IN THE

SUPREME COURT OF VIRGINIA

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RICHMOND, VIRGINIA

RECORD NO. 090069

KELIS ALLEN HAMILTON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

# BRIEF FOR THE COMMONWEALTH

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## TABLE OF CONTENTS

Page

**STATEMENT OF THE CASE** ..... 1

**ASSIGNMENTS OF ERROR** ..... 2

**QUESTIONS PRESENTED** ..... 3

I. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH THAT GARRETT JOHNSTON WAS ASSAULTED BY A MOB? ..... 3

II. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH THAT DANIEL PAYNE WAS ASSAULTED BY A MOB? ..... 3

III. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH HAMILTON WAS A MEMBER OF THE MOB THAT ASSAULTED GARRETT JOHNSTON? ..... 3

IV. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH HAMILTON WAS A MEMBER OF THE MOB THAT ASSAULTED ZACHARY SMALL? ..... 3

V. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH HAMILTON WAS A MEMBER OF THE MOB THAT ASSAULTED ZACHARY SMALL? ..... 3

VI. WAS THE EVIDENCE SUFFICIENT TO ESTALISH HAMILTON PARTICIPATED IN, OR WAS AN ACTIVE MEMBER OF, A CRIMINAL STREET GANG? ..... 4

**STATEMENT OF FACTS** ..... **4**

**RELEVANT MATERIAL PROCEEDINGS BELOW** ..... **8**

Expert Testimony on Gangs ..... 8
Motions to Strike ..... 10

**ARGUMENT** ..... **12**

I. THE EVIDENCE ADDUCED AT TRIAL PROVED HAMILTON'S GUILT. ..... 12

A. Standard of Review ..... 12

B. The evidence was sufficient to prove that a mob formed with the intent to commit bodily injury and that, in furtherance of the mob's intent, the victims were injured. ..... 13

C. The evidence was sufficient to demonstrate Hamilton was a member of the mob. ..... 13

D. The evidence proved that Hamilton participated in a criminal street gang.. ..... 213

**CONCLUSION** ..... **26**

**CERTIFICATE OF TRANSMISSION AND SERVICE** ..... **27**

# TABLE OF AUTHORITIES

## CASES

Flower v. Commonwealth,
49 Va. App. 241, 639 S.E.2d 313 (2007) ..... 25

Gunn v. Commonwealth,
272 Va. 580, 637 S.E.2d 324 (2006) ..... 23

Harrell v. Commonwealth,
11 Va. App. 1, 396 S.E.2d 680 (1990) ..... 14, 15, 16, 17

Harward v. Commonwealth,
229 Va. 363, 330 S.E.2d 89 (1985) ..... 23

Hughes v. Commonwealth,
43 Va. App. 391, 598 S.E.2d 743, 748 (2004) ..... 13, 17

Leal v. Commonwealth,
265 Va. 142, 574 S.E.2d 285 (2003) ..... 20

McCain v. Commonwealth,
261 Va. 483, 545 S.E.2d 541 (2001) ..... 12

Payne v. Commonwealth,
277 Va. 531, 674 S.E.2d 835 (2009) ..... 12

Phelps v. Commonwealth,
49 Va. App. 265, 639 S.E.2d 689 (2007) ..... 24

Sheikh v. Commonwealth,
32 Va. App. 9, 526 S.E.2d 271 (2000) ..... 14, 19, 20

Vincent v. Commonwealth,
276 Va. 648, 668 S.E.2d 137 (2008) ..... 18

Waters v. Commonwealth,
43 Va. App. 636, 600 S.E.2d 918 (2004) ..... 21

Williams v. Commonwealth,
265 Va. 268, 576 S.E.2d 468 (2003) ..... 23

Wilson v. Commonwealth,
249 Va. 95, 101, 452 S.E.2d 669 (1995) ..... 18

## OTHER AUTHORITIES

Virginia Code § 18.2-46.1 ..... 21
Virginia Code § 18.2-42 ..... 1
Virginia Code § 18.2-26 ..... 2
Virginia Code § 18.2-38 ..... 13
Virginia Code § 18.2-51.1 ..... 2
Virginia Code § 46.2-817 ..... 2
Virginia Code § 18.2-46.2 ..... 21
Virginia Code §18.2-42 ..... 13
Virginia Code §18.2-46.2 ..... 22

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# BRIEF OF THE COMMONWEALTH

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## STATEMENT OF THE CASE

This appeal from the Circuit Court of Augusta County calls upon the Court to determine whether the evidence was sufficient to demonstrate Hamilton was a member of a mob which committed assault and battery and whether Hamilton participated in or was a member of a criminal street gang.

Following a jury trial, Hamilton was convicted of three counts of assault and battery by a mob in violation of Code § 18.2-42 and

participating in a street gang in violation of Code §§ 18.2-46.1 and 18.2-46.2. He was sentenced to a total of five years and twenty four months incarceration. (App. 9-11).

Hamilton appealed to the Court of Appeals of Virginia, which granted his appeal. Following briefing and oral argument, a unanimous panel affirmed his convictions in a unpublished opinion dated November 4, 2008. (App. 12-21).

## ASSIGNMENTS OF ERROR

**I. THE COURT OF APPEALS ERRED IN FINDING THAT THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT GARRETT JOHNSTON WAS ASSAULTED BY A MOB, AS DEFINED BY VA. CODE §18.2-38.**

**II. THE COURT OF APPEALS ERRED IN FINDING THAT THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT DANIEL PAYNE WAS ASSAULTED BY A MOB, AS DEFINED BY VA. CODE §18.2-38.**

**III. THE COURT OF APPEALS ERRED IN FINDING THAT THE EVIDENCE WAS SUFFICIENT TO PROVE THAT KELIS HAMILTON WAS A MEMBER OF THE MOB, ASSUMING THAT ONE EXISTED, THAT ASSUALTED GARRETT JOHNSTON.**

**IV. THE COURT OF APPEALS ERRED IN FINDING THAT THE EVIDENCE WAS SUFFICIENT TO PROVE THAT KELIS HAMILTON WAS A MEMBER OF THE MOB, ASSUMING THAT ONE EXISTED, THAT ASSUALTED DANIEL PAYNE.**

V. THE COURT OF APPEALS ERRED IN FINDING THAT THE EVIDENCE WAS SUFFICIENT TO PROVE THAT KELIS HAMILTON WAS A MEMBER OF THE MOB, ASSUMING ONE EXISTED, THAT ASSUALTED ZACHARY SMALL.

VI. THE COURT OF APPEALS ERRED IN FINDING THAT THE EVIDENCE WAS SUFFICIENT TO PROVE THAT KELIS HAMILTON ACTIVELY PARTICIPATED IN OR WAS A MEMBER OF A CRIMINAL STREET GANG.

## QUESTIONS PRESENTED

I. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH THAT GARRETT JOHNSTON WAS ASSAULTED BY A MOB?

II. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH THAT DANIEL PAYNE WAS ASSAULTED BY A MOB?

III. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH HAMILTON WAS A MEMBER OF THE MOB THAT ASSAULTED GARRETT JOHNSTON?

IV. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH HAMILTON WAS A MEMBER OF THE MOB THAT ASSAULTED DANIEL PAYNE?

V. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH HAMILTON WAS A MEMBER OF THE MOB THAT ASSAULTED ZACHARY SMALL?

## VI. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH HAMILTON PARTICIPATED IN, OR WAS AN ACTIVE MEMBER OF, A CRIMINAL STREET GANG?

### STATEMENT OF FACTS

On August 12, 2006, Garrett and Austin Johnston hosted an end-of-summer party on their farm in Augusta County. (App. 46). Roughly 400 people attended the party, which lasted from around 10 p.m. till 3 the next morning. (App. 47).

Among those attending were several members of the Nine Trey Bloods. (App. 48, 158). Garrett Johnston noticed the group because they were "all just chilling in one section of the tent" and "they all had red bandanas on." (App. 48). He asked, "Are you guys Bloods?" and they confirmed they were. (App. 48).

Christopher McLaughlin, another party guest, arrived wearing "a red baseball cap, a red Tommy Hilfiger pullover and a pair of jeans." (App. 83). Kelis Hamilton "first thing" approached McLaughlin, greeted him and said "You're a Blood and you don't even know it." Hamilton was also wearing a red shirt and red cap. (App. 83). McLaughlin denied that he was "gang-related" and walked away from Hamilton. (App. 84).

Around three in the morning, a "big fight blew up." (App. 48). Zachary Small, who was wearing a blue and white shirt, "kicked over a bottle" with his foot while walking through a crowd of people. (App. 61, 63). He "reached down to pick it up, and it felt empty" so he "just let it fall back over." (App. 61). When he stood up, "a guy in front" of him, Marty Scott, "just hauled off and hit [him] in [his] face." (App. 61, 171).

Small felt that his jaw "was probably broke." (App. 62). He told his assailant "Hold on, man. I...It ain't like that." Small heard someone respond, "You made it like that." (App. 62). That person hit Small, then another person hit him from the other side. (App. 62-63). Small heard someone say "We ain't wearing red for nothing." (App. 69). Then something hit him on the back of the head, knocking him unconscious. (App. 63).

Christopher McLaughlin was "walking the other direction" when Small was attacked. (App. 84). When he turned around, there were "like 12 kids over top of" Small. (App. 84). "All you could see was red." (App. 85). McLaughlin also heard someone say, "You don't think we're wearing red for nothing." (App. 85).

When Matthew Howdyshell noticed the attack, Small was "laying on the ground." (App. 91). Howdyshell saw Small on the ground, his shirt pulled up. (App. 91). Small got up, stumbled, and fell down again. (App. 91). At that point, someone began kicking Small and yelling "Dip Set." (App. 92).

A friend of Small's, Daniel Stouffer, did not see the fight, but saw Small lying unconscious on the ground. (App. 76). As he walked over to Small, Stouffer observed Kelis Hamilton kneeling over Small, his hands about midway down Small's back. (App. 76, 81). Stouffer picked Small up off the ground. (App. 76). Small regained consciousness later in a friend's car. (App. 64). Among the injuries Small sustained in the altercation were small burns on his back, from which he has a scar. (App. 64-65, 135-36, 278).

Garrett Johnston saw a scuffle erupt and heard the group of people who had identified themselves to him earlier as "Bloods" saying something like "Blood-at," as if "they were trying to mimic the sound of a gun going off." (App. 49). Johnston approached the group to find out "what had happened to make this - to make it so extreme." (App. 49). Marty Scott, who seemed to be "the leader," struck Johnston in the head with a tiki torch. (App. 49-50). Scott was

surrounded by a "ring of other guys" who were wearing red bandanas. (App. 50). Some of them had the bandanas over their faces, and some were wearing red t-shirts. (App. 96). It seemed to Johnston that they were trying to protect Scott. (App. 48).

Daniel Payne also approached the group to see "what was going on." (App. 56). He was also struck with a tiki torch, which "broke on the side of" his face. (App. 56). Because Payne was "upset" at being struck he "went after" the person who struck him. (App. 56-57). Jakari Hart had been firing a gun into the air, but Hart handed the gun to Marty Scott. (App. 105, 107, 109).

Hamilton asked Hart, then Scott, for the gun, but neither gave it to him. (App. 111-12). Someone said, "Kill that mother-fucker." (App. 107). Then someone put a gun to Payne's chest and pulled the trigger. (App. 69-70). Payne heard the gun "click" but it did not fire. (App. 58).

The altercation ended when someone alerted the group that "the po-po are on their way" and the group dispersed. (App. 101-102).

## RELEVANT MATERIAL PROCEEDINGS BELOW

*Expert Testimony on Gangs*

In its case-in-chief, the Commonwealth presented the testimony of two gang experts. In sum, their testimony yielded the following:

Marty Scott has several tattoos that identify him as a Second Lieutenant in the Nine Trey Blood gang. (App. 132-33). He also has a tattoo called a "Trey burn" or "dog paw." (App. 134). This tattoo is comprised of three circles burned onto the skin with a cigarette, a metal pipe, or "anything that would leave a brand on the skin." (App. 135-36). Each burn represents a rape, robbery or murder. (App. 134-35).

"Bloods gang members can elect to get all three dog paws either one at a time or he can elect to get them all three at a time, and he actually has to commit those crimes to get those burns put on his arm." (App. 135). In fact, gang tattoos have "to be earned." (App. 138). "You don't just get a tattoo by being a gang member. You have to take some time and you have to do some crimes. You have to fulfill your obligation to the gang." (App. 138).

Different sub-groups position the three burns in different configurations. The "Nine Trey" tend to pattern two of the burns in a

line on top and the third in between and below those two. (App. 136). The burns on Small's back appears to be the start of a Trey burn. (App. 136). Placing such a burn on the member of a rival gang is a sign of "great disrespect." (App. 137).

"Blood-at" or "Blat" is a "Blood war cry." (App. 148). When other Bloods hear this war cry, they are to "essentially converge...to find out what's going on, assist, provide whatever necessary items or assistance are required." (App. 149). "Dip set" is a reference to the Diplomats rap group. Several of the Diplomats are known to be members of the Nine Trey Blood Set. (App. 148).

The Bloods' color is red, while the Crips' color is blue. (App. 138). The lower a person wears a color on his body, the less respect is shown. Likewise, wearing a color high on the body connotes high respect for the gang. (App. 152-53). A hat, for instance, in one's gang color, shows great respect. (App. 153). Blood gang members often will wear red hats or caps. (App. 153). Some will wear a hat that also incorporates the letter "B." (App. 153). Boston Red Sox hats are popular because they are not only red, they have a "B" stamped or sewn in. (App. 153). Wearing blue in a Blood member's presence would be seen as a show of disrespect. (App. 157).

While one investigator noted that, based on his training and experience, he did not believe the defendant had been previously involved in gang activity, the events of the evening suggested to him that what was going on was an "initiation" for one or more individuals into the gang. (App. 157, 159).

*Motions to Strike*

At the close of the Commonwealth's evidence, Hamilton moved to strike the evidence as insufficient. Regarding the mob assault charges, Hamilton argued first that the evidence did not demonstrate that a mob had been formed with the specific intent to assault any of the victims. (App. 161-62). Second, he argued that the evidence did not demonstrate he was a member of "those mobs." While he conceded that Daniel Stouffer's testimony placed him at the assault on Small, he argued that no testimony placed him near the assaults on Garrett or Payne. (App. 162).

Regarding the charge of gang participation, Hamilton argued that the evidence that he wore red to a party and was seen with people wearing red at a party was not sufficient to establish that he was a member of, or actively participating in, a gang. (App. 163). Further, he argued that the evidence did not demonstrate that the

assaults were committed for the benefit of, or in association with, a gang. (App. 164).

The court denied the motion, finding that "after the whiskey bottle was knocked over, and after this started, and after the war cry "Blood-at," they all assembled, and from that point forward, there isn't any question of what they were there—what they were going to do." (App. 167). Further, the court found that "for the purposes of a motion to strike, the assaults have been proved." (App. 168).

After presenting evidence, Hamilton again moved to strike the evidence as insufficient, for the reasons he stated previously. (App. 203). The court again denied the motion. (App. 203).

At sentencing, Hamilton moved to set aside the verdict. (App. 17-18, 252). Regarding the conviction for gang participation, Hamilton argued that the statute requires both that the predicate criminal act be committed at the direction of, or for the benefit of, a gang, and also that the defendant must be a member of or active participant in the gang. (App. 253). The court denied the motion, finding that the case was "replete with evidence" which "if the jury accepted it, would have [Hamilton] right up to his neck with the

Bloods, and right up to his neck in everything that went on out there that night." (App. 254).

## ARGUMENT

### I. THE EVIDENCE ADDUCED AT TRIAL PROVED HAMILTON'S GUILT.

Hamilton contends the evidence was not sufficient as a matter of law to prove he participated in a criminal street gang or that he was a member of a mob which committed assault and battery. However, he is incorrect and his convictions should stand.

#### A. Standard of Review

When addressing a claim that the evidence was insufficient, "[t]he appellate court has the duty to examine the evidence that tends to support the conviction and uphold the conviction unless it is plainly wrong or without evidence to support it." McCain v. Commonwealth, 261 Va. 483, 492-93, 545 S.E.2d 541, 547 (2001). An appellate court is required to consider the evidence and all inferences fairly deducible therefrom in the light most favorable to the Commonwealth. Payne v. Commonwealth, 277 Va. 531, 543, 674 S.E.2d 835, 841 (2009).

**B. The evidence was sufficient to prove that a mob formed with the intent to commit bodily injury and that, in furtherance of the mob's intent, the victims were injured.**

Hamilton contends that the evidence did not establish that a mob formed with the intent to assault and batter Johnston and Payne. He further argues that, even if the evidence demonstrates that a mob formed, it was insufficient to prove that Hamilton was a member of the mob that assaulted Johnston, Payne, and Small. Governing rules of appellate review, when applied to the record in this case, demonstrate otherwise.

Hamilton was convicted of 3 counts of assault and battery by a mob. Virginia Code §18.2-42 provides in pertinent part:

> Any and every person composing a mob which shall commit a simple assault or battery shall be guilty of a Class 1 misdemeanor.

"Under Code §18.2-38, a 'mob' is defined as "[a]ny collection of people, assembled for the purpose and with the intention of committing an assault or a battery upon any person or an act of violence as defined in §19.2-297.1, without authority of law..." Hughes v. Commonwealth, 43 Va. App. 391, 399, 598 S.E.2d 743, 746-47 (2004). "The criteria which distinguishes individual behavior from 'mob' behavior is assembling for the specific purpose and with the specific

intent of committing an assault and battery upon any person." Harrell v. Commonwealth, 11 Va. App. 1, 7, 396 S.E.2d 680, 683 (1990). It is not necessary that the mob agree on the manner or nature of the act of violence to be perpetrated, as long as the intention of the assembled group is to commit some assault, battery or act of violence. Sheikh v. Commonwealth, 32 Va. App. 9, 13, 526 S.E.2d 271, 272 (2000).

Here, the members of the Bloods gave a unified response to the specific gang signal "Blood-at" and that Hamilton was among those acting in response. It is clear that Hamilton joined with members of the Bloods gang who assembled with the purpose and the intention to commit assault and battery. Hamilton's reliance on Harrell v. Commonwealth is misplaced because it demonstrates the correctness of the trier of fact's conclusion that a mob had formed within the meaning of § 18.2-41.

In Harrell, the defendant and certain other noisy party-goers were in small groups late at night in the street outside the home of Jerome Pattenaude. As Pattenaude asked the crowd to disperse, he saw someone in the group strike a neighbor, Brad Metheny, with a bicycle. Nevertheless, Pattenaude attempted to reason with the group, "and they appeared receptive to his request that they leave."

11 Va. App. at 4, 396 S.E.2d at 681. "One unidentified individual," though, then threatened to bludgeon Pattenaude, and, as Pattenaude attempted to go home, Harrell clubbed him in the abdomen, thereby rupturing his spleen. Id. at 5, 396 S.E.2d at 681.

On appeal, the Court of Appeals held that the Commonwealth had failed to prove that the group had acted as a "mob" at the time that Harrell injured Pattenaude. The Court stressed Pattenaude's testimony that when he initially spoke to the group, they had been calm and receptive to him. Id. at 10, 396 S.E.2d at 685. "His evidence belies any indication that the individuals had been transformed into a mob or of any mob intent on the part of the group moments before he was struck with a club by Harrell." Id. at 11, 396 S.E.2d at 685.

The discussion in Harrell of the kinds of group actions which may give rise to a "mob" pursuant to § 18.2-41 is highly instructive in the case at bar:

> The criterion which distinguishes individual behavior while part of a group from "mob" behavior is assembling for the specific purpose and with a specific intent of committing an assault and battery upon any person. That is not to say that the purpose for which the group initially came together must have been for the purpose of committing an assault and battery before a "mob" may be said to have "assembled." It is possible that individuals who are lawfully assembled may become members of a "mob" ***without great deliberation*** and for them to become part

> of a group which is moved or controlled by those impulsive and irrational forces which perpetuate mob violence....Whether a group of individuals has been so transformed into a "mob" depends upon the circumstances; no particular words or express agreements are required to effect a change in a group's purpose or intentions. ***Events or emotionally charged circumstances suddenly may focus individuals toward a common goal or purpose without an express or stated call to join forces....Furthermore, proof of what transpired after the original assemblage, when considered in relation to the purpose for which the persons were present, may establish that persons gathered for a lawful purpose "assembled" as a mob.***

11 Va. App. at 7-8, 10, 396 S.E.2d at 683, 685 (emphasis added).

Thus, Harrell confirms the conclusion of the factfinder that the defendants and others had formed a mob before Johnston and Payne were injured. Here, in contrast to Harrell, there was a concert of action from the moment that the offense of the knocked-over bottle spurred a violent response. This was not an instance of "one belligerent individual" complaining about having to leave or one fist being thrown "by one aggressive individual from among a boisterous crowd." Harrell, 11 Va. App. at 11, 396 S.E.2d at 685. Instead the "evidence here supports a finding that the appellants collectively banded together with the common purpose and intention of

committing an assault and battery." Hughes v. Commonwealth, 43 Va. App. 391, 402, 598 S.E.2d 743, 748 (2004).

The "emotionally charged circumstances" created then Small knocked over the bottle, coupled with the call of the Blood war cry, suddenly focused the gang "toward a common goal or purpose." Harrell, 11 Va. App. at 8, 396 S.E.2d at 683. Johnson and Payne were injured in the melee which broke out following these events. These two assaults are the subject of appeal. However, Small was assaulted by mob before these two. Small was beaten, kicked, and burned because he wore blue and kicked over a bottle among a group of red-wearing Bloods.

Statements such as "We're not wearing red for nothing" further support the jury's finding that the group was acting in concert and toward a common goal. It cannot be said that no rational fact-finder could have concluded, as the jury did, that a mob formed with the intent of committing assault and battery and that Payne and Garrett were injured as a result.

### C. The evidence was sufficient to demonstrate Hamilton was a member of the mob.

Hamilton contends that, even if a mob had formed, the evidence is insufficient to demonstrate he was a member of that mob.

The principles governing proof of a defendant's intent also strongly bear upon this case. "Intent in fact is the purpose formed in a person's mind and may be, and frequently is, shown by circumstances. It is a state of mind which may be shown by a person's conduct or by his statements." Vincent v. Commonwealth, 276 Va. 648, 653, 668 S.E.2d 137, 140 (2008). "The specific intent to commit [a crime] may be inferred from the conduct of the accused if such intent flows naturally from the conduct proven. Where the conduct of the accused under the circumstances involved points with reasonable certainty to a specific intent to commit [a crime], the intent element is established." Wilson v. Commonwealth, 249 Va. 95, 101, 452 S.E.2d 669, 673-74 (1995)(internal citations omitted).

In essence, the jury made a factual finding concerning the intent of the mob in assaulting the victims. The jury's factual finding that the gang acted as a mob in carrying out the assaults was a factual finding amply supported by the record. Manifestly, the trier of fact's conclusion that the gang who assembled at the end of the party did so intending to commit assault and battery upon the group at the party was a reasonable inference, which should not be reversed on appeal.

Sheikh v. Commonwealth, 32 Va. App. 9, 526 S.E.2d 271 (2000) is instructive in this case. In Sheikh, Metcalf and a friend beat up Cham Choup. Choup was a member of a gang in which Sheikh was a head member, and Sheikh called several other gang members to beat Metcalf and his friend in retaliation. The group assembled, planned an assault on Metcalf and his friend, and then left together to find their victims. Sheikh, 32 Va. App. at 11, 526 S.E.2d at 271-72. The group found Metcalf in a vehicle, pulled up beside the car, and Michael Choup, the victim's brother, pulled out a rifle and fired into the car. Metcalf ducked down and was unharmed, but one of the shots fatally struck the driver. Id. at 12, 526 S.E.2d at 272.

The Court of Appeals found the evidence proved that the purpose of Sheikh's meeting with other gang members was to assault Metcalf and that there is no dispute as to the intentions of the group. Id. at 13, 526 S.E.2d at 273. The Court found that the evidence proved beyond a reasonable doubt that Sheikh intended to physically assault Metcalf, joined a mob that shared the same intent, and sought out their victims knowing that a member of the group had a rifle. Id. at 14, 526 S.E.2d at 273. The Court held that the evidence was

sufficient to prove the defendant was a member of the mob and that he shared the intent of that mob which killed the driver. Id.

In this case, it is clear that from the time of his arrival at the party, Hamilton identified with the Bloods. He wore red and commented to one party goer who was also wearing red that he "was a Blood and didn't even know it." Hamilton did not assist Small; in fact, the evidence was sufficient for the jury to conclude that it was Hamilton who burned a circle onto Small's back.

At the assault of Payne, which occurred immediately after the assault of Johnston, Hamilton was trying to get the gun, which had been fired at the air and was then pointed at Payne's chest and fired. Given Hamilton's behavior toward Small and Clement Miller's testimony that he heard someone order the person with the gun to "kill that motherfucker" regarding Payne, it was reasonable for the jury to conclude that Hamilton wished to acquire the gun not to end the conflict but to continue participating in it.

As noted earlier, "every person composing a mob 'becomes criminally culpable even though the member may not have actively encouraged, aided, or countenanced the act.'" Leal v. Commonwealth, 265 Va. 142, 147, 574 S.E.2d 285, 288 (2003)

(citations omitted). Indeed, individual intent is not the guiding issue because "criminal accountability flows from being a member of the mob. The gravaman of the offense is the conduct of the mob and the intent of the mob." Waters v. Commonwealth, 43 Va. App. 636, 652, 600 S.E.2d 918, 953 (2004). Thus, Hamilton, as a participant in carrying out the gang's intent, was culpable and accountable for the actions of the mob.

### D. The evidence proved that Hamilton participated in a criminal street gang.

Hamilton argues that the evidence was insufficient to support his conviction for criminal street gang participation. His argument is without merit.

Virginia Code § 18.2-46.2 provides in pertinent part:

> Any person who actively participates in or is a member of a criminal street gang and who knowingly and willfully participates in any predicate criminal act committed for the benefit of, at the direction of, or in association with any criminal street gang shall be guilty of a Class 5 felony.

A criminal street gang is defined in § 18.2-46.1 as:

> any ongoing organization, association, or group of three or more persons, whether formal or informal, (i) which has as one of its primary objectives or activities the commission of one or more criminal activities; (ii) which has an identifiable name or identifying sign or symbol; and (iii) whose members individually or collectively have

> engaged in the commission of, attempt to commit, conspiracy to commit, or solicitation of two or more predicate criminal acts, at least one of which is an act of violence, provided such acts were not part of a common act or transaction.

The statute also defines predicate criminal act as:

> (i) an act of violence; (ii) any violation of § 18.2-42, 18.2-46.3, 18.2-51, 18.2-51.1, 18.2-52, 18.2-53, 18.2-53.1, 18.2-55, 18.2-56.1, 18.2-57, 18.2-57.2, 18.2-59, 18.2-83, 18.2-121, 18.2-127, 18.2-128, 18.2-137, 18.2-138, 18.2-146, 18.2-147, subsection H, H 1 or H 2 of § 18.2-248, § 18.2-248.01, 18.2-255, 18.2-255.2, 18.2-282.1, 18.2-286.1, 18.2-287.4, 18.2-308.1, or 18.2-356; (iii) a second or subsequent felony violation of subsection C of § 18.2-248 or of § 18.2-248.1; (iv) any violation of a local ordinance adopted pursuant to § 15.2-1812.2; or (v) any substantially similar offense under the laws of another state or territory of the United States, the District of Columbia, or the United States.

Hamilton argues that §18.2-46.2 contains three required elements: (1) a predicate act; (2) that the predicate act was committed for the benefit of, at the direction of, or in association with, a criminal street gang; and (3) the defendant must have been an active participant or member of a criminal street gang. (Def. Br. at 28). Hamilton reasons that it must be possible, then, to commit an act for the benefit of a street gang and yet not be a member or active participant in a street gang. He argues that "no evidence presented

at trial established that Hamilton was an active participant or a member of a gang." (Def. Br. at 30). This assertion is incorrect.

Although penal statutes are to be strictly construed against the Commonwealth, courts are nevertheless bound by the plain meaning of unambiguous statutory language and "may not assign a construction that amounts to holding that the General Assembly did not mean what it actually has stated." Gunn v. Commonwealth, 272 Va. 580, 587, 637 S.E.2d 324, 327 (2006) (citations omitted).

"The primary objective of statutory construction is to determine legislative intent. In determining that intent, the plain, obvious, and rational meaning of a statute is always preferred over a curious, narrow, or strained construction." Harward v. Commonwealth, 229 Va. 363, 365, 330 S.E.2d 89, 90 (1985) (citations omitted); see also Williams v. Commonwealth, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003) ("When the language of a statute is unambiguous, courts are bound by the plain meaning of that language and may not assign a construction that amounts to holding that the General Assembly did not mean what it actually has stated."). Moreover, "a statute should never be construed so that it leads to absurd results." Phelps v.

Commonwealth, 49 Va. App. 265, 268, 639 S.E.2d 689, 691 (2007) (citation omitted), affirmed, 275 Va. 139, 654 S.E.2d 926 (2008).

Giving the words in the statute their plain meaning, it is clear that Hamilton was participating in or a member of a gang within the meaning of the statute. The evidence demonstrated that Hamilton was participating in the gang when he arrived at the party. He identified to some degree as a Blood, dressing in red and commented to another party-goer that because he was wearing red, he "was a Blood" and didn't "even know it." The record demonstrates that on the night of the party, Hamilton acted as a Blood. He participated in the assaults which were committed at the direction of the Bloods. Further, a gang expert testified that the events of the evening appeared to be a gang initiation, and that the burns on Small's back were consistent with the beginning of a "Trey burn." This evidence supports the conclusion that Hamilton was participating actively in or a member of a criminal street gang.

To the extent Hamilton's argument suggests that the Commonwealth was required to prove his membership or active participation in a criminal street gang with evidence ***other than*** the evidence which supports finding he was acting for the benefit of, at

the direction of, or in association with, a criminal street gang, this proposition has no merit. See e.g. Flower v. Commonwealth, 49 Va. App. 241; 639 S.E.2d 313 (2007) (Flowers' willful act of failing to secure prompt medical attention for juveniles in her charge, despite her recognition that ingesting drugs can pose a substantial risk of serious injury or death, satisfies the requirement of a "willful act" in "reckless disregard for human life," as required by Code § 18.2-371.1(B)(1)).

Finally, as the record contains evidence which would support finding any of the three assaults were predicate acts within the meaning of the statute, there is no need to remand should this court reverse one, or even two, of those assaults. The jury found Hamilton guilty of three assaults, each of which constitutes a predicate act. Hamilton's conviction for criminal street gang participation can be affirmed by any of the three mob assault convictions.

## CONCLUSION

For the foregoing reasons, the judgment appealed from the Circuit Court of Augusta County and the Court of Appeals should be affirmed.

Respectfully submitted,

**COMMONWEALTH OF VIRGINIA**
Appellee herein.

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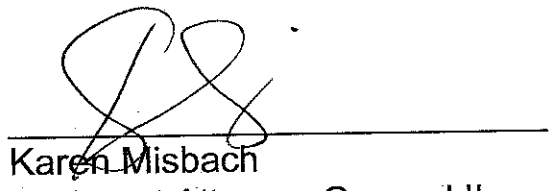
## CERTIFICATE OF TRANSMISSION AND SERVICE

On July 1, 2009, the required number of copies of this brief were hand-delivered to the Clerk of this Court and three copies were mailed to Tate C. Love, Black, Noland & Read, P.L.C., One Barristers Row, Post Office Box 1206, Staunton, Virginia, 24402-1296, counsel for the appellant.

The Commonwealth desires to present oral argument in this case.



Karen Misbach
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