No. C051707

IN THE COURT OF APPEAL OF CALIFORNIA

THIRD APPELLATE DISTRICT

_____

PEOPLE OF THE STATE OF CALIFORNIA,
Ex rel. David C. Henderson as the District Attorney,

Plaintiff and Respondent,

v.

BRODERICK BOYS,

Defendant;

_____

KEITH EDWARDS, et al.,
Movants and Appellants.

Appeal from the Superior Court of California,
County of Yolo, Case Number CV04-2085
Thomas E. Warriner, Judge

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Just two months ago, the United States Supreme Court addressed the due process question presented here: whether the state has met its obligation to provide notice and an opportunity to be heard when it knows that its method of service has not reached its intended recipient. *Jones v. Flowers*, 126 S. Ct. 1708 (2006). The Supreme Court's answer to that question was an emphatic "no." 126 Sup. Ct. at 1714. Where, as here, the means are readily at hand to provide notice that is more likely to reach the defendant, the State cannot simply shrug its shoulders and claim that it has met its obligations. *Id.* at 1716.

Here, the State "chose" to serve only Billy Wolfington. Respondent's Brief ("RB") at 2. Not even the State contends that Wolfington occupied a position of leadership or authority in the Broderick Boys. It simply assumed that he would spread the word. *Id.* Even after Wolfington *told* the police that he had no intention of appearing at the Order to Show Cause ("OSC") hearing (CT 564), it was Wolfington, and Wolfington alone, that the State again "chose" to serve when the trial court granted the OSC and ordered the State to serve the summons, complaint, and other relevant papers on "one or more" designated members of the Broderick Boys. CT 215-16, 218. "Deciding to take no further action is not what someone 'desirous of actually informing' [the Broderick Boys] would do; such a person would take further reasonable steps if any were

available." *Jones*, 126 Sup. Ct. at 1716; *accord Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Rather than addressing the Due Process Clause cases that are determinative here, the State devotes most of its brief to addressing a body of law that is not at issue: the "time honored equitable practice" of having an injunction bind unnamed parties after it has been properly issued. This appeal, however, does not challenge that "time honored" practice, which applies only after an injunction has been properly issued. It challenges the failure to provide the Broderick Boys with notice and an opportunity to be heard *before* the default judgment granting the permanent injunction was entered, thus rendering the default judgment void. Nothing in *People v. Acuna*, 14 Cal. 4th 1090 (1997), *Ross v. Superior Court*, 19 Cal. 3d 899 (1977), *Berger v. Superior Court*, 175 Cal. 719 (1917), or any of the other California cases cited by the State, addresses appellants' central contention: that the State's extraordinary and unprecedented decision to serve, and give notice to, only one individual in a case that sought a permanent injunction against 350 alleged gang members, all of whom were allegedly documented in the prosecutor's files and many of whom readily could have been given notice, is an egregious violation of the Due Process Clause. The Supreme Court's holdings in the long line of cases beginning with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and culminating in *Jones v. Flowers*, leave no doubt that the State has failed to meet its

obligation to use a method of service that is "reasonably calculated" to reach those who will be affected by the Court's judgment.

The State seeks to avoid the consequences of its failure to provide the Broderick Boys, and by extension those it intended to be bound by the injunction, with adequate notice and an opportunity to be heard by claiming that, *despite having served appellants with the injunction*, appellants lack standing to raise their due process claims. The California Supreme Court's decisions in *People v. Gonzalez*, 12 Cal. 4th 804 (1996) and *In re Berry*, 68 Cal. 2d 137 (1968) are dispositive on this issue. Non-parties to the litigation who are served with an injunction may raise their constitutional claims in the court that issued it by "seeking a judicial declaration as to its jurisdictional validity." *Berry*, 68 Cal. 2d at 148; *accord Gonzalez*, 12 Cal. 4th at 818.

The State nevertheless insists that appellants' only remedy is to bring an action for declaratory relief to determine whether they are members of the Broderick Boys, and hence subject to the injunction, unless they will concede the hotly contested question of membership—a fact that the State would otherwise have to prove by clear and convincing evidence. *People v. Englebrecht*, 88 Cal. App. 4th 1236, 1256 (2001). That position is irreconcilable with *Gonzalez* and *Berry*. Nor can it be reconciled with the United States Supreme Court's holdings in *Armstrong v. Manzo*, 380 U.S. 545 (1965) and *Peralta v. Heights Medical Center*, 485 U.S. 80 (1988).

Armstrong and *Peralta* leave no doubt that when a default judgment has been entered without providing the notice required by the Due Process Clause, the only remedy is to "wipe[] the slate clean" and begin the proceedings anew. The injured party may not be relegated to some lesser proceeding. *Armstrong*, 380 U.S. at 552.

ARGUMENT

I.

APPELLANTS HAVE STANDING TO BRING THEIR DUE PROCESS CHALLENGE

A. Those Served With An Injunction Have Standing To Challenge Its Validity In The Issuing Court, Even Though Not Named Parties To The Litigation.

The California Supreme Court's decisions in *People v. Gonzalez,* 12 Cal. 4th 804 and *In re Berry*, 68 Cal. 2d 137 leave no doubt that a person served with an injunction, even though not a named party in the litigation, has standing to challenge it either in the course of defending against a contempt proceeding or by going back to the issuing court and seeking to have it set aside. Indeed, *Gonzalez,* itself, grew out of a gang injunction proceeding. Writing for a unanimous court, Chief Justice Lucas noted:

> [U]nlike in jurisdictions that do not permit collateral challenges to injunctive orders, "[i]n this state a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial

> declaration as to its jurisdictional validity. On the other hand, he may . . . disobey the order and raise his jurisdictional contentions when he is sought to be punished for such disobedience."

People v. Gonzalez, 12 Cal. 4th at 818-19 (emphasis and internal citation omitted) (quoting *In re Berry*, 68 Cal. 2d at 148-49).[1]

One way to challenge the validity of an injunction issued in violation of the Due Process Clause is to move to have it set aside as void under Code of Civil Procedure section 473(d). In contending that only a named party in the action may bring such a motion, the State neither cites nor discusses *Skolsky v. Electronovision Prods., Inc.*, 254 Cal. App. 2d 246 (1967), nor any of the other similar cases cited in appellants' opening brief at pp. 23-25. Yet *Skolsky*, a case cited with approval by the California Supreme Court in another section 473 case, *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 885-86 (1978), directly addresses and rejects the State's argument here: "[T]he fact that Magna was not a party to the judgment does not, ipso facto, preclude Magna from moving to set aside the judgment if Magna has a sufficient interest in the subject." 254 Cal. App. 2d at 248. The State has cited no contrary authority.

In essence, the State asks this Court to treat appellants as if they were complete strangers to this action. Nowhere in its brief does the State

[1] An order issued in excess of the jurisdiction of the court includes, but is not limited to, an injunction issued where personal jurisdiction is lacking. *Gonzalez*, 12 Cal. 4th at 823.

acknowledge that it served the injunction on each of the appellants (CT 262, 266, 270, 274), let alone acknowledge that it instituted proceedings against one of them for allegedly violating the injunction's curfew provision when he picked up his wife at work one night. CT 270. Appellants' interest in having this injunction set aside could not be more direct or immediate.

B. Appellants May Not Be Relegated To Bringing A Declaratory Relief Action That Addresses Only The Issue Of Gang Membership.

By naming only the Broderick Boys as a defendant in these proceedings, *and then* purporting to effect service of process by serving only Wolfington, the State virtually assured that the injunction would be entered by default. Once issued, the State was free to serve the injunction on anyone that it contended was a member of the Broderick Boys, without being required to apply the definition of a gang member set forth in *People v. Englebrecht*, 88 Cal. App. 4th at 1261. It adds insult to injury for the State now to insist that in order to raise their jurisdictional argument, those served with the injunction must either acquiesce in the State's claim that they are Broderick Boys—a key element of the case that the State would otherwise have had to prove by clear and convincing evidence (*see Englebrecht*, 88 Cal. App. 4th at 1256)—or be relegated to bringing a declaratory relief action solely on the membership issue.

The State's position not only ignores the import of *Gonzalez, Berry*, and *Skolsky*, it is wrong for two additional reasons. First, having served appellants with the injunction, and having contended both in this Court and in the court below that appellants are, indeed, members of the Broderick Boys, the State is estopped from arguing that appellants must concede that the State is correct on this point in order to challenge the jurisdictional underpinnings of the injunction. *Mason v. U.S. Fidelity and Guaranty Co.*, 60 Cal. App. 2d 587, 591 (1943). The State may not simultaneously insist that appellants are bound by and potentially subject to contempt proceedings under the injunction, while denying that appellants are suffering any injury that entitles them to challenge the jurisdictional foundations of that injunction. *Id*.

Second, the State's position cannot be squared with the Supreme Court's holdings in *Armstrong v. Manzo*, 380 U.S. 545 (1965) and *Peralta v. Heights Medical Center*, 485 U.S. 80 (1988). As the Supreme Court held in *Armstrong*, when a judgment is entered without first affording the defendant notice and an opportunity to be heard, the due process violation can be cured only be setting aside the injunction and requiring the State to begin the proceedings anew. *Armstrong*, 380 U.S. at 552; *accord, Peralta v. Heights Medical Center*, 485 U.S. at 87 (holding that default judgment must be set aside even where defendant had no meritorious defense to the proceedings).

The State's contention here, that appellants must be satisfied with a declaratory relief action on the issue of their membership in the Broderick Boys, is much like the respondent's argument in *Armstrong*. There, Armstrong's ex-wife instituted proceedings to enable her new husband to adopt Armstrong's child. In order to avoid having to obtain Armstrong's consent, the ex-wife filed an affidavit in the juvenile court alleging that he had not met his child support obligations. Under Texas law, that was sufficient to empower the juvenile court to issue a consent to the adoption. Based on that consent, the adoption court granted the adoption.

"[A]lthough the Manzos well knew his precise whereabouts in Fort Worth, Texas[,]" all of these proceedings went forward with no notice to Armstrong until after the adoption was a *fait accompli*. *Armstrong*, 380 U.S. at 546-548. Armstrong moved to set aside the adoption decree and, as part of those proceedings, the lower court took evidence on the child support issue. It then denied the motion to set aside the decree.

The ex-wife argued that, although petitioner might have initially been denied his right to notice and an opportunity to be heard, the due process violation had been remedied since petitioner was ultimately permitted to litigate the child support issue. The Supreme Court disagreed:

> The trial court could have fully accorded [petitioner his right to be heard at a meaningful time and in a meaningful manner] only by granting [the] motion to set aside the decree and consider[ing] the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to

> the position he would have occupied had due process of law been accorded him in the first place.

Armstrong, 380 U.S. at 552. That is what must be done here as well.

The State has obtained an injunction without providing the notice that would have allowed an adversary hearing on the merits of the State's case. The resulting injunction directly and immediately affects the interests of appellants and every other person served with the injunction. The only adequate remedy is to wipe the slate clean and require the State to begin the proceedings anew.

II.

THE INJUNCTION MUST BE SET ASIDE AS VOID BECAUSE IT WAS ISSUED WITHOUT PROVIDING ADEQUATE NOTICE AND AN OPPORTUNITY TO BE HEARD

A. The Interests of Justice Require This Court To Reach The Due Process Question Presented By This Appeal.

The State argues that this Court should not reach the core due process issue raised by this appeal and should, instead, remand the case to the trial court if it resolves the standing issue in appellants' favor. A remand would be inappropriate on this record for at least three reasons.

First, there are no factual disputes to be resolved by the trial court. The State has conceded the essential facts that form the basis of appellants' due process claim and that factual basis is fully supported by the record on appeal. Thus the only issue to be decided is a pure question of law.

Second, the due process issue has been fully briefed both in the trial court and in this Court. There is thus no impediment to this Court deciding the issue.

Finally, and most importantly, this injunction will have been in effect for over 16 months at the time of the filing of this brief. It is likely that it will have been in effect for close to two years by the time this appeal is decided. The injunction was entered entirely by default. There was no adversary proceeding and no opportunity to contest the alleged factual basis for its issuance, the breadth of its probation-like restrictions, or its applicability to any of the over 80 persons who have now been served and are presumptively bound by its terms. That is because the State pursued a course of action calculated to lead to that result. The interests of justice require that the due process question be resolved now.

B. The Failure To Serve The Summons, Complaint, and Preliminary Injunction Papers On Anyone Other Than Wolfington Did Not Provide The Notice And An Opportunity To Be Heard Required By The Due Process Clause, Thus Rendering The Injunction Void.

The State concedes that it named only the Broderick Boys as a defendant and then chose to serve only a single alleged gang member, even after that individual had earlier told the State that he would not appear at the hearing on the OSC. The State attempts to justify pursuing this course of action by pointing to dictum in *People v. Acuna*, 14 Cal. 4th 1090 (1997),

that instead of naming individual gang members, it is permissible to name only the alleged gang. *Id.* at 1125.

The issue here, however, is not *who* was named as a party but the *adequacy of notice*.[2] Certainly nothing in *Acuna* authorizes what the State did here. In *Acuna*, service was such that 11 of the 38 named defendants appeared to oppose the preliminary injunction. *Id.* at 1101. The California Supreme Court emphasized that the injunction "did not issue until after *these* defendants had had their day in court, a procedure that assures 'a prompt and carefully circumscribed determination of the issue.'" *Acuna*, 14 Cal. 4th at 1114 (emphasis in original; citation omitted). The Court emphasized that the "only individuals subject to the trial court's interlocutory decree in this case, . . . are *named parties* to this action; their activities allegedly protected by the First Amendment have been and are being aggressively litigated." *Id.* (emphasis in original). It is the essence of appellants' claim here that they were denied their day in court as a direct

[2] Respondent's Brief makes reference to "the attached declarations of Anderson, McDougal, Reeves and Wold" (RB at 15) as showing that it is common practice to name only the gang as a defendant in a civil gang injunction lawsuit. Those declarations, however, are not attached to the Respondent's Brief, nor, as far as appellants can determine, are they part of the record. Be that as it may, as noted above, the due process violation here is not that the State named only the Broderick Boys as a defendant. The violation stems from the fact that the State chose to provide notice to the Broderick Boys by serving only a single individual, thus leading to the entry of a default injunction.

result of the procedures deliberately adopted by the State from the inception of the proceeding through final judgment.

The second string to the State's due process bow is the argument that there is no due process violation when a properly issued injunction runs against unnamed parties, such as the members of an unincorporated association. *See, e.g., Acuna*, 14 Cal. 4th at 1124; *Ross v. Superior Court*, 19 Cal. 3d 899 (1977); *Berger v. Superior Court*, 175 Cal. 719 (1917). *Acuna*, *Berger* and *Ross* indisputably stand for that proposition. But those cases answer the wrong question for purposes of this case. The question those cases do *not* address is the due process claim that is actually before this Court – whether due process is violated when the manner and extent of notice is not reasonably calculated to reach the named entity defendant because the plaintiff failed to serve a sufficient number of its members so that those whose interests would be most directly affected by the entry of the injunction would have the notice that is the essential prerequisite to an opportunity to be heard. That question is answered by *Mullane* and its progeny, including the Supreme Court's recent decision in *Jones v. Flowers*, 126 S. Ct.1708 (2006). The *Berger* principle comes into play only after the *Mullane* principle has been satisfied. *See, e.g., Greene v. Lindsey*, 456 U.S. 444, 455 (1982) (The obligation to provide adequate notice stands as a "constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to

present a defense despite a continuing interest in the resolution of the controversy.").

The *Jones* case has special relevance here. *Jones* involved the sale of petitioner's property based on his failure to pay his property taxes. In accordance with Arkansas law, the state sent petitioner two certified letters, two years apart, each of which informed him that his property was to be sold for back taxes. Both letters were returned to the state, unclaimed. The state then proceeded to sell the property.

When petitioner challenged the sale, the state took the position that the Arkansas service statute was valid on its face and that, having complied with its terms, the state was required to do no more. The Supreme Court disagreed. It held that because the state knew that petitioner had not received notice and because there were other available alternatives for providing that notice, the state had violated petitioner's right to due process. *Id.* at 1713. In reaching that conclusion, Justice Roberts drew the following analogy:

> If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried."

Id. at 1716.

When Officer Gore served Billy Wolfington with the OSC papers and Wolfington told Officer Gore that "he would not be appearing" (CT 564), that information was close to the equivalent of seeing the letters dropping down the storm drain. As the Court held in *Jones*, "the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice. That knowledge was one of the 'practicalities and peculiarities of the case,' . . . that the [*Mullane*] Court took into account in determining whether constitutional requirements were met." *Jones*, 126 S. Ct at 1716; *see also Covey v. Town of Somers*, 351 U.S. 141, 147 (1956) (holding notice of foreclosure by mailing, posting, and publication was inadequate when town officials knew that the property owner was incompetent and without a guardian's protection).

The State's actions here are all the more troubling given the ease with which it could have provided broader notice. As discussed in detail in appellants' opening brief, the ease with which the State could have effected broader service is illustrated by the alacrity with which the State served numerous individuals, including appellants, at their homes and workplaces once the injunction was issued. *See* Appellants Opening Brief ("AOB") at 2, 9. Appellants' opening brief also demonstrates that the course of action followed by the State here was wholly out of step with the practice followed by other courts and prosecutors in other gang injunction cases.

AOB at 42-44. Service on only a single individual is virtually unheard of. *Id*.

At bottom, the State's position boils down to the claim that because the Corporations Code permits service on "one or more" members of an incorporated association, when the State *twice* chose to serve Wolfington and no one else, it had done all that was required of it. It could safely assume that Wolfington would "spread the word" of the impending injunction, even though Wolfington's own earlier statement that he would not appear at the OSC hearing belied that assumption. RB 2. "[D]ue process requirements cannot be met by notice through hearsay or rumor. Some more direct nexus between service and notice is required." *Marchwinski v. Oliver Tyrone Corp.*, 461 F. Supp. 160, 166 (W.D. Pa. 1978).[3]

[3] Respondent's brief states that Wolfington "had been observed communicating with the gang immediately after being provided notice of the gang injunction lawsuit." RB at 2-3. The State's citation to the record on this point is to pages 218-19 of the Clerk's Transcript, which is the proof of service of the summons and complaint. That proof of service makes no reference to seeing Wolfington communicating with anyone. Appellants believe that the State is, instead, referring to the occasion on which Investigator Gore served Wolfington with notice of its intent to obtain an Order to Show Cause. It was during that encounter that "Wolfington told Investigator Gore that he would not be appearing." CT 564. Shortly thereafter, Investigator Gore and Officer Villanueva saw Wolfington talking to Douglas Allen, another alleged Broderick Boy. *Id.* Inexplicably, they did not serve Allen with notice of the OSC; nor did they serve alleged Broderick Boy Michael Hernandez, who was observed "several yards away." *See id.* (commenting on the presence of Allen and Hernandez but

As the Supreme Court concluded in *Jones*, "at the end of the day, [had the State] actually wanted to alert" those whose interests would be most directly affected by the entry of the injunction, it would have done more, "and there was more that reasonably could be done." 126 S. Ct. at 1721. The State's failure to do so renders the default judgment entering the permanent injunction in this case void.

CONCLUSION

For the foregoing reasons, the trial court's ruling on appellants' motion to set aside the injunction must be reversed and this Court must vacate that injunction on the ground that it is void, having been issued without providing adequate notice and an opportunity to be heard.

Dated: June __, 2006

Respectfully submitted,

ANN BRICK
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By _____
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giving no indication that either was served); *see also id*. at 835 (proof of service of OSC showing service only on Wolfington).

CERTIFICATE OF COUNSEL

The text of this brief consists of 4,052 words, including footnotes, as counted by the Microsoft Office Word 2003 word processing program used to generate this brief.

Dated: June __, 2006

Respectfully submitted,

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PROOF OF SERVICE

I, Leah Cerri, declare that I am employed in the City and County of San Francisco, State of California; I am over the age of 18 years and not a party to the within action or cause; my business address is 39 Drumm Street, San Francisco, California 94111.

On June 27, 2006, I served a copy of the attached

APPELLANTS' REPLY BRIEF

on each of the following by placing a true copy in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at San Francisco, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this proof of service was executed on June 27, 2006 at San Francisco, California.

_____
Leah Cerri