault, witness intimidation, car-jacking, robbery, extortion, and dope dealing. Two predicate offenses⁴ had been committed by Norteños.

The *Ortega* opinion rejected the “defendant’s assertion that the prosecution had to prove precisely which subset was involved in the present case.” (*People v. Ortega, supra*, 145 Cal.App.4th at p. 1357.) There was sufficient evidence in *Ortega* that the Norteños, as a larger group, were a criminal street gang. (*Ibid.*) Further, in *Ortega*, unlike *Zachery*’s case, there was additional, critical evidence presented by the prosecution. Specifically, “there was testimony that it was not uncommon for members

⁴*People v. Gardeley, supra*, 14 Cal.4th 605, 610, footnote 1, agreed with *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1383, footnote 13, that the term “predicate offenses” had become accepted usage to describe the crimes that establish a “pattern of criminal gang activity” within the meaning of section 186.22, subdivision (e).

of different gangs to work in concert to commit a crime.” (*Ibid.*) No similar evidence exists in this case.

The prosecution was required to prove all elements of the gang enhancement allegation beyond a reasonable doubt. Neither the trier of fact, nor the reviewing court, can assume the goals and activities of a gang subset are shared by the other subsets, or by the set as a whole. In this regard, the Court of Appeal analyzed the question of sufficiency of the evidence incorrectly as revealed by the Court’s comment, “No evidence indicated the goals and activities of a particular subset were not shared by the others.” (*People v. Ortega, supra*, 145 Cal.App.4th at p. 1357.) The proper analysis was to determine whether there was substantial evidence that the 20 to 25 subsets shared goals and activities. In *Ortega*, the matter was a distinction without a difference in the result, because there was evidence the different gangs worked together in concert and committed crimes together. (*Ibid.*) In contrast, there was no evidence of shared goals or joint criminal activity in Zachery’s case.

C. EXISTING AUTHORITY FROM THE COURTS OF APPEAL REQUIRES CLARIFICATION THAT A COLLABORATIVE OR ORGANIZATIONAL NEXUS MUST BE SHOWN BEFORE SUBSETS CAN BE TREATED AS A WHOLE WITH THE LARGER GANG.

1. THERE WAS INSUFFICIENT EVIDENCE OF A CRIMINAL STREET GANG UNDER PROPER APPLICATION OF EXISTING AUTHORITIES.

Preliminarily, appellant notes that the proper application of Court of Appeal authorities demonstrates there was insufficient evidence connecting any of the six Norteños subsets in this case to one another, or to the larger Norteños gang. In its previously published opinion in this case, the Third District Court of Appeal rejected appellant’s argument that the evidence was insufficient to support the gang enhancement allegation. (*People v. Prunty* (2013) 214 Cal.App.4th 1110.⁵) The Court of Appeal reached this outcome by committing two mistakes. First, the Court of Appeal concluded the evidence against Zachery “was remarkably similar to evidence offered for the same purpose in *In re Jose P.*” (*Id.* at p. 1115.) As demonstrated, *ante*, the evidence in *In re Jose P.* showed: (1) loyalty of all Norteños subsets to the larger Norteños group, (2) members of the different subsets and larger set spent time together, and (3) all Norteños subsets followed the

⁵ The underlying case in Court of Appeal, Appeal No. C071065, was previously reported as cited above. Appellant will refer to the pagination in the now depublished case for ease of reference, not as authority.

same Norteños bylaws. The only similarity between this case and *In re Jose P.* really was that both cases considered Norteños subsets. Thus, based on the sufficiency of the evidence present in the Third Appellate District's previous opinions in *In re Jose P.*, and *Ortega*, the evidence against appellant was insufficient.

Second, the Third Appellate District expressly disagreed with the Fifth Appellate District opinion in *People v. Williams, supra*, 167 Cal.App.4th 983, claiming *Williams* added "an element to the statute that the Legislature did not put there." (*People v. Prunty, supra*, 214 Cal.App.4th at p.1117.) Appellant disagrees. Section 186.22, subdivision (f), must be read as a whole. Subdivision (f) identifies four elements defining a "criminal street gang:" (1) "any ongoing organization, association, or group of three or more persons, whether formal or informal;" (2) "having as one of its primary activities the commission of one or more of the criminal [offenses identified in] subdivision (e); (3) "having a common name or common identifying sign or symbol;" and (4) "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." These four element must relate to one another. *Williams* did nothing more, or less, than acknowledge there must be a nexus

between elements one and two, and the fourth element. Absent the nexus, absurd and unconstitutional results would follow.

For example, one subset could commit the primary activities required by the second element, and another subset might not. This deficiency is not cured by purporting to transmute the legal question into a factual one.

(Contra, *People v. Prunty*, *supra*, 214 Cal.App.4th at p. 1118.) For example, a “subset” of the United States Army could be the 320th Military Police Battalion at Abu Ghraib, or Charlie Company of 1st Battalion, 20th Infantry Regiment, 11th Brigade, of the America Division at My Lai. The members of each subset engaged in a pattern of criminal activity. But that does not mean that another Army soldier from another unit altogether who commits a crime, is a member of that criminal street gang. (See also, *People v. Sengpadychith*, *supra*, 26 Cal.4th at pp. 323-324, discussed *post* [discussing similar analysis regarding crimes committed by police officers].)

It may be helpful to remove the analysis from the realm of criminal enterprise and focus on the organizational nexus among subsets of a larger set. Take for example members of the California State Bar. Active members in good standing share many things with one another: training, education, ideology and ethics, the requirement to pay dues and continue