IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,	Supreme Court No. S176923
Plaintiff and Respondent,	Court of Appeal No. G036560
v.	
QUANG MINH TRAN,	Superior Court No. 01WF0544
Defendant and Appellant./	

APPELLANT'S BRIEF ON THE MERITS

MARLEIGH A. KOPAS
Attorney at Law
SBN # 105947
Post Office Box 528
Ponderay, ID 83852
Telephone: (310) 455-3651
Attorney for Appellant
Quang Minh Tran
By Appointment of The
California Supreme Court
under The Appellate
Defenders, Inc. Assisted
Case System

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,	Supreme Court No. S176923
Plaintiff and Respondent,	Court of Appeal No. G036560
v.	
QUANG MINH TRAN,	Superior Court No. 01WF0544
Defendant and Appellant./	

APPELLANT'S BRIEF ON THE MERITS

MARLEIGH A. KOPAS
Attorney at Law
SBN # 105947
Post Office Box 528
Ponderay, ID 83852
Telephone: (310) 455-3651
Attorney for Appellant
Quang Minh Tran
By Appointment of The
California Supreme Court
under The Appellate
Defenders, Inc. Assisted
Case System

TABLE OF CONTENTS

STATEMENT OF THE ISSUE ---------- 1

STATEMENT OF THE CASE ---------- 2

STATEMENT OF FACTS ---------- 3

Predicate Crimes Evidence ---------- 5
The Appeal ---------- 11

ARGUMENT ---------- 13

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE PROSECUTOR TO PROVE A PATTERN OF CRIMINAL STREET GANG ACTIVITY BY INTRODUCING EVIDENCE OF APPELLANT'S OWN UNCHARGED CRIMINAL ACTS ---------- 13

A. The Standard of Review. ---------- 13

B. The Use of Appellant's Prior Extortion Activity and Conviction was Unnecessary to Establish A Pattern of Criminal Gang Activity, and The Evidence Constituted Prohibited Character/Propensity Evidence. ---------- 15

1. The Opinion. ---------- 15

2. Other Predicate Acts Unrelated to Appellant were Available to Prove The Requisite "Pattern of Criminal Gang Activity." ---------- 17

3. The Evidence of Appellant's Prior Extortions was Unduly Prejudicial and Inflammatory, as well as Cumulative, and should have been Excluded under Evidence Code Section 352. ---------- 19

a) Other Recent Appellate Decisions Correctly Apply Settled Law in This Context and Support Appellant's Argument. ---------- 20
b) The Rules of Statutory Construction do not Support The Opinion's Analysis of The Interplay between Evidence Code Section 352 and Penal Code Section 186.22. ---------- 25
c) The Trial Court Abused its Discretion in Admitting Evidence of Appellant's Prior Extortion Activity and Conviction. ---------- 29

4. Appellant's Prior Extortion Activity was not Necessary to Prove The Elements of Street Terrorism, and Thus Lacked Substantial Probative Value. ---------- 33

a) Active Participation in A Criminal Street Gang. ---------- 34
b) Knowledge of A Pattern of Criminal Gang Activity. ---------- 34
c) Willful Promotion of Any Felonious Criminal Conduct by Gang Members. ---------- 36

5. The Trial Court's Failure to Exercise Discretion in A Legally Correct Manner was Prejudicial because The Evidence Constituted Prohibited Propensity/Character Evidence. ---------- 38

C. The Evidentiary Error Requires Reversal of Appellant's Conviction. ---------- 43

CONCLUSION ---------- 52

WORD COUNT CERTIFICATION ---------- 53

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Chapman v. California
(1967) 386 U.S. 18 44

Duncan v. Henry
(1995) 513 U.S. 364 43

Estelle v. McGuire
(1991) 502 U.S. 62 43

Gibson v. Clanon
(9th Cir. 1980) 633 F.2d 851 47

Hicks v. Oklahoma
(1980) 447 U.S. 343 44

In re Winship
(1970) 397 U.S. 358 44

Jammal v. Van de Kamp
(9th Cir. 1991) 926 F.2d 918 48

Krulewitch v. U.S.
(1949) 336 U.S. 440 44

Lawson v. Borg
(9th Cir. 1995) 60 F.3d 608 47

McKinney v. Rees
(9th Cir. 1993) 993 F.2d 1378 45

Old Chief v. U.S.
(1997) 519 U.S. 172 41

Reiger v. Christensen
(9th Cir.1986) 789 F.2d 1425 48

Strickland v. Washington
(1984) 466 U.S. 668 51

U.S. v. Myers
(5th Cir. 1977) 550 F.2d 1036 41

STATE CASES

Bailey v. Taaffe
(1866) 29 Cal. 422 13

City of Sacramento v. Drew
(1989) 207 Cal.App.3d 1287 14

College Hospital Inc. v. Superior Court
(1994) 8 Cal.4th 704 51

Department of Parks & Recreation v. State Personnel Bd.
(1991) 233 Cal.App.3d 813 14

In re Luke W.
(2001) 88 Cal.App.4th 650 26

People v. Albarran
(2007) 149 Cal.App.4th 214 ..... passim

People v. Brown
(2003) 31 Cal.4th 518 13

People v. Cardenas
(1982) 31 Cal.3d 897 47

People v. Carter
(2003) 30 Cal.4th 1166 25

People v. Chenze
(2002) 97 Cal.App.4th 521 ..... 26, 28

People v. Cribas
(1991) 231 Cal.App.3d 596 46

People v. Cruz
(1996) 13 Cal.4th 764 28

People v. Cudjo
(1993) 6 Cal.4th 585 31

People v. Dellinger
(1984) 163 Cal.App.3d 284 ..... passim

People v. Duran
(2002) 97 Cal.App.4th 1448 ..... 17, 18, 19

People v. Ewoldt
(1994) 7 Cal.4th 380, superseded by statute on other grounds as stated by *People v. Britt* (2002) 104 Cal.App.4th 500 ..... passim

People v. Garceau
(1993) 6 Cal.4th 140, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93 41

People v. Garcia
(1999) 20 Cal.4th 490 ..... 13, 14

People v. Gardeley
(1996) 14 Cal.4th 605 ..... 17, 18, 19

People v. Gibson
(1976) 56 Cal.App.3d 119 44

People v. Godinez
(1992) 2 Cal.App.4th 492 47

People v. Guerrero
(1976) 16 Cal.3d 719 42

People v. Harris
(1998) 60 Cal.App.4th 727, review denied 27, 31

People v. Hernandez
(1988) 47 Cal.3d 315 47

People v. Hernandez
(2004) 33 Cal.4th 1040 26

People v. Hicks
(1993) 6 Cal.4th 784 26

People v. Holt
(1984) 37 Cal.3d 436 42

People v. Jacobs
(2007) 156 Cal.App.4th 728 14

People v. Jenkins
(1980) 28 Cal.3d 494 27

People v. Jenkins
(1995) 10 Cal.4th 234 ..... 28, 29

People v. Karis
(1988) 46 Cal.3d 612 14

People v. Kelly
(2007) 42 Cal.4th 763 ..... 30, 32

People v. Kipp
(2001) 26 Cal.4th 1100 ..... 13, 40

People v. Leon
(2008) 161 Cal.App.4th 149, review denied ..... passim

People v. Lewis
(2001) 25 Cal.4th 610 32

People v. Loeun
(1997) 17 Cal.4th 1 ..... 17, 18, 19, 30

People v. Malone
(1988) 47 Cal.3d 1 49

People v. Mason
(1991) 52 Cal.3d 909 42

People v. Mungia
(2008) 44 Cal.4th 1101 13

People v. Partida
(2005) 37 Cal.4th 428 43

People v. Pearch
(1991) 229 Cal.App.3d 1282 47

People v. Schader
(1969) 71 Cal.2d 761 31

People v. Scheer
(1998) 68 Cal.App.4th 1009 49

People v. Scheid
(1997) 16 Cal.4th 1 ..... 19, 20

People v. Statum
(2002) 28 Cal.4th 682 26

People v. Thompson
(1980) 27 Cal. 3d 303, superseded by statute on other grounds as
stated in *Clark v. Brown* (9th Cir. 2006) 442 F.3d 708 ..... passim

People v. Tran
(2009) 102 Cal.Rptr.3d 282 3

People v. Tran
(2009) 99 Cal.Rptr.3d 122 ..... passim

People v. Wagner
(1975) 13 Cal.3d 612 47

People v. Watson
(1956) 46 Cal.2d 818 ..... 49, 50, 51

People v. Watson
(1981) 30 Cal.3d 290 ..... 27, 50, 51

People v. Williams
(2009) 170 Cal.App.4th 587, review denied ..... passim

People v. Zapien
(1993) 4 Cal.4th 929 40

People v. Zemavasky
(1942) 20 Cal.2d 56 47

STATE STATUTES

Evidence Code § 210 ..... 19, 20

Evidence Code § 350 19

Evidence Code § 351 19

Evidence Code § 352 ..... passim

Evidence Code § 353, subdivision (b) 13

Evidence Code § 1101 ..... 22, 38

Evidence Code § 1101, subdivision (a) 38, 39

Evidence Code § 1101, subdivision (b) 38, 39, 41

Penal Code § 186.22 (Stats.2009, ch. 171 (Sen. Bill No. 150), sec. 1) ..... passim

Penal Code § 186.22, subdivision (a) (Stats. 1996, ch. 982 (Assem. Bill No. 2035), sec. 1) ..... passim

Penal Code § 186.22, subdivision (b) (Stats. 1996, ch. 982 (Assem. Bill No. 2035), sec. 1) 2

Penal Code § 186.22, subdivision (b)(1) (Stats. 1996, ch. 982 (Assem. Bill No. 2035), sec. 1) 2

Penal Code § 186.22, subdivision (e) (Stats. 1996, ch. 982 (Assem. Bill No. 2035), sec. 1) ..... passim

Penal Code § 187, subdivision (a) (amended by Stats.1996, ch. 1023 (Sen. Bill No. 1497), sec. 385, eff. Sept. 29, 1996) 2

Penal Code § 654 3

Penal Code § 664, subdivision (a) (amended by Stats.1994, ch. 793 (Assem. Bill No. 2433), sec. 1) 2

Penal Code § 12022.5, subdivision (a) (Stats.1995, ch. 377 (Sen. Bill No. 1095), sec. 9) 2

CONSTITUTIONAL PROVISIONS

California Constitution, Article 1, § 7 ..... 13, 43, 45

California Constitution, Article 1, § 15 ..... 13, 43, 45

California Constitution, Article 1, § 24 ..... 13, 43, 45

California Constitution, Article 1, § 28, subdivision (f)(2) 19

California Constitution, Article 6, § 13 ..... 13, 14, 51

United States Constitution, Fifth Amendment 13, 45

United States Constitution, Sixth Amendment 13, 45

United States Constitution, Fourteenth Amendment 13, 43, 44, 45

OTHER AUTHORITIES

CALJIC No. 6.50 11

CALJIC No. 17.24.2 11

CALJIC No. 17.24.3 11

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,	Supreme Court No. S176923
Plaintiff and Respondent,	Court of Appeal No. G036560
v.	
QUANG MINH TRAN,	Superior Court No. 01WF0544
Defendant and Appellant./	

APPELLANT'S BRIEF ON THE MERITS

STATEMENT OF THE ISSUE

By its order dated February 10, 2010, this court has directed that the issue to be briefed and argued shall be limited to the following:

"Did the court abuse its discretion in allowing the prosecution to introduce evidence of defendant's own uncharged criminal acts in order to prove a pattern of criminal activity for purposes of Penal Code section 186.22, subdivisions (a) and (e)?"

STATEMENT OF THE CASE

On February 10, 2003, the Orange County District Attorney charged appellant Quang Minh Tran and Huan Hoang Nguyen ("Nguyen") in an information with one count of murder (former Pen. Code, sec. 187, subd. (a)), one count of willful, deliberate and premeditated attempted murder (former Pen. Code, sec. 664, subd. (a) - 187, subd. (a)), and one count of street terrorism (former Pen. Code, sec. 186.22, subd. (a)).[1] [2] The information alleged that the murder and attempted murder were committed for the benefit of criminal street gangs (former sec. 186.22, subd. (b)(1)), and that appellant and Nguyen personally used a firearm in the commission of those offenses (former sec. 12022.5, subd. (a)). (4 CT 795-797.)

Appellant pleaded not guilty. (4 CT 798.) His jury found him guilty of first-degree murder, premeditated and deliberate attempted murder, and street terrorism as charged. The jury found appellant personally used a firearm in the commission of the murder and attempted murder, and that these crimes were committed for the

---

1 All further statutory references are to the Penal Code, with the exception of any reference to "section 352," which is to the Evidence Code.

Because the offenses occurred on May 6, 1997, all references to any "former" statute or subdivision are to the provisions then in effect. (See sec. 187, subd. (a) (amended by Stats.1996, ch. 1023 (Sen. Bill No. 1497), sec. 385, eff. Sept. 29, 1996); sec. 664, subd. (a) (amended by Stats.1994, ch. 793 (Assem. Bill No. 2433), sec. 1); sec. 186.22, subds. (a) & (b) (Stats. 1996, ch. 982 (Assem. Bill No. 2035), sec. 1 [the STEP Act]); sec. 12022.5, subd. (a) (Stats.1995, ch. 377 (Sen. Bill No. 1095), sec. 9).)

2 Nguyen and appellant were not tried together. (See 4 CT 810.)

benefit of the Viets for Life ("VFL") and V criminal street gangs. (5 CT 977-981, 997-999.)

The court sentenced appellant to 54 years-to-life in prison followed by an indeterminate term of life with the possibility of parole. (5 CT 1085-1088, 1090-1093; 7 RT 1101-1111.) On August 31, 2009, the Court of Appeal affirmed the judgment as modified to provide for the stay of the street terrorism term under section 654. (*People v. Tran* (2009) 99 Cal.Rptr.3d 122, 127 ("Opinion"). On December 2, 2009, this court granted appellant's petition for review. (*People v. Tran* (2009) 102 Cal.Rptr.3d 282.) On February 10, 2010, this court limited the issue to be briefed and argued as specified hereinabove. Appellant now submits the following brief on the merits of the issue specified by this court.

STATEMENT OF FACTS

The V and the VFL were aligned Vietnamese-American criminal street gangs until approximately May 1997, when they had a falling out. The Oriental Play Boys ("OPB") was a rival Vietnamese-American criminal street gang. (1 RT 72, 78-80, 81; 2 RT 167-170, 172; 4 RT 623, 631-632.)

On May 6, 1997, the leader of the OPB shot at a car containing at least one VFL member. (1 RT 82-84, 90-91; 2 RT 165, 202.) Appellant, a VFL member, contacted Qui Ly, a V member, and obtained guns to do a payback shooting. (2 RT 145-146, 161, 193, 195-196, 199, 203, 218.) V and VFL members held a planning meeting at the home of a V member, and drove in three cars to an

apartment complex where appellant said the OPB leader lived. (2 RT 205-212, 218-219, 223.)

Appellant, another VFL member, and V member Qui Ly each had a gun and wore masks. Hung Meo, the V gang's leader, accompanied them into the apartment complex. The three with guns shot at the OPB leader in the parking lot, with one bullet wounding him. (1 RT 81-82, 137; 2 RT 218-219, 223, 232-233; 3 RT 354.) Appellant and Qui Ly removed their masks when leaving the apartment complex separately from the others. They encountered a young Asian male carrying groceries. Appellant mistakenly identified the teenager as an OPB member. The male ran, and appellant shot him in the back and killed him. (2 RT 235, 244, 248; 3 RT 352-354; 5 RT 710, 714.)

The OPB leader told the police the males in the parking lot looked Hispanic. (2 RT 129.) Two witnesses told the police they saw young Asian males in the area at the time of the shootings. One also said she saw an Asian male with a two-handled gun [matching Qui Ly's description of appellant's gun], and the other witness said she saw three cars drive away from the area. (3 RT 417-418; 5 RT 686-689, 691; Opinion, *supra*, 99 Cal.Rptr.3d at pp. 129-130.) Eight years after these events, an eyewitness to the fatal shooting testified that he saw two males exit the apartment complex's gate and he thought their faces were covered. Both males fired their guns. (6 RT 871-872, 875-876, 887.) The same witness told the police just after the shootings in 1997 that the two males could have been Hispanic, the shooter had a Fu-Manchu mustache, and he saw only one muzzle flash. (6 RT 874,

876, 882-884, 890.) Unlike appellant and Qui Ly, V leader Hung Meo had a Fu-Manchu mustache. (See Exhibit Nos. 17A, 17B & 17C.)

V members Qui Ly and Hanh Dam testified against appellant under use immunity agreements. Hanh Dam testified appellant admitted his involvement in the shootings. (2 RT 145, 277; 4 RT 609-611, 636-637.)

The defense contended appellant was not involved in the shootings, and that there were only three perpetrators -- V members Qui Ly, Hung Meo, and Hanh Dam, or possibly VFL member Uncle Dave [Nguyen]. No eyewitness other than the accomplice Qui Ly placed appellant at the scene, there was no physical evidence linking him to the scene, and V members Qui Ly and Hanh Dam pointed the finger at appellant to protect their gang leader Hung Meo. (7 RT 976-978, 982, 985-986, 991-992; 4 CT 795.)

Predicate Crimes Evidence

Prior to trial, defense counsel objected to the use of any of appellant's prior criminal acts or convictions other than for impeachment purposes. The defense argued that under section 352 appellant's prior conviction for extortion should not be used as a predicate act for the gang charges, because there were numerous available predicate acts not involving appellant. The court overruled the objection. (1 RT 27-28.[3])

---

[3] DEFENSE COUNSEL: "The negotiating area has to do with prior acts of the defendant. If there is an intent absent my client taking the stand of introducing any of his prior criminal acts or convictions. What I am concerned about is an attempt to use his prior conviction that he went to prison as a predicate act. [Par.] There are numerous predicate acts that can be introduced in regard to

Footnote continued on next page

At trial, the prosecutor's gang expert provided evidence of predicate acts concerning the VFL and V gangs to support the street terrorism charge and gang enhancement allegations.[4] Regarding the VFL gang, the gang expert testified that VFL member Noel Jesse Mata ("Mata") was convicted of murder in 1996, and appellant committed extortion in 1994. (Exhibit No. 52 [documentation of appellant's extortion conviction]; 5 RT 759-763, 770; former sec. 186.22, subd. (e).)

Over defense objection that such testimony constituted inadmissible hearsay and was unduly prejudicial under section 352, the gang expert testified that appellant and three other VFL members conducted a series of extortions targeting Vietnamese businesses for protection money in 1993 and 1994. (5 RT 761-762.) The expert testified that "[b]usinesses were shot into[,] other businesses, were verbally threatened, but the businesses were asked for protection money to protect them from any gang activity at their businesses [sic]." (5 RT 762.) The gang expert testified that appellant, his brother

---

this case that do not involve my client, and I'm asking under [section] 352 that if there is an attempt to use a predicate act of my client that that objection be sustained and that another predicate act be introduced.

DISTRICT ATTORNEY: "Your Honor?

THE COURT: "Hang on. What authority do you have for that?

DEFENSE COUNSEL: "352 of the Evidence Code.

THE COURT: "Request is denied." (1 RT 27-28.)

[4] The V gang's predicate acts were burglary, street terrorism, attempted extortion and robbery. (5 RT 775-780.)

and another VFL member were arrested and prosecuted as the result of a sting operation in which a business owner voluntarily paid protection money to appellant. The expert opined appellant at that time was an active VFL member and the extortion benefited the VFL gang. (5 RT 762-763.)

> Q. In your opinion, was [appellant] an active gang member of Viet for Life on the day that he committed the crime of extortion on January 7, 1994?
>
> A. It is.
>
> Q. And what is the basis of your opinion?
>
> A. I spoke to the actual detective that investigated the crime. I reviewed the police reports related to the series of extortions. I reviewed F.I's police contact of [appellant] prior to that date. I reviewed his arrest of other VFL gang members prior to that date. But primarily based on that.
>
> Q. Now do you have an opinion whether or not the crime that we discussed of extortion on January 7, 1994 was committed for the benefit of Viet for Life?
>
> A. I do.
>
> Q. And what is that opinion based on?
>
> A. My prior training and experience.
>
> Q. What is your opinion?
>
> A. That it benefitted the gang VFL. (5 RT 762-763.)

At sidebar, the defense objected that the expert's testimony about businesses being shot into was highly inflammatory and prejudicial. Defense counsel noted there was nothing in the documentation to support such factual assertions, and that appellant pled guilty to only one count of extortion. The defense asked the court to strike that portion of the gang expert's testimony and order the jury

to disregard it. The trial court denied the defense request, stating the subject could be covered on cross-examination and then if necessary the defense could renew its request.[5] [6] (5 RT 763-764; Exhibit No. 52.)

Defense counsel argued that Exhibit No. 52 reflected a conviction of someone other than appellant (5 RT 764), apparently because in three of the exhibit's documents appellant's name was misspelled as "Tran Duang M." (Exhibit No. 52.) The trial court advised the prosecutor that "[y]ou only need one case, this case and the predicate. If it's not the right con [sic] withdraw it and throw it away." (5 RT 765.) The prosecutor explained that Exhibit No. 52 contained documentation concerning three defendants, one of which was appellant. (5 RT 765-766.)

---

[5] DEFENSE COUNSEL: "...I'm objecting in regard to the testimony of [gang expert] Echevarria in regard to shooting into the businesses. [Par.] In looking at the documents, and it's my understanding my client was convicted of extortion. There's nothing in here about any shootings or shooting at individuals or into businesses. [Par.] And I feel that's extremely inflammatory, highly prejudicial and I would ask that that portion of his testimony be stricken and the jury be ordered to disregard that.

THE COURT: "You can cover it on cross examination. The request to strike is denied at this time. You can renew your request if it turns out that it's necessary after cross examination...." (5 RT 763-764.)

[6] Defense counsel did not pursue the subject on cross-examination, most likely to avoid emphasizing to the jury this unduly prejudicial information. (See 6 RT 829-854.)

DEFENSE COUNSEL: "My concern is this officer testified about my client not pleading guilty to a felony count, extortion. He talked about numerous extortions. He talked about shooting into the businesses, and none of that occurs in these documents. These documents show multiple charges of extortion, that is true. However they show there is only a plea of guilty to one of those charges and there's nothing in here to indicate that in fact there was any shooting having to do with this case. I think that's highly inflammatory and very prejudicial to my client.

THE PROSECUTOR: "What's collected in the documents, your Honor –

THE COURT: "Hang on, hang on. A predicate act does not have to be of the defendant it can be of any gang member involved in the same gang [sic]. It doesn't have to be an individual that's even known to your client.

THE PROSECUTOR: "Correct.

THE COURT: "So you've got the benefit of the wrong guy here, and who cares? I mean, they misspelled his name so it must not be him. The bottom line is it's simply a predicate act and you don't do extortion unless there's a credible threat to force someone to turn loose their money. [Par.] This officer said, on checking with Los Angeles that he found a credible threat. Businesses were shot into by somebody, presumably another VFL gang member or perhaps your client with a misspelled name.

DEFENSE COUNSEL: "But I think it's improper.

THE COURT: "But we don't care. All we know is what we have by way of paperwork. We know that a crime was committed, this officer has told us that it was

committed for the benefit of VFL and was done by somebody who was a VFL member, probably your client. So what's your problem? What's your question? What do you want me to do?

DEFENSE COUNSEL: "I want the court to admonish the jury that the evidence that was presented to this jury in regards to my client being involved in shooting up these businesses –

THE COURT: "Nobody said your client was the one that did the shooting. But the inference that your client was involved in extorting money is because of his conviction for that crime that he pled guilty to. Innocent people don't plead guilty.

DEFENSE COUNSEL: "That's not reality and this court knows that.

THE COURT: "Well, I don't know what you're accusing me of but that's offensive and contemptuous." (5 RT 766-768.)

Defense counsel then acknowledged that a person who pleads guilty is guilty under the law. (5 RT 768-769.) The trial court denied appellant's request to admonish the jury, and stated "[t]here need be no further foundation to the reference made of shooting into a business was not specifically made to your client. [sic]" (5 RT 769.)

DEFENSE COUNSEL: "Would the court then admonish the jury that when the officer was talking about shooting in regard to those businesses that it was not in regard to my client?

THE COURT: "He doesn't know that.

DEFENSE COUNSEL: "I know he doesn't know that.

THE COURT: "You can cover it on cross-examination. The court's not going to admonish the jury in any way because of this brou ha ha. You can take care of it on cross." (5 RT 770; see, *ante*, at p. 8, fn. 6.)

The parties subsequently stipulated that appellant was named as the defendant in Exhibit No. 52, he pled guilty to one count of extortion occurring on or about January 7, 1994, and he was convicted of that crime on June 6, 1995. (6 RT 895-896; Exhibit No. 52.)

The trial court instructed the jury that with respect to the street terrorism charge, a "'pattern of criminal gang activity' means the commission of, attempted commission of, or conviction of two or more of the following crimes, namely, Murder, Extortion, Robbery, or Burglary...." (4 CT 926-927 [CALJIC No. 6.50].) The same language was used in the instruction on the gang enhancements. (4 CT 955-956 [CALJIC No. 17.24.2].) The court also instructed that evidence of criminal acts by gang members other than the charged crimes could be considered only for the limited purpose of determining the gang-related charge and allegations and not to prove appellant is a person of bad character or has a disposition to commit crimes. (4 CT 957 [CALJIC No. 17.24.3].)

The Appeal

On appeal, appellant argued the trial court prejudicially erred in admitting such evidence over objection pursuant to section 352 because the evidence of his prior extortions was inherently and unduly

prejudicial and inflammatory, such evidence constituted prohibited character/propensity evidence, other predicate acts not involving appellant were available to prove a pattern of criminal gang activity, and there was abundant other evidence of appellant's active gang involvement. (See Opinion, *supra,* 99 Cal.Rptr.3d at pp. 126, 131-134; Appellant's Opening Brief, pp. 31-48; Appellant's Reply Brief, pp. 4-17.)

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 of admissibility. The probativeness of the extortion evidence was overwhelming because it proved a high level of gang activity, appellant's knowledge of the gang's felonious conduct, and his 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 appellant's jury not to consider the extortion conviction as evidence of a propensity to commit the charged crimes. (Opinion, *supra*, 99 Cal.Rptr.3d at pp. 126, 131-134.)

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE PROSECUTOR TO PROVE A PATTERN OF CRIMINAL STREET GANG ACTIVITY BY INTRODUCING EVIDENCE OF APPELLANT'S OWN UNCHARGED CRIMINAL ACTS

In admitting evidence of appellant's prior criminal acts and extortion conviction to prove a pattern of criminal gang activity, the trial court failed to exercise its discretion in a legally correct manner. The court's ruling fell outside the bounds of reason, impeded the ends of substantial justice, and resulted in a miscarriage of justice. (See *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; Evid. Code, sec. 353, subd. (b).) This ruling deprived appellant of his constitutional rights to due process of law and a fair trial by an impartial jury. (U.S. Const, 5th, 6th & 14th Amends.; Cal. Const., art. 1, secs. 7, 15 & 24.)

A. The Standard of Review.

A trial court's decision to admit or exclude evidence is generally reviewable for abuse of discretion. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1130; *People v. Brown, supra,* 31 Cal.4th at p. 534; *People v. Kipp* (2001) 26 Cal.4th 1100, 1121 [applying abuse of discretion standard to review of trial court's section 352 evidentiary ruling]; *People v. Williams* (2009) 170 Cal.App.4th 587, 606, review den. ("*Williams*"); *People v. Leon* (2008) 161 Cal.App.4th 149, 164, review den. ("*Leon*").) Ordinarily, a trial court's exercise of discretion under section 352 will not be disturbed on appeal unless the

court clearly abused its discretion, e.g., when the prejudicial effect of the evidence clearly outweighs its probative value. (*People v. Karis* (1988) 46 Cal.3d 612, 637; sec. 352.[7])

Although deferential, the standard is not empty because "it asks in substance whether the ruling in question '*falls outside the bounds of reason*' under the applicable law and the relevant facts...." (*People v. Garcia, supra,* 20 Cal.4th at p. 503, emphasis in original.) "The scope of discretion always resides in the particular law being applied...." (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 737.) Further, abuse of discretion is not limited to whimsical, arbitrary, irrational or capricious rulings, but includes rulings not in conformity with the spirit of the law that impede or defeat the ends of justice. (*Id.* at pp. 736-737, 740-741; see *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298 [ruling need not be "utterly irrational" to constitute abuse of discretion] and *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831, fn. 3 ["Although an act exceeding the bounds of reason manifestly constitutes an abuse of discretion, abuse is not limited to such an extreme case"]; Cal. Const., art. 6, sec. 13.)

---

[7] Section 352 provides: "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."

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

1. The Opinion.

The appellate court briefly acknowledged that courts "have long held an antipathy for 'other crimes evidence' in criminal prosecutions" (Opinion, *supra*, 99 Cal.Rptr.3d at p. 131, citing *People v. Thompson* (1980) 27 Cal. 3d 303, 314 ("*Thompson*"), superseded by statute on other grounds as stated in *Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 714, fn. 2), and that a trial court may be found to have abused its discretion under section 352 when it fails to exclude certain evidence. (Opinion, *supra*, 99 Cal.Rptr.3d at pp. 131-132.) The Court of Appeal found that evidence of appellant's prior extortion conviction was not admitted to prove his propensity to commit crimes, and was highly relevant to proving street terrorism and a pattern of criminal gang activity. (*Id.* at pp. 131, 134.) According to the Opinion, section 352 interacts with section 186.22 and must be construed consistently with it, and section 352 is a more general statute than the specific section 186.22.[8] Thus when calculating probativeness and

---

[8] In 1997, former section 186.22, subdivision (a) provided that "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

Former subdivision (e) provided that "[a]s used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, or solicitation of, sustained juvenile

Footnote continued on next page

undue prejudice under section 352, a court must consider the type of evidence the Legislature intended to be presented under section 186.22. (*Id.* at p. 132.)

According to the Court of Appeal, section 352 is "weighted in favor of admissibility" because the Legislature requires that evidence of other crimes be admitted in gang-related prosecutions and thus anticipated the accused would be damaged by use of "other crimes evidence." (Opinion, *supra*, 99 Cal.Rptr.3d at p. 133.) The Legislature put no numerical limit on the number of other crimes that could be presented to prove a pattern of criminal gang activity, and chose not to exclude a defendant's own prior crimes. (*Id.* at pp. 133-134.)

The Court of Appeal reasoned that the "prejudice" referred to in section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and* that has very little effect on the issues, and that courts must distinguish merely damaging evidence from evidence that is "prejudicial" under section 352. (Opinion, *supra*, 99 Cal.Rptr.3d at pp. 132-133.)

The Court of Appeal found appellant's prior VFL-related extortion conviction to be overwhelmingly probative with respect to three elements of street terrorism: 1) active participation in a criminal street gang; 2) knowledge of the gang's pattern of criminal gang activity; and 3) willful promotion of felonious conduct by gang

---

petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:..." (Stats.1996, ch. 982 (Assem. Bill. No. 2035), sec. 1.)

members.[9] (Opinion, *supra*, 99 Cal.Rptr.3d at p. 134.) According to the Opinion, section 352 does not require the prosecutor to use "the most minimal and innocuous evidence available" in street terrorism prosecutions, and section 186.22 provides a "cushion" for the prosecutor in case a jury rejects a proffered predicate act. Thus the Court of Appeal concluded the trial court did not abuse its discretion. (*Ibid.*)

The Opinion conflicts with settled law in this state governing the admissibility of a defendant's own inherently prejudicial "other crimes evidence," and effectively eviscerates the application of section 352 to evidence presented in gang-related prosecutions. It is therefore contrary to statute and case law and should be reversed.

2. Other Predicate Acts Unrelated to Appellant 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 appellant to establish the necessary pattern of VFL criminal gang activity. (5 RT 765, 767; see *People v. Loeun* (1997) 17 Cal.4th 1, 8, 10 ("*Loeun*"); *People v. Gardeley* (1996) 14 Cal.4th 605, 625; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1458; former sec. 186.22, subds. (a) & (e).) The Legislature's use of the disjunctive 'or' in section 186.22,

---

[9] The gang expert testified that appellant's prior extortion conviction benefitted the VFL gang. (5 RT 763.) The information charged appellant with street terrorism based on his willful, unlawful and active participation in both the V and VFL gangs. (4 CT 796.) The jury found appellant guilty of street terrorism as charged in the information. (5 CT 981.)

subdivision (e) indicates an intent to designate alternative ways for a prosecutor to prove a pattern of criminal gang activity. (*Loeun*, *supra*, 17 Cal.4th at pp. 9-10; see, *ante*, at p. 15, fn. 8.)

> A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, ... or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. (Sec. 186.22, subd. (e); *People v. Gardeley, supra*, 14 Cal.4th at p. 617.) The predicate offenses must have been committed on separate occasions, *or* by two or more persons. (Sec. 186.22, subd. (e); ... *Loeun, supra*, 17 Cal.4th at pp. 9-10.) *The charged crime may serve as a predicate offense* (*People v. Gardeley, supra*, at p. 625; ...), as can "evidence of the offense with which the defendant is charged *and proof of another offense committed on the same occasion by a fellow gang member.*" (...*Loeun, supra*, at p. 5....)
> (*People v. Duran, supra*, 97 Cal.App.4th at p. 1457, emphasis added.)

The prosecutor did not dispute that other VFL predicate offenses were available. (Former sec. 186.22, subds. (a) & (e); see 1 RT 27-28.) The prosecutor could have used Mata's murder conviction (see, *ante*, at p. 6) and a predicate act committed within the required time period (former sec. 186.22, subd. (e)) by a VFL member *other* than appellant to establish the pattern. Alternatively, the prosecutor could have used Mata's murder conviction *and* either the charged murder or attempted murder in this case, or both charged crimes, as well as the charged offenses attributed to VFL member Nguyen as

long as his liability was not premised on being an aider and abettor. (See *Loeun, supra,* 17 Cal.4th at pp. 4-5, 8, 10; *People v. Gardeley, supra,* 14 Cal.4th at p. 625; *People v. Duran, supra,* 97 Cal.App.4th at pp. 1457, 1458 & fn. 4 ["convictions of both the defendant and the aider and abettor can establish only one predicate offense for purposes of section 186.22"]; former sec. 186.22, subd. (e).) Use of the current offenses and/or qualifying crimes committed by other VFL members would have satisfied the safeguards of section 352 because evidence of appellant's prior criminal conduct in the form of multiple extortions (even though only one conviction) would not then have been presented to his jury. 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. (See *Thompson, supra*, 27 Cal.3d at p. 318 & fn. 20; *Leon, supra*, 161 Cal.App.4th at pp. 168-169; sec. 352.)

3. The Evidence of Appellant's Prior Extortions was Unduly Prejudicial and Inflammatory, as well as Cumulative, and should have been Excluded under Evidence Code Section 352.

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 ("*Scheid*"); see also Cal. Const., art. 1, sec. 28, subd. (f)(2).) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, sec. 210.)

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 appellant's prior extortion conviction may have been relevant to establish a predicate act for purposes of the street terrorism charge (see Opinion, *supra*, 99 Cal.Rptr.3d at p. 131), and even elements of the charge (see *id.* at p. 134), the evidence was unduly prejudicial, cumulative, misleading to the jury, and confused the issues. (Sec. 352.) It should have been excluded.

a) Other Recent Appellate Decisions Correctly Apply Settled Law in This Context and Support Appellant's Argument.

In *Leon, supra*, 161 Cal.App.4th at pages 168 and 169, Division One of the Fourth District Court of Appeal held that the trial court abused its discretion in admitting evidence of the defendant's prior juvenile robbery adjudication to establish the defendant was a gang member and that his group was a criminal gang. The *Leon* court noted that robbery convictions of other gang members were sufficient to establish the predicate offenses, and evidence of the defendant's gang membership was overwhelming. (*Id.* at p. 169.) The court thus held that "the evidence of [the defendant's] 1999 robbery adjudication was 'merely cumulative regarding an issue that was not reasonably subject to dispute.'" (*Ibid.*, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380,

406 ("*Ewoldt*"), superseded by statute on other grounds, as stated by *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) "Further, as with virtually any uncharged offense, the likelihood of prejudice from allowing the jury to hear that Leon had previously committed a robbery was high." (*Leon, supra*, 161 Cal.App.4th at p. 169.)

The *Leon* prosecutor relied on case law establishing that predicate offenses demonstrating the existence of a criminal street gang could be proved using a defendant's charged offenses. (*Leon, supra*, 161 Cal.App.4th at p. 165.) The prosecutor argued that a defendant's commission of either charged *or uncharged crimes* should be admissible as predicate offenses. (*Ibid.*) The trial court found the defendant's prior robbery adjudication admissible as a predicate offense to prove the gang enhancement and the defendant's active participation in a gang.[10] (*Ibid.*) As in appellant's case, the gang expert in *Leon* testified about the defendant's prior uncharged offense, and the defendant stipulated to that fact. (*Id.* at p. 166; see, *ante*, at pp. 6-7, 11.) As in appellant's case, the *Leon* trial court gave a limiting instruction regarding the jury's use of such evidence. (*Id.* at pp. 166-167; see, *ante*, at p. 11.) Unlike the instant case, however, the *Leon* trial court *thrice* gave limiting instructions regarding the uncharged offense evidence. (*Ibid.*) And, as in appellant's case, such instruction could not cure the evidentiary error. (See *id.* at pp. 168-169.)

---

[10] The *Leon* defendant was charged in part with possessing a concealed firearm in a vehicle while being an active participant in a criminal street gang, and carrying a loaded firearm while being an active participant in a criminal street gang. (*Leon, supra*, 161 Cal.App.4th at p. 152.)

The *Leon* court analyzed the interplay between Evidence Code sections 1101 and 352 regarding the admission of uncharged offense evidence, noting that such evidence otherwise admissible under Evidence Code section 1101 must not contravene other policies limiting admission, such as those contained in section 352. (*Leon, supra*, 161 Cal.App.4th at p. 168, quoting *Ewoldt, supra,* 7 Cal.4th at p. 404.) Unlike the Opinion, *Leon* acknowledged this court's repeated holdings that uncharged offense evidence is so inherently prejudicial that extremely careful analysis is required prior to its admission, that such evidence is admissible only if it has *substantial* probative value, and that any doubt should be resolved in the defendant's favor. (*Leon, supra*, 161 Cal.App.4th at pp. 168-169; see, *post*, at pp. 30-33.) As in *Leon*, here there was ample evidence that appellant was an active gang participant, and other predicate acts were available. (*Id.* at p. 169; see, *ante*, at pp. 17-19, and *post,* at pp. 33-38.) As in *Leon*, the evidence of appellant's other crimes was merely cumulative on an issue not reasonably subject to dispute and should have been excluded. (See *Leon, supra*, 161 Cal.App.4th at p. 169.) Thus, appellant's case and *Leon* both involve the trial court's abuse of discretion.

More recently, in *Williams, supra*, 170 Cal.App.4th at pages 595, 609-611, Division Two of the Fourth District Court of Appeal followed *Leon* and *Ewoldt* in holding the trial court abused its discretion in admitting unnecessary quantities of evidence to prove street terrorism and gang enhancements. Unlike appellant's case, *Williams*, like *Leon*, expressly recognized that because evidence of a defendant's other crimes is extremely inflammatory, the trial court must take great care when evaluating its admissibility and admit such

evidence only when it has *substantial* probative value not outweighed by its potential for undue prejudice. (*Id.* at p. 610.)

In overruling the defense objection that the repetitive other crimes and gang-related evidence was cumulative, the *Williams* trial court stated that the prosecutor was entitled to use *all* evidence at his or her disposal and could even over-prove the state's case. (*Williams, supra*, 170 Cal.App.4th at p. 610.) This is remarkably close to the rulings in appellant's case. Although here the trial court understood that appellant's prior extortion conviction was not required to be admitted (see, *ante*, at p. 8; 5 RT 765), it refused to put any limits on the type or amount of evidence presented to prove a pattern of criminal gang activity. In affirming this ruling, the appellate court held that evidence of other crimes is admissible without numerical limit and without restriction as to the perpetrator. (Opinion, *supra*, 99 Cal.Rptr.3d at pp. 133-134.) "The 'or more' clause of [section 186.22, subdivision (e)] implies that *if the prosecution decides, for example, that evidence of four other crimes is appropriate, then it may put on that evidence.*" (Opinion, *supra*, 99 Cal.Rptr.3d at p. 133, emphasis added.) According to the Opinion, "there is nothing in [section 186.22, subdivision (e)] 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." (*Id.* at pp. 133-134.)

However, the *Williams* court "strongly disagree[d] with the view that prosecutors have any right to 'over-prove their case or put on all the evidence that they have....'" (*Williams, supra*, 170 Cal.App.4th at p. 610.) *Williams* noted that the state's strong interest in prompt and efficient trials permits the nonarbitrary exclusion of

evidence. (*Id.* at p. 611.) "Accordingly, neither the prosecution nor the defendant has a right to present cumulative evidence that creates a substantial danger of undue prejudice...." (*Ibid.*; sec. 352.) The *Williams* court reasoned that even though "no bright-line rules exist for determining when evidence is cumulative," the term has a substantive meaning and its application "must be reasonable and practical." (*Id.* at p. 611.) Relying on *Ewoldt* and *Leon*, *Williams* determined it was an abuse of discretion to admit cumulative evidence concerning issues not reasonably subject to dispute. (*Ibid.*; *Ewoldt, supra*, 7 Cal.4th at pp. 405-406; *Leon, supra*, 161 Cal.App.4th at p. 169.) Thus, appellant's case and *Williams* both involve a trial court's abuse of discretion in admitting cumulative evidence on issues not reasonably subject to dispute, such as (in appellant's case) active gang participation, knowledge of a pattern of criminal gang activity, and willful promotion of felonious conduct by gang members. (See, *post*, at pp. 33-38; Opinion, *supra*, 99 Cal.Rptr.3d at p. 134.)

In *People v. Albarran* (2007) 149 Cal.App.4th 214, 227-228, 232 ("*Albarran*"), the Second District Court of Appeal reversed the judgment of conviction because of the admission of irrelevant, cumulative, and unduly prejudicial gang evidence.[11] Although *Albarran* did not involve a defendant's own "other crimes evidence,"

---

[11] In *Albarran*, in which a new trial motion was granted as to the gang enhancements but denied as to the underlying offenses, the issue on appeal was whether admitting gang evidence to show intent and motive on the underlying offenses was prejudicial. (*Albarran, supra*, 149 Cal.App.4th at p. 217.)

its reasoning regarding inherently prejudicial gang evidence supports appellant's argument.

According to *Albarran*, "even if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury." (*Albarran, supra,* 149 Cal.App.4th at p. 224, citing *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [evidence of defendant's gang membership, although relevant to motive or identity, creates risk jurors will improperly infer defendant has a criminal disposition and thus is guilty of the charged offense, and so must be carefully scrutinized].) The *Albarran* court was "troubled by the lack of scrutiny given to the gang evidence (and its potential for prejudice)" by the trial court. (*Albarran, supra,* 149 Cal.App.4th at p. 228.) In appellant's case, there is the same lack of scrutiny given to his "other crimes evidence" and its potential for prejudice. (See, *ante*, at p. 5 & fn. 3; 1 RT 27-28.) Notwithstanding the limiting instruction given in appellant's case and *Albarran* (*id.* at p. 221), both cases involve a trial court's ruling that was "arbitrary and fundamentally unfair" in admitting cumulative, unduly prejudicial evidence that lacked substantial probative value, and thus "raised the distinct potential to sway the jury to convict regardless of [the defendant's] actual guilt." (*Albarran, supra,* 149 Cal.App.4th at pp. 228, 230.)

b) The Rules of Statutory Construction do not Support The Opinion's Analysis of The Interplay between Evidence Code Section 352 and Penal Code Section 186.22.

Contrary to the Opinion, even though the Legislature intended that evidence of other crimes be admitted to prove a pattern of

criminal gang activity (Opinion, *supra*, 99 Cal.Rptr.3d at p. 133), evidence of appellant's *own* prior criminal activity should have been excluded under section 352.[12] According to the Opinion, the Legislature impliedly intended that the accused's own prior criminal activity could be used as a predicate act because section 186.22 does not explicitly state otherwise. (*Id.* at pp. 133-134.) However, a "court may not rewrite a statute to conform to a presumed intent that is not expressed. [Citation.]" (*People v. Statum* (2002) 28 Cal.4th 682, 692.) Section 186.22 does not expressly state that a defendant's own prior criminal conduct may be used as a predicate act. Also, the Legislature could have created an express exception to section 352 in enacting and then subsequently amending 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.)

Further, it is well established 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

---

[12] The Opinion cites *People v. Hernandez* (2004) 33 Cal.4th 1040, 1044, in which this court noted that in the context of gang enhancements, the prosecutor often will present evidence that would be inadmissible in a trial limited to the charged crime. (Opinion, *supra*, 99 Cal.Rptr.3d at p. 133.) However, in *Hernandez*, the predicate acts used to prove a pattern of criminal gang activity did *not* involve the defendant. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1046.) Further, the evidence referenced in *Hernandez* that would be inadmissible in a trial on the charged crime concerned prior convictions of *other gang members*. (*Id.* at pp. 1044, 1051.) *Hernandez* thus does not support the Opinion's conclusion that a defendant's *own* prior crimes may be used to prove a gang charge.

there were ambiguity on this point, the interpretation most favorable to appellant is that section 352 applies fully to section 186.22.

The Opinion characterizes section 352 as a general statute that must give way to the more specific section 186.22 where there is overlapping subject matter and the two statutes cannot be reconciled. (Opinion, *supra*, 99 Cal.Rptr.3d at p. 132.) According to the Opinion, even though there is no apparent inconsistency in the two statutes, the presentation of "other crimes evidence" contemplated in section 186.22 must be included in "the calculus of probativeness and undue prejudice under section 352." (*Ibid.*)

However, assuming arguendo that the Opinion's characterization of these statutes is correct, the "preemption rule" (see *People v. Watson* (1981) 30 Cal.3d 290, 295) described by the appellate court is "designed to ascertain and carry out legislative intent." (*People v. Jenkins* (1980) 28 Cal.3d 494, 505, fn. omitted.) "The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply." (*Ibid.*) Section 186.22 governs street terrorism, to wit, its elements and punishment. (See, *ante*, at p. 15, fn. 8.) It does not cover "much the same ground" (*ibid.*) as section 352, which regulates the admission of evidence so as to ensure fair and efficient trials. (See *Williams, supra,* 170 Cal.App.4th at p. 611; *People v. Harris* (1998) 60 Cal.App.4th 727, 736, review den.) Hence the Opinion's preemption rule reasoning is inapposite. The Opinion's conclusion that section 352 must defer to section 186.22 when "other crimes evidence" concerning the defendant is at issue is contrary to this court's pronouncements and

vitiates the purpose of section 352 -- to ensure fair and efficient trials. (See *ibid.*)

Also, in enacting new legislation the Legislature is presumed to be aware of existing law and judicial decisions interpreting the law. (*People v. Cruz* (1996) 13 Cal.4th 764, 775.) The "'amendment of a statute ordinarily has the legal effect of reenacting (thus enacting) the statute as amended, including its unamended portions.' [Citations.]" (*People v. Chenze, supra,* 97 Cal.App.4th at pp. 527-528.) Thus, when amending section 186.22 in October of 2009 (Stats.2009, ch. 171 (Sen. Bill No. 150), sec. 1), the Legislature was aware of section 352. We must also presume it was aware of *Leon* in 2008 and *Williams* earlier in 2009 – judicial decisions interpreting the interaction between section 352 and section 186.22 and applying the safeguards of section 352 to gang charges and enhancements. (See *Leon, supra,* 161 Cal.App.4th 149; *Williams, supra,* 170 Cal.App.4th 587; *ante,* at pp. 20-24.) However, in amending section 186.22 the Legislature chose not to exempt the presentation of a defendant's "other crimes evidence" from a court's exercise of discretion under section 352, or to specify that in addition to a defendant's charged offenses, the prosecutor could use the defendant's *own uncharged crimes* as proof of predicate acts or elements of street terrorism.

Ultimately, a court "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and [it must] avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) While the Opinion does not, on its face, expressly prohibit a trial court from

exercising discretion under section 352 regarding a defendant's uncharged offenses in a gang-related prosecution, it effectively and improperly restricts the intelligent use of such discretion and makes null and void the concept of abuse of discretion in that context. The Opinion's interpretation of the interplay between section 186.22 and section 352 thus would lead to absurd consequences. (See *ibid.*)

c) The Trial Court Abused its Discretion in Admitting Evidence of Appellant's Prior Extortion Activity and Conviction.

Accordingly, contrary to the Opinion (Opinion, *supra*, 99 Cal.Rptr.3d at p. 133), the fact that two or more crimes may be presented to prove a pattern of criminal gang activity (former 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 *Thompson,* 27 Cal.3d at p. 318; *Ewoldt, supra*, 7 Cal.4th at pp. 405-406; *Williams, supra*, 170 Cal.App.4th at p. 609; *Leon, supra*, 161 Cal.App.4th at p. 168.)

> We are unaware of any authority in which the court directly addressed the volume of evidence that may be introduced to establish the primary activities and predicate crimes elements of a gang enhancement or gang charge. However, any such evidence must be subject to scrutiny under Evidence Code section 352, and part of the analysis under that section is whether the evidence is cumulative.
> (*Williams, supra*, 170 Cal.App.4th at p. 609.)

Again, the fact that a defendant's *current* charges may be used as predicate acts (*Loeun*, *supra*, 17 Cal.4th at p. 10) does not mean his or her prior crimes should be so used; the potential for prejudice is simply too great. (See *Thompson, supra,* 27 Cal.3d at p. 318; *People v. Dellinger* (1984) 163 Cal.App.3d 284, 297 ("*Dellinger*").) Contrary to the Opinion, appellant does not contend the prosecutor should have given him "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." (Opinion, *supra*, 99 Cal.Rptr.3d at p. 134, emphasis added.) Appellant rather contends that the trial court should have recognized the inherently prejudicial nature of his "other crimes evidence" and followed the law repeatedly enunciated by this court, to wit, that such evidence must have *substantial* probative value to be admissible and any doubt must be resolved in the defendant's favor. (See *Thompson, supra,* 27 Cal. 3d at pp. 314, 318; *People v. Kelly* (2007) 42 Cal.4th 763, 783; *Leon, supra*, 161 Cal.App.4th at p. 168; sec. 352.) This it failed to do.

The Opinion states 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." (Opinion, *supra*, 99 Cal.Rptr.3d at p. 134.) However, prosecutors have no right to "over-prove their case or put on all the evidence that they have...." (*Williams, supra*, 170 Cal.App.4th at p. 610.) Neither party has a right to present cumulative evidence that creates a substantial

danger of undue prejudice. (*Id.* at p. 611; sec. 352.) Yet that is exactly what occurred here.

"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, supra,* 60 Cal.App.4th at p. 736.) 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; see also *Thompson, supra*, 27 Cal.3d at p. 318 & fn. 20.) Here, given the availability of other predicate acts including the current murder and attempted murder charges against appellant and fellow VFL member Nguyen, it was patently unnecessary and cumulative, as well as confusing and misleading to the jury, to admit evidence of appellant's prior extortion activity to establish the street terrorism charge. (Sec. 352.) 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; accord, *Dellinger, supra,* 163 Cal.App.3d at p. 297; see *Leon, supra*, 161 Cal.App.4th at p. 169; *Williams, supra,* 170 Cal.App.4th at pp. 595, 611.)

This court "has repeatedly stressed that evidence of uncharged misconduct is so prejudicial that its admission requires extremely careful analysis." (*Leon, supra*, 161 Cal.App.4th at p. 168, quoting

People v. Lewis (2001) 25 Cal.4th 610, 637, quoting *Ewoldt, supra,* 7 Cal.4th at p. 404 [internal quotation marks omitted]; see also *Williams, supra*, 170 Cal.App.4th at p. 610.) The trial court's summary rejection of appellant's section 352 objection shows this standard was not met. (1 RT 27-28; see, *ante*, at p. 5, fn. 3.) Here the inherently prejudicial "other crimes evidence" was not essential to the prosecutor's case, and thus it did not possess the required *substantial* probative value. (*Thompson, supra,* 27 Cal.3d at p. 318; *People v. Kelly, supra,* 42 Cal.4th at p. 783; *Dellinger*, *supra*, 163 Cal.App.3d at p. 297; *Leon, supra*, 161 Cal.App.4th at p. 168; see also *Williams, supra*, 170 Cal.App.4th at p. 610.) The limited probative value of this evidence simply could not outweigh its inherent prejudicial effect. (Sec. 352.)

The Opinion states that the "prejudice must *substantially* outweigh the probativeness" of the evidence before there is an abuse of discretion. (Opinion, *supra*, 99 Cal.Rptr.3d at p. 133, emphasis in original.) Appellant submits that because evidence of the accused's prior criminal acts must have *substantial* probative value to be admissible (*Thompson, supra,* 27 Cal.3d at p. 318; *Dellinger*, *supra*, 163 Cal.App.3d at pp. 297, 299; *Leon, supra*, 161 Cal.App.4th at p. 168), a point **not** expressly acknowledged in the Opinion (see Opinion, *supra*, 99 Cal.Rptr.3d at pp. 131-134), the undue prejudice resulting from violating this standard of admission will, as a matter of course, substantially outweigh the probativeness of such inherently prejudicial evidence. "Since 'substantial prejudicial effect [is] inherent in [such] evidence,'[] uncharged offenses are admissible only if they have substantial probative value. If there is any doubt, the evidence

should be excluded." (*Thompson, supra*, 27 Cal.3d at p. 318, fn. omitted.)

4. Appellant's Prior Extortion Activity was not Necessary to Prove The Elements of Street Terrorism, and Thus Lacked Substantial Probative Value.

The Opinion's reasoning is faulty for other reasons as well. According to the appellate court, evidence of appellant's prior extortion conviction was overwhelmingly probative on the elements of street terrorism: active gang participation, knowledge of a pattern of criminal gang activity, and willful promotion or furtherance of, or assistance in, felonious conduct by other gang members. (Opinion, *supra*, 99 Cal.Rptr.3d at p. 134; former sec. 186.22, subd. (a).) However, the jury was inundated with evidence of appellant's gang involvement. The prosecutor repeatedly referred to this extensive evidence, including appellant's gang-related tattoos, in argument to the jury. (7 RT 940-941, 964-968, 998-999, 1013-1015.[13]) Thus it was "overkill" (*Albarran, supra*, 149 Cal.App.4th at p. 228) to use appellant's prior extortion conviction as a predicate act to prove a pattern of criminal gang activity and his knowledge of same, his active gang participation, and his willful promotion of felonious conduct by other gang members.

---

[13] For example, the prosecutor argued in closing that "[t]his is not a person that is a member in name only. The tattoos, all the evidence and what Investigator Echevarria told you about prior contacts, letters from other gang members where they talk about the gangs, photographs, many photographs showing [appellant] with gang members as well as showing gang signs. So I submit to you showing he was an active participant." (7 RT 966.) And, "Gang crime. This case has been filled with gangs." (7 RT 1015.)

a) Active Participation in A Criminal Street Gang.

The Opinion fails to note that although appellant's prior extortion activity may have been probative on the element of active gang participation, it was far from necessary to prove this element and thus such evidence lacked *substantial* probative value. (See Opinion, *supra*, 99 Cal.Rptr.3d at p. 134; *Thompson, supra,* 27 Cal.3d at p. 318; *Leon, supra*, 161 Cal.App.4th at p. 168; former sec. 186.22, subd. (a); sec. 352.) Given the testimony of gang members Duc Vuong, Qui Ly and Hanh Dam, the gang expert's extensive testimony including his opinion that appellant was an active gang participant at the time of the charged shootings, appellant's numerous gang-related tattoos, and the extensive gang memorabilia linking appellant to both the V and the VFL gangs, the admission of additional evidence, especially inherently prejudicial "other crimes evidence," was "overkill" on this element. (See *Albarran, supra*, 149 Cal.App.4th at p. 228; *Leon, supra*, 161 Cal.App.4th at p. 169; sec. 352.) Given the other extensive evidence, the issue of appellant's active gang participation was not reasonably subject to dispute. Thus evidence of his own prior extortion activity should have been excluded under the rule of necessity and because it was both cumulative and unduly prejudicial. (See *Thompson, supra,* 27 Cal.3d at p. 318; *Ewoldt, supra*, 7 Cal.4th at pp. 405-406; *Leon, supra*, 161 Cal.App.4th at p. 169; *Williams, supra*, 170 Cal.App.4th at pp. 610-611; sec. 352.)

b) Knowledge of A Pattern of Criminal Gang Activity.

The Opinion also found appellant's prior extortion conviction overwhelmingly probative on the element of knowledge that gang

members engage in or have engaged in a pattern of criminal gang activity. (Opinion, *supra*, 99 Cal.Rptr.3d at p. 134; former sec. 186.22, subd. (a).) Again, however, given the testimony of gang members Qui Ly and Hanh Dam and the testimony of the gang expert, the documentation of fellow VFL member Mata's prior conviction for a gang-related murder, and the evidence of prior criminal acts and convictions of V members, the jury would not need additional evidence to determine whether petitioner knew VFL and V members engaged in a pattern of criminal gang activity. For example, Qui Ly testified he had numerous prior felony convictions for robberies, assault with a deadly weapon and possession of a firearm, had committed 12 to 15 burglaries, and had often committed such crimes with both V and VFL members. (2 RT 152-154, 261-264; 3 RT 379-380; see sec. 186.22, subd. (e).) He also testified he and appellant had been good friends and socialized (2 RT 162), which if true would make it highly unlikely appellant did not know about Qui Ly's criminal gang-related activities. Qui Ly further testified appellant had contacted him to obtain guns for VFL and V members in order to retaliate against the OPB gang for disrespecting the VFL gang. (2 RT 192-193, 202-204.)

Likewise, Hanh Dam testified he had numerous prior felony convictions and juvenile court sustained petitions involving robberies, burglary, grand theft, street terrorism, false imprisonment, receiving stolen property, assault with force likely to cause great bodily injury, and giving false information to a police officer. He often was armed. (4 RT 612-614; 5 RT 650-651, 680; see sec. 186.22, subd. (e).) Hanh Dam also testified he and appellant had been very close friends, and

that in 1997 V and VFL members shared access to all kinds of guns used for robberies and shootings. (4 RT 622-623, 624, 626-627.)

The gang expert testified the VFL gang engaged in home invasion robbery, murder, extortion, prostitution and burglaries, and that appellant joined the gang in 1992. The expert also testified the V gang engaged in home invasion robbery, extortion, pimping, drug dealing, burglaries and murder, and was aligned with the VFL gang. (5 RT 752-755, 758, 772-775; 6 RT 817-818.)

Given such extensive evidence, the issue of appellant's knowledge of a pattern of criminal gang activity was not reasonably subject to dispute and his prior extortion activity should have been excluded under the rule of necessity. (See *Thompson, supra,* 27 Cal.3d at p. 318; *Ewoldt, supra*, 7 Cal.4th at pp. 405-406; *Leon, supra*, 161 Cal.App.4th at p. 169; *Williams, supra*, 170 Cal.App.4th at pp. 610-611.) Although technically relevant to prove the element of knowledge, appellant's prior extortion activity was completely unnecessary to prove this element and thus lacked *substantial* probative value. (See *Thompson, supra,* 27 Cal.3d at p. 318; *Leon, supra*, 161 Cal.App.4th at p. 168.) Aside from being cumulative and "overkill" (*Albarran, supra*, 149 Cal.App.4th at p. 228), the probative value of this inherently prejudicial evidence was substantially outweighed by the probability that is admission would create substantial danger of undue prejudice. (Sec. 352.)

c) Willful Promotion of Any Felonious Criminal Conduct by Gang Members.

In addition, the Opinion found appellant's prior extortion conviction overwhelmingly probative on the street terrorism element

requiring that appellant willfully promote, further, or assist in any felonious criminal conduct by VFL and V members. (Opinion, *supra*, 99 Cal.Rptr.3d at p. 134; former sec. 186.22, subd. (a).) Again, however, V member Qui Ly testified appellant contacted him to obtain guns to do a retaliatory shooting against the OPB gang, that appellant arranged a meeting with V and VFL members to plan the shooting and did most of the talking, that appellant led the others to the OPB leader's apartment, that appellant's car was one of three used for transportation, that appellant identified Duc Vuong in the apartment complex parking lot as the OPB leader, that appellant was the first to shoot at Duc Vuong, that appellant identified another young Asian male as an OPB member before shooting him in the back, and that appellant later told Qui Ly he had disposed of his gun. (2 RT 192-193, 202-204, 206-208, 215-218, 232-233, 235, 254-257.) If the jury disbelieved Qui Ly's testimony, they could not have convicted appellant of the charges, including street terrorism.

Further, V member Hanh Dam testified that appellant told him about the shootings and warned him about retaliation from the OPB gang. (4 RT 637-639, 641-642.) Coupled with the gang expert's testimony that appellant was an active VFL member at the time of these shootings, that his many gang tattoos and numerous gang-related items he shipped home from prison showed his pride in his gang and active membership, and that the charged murder and attempted murder benefitted both the V and VFL gangs (5 RT 782-806; 6 RT 823-828), it was unnecessary to provide evidence of appellant's prior extortion activity to establish he willfully promoted, furthered, or assisted in felonious criminal conduct by VFL and V members. Given

such extensive evidence, this element was not reasonably subject to dispute and evidence of appellant's prior extortion activity should have been excluded under the rule of necessity. (*Thompson, supra,* 27 Cal.3d at p. 318; *Ewoldt, supra*, 7 Cal.4th at pp. 405-406; see *Leon, supra*, 161 Cal.App.4th at p. 169; *Williams, supra*, 170 Cal.App.4th at pp. 610-611.) Although technically relevant to prove the element of willful promotion of criminal gang activity, such evidence was not only cumulative and "overkill" (*Albarran, supra*, 149 Cal.App.4th at p. 228) but its limited probative value was substantially outweighed by the probability that is admission would create substantial danger of undue prejudice. (Sec. 352.)

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

In discussing evidence of other crimes and propensity/character evidence (Evid. Code, sec. 1101[14]), the Opinion cites *Thompson, supra*, 27 Cal.3d 303. (See Opinion, *supra*, 99 Cal.Rptr.3d at p. 131.) The appellate court fails to note that in *Thompson,* this court stressed that "other crimes evidence" *must* be subject to any rule or policy requiring exclusion of *relevant* evidence, such as section 352.

---

[14] Evidence Code section 1101, subdivision (a), provides: "Except as provided in this section ... evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Subdivision (b) of this statute permits the admission of "other crimes evidence" only to prove certain facts at issue other than the disposition to commit the charged crimes. (Evid. Code, sec. 1101, subd. (b).)

(*Thompson, supra*, 27 Cal.3d at pp. 314-315.) Further, the Opinion states that under *Thompson*, Evidence Code section 1101, subdivision (a)'s rule of exclusion applies when the "*only* theory of relevance" is some purported propensity to commit the charged offense. (Opinion, *supra*, 99 Cal.Rptr.3d at p. 131, emphasis in original, citing *Thompson, supra*, 27 Cal.3d at p. 316.) However, *Thompson* specifically holds that even when a defendant's "other crimes evidence" is offered to prove an issue *other* than disposition, it is not automatically admissible under subdivision (b) of Evidence Code section 1101, but must still satisfy the rules of admission codified in section 352 and other Evidence Code provisions. (*Thompson, supra*, 27 Cal.3d at pp. 316-317 & fn. 17.)

Contrary to the Opinion (Opinion, *supra*, 99 Cal.Rptr.3d at p. 131), the rule of exclusion serves many important purposes even when "other crimes evidence" is relevant to the elements of an offense. The rule of exclusion is designed to prevent the "'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts,'" and recognizes that "the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor." (*Thompson, supra*, 27 Cal.3d at p. 317.) The rule also promotes judicial efficiency by restricting proof of extraneous crimes, and prevents confusion of the issues. (*Id.* at p. 317, fn. 18.)

Further, *Thompson* criticizes "'the fallacy of supposing, as some do, that the object of the rule is merely to show mercy to the guilty one, to give him a final chance for life and liberty by artificially handicapping the prosecution, - thus importing into the courts of

justice the notions of sportsmanship. On the contrary, the object is to prevent a person not guilty of the present charge from being improperly found guilty of it.' [Citation.]" (*Thompson, supra*, 27 Cal.3d at p. 317, fn. 19.) The appellate court here apparently adopts this fallacy when stating that appellant argues he is entitled to a "gratuitous break" in the presentation of "only the most minimal and innocuous evidence available." (Opinion, *supra*, 99 Cal.Rptr.3d at p. 134.) On the contrary, the rule of exclusion applies here because "'... the risk of convicting the innocent ... is sufficiently imminent for us to forego the slight marginal gain in punishing the guilty.' [Citation.]" (*Thompson, supra*, 27 Cal.3d at p. 317.)

The Opinion also asserts that appellant's prior extortion conviction constituted evidence that was merely "greatly damaging" as opposed to "unduly prejudicial." (Opinion, *supra*, 99 Cal.Rptr.3d at pp. 132-133.) Appellant disagrees. This court has described the "prejudice" referred to in section 352 as characterizing evidence that "uniquely tends to evoke an emotional bias against defendant *without regard to its relevance on material issues*." (*People v. Kipp, supra*, 26 Cal.4th at p. 1121 [internal quotation marks omitted], emphasis added.) Section 352 "uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) The evidence of appellant's prior extortion activity uniquely tended to evoke an emotional bias against him as an individual, because it painted him as a career gangland criminal with a propensity to commit violent crimes. The evidence was greatly damaging *and* unduly prejudicial. (Sec. 352.)

To be admissible under Evidence Code section 1101, subdivision (b), 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) must survive scrutiny under several exclusionary rules. (*Thompson, supra*, 27 Cal.3d at p. 315.) Again, one such exclusionary rule is section 352. (See *Dellinger*, *supra*, 163 Cal.App.3d at p. 297; *Leon, supra*, 161 Cal.App.4th at p. 168; *Williams, supra*, 170 Cal.App.4th at p. 610.)

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.) The United States Supreme Court recognizes 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.) Again, the Opinion fails to acknowledge that because "other crimes evidence" is inherently prejudicial it is to be received with extreme caution, and all doubts about its admission must be resolved in the accused's favor. (See *Thompson, supra*, 27 Cal.3d at p. 3185; *Leon, supra*, 161 Cal.App.4th at p. 168; *Williams, supra*, 170 Cal.App.4th at p. 610; see also Opinion, *supra*, 99 Cal.Rptr.3d at pp. 131-134.)

Again, these standards were not met in appellant's trial. (See, *ante*, at p. 5, fn. 3; 1 RT 27-28.)

The trial court failed to adequately consider that this "other crimes evidence" had "'potential for great prejudice to [appellant] because of its possible misuse by the jury as character trait or propensity evidence.' [Citation.]" (*Dellinger, supra,* 163 Cal.App.3d at p. 297.) As noted (*ante*, at p. 39), the admission of such evidence produces an over-strong tendency to believe the defendant is guilty of the charges simply because he is a likely person to engage in such activity. (*Thompson, supra*, 27 Cal.3d at p. 317; *People v. Holt* (1984) 37 Cal.3d 436, 450-451.) The jury may give the evidence excessive weight and either allow it to bear too strongly on the pending charge, or use it to justify a guilty verdict irrespective of the defendant's guilt of the pending charge. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724; *Albarran, supra*, 149 Cal.App.4th at pp. 228, 230.) 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 jury likely saw appellant as capable of the acts alleged not solely because of the evidence presented against him on the charges, but because of his status as a convicted extortionist who committed violent crimes for his gang. 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 the VFL and V gangs.

The Opinion in effect reasons the same impermissible way. Appellant's prior extortion conviction showed he had the *propensity* to actively participate in a criminal street gang and willfully promote, further, or assist in felonious conduct of other gang members on *this* occasion, with knowledge such members engage in a pattern of criminal gang activity. (See Opinion, *supra*, 99 Cal.Rptr.3d at p. 134.[15])

C. The Evidentiary Error Requires Reversal of Appellant's Conviction.

As shown, any limited probative value of appellant's prior extortion activity was substantially outweighed by the undue prejudicial effect of such evidence, confusion of the issues, tendency to mislead the jury, and because it was cumulative. (Sec. 352.) The admission of this highly inflammatory evidence, which was unnecessary to prove the gang charge or enhancements yet painted appellant as a dangerous predator, so infused the trial with unfairness as to deny him due process of law under the Fifth and Fourteenth Amendments. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 75; *Duncan v. Henry* (1995) 513 U.S. 364, 365-366 [federal Due Process Clause implicated by admission of prejudicial evidence in violation of section 352 if evidence so inflammatory as to prevent fair trial]; *People v. Partida* (2005) 37 Cal.4th 428, 435-436; *Albarran, supra*, 149 Cal.App.4th at pp. 229-230, 232; Cal. Const., art. 1, secs. 7, 15 & 24.) This evidentiary error impermissibly lessened the prosecutor's

---

[15] Appellant's street terrorism conviction was premised on the charged murder and attempted murder. (Opinion, *supra*, 99 Cal.Rptr.3d at p. 127.)

burden of proof beyond a reasonable doubt of all charges. (*In re Winship* (1970) 397 U.S. 358, 364.) The clear misapplication of state law in this case also deprived appellant of due process under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Contrary to the Opinion (Opinion, *supra*, 99 Cal.Rptr.3d at p. 134), the trial court's limiting instruction could not alleviate the inherent prejudice. (*Dellinger, supra*, 163 Cal.App.3d at pp. 299-300 ["Because of the inherently prejudicial nature of other crimes evidence, the courts have recognized that limiting instructions are frequently inadequate to protect the accused"]; see *Leon, supra*, 161 Cal.App.4th at pp. 166-167, 169.) It is doubtful the jury could abide by such instruction given the inherently prejudicial nature of appellant's "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 [other crimes] 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 beyond a reasonable doubt that this error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24-25 ("*Chapman*").) Appellant may have

exercised his constitutional right not to testify in order to keep evidence of his prior conviction from being used to impeach him, but the choice was meaningless if the jury would hear this inherently prejudicial information anyway. (U.S. Const., 5th, 6th & 14th Amends.) The jury's consideration of this highly prejudicial and inflammatory evidence that portrayed appellant 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, 1380-1385.)

This was a closely balanced case. The evidence against appellant was not overwhelming. No physical evidence tied him to the shootings, and no eyewitness (other than the accomplice Qui Ly whose credibility was questionable) could identify him as being present. Like Qui Ly, witness Hanh Dam was a member of the V gang and not appellant's gang, and both men had much to gain personally by implicating appellant 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 appellant as the shooter rather than their gang's leader, Hung Meo. (Again, Hung Meo's photograph matches the description of the shooter given to the police by eyewitness Guy Puleo on the night of the fatal shooting.[16] [5 CT 1024-

[16] Although at trial Puleo testified the males exiting the gate had their faces covered, Qui Ly testified he and appellant removed their masks at the gate prior to the fatal shooting of the young Asian male. (2 RT 235.)

Puleo also initially described the shooter as being approximately 5'10" tall, and the second male at the gate as being

Footnote continued on next page

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 (excluding recesses and readback periods), and requests for readbacks of key testimony. (4 CT 875-880; 5 CT 997-999.) "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 appellant was involved in the shootings. The jury's difficulty in convicting appellant shows this case was closely balanced.

On the second day of deliberations, the jury requested the readback of the testimonies of the accomplice Qui Ly, the only witness placing appellant at the scene, and Hanh Dam, who testified appellant admitted participating in the shootings. The jury wanted to hear Qui Ly's testimony about what happened from the time the suspects exited the vehicles until they left the crime scene, and Hanh Dam's testimony about what Uncle Dave [Nguyen] and appellant told him about the shootings. (4 CT 876.) On the third day of deliberations, the jury asked to again hear Qui Ly's redirect and re-cross examination testimony (which concerned his being an informant in this and other cases, details of the charged shootings, and his belief he was risking his life to testify). (4 CT 878; 3 RT 341-370, 372, 381.) The jury returned verdicts and findings the next court day. (5 CT 997-

---

approximately 5'11" or 6' tall. (Defense Exhibit B.) Appellant is 5'5" tall. (5 CT 1056.)

999.) (See *People v. Hernandez* (1988) 47 Cal.3d 315, 352 [case is not close where no request for rereading of particular testimony]; *People v. Godinez* (1992) 2 Cal.App.4th 492, 504 [case is close where jury deliberates several days and requests rereading of certain testimony]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [requests for readback indicate a close case].)

Deliberations here occurred over four days, following a nine-day jury trial, six days of which involved the presentation of evidence. (4 CT 840-858, 862-875, 877, 879-880; 5 CT 997-999.) 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; see *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612, citing *Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 855, fn. 8 [nine hours of deliberations deemed protracted]; *People v. Godinez, supra,* 2 Cal.App.4th at p. 504.) Thus, any doubt as to the prejudicial character of the error should have been resolved in appellant's favor. (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62; see *People v. Wagner* (1975) 13 Cal.3d 612, 621.)

As in *Albarran*, this case presents "one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Albarran, supra*, 149 Cal.App.4th at p. 232.) As in *Albarran*, the trial court's ruling here was "arbitrary and fundamentally unfair." (See *id.* at p. 230.) As in *Albarran*, there were no permissible inferences the jury would likely draw from the improperly admitted

evidence of appellant's prior extortion activity involving shootings and threats, which evidence was of such prejudicial quality that it necessarily prevented a fair trial. Thus it can be inferred appellant's jury must have used the evidence for an improper purpose. (See *id.* at pp. 229-230, citing *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, and *Reiger v. Christensen* (9th Cir.1986) 789 F.2d 1425, 1430.)

> From this evidence there was a real danger that the jury would improperly infer that whether or not [the defendant] was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished. Furthermore, this gang evidence was extremely and uniquely inflammatory, such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues.
> (*Albarran, supra*, 149 Cal.App.4th at p. 230.)

Likewise, evidence of appellant's prior extortion activity created a very real danger that his jury would improperly infer a propensity to commit other violent crimes in the future and thus would convict him on that basis, and the prejudice arising from the exposure to such inherently inflammatory evidence could only have served to cloud his jury's resolution of the issues. (See *Albarran, supra*, 149 Cal.App.4th at p. 230.) As in *Albarran*, "here the error concerns, not the omission or exclusion of evidence from the trial, but evidence which the jury actually heard and which was emphasized

throughout the trial." (*Albarran, supra*, 149 Cal.App.4th at p. 231, fn. 17.) Here the prosecutor in argument reminded the jury of appellant's prior criminal acts by twice emphasizing evidence of the prior extortion to establish VFL's primary activities and the gang's pattern of criminal activity, even referring the jury to Exhibit No. 52. (7 RT 964-965.) As in *Albarran*, it is simply not possible to assess the fairness of the trial in the absence of such inherently prejudicial evidence. (See *ibid.*) The evidence of appellant's prior violent criminal activity thus was plainly and without question prejudicial to him. (See *ibid.*)

However, applying a lesser standard of prejudice, a result more favorable to appellant was reasonably probable had this prejudicial "other crimes evidence" been excluded. (*People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019.) In *Leon*, the appellate court found the trial court's abuse of discretion in admitting the defendant's prior conviction to be harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836 ("*Watson*"), given the overwhelming evidence that the defendant committed the charged crimes in association with a criminal street gang, and the considerable evidence he acted with intent to promote, further, or assist criminal conduct by gang members. (*Leon, supra*, 161 Cal.App.4th at pp. 169-170.) In contrast, here there is no overwhelming or even considerable evidence that appellant committed the underlying crimes. No physical evidence tied him to the crime scene, he was not identified by any eyewitness other than the accomplice Qui Ly who had much to gain by implicating appellant, and the initial description of the shooter given by the eyewitness to the fatal shooting matched V gang leader

Hung Meo and not appellant. (See, *ante*, at pp. 4-5, 45 & fn. 16.) Thus the street terrorism charge, premised on these same charges (see Opinion, *supra*, 99 Cal.Rptr.3d at pp. 140-141), is unsupported by overwhelming or considerable evidence. Unlike *Leon*, the trial court's abuse of discretion here *was* prejudicial.

Williams also found the trial court's plain error to be harmless under *Watson* given the overwhelming admissible evidence establishing the defendant's guilt of the charged crimes and the truth of the gang enhancement allegations. (*Williams, supra*, 170 Cal.App.4th at pp. 612-613.) The *Williams* court relied on the fact the jury had acquitted the defendant of one charge and found him guilty of a lesser offense, and found a gang enhancement allegation tied to another charge not true. The court inferred from the verdict that the jurors did not accept the repetitive other crimes and gang evidence uncritically, and in fact followed the court's instruction not to consider such evidence to prove the defendant had a bad character or criminal disposition. (*Id.* at p. 613.)

Again, in appellant's case, there is no overwhelming or considerable evidence that he even committed the charged crimes. (See, *ante*, at pp. 49-50.) Further, unlike *Williams* where the jury acquitted the defendant of one charge and gang enhancement, appellant's jury convicted him on *all* charges and enhancements, indicating his jurors accepted the erroneously admitted "other crimes evidence" uncritically and likely failed to follow the court's limiting instruction not to consider such evidence to prove appellant had a bad character or criminal disposition. (See *Williams, supra*, 170 Cal.App.4th at p. 613.) Thus, unlike *Williams*, the trial court's abuse

of discretion here was prejudicial. Given that "the likelihood of prejudice from allowing the jury to hear that [appellant] had previously committed [extortion] was high" (*Leon, supra*, 161 Cal.App.4th at p. 169), it is reasonably probable a more favorable result would have been reached but for the trial court's error. (*Watson, supra,* 46 Cal.2d at p. 836.) Under *Watson*, "a 'probability' ... does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis in original; cf. *Strickland v. Washington* (1984) 466 U.S. 668, 693-694 ["reasonable probability" means merely a "probability sufficient to undermine confidence in the outcome"].)

Had this evidence of prior extortions involving shootings and threats been excluded, there is a reasonable chance given the weaknesses of the case that at least one juror would have found appellant's theory of the case more credible and been unable to convict him of any or all of the charges. (*Watson, supra,* 46 Cal.2d 818.) There is a reasonable chance that without this error, the jury might have convicted appellant of the attempted murder of Duc Vuong, but found him not guilty of the murder of the young male because appellant did not match the shooter's description initially given by Guy Puleo. (*Ibid*; see, *ante*, at p. 45 & fn. 16.) Hence, there is a reasonable probability that in the absence of this serious evidentiary error, appellant would not have been convicted on all charges and allegations. (*Ibid.*; Cal. Const., art. 6, sec. 13.)

CONCLUSION

For the reasons set forth herein, the trial court abused its discretion in allowing the prosecution to introduce evidence of appellant's own uncharged criminal acts to prove a pattern of criminal gang activity. This evidentiary error was prejudicial, and appellant's convictions must be reversed.

Respectfully submitted,

MARLEIGH A. KOPAS
Attorney for Appellant
Quang Minh Tran

WORD COUNT CERTIFICATION

Pursuant to rule 8.520(c)(1) and (c)(3) 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 13,630 words excluding tables, quotation of issues and this certificate. I certify that I prepared this document in Microsoft Office 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: April 12, 2010

MARLEIGH A. KOPAS

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 April 12, 2010, I served the within

APPELLANT'S BRIEF ON THE MERITS

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 12th day of April, 2010, at Sandpoint, Idaho.

MARLEIGH A. KOPAS

SERVICE LIST

OFFICE OF THE ATTORNEY GENERAL
110 West "A" Street, Suite 1100
Post Office Box 85266
San Diego, CA 92186-5266
Deputy Attorney General: LISE S. JACOBSON

COURT OF APPEAL
Fourth Appellate District
Division Three
Post Office Box 22055
Santa Ana, CA 92702

OFFICE OF THE DISTRICT ATTORNEY
County of Orange
700 Civic Center Drive West
Santa Ana, CA 92701
Deputy District Attorney: CYNTHIA M. HERRERA

LYNELLE K. HEE, Staff Attorney
APPELLATE DEFENDERS, INC.
555 West Beech Street, Suite 300
San Diego, CA 92101-2939

SUPERIOR COURT CLERK
Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92702-3734
(For Delivery to the Honorable
Robert R. Fitzgerald, Judge)

MR. QUANG MINH TRAN
#K80278
CSP D-1 125Low
Post Office Box 931
Imperial, CA 92251

JOANNE HARROLD
Attorney at Law
543 Via Lido Soud
Newport Beach, CA 92663
(Trial Counsel)