

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

vs.

ROBERT COOPER,

Defendant and Appellant

) No. S273134

) 2d. Crim. B304490

) Sup. Ct. No. TA140718

**MOTION FOR EVENTUAL REMAND TO THE COURT OF
APPEAL, OR, IN THE ALTERNATIVE, TO EXPAND THE
ISSUES ON REVIEW TO ADDRESS THE EFFECT OF NEW
LAW DECIDED UNDER A.B. 333 THAT IS APPLICABLE TO
APPELLANT'S CASE**

Elizabeth K. Horowitz
State Bar No. 298326

Law Office of Elizabeth K. Horowitz, Inc.
5272 S. Lewis Ave, Suite 256
Tulsa, OK 74105
Telephone: (424) 543-4710
Email: elizabeth@ekhlawoffice.com
Attorney for Appellant
By Appointment of the Court of Appeal
Under the California Appellate Project
Independent Case System

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

vs.

ROBERT COOPER,

Defendant and Appellant

) No. S273134

) 2d. Crim. B304490

) Sup. Ct. No. TA140718

To The Honorable Tani Cantil-Sakauye, Chief Justice of the
Supreme Court of the State of California:

Appellant Robert Cooper, by and through his appointed
counsel, respectfully requests, pursuant to California Rules of
Court, rule 8.528, subdivisions (a), (c), & (d)¹, that in addition to

¹ These rules provide:

(a) Normal disposition

After review, the Supreme Court normally will affirm, reverse,
or modify the judgment of the Court of Appeal, but may order
another disposition. [¶] ...[¶]

(c) Remand for decision on remaining issues

If it decides fewer than all the issues presented by the case,
the Supreme Court may remand the cause to a Court of
Appeal for decision on any remaining issues.

(d) Transfer without decision

After ordering review, the Supreme Court may transfer the
cause to a Court of Appeal without decision but with

any other disposition the Court may eventually order in appellant's case (following either a grant or denial of review), the Court also remand the case to the Court of Appeal for further consideration of issues concerning the retroactive application of Assembly Bill No. 333's new Penal Code section 1109, as addressed in two recent Court of Appeal decisions (discussed below).² Or, in the event the Court decides to grant review in appellant's case, appellant requests in the alternative that the Court expand the issues on review to include an assessment of the retroactive application of section 1109 to appellant's case.

As set forth in the Petition for Review, appellant was convicted of first degree premeditated murder, and the jury found true principal firearm enhancements pursuant to section 12022.53, subdivisions (b), (c), (d), and (e), and a gang enhancement pursuant to section 186.22, subdivision (b)(1)(C).

On April 1, 2022, this Court requested an answer to appellant's Petition for Review, which raised, among other things, an issue concerning the Court of Appeal's faulty application of the amendments to section 186.22 under Assembly Bill No. 333 ("A.B. 333"), which apply retroactively to appellant's case. Respondent filed its answer to the petition on April 11, 2022, and appellant filed his reply to the answer on April 14, 2022.

instructions to conduct such proceedings as the Supreme Court orders.

² All further statutory references are to the Penal Code.

The following day, on April 15, 2022, the Sixth District of the Court of Appeal decided *People v. Burgos* (April 15, 2022, H045212) __Cal.App.5th__ [2022 WL 1124863], in which the majority held that section 1109, the newly enacted procedural section of A.B. 333 that requires bifurcation of the trial of criminal street gang enhancements upon request, also applies retroactively. (*Id.* at pp. *9-11.) After drawing this conclusion, the *Burgos* court reversed the defendant’s robbery convictions as well as the criminal street gang enhancements, despite finding sufficient evidence to support the underlying convictions. (*Id.* at pp. *11-12.)

The *Burgos* court first concluded that the plain language of section 1109 makes it applicable to a distinct class of defendants (i.e., those charged with gang enhancements), and that the legislative findings of A.B. 333 show that reducing punishment for people of color, “who overwhelmingly comprise the class of defendants charged with gang enhancements,” was a central motivation for the bill. (*Burgos, supra*, 2022 WL 1124863 at p. *9, citing A.B. 333, § 2, subd. (d)(1) [“The gang enhancement statute is applied inconsistently against people of color, creating a racial disparity.”].)

The majority in *Burgos* also rejected the contention that section 1109 was merely a rule of criminal procedure and not designed to ameliorate punishment, as required under *In re Estrada* (1966) 63 Cal.2d 740. (*Burgos, supra*, 2022 WL 1124863, at pp. *10-11.) It based this holding on several aspects of the legislative intent as set forth in the bill, including the findings

that bifurcation reduces the harmful and prejudicial impact of gang evidence (A.B. 333, § 2, subd. (f)); and that gang evidence can be unreliable and prejudicial because it is lumped together with evidence of the underlying charges. (*Id.* at § 2, subd. (d)(6).) Thus, *Burgos* held, section 1109 ameliorates the effects of gang enhancements by increasing the possibility of acquittal, and by reducing pressure to accept plea bargains when facing trials involving gang evidence. (*Burgos, supra*, 2022 WL 1124863, at p. *10, citing A.B. 333, § 2, subd. (e).)

The *Burgos* court further concluded that if the Legislature “‘did not want the statute to apply retroactively to nonfinal judgments, it needed to clearly and directly indicate such intent in order to rebut *Estrada*’s inference of retroactivity.’” (*Burgos, supra*, 2022 WL 1124863, at p. *10, quoting *People v. Frahs* (2020) 9 Cal.5th 618, 635.) And in light of this, the court “reject[ed] the argument that different parts of Assembly Bill 333 should be treated differently under *Estrada*,” noting that “[t]he Legislature could have added an express savings clause carving out a section of the bill as prospective-only, but there is no such clause, and no indication of any such intent.” (*Burgos, supra*, 2022 WL 1124863, at p. *10.) “To the contrary,” the *Burgos* court found, “the legislative findings setting forth the ameliorative purposes of the bill apply to the entire bill, and they specifically address the reasons for the new bifurcation rules.” (*Ibid.*)

After *Burgos* was decided, on April 27, 2022, the Fifth District of the Court of Appeal also held that section 1109 is retroactive, in *People v. Ramos* (April 27, 2022, F080916)

__Cal.App.5th__ [2022 WL 1233755], which emphasized the same law and policies.

In appellant’s case, which is not final, the trial of his criminal charges was not bifurcated from the trial of his gang enhancement, which thus amounts to error under *Burgos* and *Ramos*, and their holdings concerning the retroactivity of section 1109.

As to prejudice, *Burgos* found that it would be “difficult to determine how the outcome of the trial would have been affected if it had been bifurcated to try the gang enhancements separately,” since “the nature of the proceeding would have been entirely different,” and therefore the circumstance presented “likely constitutes ‘structural error’ because it ‘def[ies] analysis by harmless-error standards.’ ” (*Burgos, supra*, 2022 WL 1124863, at p. *11, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 280 [111 S.Ct. 1246, 113 L.Ed.2d 302].) In addition, *Burgos* explained that “the defining feature of a structural error is that it ‘affect[s] the framework within which the trial proceeds,’ rather than being “simply an error in the trial process itself.” (*Weaver v. Massachusetts* (2017) — U.S. —, 137 S.Ct. 1899, 1907 [198 L.Ed.2d 420]; *Burgos, supra*, 2022 WL 1124863, at p. *11.) *Burgos* then concluded that bifurcation necessarily affects the framework within which the trial proceeds, and explained that “the legislative findings in Assembly Bill 333 underscore the inherently prejudicial nature of gang evidence.” (*Burgos, supra*, 2022 WL 1124863, at p. *11.)

In *Ramos*, the court applied the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818 when assessing whether the error was harmless, but did so without directly analyzing the issue or considering the concept of structural error, instead noting only in a footnote that: “We apply the *Watson* standard in reviewing for prejudice because *Ramos* does not argue, nor can we conclude, the failure to bifurcate the gang enhancement from the trial on the substantive charges violated his federal constitutional right to due process such that it rendered his trial fundamentally unfair.” (*Ramos, supra*, at p. 13, n. 7.)

The *Burgos* court’s reasoning that structural error exists in a case like the current one is sound. The error here pertains to the framework of the proceedings, it would not be possible to fully assess which evidence would have been admitted or excluded if the trial had been bifurcated, and therefore the prejudicial impact of the excessive gang evidence cannot be fairly measured.

Importantly, however, even if a harmless error analysis is tenable, prejudice exists in this case under either the federal standard from *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], or the state standard set forth in *Watson, supra*, 46 Cal.2d 818, 836.)

Notably, in *Burgos*, after addressing the presence of structural error, the court went on to find that even if a harmless error analysis was applied, the error there required reversal under either standard since the jury had likely relied on gang evidence when deciding the issue of identity, and to infer aiding and abetting. (*Burgos, supra*, 2022 WL 1124863, at p. *11.)

Applying this reasoning here, the same conclusion should be reached. Appellant's jury very likely relied on the substantial amount of gang evidence that was admitted to infer that appellant was either a shooter, or that he aided and abetted the shootings and acted with the requisite intent to kill. (*Burgos, supra*, 2022 WL 1124863, at p. *11.) For example, appellant was never identified as a shooter, no evidence tied him to the murder weapon, and the only witness to the crime, who knew appellant, said he was not a fighter, thus rendering it unlikely the jury found he was an actual killer, and quite likely that the gang evidence would have played a prejudicial role if any such finding was made. (2RT 1948; 3RT 2128, 2409-15, 2421.) And the evidence of aiding and abetting was similarly weak, as appellant was not the driver of the vehicle, and no evidence showed that he did something to encourage or assist in the shooting. (See CALCRIM 401.) Instead, the evidence showed mainly that he was present, which is not enough (see CALCRIM 401; *People v. Villa* (1957) 156 Cal.App.2d 128, 134), and therefore it is very likely that it was the gang evidence that created the inference of appellant's guilt.

Indeed, the prosecution relied heavily on petitioner's gang membership during closing when addressing his guilt of the underlying crime, noting the gang expert testimony that "they don't just let anyone in the car," and asserting that the jury could infer petitioner was a gang member and therefore must have known what was going to happen, to argue that he was guilty of aiding and abetting. (3RT 2751, 2751-52.)

Bifurcation of the gang enhancement in this case would have meant that portions of the gang evidence would have been excluded, and uses of the evidence admitted would have been limited, thus avoiding the submission/use of gang evidence that was “unreliable and prejudicial” because it was “lumped into evidence of the underlying charges.” (A.B. 333, § 2, subd. (d)(6); see also *id.*, at § 2, subd. (f); *Burgos, supra*, at p. *12.) As such, the lack of bifurcation in this case was prejudicial under either *Chapman or Watson*.

Accordingly, appellant respectfully requests that in addition to any other disposition the Court may eventually order in appellant’s case, the Court remand the case to the Court of Appeal for further consideration of the issue discussed above; or, in the event the Court grants review in this case, appellant requests in the alternative that the Court expand the issues on review to include that issue. (See Cal. Rules of Court, rules 8.528, subds. (a), (c), & (d), and 8.516, subd. (a).)

Dated: May 6, 2022

Respectfully Submitted,

Law Office of Elizabeth K. Horowitz

Elizabeth K. Horowitz
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I, Elizabeth K. Horowitz, hereby certify that, according to the computer program used to prepare this document, this motion contains 1,826 words.

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

Executed May 6, 2022, at Tulsa, Oklahoma.

Elizabeth K. Horowitz
State Bar No. 298326

PROOF OF SERVICE

Law Office of Elizabeth K. Horowitz, Inc.
5272 S. Lewis Ave, Suite 256
Tulsa, OK 74105

Case No. S273134

I, the undersigned, declare: I am over 18 years of age, employed in the County of Tulsa, Oklahoma, and not a party to the subject cause. My business address is 5272 S. Lewis Ave, Suite 256, Tulsa, OK 74105. I served the within Motion For Eventual Remand To The Court Of Appeal, Or, In The Alternative, To Expand The Issues On Review, To Address The Effect Of New Law Decided Under A.B. 333 That Is Applicable To Appellant's Case by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Robert Cooper (BN8752)
HDSP
P.O. Box 3030
Susanville, CA 96127-3030

Clerk, Superior Court of Los
Angeles County
200 West Compton Blvd.
Compton, CA 90220

Each envelope was then sealed and with the postage thereon fully prepaid and deposited in the mail by me at Tulsa, Oklahoma, May 6, 2022.

I also served a copy of this brief electronically on the following parties:

- California Attorney General, at docketingLAawt@doj.ca.gov
- George Gascon, District Attorney, at truefiling@da.lacounty.gov
- California Appellate Project, at capdocs@lacap.com

Pursuant to an understanding with the Clerk of the Court of the Second Appellate District, appellant served the Court of Appeal by filing this reply with the Supreme Court through TrueFiling.

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

Executed on May 6, 2022, at Tulsa, Oklahoma.

Elizabeth K. Horowitz