Supreme Court Copy

SUPREME COURT

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

QUANG MINH TRAN,

Defendant and Appellant./

NO. S176923

Orange County Superior Court No. 01WF0544

(COA No. G036560)

On Appeal From Judgment Of The Superior Court Of California

Orange County

Honorable Robert R. Fitzgerald, Judge

PETITION FOR REVIEW

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By Appointment of The
Court of Appeal under The
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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to rules 8.500 and 8.504 of the California Rules of Court, appellant and petitioner Quang Minh Tran respectfully requests this court to grant review in this matter following a published decision rendered by the Court of Appeal, Fourth Appellate District, Division

Three, filed August 31, 2009, affirming as modified the judgment of the superior court and petitioner's conviction and sentence.[1] A copy of this document is attached hereto as Exhibit A. Petitioner filed a petition for rehearing in the Court of Appeal. A copy of the Order Denying Rehearing and Modifying Opinion; No Change in Judgment filed on September 29, 2009 is attached hereto as Exhibit B. (These documents are hereafter collectively referred to as the "Opinion.") This petition has been filed within the time set forth in rule 8.500(e)(1).

Review is sought pursuant to rule 8.500(b)(1) because the Court of Appeal made errors of federal constitutional law and review is necessary to provide uniformity of decision on issues that could affect numerous defendants in gang-related prosecutions in this state. Four issues raised in this petition are based on the grounds for review specified in rule 8.500. The remaining issue is raised only to exhaust petitioner's state remedies for the purpose of further federal court review. (Rule 8.508.)

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[1] All further references to particular rules are to the California Rules of Court unless specified otherwise.

ISSUES PRESENTED FOR REVIEW

1. Did the Legislature intend in enacting Penal Code section 186.22, subdivision (a), that the necessary "pattern of criminal gang activity" could be proved by evidence of the accused's own prior criminal activity, notwithstanding the inherently prejudicial nature of "other crimes evidence" and its tendency to improperly denote propensity?
2. When a defendant is charged with murder and attempted murder in a gang shooting case, should an accomplice's testimony that he is afraid to testify against the defendant because the accomplice's sister was previously "executed" be stricken upon request, or warrant a mistrial or a new trial, when no evidence links the defendant to the sister's murder?
3. Did the evidentiary errors that occurred in petitioner's trial create cumulative prejudice so that petitioner was denied his constitutional rights to a fair trial and due process of law?
4. Can a juror who believes recidivists should be physically tortured render an unbiased verdict when the defendant's prior criminal history is revealed at trial, and is that juror guilty of misconduct for not revealing such strong opinions in voir dire when asked if he could be fair and impartial?
5. Does the imposition of upper terms based on a trial court's findings regarding the seriousness of a defendant's prior convictions and his prior prison terms violate that defendant's constitutional rights to a jury trial and due process of law?

NECESSITY FOR REVIEW

First, this petition is filed in order to secure uniformity of decision on the issue of whether inherently prejudicial "other crimes" evidence concerning a defendant may be used to prove a pattern of criminal street gang activity, when criminal activity not involving the defendant is available to prove the necessary predicate acts. Petitioner was a criminal street gang member and charged with murder, attempted murder, street terrorism, and related gang and gun use enhancements in connection with two gang-related shootings. The prosecutor's gang expert testified that predicate crimes committed to benefit petitioner's gang consisted in part of petitioner's prior series of extortions involving shooting into businesses and verbal threats. On appeal, petitioner argued the trial court prejudicially erred in admitting such evidence over objection pursuant to Evidence Code section 352[2] because the evidence constituted prohibited character/propensity evidence, other predicate acts not involving petitioner were available to prove a pattern of criminal gang activity, the evidence of his prior extortions was unduly prejudicial and inflammatory, and there was abundant other evidence of petitioner's active gang participation. (Exhibit A, pp. 2-3, 6-7; Exhibit B, p. 2, no. 2.)

The Court of Appeal ruled the evidence was relevant to prove the substantive charge of street terrorism, and the balancing between probativeness and undue prejudice under section 352 weighed in favor

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[2] All undesignated statutory references are to the Penal Code, with the exception of any reference to "section 352," which is to the Evidence Code.

of admissibility. The probativeness of the extortion evidence was overwhelming because it proved a high level of gang activity, knowledge of the gang's felonious conduct, and willful promotion of the gang's interests. The Legislature provided in section 186.22 that evidence of other crimes, without numerical limit and without restriction as to the perpetrator, be presented to the factfinder. Further, the trial court instructed the jury not to consider the extortion conviction as evidence of a propensity to commit the charged crimes. (Exhibit A, pp. 10-16.) However, the appellate court made an error of federal constitutional dimension. The Opinion conflicts with settled law regarding the inherently prejudicial nature of "other crimes" evidence and a defendant's right to a fair trial and due process of law.

Second, review should be granted in order to secure uniformity of decision with respect to a trial court's exercise of discretion in admitting testimony that infers a defendant on trial for murder was involved in another gang-related murder. On appeal, petitioner argued the trial court erred in denying his motion to strike an accomplice's testimony that he was afraid to testify against petitioner because his sister had been "executed," as well as petitioner's motions for a mistrial and a new trial on this basis. Petitioner argued the testimony was not relevant, and unduly prejudicial because it created an inference that he was responsible. The Court of Appeal found the testimony bolstered the witness's credibility because he was risking his life to testify, and was therefore probative. It was not unduly prejudicial because it was unlikely the jury presumed that petitioner, and not the gang itself, had executed the witness's sister. Further, there was no basis to impute misconduct to the prosecutor. (Exhibit A,

pp. 16-18; Exhibit B, p. 2, no. 4.) However, the appellate court made an error of federal constitutional dimension. The Opinion is not supported by the record and conflicts with settled law regarding a defendant's right to a fair trial and an impartial jury. Review is necessary to clarify whether testimony inferring a defendant's involvement in another violent crime in a closely balanced case can ever constitute admissible evidence.

Third, review should be granted with respect to whether the cumulative effect of these evidentiary errors denied petitioner a fair trial. The Court of Appeal determined there was no cumulative prejudice because it found the evidence challenged on appeal was properly admitted. (See Exhibit A, p. 4, fn. 4; Exhibit B, p. 2, no. 5.)

Fourth, review should be granted in order to secure uniformity of decision on the issue of juror misconduct during voir dire and a prospective juror's duty to disclose beliefs regarding recidivists that would make impartial judgment of a recidivist defendant highly unlikely. On appeal petitioner argued there was juror misconduct because a juror vigorously expressed an opinion after trial that recidivists should be caned as in Singapore, and therefore during voir dire concealed his bias against recidivist offenders like petitioner. The appellate court found the questioning during voir dire was not sufficiently specific to elicit this information, and there was no necessary relation between a philosophy of punishment and an ability to be fair and impartial in the determination of facts. (Exhibit A, pp. 18-19.) The Opinion conflicts with settled law regarding a defendant's right to a fair trial and an unbiased jury.

Appellant's fifth argument concerning sentencing factors is included in this petition purely to exhaust state remedies for purposes of federal habeas corpus review. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 844-845.)

STATEMENTS OF THE CASE AND FACTS

The facts stated in the Opinion are sufficient for rendering a decision on this petition (Exhibit A, pp. 2-10; Exhibit B, p. 2, nos. 2 & 3), except for a few minor errors and where additional clarification and citation to the record are set forth herein.[3]

[3] For example, the Opinion states that three members of two Vietnamese gangs entered an apartment complex in search of a particular rival gang member. (Exhibit A, p. 2.) The evidence established there were four members of two Vietnamese gangs who so entered the apartment complex. (2 CT 231-232.) The Opinion also states that another gang member was convicted of the 1992 murder of a rival gang member. (Exhibit A, p. 7.) That murder occurred in 1996. (5 RT 759-760.)

ARGUMENT

I. REVIEW IS NECESSARY TO CLARIFY WHETHER A PROSECUTOR MAY PROVE A PATTERN OF CRIMINAL STREET GANG ACTIVITY BY USING INHERENTLY PREJUDICIAL EVIDENCE OF A DEFENDANT'S OTHER CRIMES, WHEN CRIMINAL ACTIVITY BY OTHER GANG MEMBERS IS AVAILABLE FOR SUCH USE AND THERE IS AMPLE OTHER EVIDENCE LINKING THE DEFENDANT TO A GANG

Petitioner's jury convicted him of murder, attempted murder and street terrorism. (Exhibit A, p. 2.) With respect to the predicate crimes committed to benefit petitioner's gang (the "VFL"), the prosecutor's gang expert testified that petitioner had committed a series of extortions involving shooting into businesses and verbal threats, and that another fellow gang member was convicted of murdering a rival gang member. (Exhibit A, p. 7; Exhibit B, p. 2, no. 2; sec. 186.22, subds. (a) & (e).)

On appeal, petitioner argued the trial court prejudicially erred in admitting evidence regarding his prior criminal activity over objection pursuant to section 352. (Exhibit A, pp. 3, 10-12; see, *ante*, at p. 4; AOB, 31-48; ARB, 4-17.) The Court of Appeal disagreed. (Exhibit A, pp. 10-16; see, *ante*, at pp. 4-5.)

This issue presents a unique opportunity for this court to clarify how a defendant's constitutional right to a fair trial by an impartial jury may be protected in a proceeding involving street terrorism and the need to prove a pattern of criminal gang activity, and whether the

accused's own prior criminal activity is too inherently prejudicial to be presented as a predicate act when other evidence is available.

A. The Use of Petitioner's Prior Extortions was Unnecessary to Establish A Pattern of Criminal Gang Activity, and The Evidence Constituted Prohibited Character/Propensity Evidence.

Contrary to the Opinion (Exhibit A, p. 16), the trial court failed to exercise its discretion in a legally correct manner. The trial court's ruling fell outside the bounds of reason, impeded the ends of substantial justice, and resulted in a miscarriage of justice. (*People v. Brown* (2003) 31 Cal.4th 518, 534; *People v. Garcia* (1999) 20 Cal.4th 490, 503; *Bailey v. Taaffe* (1866) 29 Cal. 422, 424; Cal. Const., art. 6, sec. 13.)

1. Other Predicate Acts were Available to Prove The Requisite "Pattern of Criminal Gang Activity."

The trial court correctly noted that the prosecutor could use the current case and one predicate offense not involving petitioner to establish the necessary pattern of criminal gang activity with respect to the VFL gang. (5 RT 765, 767; see *People v. Loeun* (1997) 17 Cal.4th 1, 8, 10; *People v. Gardeley* (1996) 14 Cal.4th 605, 625; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1458; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1383-1384; sec. 186.22, subds. (a) & (e).) The Legislature's use of the disjunctive 'or' in section 186.22, subdivision (e) indicates an intent to designate alternative ways for a prosecutor to prove a pattern of criminal gang activity. (*People v. Loeun, supra*, 17 Cal.4th at pp. 9-10.)

The prosecutor did not dispute the defense claim that other VFL predicate offenses were available to prove the requisite "pattern of

criminal gang activity." (See 1 RT 27-28; sec. 186.22, subds. (a) & (e).) Use of the current offenses and/or crimes committed by other VFL members would have satisfied the limitations of section 352 because evidence of petitioner's prior criminal conduct in the form of multiple extortions (even though only one conviction) would not then have been presented to the jury. (Sec. 352.) The trial court erred in permitting the prosecutor to present such inherently inflammatory and prejudicial information to the jury given the alternatives and the fact such evidence was completely unnecessary to the prosecutor's case.

2. The Evidence of Petitioner's Prior Extortions was Unduly Prejudicial and Inflammatory, and should have been Excluded.

Only relevant evidence is admissible, but even relevant evidence can be excluded under the federal or state Constitution or by statute. (Evid. Code, secs. 350 & 351; *People v. Scheid* (1997) 16 Cal.4th 1, 13 (hereafter "*Scheid*").) According to this court, the admissibility of evidence has two components. First, did the challenged evidence satisfy the "relevancy" requirement set forth in Evidence Code section 210? Second, if the evidence was relevant, did the trial court abuse its discretion under section 352 "in finding that the probative value of the [evidence] was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice?" (*Scheid, supra*, 16 Cal.4th at p. 13.) Although petitioner's prior extortion conviction might have been relevant to establish a predicate act for purposes of the gang charge (Exhibit A, p. 11), the evidence was unduly prejudicial, cumulative, misleading to the jury, and confused the issues. (Sec. 352.)

Contrary to the Opinion, even though the Legislature intended that evidence of other crimes be admitted to prove a pattern of criminal gang activity (Exhibit A, pp. 12-14), under section 352 evidence of petitioner's *own* prior criminal activity should have been excluded. According to the Opinion, the Legislature impliedly intended that the accused's prior criminal activity could be used as a predicate act because section 186.22 does not explicitly state otherwise. (Exhibit A, p. 14.) However, a "court may not rewrite a statute to conform to a presumed intent that is not expressed." (*People v. Statum* (2002) 28 Cal.4th 682, 692, citing *Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 73-74.) Further, the well-established rule is that when a statute is susceptible of two reasonable constructions, the one that is more favorable to the defendant will be adopted. (*People v. Hicks* (1993) 6 Cal.4th 784, 795-796; *In re Luke W.* (2001) 88 Cal.App.4th 650, 655.) Thus even if there were ambiguity on this point, the interpretation most favorable to petitioner is that section 352 still fully applies to section 186.22, subdivisions (a) and (e). Also, the Legislature could have created an express exception to section 352 in enacting section 186.22, but did not do so. Implied repeals of statutes are disfavored. (See *People v. Chenze* (2002) 97 Cal.App.4th 521, 526.)

Contrary to the Opinion (Exhibit A, p. 14), the fact that two or more crimes may be presented to prove a pattern of criminal gang activity (sec. 186.22, subd. (e)) does not mean section 352 has little or no application. The Evidence Code and California case law governing the admission of inherently prejudicial "other crimes evidence" establish that the prosecutor's use of such evidence is not unfettered

and indeed must survive scrutiny under several exclusionary rules, including section 352. (See *People v. Thompson* (1980) 27 Cal.3d 303, 318, superseded by statute on other grounds as stated in *Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 714, fn. 2 (hereafter "*Thompson*").) In addition, the fact that a defendant's *current* charges may be used as predicate acts (*People v. Loeun*, *supra*, 17 Cal.4th at p. 10) does not mean his prior "other crimes" should be so used; the potential for prejudice is simply too great. (See *Thompson, supra,* 27 Cal.3d at p. 318; *People v. Alcala* (1984) 36 Cal.3d 604, 631-632, superseded by statute on another ground as stated in *People v. Falsetta* (1999) 21 Cal. 4th 903, 911 (hereafter "*Alcala*"); *People v. Dellinger* (1984) 163 Cal.App.3d 284, 297 (hereafter "*Dellinger*").)

"When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption." (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) A crucial component of this statute is "undue prejudice," because the ultimate goal of the section 352 weighing process is a *fair trial.* (See *People v. Harris* (1998) 60 Cal.App.4th 727, 736, review den.) As this court long ago recognized, "[t]he chief elements of probative value are relevance, materiality and necessity." (*People v. Schader* (1969) 71 Cal.2d 761, 774 –775.) Here, given the availability of other predicate acts including the current murder and attempted murder charges, it was patently unnecessary and cumulative, as well as confusing and misleading to the jury, to admit evidence of petitioner's prior extortions to establish the requisite pattern of criminal gang activity. If evidence of "other crimes" is " 'merely cumulative with

respect to other evidence which the People may use to prove the same issue' it is excluded under a rule of necessity. [Citations.]" (*Thompson, supra,* 27 Cal.3d at p. 318; *Alcala, supra,* 36 Cal.3d at pp. 631-632; *Dellinger, supra,* 163 Cal.App.3d at p. 297.)

Given the substantial prejudicial effect inherent in evidence of the accused's prior criminal acts, it must have *substantial* probative value to be admissible and "[i]f there is any doubt, the evidence should be excluded." (*Thompson, supra,* 27 Cal.3d at p. 318; *Alcala, supra*, 36 Cal.3d at p. 631; *Dellinger*, *supra*, 163 Cal.App.3d at pp. 297, 299.) This inherently prejudicial evidence was not essential to the prosecutor's case, and thus its probative value could not outweigh its prejudicial effect and the evidence should have been excluded. (Sec. 352.)

According to the Opinion (Exhibit A, p. 15), evidence of petitioner's prior extortions proved a high level of active gang participation, an element of street terrorism. However, the jury was inundated with evidence of petitioner's active gang involvement. The prosecutor referred to this extensive evidence, and to petitioner's tattoos, in argument to the jury. (7 RT 965-966.) Thus it was complete overkill to use petitioner's prior extortion conviction as a predicate act to prove a pattern of criminal gang activity and his active gang participation. Given the testimony of Duc Vuong, Qui Ly, Hanh Dam and the gang expert, the documentation of a fellow VFL member's prior conviction for a gang-related murder, and the extensive gang memorabilia linking petitioner to both the V and the VFL gangs, the jury would not need additional evidence to determine if petitioner was an active participant. Thus admission of his prior extortion conviction

was cumulative and should have been excluded under the rule of necessity. (*Thompson, supra,* 27 Cal.3d at p. 318.)

3. The Trial Court's Failure to Exercise Discretion in A Legally Correct Manner was Prejudicial because The Evidence Constituted Prohibited Propensity/Character Evidence.

This court has "described the 'prejudice' referred to in section 352 as characterizing evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*Scheid, supra*, 16 Cal.4th at p. 19; *People v. Crittenden* (1994) 9 Cal.4th 83, 134; see Exhibit A, p. 13.) The evidence of petitioner's prior extortions uniquely tended to evoke an emotional bias against him as an individual, because it painted him as a career criminal with a propensity to commit violent crimes. Contrary to the Opinion (Exhibit A, p. 15), petitioner's prior extortions and conviction had "only slight probative value" given the alternatives available to the prosecutor. (See *Scheid, supra*, 16 Cal.4th at p. 19.)

Subdivision (b) of Evidence Code section 1101 allows the admission of "other crimes evidence" only to prove certain facts at issue other than the disposition to commit the charged crimes. To be admissible, evidence of prior offenses: (1) must be offered to prove a material fact, (2) must have a tendency to prove or disprove the material fact; and (3) the proffered evidence *must survive scrutiny under several exclusionary rules*. (*Thompson, supra*, 27 Cal.3d at p. 315.) One of these exclusionary rules is section 352. (See *Dellinger, supra*, 163 Cal.App.3d at p. 297.)

The trial court admitted this inherently prejudicial "other crimes evidence" to establish a pattern of criminal gang activity. However, "[a] concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is. The reason for this rule is that it is likely that the defendant will be seriously prejudiced by the admission of evidence indicating that he has committed other crimes." (*U.S. v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044; see *People v. Garceau* (1993) 6 Cal.4th 140, 186 [use of "other crimes evidence" may dilute the presumption of innocence], overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) This court has long recognized that the admission of prior convictions may substantially prejudice a criminal defendant. (*People v. Calderon* (1994) 9 Cal.4th 69, 79.) The United States Supreme Court has also recognized that propensity evidence may deny a criminal defendant a fair opportunity to defend against a particular charge. (See *Old Chief v. U.S.* (1997) 519 U.S. 172, 181.) Because substantial prejudicial effect is inherent in such evidence, other crimes are admissible *only* if they have *substantial* probative value. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Crittenden, supra,* 9 Cal.4th at p. 134; *Scheid, supra*, 16 Cal.4th at p. 19; see, also, *Dellinger, supra*, 163 Cal.App.3d at p. 297; see, *ante*, at p. 13.)

In addressing the use of "other crimes evidence" under Evidence Code sections 1101 and 352, this court stated that "because other-crimes evidence is so inherently prejudicial, its relevancy is to be 'examined with care.'" (*Alcala, supra,* 36 Cal.3d at p. 631.) Contrary to the Opinion (Exhibit A, pp. 10-16), such evidence is to be received with "extreme caution" and all doubts about its admission

must be resolved in the accused's favor. (*Ibid.*; see, also, *People v. Lewis* (2001) 25 Cal.4th 610, 637; *Dellinger*, *supra*, 163 Cal.App.3d at p. 297.)

The trial court failed to adequately consider that this "other crimes evidence" had "'potential for great prejudice to [petitioner] because of its possible misuse by the jury as character trait or propensity evidence.' [Citation.]" (*Dellinger, supra,* 163 Cal.App.3d at p. 297.) Such evidence "uniquely tends to evoke an emotional bias against the defendant as an individual and ... has very little effect on the issues." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) In *People v. Holt* (1984) 37 Cal.3d 436, 450-451, this court recognized the admission of such evidence produces an overly-strong tendency to believe the defendant is guilty of the charges simply because he is a likely person to engage in such activity. There also is a danger the jury may convict a defendant in order to punish him for his prior crimes. (*People v. Mason* (1991) 52 Cal.3d 909, 949-950.)

All of these potential sources of prejudice are present here. The prosecutor thus was allowed to theorize, in effect, that petitioner's prior criminal activity demonstrated his propensity to use whatever means possible, including murder, to obtain his objective of promoting VFL.

B. The Evidentiary Error Requires Reversal of Petitioner's Conviction.

The admission of this highly inflammatory evidence, which was unnecessary to prove the gang charge yet painted petitioner as a dangerous predator, so infused the trial with unfairness as to deny him due process of law under the Fifth and Fourteenth Amendments.

(*Estelle v. McGuire* (1991) 502 U.S. 62, 75; *Duncan v. Henry* (1995) 513 U.S. 364, 365; *People v. Partida* (2005) 37 Cal.4th 428, 435-436; Cal. Const., art. 1, secs. 7, 15 & 24.) This evidentiary error impermissibly lessened the prosecutor's burden of proof beyond a reasonable doubt of all of the charges. (*In re Winship* (1970) 397 U.S. 358, 364; *People v. Tewksbury* (1976) 15 Cal.3d 953, 972.) The clear misapplication of state law in this case also deprived petitioner of due process of law under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

Contrary to the Opinion (Exhibit A, p. 16), the trial court's limiting instruction could not alleviate the inherent prejudice. It is doubtful the jury could abide by it given the inherently prejudicial nature of such "other crimes evidence." "It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect...We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130; see, also, *Krulewitch v. U.S.* (1949) 336 U.S. 440, 453 (conc. opn. of Jackson, J.) ["The naive assumption that prejudicial effects can be overcome by instructions to the jury, [citation], all practicing lawyers know to be unmitigated fiction. [Citation]"].)

The government failed to show this error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24-25 (hereafter "*Chapman*".) The jury's consideration of this highly prejudicial and inflammatory evidence that portrayed petitioner in the

worst possible light violated his state and federal constitutional rights to a fair trial and due process of law. (Cal. Const., art. I, secs. 7, 15 & 24; U.S. Const., 5th, 6th & 14th Amends.; see *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

This was a close case. The evidence against petitioner was not overwhelming. No physical evidence tied him to the shootings, and no eyewitness (other than the accomplice Qui Ly whose credibility was highly questionable) could identify him as being present. Like Qui Ly, witness Hanh Dam was a member of the V gang and not petitioner's gang, and both men had much to gain personally by implicating petitioner in the shootings. Qui Ly admitted the V and VFL gangs were no longer aligned in May 1997, and both he and Hanh Dam took great pains to implicate petitioner as the shooter rather than their gang's leader, Hung Meo. (Hung Meo's photograph matches the description of Long Bui's shooter given to the police by eyewitness Guy Puleo on the night of the shootings.[4] [5 CT 1024-1025; Exhibit No. 17B (photo of Hung Meo); Defense Exhibit B (Garden Grove Police Department Supplemental Report)].)

The guilty verdicts and findings were reached only after approximately 7-1/2 hours of deliberation over four days, and requests for readbacks of key testimony.[5] (4 CT 875-880; 5 CT 997-999.)

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[4] Puleo also described the shooter as being approximately 5'10" tall, and the second male at the gate as being approximately 5'11" or 6' tall. (Defense Exhibit B.) Petitioner is 5'5" tall. (5 CT 1056.)

[5] The jury twice requested the readback of the accomplice Qui Ly's testimony, the only witness placing petitioner at the scene, and

Footnote continued on next page

"Apparently, the jury did not view its decision as clear cut." (*People v. Cribas* (1991) 231 Cal.App.3d 596, 608.) The jurors' requests indicate they were struggling to determine whether and to what extent petitioner was involved in the shootings. (See *People v. Hernandez* (1988) 47 Cal.3d 315, 352-353 [a case is not close where there is no request for rereading of particular testimony]; *People v. Godinez* (1992) 2 Cal.App.4th 492; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40.) According to this court, "jury deliberations of almost six hours are an indication that the issue of guilt is not 'open and shut' *and strongly suggest that errors in the admission of evidence are prejudicial*." (*People v. Cardenas* (1982) 31 Cal.3d 897, 907, emphasis added.) Thus, any doubt as to the prejudicial character of the error should have been resolved in petitioner's favor. (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62; *People v. Wagner* (1975) 13 Cal.3d 612, 621.)

Even applying a lesser standard of prejudice, a result more favorable to petitioner was reasonably probable had this extremely prejudicial evidence been excluded. (*People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019.) There is a reasonable chance the jury would have found petitioner's theory of the case more credible on some points and been unable to convict him of all the charges. (*People v. Watson* (1956) 46 Cal.2d 818 (hereafter "*Watson*"); *College Hospital Inc. v. Superior*

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also requested the readback of Hanh Dam's testimony, who testified petitioner admitted participating in the shootings. (4 CT 876, 878.)

Court (1994) 8 Cal.4th 704, 715; cf. *Strickland v. Washington* (1984) 466 U.S. 668, 693-694, 697, 698.)

Given the numerous street terrorism prosecutions in this state, this court should grant review to secure uniformity of decision as to the interplay of section 352 and "other crimes evidence" in the context of proving a pattern of criminal gang activity.

II. REVIEW IS NECESSARY TO CLARIFY WHETHER TESTIMONY ERRONEOUSLY INFERRING A MURDER DEFENDANT'S INVOLVEMENT IN AN UNRELATED MURDER CAN CONSTITUTE ADMISSIBLE EVIDENCE SIMPLY BECAUSE IT BOLSTER'S THE WITNESS'S CREDIBILITY REGARDING HIS FEAR IN TESTIFYING

Prior to trial, the defense moved to exclude any mention of Qui Ly's sister and her death on relevancy and section 352 grounds. The sister had been V gang leader Hung Meo's girlfriend, and her murder was unsolved. The prosecutor indicated she would not present the fact of the sister's death, although her name might be mentioned in other contexts. The prosecutor indicated the fact of Hung Meo's death would be elicited, but she would not ask "how they died or why they died." (1 RT 30-31; Exhibit A, p. 7.) The trial court specifically sought reassurance from the prosecutor that she would not attempt to implicate petitioner in the sister's killing "in any way." (1 RT 31.) The court stated it would rule on specific objections if anything occurred in that regard. (1 RT 31-32.)

During Qui Ly's redirect examination, he testified he feared for his life in testifying against petitioner because his sister had been "executed." (3 RT 369; Exhibit A, pp. 3, 7-8.)

The defense strongly objected to this testimony, stating it was "outrageous" for the prosecutor to ask a question that elicited this information in light of the pre-trial discussion, and noting that Qui Ly "is crying in front of the jury." (3 RT 371.) Defense counsel assumed the prosecutor instructed Qui not to mention his sister's death. Instead, the prosecutor elicited the information for sympathy purposes to

support Qui Ly's credibility. The court denied the motion to strike.[6] (1 RT 371-372; Exhibit A, p. 8.)

Following his conviction, petitioner moved for a new trial in part on this ground. (Exhibit A, p. 9.) The defense argued that even a slight evidentiary error could have tipped the jury against petitioner, given the close nature of the case and lengthy deliberations. The trial court denied the motion. (7 RT 1098-1100.)

On appeal, petitioner argued the trial court erred in denying his motion to strike the accomplice Qui Ly's testimony about his sister's execution, as well as petitioner's motions for a mistrial and a new trial on this basis. The testimony was not relevant, and unduly prejudicial because it created an inference that petitioner was responsible. The Court of Appeal found the testimony highly probative because it bolstered Qui Ly's credibility, given he was risking his life to testify. It was not unduly prejudicial because it was unlikely the jury presumed that petitioner, and not the gang itself, had executed Qui Ly's sister. Further, there was no basis to impute misconduct to the prosecutor. (Exhibit A, pp. 16-18; Exhibit B, p. 2, no. 4.)

A. The Trial Court Prejudicially Erred in Allowing The Jury to Consider Evidence that Qui Ly's Fear in Testifying against Petitioner was Based on His Sister's Execution.

Evidence of the murder of Qui Ly's sister's was not relevant to the charges against petitioner, and thus should never have been admitted. (Evid. Code, secs. 210 & 350; *Scheid, supra*, 16 Cal.4th at

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[6] The parties and the court considered the motion to strike as also involving a mistrial motion. (Exhibit A, p. 8.)

p. 13.) Even assuming arguendo the evidence was relevant to Qui Ly's credibility (see Exhibit A, pp. 16-18), its unduly prejudicial effect on the jury clearly outweighed any possible probative value and such evidence could only confuse the issues and mislead the jury. (Sec. 352; *Scheid, supra*, 16 Cal.4th at p. 13.)

The Opinion notes the statement came out on *redirect* examination when the prosecutor was trying to elicit that the accomplice Qui Ly risked his life by testifying, even though he had something to gain by cooperating with the prosecutor. (Exhibit A, p. 18.) However, Qui Ly had already testified on *direct* examination that he risked his life in testifying against petitioner because of retaliation suffered by other "snitches" *and their families*. (2 RT 259-260.) The gang expert also testified that "rats" and "snitches" risk their lives and the lives of family members when they testify against other gang members. (5 RT 748-749.) Hanh Dam testified he was risking his life by testifying in this case. (4 RT 645.) The jury could easily judge Qui Ly's credibility in the context of his fear without being exposed to the inflammatory and irrelevant fact of his sister's "execution", a murder that they could only tie to petitioner because it was *petitioner* that Qui Ly was testifying against, and petitioner was on trial for *murder and attempted murder*.

The Opinion relies on *People v. Olguin, supra,* 31 Cal.App.4th at pp. 1368-1369, in finding that Qui Ly's statement was highly probative because the jury was given a fact to explain his fear. (Exhibit A, pp. 16-17.) However, in quoting *Olguin* on this point (Exhibit A, p. 17), the Opinion deletes key language, to wit, that the jury "would be entitled to know not just that the witness was afraid,

but also, *within the limits of Evidence Code section 352*, those facts which would enable them to evaluate the witness's fear." (*Id.* at p. 1369, emphasis added to show omitted part of quotation.) Contrary to the Opinion, the limits of section 352 should have been applied to Qui Ly's statement. Also, *Olguin* involved only *threats* of harm to a witness *by third persons*, and not the much more prejudicial *murder* of a witness's family member by testimony inferring the defendant was involved. (See *id.* at pp. 1367-1368.) And, unlike in *Olguin* (*id.* at pp. 1368-1369), petitioner's jury was not given a limiting instruction that the evidence went only to Qui Ly's state of mind. (See, also, *People v. Burgener* (2003) 29 Cal.4th 833, 870 [harmless error to admit evidence of source of threat to witness, because jury instructed to disregard that evidence].)

As this court reaffirmed, a prosecutor has a duty to guard against statements by witnesses containing inadmissible evidence. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1406 (hereafter "*Leonard*").) The *Leonard* court recognized that if the prosecutor asks a question likely to elicit a reference to inadmissible matter, the question constitutes misconduct even if the prosecutor *did not intend* to elicit such a reference. (*Id.* at p. 1405; *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Contrary to the Opinion (Exhibit A, p. 17), it is immaterial that the prosecutor may have acted innocently in wanting Qui Ly to repeat that he feared for his life. No "nefarious clever maneuvering" (Exhibit A, p. 17) is necessary for prosecutor error. (See *Leonard, supra,* 40 Cal.4th at p. 1405; *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.) "If the prosecutor believes a witness may give an inadmissible answer during his examination, he *must*

warn the witness to refrain from making such a statement.' (*People v. Warren* (1988) 45 Cal.3d 471, 481-482....)" (*Leonard, supra,* 40 Cal.4th at p. 1406, emphasis added.)

Contrary to the Opinion (Exhibit A, pp. 17-18 & fn. 8), the record shows the prosecutor should have anticipated that Qui Ly might refer to the murder of *his sister,* especially because she was killed with his best friend Hung Meo and the prosecutor intended to elicit the fact of Hung Meo's death. Thus, the prosecutor had a duty to warn Qui Ly to refrain from making a statement about his sister's killing. (*Leonard, supra,* 40 Cal.4th at p. 1406; see 1 RT 371-372.) With proper advisement from the prosecutor, Qui Ly's testimony could have been limited to the fact he feared for his life and the welfare of his family because he was now a "rat" and a "snitch." Instead, the jury was left to reasonably infer that *petitioner*, who was on trial for murder, and not just his gang (see Exhibit A, pp. 17-18), was somehow involved in that apparently retaliatory murder.

A trial judge is obligated to protect a defendant's right to a fair trial when highly prejudicial matter comes in, without waiting for an objection or motion to strike. (*People v. Arends* (1957) 155 Cal.App.2d 496, 508; see *Powell v. State of Alabama* (1932) 287 U.S. 45, 52; *People v. Evans* (1952) 39 Cal.2d 242, 248-249.) The trial court failed to comply with this duty. This was a closely balanced case. (See, *ante*, at pp. 18-19.) The "erroneous denial of an objection may, in a close case, warrant reversal...." (*People v. Carrera* (1989) 49 Cal.3d 291, 321.)

B. The Trial Court's Refusal to Grant A Mistrial Requires Reversal of Petitioner's Conviction.

The trial court also erred in denying a mistrial. It was clear at the time that "the bell could not be unrung" with respect to the extensive, damaging effect of Qui Ly's reference to his sister's "execution" as a basis for his fear in testifying against petitioner. (*U.S. v. Garza* (5th Cir. 1979) 608 F.2d 659, 666.)

A mistrial "should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986 (hereafter "*Jenkins*"); *Illinois* v. *Somerville* (1973) 410 U.S. 458, 461-462.) A mistrial is necessary when a defendant's chances of receiving a fair trial have been irreparably damaged. (*People v. Bolden* (2002) 29 Cal.4th 515, 555; *Jenkins, supra*, 22 Cal.4th at p. 986.) Contrary to the Opinion (Exhibit A, pp. 17-18), Qui Ly's testimony improperly linked petitioner to yet another gang-related murder. Some bells simply peal too loudly and piercingly to be unrung. (See *People v. Hill, supra,* 17 Cal.4th at pp. 845-846; *U.S. v. Garza, supra,* 608 F.2d at p. 666.) The prosecutor's error in failing to warn Qui Ly about mentioning his sister's murder warranted a mistrial. The court's refusal to declare a mistrial constituted a clear abuse of discretion. (See *People v. Garcia, supra,* 20 Cal.4th at p. 503; *People v. Bolden, supra,* 29 Cal.4th at p. 555; *Jenkins, supra*, 22 Cal.4th at p. 986.)

C. The Trial Court's Refusal to Grant A New Trial Requires Reversal of Petitioner's Conviction.

Where irrelevant evidence is admitted, and is of such character as necessarily to be prejudicial to the defendant, a new trial must be granted. (*People v. Gilliland* (1940) 39 Cal.App.2d 250, 261; *People*

v. Martin (1910) 13 Cal.App. 96, 107; sec. 1181, subd. (5).) As the Ninth Circuit Court of Appeals recognized, when there is both substantial admissible and inadmissible evidence presented to the jury, a new trial is warranted because the reviewing court cannot know what evidence influenced the minds of each juror. (*Leahy v. U.S.* (9th Cir. 1959) 272 F.2d 487, 488.) Here testimony regarding the sister's murder was in essence deemed inadmissible by the trial court, yet subsequently admitted. The trial court then refused to strike the improper testimony and did not instruct the jury to disregard it. It is impossible to know if this "inadmissible" testimony improperly implicating petitioner in yet another gang-related murder influenced the mind of any juror. Thus, contrary to the Opinion (Exhibit A, p. 18), the failure to grant a new trial in this closely balanced case resulted in a miscarriage of justice. (Cal. Const., art. 6, sec. 13; *People v. Ault* (2004) 33 Cal.4th 1250, 1261-1262, 1266.)

Qui Ly's improper testimony did not tend to establish petitioner's guilt of the charged crimes. Rather it tended only to degrade him and to prejudice him before the jury because the jury was authorized and instructed to consider *all this prejudicial evidence* against petitioner. (*People v. Gilliland, supra,* 39 Cal.App.2d at pp. 261-262.) Here the information elicited by the prosecutor amounted to a charge that petitioner was involved in the execution of Qui Ly's sister. (See *id.* at p. 262.) "The human mind is not so constructed that a thing of that kind can be either forgotten or overlooked by a jury." (*Ibid.*)

When a trial court manifestly and unmistakably abuses its discretion, the order denying a new trial must be reversed. (*People v.*

Lewis (2001) 26 Cal.4th 334, 364; *People v. Delgado* (1993) 5 Cal.4th 312, 328.) In deciding "whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background. [Citation.]" (*People v. Delgado, supra*, 5 Cal.4th at p. 328, internal quotation marks omitted.) When, as in this case, a motion for a new trial is denied and a constitutional right such as the right to an impartial jury is implicated, Article VI, section 13 of the California Constitution requires the reviewing court to conduct an independent examination of the proceedings to determine whether a miscarriage of justice occurred. (*People v. Ault, supra,* 33 Cal.4th at pp. 1261-1262.) Given the facts here and contrary to the Opinion (Exhibit A, p. 18), the trial court not only failed to exercise discretion in a legally correct manner but also abused its discretion in denying the motion for a new trial, resulting in a miscarriage of justice.

D. These Errors Require Reversal of Petitioner's Conviction.

This evidence was inadmissible because not relevant. (Evid. Code, secs. 210, 350 & 351.) Even if relevant to Qui Ly's credibility, any possible probative value was substantially outweighed by the undue prejudicial effect of such evidence, confusion of the issues, and tendency to mislead the jury. (Sec. 352.) Further, the admission of this highly inflammatory evidence, which wrongly implicated petitioner in the murder of a young woman during his trial for *murder and attempted murder*, so infused the trial with unfairness as to deny him due process of law under the Fifth and Fourteenth Amendments. (*Estelle v. McGuire, supra,* 502 U.S. at p. 75; *Duncan v. Henry, supra,* 513 U.S. at p. 365; *People v. Partida, supra,* 37 Cal.4th at pp.

435-436; Cal. Const., art. 1, secs. 7, 15 & 24.) The prosecutor's burden of proving each element of the serious charges beyond a reasonable doubt was significantly lessened by the jury's exposure to testimony implicating petitioner in yet another murder. (*In re Winship, supra,* 397 U.S. at p. 364; *Mullaney v. Wilbur* (1975) 421 U.S. 684; *People v. Tewksbury, supra,* 15 Cal.3d at p. 972; U.S. Const, 6th & 14th Amends.)

The government failed to show this error did not contribute to the verdict. (*Chapman, supra,* 386 U.S. at pp. 24-25.) The jury's consideration of this highly prejudicial and inflammatory evidence, which portrayed petitioner as a vicious serial killer, violated his state and federal constitutional rights to a fair trial and due process of law. (Cal. Const., art. I, secs. 7, 15 & 24; U.S. Const., 5th, 6th & 14th Amends.; see *McKinney v. Rees, supra,* 993 F.2d 1378.)

The trial court's rulings fell outside the bounds of reason, impeded the ends of substantial justice, and resulted in a miscarriage of justice. (*People v. Brown, supra*, 31 Cal.4th at p. 534; *People v. Garcia, supra,* 20 Cal.4th at p. 503; *Bailey v. Taaffe, supra,* 29 Cal. at p. 424.) This was a textbook close case, and any doubt as to the prejudicial nature of this substantial error should have been resolved in petitioner's favor. (See, *ante*, at pp. 18-19; *People v. Zemavasky, supra,* 20 Cal.2d at p. 62.) Consequently, a miscarriage of justice occurred. (Cal. Const., art. 6, sec. 13.) In addition, the clear misapplication of state law deprived petitioner of due process of law under the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. 343.)

Even under the *Watson* standard of prejudice, a result more favorable to petitioner was reasonably probable had this extremely prejudicial evidence been excluded. (*Watson, supra,* 46 Cal.2d 818.)

This court should grant review to secure uniformity of decision and to clarify when, if ever, testimony erroneously inferring a defendant's involvement in another violent crime in a closely balanced case can constitute admissible evidence.

III. THE SERIOUS EVIDENTIARY ERRORS IN THIS CASE CREATED CUMULATIVE PREJUDICE AND UNDERMINED THE FUNDAMENTAL FAIRNESS OF PETITIONER'S TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, REQUIRING REVERSAL OF HIS CONVICTION

Petitioner argued the evidentiary errors in his case cumulatively resulted in a denial of his constitutional rights to due process of law and to a fair and impartial jury trial. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. 1, secs. 7 & 15.) The Court of Appeal disagreed because it found the evidence challenged on appeal was properly admitted. (Exhibit A, p. 4, fn. 4; Exhibit B, p. 2, no. 5.)

Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively result in a trial that is fundamentally unfair. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 764; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6; *Harris by and through Ramseyer v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; U.S. Const., 6th & 14th Amends.) Petitioner has shown his trial was far from perfect. (*People v. Hill, supra,* 17 Cal.4th at p. 845.) Even if these evidentiary errors were independently harmless, they undoubtedly rose by accretion to the level of reversible and prejudicial error. (See *id.* at p. 844.)

Even if one or more of these errors is subject to the less strict *Watson* standard, because the evidentiary error is of constitutional dimension the government must establish their cumulative effect was

harmless beyond a reasonable doubt. (*People v. Williams, supra,* 22 Cal.App.3d at pp. 58-59; *Chapman, supra,* 386 U.S. at p. 24.) This burden was not met in this closely balanced case. Petitioner is entitled to a reversal of the judgment of conviction. (*See Lincoln v. Sunn, supra,* 807 F.2d at p. 814, fn. 6; *People v. Hill, supra,* 17 Cal.4th at p. 847.)

IV. REVIEW SHOULD BE GRANTED TO SECURE UNIFORMITY OF DECISION ON WHAT CONSTITUTES JUROR MISCONDUCT DURING VOIR DIRE, AND TO CLARIFY THE DUTY OF A PROSPECTIVE JUROR TO DISCLOSE BELIEFS REGARDING RECIDIVISTS THAT WOULD MAKE IMPARTIAL JUDGMENT OF A RECIDIVIST DEFENDANT UNLIKELY

Just after the verdicts, Juror No. 8 adamantly asserted that repeat offenders (like petitioner) should be caned as in Singapore, and that this would stop recidivism. (Exhibit A, pp. 3, 9; 5 CT 1015-1018.) In petitioner's motion for a new trial, he argued that this juror improperly concealed information during voir dire which would have elicited a challenge for cause and which deprived petitioner of his right to exercise peremptory challenges in light of the gang-related evidence and evidence of petitioner's prior conviction to be presented at trial. (5 CT 1015-1025.) The trial court refused to allow petitioner to call Juror No. 8 to testify regarding this matter, and in denying the motion for a new trial summarily determined there was no juror misconduct. (Exhibit A, p. 9.)

On appeal petitioner argued there was juror misconduct because Juror No. 8 concealed his bias against recidivist offenders like petitioner during voir dire, and the trial court erred in refusing to allow the defense to subpoena the juror for an evidentiary hearing and to conduct such a hearing. (Exhibit A, pp. 9, 18.) The appellate court found no prima facie case of juror misconduct had been established because the questioning during voir dire was not sufficiently specific to elicit this information. There was no necessary relation between a

philosophy of punishment and an ability to be fair and impartial in the determination of facts. (Exhibit A, pp. 18-19.)

A. Court Proceedings.

During voir dire, the court informed the prospective jurors that the case involved criminal street gangs. (Certification of Settled Statement on Appeal filed April 11, 2007 in the Court of Appeal ["Settled Statement"], pp. 2-3, par. 1.) The court asked the prospective jurors if they could be fair in this case. (Settled Statement, p. 3, ls. 3-5.) Defense counsel asked the prospective jurors if any of them believed they should not sit on this case. (1 AUG RT 38.) The prosecutor repeatedly asked if prospective jurors could be fair and listen impartially to a witness's testimony *while knowing that witness had prior convictions*. (1 AUG RT 49-52.) Juror No. 8 informed the court he could be fair and impartial and follow the law, and there was nothing about which he needed to inform the court. (1 AUG RT 118-119.)

At trial, the prosecutor's gang expert testified that petitioner committed a series of extortions involving shooting into businesses and verbal threats. (5 RT 761-762; Exhibit A, p. 7; Exhibit B, p. 2, no. 2.) The gang expert also opined petitioner was an active participant in the VFL criminal street gang based in part on crimes he had committed with other VFL members. (5 RT 782.)

B. The Trial Court and Appellate Court Erred in Finding No Juror Misconduct Occurred.

Juror No. 8's vocal opinions regarding recidivism indicated bias, especially in light of the presentation, over defense objection, of evidence concerning petitioner's prior conviction.

In evaluating a claim of juror misconduct, the reviewing court must "accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*People v. Nesler* (1997) 16 Cal.4th 561, 582 (hereafter "*Nesler*").) Juror misconduct raises a rebuttable presumption of prejudice. (*People v. Majors* (1998) 18 Cal.4th 385, 417, citing *In re Hitchings* (1993) 6 Cal.4th 97, 118 (hereafter "*Hitchings*").) Whether juror misconduct has resulted in prejudice "is a mixed question of law and fact subject to an appellate court's independent determination." (*Nesler, supra*, 16 Cal.4th at p. 582; *Hitchings, supra*, 6 Cal.4th at p. 119; *People v. Hardy* (1992) 2 Cal.4th 86, 174.)

Again, when a motion for a new trial is denied, Article VI, section 13 of the California Constitution requires the appellate court to conduct an independent examination of the proceedings to determine whether a miscarriage of justice occurred. (*People v. Ault, supra*, 33 Cal.4th at pp. 1261-1262.) "Courts have stressed the particular need for independent review of the trial court's reasons for denying a new trial motion in juror bias cases. This is because the reviewing court must protect the complaining party's right to a fully impartial jury as an ' "inseparable and inalienable part" of the [fundamental] right to jury trial [(U.S. Const., amend. VI; Cal. Const., art. I, sec. 16)]. [Citations.]'" (*Id.* at p. 1262.)

Juror misconduct implicates the constitutional rights guaranteed by the Sixth and Fourteenth Amendments. (*Marino v. Vasquez* (9th Cir. 1987) 812 F.2d 499, 505.) According to this court, "A defendant is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to the

unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]'" (*Nesler, supra*, 16 Cal.4th at p. 578; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, sec. 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *Hitchings, supra,* 6 Cal.4th at p. 110.) Reversal is required when "the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the defendant's detriment...." (*People v. Marshall* (1990) 50 Cal.3d 907, 951.) In such a case, "we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial." (*Ibid.*)

Due process requires a jury in which no member has been improperly influenced and every member is capable and willing to decide the case solely on the evidence before it. (*Nesler, supra*, 16 Cal.4th at p. 578, quoting from *Smith v. Phillips* (1982) 455 U.S. 209, 217; *In re Hamilton* (1999) 20 Cal.4th 273, 294.) "This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." (*Turner v. State of Louisiana* (1965) 379 U.S. 466, 472.)

A criminal defendant may move for a new trial on specified grounds, including juror misconduct. (Sec. 1181, subds. (2), (3) & (4); *People v. Ault, supra,* 33 Cal.4th at p. 1260.) Among the overt acts that are expressly admissible and regarding which jurors may testify are statements. (*People v. Steele* (2002) 27 Cal.4th 1230, 1265; *In re Stankewitz* (1985) 40 Cal.3d 391, 398.)

> "When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, *such as when a juror conceals bias on voir dire*, ... or shares improper information with other jurors, the event is called juror misconduct." (*In re Hamilton, supra*, 20 Cal.4th at p. 294, emphasis added.)

1. Juror No. 8 Concealed The Material Fact that He was Biased Against Criminal Defendants and Especially Recidivists.

Juror concealment of material facts or giving false answers during voir dire constitutes misconduct and raises a presumption of prejudice. (*People v. Carter* (2005) 36 Cal.4th 1114, 1208 (hereafter "*Carter*"); *People v. San Nicolas* (2004) 34 Cal.4th 614, 644; *Hitchings, supra*, 6 Cal.4th at p. 111; *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929 (hereafter "*Blackwell*").) A prospective juror's false answer or concealment on voir dire can prevent the parties from intelligently exercising their statutory right to challenge a prospective juror for cause, and can eviscerate their right to exercise peremptory challenges and remove a prospective juror they believe cannot be fair and impartial. (*Hitchings, supra*, 6 Cal.4th at p. 111.)

A defendant establishes a prima facie case of concealment or deception if the voir dire questioning was sufficient to elicit the information not disclosed, or if he or she shows the juror gave a false answer in response to such questioning. (*Blackwell, supra*, 191 Cal.App.3d at p. 929; Exhibit A, p. 18.) The presumption of prejudice then "'may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the

misconduct].'" (*Carter, supra*, 36 Cal.4th at p. 1208; *In re Hamilton, supra*, 20 Cal.4th at p. 296; *Blackwell, supra*, 191 Cal.App.3d at p. 930; *Hitchings, supra*, 6 Cal.4th at p. 119.) Prejudice may be rebutted by the juror's testimony at an evidentiary hearing. (*Carter, supra*, 36 Cal.4th at p. 1208.)

In determining whether a juror's voir dire responses constitute misconduct, the reviewing court must decide whether the question was relevant to the voir dire examination and unambiguous, and if the juror had substantial knowledge of the information sought to be elicited. (*Blackwell, supra*, 191 Cal.App.3d at p. 930.) If so, the court must determine if prejudice to the accused in selecting the jury reasonably could be inferred from the juror's failure to adequately respond. If prejudicial, the reviewing court should order a new trial. (*Ibid.*; *People v. Diaz* (1984) 152 Cal.App.3d 926, 935 (hereafter "*Diaz*").)

According to the Opinion, the "requisite specificity is not shown" and "there is no 'fit' between the question" as to whether Juror No. 8 could be fair and impartial and follow the law, and his "supposedly false answer." (Exhibit A, pp. 18-19.) This reasoning carried to its logical conclusion would require a question such as, "Do you believe recidivist offenders should be flogged with a cane, and if so, can you still be fair and impartial in this case given that this defendant has prior convictions?" Such exacting specificity is not required; what is required is that the questions be relevant to the voir dire examination, unambiguous, and that the juror has substantial knowledge of the information sought to be elicited. (*Blackwell, supra,* 191 Cal.App.3d at p. 930.) Contrary to the Opinion (Exhibit A, pp.

18-19), that test is satisfied here. The questions posed clearly apprised the panel that they should reveal any conflicting opinions such as those held by Juror No. 8. (See, *ante*, at p. 34.)

Petitioner disagrees with the appellate court's reasoning that in every case an individual's attitude toward punishment does not affect the ability to be fair in determining the facts. (Exhibit A, p. 19.) In most cases, this may be so. However, in *this* case, the juror's extreme attitude toward punishment concerned *recidivists*. In *this* case, the accused (petitioner) was a *recidivist* and evidence concerning his prior criminal activity was presented to the jury. Juror No. 8's claim that he could be fair and impartial is belied by his strong belief that repeat offenders should be physically tortured. It is highly unlikely he could listen to evidence of petitioner's prior crimes and not convince himself that petitioner deserved to be convicted and punished if there was *any* evidence of petitioner's guilt.[7]

Contrary to the Opinion (Exhibit A, pp. 18-19), the questions clearly were relevant to the voir dire examination, and were unambiguous. (*Blackwell, supra*, 191 Cal.App.3d at p. 930.) This was a gang-related murder case, and the prosecutor planned to use petitioner's prior conviction as a predicate offense. It was imperative

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[7] Petitioner respectfully submits that it is immaterial here whether George Washington or Thomas Jefferson believed in physical punishment several centuries ago. (See Exhibit A, p. 19 & fn. 10; Exhibit B, p. 2, no. 5.) Further, a resurrected George Washington who today revealed in voir dire that he believed lashing to be an appropriate punishment for deserters (Exhibit A, p. 19), likely would be excluded in a case involving a deserter as a defendant when that information would come out at trial.

the jurors not be predisposed to assume petitioner was guilty. The line of questioning by counsel and the court was sufficiently clear to alert this juror to provide information about his opinions on such matters. (See *id.* at pp. 929-930.) Further, Juror No. 8 had substantial knowledge of the information sought to be elicited, to wit, whether he was biased against criminal defendants and especially recidivists. (See *id.* at p. 930.) Given his strong beliefs that those who commit crimes should be subjected to cruel and unusual punishment in the form of physical torture, he could not possibly be fair and impartial in this case and must have been aware of this crucial fact.

The Opinion relies on *Mello v. DiPaulo* (1st Cir. 2002) 295 F.3d 137 to demonstrate the lack of a necessary connection between a juror's philosophy of punishment and the ability to be fair and impartial. (Exhibit A, p. 19.) In *Mello*, the defendant in an arson-murder case claimed that his trial counsel represented him ineffectively because counsel did not exercise a peremptory challenge against a juror whose father was a firefighter. The reviewing court observed that "the decision by defense counsel of an accused arsonist to permit the child of a firefighter to sit on the jury seems odd." (*Id.* at p. 147.) Nonetheless, there was no ineffective assistance because the defendant failed to demonstration any prejudice resulting from inclusion of the juror, who had sworn to be "fair and impartial." (*Ibid.*) However, *Mello* is distinguishable because that juror did not subsequently express strong views that arsonists should be physically tortured or punished in some other extreme manner. Had she done so, her ability to be fair and impartial in that case, notwithstanding her avowal that she could be, could have been successfully challenged.

(See *Diaz, supra*, 152 Cal.App.3d at p. 932; *Hitchings, supra*, 6 Cal.4th at p. 120.)

Further, someone who strongly and vocally believes recidivist offenders should be physically tortured cannot also truly believe that such offenders are entitled to a presumption of innocence. Juror No. 8's "self-serving statement regarding [his] ability to deliberate impartially" does not change the fact petitioner was denied his right to an impartial and unbiased jury through the undermining of the integrity of the voir dire process and the controverting of his statutory right to a specific number of peremptory challenges. (See *Diaz, supra*, 152 Cal.App.3d at p. 932.) Also, "[s]ubconsciously, the juror may tend to favor the prosecution" (*id.* at p. 939) if he holds such extreme "law and order" views. There simply was no evidence to rebut the presumption of prejudice arising from Juror No. 8's nondisclosure of "relevant facts," to wit, his bizarre and biased opinions regarding recidivists.[8] (See *id.* at p. 932; *People v. Majors, supra,* 18 Cal.4th at p. 417; Code Civ. Proc., sec. 225, subds. (b)(1)(B) & (b)(1)(C), sec. 227, subds. (c) & (d), and sec. 229, subd. (f).)

Further, the concealment need not even have been intentional to constitute juror misconduct. (*Diaz, supra,* 152 Cal.App.3d at p. 932.) Courts may also find implied bias even when a juror does not

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[8] Juror No. 8 also could have violated his oath and committed misconduct in basing his verdict on passion and prejudice, thus disobeying the court's instructions. (See 4 CT 882 [CALJIC No. 1.00]; see, also, *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 106-110.)

intentionally withhold information. (*Fields v. Woodford* (9th Cir. 2002) 309 F. 3d 1095, 1104.)

However, intentional concealment of relevant information on voir dire may itself constitute implied bias justifying the potential juror's disqualification or removal. (*Blackwell, supra*, 191 Cal.App.3d at pp. 929-931.) The record here does not contain an affirmative showing that prejudice does not exist, but rather establishes there is a reasonable probability of actual harm to petitioner resulting from Juror No. 8's misconduct. (*Id.* at p. 931; *In re Stankewitz, supra*, 40 Cal.3d at pp. 400-403.)

The trial court also should have conducted an evidentiary hearing prior to ruling there was no jury misconduct. The court abused is discretion in not allowing an evidentiary hearing at which Juror No. 8 could testify regarding his statements and whether he had shared his opinions on this issue with any other jurors during the trial. (See *People v. Hedgecock* (1990) 51 Cal.3d 395, 415, 417; *People v. Duran* (1996) 50 Cal.App.4th 103, 113; see, also, *Smith v. Phillips, supra,* 455 U.S. at p. 217, fn. 7, & 222 [conc. opn. of O'Connor, J]; *Remmer v. U.S.* (1954) 347 U.S. 227, 229-230.) Given the admission of petitioner's prior extortion conviction as a predicate offense, defense counsel was rightfully concerned that this juror had been biased against the defense from the beginning, had concealed this bias during voir dire, and also may have tainted deliberations by expressing such views to other jurors during the trial. Prior to ruling, the trial court should have conducted a hearing to determine if Juror No. 8 had in fact acted improperly.

2. Juror No. 8's Misconduct Prejudiced Petitioner.

Contrary to the Opinion (Exhibit A, pp. 4, 18-19), there was juror misconduct, as well as a presumption of prejudice arising from such misconduct that was not rebutted because the state failed to affirmatively show that prejudice did not exist. (See *Carter, supra*, 36 Cal.4th at p. 1208; *Hitchings, supra*, 6 Cal.4th at p. 119; *Blackwell, supra,* 191 Cal.App.3d at p. 930.) The entire record indicates a reasonable probability of prejudice – that is, there is a substantial likelihood that at least Juror No. 8 (if not other jurors potentially influenced by his extreme opinions) was actually biased against petitioner. (See *In re Hamilton, supra*, 20 Cal.4th at p. 296; *Hitchings, supra*, 6 Cal.4th at p. 119; see, also, *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 556-559 (conc. opn. of Blackmun, J.).) "Moreover, when a juror conceals material information on voir dire, 'that information establish[es] substantial grounds for inferring that [the juror] was biased...despite...protestations to the contrary.' [Citation.]" (*Hitchings, supra*, 6 Cal.4th at p. 120.) Because Juror No. 8 was actually biased, petitioner's conviction must be reversed even without a showing of actual prejudice. (*Carter, supra*, 36 Cal.4th at p. 1208; *Hitchings, supra*, 6 Cal.4th at p. 119; *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973, fn. 2.) But there was actual prejudice here.

Juror No. 8's bias against criminal defendants and especially recidivists, whether conscious or unconscious, made it impossible for him to be impartial even if he sincerely tried to be. A new trial must be granted when juror concealment, even when unintentional, reflects a state of mind that would prevent that juror from acting impartially.

(*People v. San Nicolas, supra*, 34 Cal.4th at p. 644; *Diaz, supra*, 152 Cal.App.3d at pp. 934-936.)

The strength of Juror No. 8's opinions on criminals and recidivists and his willingness to vocalize them publicly show that the probability of bias was strong. (See *Diaz, supra*, 152 Cal.App.3d at p. 939.) Further, the trial court precluded the defense from ascertaining if Juror No. 8 used this concealed information during deliberations and/or shared it with any other jurors. On the existing record, it cannot be concluded Juror No. 8 was unbiased. (See *Fields v. Woodford, supra,* 309 F.3d at pp. 1103, 1106 [evidentiary hearing necessary regarding juror bias claim, because in absence of credibility determination reviewing court cannot rule juror was not intentionally misleading on voir dire and could be fair and impartial].) Juror No. 8 voted for guilt. Convincing evidence of guilt does not deprive a defendant of the right to a fair trial, because a fair trial includes in part the right to an unbiased and impartial jury. (*People v. Pierce* (1979) 24 Cal.3d 199, 207; *Diaz, supra*, 152 Cal.App.3d at p. 935.) On this record, the presumption of prejudice was not rebutted.

The Court of Appeal made an obvious error of federal constitutional law in upholding the trial court's rulings. This court should grant review to secure uniformity of decision regarding a defendant's right to a fair trial and an unbiased jury in the context of voir dire.

STATEMENT OF PETITIONER'S FEDERAL CONSTITUTIONAL CLAIMS RAISED FOR THE PURPOSE OF EXHAUSTING STATE REMEDIES

V. THE IMPOSITION OF UPPER TERMS VIOLATED PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A JURY TRIAL AND DUE PROCESS OF LAW

A. Procedural History.

The defense objected to the imposition of any upper and consecutive terms based on *Blakely v. Washington* (2004) 542 U.S. 296 (hereafter "*Blakely*"). The defense argued that petitioner was entitled to have a jury determine the existence of any aggravating factors, including recidivist-related ones, beyond a reasonable doubt. (7 RT 1101-1103.) She noted the probation report listed petitioner's prior satisfactory performance on parole as a mitigating factor under rule 4.423(b)(6). (See 5 CT 1036-1041.)

For the murder conviction, the court imposed a term of 25-years-to-life (sec. 190, subd. (a)), and a consecutive 10-year upper term for the firearm use enhancement (sec. 12022.5, subd. (a)). For the attempted murder conviction, the court imposed a consecutive life term with the possibility of parole (secs. 664 & 187), and a consecutive 10-year upper term for the firearm use enhancement (sec. 12022.5, subd. (a)). For the count 3 street terrorism conviction, the court imposed a 3-year upper term (sec. 186.22, subd. (a)).[9] (7 RT 1105-1107; Exhibit A, pp. 9-10.)

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[9] The Court of Appeal stayed the three-year street terrorism sentence pursuant to section 654. (Exhibit A, pp. 24-27.)

The court imposed upper terms and consecutive life terms because: 1) rule 4.421(a)(1) - the crimes involved violence, callousness and cruelty; 2) rule 4.421(b)(2) – petitioner's prior adult convictions were increasingly serious; and 3) rule 4.421(b)(3) – he served two prior prison terms. The court stated it imposed consecutive terms because of petitioner's use of a weapon. (7 RT 1105-1107; see rule 4.421(a)(2).) The court indicated it imposed aggravated terms on the enhancements tied to the murder and attempted murder because both victims were particularly vulnerable in being attacked near their homes. (7 RT 1106-1107; Exhibit A, p. 20.)

On appeal petitioner argued there was error under *Cunningham v. California* (2007) 549 U.S. 270 (hereafter "*Cunningham*") and related case law because the trial court relied on factors not found true by a jury beyond a reasonable doubt, and that *People v. Black* (2007) 41 Cal.4th 799 (hereafter "*Black II*") was wrongly decided. (Exhibit A, pp. 3, 21-22; Exhibit B, pp. 1-2, no. 1.) The appellate court noted the argument was made for "issue preservation" purposes in the event federal courts reject the reasoning of *Black II*. (Exhibit A, p. 4.) The Court of Appeal found no error because rule 4.421(b)(2) lists increasingly serious convictions as an aggravating factor, section 669 and *Black II* authorize judges to impose consecutive sentences,[10] and under *Black II* the prior convictions made petitioner eligible for the upper term notwithstanding the presence of a mitigating factor that

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[10] In *Oregon v. Ice* (2009) __ U.S. __ [179 S.Ct. 711], our nation's high court held that the right to a jury trial does not extend to consecutive sentencing.

was inherently linked to the aggravating factor of prior prison terms. A court can more appropriately determine whether a defendant has suffered prior convictions, and whether those convictions are numerous. (Exhibit A, pp. 4, 20-22; Exhibit B, pp. 1-2, no. 1.)

B. Standard of Review.

Preserved challenges under *Blakely* and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (hereafter "*Apprendi*") are reviewed de novo. (*U.S. v. Hollis* (9th Cir. 2007) 490 F.3d 1149, 1154; *U.S. v. Smith* (9th Cir. 2002) 282 F.3d 758, 771.)

C. Petitioner's Sentence Violates The Federal Constitution because The Court Relied on Factors not Found True Beyond A Reasonable Doubt by Petitioner's Jury.

Under *Apprendi, supra,* 530 U.S. at p. 490, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. In *Blakely*, the high court held the trial court's use of an aggravating factor not found true by the jury to increase the defendant's sentence above the statutory maximum, other than the fact of a prior conviction, violated the rule explained in *Apprendi*. (*Blakely*, *supra*, 542 U.S. at pp. 303-304.)

In *Cunningham*, the United States Supreme Court held that California's determinate sentencing law violates a defendant's federal constitutional right to a jury trial and proof beyond a reasonable doubt by allowing the judge to impose an aggravated sentence based on facts found by the judge by a preponderance of the evidence. (*Cunningham, supra,* 549 U.S. at pp. 274, 280-282, 288-289.)

Here, none of the factors used by the trial court pass muster under *Cunningham*. The mere "fact of a prior conviction" (*Apprendi, supra,* 530 U.S. at p. 490; see, *Cunningham, supra*, 549 U.S. at pp. 274-275) is not an aggravating factor under rule 4.421, and was not so used by the trial court. Rather, the court's use of petitioner's prior convictions and prison terms were based on qualitative, subjective conclusions which are the type of findings that *Cunningham*, *Blakely*, and *Apprendi* reserve for the jury.

The Opinion recognizes that petitioner's gun use could not support consecutive sentencing because he was punished under section 12022.5, subdivision (a) for use of a firearm. (Exhibit A, pp. 22-23.) The Opinion also in effect acknowledges the two other non-recidivist factors relied upon by the trial court to impose upper terms and a consecutive life term are invalid. (See Exhibit A, pp. 20-23.) The trial court's reliance on rule 4.421(a)(1) [the crimes involved great violence and great bodily harm] and the victim vulnerability factor (rule 4.421(a)(3)) to impose upper terms was improper. (See Exhibit A, pp. 20-22; see, also, *People v. Lincoln* (2007) 157 Cal.App.4th 196, 202 (hereafter "*Lincoln*") [Sixth Amendment violated where factors cited by court (circumstances of offense, vulnerable victims, etc.) all required factual determinations beyond those necessarily encompassed by jury verdict].) Thus, it cannot be concluded "beyond a reasonable doubt that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance" cited by the trial court here if asked to decide the rule 4.421(a)(1) and (a)(3) factors.

(*People v Sandoval* (2007) 41 Cal.4th 825, 838-839 (hereafter "*Sandoval*"); *Lincoln, supra*, 157 Cal.App.4th at p. 202.)

The two remaining factors used to impose upper and consecutive terms were recidivist-related. The Court of Appeal noted it is bound by this court's decision in *Black II*. (Exhibit A, p. 21.) The Opinion relies on *Black II* in holding the trial court's sentencing is constitutionally valid because these recidivist factors fall outside the Sixth Amendment requirements set forth in *Apprendi*, *Blakely* and *Cunningham*. (See Exhibit A, pp. 20-22.)

Black II held, in part, that as long as a single aggravating circumstance makes a defendant eligible for the upper term sentence, there is no Sixth Amendment violation. (*Black II*, *supra*, 41 Cal.4th at pp. 805-806, 812-813.) *Black II* found two factors in aggravation that did not require a jury determination. One was that the defendant's prior convictions were numerous and of increasing seriousness. (*Id.* at pp. 816, 818-820.) Petitioner respectfully contends that the holding in *Black II* is incorrect and otherwise inapplicable to petitioner.

D. *Black II* Misconstrues United States Supreme Court Precedent.

Black II departs from, and impermissibly expands upon, the "mere fact" of a prior conviction exception in *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224 (hereafter "*Almendarez-Torres*"). First, the validity of the exception is highly questionable. This court noted the reasoning in *Almendarez-Torres* was inconsistent with other United States Supreme Court precedent. (*Black II*, *supra*, 41 Cal.4th at p. 819, fn. 8.) Nevertheless, *Black II* concluded the "prior conviction" exception was still viable because the nation's high court consistently

referred to *Almendarez-Torres* in other decisions and because of *U.S. v. Booker* (2005) 543 U.S. 220. (*Black II, supra*, 41 Cal.4th at pp. 814-815, 818-819 & fn. 8.)

Second, the "mere fact" of a prior conviction is conceptually different from the factual conclusion that a defendant's priors are numerous or of increasing seriousness or that he served prior prison terms. Contrary to *Black II*'s reasoning, *Cunningham* and *Almendarez-Torres* do not permit a court to impose an upper term based on either or both of those aggravating factors without submitting them to a jury. Although *Cunningham* reiterated the exception for the fact of a prior conviction that was premised on *Almendarez-Torres*, it is clear from *Apprendi* and cases thereafter that the *Almendarez-Torres* exception may no longer be viable and is at the very least severely limited. The limitations on the exception operate to exclude from its purview the various recidivist factors outlined in rule 4.421(b).

In *Apprendi*, the court stated "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested...." (*Apprendi, supra*, 530 U.S. at p. 490.) The high court decided "to treat the case as a narrow exception to the general rule we recalled at the outset." (*Id.* at p. 490.)

In *Shepard v. U.S.* (2005) 544 U.S. 13 (hereafter "*Shepard*"), the court further clarified that *Almendarez-Torres* was to be read very narrowly. When determining whether a plea in another jurisdiction involved a qualifying offense under a federal sentencing statute, *Shepard* limited a court's consideration to only that which the

defendant necessarily admitted by his plea. (*Id.* at p. 16.) "While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* [*v. U.S.* (1999) 526 U.S. 227] and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." (*Id.* at p. 25.) In his concurring opinion, Justice Thomas noted that *Almendarez-Torres* "has been eroded by this Court's subsequent Sixth Amendment jurisprudence" and was wrongly decided. (*Id.* at p. 27 [conc. opn. of Thomas, J].) He therefore urged that the "flawed rule" of *Almendarez-Torres* should be reconsidered in the appropriate case. (*Id.* at pp. 27-28.)

In *People v. McGee* (2006) 38 Cal. 4th 682, this court concluded that the *Almendarez-Torres* exception supported its view that a court could find recidivist sentencing provisions (*id.* at pp. 695-699), and that *Apprendi* does not preclude a court from making sentencing determinations related to recidivism (*id.* at p. 707). However, *McGee* misread *Almendarez-Torres* and *Apprendi* to expand the *Almendarez-Torres* exception beyond both its original holding and the later limitations imposed.

Almendarez-Torres was a very limited holding addressing a very narrow issue -- whether the federal constitution required that a prior conviction supporting an enhanced sentence be pleaded in the indictment. (See *Apprendi*, *supra*, 530 U.S. at pp. 487-488.) The high court concluded it did not. (*Almendarez-Torres*, *supra*, 523 U.S. 224 at pp. 243-248.) The reasons for exempting recidivism from being treated as an element, however, have now been soundly rejected in

connection with other "sentencing factor" affecting upper terms subsequently brought before the high court. (See *Apprendi, supra*, 530 U.S. at pp. 490, 494; see, also, *Ring v. Arizona* (2002) 536 U.S. 584, 602 & 610 [conc. opn. of Scalia, J.: "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt"]; *Blakely, supra*, 542 U.S. at pp. 303-304; *U.S. v. Booker, supra*, 543 U.S. at pp. 243-244; *Cunningham, supra*, 549 U.S. at p. 291, fn. 14 [rejecting a bifurcated approach whereby only facts concerning the offense, but not facts concerning the offender, would be submitted to the jury].)

Almendarez-Torres did not involve the question of the right to a jury trial on the issue of the prior conviction or what burden of proof should be applied. The high court expressly declined to address the standard of proof to be applied to such facts, because the defendant *admitted* his recidivism at the time he pleaded guilty and had not raised the issue. (*Almendarez-Torres, supra*, 523 U.S. at pp. 247-248; see, also, *Apprendi, supra*, 530 U.S. at p. 488.) It was thus clear in *Apprendi* that while the court was not overruling *Almendarez-Torres* with respect to its narrow holding, the court intended that it be a very limited exception to the general rule that any fact increasing the maximum sentence for a specific offense must be treated as an element and submitted to a jury, and proved beyond a reasonable doubt. (*Id.* at pp. 489-490; see also *Jones v. U.S., supra,* 526 U.S. at pp. 248-249 [distinguishing *Almendarez-Torres* as a pleading case].)

The only potential remnant of the *Almendarez-Torres* "recidivism" exception is the fact of the prior conviction itself, with "conviction" being limited to the "facts" necessarily established by the prior jury finding or the defendant's admissions. (See *Apprendi, supra*, 530 U.S. at pp. 488-489; *Shepard, supra*, 544 U.S. at pp. 15-16, 22-25; see, also, *Cunningham, supra*, 549 U.S. at p. 291, fn. 14.) The only remaining rationale for maintaining this exception is the lack of dispute over the fact of the prior conviction and the assurance that it "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." (*Jones v. U.S., supra*, 526 U.S. at p. 249; *Shepard, supra*, 544 U.S. at p. 25; see also *People v. McGee, supra*, 38 Cal 4th at pp. 713-714 [dis. opn. of Kennard, J.].)

The recidivist factors used here go far beyond the bare fact of the conviction or its significance based upon the facts necessarily found by a jury or admitted by petitioner. Rather, they all require findings of additional potentially disputed facts. Petitioner was entitled to a jury trial on each of the purported rule 4.421(b) aggravating factors, and accordingly none of those factors found by the trial court are sound.

1. Whether Petitioner's Prior Convictions are Numerous or of Increasing Seriousness Requires Additional Findings.

Black II incorrectly holds that Sixth Amendment rights do not apply to the aggravating factor of numerous or increasingly serious prior convictions. (See *Black II, supra*, 41 Cal.4th at pp. 818-820.) Whether prior convictions are numerous or of increasing seriousness

depends on findings, not only that the convictions occurred, but also of additional facts establishing they were in fact "numerous or of increasing seriousness." (Rule 4.421(b)(2).) The Judicial Council's choice of the subjective term "numerous" in rule 4.421(b)(2) injects an element of subjectivity. California courts have held that two prior convictions are not numerous. (See *People v. Fernandez* (1990) 226 Cal.App.3d 669, 681; *People v. Berry* (1981) 117 Cal.App.3d 184, 191.) However, no case authority apparently establishes whether any particular greater number of offenses is necessarily "numerous."

Contrary to *Black II*'s reasoning, the length of time between priors and how long ago they occurred are factual determinations beyond the mere finding of the convictions themselves. (See *Black II, supra*, 41 Cal.4th at pp. 819-820.) Whether crimes are of increasing seriousness can involve even more extensive factual determinations. If seriousness is to be determined by length of potential sentence or the manner in which the offense is characterized in the Penal Code (e.g., "serious" or "violent"), many offenses are of the same level of seriousness. (See, e.g., secs. 667.5, subd. (c) [listing multiple violent felonies]; 1192.7, subd. (c) [listing multiple serious felonies]; 18 [listing the sentence for all felonies with punishment not otherwise prescribed]; 461, subd. (1) [first degree burglary] & 451, subd. (c) [arson of a structure or forest land] [both punished by two, four or six years].) Thus, distinctions between these crimes would turn on a determination of the facts underlying the compared crimes or perhaps the actual sentences imposed. Further, the question of whether the defendant has numerous prior convictions of increasing seriousness is generally determined based upon the probation officer's report, which

may include information regarding the facts underlying the priors as well as "factually supported" arrest data. (See *People v. Taylor* (1979) 92 Cal. App. 3d 831, 833.) These findings are not conclusively demonstrated by a judicial record or based upon the mere fact of the prior conviction alone.

2. Whether Petitioner Served Prior Prison Terms also Requires Additional Findings.

Black II did not address the "prior prison term" recidivist factor. However, in *People v. Towne* (2008) 44 Cal.4th 63, 79, this court held that the right to a jury trial does not extend to this factor. Petitioner respectfully disagrees. The case law relating to adequate proof of an enhancement under subdivision (b) of section 667.5 demonstrates that proof of a prior prison term involves more than a showing of the mere fact of a conviction. (See, e.g., *People v. Tenner* (1993) 6 Cal.4th 559, 563; *People v. Seals* (1993) 14 Cal.App.4th 1379.) Additionally, some defendants may have only gone to prison after probation was revoked for a prior conviction, or may have been released directly from county jail because they served the entire prison term pre-sentence. Finding the prior prison term factor in either of those situations would involve another layer of proof beyond the mere proof of a conviction.

3. Even if The Rule 4.421(b) Aggravating Factors were within The "Prior Conviction" Exception and Permitted A Judicial Determination, Such Factors are Still Improper because Found by A Preponderance of The Evidence Rather than Beyond A Reasonable Doubt.

Even if one or more of petitioner's purported aggravating factors fell within the *Almendarez-Torres* "prior conviction" exception, there remains the problem that the trial court, applying pre-

Cunningham California law, found the factors true by a preponderance rather than by a reasonable doubt. In *In re Winship, supra,* 397 U.S. at p. 364, the high court invalidated a statute wherein the burden of proof in a juvenile delinquency proceeding was reduced to a preponderance of the evidence, holding that "the Due Process Clause protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged." In *Mullaney v. Wilbur, supra,* 421 U.S. 684, the high court extended the *In re Winship* rule to determinations that went not to a defendant's guilt or innocence, but to the length of his sentence.

In *Almendarez-Torres, supra*, 523 U.S. 224, the four-justice dissent indicated the Sixth Amendment applied to the determination of sentencing priors, requiring both a jury trial and proof beyond a reasonable doubt. Subsequently, the high court has been consistently critical of *Almendarez-Torres*. (See, *ante*, at pp. 49-52.) The earlier decisions in *In re Winship* and *Mullaney* require that a prior conviction that increases the sentence must be found beyond a reasonable doubt, even if a court and not a jury makes the determination.

California law has long required prior convictions charged as enhancements to be proved to a jury beyond a reasonable doubt. (Secs. 1025, 1158; *In re Yurko* (1974) 10 Cal.3d 857, 862; see also *People v. Barre* (1992) 11 Cal.App.4th 961, 965-966.) In light of the foregoing authorities, the "beyond a reasonable doubt" standard is constitutionally required both for charged enhancement priors and priors used to select the upper term. It would be anomalous if the

aggravating factor of a defendant's remorselessness, for example, had to be determined by a jury beyond a reasonable doubt, but a prior conviction could be used based only on a finding it was more likely than not that it existed.

Black II's analysis of this issue is flawed (see *Black II, supra*, 41 Cal.4th at p. 820, fn. 9), because there is at the very least "genuine doubt" (see *Almendarez-Torres, supra*, 523 U.S. at p. 251) on this issue. Under the rule of "constitutional doubt," an unnecessary interpretation of California sentencing law that is constitutionally dubious and will invite further uncertainty and appellate litigation should be avoided. (*U.S. ex rel. Attorney General v. Delaware & Hudson Co.* (1909) 213 U.S. 366, 408; see also *Almendarez-Torres, supra*, 523 U.S. 224, 248-250.) Thus section 1170 should be interpreted as requiring proof beyond a reasonable doubt of any aggravating fact necessary to impose the upper term, including a prior conviction.

E. *Black II* is Inapplicable to Petitioner's Case because of The Presence of Mitigation.

Contrary to the Opinion (Exhibit A, p. 22), *Black II* is inapplicable to the instant case because *Black II* involved *no* mitigation, whereas petitioner's prior satisfactory performance on parole constituted a mitigating factor. (See *Black II, supra*, 41 Cal.4th at p. 807.) *Black II* concluded an upper term did not infringe on the federal right to a jury trial "so long as one legally sufficient" aggravating factor had been found by constitutional means. (*Id.* at pp. 805-806, 812-813.) Even assuming arguendo that one aggravating factor was found true by constitutional means in petitioner's case, the

upper term was nonetheless improper given this significant factor in mitigation. Thus, *Black II*'s rationale is inapplicable here because it addressed the upper term issue without having to discuss what impact, if any, mitigation would have on a defendant's upper term eligibility.

California law has long required that aggravation outweigh mitigation before an upper term may be imposed. (*People v. Hall* (1994) 8 Cal. 4th 950, 957-958; *People v. Wright* (1982) 30 Cal.3d 705, 709-710, 720; rule 4.420(a) & (b).) *Black II* did not purport to overrule this longstanding requirement. This court simply stated in broad terms that one factor rendered it lawful to impose the upper term (*Black II, supra*, 41 Cal.4th at pp. 805-806, 812-815), and then described the defendant's recidivist-related factor as legally sufficient (*id.* at pp. 819-820). Although a single factor may be "legally sufficient" for a defendant with no mitigation (see *id.* at p. 813), this does not mean any single aggravating factor is likewise "legally sufficient" in a case like petitioner's where there is countervailing mitigation.

Further, *People v. Osband* (1996) 13 Cal.4th 622, cited by this court for the proposition that one factor is sufficient for upper term eligibility (*Black II, supra*, 41 Cal.4th at p. 813), did not create a rule that a single aggravating factor made a defendant absolutely eligible for the upper term irrespective of mitigation. Rather, *Osband* considered whether there was prejudicial error in relying on an improper factor. (*People v. Osband, supra*, 13 Cal. 4th at p. 728.) Like *Black II*, and unlike petitioner's case, there was no indication of any countervailing mitigating factor in *Osband*. Thus, neither *Black II* nor *Osband* resolved the sentencing issue here. (Cf., *People v. Dillon*

(1983) 34 Cal.3d 441, 473-474; *Ex parte Tartar* (1959) 52 Cal.2d 250, 258 ["Cases are not authority for propositions not considered"].)

F. Because Sentencing Enhancements are Still Subject to The Middle Term Presumption, Petitioner's Upper Term Sentences on His Firearm Use Enhancements are Invalid.

Sentencing enhancements with triads are still subject to the middle term presumption, because *Sandoval* and the Legislature changed only section 1170, subdivision (b) governing substantive offenses, and not section 1170.1, subdivision (d) which sets the same middle term presumption for enhancements. (*Lincoln, supra*, 157 Cal.App.4th at pp. 204-205.) Subdivision (b) of section 1170 now reads in pertinent part, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." (Sec. 1170, subd. (b), as amended by Stats. 2007, c. 3, sec. 2 (effective Mar. 30, 2007).) However, section 1170.1, subdivision (d) still provides, "If an enhancement is punishable by one of three terms, the court shall impose the middle term unless there are circumstances in aggravation or mitigation...." According to the *Lincoln* Court, "This provision suffers from the identical constitutional infirmities identified by the United States Supreme Court in *Cunningham, supra*, 127 S.Ct. 856, and is similarly unconstitutional. The Legislature has taken no step to amend this provision to render it compliant with the Sixth Amendment, and the California Supreme Court did not reform it in *Sandoval*...." (*Id.* at p. 205.) Thus petitioner's 10-year upper terms for the firearm use enhancements are invalid in the absence of any valid aggravating factors.

G. The State did not Establish The Sentencing Error was Harmless Beyond A Reasonable Doubt.

Finally, it cannot be concluded the error in this case was harmless. In *Washington v. Recuenco* (2006) 548 U.S. 212, 218-222, the high court held that constitutional sentencing error under the Sixth Amendment is subject to harmless error analysis. (See, also, *Sandoval, supra*, 41 Cal.4th at p. 838; *Lincoln, supra*, 157 Cal.App.4th at p. 202.) Because the error here involves federal constitutional error, the "harmless beyond a reasonable doubt" standard of *Chapman* applies. (*Sandoval, supra*, 41 Cal.4th at p. 838.) Given that petitioner's prior felonies actually decreased in seriousness over time and his fairly short prior record (5 CT 1065-1066[11]), as well as the mitigating factor of his satisfactory performance on parole (5

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[11] The probation report shows that at ages 18 and 19, petitioner suffered misdemeanor convictions in three cases and received probation in each case. He then pleaded guilty to extortion committed when he was 19, and went to prison. *After* the crimes in this case, he pleaded no contest to two counts of second-degree robbery and served a prison term. (5 CT 1065-1066.) Under *Black II, supra*, 41 Cal.4th at pp. 819-820, the number of petitioner's offenses, their dates, the offenses themselves, and their sentencing ranges do not show numerous or increasingly serious convictions. For example, although murder and attempted murder are more serious than extortion, second-degree robbery is less serious than murder and attempted murder and carries only a sentence range of two, three or five years (secs. 211 & 213, subd. (a)(2)).

The probation report contained the information concerning petitioner's criminal history (5 CT 1065-1066), and the trial court is presumed to have read and considered that report when sentencing. (*Black II, supra*, 41 Cal.4th at p. 818, fn. 7.) The information available to the trial court simply does not support a finding that petitioner's prior convictions were numerous or of increasing seriousness, and thus the trial court's finding cannot be upheld.

CT 1070), it cannot be concluded beyond a reasonable doubt that his jury would have found his prior convictions were numerous or of increasing seriousness, or that he served prior prison terms, or that either of these factors outweighed the mitigation. Even if his jury might have found, for example, that petitioner served prior prison terms, such finding does not make the upper term the statutory maximum because there must be an additional factual finding that this aggravating factor outweighed the mitigating factor. (See *People v. Hall, supra,* 8 Cal. 4th at pp. 957-958; *People v. Wright, supra,* 30 Cal.3d at pp. 709-710, 720; rule 4.420(a) & (b).)

Further, the same fact cannot be used to impose both upper terms and a consecutive sentence (*People v. Osband, supra*, 13 Cal.4th at p. 728), so under *Black II* only one of the two recidivist factors may be used to support the upper terms. In the absence of the other invalid factors noted herein, the aggravating and mitigating factors are at the very least equal.

Also, while petitioner's prior criminal history or prior prison terms may have rendered him eligible for an upper term sentence under *Black II*, each factor standing alone might not necessarily mandate imposition of that term. In *Sandoval, supra*, 41 Cal.4th 825, this court reiterated that a trial court's "sentencing decision [is] subject to review for abuse of discretion," and its "discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*Id.* at p. 847.) Thus, "a trial court will abuse its discretion ... if it relies upon circumstances that are not

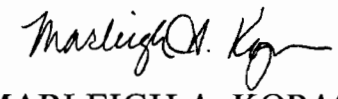
relevant to the decision or that otherwise constitute an improper basis for decision. [Citations.]" (*Id.* at p. 847.) Given petitioner's prior record and his satisfactory performance on parole, the trial court abused its discretion in imposing upper terms.

The unconstitutionally imposed upper terms should be stricken and the applicable midterms imposed. Specifically, in counts 1 and 2 petitioner should receive four-year terms for the firearm use enhancements (former sec. 12022.5, subd. (a)(1)).

CONCLUSION

For the reasons set forth herein, this court should grant review to secure uniformity of decision. Review also should be granted to avoid a miscarriage of justice in petitioner's case. (Cal. Const., art. 6, sec. 13.)

Respectfully submitted,



MARLEIGH A. KOPAS
Attorney for Appellant
And Petitioner
Quang Minh Tran

WORD COUNT CERTIFICATION

Pursuant to rule 8.504(d)(1) of the California Rules of Court, I, Marleigh A. Kopas, appellate counsel in this matter, certify as follows:

To the best of my information and belief and relying on the word count of the computer program used to prepare this petition for review, this document contains 15,733 words excluding tables, exhibits and this certificate. I certify that I prepared this document in Microsoft Word 2007, and that this is the word count this program generated for this brief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: October 5, 2009

MARLEIGH A. KOPAS

EXHIBIT A

(COURT OF APPEAL OPINION)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

QUANG MINH TRAN,

Defendant and Appellant.

G036560

(Super. Ct. No. 01WF0544)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert R. Fitzgerald, Judge (Retired judge of the Orange Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Marleigh A. Kopas, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

I. INTRODUCTION

Three members of two Vietnamese gangs aligned with each other entered nt complex in search of a particular member of a rival Vietnamese gang who elves the "Oriental Play Boys." They found the rival gang member in a . When the rival gang member fled, one of the assault team, appellant Quang , shot at him and missed. Two of the team then bumped into an innocent carrying groceries. Tran exclaimed, mistaking the bystander for a member of ng, "Hey, that's Play Boy." Then, as the bystander fled, Tran crouched on the ook aim, and shot him.

This time his aim was better. The shot went through the bystander's back, bdomen, then lodged in his arm. The bystander bled to death. When Tran nonth later that the bystander was innocent of affiliation with the rival gang, he c it, like oh well."

Tran was later caught, tried, and sentenced. The constituent parts of his re:

(1) 25 years to life for the murder of the bystander.

(2) 10 years for use of a firearm in the bystander's murder (the upper

(3) 3 years for a gang enhancement.

(4) Life with possibility of parole for the attempted murder of the rival ber.

(5) 10 years for use of a firearm in the attempted murder of the rival.

(6) 3 years for a gang enhancement on the attempted murder.

(7) And the upper term of 3 years for street terrorism.

All parts of the sentence are to run consecutively. Adding up the numbers for everything except the life-with-possibility-of parole term for the attempted murder

results in a sentence of 54 years to life, at which point Tran can begin his life sentence with the possibility of parole.

In this appeal, Tran raises these six basic[1] issues:

(1) An Evidence Code section 352 challenge to evidence that Tran and three other fellow gang members had been involved in a series of protection racket extortions of Vietnamese businesses in 1993 and 1994 on behalf of the gang.

(2) An Evidence Code section 352 challenge occasioned by a gang member witness's blurting out the fact that his sister had been "executed."

(3) A charge of juror misconduct based on trial counsel's affidavit that she had spoken to some of the jurors after the trial and one had said he believed in caning for recidivists.

(4) The question of whether the three years for the street terrorism conviction punished Tran for the same acts as the murder and attempted murder. (See generally, Pen. Code, § 654.[2])

(5) A *Cunningham*[3] challenge to the court's use of upper terms and consecutive sentences based on some facts -- prior convictions and prison sentences as an adult -- that had not been found by the jury.

(6) A challenge to the trial court's use of consecutive sentences based on the use of a gun, when the use of a gun already had been used to impose gun enhancements.

All but one of these arguments ultimately fail. The testimony about the extortions was highly relevant to prove gang affiliation. The prosecutor couldn't help the witness's spontaneous elaboration as to why he was afraid, and, in context, there was no

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[1] A number of these issues give rise to "spin-off" issues, making his brief appear to raise more issues than just these basic six. For example, a spin-off of issue (3), involving juror misconduct, is the sub-issue whether the trial court erred in denying an evidentiary hearing to inquire into the bona fides of the misconduct charge. Another spin-off issue is the assertion that the evidentiary issues (1) and (2) had the "cumulative" effect of undermining the fairness of the trial.

[2] All undesignated statutory references in this opinion are to the Penal Code, with the exception of any reference to "section 352," which is to the Evidence Code.

[3] After *Cunningham v. California* (2007) 549 U.S. 270.

reason for the jury to assume that Tran, as distinct from somebody else, had executed the sister. The juror misconduct argument fails because a mere belief in caning as a *punishment*, in the *abstract*, does not equate with an inability to be fair in judging the *facts* of a given case. The *Cunningham* challenge is obviously a simple exercise in "issue preservation" in the hope that one day the federal courts will reject the reasoning of our highest court in *People v. Black* (2007) 41 Cal.4th 799. And, while the use of a gun should not have been among the bases to both enhance Tran's sentence as well as having been *one* of several factors in the trial court's decision to impose consecutive sentences, we cannot say that there is a reasonable probability the trial court would do anything different on remand: Several other factors easily sufficed to justify consecutive sentencing.

The "654 issue," however, is different. This court's decision in *People v. Herrera* (1999) 70 Cal.App.4th 1456, upholding a street terrorism conviction against a 654 challenge, is distinguishable. In *Herrera*, the defendant had an intent to kill people independent of their gang affiliation that was separate and independent of his intent to promote his gang. Here, however, at the two moments Tran pulled the trigger, in the one instance he was aiming at someone he knew to be a rival gang member and in the other instance he was aiming at a bystander whom he thought he was a rival gang member, as shown by the fact that, as he aimed the gun, he exclaimed, "That's Play Boy," referring to a rival gangster. Moreover, the trial judge told the jury that the sole basis for the street terrorism conviction had to be either the attempted murder of the rival gang member, or the actual murder of the bystander whom he thought was a rival gang member. Under such circumstances, *People v. Vu* (2006) 143 Cal.App.4th 1009 -- where there was, like here, only one objective and intent in pulling the trigger -- requires us to reverse the street terrorism conviction. Rather than remand for resentencing, though, we will simply modify the judgment on appeal to stay the sentence of three years for street terrorism. Tran will now be able to begin serving his life sentence with possibility of parole after 51 years, instead of 54.

II. FACTS[4]

A. *The Gangs*

Like other gang-related tragedies, we must begin by noting the existence of the competing foes. In this case, the feuding groups are two Vietnamese gangs, one known as the "VFL" or "Vietnamese for Life" and the other, the "OPB" or "Oriental Play Boys." A third gang, known simply as "V" plays a minor role in the story, since the "V" gang was on relatively good terms with the VFL at the time of the two shootings; indeed, a "V" member was present at both shootings and supplied the trial court with much of the testimony about precisely what happened.

B. *The Provocation*

On the morning of May 6, 1997, Duc Vuong, an OPB member, drove fellow OPB gang members "Wes" and "Andy" in his Acura to a gas station. When a Honda carrying three VFL members drove into the station, one of the VFL members asked what gang the three OPB members belonged to. Rather than answer, Wes drew a gun from his waistband. The Honda with the VFL members took off. Vuong got the gun and fired a "warning shot."

C. *The Retaliation*

1. The Plan

Soon after the gas station incident, Tran contacted Qui Ly, a V gang member, for some guns. Once Ly met up with Tran to give him the guns, Ly learned that Tran needed the weapons because Tran wanted to retaliate against the OPB for the disrespect shown the VFL at the gas station. Ly, Tran, and other V and VFL gang members went to a private garage to discuss retaliating against Vuong. They planned to have Tran and two other VFL members carry guns into Vuong's home while the rest

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[4] Appellant's opening brief is a series of summaries of testimony, rather than an attempt to construct a single, chronological narrative of events. If this were a substantial evidence case, there might be method to that madness. But substantial evidence is an issue most assuredly not part of this appeal. The Attorney General's hard work in constructing a unified story line is more helpful to the court in understanding the precise facts in this case. (See *Chen v. County of Orange* (2002) 96 Cal.App.4th 926, 931, fn. 1 [because appellant presented facts without regard to chronological order, appellant had no cause to complain if court's statement of facts followed "more closely the chronologically oriented statement of facts in the respondent's brief"].)

were to drive and wait in one of three cars. Their plans changed when they determined that Ly would not be a good getaway driver (he didn't know the fastest way to the freeway), so he was subbed in as a shooter for one of the VFL members.

2. The Initial Assault on Duc Vuong

Later that day, Vuong walked outside his apartment to pick up items from his car trunk. When he closed his trunk, he saw three men standing in front of him, including Tran. Tran fired the first shot at Vuong, then Ly and "Uncle Dave" (Huan Hoang Nguyen) also fired shots.

Vuong fled to his apartment. More shots were fired, one ultimately hitting Vuong's right shoulder.

3. The Shooting of the Bystander

About the same time as the attack on Vuong, Lon Bui had gone to the market with his mother to buy groceries. His mother lived across the street from his aunt, who lived in the same apartment complex as Vuong. While Bui was holding the groceries and using a key to open the front gate to the apartment complex, he chanced upon Tran and Ly as they were fleeing after shooting at Vuong. Bui turned to run away, but Tran told Ly, "Hey, that's Play Boy . . . that's him, that's him, that's Play Boy."

And with that, Tran kneeled down on one knee, took aim, and shot Bui. A shot went through his back, exited his abdomen, and lodged in his right arm. Bui bled to death.

A month later, at a wedding, Tran would learn from Ly that Bui was not a member of OPB. His response was terse. "Fuck it, like oh well."

D. *The Prosecution*

1. The Information

On March 2, 2001, the Orange County District Attorney filed a four-count information against Tran and Huan Hoang Nguyen. The counts were the murder of Bui, the attempted murder of Vuong, and street terrorism. On top of those counts, the

information charged enhancements for committing each crime for the benefit of a criminal street gang and for committing each crime with a firearm. Tran and Huan were tried separately.

2. The Gang Expert's Testimony

The prosecution introduced the testimony of a Garden Grove Police Department gang expert. He opined that (a) the VFL really is a gang, whose (b) primary activities were "extortion, prostitution, robberies [and] burglaries." The expert noted that in 1996 (and we remember that the events in this case took place in 1997) a VFL member was convicted of the 1992 murder of an OPB member.

The gang expert also testified -- over defense objections that the testimony was too inflammatory -- that in 1995 Tran himself was convicted of a series of extortions in connection with the shakedown of Vietnamese businesses in Los Angeles for protection money. These extortions involved shots being fired into businesses coupled with verbal threats.

3. Ly's Testimony

Ly, as we have noted, was the prosecution's main witness because he was present at both shootings. While Tran's defense counsel sought to establish Ly's own hope of leniency in return for his testimony, the prosecution sought to establish the fact that Ly was taking his life into his hands in offering his testimony.

And Ly had good reason. A fellow V member, Hung Meo, had urged Ly not to get involved in the retaliation project. Indeed, Ly and Meo had hid out in hotels for about six weeks after the shooting. Some time before trial, however, Meo was murdered in Mexico, along with his girlfriend. And Meo's girlfriend was Ly's sister.

The prosecutor, however, agreed in advance of Ly's testimony not to offer the fact that Ly's sister was killed with another gang member (Hung Meo) in Mexico, or to impute her death to Tran in any way. But that didn't stop Ly from blurting out the fact of his sister's murder in response to a question that -- as we will now show -- didn't ask for it.

We now set out the relevant testimony:

"Q: As you come here are you fearful of your life?

"A: Yes.

"Q: Yes?

"A: I lost my sister, man. Executed."

With that, Ly began to cry. When he regained his composure, the questioning continued:

"Q: Mr. Ly, as you come here today and testify, do you believe that you're considered to be a snitch?

"A: Yes. . . .

"Q. And do you believe in that you are risking your life by coming here?

"A: Yes.

"Q: Why?

"A: Because I'm breaking the number one rule in the street life. I'm telling on a fellow gang member which can result in death or family members being hurt."

Defense counsel made a motion to strike the testimony about the death of Ly's sister as a "sympathy factor or something to support his credibility." However, the trial court denied her motion to strike the testimony, treating it as a motion for mistrial.

4. The Forensic Evidence

Part of Ly's testimony is that Tran acquired a "tech-nine." The weapon, technically known as the Intratec TEC-DC9, aka "TEC-9," is of Swedish origin, later redesigned in the United States, intended for use as a cheap submachine gun. Hence, it has a magazine protruding from below the barrel, which would give it the appearance of having two handles. A witness who testified she saw two Asian men in the area of the attacks thus noted that one of them was carrying a two-handled, 12- to-14-inch black gun, which is a good description of a TEC-9.

We need only note here that there is no issue of substantial evidence in this appeal about who killed or tried to kill whom: There was testimony that showed a particular TEC-9 was used to shoot Bui, which corroborated Ly's eyewitness testimony

that Tran shot Bui. Moreover, other forensic evidence excluded *other* nine-millimeter casings found at the apartment complex from being that particular weapon. More plainly, there is no challenge on appeal to the proposition that it was Tran in particular who killed Bui.

5. The Conviction

and the Ensuing Motions

The jury convicted Tran of all three charged counts of first degree murder, attempted murder, and street terrorism. The gang and firearm enhancements were found to be true for the counts of attempted murder and murder.

Before Tran could be sentenced, defense counsel made a motion for a new trial on August 11, 2005. The main basis for her motion stemmed from a conversation she had with juror number 8 after the verdicts were read. She declared, "Juror No. 8 was very vocal about his views on repeat offenders, recidivism and how to stop crime. He openly said that we should cane them just as they do in, I believe he said Singapore, and this would stop recidivism. He gave statistics for recidivism in Singapore and compared them to statistics in the United States." Since the defense counsel had juror number 8's contact information, she subpoenaed him. Once she learned that the court's approval was required for such a subpoena, defense counsel filed a petition with the court for juror identifying information and permission to subpoena the juror. Both the petition and the new trial motion were denied.

In addition, the motion for new trial was based on the trial court's denial of the defense counsel's motion for a mistrial for admitting Ly's testimony about the death of his sister.

6. The Sentence

At the sentencing hearing on December 23, 2005, Tran was sentenced to 25 years to life for murder, and a consecutive life term for the attempted murder. The enhancements added an additional 13 years to each sentence, 10 years for the use of a gun and three years for the gang enhancement. Finally, Tran was sentenced to a

consecutive term of three years for the street terrorism count. The total sentence was 54 years to life.

All of the terms the trial court imposed for the enhancements were the maximum allowed by the enhancement statutes. The trial court rationalized this decision, as well as that to impose consecutive as opposed to concurrent terms by stating: "[the] crime involved great violence and great bodily harm. Disclosing a high degree of cruelty, viciousness and callousness. In this case [Tran] and his companions sought out, shot the victim, apparently due to gang rivalries, and in the process also shot and killed an innocent bystander who happened to cross their path. [¶] Also [Tran] was armed and used a weapon. That's a reason for consecutive terms. [¶] As to . . . aggravation on the enhancements . . . both victims were particularly vulnerable. They were in or near the apartment complex which was a home when they were attacked by the gunman. [¶] Other reasons . . . [Tran's] prior convictions as an adult are numerous and of increasing seriousness . . . . [Tran] has served two prison terms."

III. DISCUSSION

A. The Evidence of a Prior Conviction for Extortion

Let us begin our analysis of Tran's assertion that the court should have excluded the gang expert's testimony concerning Tran's conviction for extortion in 1994 by recognizing its strengths.[5] Courts have long held an antipathy for "other crimes evidence" in criminal prosecutions. (E.g., *People v. Thompson* (1980) 27 Cal.3d 303, 314 [quoting Wigmore concerning the "'highly inflammatory and prejudicial effect'" of "any evidence that involves crimes other than those for which a defendant is being tried" on the "trier of fact"].) The general "bar cram" rule is that evidence of an "uncharged" offense is barred because it merely proves a "propensity (or disposition) to commit the crime charged." (*Thompson, supra*, 27 Cal.3d at p. 316.) However, it still may be

[5] The issue was well preserved for appeal, having been raised both prior to trial, by way of an objection to the use of any of Tran's prior criminal acts other than for impeachment, by objection at the time of the question, and by way of a motion to strike the gang expert's testimony after it was given.

admissible if relevant in some *other* way. (*Ibid.*; see generally Evid. Code, § 1101, subd. (b) ["Nothing in this section prohibits the admission of evidence that a person committed a crime . . . when relevant to prove some fact . . . other than his or her disposition to commit such an act."].)

In the present case, however, evidence of Tran's conviction for extortion was ineluctably relevant (we will discuss just how relevant soon) to prove the substantive charge of street terrorism under section 186.22, subdivision (a), which uses the phrase "pattern of criminal gang activity." Subdivision (e) of section 186.22 requires the prosecution, in order to show a "pattern of criminal gang activity," to prove the fact of "two or more" of a great list of 33 offenses, one of which, number 19, is the classic gang crime of felony extortion. Given that particular relevance, Tran does not argue (though his brief sort of nudges up to it) for the per se rule of exclusion under section 1101, subdivision (a) of the Evidence Code. That rule of exclusion applies when the "*only* theory of relevance" (as the court put it in *Thompson, supra*, 27 Cal.3d at page 316, italics added) is some purported propensity to commit the charged crime, and here the evidence was not offered to prove propensity.

Rather, Tran's attack comes by way of Evidence Code section 352, which, unlike Evidence Code section 1101, subdivision (a), is not framed as a *prohibition* on certain evidence, but a grant of authority to the trial court to use its *discretion* to exclude evidence which necessitates the "undue consumption of time," or creates a "substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."[6] While the plain text of the statute does not provide any authority for the idea that a trial court might somehow run afoul of the law by *not* excluding evidence -- the text says what the trial court can do, not what it must do -- it is well established that there are times when the mix between probativeness and undue prejudice is so out of whack that a trial court abuses its discretionary authority under section 352 by *not* excluding evidence. (E.g.,

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[6] Here is the complete text of section 352: "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."

People v. Burns (1952) 109 Cal.App.2d 524, 541 [holding that certain autopsy photographs were "of no particular value to the jury," therefore it was clear "the only purpose of exhibiting them was to inflame the jury's emotions against defendant"].) Tran contends that this case is one of them.

We now make a couple of observations about section 352.

First, it does not exist in a vacuum. This case, for example, entails its interaction with another statute, section 186.22. Thus, to the extent that section 352 contemplates the same subject matter as section 186.22, it must be construed consistently with it. (See, e.g., *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1086 ["When we construe potentially conflicting statutes, our duty is to harmonize them if reasonably possible."]; *S&S Cummins Corp. v. West Bay Builders, Inc.* (2008) 159 Cal.App.4th 765, 782 [construing interest charge provision in public contracting statute to be "consistent with other statutes governing judgments"]; *Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 360 [interpreting government immunity statute so as to be consistent with other statutes touching on the subject of emergency rescue services].)

Second, as a general statute, section 352 must give way where overlapping subject matter is controlled by section 186.22, which is a more specific statute, and the two statutes cannot be reconciled. (See *Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 121 ["the rule in California is that a specific statute controls over a general statute, regardless of which statute was passed earlier"].)

Now, none of this is to say that section 352 *is* inconsistent with the more specific, later-enacted, street terrorism statute, section 186.22, subdivision (a). Nothing on the face of either statute necessarily contradicts the other. But it does suggest that, in ascertaining whether a trial court has *abused its discretion* in admitting evidence going to a street terrorism count as against a section 352 objection, the sort of evidence that the Legislature contemplated could be presented under section 186.22 must *legitimately be included in the calculus of probativeness and undue prejudice* under section 352.

Two more important points about section 352 must also be noted now. One, the probativeness-undue prejudice balance should not be thought of as a scale holding two sets of weights, each independent of the other. Rather, as our high court said in *People v. Karis* (1988) 46 Cal.3d 612, 638, "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues.*'" (*Id.* at p. 638, italics added.) That is, undue prejudice and probativeness are, like space and gravity, interrelated. Undue prejudice *itself* is a *function* of the relevance of the probativeness of the evidence.

The other point is that courts must be careful to distinguish *damaging* evidence from *unduly prejudicial* evidence. (See *Karis, supra,* 46 Cal.3d at p. 638 ["'In applying section 352, "prejudicial" is not synonymous with "damaging"'"].) For example, given the clear *relevance* of the prior extortion conviction in this case, Tran's 352 argument subtly conflates the two, by indiscriminately characterizing the extortion evidence as "prejudicial" when, as we now show, it was simply greatly damaging. In short, because it was highly probative, it must be prejudicial, says Tran.

Tran's point is, of course, untenable. The balancing between probativeness and undue prejudice under section 352 is, if anything, weighted in favor of admissibility. The prejudice must *substantially* outweigh the probativeness before there is any abuse of discretion in admitting the evidence. (E.g., *People v. Doolin* (2009) 45 Cal.4th 390, 439 ["Unless the dangers of undue prejudice, confusion, or time consumption "'substantially outweigh'" the probative value of relevant evidence, a section 352 objection should fail."].)

Let us now also note a few things about section 186.22 that impact the balancing of probativeness and undue prejudice function of section 352. Section 186.22 clearly contemplates the presentation of not only evidence of other crimes (that is, crimes other than those the defendant is charged with in the current proceeding) -- that is remarkable enough -- but it also contemplates evidence of "two or more" of such other crimes, and those crimes can be actual convictions. (See § 186.22, subd. (e) ["'pattern of

criminal gang activity' means the . . . conviction of two or more of the following offenses'"].) The Legislature thus contemplated that when street terrorism is charged, defendants will inevitably sustain that degree of *damage* that is *necessarily* attendant upon the presentation of the evidence of the "two or more" other crimes *required* to prove a "'pattern of criminal gang activity.'" (Cf. *People v. Hernandez* (2004) 33 Cal.4th 1040, 1044 [noting that when prosecution seeks criminal street gang enhancement, "it will often present evidence that would be inadmissible in a trial limited to the charged offense"].)

In other words, the Legislature said, in effect: When street terrorism is charged, we don't care about the damaging effect of the prosecutor's presentation of "two or more" other crimes. It just comes with the territory for prosecution of street terrorism.

A particular aspect of the phrase, in section 186.22, subdivision (e), "two or more of the following offenses" is also remarkable. Not only does the phrase actually obligate the *prosecution* to put on evidence of *at least* two other crimes, but it clearly implies that the prosecution has the discretion to put on evidence of "more" than two other crimes. And the choice of words indicates that it does not mean, "and no more than three." If the Legislature wanted to say, "at least two but no more than three," it could have easily said so. The "or more" clause of the statute implies that if the prosecution decides, for example, that evidence of four other crimes is appropriate, then it may put on that evidence. Put another way, our Legislature has taken street gangsterism so seriously that it has built into the statute, in the engineering sense of the word, a certain amount of redundancy. (However, we need not express an opinion in this case as to whether a trial judge might be within his or her discretion, under section 352, to limit the prosecution merely to two other crimes.)

Another point of the text of section 186.22, subdivision (e) that is important for our analysis of whether the trial court abused its discretion under section 352 is that there is nothing in it that indicates that the *defendant himself* cannot be one of the "two or more persons" who must have committed "two or more" of the list of 33 crimes. Again, the Legislature could have said so. It didn't.

Now -- to the task that the prosecution faced in this case. The elements of street terrorism, according to *People v. Lamas* (2007) 42 Cal.4th 516, 523, are:

-- "Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive,"

-- "'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,'" and

-- "the person 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.'"

Given these three elements, the probativeness of Tran's extortion conviction becomes overwhelming. What better way of showing all these elements in one fell swoop than by evidence that the defendant hazarded a felony conviction for extortion in the service to his gang? The extortion evidence proved a high level of "activity," clear "knowledge" of the gang's felonious conduct, and his own willful promotion of the gang's interests.

Against this high level of probativeness, Tran's briefs on appeal assert that the prosecutor should have, in essence, given Tran the gratuitous break of going out of its way to confine the prosecution to the minimum of two predicate crimes, and, on top of that, chose as those two crimes offenses that either did not involve Tran, or used the offenses that Tran committed in this case plus someone else's crime. The answer to this contention is that there is nothing in section 352 that requires the prosecutor, in street terrorism prosecutions, to present only the most minimal and most innocuous evidence available.

Indeed, in the case before us, the prosecution did not present the full range of evidence that section 186.22, subdivision (e) might contemplate. It presented, as "predicate acts" for the street terrorism count, (1) Tran's extortion conviction, (2) Tran's murder and attempted murder in the case before it, (3) the attempted murder of the rival gang member by another member of the assault team when he fired a shot at the member, and (4) the fact that another VFL member was convicted of a murder of an OPB member. As indicated above, Tran's conviction for extortion also served to show highly active

involvement in the gang, his promotion of the gang's interests, and his knowledge of the gang's criminal nature.

Under all the circumstances, then, it can hardly have been an abuse of discretion for the trial judge not to exclude, under section 352, evidence of Tran's conviction for extortion. As the Attorney General aptly notes, there was no guarantee that the jury would accept the attempted murder of the rival gang member by another member of the assault team, or even the fact that another VFL member was convicted of murder of an OPB member. The Legislature contemplated some "cushion" for the prosecution in the number of predicate crimes ("two or more") that might be proved in a street terrorism prosecution, and the trial judge specifically admonished the jury *not* to consider Tran's extortion conviction as evidence of a propensity to commit the charged crimes, and to only consider it in regard to the gang enhancements and street terrorism charge. The trial court was clearly "within the bounds of reason."

B. Ly's "Sister" Exclamation

Tran argues the trial court erred in denying its motions for a mistrial and a new trial based on the trial court's admission of Ly's testimony that he was afraid to testify because his sister had been "executed." Tran claims that such testimony was not relevant, and even if it was, it was unduly prejudicial because it created an inference that Tran was responsible for the deaths of Ly's sister and her boyfriend.

First, because this is another section 352 argument and thus goes to the ultimate reasonableness of the trial court's call, we begin (again) by noting the high level of probativeness of the challenged evidence, here, Ly's quite legitimate and understandable fear in testifying. (See generally Evid. Code, § 780 [witness's "attitude . . . toward the giving of testimony" as one factor "the court or jury may consider in determining the credibility of a witness"].) As an example of that probativeness, consider that in *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369, this court had occasion to note the bolstered credibility of a witness who has the gumption to testify in the face of the possibility of recrimination: "A witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony

. . . the jury would be entitled to evaluate the witness's testimony knowing it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also . . . those facts which would enable them to evaluate the witness's fear." (Italics in original deleted.)

Second, under established rules of appellate review, we are required to draw any conflicting reasonable inferences in favor of the judgment. That means, as regards the prosecutor's saying "yes?" to Ly's "yes" in answer to the question of whether he was fearful in testifying, we must draw the innocent inference that the prosecutor either *didn't clearly hear* Ly's answer and wanted him to merely repeat a simple "yes," as distinct from some bit of nefarious clever maneuvering to elicit the fact of the sister's murder. That inference is particularly reasonable when one realizes that there was nothing in the substantive question that called for Ly to augment his fear with an *explanation* for it. Thus there is no basis to impute any sort of misconduct to the prosecutor based on her merely asking a simple question about the witness's fear and then asking for a repeat of a simple yes answer.

Third, there was an attenuation between the answer and any direct prejudice to Tran himself. We reject, as unrealistic, Tran's appellate argument that the answer somehow insinuated the idea that Tran himself executed Ly's sister. A juror with only the most elementary impression of gangs (say, based on television crime dramas like the Sopranos) would assume that *gangs*, with a collective will independent of any given member's status as a defendant, have a tendency to execute their members and member's relations when some line is crossed. The focus of Ly's answer was thus on the danger to *him -- to Ly* -- and not on what Tran personally had done or might do. In context, the statement simply said what any juror who watches television already knew: Internal gang discipline is brutal. You turn state's evidence not only at risk to yourself, but your

family members. Given the facts of this case, the significance of that particular revelation was no big deal.[7]

Finally, we must remember that the quoted exchange came out on *re-direct* examination. That is, the original fear question was reasonably related to Ly's credibility, attacked on cross. (Attacking Ly's credibility was of course easy -- he had at least something to gain from turning on his former allies.) Thus we may reasonably infer that the prosecutor's motive in asking the fear question was pure: She was not trying to bring out any sympathy for the sister. She simply wanted the jury to know that Ly was risking *his* life in testifying, despite the fact he had something to gain by testifying.

Given the four factors identified above, we can hardly say that the trial judge's decision was unreasonable.[8]

C. Juror "Misconduct"

Tran argues that a juror who, after the trial, expressed the opinion that recidivists should be caned, as is done in Singapore, committed juror misconduct by concealing his bias in favor of the prosecution during voir dire.

To establish even a prima facie case of juror misconduct based on concealed bias, there must be "questioning" that "is sufficiently specific to elicit the information which is not disclosed, or as to which a false answer is later shown to have been given." (See *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929.) Here, the

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[7] Indeed, at no point did Ly state that Tran had threatened him personally or that Tran was in any way involved with the murders of Ly's sister or Meo.

[8] And, to the degree that there is any strand of argument based on prosecutorial misconduct in the prosecutor's "yes?" here, *People v. Leonard* (2007) 40 Cal.4th 1370 disposes of it. There, a prosecutor asked a detective this question: "And what did you tell him," i.e., what the detective told the defendant. (*Id.* at p. 1405.) The question elicited the answer that the detective told the defendant "we were doing the investigation regarding *the thrill killer*, and that his name had come up as a result of being spoken to by officers . . . ." (*Ibid.*, italics in original.) The reference to "thrill killer" violated a stipulation "not [to] mention that this was the matter referred to in the news media as the 'Thrill Killer' case." (*Ibid.*) The *Leonard* court held that even if the defense had preserved the issue, there was no prosecutorial misconduct because the "prosecutor's question was innocuous, and there [was] no evidence that he asked it with the intent to elicit [a] reference to the Thrill Killer." (*Ibid.*) The questions in the case before us -- the substantive "As you come here are you fearful of your life?" and the subsequent "yes?" were objectively less likely to elicit information about the death of Ly's sister than the question "And what did you tell him" was to elicit information about the investigation of the "Thrill Killer."

question that juror eight supposedly didn't answer truthfully was: "If selected, can you be fair, impartial and follow the law?"

The requisite specificity is not shown. There is no "fit" between the question and the supposedly false answer. Tran's juror misconduct argument is based on a serious flaw in logic. The flaw in logic is that certain (let us call them illiberal) attitudes toward *punishment* necessarily mean that a juror cannot be fair in the determination of the *facts* of a case.

Nonsense. There is no necessary relation between an individual's ability to be fair and impartial in the determination of facts and an individual's philosophy of punishment, whether founded on moral desert, deterrence or even rehabilitation.

The lack of a necessary connection is illustrated by a First Circuit opinion evaluating a state conviction for first degree murder on federal habeas corpus, *Mello v. DiPaulo* (1st Cir. 2002) 295 F.3d 137. In *Mello*, the defendant in an arson-murder case contended that his trial counsel represented him ineffectively because the trial counsel did not exercise a peremptory challenge against a juror whose own father was a firefighter. The First Circuit observed that "the decision by defense counsel of an accused arsonist to permit the child of a firefighter to sit on the jury seems odd." (*Id.* at p. 147.) But odd as it was, there was no ineffective assistance because there was no prejudice, because the juror had sworn, like the proponent of caning in the case before us, to be "fair and impartial." (*Ibid.*) We need only add that George Washington apparently saw no intrinsic reason not to impose the penalty of 100 lashes for a deserter during the revolutionary war.[9] Under Tran's argument, a resurrected George Washington who answered in voir dire that he would be fair and impartial in judging the *facts* of the case would still be committing "juror misconduct" by concealing a pro-prosecution bias based merely on his willingness to countenance whipping as a punishment.

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[9] See Hapgood, George Washington (2008) at page 82. (As of this writing, the cited reference is easy to find online at google books, if one types in "George Washington" "lashes" and "Hapgood.") In the same vein, Thomas Jefferson held ideas about appropriate punishments that would make our juror who favors caning for recidivists in the present case seem like a member of Amnesty International.

D. The *Cunningham* Challenge

Less than two years ago, the United States Supreme Court held in *Cunningham v. California, supra,* 549 U.S. 270, 288 (*Cunningham*) that California's determinate sentencing law was unconstitutional insofar as it gave the trial judge discretion to impose higher sentences for criminal defendants based on circumstances established by a mere preponderance of the evidence as determined by the court, when those circumstances should have instead been established beyond a reasonable doubt as determined by a jury. The court said: "Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Id.* at pp. 288-289.)

In the present case, the trial court imposed upper terms because of the violence, callousness and cruelty attendant to the charged crimes, the vulnerability of the victims (both attacked near their homes), Tran's "numerous" prior convictions of increasing seriousness as an adult, and two prior prison terms. It also imposed consecutive terms because the crimes were committed while Tran was armed, and used a weapon. All of this "consecutizing" and "upper-terming" Tran now ascribes as *Cunningham* error.

No. First, we note that the trial judge had authority under California law to use increasingly serious prior prison terms as aggravating factors to impose upper terms. California Rules of Court rule 4.421(b)(2) lists "The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness" as a factor for determining "circumstances in aggravation" for purposes of sentencing. And one should recall that *Cunningham* specifically excluded prior convictions from its holding. (*Cunningham, supra*, 549 U.S. at p. 291.)

And second, dispositively, the matter was settled by our state Supreme Court in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*). There the court said that a "defendant's criminal history" was an "aggravating circumstance[] that independently satisf[ied] Sixth Amendment requirements" and did not need to be submitted to the jury. More specifically, *Black II* said: "[S]o long as a defendant is eligible for the upper term

by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term . . . regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Id.* at pp. 813, original italics deleted.)

As to the consecutizing of sentences, we again note that the trial judge had the authority under California law to do so. (See Pen. Code, § 669 [general authority of trial judge to impose consecutive sentences][10].)

And, as to whether consecutive sentences contravened federal law, the question has again been answered by *Black II*: "The determination whether two or more sentences should be served [consecutively] is a 'sentencing decision [] made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense' and does not 'implicate [] the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense." (*Black II, supra*, 41 Cal.4th at p. 823.)

As an intermediate appellate court, we are bound by *Black II*. The reply brief treats us to a lengthy discussion as to why *Black II* is incorrect, in an obvious (though understandable) attempt to preserve the *Cunningham* issues for the day when our own high court overrules *Black II* or the United States Supreme Court disapproves it. The discussion might form the basis of an interesting law review article, but until that day comes, it is, from this court's point of view, strictly academic. As far as we are concerned, *Black II* ends the issue.

Except for one thing. The reply brief attempts to *distinguish Black II* on the theory that, in this case, there is a *mitigating* factor -- prior satisfactory performance on

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[10] The statute states in pertinent part: "When any person is convicted of two or more crimes . . . the second or subsequent judgment . . . shall direct whether the terms of imprisonment . . . shall run concurrently or consecutively. Life sentences . . . may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction."

parole -- while *Black II* itself involved no countervailing mitigating factors. On this point, there are two answers.

First, the issue was waived. There was no attempt in the *opening brief* to distinguish *Black II,* which, in the context of *this* argument, would have been the natural place to raise the *inapplicability* of *Black II.* (Tran's appellate counsel obviously knew that *Black II* would have to be addressed if a *Cunningham* issue were raised. The table of contents for just the state cases alone mentioned in the opening brief goes on for six pages.)

Second, on the merits, the rationale of *Black II* necessarily includes recidivist aggravating factors even with balancing mitigating factors, at least when the mitigating factor, as it is here -- performance on parole -- is *inherently* linked to the aggravating factor -- here, prior prison terms. As *Black II* said: "The determinations whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness' . . . require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. *This type of determination is . . . one more typically and appropriately undertaken by a court.*'" (*Black II, supra*, 41 Cal.4th at pp. 819-820, italics added.) Without prison, there is no parole.

E. The Dual Use of
the Gun's Use

California Rules of Court, rule 4.425(b) says: "Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: . . . A fact used to otherwise enhance the defendant's prison sentence." Yet, this prohibited action is precisely what the trial court did in this case. At Tran's sentencing hearing, the trial court stated, "Also the defendant was armed and used a weapon. That's a reason for consecutive terms." This same fact -- use of a weapon -- was also used as the basis for a firearm enhancement pursuant to section 12022.5, subdivision (a)(1) (which can be imposed on "any person who

personally uses a firearm in the commission of a felony or attempted felony") to twice enhance Defendant's sentence by ten years.

We agree with both parties that the trial court erred in using the same factor to both enhance Tran's sentence and to run it consecutively.

So the real question is whether the error was harmless. Answer: Yes.[11]

Only a single factor is needed to impose consecutive sentences. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729 (*Osband*).) Recall that California Rules of Court, rule 4.425 allows *any* circumstance in aggravation to be used in imposing consecutive sentences, except that otherwise prohibited under the rule. And the standard for harmless error is reasonable probability of a more favorable result. (E.g., *People v. Avalos* (1984) 37 Cal.3d 216, 233 ["'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'"].)

When the use of a gun is stripped away from the trial court's reasoning, there remain two overarching factors, immune from *Cunningham* considerations, that justified the imposition of the consecutive sentences: Numerous prior convictions of "increasing seriousness" combined with the fact that Tran had "served two prison terms."

In short, Tran is a career criminal with a long rap sheet, and two previous stays in the big house had done nothing to dampen his devotion to his gang. Given the strength of those factors, it is clear that the improper double use of the use of a weapon was just frosting on the cake. (Cf. *Avalos, supra*, 37 Cal.3d at p. 233 [court could not "determine whether the improper factor was determinative for the sentencing court"].) Indeed, given the record and the court's remarks here, it is well nigh impossible to imagine Judge Fitzgerald giving any lesser sentence if Tran had not used a gun at all. (See *ibid.* [Considering the circumstances, especially "the court's remarks" to conclude that "it seems clear that the improper dual use of facts was not determinative."]; *Osband, supra*, 13 Cal.4th at p. 729 ["In this case, the court could have selected disparate facts

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[11] While the Attorney General posits that Tran waived the issue by failing to object at trial, the Attorney General addresses the merits of the point because of the ineffective-assistant-of-counsel claim that accompanies the failure-to-object rejoinder. Since we conclude any failure to object was harmless, the ineffective assistance claim is moot.

from among those it recited to justify the imposition of both a consecutive sentence and the upper term, and on this record we discern no reasonable probability that it would not have done so. Resentencing is not required."].)

F. The 654 Issue

In *Neal v. State of California* (1960) 55 Cal.2d 11, the Supreme Court articulated what has come to be known as the single objective and intent test for application of section 654.[12] Said the court: "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 *depends on the intent and objective of the actor*. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Id.* at p. 19, italics added.)

In *People v. Latimer* (1993) 5 Cal.4th 1203, our high court noted section 654 does not apply when the defendant has separate but simultaneous objectives. (See *id.* at p. 1212 [noting non-application of section 654 in cases of "separate, although sometimes simultaneous, objectives"].)

In *People v. Herrera, supra,* 70 Cal.App.4th 1456, this court applied the separate but simultaneous objective test to conclude that section 654 did not apply where a gang member went on a drive-by shooting spree motivated by *both* a desire to promote the gang *and* "simply a desire to kill." (*Id.* at p. 1467.)

We stress: In the present case, *unlike Herrera*, the evidence *affirmatively excludes* even the *possibility* that Tran might have had separate, but simultaneous motives. Tran exclaimed, "Hey, that's Play Boy . . . that's him, that's him, that's Play Boy," when he shot Bui. The statement will admit of no other possibility but that when

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[12] Section 654 provides:

"(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other. [¶] (b) Notwithstanding subdivision (a), a defendant sentenced pursuant to subdivision (a) shall not be granted probation if any of the provisions that would otherwise apply to the defendant prohibits the granting of probation."

Tran shot Bui, he did not have a generalized desire to kill, but the specific desire to kill a rival gang member, as evidenced by the use of the gang moniker.

Given these facts, the case of *People v. Vu, supra,* 143 Cal.App.4th 1009, rather than *Herrera*, controls. In *Vu*, like here, but unlike *Herrera*, there was no evidence that the defendant's shooting of the bystander had a dual purpose of a simple "desire to kill" along with his desire to promote his gang. We therefore follow *Vu* and apply section 654 in this instance.

In supplemental briefing,[13] the issue was raised as to whether Tran's *uncharged* procurement and possession of a firearm in the course of preparation for the shooting -- Tran is, after all, a convicted felon[14] -- might serve as a basis for the street terrorism conviction independent of the shots fired at Vuong and Bui. Tran's appellate counsel, however, points out that being a felon-in-possession of a firearm was never charged. Moreover, and most persuasively, the trial judge specifically instructed the jury that it was the two shootings that constituted the basis for the street terrorism charge, never mentioning that being a felon-in-possession was a potential basis on which to convict Tran of street terrorism.[15]

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[13] We grant the Attorney General's request for judicial notice of the legislative history of the Street Terrorism Enforcement and Prevention Act.

[14] See section 12021, subdivision (a)(1) [convicted felons commit another felony if they have a firearm in their possession or control].

[15] The main point we established in *Herrera* was that the crime of street terrorism had, as its "gravamen," the "participation in the gang itself." (*Herrera, supra*, 70 Cal.App.4th at p. 1467.) One can thoroughly participate in a criminal street gang, fully and repeatedly, without ever pulling a trigger and killing another human being. Thus, as in *Herrera*, when one gang member jumps into a car with his gang buddies, pulls out two guns and yells that his "home boys [are] after the guys," the ensuing drive was for the express purpose of participation in the gang's criminal activities. The driving served the gang's primary purpose, but the driving itself did not *require* any of the car's occupants to *not only* shoot at the home of a rival's mother, but *also* spray the vicinity with bullets, hitting two innocent bystanders on the first pass and then turning around and *further* spraying the neighborhood with bullets a second time, hitting and damaging multiple parked cars. (*Id.* at p. 1461.)

By contrast, in the case at bar the record *requires* us to proceed on the premise that Tran did *nothing* else of a criminal nature *but* shoot a rival gang member and at someone Tran expressly thought was a rival gang member. Remember that here the trial court specifically instructed the jury that the two shootings were the *sole* acts it could use to support the street terrorism charge. This distinction makes *Herrera* inapplicable.

While Tran's very presence *might* have constituted adequate encouragement to his fellow gang members, prompting them to carry out a lethal assault, we cannot infer, under the circumstances of *this* case, where the trial court specifically instructed the jury that the two shootings were the *sole* acts it could use to support the street terrorism charge, that the fact of his presence alone is sufficient evidence to support a street terrorism conviction.

We cannot uphold the street terrorism conviction under the facts of this case based on a crime never charged, because such a procedure would offend the due process need for jury unanimity in criminal cases. (See *People v. Jones* (1990) 51 Cal.3d 294, 305 ["the defendant has a due process right to fair notice of the charges against him and reasonable opportunity to defend against those charges"], 321 ["we acknowledge that the requirement of unanimity in criminal cases is of constitutional origin"].) More specifically, the prosecutor elected (and the trial court instructed the jury accordingly) to base the street terrorism conviction *only* on the charged shootings. As the court said in *People v. Mayer* (2003) 108 Cal.App.4th 403, 418: "When a defendant is charged with a single offense, but there is proof of several acts, any one of which could support a conviction, either the prosecution must select the specific act relied upon to prove the charge, or the jury must be instructed that all the jurors must agree that the defendant committed the same act or acts. [Citation.] *When the prosecutor does not make an election, the trial court has a sua sponte duty to instruct the jury on unanimity.* [Citation.]." (Italics added.)

The Attorney General offers us no basis on which to say that the jury unanimity requirement does not apply here. Nor do we see one ourselves. The street terrorism conviction must, accordingly, be stayed under section 654.

However, as mentioned above, there is no need to reverse the judgment; we simply modify the sentence here to provide for the stay of the street terrorism term.

However, nothing we say in this opinion is intended to suggest that, had the trial court *not* so limited the jury in its instructions concerning the street terrorism charge, section 654 would be applicable.

IV. DISPOSITION

The judgment is modified to require that the three year sentence for street terrorism count be stayed. The judgment is affirmed as to the remaining 51 years, and in all other respects.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.

EXHIBIT B

(COURT OF APPEAL ORDER DENYING REHEARING
AND MODIFYING OPINION; NO CHANGE IN JUDGMENT)

Filed 9/29/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. QUANG MINH TRAN, Defendant and Appellant.	G036560 (Super. Ct. No. 01WF0544) ORDER DENYING REHEARING AND MODIFYING OPINION; NO CHANGE IN JUDGMENT

The petition for rehearing is DENIED.

The opinion filed August 31, 2009 is hereby modified in the following ways:

1. Strike the last sentence of the incomplete paragraph that appears at the top of page 22 of the slip opinion (the sentence ending in the words "two answers", and also strike the first full paragraph immediately beneath that sentence. Strike the first

EXHIBIT B

sentence in the second full paragraph on page 22, and in its place substitute the following sentence: "The rationale of *Black II*, however, necessarily includes recidivist aggravating factors even with balancing mitigating factors, at least when the mitigating factor, as it is here -- performance on parole -- is *inherently* linked to the aggravating factor -- here, prior prison terms."

2. On page 7 of the slip opinion, strike the first sentence of the second full paragraph and in its place substitute the following sentence: "The gang expert also testified -- over defense objections that the testimony was too inflammatory -- that in 1993 and 1994 Tran 'began series of extortions' in connection with the shakedown of Vietnamese businesses in Los Angeles for "protection money."

3. On page 9 of the slip opinion, strike the last sentence of the incomplete paragraph that appears at the top of the page.

4. On page 16 of the slip opinion, strike the first sentence of the second complete paragraph and in its place substitute the following sentence: "Tran argues the trial court erred in denying his motion to strike Ly's testimony that he was afraid to testify because his sister had been 'executed,' and otherwise erred in denying his motions for a mistrial and a new trial based on the admission of that testimony."

5. On page 4 of the slip opinion, insert the following new footnote 4 after the word "sister" at the top of the page: "Obviously, since we find no evidentiary error, there was no denial of a fair trial because of any hypothetical cumulative prejudice from more than one evidentiary error." All footnotes after new footnote 4 should, of course, be correspondingly renumbered.

These modifications do not affect the judgment.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.

PROOF OF SERVICE

I am a citizen of the United States of America, an active member of the State Bar of California, and not a party to the within action. My business address is Post Office Box 528, Ponderay, Idaho 83852.

On October 5, 2009, I served the within

PETITION FOR REVIEW

in this action, by causing true copies thereof enclosed in sealed envelopes with first-class postage prepaid thereon, addressed as stated on the attached mailing list, to be deposited in the United States mail at Sandpoint, Idaho.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 5th day of October, 2009, at Sandpoint, Idaho.

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