IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. RONALD TRI TRAN, Appellant.	)	S165998 Orange County Case No. 01HF0193 **CAPITAL CASE**

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

Appeal From The Judgment Of The Superior Court
Of The State Of California, Orange County

Honorable William R. Froeberg, Judge

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XVI. BECAUSE RESPONDENT CANNOT PROVE THE OMISSION OF INSTRUCTIONS ON THE NEW ELEMENTS OF SECTION 186.22, SUBDIVISION (B), HARMLESS BEYOND A REASONABLE DOUBT, AND IN LIGHT OF RESPONDENT'S CONCESSION THAT PREJUDICIAL ERROR HAS OCCURRED, REVERSAL OF THE GANG ENHANCEMENT IS REQUIRED.

A. Respondent's Concession Requires Reversal of the Section 186.22 Gang Allegation.

In Argument XVI of his second supplemental opening brief ("2 Supp. AOB"), appellant Ron Tran contended that the true finding on the gang enhancement must be reversed in light of newly-enacted Assembly Bill ("AB") 333's amendments to section 186.22.[2] (2 Supp. AOB 21-44.) According to Mr. Tran, AB 333 changed the statutory elements for imposition of a gang enhancement under section 186.22, subdivision (b), and these changes apply retroactivity to Mr. Tran's case. (2 Supp. AOB 22-31.) Mr. Tran concluded that the state failed to prove the gang enhancement under amended section 186.22 because there was insufficient

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[1] In this Second Supplemental reply brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in Appellant's Opening Brief or previous Supplemental Opening Briefs. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the earlier briefs, does not constitute a concession, abandonment, or waiver of the point by appellant (*see People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another point by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

[2] All statutory citations are to the Penal Code unless otherwise specified.

evidence that (1) the alleged gang Viets for Life ("VFL") was "an ongoing, organized association or group;" (2) VFL members "collectively" engaged in a "pattern of criminal gang activity;" (3) the five predicate offenses used to establish the pattern of criminal gang activity "commonly benefited" the VFL and the benefit was "more than reputational;" and (4) Mr. Tran specifically intended to provide a "common benefit" to other VFL members which was "more than reputational." (2 Supp. AOB 31-43.)

Respondent agrees that AB 333's changes to section 186.22, subdivision (b), apply retroactively to Mr. Tran's case. (Second Supplemental Respondent's Brief ("2 Supp. RB") 9-13.) Respondent also agrees that the state did not prove (1) VFL members "collectively" engaged in a "pattern of criminal gang activity" and (2) the predicate offenses "commonly benefited" the VFL and the benefit was "more than reputational." (2 Supp. RB 13-16.) Accordingly, respondent concludes that "the gang enhancement should be vacated." (2 Supp. RB 16.)

Respondent does disagree with Mr. Tran on two points. First, respondent disagrees that there was insufficient evidence that VFL was "an ongoing, organized association or group." (2 Supp. RB 16-17.) Second, respondent disagrees that there was insufficient evidence that Mr. Tran specifically intended to provide a "common benefit" to other VFL members which was "more than reputational." (2 Supp. RB 17-19.) Appellant addresses these insufficiency arguments in the event (albeit unlikely) the Court disagrees with respondent's

concessions described above.

First, as noted in the second supplemental opening brief, in enacting the revised section 186.22 the Legislature did not define "organized," but identified some "basic organizational requirements" in its findings as "leadership, meetings, hierarchical decisionmaking, and a clear distinction between members and nonmembers." (2 Supp. AOB 35; Stats. 2021, ch. 699, § 2, para. (d)(8).) Findings are "given great weight" in determining legislative purpose. (*O.G. v. Superior Court* (2021) 11 Cal.5th 82, 91, quoting *Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal. 4th 1243, 1252; *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.3d 133.)

Respondent does not dispute the meaning of the term "organized" within the statute. Instead, respondent argues that "[b]ased on [purported gang expert Mark] Nye's testimony, the gang had an organizational structure and rules." (2 Supp. RB 17.) Respondent does not cite to any structure or rules, but instead, relies on (1) Nye's testimony that Hong Lay was a VFL leader who wrote his "homie" Noel Plata a letter, wanting the "favor" of "jumping out" another VFL member named Homeless out of the gang, which indicated to Nye that Plata had a "high status within the gang" (8 RT 1527, 1539) and (2) Plata wrote a letter to a deceased VFL member named Tam, expressing concern that VFL gang leader Anthony Johnson was going to have him "jumped out" of the gang for speaking to police (8 RT 1543-1544). According to respondent, "Nye's testimony established that VFL was an organized group." (2 Supp. RB 17.) If the argument is that the

existence of leaders inexorably leads to the conclusion that VFL was an "organized" group, respondent is wrong.

Without foundation, Nye testified that Lay and Johnson were leaders within the VFL. (8 RT 1538-1529, 1541.) Even if Nye was correct that the two were leaders, the presence of leaders in a group does not mean the group is an organization within the meaning of section 186.22. A group of neighborhood friends could have natural leaders without the existence of a organization. Nye certainly did not testify that Lay and Johnson were leaders in the sense that they were managers above others in a group with hierarchical decisionmaking authority. In fact, Nye testified that Lay asked his "homie" Plata for "a favor;" there was nothing about the request that indicated a command from an authority within a hierarchy. (8 RT 1539.) Moreover, Nye testified that Johnson was a leader in the group simply because he grew up with "some of these kids, some of the main members of V.F.L.," and was "big in stature," a "no-nonsense kind of guy," "extremely violent" and "pretty intelligent." (8 RT 1528-1528.) This is not evidence of organizational leadership; at most, it is leadership within a social group of "kids" who grew up together.

Likewise, there was no testimony about an organizational structure and rules within the VFL. (*Compare People v. Vasquez* (2022) 74 Cal.App.5th 1021, 1028 [evidence of Mexican Mafia gang structure and hierarchy, including identification of upper and lower management, meetings schedule and taxation

rules]; *People v. Kopp* (2019) 38 Cal.App.5th 47, 71 [evidence of Mexican Mafia gang structure and hierarchy, including identification of upper management and its ability to order executions and taxation]; *People ex rel. Reisig v. Broderick Boys* (2007) 149 Cal. App. 4th 1506, 1513 [evidence of Broderick Boys gang hierarchy, including description of "foot soldiers," "hommies," "veteranos" and "shot callers," and membership rules]; *United States v. Collazo* (9th Cir. 2021) 984 F.3d 1308, 1316 [evidence of Mexican Mafia hierarchical structure and roles at each level]; *United States v. Shryock* (9th Cir. 2003) 342 F.3d 948, 961 [evidence of specific rules to become a Mexican Mafia member, membership codes of conduct, and regular meetings].) The Legislature passed AB 333 because it was concerned that "social networks of residents . . . are often mischaracterized as gangs despite their lack of basic organizational requirements . . ." and section 186.22 punished individuals based on "their cultural identity, who they know, and where they live." (Stats. 2021, ch. 699, § 2, para. (a).) Respondent's argument that evidence of leaders within a group of individuals -- without evidence of any hierarchical decisionmaking, rules of membership, codes of conduct, or other indicia of an organized structure -- is sufficient to distinguish a social network from a criminal "ongoing, organized association or group" within the meaning of amended section 186.22 must fail.

Respondent's second argument fares no better. Respondent disagrees that there was insufficient evidence that Mr. Tran specifically intended to provide a

"common benefit" to other VFL gang members which was "more than reputational." (2 Supp. RB 17-19.) Respondent concedes that Nye "explained that such violent crimes [robberies, burglaries and murders] enhance the reputation of the gang within the community." (2 Supp. RB 18; *see* 8 RT 1558.) Respondent contends, however, that "the prosecutor did not place any emphasis on this when discussing the gang enhancement." (2 Supp. RB 18, citing 8 RT 1697-1699, 1740.) In fact, the prosecutor specifically argued that the jury should find that there was a "benefit" to the gang because "[y]ou heard Sergeant Nye talk about it." (8 RT 1740.)

Respondent also argues that although Nye testified about the reputational benefit, he also testified that "proceeds from the crimes committed by gang members support the gang because the proceeds are shared with the people who are involved in the crime as well as others back at the crash pad." (2 Supp. RB 17; *see* 8 RT 1557-1558.) Nye actually testified that robberies and burglaries benefit a gang because the proceeds "are shared with the people who are involved in the crime as well with others back at the crash pad" to pay for the gang's living expenses. (8 RT 1557, 1559-1560.) The state's allegation, however, was that the *murder* was committed for the "common benefit" of the VFL. (1 CT 759.) Nye did not actually testify that gang members commit murder to provide a "common benefit" of financial gain to other gang members.

Respondent also argues that -- despite "no specific evidence that the

proceeds were shared with other gang members" -- it can be "reasonably inferred that they [Mr. Tran and Plata] did so because that is how the gang operated." (2 Supp. RB 18.) The state's own expert Nye recognized, however, that gang members could also commit crimes to share the proceeds with each other and thus, benefit only each other (8 RT 1559); this is not a "common benefit" to the VFL gang.

Respondent also argues that "[i]t does not appear that Plata and Tran went off on a lark and committed the crime without the gang's knowledge; according to prior statements by Linda Le, on the night of the murder, Plata was cleaning a knife and talking about the incident with Terry Tackett, a fellow gang member." (2 Supp. RB 18; *see* 6 RT 1183-1184.) There was no evidence, however, that Plata shared the robbery's proceeds with Tackett in tribute to VFL. Moreover, respondent does not explain how evidence that Plata talked about the incident with a fellow gang member after the fact means that Mr. Tran committed the murder with the specific intent to financially benefit the VFL.

Finally, respondent argues that AB 333 "provides as an example of a common benefit that is more than reputational, 'silencing of a potential current or previous witness or informant,'" and "the evidence suggested that Linda recognized Tran because Joann Nguyen, Tran's girlfriend and Linda's friend, had previously shown her [Linda] a picture of him [Tran]" and "[a]fter the murder, Tran told Joann that Linda was killed because he did not want her to identify

him." (2 Supp. RB 18; *see* 5 RT 1011, 1047.) Mr. Tran agrees that this testimony was substantial evidence that the murder was committed to benefit himself, i.e. to ensure that Linda did not identify him. This testimony, however, was not substantial evidence that Mr. Tran specifically intended the murder to provide a "common benefit" to the VFL.

Respondent argues that the "common benefit" of killing Linda was that Linda's identification of Tran would lead to the identification of Plata and would have a negative impact on the gang." (2 Supp. RB 19.) This theory was never posited at trial -- by the parties or the evidence. There was nothing to suggest that the identification of Mr. Tran would lead to the identification of Plata. Nor did Nye testify that identification of VFL members in crimes had a negative impact on the VFL. If anything, based on Nye's own testimony that crimes enhanced reputation, the identification of VFL members committing crimes beneficially increased VFL's reputation in the community for violence. (8 RT 1557-1558.)

In any event, respondent's disagreements about the insufficiency of evidence that VFL was "an ongoing, organized association or group" and that Mr. Tran specifically intended to provide a "common benefit" to other VFL members which was "more than reputational" are irrelevant. The fact remains that, even if the evidence supported respondent's alternate theories, Nye still testified that one of the theories was a reputational benefit. By requiring proof for a gang enhancement that the benefit to the gang was more than reputational, AB 333

adds a new element to the section 186.22, subdivision (b), enhancement. When jury instructions are deficient for omitting an element of an offense, the defendant's federal constitutional rights are implicated, and this Court must review for harmless error under the strict standard of *Chapman v. California* (1967) 386 U.S. 18. (*People v. Flood* (1998) 18 Cal.4th 470, 502–503; *People v. Lewis* (2006) 139 Cal.App.4th 874, 884.) Respondent concedes that this standard applies here, where the new element to the offense is introduced through the retroactive application of a new law. (2 Supp. RB 14.) Under the *Chapman* standard, reversal is required unless "it appears beyond a reasonable doubt that the error did not contribute to th[e] jury's verdict." (*People v. Flood*, *supra*, 18 Cal.4th at p. 504.)

In order to prove harmless error under the *Chapman* standard, it is not enough to show that substantial or strong evidence existed to support a conviction under the correct instructions. (*People v. Sek* (2022) 74 Cal.App.5th 657, 668.) "[T]he question . . . is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Courts have found harmless error under this standard where the missing element from an instruction was uncontested or proved as a matter of law. For example, in *People v. Merritt* (2017) 2 Cal.5th 819, the trial court omitted the elements of robbery from the jury instructions, but the court held that the error was harmless because the only contested issue at trial was the identity of the defendant. (*Id.* at p. 832.) "Defendant knew what the elements of robbery were, and he had the opportunity to present any evidence he wished on the subject. '[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.'" (*Ibid.*, quoting *Neder v. United States* (1999) 527 U.S. 1, 17.)

Similarly, in *People v. Vinson* (2011) 193 Cal.App.4th 1190, the court affirmed the defendant's conviction of petty theft with a prior theft conviction even though the law had changed after trial to require the proof of three prior convictions, rather than one. (*Id.* at p. 1200.) The defendant conceded that he had suffered two prior convictions, and his attorney stipulated at trial to a third conviction. Thus, there was no dispute as to whether the new element in the law was proved. (*Ibid.*)

Here, in contrast, the basis of the jury's verdict on the section 186.22, subdivision (b), allegation is not clear. Nye testified about several ways in which

crimes could benefit a criminal street gang, but one of these was reputational. When asked how hypothetical crimes similar to the ones Mr. Tran and Plata committed "benefits the entire gang," Nye testified, "[N]ot only are proceeds shared from robberies, but also any benefit, any enhanced benefit through respect in the community, committing violent crimes within the community enhances their reputation if it's known that they've committed these violent crimes" and "[a]ny monies that they get, large amounts of money, jewelry, things of that nature that the gang nets again enhances their reputation as a gang within the community, and everybody in that gang's reputation is enhanced as the gang reputation is enhanced." (8 RT 1558. *See also* 8 RT 1559-1560 ["the gang's reputation may be enhanced by the crime you're committing for other members of that gang"].) In closing argument, the prosecutor told the jury it could rely on Nye's testimony to find the gang enhancement true under the "benefit" theory; the prosecutor did not rely on any one theory of benefit. (8 RT 1697-1699, 1740.) Thus, even if respondent is correct, and there was substantial evidence of benefits to VFL that went beyond reputational, this Court cannot rule out the possibility that the jury relied on reputational benefit to the gang as its basis for finding the enhancement true. (*See People v. Delgado* (2022) 74 Cal.App.5th 1067, 1090 ["We cannot conclude beyond a reasonable doubt that the jury imposed the gang enhancements on a now legally valid ground under Assembly Bill 333's amendments"].)

Respondent similarly argues that there was also "compelling evidence that

the charged crimes were committed 'in association with the VFL.'" (2 Supp. RB 19, n. 7.) According to respondent, "Plata and Tran relied on their common gang membership and the apparatus of the gang in committing the charged crimes." (2 Supp. RB 19, n.7.) Respondent does not cite to any evidence to support the theory that the defendants relied on a VFL membership or the "apparatus of the gang" (whatever that means) to commit any crime. But perhaps more important, the theory of "association" is simply another theory upon which the jury *could* have rested its verdict. (*See* 4 CT 1050 [CALCRIM 1401].) Respondent does not -- indeed cannot -- prove beyond a reasonable doubt that the jury actually *did* rest its verdict on that theory. Thus, for all these reasons, the instructional error on this question was not harmless under the *Chapman* standard.

B. Penal Code Section 1109 Operates Retroactively and Requires Reversal of Mr. Tran's Convictions.

Respondent raises section 1109, newly added under AB 333, and argues that although AB 333 applies retroactively, "section 1109, on its own, is prospective in nature." (2 Supp. RB 13, n. 3.) After the filing of both appellant's second supplemental opening brief and respondent's second supplemental brief, two lower court decisions have been issued which hold otherwise. In reply to respondent's argument, Mr. Tran contends, based on the recent decisions in *People v. Burgos* (2022) 77 Cal.App.5th 550 and *People v. Ramos* (2022) __Cal.App.5th __ [2022 Cal.App. LEXIS 355], that section 1109, the bifurcation provision enacted as part of AB 333, applies retroactively to his case. For the

reasons set forth below, Mr. Tran's convictions must be reversed and the case remanded for a new bifurcated trial.

1. Mr. Tran was not provided the bifurcated trial that section 1109 requires.

Penal Code section 1109, subdivision (a), enacted as part of AB 333, the STEP Forward Act, provides:

> If requested by the defense, a case in which a gang enhancement is charged under subdivision (b) or (d) of Section 186.22 shall be tried in separate phases as follows:
>
> (1) The question of the defendant's guilt of the underlying offense shall be first determined.
>
> (2) If the defendant is found guilty of the underlying offense and there is an allegation of an enhancement under subdivision (b) or (d) of Section 186.22, there shall be further proceedings to the trier of fact on the question of the truth of the enhancement. Allegations that the underlying offense was committed for the benefit of, at the direction of, or in association with, a criminal street gang and that the underlying offense was committed with the specific intent to promote, further, or assist in criminal conduct by gang members shall be proved by direct or circumstantial evidence.

Mr. Tran's case is one in which a gang enhancements was charged under Penal Code section 186.22, subdivision (b). The gang enhancement was tried together with the underlying offense.

2. Penal Code Section 1109 Applies Retroactively to Mr. Tran's Case.

The *Estrada* rule is set forth in Mr. Tran's second supplemental opening brief. (2 Supp. AOB 24-25; *see In re Estrada* (1965) 63 Cal.2d 740.) Briefly, it provides for an exception to the presumption that new statutes are intended to operate prospectively: the presumption does not apply to statutes changing the law to benefit criminal defendants. (*See Tapia v. Superior Court* (1991) 53 Cal.3d 282, 301.) In such cases, criminal defendants whose appeals are not final on direct appeal are entitled to the benefit of the new law. (*See Burgos, supra,* 77 Cal.App.5th at p. 568; *Ramos, supra,* 2022 Cal.App. LEXIS 355 at *17.)

In *Burgos*, *supra*, the appellate court held that section 1109 applies retroactively under *Estrada*, noting that this Court has recently held that "a new statute may apply retroactively even if it concerns purely procedural changes that do not directly reduce the punishment for a crime. [Citations.]" (*Burgos, supra,* 77 Cal.App.5th at p. 565, citing *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303-304 [Proposition 57, which prohibits prosecutors from charging juveniles directly in adult court, is retroactive].)

Burgos discussed *Lara* and *People v. Frahs* (2020) 9 Cal.5th 618, which held that a new law creating a pretrial diversion program for certain defendants with mental health disorders was retroactive under *Estrada*, noting that *Frahs*

"reiterated the principle that a statute that provides a 'possible benefit to a class of criminal defendants' should be applied retroactively in the absence of an express savings clause limiting the statute to prospective-only application." (*Burgos, supra,* 77 Cal.App.5th at p. 565, quoting *Frahs, supra,* 9 Cal.5th at 631.) *Burgos* noted that the language of Penal Code section 1109 identifies a distinct class of defendants -- those charged with gang enhancements under section 186.22(b) or (d). (*Burgos, supra,* 77 Cal.App.5th at p. 565.) *Burgos* also noted that the legislative findings in AB 333 show that the Legislature intended to ameliorate the disparate punishment of people of color -- "who overwhelmingly comprise the class of defendants charged with gang enhancements." (*Ibid.*)

Burgos further pointed to legislative findings accompanying AB 333, which show that bifurcation of gang enhancements at trial is intended to ameliorate the prejudicial impact of trying enhancements together with the offense. (*Burgos, supra,* 77 Cal.App.5th at p. 567; *see* AB 333, §§ 2(d)(6), 2(e), 2(f).) "In other words," *Burgos* explained, "one of the ameliorative effects of bifurcation is that some defendants will actually be *acquitted* of the underlying offense absent the prejudicial impact of gang evidence. This increased possibility of acquittal -- which necessarily reduces possible punishment -- is sufficient to trigger retroactivity under the *Estrada* rule." (*Burgos, supra,* 77 Cal.App.5th at p. 567.)

Burgos rejected the argument that different parts of AB 333 should be

treated differently under *Estrada,* noting that "[t]he Legislature could have added an express savings clause carving out a section of the bill as prospective-only, but there is no such clause, and no indication of any such intent." (*Burgos, supra,* 77 Cal.App.5th at p. 567.) "[T]he Legislature is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted . . . . [T]o rebut *Estrada*'s inference of retroactivity concerning ameliorative statutes, the Legislature must demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it." (*Ibid.,* quoting *Frahs*, *supra,* 9 Cal.5th at 634-635; internal quotation marks omitted).) "This admonition carries even greater weight here[,]" the *Burgos* court explained, because it "would be especially incongruous for the Legislature to make one isolated section of a bill prospective-only without stating so expressly, expecting instead that a court would somehow discern this anomaly." (*Ibid.*)

The *Ramos* court reached the same conclusion: Because section 1109 is an ameliorative statute intended to benefit a class of criminal defendants by reducing the prejudicial impact of gang evidence and to address wrongful convictions and mitigate punishment resulting from irrelevant and prejudicial gang evidence, "the logic of *Estrada* applies." (*Ramos, supra,* 2022 Cal.App. LEXIS 355 at *23.) *Ramos* further rejected the Attorney General's argument, also raised by respondent here (2 Supp. RB 13, N. 3), based on *People v. Cervantes* (2020) 55

Cal.App.5th 927, 940, and *People v. Sandee* (2017) 15 Cal.App.5th 294, that section 1109 merely governs procedure and does not alter the substantive requirements of gang allegations or mitigate punishment. (*See Ramos, supra,* 2022 Cal.App. LEXIS 355 at **24-28.)

Mr. Tran urges this Court to follow the well-reasoned decisions in *Burgos* and *Ramos* and hold that AB 333 in its entirety, including section 1109, applies retroactively. (*But see People v. Perez* (2022) __Cal.App.5th __ [2022 Cal. App. LEXIS 374] [section 1109 is not retroactive].) Because Mr. Tran's convictions were not final on direct appeal when AB 333 went into effect, he is entitled to the benefit of section 1109.

3. The error is structural; in the alternative, Mr. Tran was prejudiced by the court's failure to bifurcate.

Burgos concluded that failure to comply with Evidence Code section 1109's bifurcation provision "likely constitutes 'structural error' because it 'def[ies] analysis by harmless-error standards.'" (*Burgos, supra,* 77 Cal.App.5th at p. 568, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 280.) "[T]he defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" (*Weaver v. Massachusetts* (2017) __ U.S. __, 137 S.Ct. 1899, 1907.) Bifurcation "necessarily affects the framework within which the trial proceeds." (*Burgos,*

supra, 77 Cal.App.5th at p. 568 [citations and internal quotation marks omitted]; *but see People v. E.H.* (2022) 75 Cal.App.5th 467, 480 [holding that even if section 1109 is retroactive, the failure to bifurcate was not prejudicial under *People v. Watson* (1956) 46 Cal.2d 818]; *Ramos, supra,* 2022 WL 1233755, at *13 [applying *Watson* to failure to bifurcate].) Indeed, bifurcation creates the framework within which the trial proceeds. This Court should reverse Mr. Tran's convictions and remand for a new, bifurcated trial.

Even if harmless error analysis were applied, reversal is required; Mr. Tran suffered prejudice under either the *Chapman v. California, supra*, 386 U.S. 18, or *People v. Watson*, *supra,* 46 Cal.2d 818, standards. Gang evidence is highly prejudicial, as the Legislative findings accompanying AB 333 make clear. (AB 333, § 2(d)(6) ["Gang enhancement evidence can be unreliable and prejudicial to a jury because it is lumped into evidence of the underlying charges which further perpetuates unfair prejudice in juries and convictions of innocent people."]; *id.* at § 2(e) ["California courts have long recognized how prejudicial gang evidence is," citing *People v. Williams* (1997) 16 Cal.4th 153, 193, and studies suggest that it may lead to wrongful convictions]; see *Williams, supra,* 16 Cal.4th at 193 ["even where gang membership is relevant . . . it may have a highly inflammatory impact on the jury"].) Indeed, it can render a trial fundamentally unfair, in violation of the federal constitutional right to due process. (See *People v. Albarran* (2007)

149 Cal.App.4th 214, 231-232; U.S. Const., 14th Amend.)

That is what happened here. Had the gang allegation been tried separately, the gang evidence in this case would have been excluded from the trial on the underlying offense and special circumstance allegations because only evidence that went to the question of Mr. Tran's guilt or innocence would be admissible. (*See People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 ["In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]"]; *People v. Memory* (2010) 182 Cal.App.4th 835, 859 ["'Evidence of gang membership may not be introduced . . . to prove intent or culpability,'" citing *Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041, 1055-1056; *but cf. People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168 [trial courts should carefully scrutinize gang evidence; wide latitude is permitted in admitting evidence of the existence of motive]; *Ramos, supra,* 2022 Cal.App. LEXIS 355 at *28 [finding failure to bifurcate harmless under *Watson* where some of the gang evidence

would have been admissible at a trial of the underlying offenses].[3]

For purposes of assessing prejudice from the failure to bifurcate, the question is not whether the trial court abused its discretion or would have abused its discretion in admitting gang-related evidence in a bifurcated trial of the underlying offenses. The question is whether the trial court might have exercised its discretion to exclude these items of evidence in the first place. The trial court's weighing of prejudicial effect against probative value under Evidence Code section 352[4] would necessarily have been different, because the court would have weighed

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[3] The *Ramos* court's prejudice analysis is flawed. First, the court's statement that "[i]t is apparent from this record the jury did not simply rely on the gang evidence to convict the defendants of the charged crimes" does not reflect the appropriate standard. (*Ramos, supra,* 2022 Cal.App. LEXIS 355 at *27.) Even under *Watson*, the question is not whether the jury convicted the defendant based on the inadmissible evidence alone; the question is whether, in the absence of the inadmissible evidence, there is more than an abstract chance that the result would have been different. (*See People v. Wilkins* (2013) 56 Cal.4th 333, 351; *People v. Soojian* (2010) 190 Cal.App.4th 491, 519-521.)

More, *Ramos* focuses on the gang evidence that would have come in at a bifurcated trial on the underlying offenses (see *Ramos, supra,* 2022 Cal.App. LEXIS 355 at **27-29); it does not assess the prejudicial effect of the evidence that would *not* have come in at such a trial. (*See Wilkins, supra,* 56 Cal.4th at 351 [asking whether there is "more than an abstract possibility" that the error affected the verdict]; *People v. Gallardo* (2017) 18 Cal.App.5th 51, 76 [concluding error was not harmless under *Watson*, based on several factors, including the highly prejudicial nature of the erroneously admitted evidence].)

[4] Evidence Code section 352 reads: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

the prejudicial effect of the evidence against its probative value with respect to the elements of the underlying crime, not its probative value with respect to the elements of the gang enhancement. (*See People v. Hernandez, supra,* 33 Cal.4th at p. 1050 [noting gang evidence might be excluded under section 352 when no gang enhancement is charged].) Moreover, not only would the prosecution's gang evidence have been subject to different limitations under Evidence Code section 352, but the defense cross-examination would likely have been different as well. Finally, the prosecutor would not have been able to rely on the gang evidence at the guilt phase closing argument, which, as explained in the second supplemental opening brief, played a large role in setting up the state's theory at the penalty phase -- that Mr. Tran was a gangbanger killer who callously got tattoos to brag about murdering a young girl to fellow gangmembers, and evidence a further commitment to the criminal street gang. (*See* 2 Supp. AOB 75-76.)[5] On this record, the failure to comply with Evidence Code section 1109's bifurcation provision cannot be deemed harmless no matter which standard of prejudice applies. Reversal of the guilt and penalty phase verdicts is required.

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[5] For these reasons, again, the error should be deemed structural. The failure to bifurcate affected the framework within which the guilt phase and penalty phase proceeded, altering what the prosecution needed to prove, altering the Evidence Code section 352 analysis applicable to every item of gang-related evidence, affecting defense incentives to cross-examine, and altering the composition of opening and closing arguments in both phases of trial.

XVII. BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE PREDICATE OFFENSES ABSENT TESTIMONIAL CASE-SPECIFIC HEARSAY, AND IN LIGHT OF RESPONDENT'S CONCESSION THAT PREJUDICIAL ERROR OCCURRED, REVERSAL OF THE GANG ENHANCEMENT IS REQUIRED.

In Argument XVII of his second supplemental opening brief, Mr. Tran contended that the state introduced case-specific hearsay in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 to prove the requisite predicate offenses -- committed by Se Hoang, Phi Nguyen and Anthony Johnson -- for a true finding on the section 186.22, subdivision (b), gang enhancement. (2 Supp. AOB 54-59.) According to Mr. Tran, because there was insufficient evidence that Hoang, Nguyen and Johnson were VFL members to support the enhancement absent the erroneously admitted evidence, the error was not harmless. (2 Supp. AOB 59-63.)

Respondent concedes that Nye related case-specific hearsay to prove the predicate offenses. According to respondent, "[i]n testifying about the predicate offenses, it appears Nye related case-specific hearsay in concluding that Se Hoang and Phi Nguyen were VFL gang members." (2 Supp. RB 19.) Respondent further concedes that there was insufficient evidence "to support a finding that the VFL satisfied the statutory requirements for a criminal street gang in the absence of Nye's testimony" and thus, "the error was not harmless." (2 Supp. RB 21-22.)

Respondent does not concede that Nye related case-specific hearsay in testifying that Anthony Johnson was a VFL gang member. Instead, respondent

argues "it seems that Nye's conclusion that Anthony Johnson was a VFL gang member was based on his own personal knowledge" and "it does not appear that when testifying about Johnson's gang membership, Nye was simply 'regurgitat[ing] information from another source.'" (2 Supp. RB 21, citing *People v. Veamatahau* (2020) 9 Cal.5th 16; *see* 8 RT 1533.) According to respondent, "Nye assisted in investigating the 1995 attempted murder by Johnson and personally interviewed Johnson." (2 Supp. RB 21; s*ee also* 2 Supp. RB 15 [same].)

However, Nye never claimed to learn of Johnson's gang membership from the investigation or interview. Moreover, there was no evidence about what information was gleaned from the investigation or interview. Thus, respondent is simply speculating that Nye learned of Johnson's gang membership from these sources. But putting this aside, if Nye learned of Johnson's gang membership from the investigation and interview, then, contrary to respondent's argument, Nye was not relying on personal knowledge, but rather regurgitating information from Johnson or another source in his investigation. This is case-specific hearsay. In any event, Nye also claimed that he reviewed a transcript of a police interrogation of Plata in which Plata told officers that Johnson was a VFL member. (8 RT 1538.) Respondent does not dispute that this evidence was testimonial case-specific hearsay, or explain how this erroneously admitted evidence was not prejudicial as to proving that Johnson was a VFL member.

In any event, as respondent concedes, without the evidence admitted in violation of *Sanchez*, and without the ability to rely on the charged offense to prove the requisite predicate offenses pursuant to newly amended section 186.22, there was insufficient evidence to sustain the gang enhancement and it must be stricken. (2 Supp. RB 21-22. *Compare People v. Navarro* (2021) 12 Cal.5th 285, 313 [*Sanchez* error harmless where the jury could rely on the charged offense under former section 186.22].)

XVIII. BECAUSE RESPONDENT CONCEDES THAT NYE RELATED SIGNIFICANT CASE-SPECIFIC HEARSAY OF MR. TRAN AND PLATA'S GANG MEMBERSHIP, AND IN LIGHT OF THE STATE'S HEAVY RELIANCE ON THIS PREJUDICIAL EVIDENCE, REVERSAL OF THE GANG ENHANCEMENT AND PENALTY PHASE IS REQUIRED.

In Argument XVIII of his second supplemental opening brief, Mr. Tran contended that Nye and probation officer Timothy Todd related case-specific hearsay in violation of *People v. Sanchez*, *supra*, 63 Cal.4th 665 to prove that he and Plata were VFL members. (2 Supp. AOB 68-71.) The admission of this evidence was so prejudicial that reversal of the gang enhancement and the verdict of death is required. (2 Supp. AOB 72-77.)

Respondent concedes that "Nye and Todd relied on police reports or other documentation such as FI cards to form their opinions that Tran was a member of VFL," and "conveyed case-specific hearsay" in violation of *Sanchez*. (2 Supp. RB 23.) Respondent claims, however, that "the admission of case-specific facts asserted in hearsay statements is improper only if the facts are not otherwise independently proven by competent evidence." (2 Supp. RB 23, citing *People v. Sanchez*, *supra*, 63 Cal.4th at p. 686.) According to respondent, *Mr. Tran's gang membership* "was independently proven by other competent evidence." (2 Supp. RB 23.) As this other competent evidence, respondent sets forth (1) Nye and

Todd's testimony regarding Mr. Tran's tattoos[6] and (2) Nye's testimony regarding a textbook found in a search of Mr. Tran's parents' home which contained handwritten writings, including "Scrappy," "VFL," "Fuck TRG," and the letters "TRG" crossed out. (2 Supp. RB 24-26; see 6 RT RT 1555.) Respondent is mixing apples and oranges.

Sanchez held, "What an expert cannot do is relate as true case-specific facts asserted in hearsay statements, unless *they"* -- the case-specific facts -- "are independently proven by competent evidence or are covered by a hearsay exception." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 686, emphasis added.) Put another way, case-specific facts are not made admissible if the state introduces independent and competent evidence to support the expert's conclusion; the case-specific facts themselves must be independently proven by competent evidence.

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[6] Respondent claims "Tran does not dispute that Nye could base his opinion about Tran's VFL membership on his tattoos . . . ." (RB 24.) But that is exactly what Mr. Tran disputed. In Argument XVIII of the second supplemental opening brief, and here in reply, Mr. Tran contends that Nye (and Todd) could not rely on the Korean symbol tattoo or the Vietnamese writing tattoo to prove VFL membership. (*See also* 2 Supp. AOB 125-127.) In Argument XX of the second supplemental opening brief, Mr. Tran specifically disputed the propriety of relying on Mr. Tran's remaining tattoos -- which respondent does not address -- to prove VFL membership. (*See* 2 Supp. AOB 116-117, 124 [map of Vietnam]; 124-125 ["in loving memory of Viet" tattoo]; 125 ['93, '94, '95, and '96 tattoo]; 125 [tattoos saying "Scrappy Tran" with a "V" surrounded by a ray of lines].) Respondent's claim that Mr. Tran does not dispute the propriety of relying on the tattoos must be rejected.

By way of example here, as respondent concedes, Nye related as true the case-specific facts found in "police reports or other documentation such as FI cards" that Mr. Tran admitted to officers that he was a VFL member; Nye related the information to support his ultimate conclusion that Mr. Tran was a VFL member. (RB 23; *see* 8 RT 1554-1555.) What *Sanchez* says is that Nye's testimony relating the case-specific facts of Mr. Tran's admissions was inadmissible unless the state also introduced competent evidence that Mr. Tran indeed admitted to officers that he was a VFL member, such as the testimony of these officers or other witnesses to the admissions. Contrary to respondent's argument, *Sanchez* does not stand for the entirely different proposition that Nye's testimony relating the case-specific facts of Mr. Tran's admissions was improper unless the state also introduced competent evidence that supported Nye's ultimate opinion that Mr. Tran was a VFL member. The evidence of Mr. Tran's tattoos and textbook writings -- which supported Nye's ultimate conclusion -- does not make the case-specific facts of Mr. Tran's admissions to officers admissible evidence. Because respondent does not -- and cannot -- point to any competent evidence which independently proves Mr. Tran's admissions to officers, the admission of Nye's testimony relating these admissions was error.

Putting this aside, respondent cannot rely on (1) Nye and Todd's testimony regarding Mr. Tran's tattoos and (2) Nye's testimony regarding a textbook found

in a search of Mr. Tran's parents' home as competent evidence to prove Mr. Tran's gang membership. There are problems with this evidence too.

As to Mr. Tran's tattoo of Korean characters which literally translated "Forgive," Nye and Todd testified that the tattoo was a form of bragging to fellow VFL members about the murder. (6 RT 1156-1159; 8 RT 1553-1554.) Of course, to logically constitute bragging, the fellow gang members would have to know that (1) a crime was committed against a person, (2) the person was Korean, (3) the characters were Korean, (4) the Korean characters were a nod to that person's heritage, (5) the characters meant something other their literal translation, "Forgive," (6) that the meaning was braggadocious, and (6) Mr. Tran meant to convey that meaning.

Even ignoring these logical leaps, and the dearth of evidence that this ever happened, Nye and Todd claimed their opinions were reinforced by Plata's recorded statement to Qui Ly that the tattoo translated, "blow me" and "suck me." (6 RT 1158; 8 RT 1554.) Neither expert explained -- nor does respondent explain -- how Plata's own translation of the Korean tattoo was reliable evidence of what Mr. Tran meant the tattoo to convey; there was no evidence that Mr. Tran actually told Plata what he meant to convey. Nor is there any logical explanation as to why Mr. Tran would tattoo himself with Korean symbols which translated, "Forgive," if he actually meant to convey "blow me" or "suck me," or otherwise brag about

committing murder. Anyway, respondent does not dispute that the evidence was case-specific double hearsay, including both testimonial and non-testimonial statements, admitted in violation of *Sanchez*, *supra*. (2 Supp. RB 24.)

Instead, respondent argues that in concluding that Mr. Tran was a VFL member based on this tattoo, "Nye and Todd also relied on their own experiences interacting with Asian gang members and seeing their various tattoos." (2 Supp. RB 24.) Based on his experience, Nye testified, according to respondent, that "if it was known within Tran's gang that a Korean person was murdered, Tran would be taking credit for the murder by getting a tattoo" and "it would not be a genuine expression of remorse because remorse is a sign of weakness in gang culture, and Tran would not want to advertise weakness to other gang members." (2 Supp. RB 24-25; *see* 8 RT 1553-1554.) Likewise, according to respondent, Todd testified that "in his experience, tattoos are a way for gang members to brag about the things their gang has done." (2 Supp. RB 25; *see* 6 RT 1155, 1157.)

Whatever else can be said about the meaning of the tattoo, there is a problem with respondent's logic. Respondent is essentially relying on the expert testimony -- that a person who belongs to a gang and gets a tattoo related to a crime must be bragging to fellow gang members about the crime -- to support the conclusion that the person with the tattoo must be a gang member. The expert testimony here presupposes that the person is a gang member in the first place.

This bootstrapping logic fails and the testimony is not competent, admissible evidence that Mr. Tran was actually a VFL member.

Next, as to Mr. Tran's tattoo of the Vietnamese saying, "no good deed has been returned to my father and mother by me," respondent notes that Nye "explained that based on the thousands of gang members he has talked to and the tattoos he has seen, the tattoo basically means that the individual has lost the love of his family and is willing to participate in the gang life and engage in criminal activity." (2 Supp. RB 25; *see* 6 RT 1564-1565.) Accepting Nye's rather dubious testimony on its face that he actually spoke to thousands of gang members about the meaning of this particular tattoo, the fact remains that the testimony related case-specific hearsay, i.e. out-of-court statements that the tattoo means a willingness to engage in gang and criminal activity offered for the truth that the tattoo -- worn by Mr. Tran -- means a willingness to engage in gang and criminal activity.

Respondent disagrees. Citing *People v. Veamatahau* (2020) 9 Cal.5th 16, respondent argues, "Nye could opine about the meaning of the tattoo based on background knowledge Nye obtained through his work and interactions with gang members." (2 Supp. RB 26.) *Veamatahau* actually assists Mr. Tran, not respondent.

This Court recently discussed *Veamatahau* and the difference between

background knowledge and case-specific facts in *People v. Valencia* (2021) 11 Cal.5th 818:

> In *Veamatahau*, the defendant was charged with possessing contraband pills. The question at trial was whether the recovered pills contained the controlled substance alprazolam. An expert compared markings he saw on the pills "against a database containing descriptions of pharmaceuticals." (*Veamatahau*, *supra*, 9 Cal.5th at p. 22.) Asked about the identification process, the expert testified that the approach he employed was generally accepted in the scientific community. He elaborated on cross-examination that "when 'there's a controlled substance in the tablet, the (Food and Drug Administration) requires companies to have a distinct imprint on those tablets to differentiate it from any other tablets. The FDA regulates that. [¶] And if there's a tablet that has -- in this case GG32—or 249 [as an imprint] -- you can look that up. And it's going to tell you that it contains alprazolam, 2 milligrams. And that's -- we trust that, all those regulations being in place, to say that there's alprazolam in those tablets.'" (*Id.* at p. 23.) Based on this database search, the expert opined the pills contained alprazolam. (*Ibid.*) *Veamatahau* concluded that the expert's testimony about what he read from the database was background information. "[The expert's] statement concerning what the database 'tell[s] you' related general background information relied upon in the criminalist's field. The facts disclosed by the database, and conveyed by [the expert], are 'about what [any generic] pills containing certain chemicals look like.' [Citation.] The database revealed nothing about 'the particular events . . . in the case being tried,' i.e., the particular pills that [police] seized from defendant. [Citation.] Any information about the specific pills seized from defendant came from [the expert's] personal observation (that they contained the logos 'GG32—or 249') and his ultimate opinion (that they contained alprazolam), not from the database. In short, information from the database is not case specific but is the kind of background information experts have traditionally been able to rely on and relate to the jury." (*Id.* at p. 27.)

> *Veamatahau* clarifies that the distinction between background information and case-specific facts can depend, in part, on what the

> evidence, considered independently, is offered to prove. The expert's testimony about the contents of the database, and expert reliance on it, was offered to prove that all pills with a given imprint contain alprazolam. That testimony, though hearsay, related background information. His opinion was offered to prove that the defendant's pills, those at issue in the current prosecution, contained alprazolam. The markings on the defendant's pills were case-specific facts. The expert was permitted to testify about them because his own observation of the markings provided personal knowledge. The jury was entitled to consider the expert-provided background information, even though hearsay, along with his personal observations and opinion to determine whether the pills the defendant possessed contained the controlled substance.

(*People v. Valencia*, *supra*, 11 Cal.5th at pp. 833-834.)

According to the Court, "Hallmarks of background facts are that they are generally accepted by experts in their field of expertise, and that they will usually be applicable to all similar cases. Permitting experts to relate background hearsay information is analytically based on the safeguard of reliability. A level of reliability is provided when an expert lays foundation as to facts grounded in his or her expertise and generally accepted in that field." (*People v. Valencia*, *supra*, 11 Cal.5th at pp. 833-834.) As an example, the Court relied on *Veamatahau* and stated, "[T]he hearsay database information was accepted by experts in the field as accurately stating that pills of a certain appearance contain alprazolam." (*People v. Valencia*, *supra*, 11 Cal.5th at p. 836, citing *People v. Veamatahau*, *supra*, 9 Cal.5th at p. 32.)

In stark contrast, Nye's testimony about the meaning of the Vietnamese

tattoo did not have any of the hallmarks of background facts. Nye simply stated, "consistently over the thousands of gang members I've talked to or contacts I've had and the tattoos I've seen, it's generally just a saying that tells others that they're willing to participate in criminal activity and live in that gang subculture." (8 RT 1564-1565.) Unlike the hearsay database information in *Veamatahau* -- which was generally accepted by experts in the field as reliable and accurate -- Nye was not referencing information that he claimed was generally accepted by experts in his field. For instance, he did not rely on a database or list of gang tattoo meanings consistently relied upon by experts in the gang field. He did not even claim that experts in the gang field agreed on the tattoo's meaning. Instead, he was simply regurgitating information he had personally heard from gang members; no expertise was involved and the reliability justification to admitting the hearsay was absent.

Even if respondent is correct that Nye's testimony about the meaning of the tattoo constitutes admissible background information, the information is still not competent and relevant evidence which proved that Mr. Tran was a VFL member. Respondent argues that "if admissible evidence was introduced that a defendant had a diamond tattooed on his arm, a gang expert could properly testify that the diamond is a symbol adopted by a given street gang" and also opine that the presence of a diamond tattoo shows the person belongs to the gang." (2 Supp. RB

25-26, citing *People v. Sanchez*, *supra*, 63 Cal.4th at p. 677.) That is not what happened here though.

Although Nye testified that he spoke to thousands of gang members who told him the meaning of the tattoo, he did not say that he spoke to a VFL member about the meaning of the tattoo or whether it symbolized VFL membership. Indeed, VFL only had 20 to 30 members in 1995 (8 RT 1535); Nye did not claim that even one VFL member had this tattoo at that time or that any VFL members ever associated the group with this tattoo in any way. Without proof connecting the tattoo to VFL membership, respondent cannot rely on Nye's testimony regarding Mr. Tran's tattoo as independent proof that Mr. Tran was a VFL member.

Nye also testified that he relied on a school science textbook which was found in Mr. Tran's family's home with handwriting saying, "Scrappy, Viets for Life," and "Fuck T.R.G.," (VFL's rival), with the TRG crossed out, and "Big Bad VFL Gang '93," to conclude that Mr. Tran was a VFL member. (8 RT 1526, 1554-1555.) According to respondent, "Nye [] properly relied on a text book containing handwriting that was found during the search of Tran's parent's [sic] home" and "[g]iven where the text book was found and the content of the handwriting, Tran does not argue that the handwriting could not be attributed to him." (RB 26.) While the words in the textbook might not be hearsay, the fact that the book was found at Mr. Tran's family's home was case-specific hearsay. Nye was not

identified as an officer who was present at the time the book was found; he was informed of the search and the location of the book. Putting this aside, neither Nye nor respondent explains how the writing in the textbook necessarily identified Mr. Tran as a VFL member as opposed to a mere associate or friend of VFL.

In short, respondent concedes that Nye and Todd related case-specific hearsay statements in police reports and FI cards that Mr. Tran admitted being a member of the VFL, violating *Sanchez*, *supra*. There was no independent evidence of these admissions. The admission of these statements was error. The remaining evidence of Mr. Tran's VFL membership was tainted by *Sanchez* error and did not actually prove VFL membership.

Turning to Plata, respondent again concedes that "to the extent Nye relied on police reports, FI cards and police statements to form his opinion regarding Plata's gang membership, Nye was relating case-specific hearsay." (2 Supp. RB 27.) Nonetheless, respondent argues that "Nye also based his opinion on other competent evidence, citing (1) a letter from Hong "Old Man" Lay to Plata and (2) a letter from Plata to Tam, a deceased individual. (2 Supp. RB 27-28.) Mr. Tran has already anticipated and addressed this argument in his second supplemental opening brief and there is no reason to repeat that discussion here. (*See* 2 Supp. AOB 69-70, 121-123.) Suffice it to say, this evidence too contained case-specific hearsay in violation of *Sanchez* and was otherwise unreliable evidence that Plata

was a VFL member.[7]

Respondent alternatively argues that "[a]ny error by Nye or Todd in relating case-specific hearsay regarding Plata and/or Tran's gang membership was harmless beyond a reasonable doubt" because "there was additional evidence presented at trial establishing that Plata and Tran were VFL members. (2 Supp. RB 28.) Respondent relies on (1) Linda Le's testimony that both Mr. Tran and Plata were VFL members and (2) Joann Nguyen's testimony that Mr. Tran told her that he was a VFL member. (2 Supp. RB 28.) Again, Mr. Tran already anticipated and addressed this argument in his second supplemental opening brief. (*See* 2 Supp. AOB 73-75.) Put simply, Nyugen's and Le's claims were not persuasive

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[7] Mr. Tran will address one additional point made by respondent. Respondent argues that the letter from Lay to Plata in which he "asked Plata to jump Homeless out of the gang, showed that Hong Lay trusted Plata with gang business." (2 Supp. RB 27.) According to respondent, "Lay's request was not hearsay because it did not assert the truth of any fact." (2 Supp. RB 27.) Respondent cites *People v. Jurado* (2006) 38 Cal.4th 72, 117, in which this Court held that "[b]ecause a request, by itself, does not assert the truth of any fact, it cannot be offered to prove the truth of the matter stated," and thus, was not hearsay.

But here, the words of Hong's request did assert the truth of a fact. In his letter to Plata, he said, "Jump Homeless out of V.F.L. because he want [sic] to jump out long [sic] time ago, but we did not have time, so that way I want you and some of the guy [sic] to go with you and jump him out." (8 RT 1539.) The relevant fact asserted -- that Hong wanted Plata and another "guy" to "jump out" Homeless -- was offered for its truth to prove that indeed, Hong wanted Plata to jump out Homeless, which, as respondent concedes, was relevant to "show[] that Hong Lay trusted Plata with gang business." This is hearsay and *Jurado* does not apply here.

witnesses on this point, and, not surprisingly, the prosecutor instead relied in closing argument on Nye's conclusions that Mr. Tran and Plata were VFL members. (*See, e.g.*, 8 RT 1698 ["the expert talked about it"], 1740 ["[y]ou heard Sergeant Nye talk about it."].)

Respondent also relies on evidence that (1) 3-inch plaster letters spelled VFL were found on Mr. Tran's girlfriend Kathy Nguyen's bedroom wall (6 RT 1252) and (2) a letter from Plata to Mr. Tran was found in Mr. Tran's family home which was signed, "Your homie, Noel" (6 RT 1255). (2 Supp. RB 28.) Respondent does not explain how evidence that a girlfriend put VFL on her own bedroom wall or a friend calling himself Mr. Tran's "homie," actually proved Mr. Tran's VFL gang membership. Contrary to respondent's argument, this evidence certainly does not render the admission of Nye's opinions that Mr. Tran and Plata were VFL members harmless.

Finally, respondent addresses in a footnote Mr. Tran's argument that the penalty phase verdict should be reversed in addition to the gang enhancement. (2 Supp. RB 29, n. 12.) According to respondent, the prosecutor did not primarily rely on the gang evidence but instead "the main focus of the prosecutor's argument was the torture Plata and Tran inflicted on Linda." (2 Supp. RB 29, n. 12.) Respondent claims "the prosecutor told the jury that they could forget about everything else -- the torture was enough to warrant the death penalty." (2 Supp.

RB 29, n. 12, citing 12 RT 2403.)

In fact, the prosecutor actually told the jury, "I submit to you -- I just go back to this, just the special circumstance of torture by itself, just by itself. Forget about everything else. Forget about his other crimes. Forget about the robbery, the burglary, the strangulation. Just talk about the torture. Not even close. Not even close." (12 RT 2403.) Contrary to respondent's suggestion, however, the prosecutor did not actually tell the jury to ignore the gang evidence. In fact, the prosecutor specifically told the jury to give weight to the evidence that Mr. Tran and Plata were "two selfish gang-bangers." (*See* 2 Supp. AOB 76 and citations within.) In short, the record speaks for itself. As detailed in the second supplemental opening brief, the prosecutor repeatedly relied on the evidence of gang membership in urging the jury to return a verdict of death. (*See* 2 Supp. AOB 75-77.) The fact that the prosecutor also relied on other evidence in closing argument does not vitiate the prejudicial effect of the erroneously admitted evidence on the outcome of the penalty phase. (*See People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz* (1964) 61 Cal.2d 861, 868 [same]. *Accord Clemons v. Mississippi* (1990) 494 U.S. 738, 753 [the prosecution's reliance on a particular issue bears on whether error regarding that issue is harmless; *United States v. Kojoyan* (9th

Cir. 1996) 8 F.3d 1315, 1318 ["closing argument matters; statements from the prosecutor matter a great deal"].) Reversal of the gang enhancement and penalty phase verdict of death is required.

XIX. THE ERROR IN ADMITTING CASE-SPECIFIC HEARSAY IN VIOLATION OF SANCHEZ TO UNDERCUT KEY DEFENSE EVIDENCE OF REMORSE REQUIRES REVERSAL OF THE PENALTY PHASE.

As fully explained in Argument XIX of the second supplemental opening brief, it is universally accepted that evidence of a defendant's expressions of remorse (or lack thereof) -- as to either the consequences of his actions for the victim and her survivors or the consequences of his actions for his own family -- can be critical for the jury and outcome-determinative at the penalty phase. (*See* 2 Supp. AOB 82-84, and citations therein.) In this case, there was key defense evidence of remorse that, subsequent to the charged crimes, Mr. Tran got (1) a tattoo with Korean characters which translated, "Forgive," which he told his girlfriend Joann Nguyen meant, "[f]orgive me" (5 RT 1047-1048; 8 RT 1552-1553); and (2) a tattoo with Vietnamese writing which translated, "No good deed has been returned to my father and my mother by me" (8 RT 1550-1552).

The state's theory, however, was that Mr. Tran did not mean to convey remorse with these tattoos. Instead, according the state, the tattoos were Mr. Tran's means of bragging to fellow gang members about committing the charged crimes. To support this theory, the prosecutor introduced the testimony of Nye and Todd about the meaning of both tattoos.

Nye testified that, although the Korean symbol tattoo literally translated, "Forgive," Mr. Tran was actually "taking credit for that crime [the murder of

Linda Park] by tattooing this on his body" and "he's taking credit for what he did." (8 RT 1553.) According to Nye, the tattoo could not mean remorse because "[s]howing remorse is a sign of weakness within the gang" and [w]hy would he want to advertise his weakness to other gang members?" (8 RT 1553-1554.) He claimed his opinion was "reinforced" by the fact that "during a taped conversation between Mr. Plata and another individual who was trusted within the gang, Mr. Plata said that that actually means, at least what Mr. Tran was conveying 'blow me' or 'suck me.'" (8 RT 1554.)

Todd testified much to the same. He claimed that he believed that Mr. Tran's tattoo was "an attempt at projecting his pride at something that occurred," and even though the tattoo literally translated, "Forgive," Todd agreed with Nye that "the significance of that tattoo in [his] training and experience is nothing more than bragging." (6 RT 1158-1159.) Like Nye, Todd claimed "a gang member would not want to admit that he felt remorse or might not want to show any weakness in front of other gang members." (6 RT 1160.) He too relied on the transcript in which "Plata told Qui Ly that the tattoo that's on the side of Tran's neck stands for something to the effect of 'suck me' or 'blow me." (6 RT 1158.) He believed it was significant that "a fellow gang member is conveying to a trusted gang member of the gang that Mr. Tran perceives that [the tattoo] to indicate 'suck me' or 'blow me.'" (6 RT 1158.) The transcript of Plata's statement

"solidified [his] interpretation of the tattoo." (6 RT 1160.)

Nye also testified about the meaning of Mr. Tran's tattoo of Vietnamese writing, which translated, "No good deed has been returned to my father and my mother by me." He claimed that "consistently over the thousands of gang members I've talked to or contacts I've had and the tattoos I've seen, it's generally just a saying that tells others they're willing to participate in criminal activity and live in that gang subculture." (8 RT 1565.) According to Nye, "it's a symbol to other gang members that they have nothing to lose because their parents -- they've lost the love of their family. They have nothing else, basically, so they're more open to do whatever." (8 RT 1564.)

In Argument XIX of his second supplemental opening brief, Mr. Tran contended that the state's purported gang expert Nye and probation officer Todd related case-specific hearsay in violation of *People v. Sanchez*, *supra*, 63 Cal.4th 665, to reinforce their opinions that Mr. Tran did not mean to convey remorse with his tattoos, but rather he was taking credit for committing the crimes and bragging to his fellow gang members. (2 Supp. AOB 78-81.) Given the critical importance of the evidence that Mr. Tran was truly remorseful for his crimes to the jury's decision on whether he should live or die, the erroneous admission of the case-specific hearsay required reversal of the penalty phase. (2 Supp. AOB 81-87.)

In addressing the *Sanchez* error here, respondent repeats the arguments

made in Argument XIX-A of its second supplemental brief that Nye and Todd basically related background information in their testimony, and any case-specific hearsay was otherwise established through admissible evidence. (2 Supp. RB 30.) Mr. Tran has already addressed these arguments in Argument XVIII, *supra*. He therefore turns to prejudice.

Respondent does not dispute that a jury's decision at the penalty phase of trial can alone rise and fall on the presence (or absence) of a defendant's remorse. Nor does respondent dispute that the parties implicitly recognized this truism and thus, the evidence of Mr. Tran's remorsefulness was critical to the parties in closing arguments at both the guilt phase and penalty phase. (*See* 2 Supp. AOB 84-86.) Instead, respondent argues that even if the admission of Nye's and Todd's testimony was error, the error was harmless because "there was other compelling evidence that Tran lacked remorse for his crimes." (2 Supp. RB 30.) According to respondent, the prosecutor (1) "talked about how Tran's repeated criminal actions showed that he was not a remorseful person," pointing out "that Tran had committed a string of residential burglaries and had only been out of prison for six months when he killed Linda" and (2) "pointed to Tran's taped conversations with Qui Ly about the crimes" in which "Tran did not express sorrow or remorse for what he had done, but rather exhibited callousness and selfishness." (2 Supp. RB 31-32.)

First things first. The burglaries, and Linda's home burglary, do not show that appellant is not a "remorseful person." Burglaries are not murder. Even if Mr. Tran did not "express sorrow or remorse" during his conversation with Ly, there was no evidence that the two had such a relationship that Mr. Tran would share his true feelings of sorrow and remorse with Ly while sitting in a holding cell.

But putting this aside, and contrary to respondent's argument, the fact that the state presented so-called "other compelling evidence" that Mr. Tran "lacked remorse for his crimes" did not cure the harm here; it made it worse. Under the defense theory, the tattoos proved that Mr. Tran was immediately remorseful for his conduct; he was not simply remorseful because he was caught and charged with crimes. The fact that the state presented "compelling evidence," that Mr. Tran was not a "remorseful person" and did not "express sorrow or remorse" when discussing the crimes, made the defense evidence of the tattoos and their meaning all that more critical to the jury's determination of whether Mr. Tran was indeed remorseful for these crimes. After all, the issue of remorse (or lack thereof) was highly disputed between the parties. The jury's ability to fairly determine this highly disputed issue was skewed by the erroneous admission of the case-specific hearsay related by Nye and Todd that Mr. Tran did not mean to convey remorse, but rather meant to callously brag about committing the crimes to

other gang members.

Finally, respondent argues that "whether Tran was remorseful or not, the fact remains that he and Plata tied up an eighteen-year-old girl, duct-taped her mouth, slashed her throat twice, and eventually strangled her to death" and "Linda suffered and died so Plata and Tran could get away with some cash and jewelry." (2 Supp. RB 32.) Again, it is precisely respondent's characterization of the crimes -- likewise made by the prosecutor to the jury in this case and not meaningfully disputed by the trial defense -- that made the evidence of remorse so key to the outcome of the penalty phase. If the jury did not believe Mr. Tran was remorseful for committing such horrific crimes, there was no real hope for a verdict of life.

This was not lost on the prosecutor. In closing argument of the guilt phase, the prosecutor told the jury, "No evidence of bragging or lack of remorse. That's what Mr. Pohlson [defense counsel] said. Really? Really? . . . How about the opinion of Todd and Nye. This is evidence, both of them, experienced in the field, told you that that's evidence of bragging." (8 RT 1734-1735.) Moreover, according to the prosecutor, "Well, how about 'blow me and suck me?' It's on tape. It's on tape. This is on tape. How does that factor into the opinion of Nye and Todd, 'Blow me and suck me.' Telling people that's what it means." (8 RT 1735.) Later the prosecutor ridiculed the defense theory that "Nye does not know if Tran

bragged about it," telling the jury, "Sure he does. The 'blow me and suck me' comments, sure he does." (8 RT 1740.)

In the penalty phase of closing argument, the prosecutor again turned to whether there was evidence of remorse. (12 RT 2380 ["When . . . they get up and they want to say, 'Well' -- start talking about remorse and feeling sorry, I want you to think about something because talk is cheap."]; 2381 ["They want to play this -- they want to tell you, 'Oh, he was remorseful.' Talk is cheap. Talk is cheap. Let's look at your conduct."]; 2385 ["You want to talk about remorse? You want to talk about that? Let's talk about that. Let's talk about Mr. Tran."]; 2389 ["You want to talk remorse?"].)

The state cannot demonstrate that the erroneously admitted evidence would not have impacted at least one juror's vote for death. In fact, numerous studies indicate that perceived remorsefulness is often the most important factor to capital jurors in choosing the appropriate sentence. (Bandes, Remorse and Demeanor in the Courtroom: Cognitive Science and the Evaluation of Contrition in The Integrity of Criminal Process: From Theory into Practice (Hunter et al., eds. 2016) p. 310, fn. 7 [citing studies].) In California capital cases, a defendant's degree of remorse is a frequently discussed issue in the jury room and a factor that many jurors cite as the most compelling reason for their decision. (Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and

the Death Penalty (1998) 83 Cornell L. Rev. 1557, 1560.)

Bandes posits that remorse "is a complex, unfolding, internal process rather than a discrete emotion." (Bandes, Remorse and Criminal Justice (2015) Emotion Review 1, 2.) It develops over time and encompasses several stages, including "a recognition that one has caused harm; an acceptance of responsibility for causing that harm; an associated internal strife; a desire to atone or make things right; a desire to be forgiven; and perhaps some actions in furtherance of atonement and reparation." (*Ibid*., citing Proeve & Tudor, Remorse: Psychological and Jurisprudential Perspectives (2010) p. 48.) The fact that, subsequent to Linda's murder, Mr. Tran got permanent tattoos that acknowledged dishonoring his parents and asked for forgiveness, which was powerful evidence that he was remorseful for his role in Linda's death.

Thus, although respondent now attempts to downplay the role of remorse in this case, respondent knew and argued strenuously about how important remorse should be to the jury in this case. No doubt respondent was simply recognizing what is universally accepted (*see* 2 Supp. AOB 82-84) -- that a defendant's remorse is important to all juries in capital cases. Indeed, there is no need to even guess as to the importance of remorse to the jury in this case. One juror's contemporaneous writing during penalty phase deliberations in this case indicated that he could not grant mercy absent a show of genuine remorse. (*See* 2

SCT 390-391.) Under all these circumstances, the erroneously admitted evidence -- which directly undercut the defense's critical evidence of remorse -- cannot be deemed harmless. Mr. Tran's death sentence should be reversed.

XX. BECAUSE NYE'S AND TODD'S "TRAINING AND EXPERIENCE" ARE NOT RELIABLE PRINCIPLES AND METHODOLOGY AS REQUIRED UNDER *SARGON*, AND BECAUSE THEIR TESTIMONY WAS CRITICAL TO THE STATE'S ARGUMENT THAT MR. TRAN SHOULD DIE, REVERSAL OF THE PENALTY PHASE VERDICT IS REQUIRED.

In Argument XX of his second supplemental opening brief, Mr. Tran contended that the trial court prejudicially failed to fulfill its duty as a gatekeeper and exclude opinions rendered by Nye and Todd, who were called by the prosecution as purported gang experts. (2 Supp. AOB 88-134.) This Court articulated the gatekeeping duty in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*), about five years after the completion of Mr. Tran's trial. In Argument XX, Mr. Tran has shown that under *Sargon*, several of Nye and Todd's opinions -- that defendants and others were members of VFL, that VFL was a criminal street gang, that Mr. Tran committed the charged crimes for benefit of, at the direction of, or in association with VFL, the specific intent to promote, further and assist in the criminal conduct of the VFL -- were speculative and illogical and that the matter these experts relied upon did not provide a reasonable basis for them. The challenged opinions were not generated by the application of reliable principles and methodology -- or indeed *any* principles or methodology other than ipse dixit. (2 Supp. AOB 110-133.)

Respondent does not specifically address each of Mr. Tran's challenges to these opinions, but instead, generally argues that "[t]he record reveals reliable

bases for the expert opinions -- i.e., the experts' extensive training and experience with respect to Asian gangs, including frequent interactions with Asian gang members (VFL members included), and the review of documents and reports regarding crimes committed by members of Asian gangs." (2 Supp. RB 32.)[8] In other words, respondent believes that an expert's general "training and experience" is all the reliability an expert opinion requires to be admissible. This is not true.

Respondent relies on *People v. Hill* (2011) 191 Cal.App.4th 1104, 1120, which held that "a gang expert may rely upon conversations with gang members, on his or her personal investigations of gang-related crimes, and on information obtained from colleagues and other law enforcement agencies," and *People v. Gonzalez* (2006) 38 Cal.4th 939, 949, which held that "[a] gang expert's overall opinion is typically based on information drawn from many sources and on years of experience, which in sum may be reliable." (2 Supp. RB 34.) These cases are not particularly helpful in light of the subsequent decisions in *Sanchez* and *Sargon*.

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[8] By way of example only, Mr. Tran set forth a myriad of reasons why Nye's and Todd's opinions that he and Plata were VFL gang members did not pass muster under *Sargon*. (2 Supp. AOB 113-127.) Respondent does not specifically address any of Mr. Tran's points as to either opinion. Instead, respondent globally states the opinions "were properly supported by the application of the experts' background knowledge to the specific facts of the case." (2 Supp. RB 37.)

After *Sanchez*, reliability is no longer the sole touchstone of admissibility where expert testimony to hearsay is at issue. If the expert relates a case-specific fact and the expert has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it unless it has been proven by independent admissible evidence. (*People v. Sanchez*, *supra*, 63 Cal.4th at pp. 684-686.) If the hearsay relied upon by the expert is not case-specific, the evidence is still admitted for its truth (*id.* at pp. 685-686), and is therefore hearsay, but it is admissible due to the latitude accorded experts, as a matter of practicality, in explaining the basis for their opinions (*id.* at p. 676). Where general background hearsay is concerned, the expert may testify about it so long as it is reliable and of a type generally relied upon by experts in the field, all subject to the court's gatekeeping duty under *Sargon*. (*People v. Sanchez*, *supra*, at pp. 676-679, 685; Evid. Code, §§ 801, 802)

Particularly instructive in understanding the application of *Sargon* to general background hearsay is *People v. Gonzalez* (2021) 59 Cal.App.5th 643 (*Gonzalez*). There, the appellate court found that gang enhancements were unsupported by substantial evidence. Although the claim arose as a sufficiency issue rather than a pretrial evidentiary ruling, *Gonzalez* relied on *Sargon* in finding that the gang officer "had no logical basis for his opinion" that the three charged robberies were committed for the benefit of the defendant's gang. (*People*

v. Gonzalez, supra, 59 Cal.App. 5th at p. 649.) *Gonzalez* declared: "Expert opinion must have a logical basis. Experts declaring unsubstantiated beliefs do not assist the truth-seeking enterprise." (*Ibid.*)

In *Gonzalez*, *supra*, the parties stipulated that the Boulevard Mafia Crips was a criminal street gang and that the defendant was a member. (59 Cal.App.5th at p. 646.) On cross-examination, the gang officer "admitted many gang connections were missing" in defendant's case. (*Id.* at p. 647) For example, the defendant had worked alone in two of the robberies and the evidence did not establish that the getaway driver involved in the third was a gang member. The defendant did not wear gang colors, make gang hand signs, or yell gang slogans. There was no evidence the defendant told his fellow members about the robberies, showed them the necklaces he obtained in each, or shared any profits. (*Ibid.*)

Although the gang officer in *Gonzalez* opined that the defendant had benefited his gang because he was "'assisting his gang in having a feared reputation,'" the court found "this claim made no sense when nothing linked these crimes to a gang." (*Gonzalez*, *supra*, 59 Cal.App.5th at p. 649.) Similarly, the officer's opinion that the defendant was providing monetary support to the gang was illogical because he conceded no evidence proved defendant shared his ill-gotten gain. (*Ibid.*)

The gang officer in *Gonzalez* sought to bolster his opinions with his

experience and past observations. In no uncertain terms, the court explained why that was insufficient:

> The expert also based his opinion "on the pattern of my observations about this gang, as well as [of Gonzalez] ...." It is insufficient for an expert simply to announce, "based on my experience and observation, X is true." This is the method of the Oracle at Delphi. It is the black box. This method cannot be tested or disproved -- a feature convenient for would-be experts but unacceptable in court. "'This "Field of Dreams" "trust me" analysis'" amounts only to a defective " 'faith-based prediction.'" (*Sargon*, *supra*, 55 Cal.4th at p. 766 . . . ; *see id*. at p. 778 [excluding expert opinion that was "'nothing more than a tautology'"].)

(*Gonzalez*, *supra*, 59 Cal.App.5th at p. 649.)

Using the same tactic that was rejected in *Gonzalez*, respondent claims that Nye and Todd based their opinions on their "training and experience" with Asian gangs, including the VFL, which thus, provided a sufficiently reliable basis for their opinions. (2 Supp. RB 32.) While training and experience in a particular field may qualify a witness to testify as an expert in that field, that expertise alone does not open the door to opinions that are illogical, methodologically unsound or unreliable or otherwise not accepted in the expert's field. As courts and scholars have recognized, making truth statements based only on experience or observation should be unacceptable. (*See*, *e.g.*, *Gonzalez*, *supra*, 59 Cal.App.5th at p. 649; *United States v. Medina-Copete* (10th Cir. 2014) 757 F.3d 1092, 1102 ["Mere observation that a correlation exists -- especially when the observer is a

law enforcement officer likely to encounter a biased sample -- does not meaningfully assist the jury"]; 2 Supp. AOB 108, quoting Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule* (2012) 39 Pepp. L. Rev. 551, 593-594 ["mere experience, uninformed by methodological analysis, can lead to false inferences"] (Poulin 2012).)

The Ninth Circuit Court of Appeals has recently emphasized the importance of gatekeeping when experienced-based expert opinion testimony is presented. Acknowledging that gatekeeping may in some respects be harder with non-scientific experts, the court explained:

> [A]ny such difficulty cannot simply lead to a "that goes to weight, not admissibility" default, as here. Indeed, we see a strong argument that reliability becomes more, not less, important when the "experience-based" expert opinion is perhaps not subject to routine testing, error rate, or peer review type analysis, like science-based expert testimony. The Supreme Court has made it abundantly clear that reliability is the lynchpin -- the flexibility afforded to the gatekeeper goes to *how* to determine reliability, not *whether* to determine reliability . . . .

(*Valencia-Lopez* (9th Cir. 2020) 971 F.3d 891, 898.)[9]

In *Valencia-Lopez*, the appellate court stated that the special agent who testified in that case "had sufficient experience and knowledge to qualify as an expert." (*Ibid.*) However, no evidence was presented to show that the agent's

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[9] As shown in the opening brief, the California state law gatekeeping standard refers to federal standards. (*See* 2 Supp. AOB 91.)

experience meant his opinion that a drug cartel would almost certainly not coerce a person at gunpoint to carry drugs across the border was reliable. (*Id*. at pp. 898-899.) The agent "never explained the methodology, if any, that he relied on to arrive at the near-zero probability of drug trafficking organizations using coerced couriers." (*Id*. at p. 899.)

In Mr. Tran's case, there is no reason to believe that Nye and Todd applied any type of methodology or principles, much less reliable and empirically sound ones, to reach their conclusions. Respondent does not show otherwise.

Finally, respondent argues that any *Sargon* error was harmless. (2 Supp. RB 38.) Respondent cites its previous arguments raised in Arguments XIX-C and XX of its second supplemental brief. (2 Supp. RB 38.) In Argument XIX-C, respondent argued that "any error by Nye or Todd in relating case-specific hearsay regarding Plata and/or Tran's gang membership was harmless beyond a reasonable doubt" (2 Supp. RB 28-29), and in Argument XX, respondent argued that "the introduction of the evidence regarding Plata's statement to Qui Ly was harmless beyond a reasonable doubt" (2 Supp. RB 30). Mr. Tran has already addressed these arguments above in Arguments XVIII and XIX, *supra*, and there is no reason to repeat them here.

In a nutshell, there was an overwhelming amount of case-specific testimonial and nontestimonial hearsay, and unreliable, speculative opinions,

admitted into evidence which undermined the guilt and penalty phase verdicts. The prosecutor not only relied on this inflammatory gang evidence to prove the gang enhancement (which the state already concedes must be reversed), but relied on the evidence to urge the jury to find that gangs "have declared a war on our way of life." Mr. Tran and Plata were "two selfish gangbangers that had no regard for life," who murdered Linda for money and to enhance the reputation of the VFL gang. Any adversity experienced by the Mr. Tran in life did not lead to becoming a gang member; instead, Mr. Tran was a gang criminal "by choice." Mr. Tran suffered no remorse for killing Linda, but instead bragged about the murder and further committed to the gang life. Because the gang evidence was a fulcrum on which the prosecutor's penalty phase argument hinged, respondent's arguments that the error in admitting Nye and Todd's testimony in violation of both *Sargon* and *Sanchez* must be rejected. Reversal is required.

XXI. BECAUSE MR. TRAN COMMITTED THE CRIME WHEN HE WAS 20 YEARS OLD, HIS DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE PRINCIPLES OF *ROPER V. SIMMONS*.

In Argument XV of his first supplemental opening brief, and updated in Argument XXII of his second supplemental opening brief, Mr. Tran contended that his death sentence is unconstitutional for 18 to 20 year-olds for the reasons articulated in *Roper v. Simmons* (2005) 543 U.S. 551. Mr. Tran anticipated and addressed all respondent's arguments in its second supplemental reply and thus no further reply is necessary.

XXII. CUMULATIVE PREJUDICE REQUIRES REVERSAL IN THIS CASE.

In Argument XIV of his opening brief ("AOB"), and updated in Argument XII of his second supplemental opening brief, Mr. Tran contended that cumulative prejudice from all issues raised in the opening and supplemental briefing requires reversal of the case. (AOB 322-324; 2 Supp. AOB 194-196.) Respondent argues "any errors were few in number" and "[t]herefore, there was little if any error to accumulate, and Tran cannot establish cumulative error." (2 Supp. RB 40.)

Mr. Tran has already fully set forth the cumulative prejudice from the errors in this case, including those which respondent has conceded. He instead reminds this Court that capital cases intensify the necessity for cumulative error review. "When a defendant's life is at stake, the [United States Supreme] Court has been particularly sensitive to insure that every safeguard is observed." (*Gregg* v. *Georgia* (1976) 428 U.S. 153, 187; *see also Ake v. Oklahoma* (1985) 470 U.S. 68, 87 ["In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases.") (Burger, C.J., concurring in judgment). The Court has often required "procedures that safeguard against the arbitrary and capricious imposition of death sentences." (*Roberts* v. *Louisiana* (1976) 428 U.S. 325, 334.)

These procedural protections ensure that only the guilty -- indeed, only the

worst of the worst -- are executed. (*See*, *e.g.*, *Gilmore* v. *Taylor* (1993) 508 U.S. 333, 342 ["[In] capital case[s], . . . we have held that the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case."]; *Beck* v. *Alabama* (1980) 447 U.S. 625, 643 [striking down procedures that "introduce a level of uncertainty and unreliability . . . that cannot be tolerated in a capital case"].) When, as here, a capital trial is infected by numerous errors, the heightened procedural scrutiny the Supreme Court has demanded permits no escape from cumulative-error review. An assessment of whether multiple constitutional violations combined to "den[y] [a capital defendant] a trial in accord with traditional and fundamental standards of due process," (*Chambers v. Mississippi* (1973(410 U.S. at 302-303, surely qualifies as a basic "procedure[] that safeguard[s] against the arbitrary and capricious imposition of death sentences," (*Roberts* v. Louisiana, *supra*, 428 U.S. at p. 334.) The "greater degree of accuracy and factfinding" required for capital cases, *Gilmore v. Taylor*, *supra*, 508 U.S. at p. 342, confirms the need for a rigorous analysis. To execute a death sentence without the assurance that the accused received a fundamentally fair trial would "permit this unique penalty to be . . . wantonly and . . . freakishly imposed." (*Lewis* v. *Jeffers* (1990) 497 U.S. 764, 774.) While the Due Process Clause requires cumulative error review before the state may deprive a person's "liberty," its command is even more resounding when "life"

is on the line. There were multiple errors in this case, some of which respondent has conceded, and most of which respondent argues are harmless. While Mr. Tran believes these errors alone require reversal, he believes "a rigorous analysis" of all the prejudice from the errors in this case indisputably demands reversal.

CONCLUSION

For all these reasons, and the reasons stated in both appellant's opening brief and the supplemental briefing, reversal is required.

DATED: May 19, 2022

Respectfully submitted,

By: /s/ Catherine White
Catherine White
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the accompanying brief was produced on a computer. The word count of the computer program used to prepare the document shows that there are 14,095 words in the brief.

Dated: May 19, 2022

/s/ Catherine White
Catherine White

CERTIFICATE OF SERVICE

I, Catherine White, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 4833 Santa Monica Avenue, #70220, San Diego, California 92107.

On May 19, 2022, I served the within

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF, S165998

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I declare under penalty of perjury under the laws of the State of California that the information submitted is true and correct. Executed on May 19, 2022, in San Diego, California.

/s/ Catherine White
Declarant

STATE OF CALIFORNIA
Supreme Court of California

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