3rd Petition for Review

Supreme Court Number S184212

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE , Plaintiff and Respondent, v. XUE VANG, et al., Defendants and Appellants.	D054343 (Superior Court No. SCD213306)
THE PEOPLE, Plaintiff and Respondent, v. DANNY LÊ, Defendant and Appellant.	D054636

PETITION FOR REVIEW AFTER A PUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, AFFIRMING THE JUDGMENT

Kevin D. Sheehy, Esq.
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By appointment of the Court of Appeal
under the Appellate Defenders, Inc.
independent case system

Attorney for Petitioner Dang Hai Ha

Supreme Court Number S184212

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE ,	)	D054343
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	
	)	(Superior Court
XUE VANG, et al.,	)	No. SCD213306)
	)	
Defendants and Appellants.	)	
	)	
THE PEOPLE,	)	D054636
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	
	)	
DANNY LÊ,	)	
	)	
Defendant and Appellant.	)	
	)	

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DANNY LÊ,	)	
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PETITION FOR REVIEW AFTER A PUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE AFFIRMING THE JUDGMENT

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant, appellant, and petitioner Dang Hai Ha ("petitioner Ha") respectfully petitions this Honorable Court for review, pursuant to

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Constitution

State Statutes

State Rules of Court

Supreme Court Number S184212

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PETITION FOR REVIEW AFTER AN UNPUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE AFFIRMING THE JUDGMENT

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant, appellant, and petitioner Dang Hai Ha ("petitioner Ha") respectfully petitions this Honorable Court for review, pursuant to

California Rules of Court, rule 8.500 (a)(1), after the unpublished opinion of the Court of Appeal, Fourth Appellate District, Division One, filed on June 7, 2010, affirming, as modified, the judgment. A copy of the Court of Appeal's Opinion ("the Opinion") is attached hereto as Exhibit A.

ISSUES PRESENTED FOR REVIEW

1. Does prosecution gang-expert opinion testimony bearing directly upon a defendant's state of mind and violating the holding of *People v. Killebrew* (2002) 103 Cal.App.4th 644, also violate a defendant's Fifth and Fourteenth Amendment due process rights by lowering the prosecution's burden of proving, beyond a reasonable doubt, each and every essential element of a charged crime (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 1073, 25 L.Ed.2d 368]; *People v. Flood* (1998) 18 Cal.4th 470, 480-481), or violate a defendant's Sixth and Fourteenth Amendments right to have a jury determine, beyond a reasonable doubt, each and every element of the crime with which he is charged (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523 [115 S.Ct. 2310, 132 L.Ed.2d 444])?

2. Did prejudicial and reversible state-law error result from the admission in evidence of prosecution gang-expert-opinion testimony bearing directly upon petitioner Ha's state of mind and violating the holding of *Killebrew*?

3. Did prejudicial and reversible federal constitutional error, violating petitioner Ha's Fifth, Sixth, and Fourteenth Amendment rights, result from the admission in evidence of prosecution gang-expert-opinion testimony bearing directly upon petitioner Ha's state of mind and violating the holding of *Killebrew*?

NECESSITY FOR REVIEW

Review is being sought herein, in part, so that petitioner Ha may present his federal constitutional claims brought under the Fifth, Sixth and Fourteenth Amendments as to Issues 1 and 3, in order to enforce and to exhaust his state-court remedies as to such federal constitutional rights. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 843 [119 S.Ct. 1728, 144 L.Ed.2d 1].)

Furthermore, review is being sought herein, pursuant to rule 8.500 (b)(1) of the California Rules of Court, in order to settle an important question of federal law and to secure uniformity of decision, as to Issues 1 and 3.

PETITION FOR REHEARING

Petitioner Ha's petition for rehearing was filed on June 11, 2010, and was denied by the Court of Appeal's Order modifying the Opinion, filed on June 25, 2010, a copy of which Order is attached hereto as Exhibit B ("Ex. B").

STATEMENTS OF CASE AND FACTS

Solely for the purposes of this Petition for Review, petitioner Ha adopts the statements in the "Procedural Background" and "Factual Background" sections set forth on pages 2 through 8 of the Opinion. (Ex. A, pp. 2-8.) Additional material facts are supplied below in the text of the "Legal Discussion" section.

LEGAL DISCUSSION[1]

I.

THE ADMISSION IN EVIDENCE OF GANG-EXPERT-OPINION TESTIMONY BEARING DIRECTLY ON PETITIONER'S STATE OF MIND CONSTITUTED REVERSIBLE STATE-LAW ERROR UNDER THE HOLDING OF *PEOPLE V. KILLEBREW.*

The Opinion concludes correctly that the opinion testimony of prosecution gang expert Detective Hatfield was inadmissible as a matter of state law, under the analysis of *Killebrew*, *supra*, 103 Cal.App.4th 644, as to petitioner Ha. (Ex. A, pp. 8-14.)

However, the Opinion's conclusion that such state-law error is harmless error (Ex. A, pp. 14-15) is clearly erroneous, because the Opinion (a) applies the wrong standard of prejudice for the state-law error, and (b) fails to consider the trial testimony of codefendant Sitthideth, or trial circumstances, which were flagged in briefing and oral argument on petitioner Ha's behalf as bases for the conclusion that such state-law error could not be considered harmless error.

The only proper standard of prejudice for the demonstrated state-law *Killebrew* error here is provided by the *Watson* test: An error cannot be deemed harmless if it is "reasonably probable that a result more favorable to defendant would have been reached in the absence of the error[.]" (*People v. Watson* (1956) 46 Cal.2d 818, 837.) As the Supreme Court has declared time and again, the term "reasonable probability," in the context of the *Watson* standard of prejudice, *"does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility."* (*College*

---

[1] All statutory references herein are to the Penal Code.

Hospital, Inc. v. Superior Court (1994) 8 Cal.4th 704, 715, italics added; *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050-1051; *Cassim v. Allstate Insurance Company* (2004) 33 Cal.4th 780, 800; *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918.)

The Opinion deviates fatally from the above-stated formulation of the *Watson* test with the following statement: "The next question is whether the error was harmless, that is, *whether there is enough evidence* . . . from which a reasonable jury could infer defendants committed the assault . . . within the meaning of section 186.22, subdivision (b)(1)." (Ex. A, p. 14, italics added.) As the above-*italicized* wording of the Opinion demonstrates, the standard of prejudice being applied erroneously to the trial evidence is an improper "substantial evidence" test (comparable to what a reviewing court would apply to an insufficient evidence claim), instead of the proper *Watson* test which would require a reviewing court to consider the substantiality of trial evidence and other trial circumstances supportive of a defendant's innocence of a charge or enhancement allegation, in order to ascertain whether such trial evidence and circumstances posed "a reasonable chance, more than an abstract possibility," of a different trial outcome but for the state-law error. (*Watson*, *supra*, 46 Cal.2d at p. 837; *College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 715; *Richardson*, *supra*, 43 Cal.4th at pp. 1050-1051; *Cassim*, *supra*, 33 Cal.4th at pp. 800; *Ghilotti*, *supra*, 27 Cal.4th at p. 918.)

The Order modifying the Opinion purports to rectify (albeit unsuccessfully) this fatal flaw in the Court of Appeal's analysis by declaring that the Court of Appeal is applying the *Watson* standard of prejudice, rather than a substantial evidence standard of review, in concluding that no reversible state-law error has occurred. (Ex. B, p. 1.)

Notwithstanding the gloss provided by this post-hoc pronouncement, which pays only lip service to the *Watson* test, what the unrevised text of the Opinion itself reveals is that the Court of Appeal has viewed (albeit erroneously) the trial evidence in the light most favorable to the prosecution, in order to support a conclusion that there was substantial evidence to support a jury finding that the gang enhancement allegation was true as to petitioner. Whether or not there was "*enough evidence*" (Ex. A, p. 14, italics added) – in other words, "substantial" evidence – to support such finding is not the proper inquiry under the *Watson* test. Nor is it proper to hinge a prejudice determination upon whether or not the evidence opposing a true finding on the gang enhancement allegation preponderated over the evidence supporting a true finding on the allegation; because the *Watson* line of cases instructs that the term "reasonable probability," in the context of the *Watson* standard of prejudice, "does not mean more likely than not." (*Watson, supra*, 46 Cal.2d at p. 837; *College Hospital, Inc., supra*, 8 Cal.4th at p. 715; *Richardson, supra*, 43 Cal.4th at pp. 1050-1051; *Cassim, supra*, 33 Cal.4th at pp. 800; *Ghilotti, supra*, 27 Cal.4th at p. 918.)

Instead, the Opinion should have proceeded, but failed to proceed, to an inquiry as to the quantum of trial evidence and other trial circumstances – the strength of defense attacks on the credibility of the prosecution witnesses (including Phanakhon), the materially conflicting testimonial accounts of the prosecution and defense witnesses and attendant issues of their respective credibility, the lengthy jury deliberations, and the jury's rejection of the deadly-weapon-use and great-bodily-injury allegations as to all four defendants – supporting petitioner Ha's innocence as to the gang enhancement allegation; and as to whether such pertinent trial evidence and trial circumstances supported *"a reasonable chance, more than an abstract*

possibility" of a different trial outcome but for the erroneous admission in evidence of Detective Hatfield's improper gang-expert opinion testimony on the prosecution's behalf.

Not only does the Opinion apply the wrong standard of prejudice, but the Opinion also fails to give due consideration, or any consideration at all, to any of the following pertinent evidence and trial circumstances, which were marshaled in petitioner Ha's opening and reply briefs (and echoed at the oral argument) to show that the state-law error stemming from Detective Hatfield's erroneously admitted opinion testimony could not be harmless under the proper *Watson* standard of prejudice, and that such error was, therefore, reversible error:

> The state-law prejudice here is manifest under the *Watson* test for the following reasons:
>
> First, the jury deliberated for about 8 hours before reaching a verdict. (2CT 449-453.) The protracted deliberations indicated that the prosecution's case was anything but a slam dunk.
>
> Logical reasons for the jurors' lengthy deliberations included the fact that they had to wrestle with two fundamentally different versions of the April 28 incident – one version involving Phanakhon being attacked by 3 or 4 males with or without a weapon in the hand of one of them, and the other version involving a two-person mutual combat by fisticuffs, between Phanakhon and Vang, proposed by and voluntarily participated in by Phanakhon himself.
>
> Added to this mix for the jury to sort out was the attendant and ultimate issue – for purposes of the gang enhancement allegation under section 186.22, subdivision (b)(1) – of whether, under either version of the April 28 incident, the incident was or was not gang-related, particularly in light of Sitthideth's testimony. Had the court properly sustained the defense objections to the hypothetical questions to Hatfield, the jury would never have heard Hatfield's unsupported and irrelevant opinion on this ultimate issue. As noted above, Phanakhon himself said he could only

guess as to why the April 28 incident took place.

The jurors also had to wrestle with a host of credibility issues regarding the materially conflicting testimonial accounts of Phanakhon, various law enforcement witnesses, and defense witnesses.

By finding not true the deadly-weapon-use and great-bodily-injury allegations as to all four defendants (2CT 454, 456, 458, 460), the jurors apparently rejected, at least in significant part, Detective Collins' claim that, as the closest surveilling officer at the scene, he had seen clearly (from 110 feet away through his vehicle's left side mirror) the incident, including someone's use of a pipe, stick, or other weapon to strike repeatedly Phanakhon's head.

For each and all of these reasons, it is at least "reasonably probable that a result more favorable to defendant would have been reached in the absence of the error" by the trial court in permitting the gang expert's opinion testimony responding to these objectionable prosecution questions. (*Watson, supra*, 46 Cal.2d at p. 837.)

(Petitioner Ha's "Appellant's Opening Brief" (filed Aug. 12, 2009), Argument I. C., pages 24-25.)

In the face of trial evidence which pointed away from, at least as much as toward, any gang-relatedness of the confrontation, respondent makes the unsupportable contentions (RB, pp. 11-12) that evidence of [petitioner] Ha's and the other defendants' intent was "overwhelming," and that the state-law evidential errors here are harmless. In light of the evidence being in equipoise on whether or not the incident was gang-related, the jury's eight hours of deliberations (2CT 449-453), and the materially conflicting testimonial accounts of Phanakhon, various law enforcement witnesses, and defense witnesses, there was at least a "reasonable probability" -- i.e., *"a reasonable chance, more than an abstract possibility"* – that these evidential errors affected the outcome of the jury finding on the gang enhancement allegations. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics added; *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050.) Because these errors were not harmless ones, reversal of the judgment is

required.

(Petitioner Ha's "Reply Brief" (filed Feb. 9, 2010), page 5, original italics and underlining.)

Due consideration must also be given to the commonsense notion that the jurors, lacking any expertise with the internal workings of gangs, could reasonably be expected to defer to whatever pronouncements of the prosecution gang expert that the trial court permitted the jurors to hear and to consider in their deliberations, including Detective Hatfield's improper opinion testimony bearing directly on petitioner Ha's state of mind and constituting *Killebrew* error. The noted "laughter or tittering from the jury" (Ex. A, p. 14; 6RT 1396) when the prosecutor was posing an improper opinion question, violating *Killebrew*, to Detective Hatfield, evidences the fact that the jury understood Hatfield would be opining specifically about petitioner Ha and the other defendants. Because the trial court did not exclude such improper opinion testimony from the jurors' hearing or consideration, the jurors could be expected to consider and give great weight to Hatfield's inadmissible opinion testimony when deciding whether petitioner Ha had the requisite state of mind to violate section 186.22, subdivision (b)(1).

Moreover, in concluding that there was "enough" evidence to support the gang enhancement allegation, the Opinion places undue weight upon what it acknowledges to have been Phanakhon's two "guesses" about why he was assaulted (Ex. A, p. 15) – either that he had disassociated himself from the TOC gang or that he had heard something he was not supposed to hear. Phanankhon admitted that he did not know why he would have been assaulted. (2RT 234-235, 240, 248, 269-271, 275-277, 308-309, 322, 326.) Phanakhon's guesses were pure speculation on his

part, lacking any foundation at all. There was no evidence as to what, if any, thing he may have heard about TOC; or how or by what means he had heard it; or how anyone connected with TOC might have come to know that he had heard something about TOC; or why any such knowledge on his part would be a basis for someone assaulting him on TOC's behalf. Phanakhon provided no explanation of when he had stopped talking to or associating with anyone at TOC, or who that might have been; no explanation for why his disassociating himself from TOC might be a reason for an assault upon him; and no account for how or when anyone connected with TOC might have become aware that he was no longer communicating or associating with anyone from TOC. There was no evidence that anyone connected in any way with TOC had decided to assault Phanakhon on TOC's behalf, or to have someone else do so, or had discussed doing so with anyone. There is no factual basis for assuming that Phanakhon was doing anything more than telling officers what they wanted to hear or talking off the top of his head. Conceivably, because of his own social relationship with one or more of the defendants and his own bias and interest in the outcome of the case, Phanakhon was telling police a tale designed to keep authorities off his back by downplaying his involvement in the incident, particularly so, if, as Sitthideth testified, Phanakhon was a willing combatant with Vang. (7RT 1702-1703, 1714-1719, 1718, 1722-1723.)

Finally, the Opinion gives undue weight to the credibility of Detective Collins as a percipient witness regarding his testimony that he did not see Phanakhon "fight back." (Ex. A., 15.) Again, by finding not true the deadly-weapon-use and great-bodily-injury allegations as to all four defendants (2CT 454, 456, 458, 460), the jurors implicitly rejected, at least in significant part, Detective Collins' claim that, as the closest surveilling

officer at the scene, under poor nighttime viewing conditions, he had seen clearly (from 110 feet away through his vehicle's left side mirror) the incident, including someone's use of a visible weapon (never found) to strike repeatedly Phanakhon's head. (2RT 382-388, 390, 392; 3RT 340-345, 409, 416-417, 428-430, 434-437, 446-449, 455, 457-461, 469-470, 483-486, 488-489, 493, 501-504, 522, 539; 4RT 592-593, 595-596, 601-602, 605, 609-610, 612-613, 627, 629-630, 633.) Collins' eyewitness testimony, taken both at face value, and as the jury apparently saw it, was not solid or credible evidence.

In sum, but for the fact that the jury did hear Detective Hatfield's improper gang opinion testimony bearing on petitioner Ha's subjective state of mind (which testimony the Opinion correctly determines to have been inadmissible under state law), there was *"*a reasonable chance, more than an abstract possibility" of a different outcome – either a "not true" finding, or one or more "hung" jurors during deliberations, on the gang enhancement allegation as to petitioner Ha (who was not implicated in Sitthideth's trial account of a two-person mutual combat between Phanakhon and defendant Vang sparked by a private quarrel between the two combatants).

For these state-law reasons, review should be granted, and the "true" finding for the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) should be reversed as to petitioner Ha.

II.

THE *KILLEBREW* ERROR ALSO CONSTITUTED REVERSIBLE FEDERAL CONSTITUTIONAL ERROR UNDER THE *CHAPMAN* STANDARD OF PREJUDICE.

Argument I. D. of petitioner Ha's "Appellant's Opening Brief" (at pages 25 through 27 thereof) contended that the very same inadmissible gang expert opinion testimony of Detective Hatfield that triggered reversible state-law *Killebrew* error also triggered reversible federal constitutional errors as well. Specifically, the opening brief contended:

> In addition to interposing objections based on state law, [petitioner Ha's] counsel also objected under the Fifth and Sixth Amendments to these same questions to Hatfield. (6RT 1395-1396.)
>
> Under the Fifth and Fourteenth Amendment due process guarantees of the United States Constitution, the prosecution bears the burden of proving beyond a reasonable doubt each and every essential element of the charged crime. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 1073, 25 L.Ed.2d 368]; *People v. Flood* (1998) 18 Cal.4th 470, 480-481.)
>
> Under the Sixth Amendment, a defendant has the right to have a jury determine beyond a reasonable doubt each and every element of the crime with which he is charged. (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523 [115 S.Ct. 2310, 132 L.Ed.2d 444].) "[T]he jury may find for the defendant even if the only evidence regarding an element favors the prosecution, but that evidence nevertheless falls short of proving the element beyond a reasonable doubt." (*Flood, supra*, 18 Cal.4th at p. 481.)
>
> By posing as "expert" testimony purportedly beyond the commonsense and common experience of the average juror, and substituting for competent evidence bearing on [petitioner Ha's] or his codefendants' respective subjective intentions on April 28, [Detective] Hatfield's unfounded, speculative, and irrelevant opinions responding to these objectionable questions <u>lowered</u> the prosecutor's burden of proof beyond a reasonable doubt, under the Fifth and

Fourteenth Amendments, as to whether [petitioner Ha] (and the other defendants) specifically intended to engage in an attack for the benefit of, in association with, or at the direction of the TOC street gang, as was required by the gang enhancement allegation under subdivision (b)(1) of section 186.22.

These improper questions also violated [petitioner Ha's] Sixth Amendment right to have the jury decide beyond a reasonable doubt whether [petitioner Ha] (or the other defendants) had such specific intent, by allowing [Detective] Hatfield's "expert" opinion – supposedly beyond the realm of the jurors' common experience and knowledge, and thus an opinion to which the jurors should defer in light of Hatfield's "expertise" – to stand in for the jury's own collective opinion, thereby usurping the jury's Sixth Amendment function as decision maker. (See *Killebrew*, *supra*, 103 Cal.App.4th at p. 658 ["the suspects' knowledge and intent on the night in question [were] issues properly reserved to the trier of fact']; [In re] *Frank S.* [(2006)] 141 Cal.App.4th 1192, 1199 [minor's intent regarding weapon possession was "issue reserved to the trier of fact"].)

These demonstrated federal constitutional errors violating [petitioner Ha's] Fifth, Sixth and Fourteenth Amendment rights cannot be deemed harmless under the *Chapman* standard of prejudice whereby the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-308 [111 S.Ct. 1246, 113 L.Ed.2d 302].) For the very same reasons the concomitant state-law errors are not harmless under the *Watson* standard of prejudice, as explained in Argument I.C., above, *a fortiori*, these federal constitutional errors may not be considered harmless errors beyond a reasonable doubt under the more demanding *Chapman* standard of prejudice.

Accordingly, these prejudicial state-law and federal constitutional errors require reversal of the true finding for the gang enhancement. (See *Frank S.*, *supra*, 141 Cal.App.4th at p. 1199; [*People v. Ramon* (2009) 175 Cal.App. 4th 843, 853, 858].)

(Petitioner Ha's "Appellant's Opening Brief," Argument I. D., pages 25-27.)

To recap, Detective Hatfield was effectively a thirteenth juror sitting on the jury. The thrust of Hatfield's gang expert opinion testimony, and of the prosecution's arguments based thereon, was that Hatfield knew (and the jurors did not know) what the score was with gangs in the area and with the particular gang (TOC) supposedly behind whatever struggle took place between one or more defendants and Phanakhon. Because Hatfield was the expert (and the jurors were not), the jurors should defer to his expertise and his pronouncements upon whatever he was being asked by the prosecutor. Because the jurors heard unfiltered – due to the fact that the trial court overruled defense *Killebrew* objections and allowed jurors to hear, without any admonition or limiting instruction – Hatfield's improper and inadmissible opinion testimony bearing directly on petitioner Ha's state of mind, one or more jurors could be reasonably expected to give the same deference to those improper and inadmissible opinions and to Hatfield's other, admissible pronouncements. Put simply, a reasonable juror could be expected to think that, if the prosecution gang expert said the struggle was intended by petitioner Ha (and the other defendants) to benefit the TOC gang, then it must be so, since the gang expert was the one in the know. Effectively, Hatfield's speculative testimony bearing generally on the gang enhancement allegation, and particularly on the defendants' state of mind, lowered the prosecutor's burden of proof, and usurped the jurors' role as triers of fact, regarding the material issues of petitioner Ha's and other defendants' respective knowledge and intent on the night in question.

Petitioner Ha's "Reply Brief" renewed these federal constitutional claims. (Petitioner Ha's "Reply Brief", pages 2, 5-6.) Moreover, the Reply

Brief pointed out that respondent had forfeited any right to contest these federal constitutional claims:

> The Respondent's Brief (RB, pp. 6-12) is silent regarding [petitioner] Ha's federal constitutional claims (AOB, pp. 25-27) that reversible error violating his Fifth and Sixth Amendment rights stems from the erroneous admission in evidence of the prosecution gang expert's opinions on the defendants' subjective knowledge and intent. By operation of waiver, forfeiture, or judicial estoppel, respondent's silence should be deemed a tacit acceptance of the merit of [petitioner] Ha's federal constitutional claim. At a minimum, respondent has failed to sustain its burden of showing these demonstrated federal constitutional errors to be harmless under the federal constitutional standard of prejudice – i.e., harmless "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *O'Neal v. McAninch* (1995) 513 U.S. 432, 437-439 [115 S.Ct. 992, 130 L.Ed.2d 947].)

(Petitioner Ha's "Reply Brief," pages 5-6 .)

The Opinion (Ex. A, pp. 8-36) fails to mention at all, let alone address the merits of, these meritorious federal constitutional claims; and further fails to address either respondent's procedural default via waiver, forfeiture, or estoppel, or respondent's failure to sustain its burden of showing harmless federal constitutional error, as the *Chapman* standard of prejudice requires. Petitioner Ha's "Petition for Rehearing" (filed on June 11, 2010), at pages 9 through 12 thereof, flagged these material omissions in the Opinion, but the Order modifying the Opinion failed to address or rectify the omissions (Ex. B, p. 1).

Because petitioner Ha has demonstrated prejudicial and reversible federal constitutional error here, the Court should grant review and reverse the "true" finding for the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) as to petitioner Ha.

CONCLUSION

For the reasons stated above, it is respectfully requested on behalf of petitioner that the Supreme Court grant review; and reverse the "true" finding for the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) as to petitioner Ha.

Dated: July 8, 2010

Respectfully submitted,

KEVIN D. SHEEHY, ESQ.
Attorney for Petitioner Dang Hai Ha

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504 (d)(1)

(*People v. Xue Vang et al.*, Consolidated Nos. D054343, D054636)

I certify that this document was prepared on a computer using WordPerfect X4, and that, according to that software program's word-counting function, this document contains 4,101 words.

Dated: July 8, 2010

KEVIN D. SHEEHY, ESQ.
Appellate Counsel for Petitioner Dang Hai Ha

EXHIBIT A

COURT OF APPEAL DECISION

Filed 6/7/10

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. XUE VANG et al., Defendants and Appellants.	D054343 (Super. Ct. No. SCD213306)
THE PEOPLE, Plaintiff and Respondent, v. DANNY LÊ, Defendant and Appellant.	D054636

CONSOLIDATED APPEALS from an order of the Superior Court of San Diego County, Michael D. Wellington, Judge. Affirmed as modified.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant Xue Vang.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant Dang Ha.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant Sunny Sitthideth.

Sachi Wilson, under appointment by the Court of Appeal, for Defendant and Appellant Danny Lê.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Steve Oetting, Supervising Deputy Attorney General and Eric Swenson, Deputy Attorney General, for Plaintiff and Respondent.

The principal issue in this appeal is whether the court erred in admitting the gang expert's opinion regarding defendants' knowledge and intent in committing the underlying assault over defense objections that the testimony exceeded the limits set forth in *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*). One or more defendants also raise evidentiary issues, dispute the sufficiency of the evidence to support the verdicts, ask that we review the police officer personnel records viewed in camera by the trial court pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), challenge a probation condition, and assert that any failure to make timely and specific objections or motions should be deemed ineffective assistance of counsel. We conclude that the court erred in admitting expert opinion on defendants' knowledge and intent in response to two hypothetical questions, but the error was harmless. We modify item 12G of the probation order for one defendant as agreed by the parties, and affirm the judgment as modified.

PROCEDURAL BACKGROUND

Police arrested Xue Vang, Sunny Sitthideth, Dang Ha and Danny Lê after breaking up a street fight in which William Phanakhon was knocked out, but not

seriously injured. The jury convicted the four defendants of assault by means of force likely to cause great bodily injury, and found true the gang enhancement allegation. The jury found *not true* the special allegations that defendants personally inflicted great bodily injury and used a deadly weapon in the commission of the assault.

Vang, Sitthideth and Ha received prison sentences which included two or three years for the gang enhancement imposed under the Street Terrorism Enforcement and Prevention Act (STEP Act). (Pen. Code, § 186.20 et seq.; undesignated statutory references are to the Penal Code.) The court sentenced Vang to a total of six years, Sitthideth to four years, and Lê to 12 years based on his admission that he had one prior strike. It suspended execution of Ha's sentence and placed him on probation with various conditions, including one year of jail custody. All four defendants appeal. Sitthideth and Lê expressly join in relevant arguments presented by their codefendants.

FACTUAL BACKGROUND

The victim, 20-year-old William Phanakhon, lived with his family in Mira Mesa. After graduating from high school, Phanakhon began hanging out with members of the Tiny Oriental Crips or "TOC" criminal street gang. At trial, Sitthideth, Ha and Lê stipulated to being members of TOC. However, Vang denied any gang connections. Phanakhon also denied gang membership. He stated he committed no crimes, and simply went out to eat, drink or hang around with people who were TOC members. Phanakhon met the four defendants in the fall and winter of 2007. Sitthideth, Ha and Vang were often present when Phanakhon was with members of TOC. However, Phanakhon recalled meeting Lê on just one occasion. Eventually, Phanakhon began declining

invitations to go out with gang members because "[t]his is not where [he] wanted [his] life to go."

Phanakhon was at home watching television between 10:00 and 11:00 on the night of April 28, 2008, when he received a phone call. The caller, whose voice sounded familiar, asked to come over. Phanakhon thought it was a neighbor and agreed. He went to his garage and Vang arrived a short time later. Phanakhon also saw Lê peek inside the garage. About five minutes later, Vang asked Phanakhon if he wanted to go hang out. Phanakhon followed Vang down the street. He also saw Ha and Sitthideth walking towards the corner. When Phanakhon rounded the corner, someone struck him in the back of the head from behind. He fell down and tried to protect his head from continued punches. Phanakhon was unable to describe anything about the assault because he lost consciousness until assisted by police and paramedics.

By coincidence, members of the San Diego Police Department gang unit were conducting surveillance near the scene of the assault. Detective Dave Collins was seated in an unmarked car watching the intersection through his side rear view mirror. Detective Collins was the only officer with a clear view of the incident, being situated approximately 110 feet away from the corner which was illuminated by a street light. There was a second street light approximately 10 to 20 feet away from Detective Collins.

Detective Collins watched as four males approached the corner. Suddenly, three of the men began beating the fourth, but the victim did not fight back. At one point, the victim fell to the ground, but two of the assailants pulled him up and hit him again. Detective Collins observed two of the men back up while the third pulled out a stick or

pipe and used it to strike the victim on the head. The victim fell to the ground a second time. Detective Collins broadcast that he was witnessing a "beat down." Officer Michael Dewitt, also part of the surveillance team, responded and was the first to arrive on the scene. He saw four men beating the victim.

As additional members of the surveillance team moved in, the assailants fled. Detective Collins arrested Vang after a short chase. Ha, Sitthideth and Lê were arrested nearby. However, a search of the scene failed to locate anything resembling the stick or pipe that Detective Collins described.

When Officer Jacob Resch arrived, he saw Phanakhon sitting upright on the curb. Detective Collins, who arrived after Officer Resch, observed that Phanakhon was nonresponsive to questioning even after Detective Collins worked to revive him. Detective Collins also observed that the left side of Phanakhon's face had begun to swell. Paramedics transported Phanakhon to the hospital where he was examined for head injuries, then released.

Phanakhon offered at least two "guesses" for why he was assaulted by the defendants. First, he believed he was attacked for "disassociating" himself from TOC, even though he testified that he had never been a member of the gang. Second, Phanakhon suggested that he got "checked" because he heard something he was not supposed to hear. Phanakhon stated that he was not afraid of the defendants. He was, however, afraid of TOC and what might happen to him or his family if he testified at trial.

The prosecution called Detective Daniel Hatfield as its expert witness on criminal street gangs. Detective Hatfield testified about the culture and habits of gangs, including member-on-member discipline for no longer hanging out with the gang or not "putting in work." Turning to TOC, he described it as a predominantly Laotian group that split off from a larger gang set in the early 1990's and claimed Linda Vista as its territory. Detective Hatfield identified three separate predicate offenses committed by its members and opined that TOC was a criminal street gang. Given the stipulation, there was no dispute that Ha, Sitthideth and Lê were members of TOC. Detective Hatfield believed that Vang and the victim Phanakhon were also gang members. He described the Department of Justice guidelines and San Diego Police Department guidelines for documenting "contacts" with suspected gang members. He testified that although Vang had not identified himself as a gang member, he met all the Department of Justice guidelines. As to Phanakhon, Detective Hatfield stated that he met the San Diego Police Department guidelines based on his association with TOC. On cross-examination, Detective Hatfield testified that the three "contacts" with Phanakhon included: (1) the April 28, 2008 incident at issue here; (2) a traffic stop in March 2008 in which San Diego police officers found a picture of a gang member in his passenger's purse, but no one in the car was identified as a gang member; and (3) the discovery in October 2007 of Phanakhon's number along with at least 50 others on Ha's cell phone. Detective Hatfield acknowledged that the San Diego Police Department guidelines for documenting gang members might differ from those the gang used to define its membership.

Over defense objection, Detective Hatfield responded to two hypothetical questions from the prosecution that tracked the facts of the case. Detective Hatfield opined that if a "young baby gangster" in TOC was not putting in work or hanging out with TOC members, a physical assault on that "young baby gangster" was designed to put the person "in check" and bring him back in line with the gang's expectations. He stated that the assault would benefit TOC and was committed in association with TOC and at the direction of TOC members. Detective Hatfield also opined that, based on a second hypothetical that included Detective Hatfield's opinions as to the hypothetical parties' gang membership, the attack on the "young baby gangster" was gang motivated. When questioned further by the prosecution, Detective Hatfield responded that the hypothetical facts told him that "this is a gang-motivated incident. It wasn't about friends fighting among one another."

Vang testified at trial against the advice of his attorney. The court warned Vang that in addition to allowing impeachment with prior felony convictions, his testimony might open the door to questioning that could cause unnecessary damage to his own defense and that of the other defendants. Thereafter, Vang briefly testified that he was not a member of TOC, had no tattoos, and was not in any of the gang photos introduced at trial. On cross-examination, Vang acknowledged his priors. He also acknowledged that he hung out with members of TOC. Over defense objection that the question exceeded the scope of direct, Vang testified that he was hanging out with members of TOC on April 28, 2008. The court cautioned the prosecutor about the scope of direct examination and there were no further questions about the events of that date.

However, Sitthideth did testify about events that occurred in Phanakhon's garage before the fight on the street. Contrary to Phanakhon's testimony, Sitthideth stated that he, Vang, Ha and Lê went to Phanakhon's house around 9:00 p.m., where they all ate pizza in the garage. When Phanakhon brought "something" out of his pocket, he and Vang started calling each other names. Phanakhon challenged Vang to a fight, and the group went outside to watch the one-on-one fight between Phanakhon and Vang at the corner.

DISCUSSION

I. *The Gang Enhancement*

A. Admission of the Gang Expert's Opinion on Defendants' Knowledge and Intent

As we explained, the information included the special allegation that defendants committed the assault "for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist criminal conduct by gang members within the meaning of" section 186.22, subdivision (b)(1). Defendants argue that the trial court abused its discretion when it allowed Detective Hatfield to testify in response to a hypothetical question that the assault on Phanakhon, thinly disguised in the hypothetical as "young baby gangster," was for the benefit of TOC and was gang motivated. Defendants contend Detective Hatfield's testimony was mere speculation and the ultimate issues of knowledge and intent were for the jury to decide.

Resolution of the question requires us to consider the gang testimony in light of rules that usually permit experts to testify on ultimate issues through hypothetical questions (Evid. Code, § 801; *People v. Gardeley* (1996) 14 Cal.4th 605, 618

(*Gardeley*)), but disallow expert testimony on a specific defendant's knowledge and intent that "'amounts to no more than an expression of his general belief as to how the case should be decided . . . .' [Citation.]" (*Killebrew*, *supra*, 103 Cal.App.4th at pp. 647, 651.) We are also mindful of the common use of a fiction which Ha's defense counsel aptly described when objecting to Detective Hatfield's testimony:

> "[W]hen a hypothetical is crafted so carefully that it is transparent to everybody in the courtroom, including the jury, that we are talking about the facts of this very case, I think that crosses the line and it becomes [*Killebrew* error] rather than an expert witness answering the general hypothetical. . . . And I think that what that does is pay lip service to the rule that you can offer a hypothetical, while in reality, as is perfectly apparent to every juror what you are really doing is asking the witness to opine on his [subjective] thoughts and ideas of the defendants . . . ."

Although a bright line between gang expert testimony which is or is not admissible to show knowledge and intent may be elusive, we conclude that Detective Hatfield's testimony crossed it. We agree with the rule of *Killebrew* that an expert witness may not offer an opinion on what a particular defendant is thinking. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 647.) And more importantly here, the prosecutor may not circumvent that rule by asking the expert a hypothetical question that thinly disguises the defendants' identity. We also conclude that the error in admitting Detective Hatfield's responses to the hypothetical questions was harmless in the circumstances of this case.

Under California law, a person with "special knowledge, skill, experience, training, or education" in a particular field may qualify as an expert witness and give testimony in the form of an opinion. (Evid. Code, §§ 720, 801.) However, expert testimony is admissible only if it relates to a subject "sufficiently beyond common

experience that the opinion of an expert would assist the trier of fact . . . ." (Evid. Code, § 801.) The culture and habits of criminal street gangs are appropriate subjects for expert testimony and therefore admissible. (*Gardeley, supra,* 14 Cal.4th at p. 617.) Expert opinion on a specific defendant's subjective knowledge and intent is not. (*Killebrew, supra,* 103 Cal.App.4th at pp. 647, 651.)

The trial court has "considerable discretion" to control how the expert is questioned "'to prevent the jury from learning of incompetent hearsay.' [Citation.]" and "'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' [Citation.]" (*Gardeley, supra,* 14 Cal.4th at p. 619.) We review the trial court's rulings on the admissibility of expert testimony for abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.) Here, the trial court abused its discretion by admitting Detective Hatfield's testimony regarding defendants' knowledge and intent based on its apparent belief that such testimony was admissible so long as it was presented in the form of a hypothetical. As we explain, the prosecution may not use a hypothetical question to conceal an expert's improper testimony on the real defendants' subjective knowledge and intent.

The prosecution typically offers expert testimony on criminal street gangs in two forms: (1) the expert's description of a particular gang's colors, territory, typical crimes, and other matters relating to gang culture or psychology based on "material not admitted into evidence" as long as it is "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates" (Evid. Code,

§ 801; see e.g., *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1545 [prison activities of the "Mexican Mafia"]) and (2) the expert's opinion in response to a hypothetical question based on facts shown by the evidence which asks the expert to assume their truth (*Gardeley, supra,* 14 Cal.4th at p. 618). On direct examination, the expert may describe the reasons for his or her opinion and the matter on which the opinion is based. (Evid. Code, § 802.) As long as that material meets a threshold requirement of reliability, "matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony." (*Gardeley, supra,* 14 Cal.4th at p. 618, italics in original.)

"Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.) However, courts cannot allow experts to express *any* opinion they may have about gangs and gang activities. (*Killebrew, supra*, 103 Cal.App.4th at pp. 651, 654.) The defendant in *Killebrew* was one of several men arrested in connection with a drive-by shooting. He was not inside any of the three cars police suspected were involved, but was standing on a nearby corner when police stopped one of the cars. The discovery of a handgun at a nearby taco stand and in at least one of the cars formed the basis for Killebrew's prosecution for conspiring to possess a handgun. (*Id.* at pp. 647-649.) The court reversed his conviction on appeal. (*Id.* at p. 647.) The error identified in *Killebrew* was that "in response to hypothetical questions, the People's gang expert exceeded the permissible scope of expert testimony by opining on 'the subjective *knowledge and intent* of each' of the gang members involved in the crime. [Citation.]" (*People v. Gonzalez, supra,* 126 Cal.App.4th at pp. 1550-1551, italics in original.)

Specifically, the expert testified that each of the individuals in a caravan of three cars knew there were guns in two of the cars and jointly possessed the guns with everyone else in the three cars for mutual protection. (*Id.* at p. 1551.) However, "*Killebrew* does not preclude the prosecution from eliciting expert testimony to provide the jury with information from which the jury may infer the motive for a crime or the perpetrator's intent; *Killebrew* prohibits an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial. [Citation.]" (*Ibid.*)

With two exceptions, post-*Killebrew* jurisprudence has been left entirely in the hands of the intermediate appellate courts. The Supreme Court distinguished *Killebrew* in *People v. Ward* (2005) 36 Cal.4th 186, 210, noting that the expert opinions at issue fell within the gang culture and habit evidence approved in *Gardeley*. *Killebrew* received slightly more than a passing reference in *People v. Gonzalez* (2006) 38 Cal.4th 932, where the Supreme Court again distinguished the circumstances of the case. In rejecting the defendant's claim of *Killebrew* error in the guilt phase, the Supreme Court noted that the challenged testimony was "quite typical of the kind of expert testimony regarding gang culture and psychology that a court has discretion to admit." (*People v. Gonzalez, supra*, 38 Cal.4th at p. 945.) "[W]ithout deciding" whether *Killebrew* was correct "in this respect," the *Gonzalez* court read the case as "merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.'" (*People v. Gonzalez, supra*, 38 Cal.4th at p. 946.) The Supreme Court attempted to clarify its comments in dicta included in a footnote: "Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be

incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons." (*Id.* at p. 646, fn. 3.) Neither *Ward* nor *Gonzalez* addressed the issue presented here - whether an expert witness can offer an opinion in response to a hypothetical question as to a defendant's mental state where he cannot testify *directly* regarding a specifically named defendant's mental state.

Reversal was required in *Killebrew* because the gang expert's testimony was the only evidence offered by the prosecution to establish the elements of the crime and there was no other evidence from which a reasonable jury could infer intent. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 658; see also *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661-662 (*Ochoa*) [nothing in the circumstances of the carjacking sustained the expert witness's inference that it was gang-related]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 850-851 [no facts from which the expert could discern whether the defendants were acting on their own behalf or on behalf of the gang]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 (*Frank S.*) [no evidence apart from expert testimony to establish that the minor possessed a knife for the benefit of the gang].) "'[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.' [Citation.]" (*Ochoa*, *supra*, 179 Cal.App.4th at p. 657.) "To allow the expert to state the minor's specific intent . . . without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (*Frank S.*, *supra*, 141 Cal.App.4th at p.

1199.) However, prejudicial error does not result in every case in which a gang expert offers testimony on an ultimate issue such as knowledge or intent - at least not in cases where there is other evidence to support an inference that the alleged crime was committed for the benefit of the gang. (See, e.g., *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930-931 ["Undoubtedly, the expert's testimony alone would not have been sufficient to find the drug offense was gang related"].)

Here, Detective Hatfield's testimony in response to the two hypothetical questions violated the rule in *Killebrew*. The only apparent difference between the trial testimony and the hypothetical was the names of the parties. In the hypothetical question, the prosecution called the victim "young baby gangster" instead of Phanakhon and called the four defendants "three baby gangsters and one O.G.," that is, "original gangster." Indeed, one of the defense attorneys reported hearing "laughter or tittering from the jury" when Ha's defense attorney objected to the use of the hypothetical at an earlier stage in Detective Hatfield's testimony.

The next question is whether the error was harmless, that is, whether there is enough evidence, including testimony that Detective Hatfield was *permitted* to offer concerning the general culture and habits of TOC (*Gardeley, supra*, 14 Cal.4th at p. 617), from which a reasonable jury could infer defendants committed the assault "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" within the meaning of section 186.22, subdivision (b)(1). (*Gardeley, supra*, 14 Cal.4th at p. 617.) The record reveals the following admissible evidence relevant to the issue of

knowledge and intent. First, the phone call from an unidentified "familiar" voice, Vang's arrival and suggestion that they leave the garage to "hang out," and the assault by other known gang members at a nearby corner could support an inference that Phanakhon was "set up." Second, Phanakhon's two "guesses" for why he was assaulted - that he had disassociated himself from TOC or heard something he was not supposed to hear - linked the assault to the gang. Indeed, Phanakhon testified that although he was not afraid of the defendants, he was afraid of TOC. Third, Detective Collins observed that the victim of the assault did not fight back, consistent with the theory that the beating was some kind of group punishment rather than a simple fight between Phanakhon and Vang as portrayed by Sitthideth. Based on this record, we conclude the error in admitting Detective Hatfield's opinions as to the defendants' subjective state of mind was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. Sufficiency of the Evidence To Support the True Finding

Our conclusion that the error in admitting Detective Hatfield's testimony on defendants' knowledge and intent was harmless also supports the conclusion there was sufficient evidence to support the jury finding that the special gang allegation was true. (§ 186.22, subd. (b)(1).)

When a defendant challenges the sufficiency of the evidence, we "must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence - evidence that is reasonable, credible and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053 (*Kraft*), citing *People v. Johnson*

(1980) 26 Cal.3d 557, 578.) We presume in support of the judgment existence of every fact the jury could reasonably deduce from the evidence. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237 (*Pensinger*).) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Kraft, supra*, 23 Cal.4th at pp. 1053-1054.)

Both Lê and Sitthideth assert that Phanakhon disclaimed membership in TOC and, after excluding the improper opinion testimony, there was no other evidence to support Detective Hatfield's opinion to the contrary. Lê argues that the evidence showed only that Phanakhon was an acquaintance of the defendants and there was no other evidence to show the purported retaliatory assault on him was for the benefit of or with the intent to promote TOC. The record does not support these arguments.

As we explained, there was evidence apart from Detective Hatfield's inadmissible testimony from which a reasonable jury could infer the facts necessary to prove the gang enhancement. (*Ante*, pp. 14-15.) In addition, the presence of Lê at the scene, whose tattoos led Detective Hatfield to opine he was an "Original Gangster" or "shot caller," also supports the retaliation theory. Regardless of whether Phanakhon was an actual member of TOC or merely an associate with some knowledge of gang activities, a reasonable jury could conclude that the purpose of the attack was the same, that is, to maintain discipline for the benefit of the gang. Thus, we conclude that evidence *apart*

from Detective Hatfield's inadmissible opinion on defendants' knowledge and intent, and the inferences reasonably drawn from that evidence, were sufficient to sustain the true findings.

II. *Motion to Bifurcate Trial of the Gang Enhancement*

Defendants moved in limine to bifurcate the gang enhancement allegations from the trial of the underlying assault. Alternatively, Ha represented that he would stipulate that TOC met the statutory definition of a criminal street gang, and that he was a gang member, thereby obviating the need for prejudicial expert testimony on the details of defendants' involvement in the gang. Defendants argue that the court abused its discretion in denying the motion. We conclude the ruling was proper.

In *People v. Hernandez* (2004) 33 Cal.4th 1040 (*Hernandez*), the Supreme Court described the possible prejudice where a gang enhancement allegation is tried at the same time as the substantive crime. "The predicate offenses offered to establish a 'pattern of criminal gang activity' (§ 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Hernandez, supra,* at p. 1049.) At the same time, evidence of gang culture, habits and membership is often relevant and admissible as to the charged offense. Thus, "[e]vidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the

like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Id.* at pp. 1049-1050.) The Supreme Court concluded that "[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself—for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged—a court may still deny bifurcation." (*Hernandez, supra,* at p. 1050.) As with motions for severance, the burden is on the defendant to persuade the court that considerations favoring a single trial "are outweighed by a substantial danger of undue prejudice," and the decision to bifurcate is left to the trial court's discretion. (*Id.* at pp. 1048-1049.)

Here, the court observed that even without the gang enhancement allegation, gang evidence would likely come in to show defendants' motive for assaulting Phanakhon, and it wondered how much time would actually be saved by bifurcation. Based on the considerations identified in *Hernandez*, the court carefully questioned the prosecutor about the evidence she intended to introduce, including evidence on the predicate offenses. It then expressed concern that one of the predicate offenses involved a gang member with the same last name as defendant Danny Lê, but unrelated to him, who pleaded guilty to assault with a deadly weapon. The court ultimately ruled that as long as someone was prepared to provide a non-hearsay factual summary of that predicate

offense which omitted reference to the victim being shot eight or nine times, it would not bifurcate trial of the gang enhancement allegations. On this record, we conclude there was no abuse of discretion.

III. *Exclusion of Defense Evidence*

Defendants challenge two evidentiary rulings apart from those we already considered in connection with the gang expert's opinion testimony. They assert that the trial court erred in excluding: (1) Phanakhon's methamphetamine use and (2) a defense video of the crime scene at night. We conclude that both rulings were correct.

A. Evidence of Phanakhon's Methamphetamine Use

Sitthideth asserts that the court's exclusion of evidence of Phanakhon's methamphetamine use violated his due process right to present a complete defense and the right to confront and cross-examine witnesses. Specifically, he contends the court improperly precluded him from questioning Phanakhon about his prior drug-related arrest and the role of methamphetamine in the fight with Vang, and therefore prevented Sitthideth from fully presenting his version of events to the jury. Sitthideth maintains that the excluded evidence would have provided a non-gang-related motive for the fight, explained Phanakhon's apparent loss of consciousness and difficulty speaking, and undermined Phanakhon's credibility and the prosecution's case against Sitthideth. We conclude: (1) Sitthideth failed to preserve the issue of Phanakhon's methamphetamine use; (2) in any event, the court did not abuse its discretion in excluding evidence of past and current drug use; and (3) defense counsel's failure to preserve Sitthideth's claim of error did not constitute ineffective assistance of counsel.

The prosecution moved in limine to exclude evidence of Phanakhon's prior drug use. At the same time, Sitthideth filed an in limine motion to allow the defense to cross-examine Phanakhon about a March 28, 2008 drug-related arrest. The trial court observed at the hearing that the victim's *prior* drug use was irrelevant, and continued: "If there was a basis to believe that he had drugs in his system at the time of the incident, then that would be something we should talk about." Lê's counsel responded that Phanakhon's vital signs after the assault were consistent with methamphetamine use, but noted that no "tox screens" were done on the victim. Vang's counsel added that there was a "possibility" that his client could testify that Phanakhon admitted ingesting methamphetamine the night of the attack. The court rejected that suggestion as speculative, and responded that Phanakhon's elevated vital signs were also consistent with his having just been attacked. Contrary to Sitthideth's representation on appeal, no one argued at the in limine hearing that there was evidence that a dispute over drugs precipitated the fight. The court ruled that pending Vang's decision to testify, and absent any solid evidence of Phanakhon's drug use the night of the attack, references to past or present methamphetamine use would be excluded as irrelevant. It also ruled the misdemeanor drug charge was inadmissible for purposes of impeachment.

Vang testified in compliance with the court's rulings, avoiding any reference to Phanakhon's past or present drug use. Sitthideth's testimony for the defense moved closer to the line. On direct examination he stated that while defendants were in the garage, Phanakhon brought "something" out of his pocket. Sitthideth did not elaborate on the nature of the "something," but continued: "I don't know if I can say it or not here." The

prosecutor objected, saying: "I think there has been a prior ruling in this regard." Without ruling on the objection, the court asked defense counsel to restate the question. The following exchange took place:

> "[DEFENSE COUNSEL]: I think the question was what happened next?
>
> "THE COURT: What happened next?
>
> "[SITTHIDETH]: After he brought the stuff out of his pocket?
>
> "THE COURT: Yes.
>
> "[SITTHIDETH]: They started arguing, calling each other names and stuff."

At no time did defense counsel proffer new evidence of Phanakhon's drug use the night of the attack, argue its relevance in precipitating the fight, or otherwise challenge the court's in limine rulings. Accordingly, Sitthideth forfeited his challenge to the exclusion of evidence of Phanakhon's drug use. (*People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3.) "The reason for this rule is that until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility." (*Ibid.*) For the same reason, we reject Sitthideth's argument that any objection or offer of proof would have been futile.

Sitthideth blames trial counsel for his failure to make "timely and specific objections" regarding admissibility of evidence showing Phanakhon's present or past methamphetamine use. In reviewing a claim of ineffective assistance, we begin with the presumption "that counsel rendered adequate assistance and exercised reasonable

professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703.) To prove ineffective assistance, Sitthideth must show that: (1) counsel's performance fell below an objective standard of reasonableness based on the performance expected of a reasonably competent attorney and (2) he was prejudiced in that there is a reasonable probability the result would have been different absent counsel's unprofessional errors. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 (*Strickland*); *People v. Berryman* (1993) 6 Cal.4th 1048, 1081 (*Berryman*), overruled on a different ground in *People v. Hill* (1998) 17 Cal.4th 800, 822-823.) Sitthideth fails to establish either prong of the *Strickland* test.

The record does not reveal the reasons trial counsel failed to renew his objection to the in limine rulings and/or argue the relevance of drugs in Sitthideth's account of the event. The point where the prosecutor reminded the court of the ruling regarding Phanakhon's current drug use would have been an appropriate time to do so. Absent more, we can only presume that Sitthideth's counsel had no new, relevant and non-speculative evidence to offer, or had tactical reasons for not pursuing the matter. If the record on appeal fails to show why counsel acted or failed to act in the manner challenged, we will affirm unless counsel was asked for an explanation and failed to provide one, or there "'simply could be no satisfactory explanation.' [Citation.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) And where the record is silent on these points, a claim of ineffective assistance is more appropriately pursued in a petition for writ of habeas corpus. (*Id.* at pp. 266-267.)

In any event, Sitthideth fails to show that he was prejudiced by the court's decision to exclude references to Phanakhon's methamphetamine use or evidence suggesting that the drugs precipitated the argument that lead to the fight. The trial court was correct in ruling that Phanakhon's prior drug use was irrelevant. After speculating at the hearing on in limine motions that Phanakhon's vital signs were consistent with *current* methamphetamine use, defendants never made an offer of proof at trial that methamphetamine could cause a person to fall in and out of consciousness or that Phanakhon was under the influence of methamphetamine at the time of the attack. Moreover, Sitthideth's account of the events of the night was unconvincing in the face of other evidence introduced at trial. His testimony that all the defendants were hanging out in Phanakhon's garage contradicted Phanakhon's testimony that only Vang and Lê were present. And his testimony that the fight was between Vang and Phanakhon was inconsistent with Detective Collins's and Officer Dewitt's observations that Phanakhon never threw a punch and was assailed by the four others who were present. Sitthideth exaggerates the potential impact of Phanakhon's drug use in the face of this and other evidence that supports the verdicts. And it was irrelevant whether Vang and Phanakhon argued over drugs, women or who would pay for the pizza, inasmuch as the jury rejected Sitthideth's testimony that it was only a fight between the two of them and not gang-related.

B. Rulings on Pictures of the Scene of the Assault

Sitthideth next contends that the court abused its discretion and violated his due process rights by *excluding* a video of the crime scene at night and *admitting* daylight

photos of the same location. He argues that the rulings resulted in the jury having a one-sided and misleading impression of what Detective Collins could see through his side view mirror the night of the assault. We conclude there was no abuse of discretion in either ruling, and reject Sitthideth's argument that the combined rulings warrant reversal.

Ha's defense counsel asked an investigator to prepare a video to recreate what Detective Collins would have seen through his side view mirror the night of the assault. It was offered to help the jury understand what the lighting would have been like and to cast doubt on Detective Collins's description of the events. At the Evidence Code section 402 hearing, Detective Collins testified that the video was too dark and out of focus, and did not accurately depict what he saw that night. Detective Collins described the location of the street lights and testified that the scene was back-lit. In response to further questioning by the court, Detective Collins stated that the street lights allowed him to distinguish figures but not faces of those involved in the assault. At the close of Detective Collins's testimony, the prosecutor argued that the video was not relevant because it did not accurately depict the lighting conditions at scene of the crime. She also asserted that the video's depiction of the street lights as specks was misleading based on common experience that street lights illuminate an area, and maintained the video should be excluded under Evidence Code section 352. The court agreed with the prosecution and excluded the video as "fundamentally misleading."

At trial, Detective Collins testified that the group of guys was backlit. He determined they were males, but he could not see anyone's face. Detective Collins stated that the victim and two of the assailants were wearing hoodies, but he could not

distinguish any other details of their appearance. Later in Detective Collins's testimony, the prosecutor sought to introduce three daylight photographs taken of the crime scene *two days before* from Detective Collins's actual vantage point. She argued there was no prejudice because the photographs were substantially similar to photographs previously provided. Ha's defense counsel objected on grounds the prosecution was attempting to create new evidence after the close of discovery in response to what was going on at trial. The court overruled the objection, stating there was no discovery violation because the evidence was obtained in response to matters that developed during defense cross-examination. At the point in redirect when the prosecution questioned Detective Collins about the new photographs, Lê's defense counsel made an unspecified objection and requested a sidebar, but the court overruled the objection. Counsel did not put the basis for his objection on the record.

We begin with the rule that only relevant evidence is admissible. (Evid. Code, § 350.) 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, § 210.) The trial court has broad discretion in deciding whether challenged evidence is relevant and therefore admissible. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) In exercising its discretion to admit or exclude evidence, the court must at times consider the constraints of Evidence Code section 352, under which evidence is excluded if its probative value is outweighed by undue prejudice. In this context, the term "prejudice" refers to evidence "which uniquely tends to evoke an emotional bias against one party as an individual and which has very little effect on the issues." (*People v. Wright* (1985) 39

Cal.3d 576, 585.) "Prejudicial" is not synonymous with "damaging." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) We review rulings on relevance and undue prejudice for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Cain* (1995) 10 Cal.4th 1, 33.)

In *People v. Gonzalez, supra*, 38 Cal.4th 932, the Supreme Court upheld exclusion of the defendant's videotape of the crime scene. (*Id.* at p. 952.) It explained that "'To be admissible in evidence, an audio or video recording must be authenticated. [Citations.] A video recording is authenticated by testimony or other evidence "that it accurately depicts what it purports to show." [Citation.]' [Citation.] 'In ruling upon the admissibility of a videotape, a trial court must determine whether: (1) the videotape is a reasonable representation of that which it is alleged to portray; and (2) the use of the videotape would assist the jurors in their determination of the facts of the case or serve to mislead them.' [Citation.]" (*Ibid.*) Here, the testimony at the Evidence Code section 402 hearing supports the court's determination that the video proffered by the defense did not accurately depict what Detective Collins would have seen the night of the assault. For that reason, it was not relevant and would not assist the jury in deciding the facts of the case. The investigator had attempted in the first part of the video to replicate Detective Collins's view through the side view mirror. As Detective Collins testified, the first part of the video was dark and "so blurry you can't even see down the street." The court noted that "it doesn't take an expert to know that the problem there is that the picture was being taken through a mirror and the auto focus doesn't know whether to focus on the image in the mirror or the bezzle around the mirror, and so it is totally out of focus." The camera

angle shifted in the second half of the video, but the scene was still darker than it appeared in real life. The court again noted the difference between a video camera and the human eye. "[T]he camera can't see the range of contrast the human eye can. So a simple answer to this is anybody who's ever been in a residential street at night knows that you can see more than what can be seen in this picture." The court concluded that it was not "fair or accurate" to say that "this faithfully shows what the scene would look like to a human being on the scene . . . ."

As to the three photographs introduced during redirect examination of Detective Collins, the defense unsuccessfully objected on grounds they violated discovery rules. Because the defense never objected to the photographs on grounds they were "much more 'misleading' than anything offered by the defense," the issue is forfeited. (Evid. Code, § 353; See *People v. Partida* (2005) 37 Cal.4th 428, 433-434.) There can be no serious argument that admission of the three photographs prejudiced defendants, and therefore we also reject Sitthideth's claim that failure to object constituted ineffective assistance of counsel.

IV. *Sufficiency of the Evidence of Assault*

Defendants contend there is insufficient evidence to support two additional aspects of the verdicts: (1) Lê's conviction of assault in the face of evidence he was a bystander and (2) defendants' conviction of assault with force likely to produce great bodily injury. Applying the standard of review set forth in *Kraft, supra*, 23 Cal.4th at page 1053, we conclude there is substantial evidence to support the guilty verdicts.

A. Lê's Conviction for Assault

The information charged defendants with assault "with a deadly weapon or instrument . . . or by any means of force likely to produce great bodily injury . . . ." (§ 245, subd. (a)(1).) Lê contends there is no evidence to show he was involved in the beating of Phanakhon and therefore the evidence did not support his conviction for assault. He notes that the officers who witnessed the assault indicated that Lê was on the sidewalk in the shadows along a fence away from where his codefendants were assaulting Phanakhon in the street. Thus, the only evidence to suggest he was an aider and abettor in the assault was Detective Hatfield's testimony that, based on his tattoos, he was an "O.G." and "shot-caller." Lê adds that "the court's errors with respect to the gang enhancement also render invalid [his] conviction for the assault." We disagree.

The prosecutor argued that Lê was criminally liable for the assault as a direct participant based on Officer Dewitt's testimony that he saw four men beating Phanakhon when he drove up to the scene. Although the court instructed the jury on aider and abettor liability, the prosecutor did not present that theory in her closing remarks and there is no indication the prosecution argued anything other than Lê's direct physical involvement in the crime. The jury was left with the task of resolving the conflict in the number of assailants and the jury resolved it against Lê. We conclude there is sufficient direct and circumstantial evidence, including the admissible testimony of Detective Hatfield, to support the verdict.

B. Assault With Force Likely to Produce Great Bodily Injury

Next, Sitthideth contends there is insufficient evidence to support defendants' conviction of assault "by any means of force likely to produce great bodily injury" (§ 245, subd. (a)(1)), because the prosecution failed to prove that "the force used *was* likely to cause *great* bodily injury . . . ." (Italics in original.) In support of this argument, he notes that the jury found *not true* the special allegations that defendants used a deadly weapon and personally inflicted great bodily injury in the commission of the assault. Alternatively, Sitthideth contends the court had a duty to clarify the meaning of "great bodily injury" when asked by the jury. Neither argument has merit.

1. Elements of the Crime

Section 245, subdivision (a)(1) punishes an assault committed "by any means of force likely to produce great bodily injury . . . ." No weapon or instrument is required and the criminal force often consists of kicks or blows by the fist. (See *People v. Tallman* (1945) 27 Cal.2d 209, 212.) "Although neither physical contact nor injury is required for a conviction, if injuries result, the extent of such injuries and their location are relevant facts for consideration." (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086.) The question at trial is whether the force was *likely* to produce great bodily injury, and whether the victim actually suffered harm is immaterial. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) Thus, in *People v. Hahn* (1956) 147 Cal.App.2d 308, the court found sufficient evidence of aggravated assault under section 245, where the defendant struck the victim on the head four times with a beer can. The victim never lost consciousness and the cuts on his head did not require sutures or follow-up treatment.

(*Id.* at pp. 309-311.) The court explained: "While the wounds on [the victim's] head did not appear to be incurable, they were such as to require medical attention and because life-long nervous disorders are known to have resulted from no more violence than was applied to [the victim], it required no great strain of the deductive processes to infer that the force used upon him was 'likely to produce great bodily injuries.'" (*Id.* at p. 312.) Whether or not the force used was likely to produce great bodily injury is a question of fact based on all the evidence, including but not limited to evidence of the injury actually inflicted. (*People v. Chavez* (1968) 268 Cal.App.2d 381, 384.)

2. The Record Supports the Verdicts

Sitthideth cites the testimony of various officers along with hospital records to support his claim that Phanakhon's injuries were "simple injuries" and "not the type of great or serious injury" contemplated by section 245, subdivision (a)(1). He also argues there was no evidence that he personally hit Phanakhon or actively aided and abetted anyone else's assault on Phanakhon. Sitthideth's argument does not directly address the question whether there was evidence from which a jury could reasonably infer the defendants' actions were *likely* to produce great bodily injury.

The record in this case shows that defendants beat Phanakhon. Although Phanakhon was crouching on the curb when Officer Dewitt arrived at the scene, his condition appeared to worsen as the other officers arrived. Officer Resch described Phanakhon as "out of it" and "slipping in and out of consciousness" when he placed handcuffs on Phanakhon. Detective Collins approached to find Phanakhon handcuffed, on the ground, nonresponsive, and breathing heavily. After Detective Collins applied a

sternum rub, Phanakhon partly revived, but was unresponsive to questions and provided only garbled responses. Detective Collins observed that the left side of Phanakhon's face had already begun to swell. Photos taken at the hospital revealed cuts and bruises on Phanakhon's head and face.

Although Phanakhon's actual injuries did not turn out to be severe, defendants' beating left him unconscious. Whether defendants used a pipe or stick or their fists, we conclude there is substantial evidence to support the jury's determination that they used force *likely* to produce great bodily injury. Moreover, the jury's findings that defendants did not *personally* inflict great bodily injury within the meaning of sections 12022.7, subdivision (a) and 1192.7, subdivision (c)(8) are *not* inconsistent with the guilty verdict on count 1 given the different statutory language in those enhancements.

3. Response to Jury's Request for Clarification

The court instructed on the elements of section 245 in accordance with CALCRIM No. 875, including proof that "[t]he force used was likely to produce great bodily injury." The instruction provided the following additional points for guidance of the jury: "No one needs to actually have been injured by defendants' act. But if someone was injured, you may consider that fact, along with all the other evidence in deciding whether the defendant committed assault. And if so, what kind of assault. [¶] *Great bodily injury means significant or substantial physical injury. It's an injury that is greater than minor or moderate harm.*" (Italics added.) The court also instructed the jury with CALCRIM No. 3160 which includes the same definition of great bodily injury, this time in the context of the section 1192.7 and section 12022.7 enhancements. During deliberations,

the jury inquired: "Is there any further clarification on what is great bodily injury? What is considered mild or moderate vs. something greater?" Counsel agreed with the court's proposed response which the court then read to the jury:

> "The law provides no more specific definition of Great Bodily Injury than what is in your instructions. The words 'minor,' 'moderate' and 'great' as well as 'significant' and 'substantial' as used in the instruction (number 3160) have no special legal meaning. They are to appl[y] using their ordinary, everyday meanings.
>
> "Whether the injuries are 'great' as opposed to 'minor' or 'moderate' is a factual judgment for you to make. In order for you to find the allegation true, you must unanimously find that it has been proved beyond a reasonable doubt."

Sitthideth contends that the court had a mandatory duty to define "great bodily injury" in response to the jury's request for clarification. He argues that the court was mistaken in saying the law gives no special meaning to the term, and continues: "Had the jury known simple injury is that requiring special medical attention and 'great bodily injury' is substantially greater than that, it is reasonably likely [Sitthideth] would have been found not guilty of the charge in Count 1 or of only the lesser-included simple assault charge."

Sitthideth forfeited any claim of error by agreeing to the court's written response. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 373, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) We nonetheless consider and reject his argument on the merits in light of his claim of ineffective assistance of counsel.

The trial court has a duty to instruct sua sponte on "general principles of law that are closely and openly connected with the facts presented at trial" (*People v. Ervin* (2000)

22 Cal.4th 48, 90), including terms that have a "technical meaning peculiar to the law" (*People v. Reynolds* (1988) 205 Cal.App.3d 776, 779, overruled in part on a different ground in *People v. Flood* (1998) 18 Cal.4th 470, 480.) The duty to elaborate or clarify does not extend to non-technical terms such as "great bodily injury." (*People v. La Farque* (1983) 147 Cal.App.3d 878, 886-887 (*La Farque*).) Moreover, if "the original instructions are themselves full and complete," the question whether additional explanation is required "to satisfy the jury's request for information" is a matter left to the trial court's discretion. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1213.) Indeed, "'comments diverging from the standard are often risky.' [Citation.]" (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1015 (*Solis*); see *People v. Montero* (2007) 155 Cal.App.4th 1170, 1179 [court did not abuse its discretion in advising the jury to re-read the form instruction].) At the same time, courts have cautioned that "'[a] definition of a commonly used term may nevertheless be required if the jury exhibits confusion over the term's meaning. [Citation.]' [Citation.]" (*Solis, supra,* 90 Cal.App.4th at p. 1015; see, e.g., *People v. Ross* (2007) 155 Cal.App.4th 1033, 1047 [where self-defense at issue in prosecution for assault and battery, court erred in failing to instruct on the meaning of "mutual combat"].)

"Great bodily injury," the term at issue here, "has been used in the law of California for over a century without further definition and the courts have consistently held that it is not a technical term that requires further elaboration." (*La Farque, supra,* 147 Cal.App.3d at pp. 886-887.) Our courts have also rejected the claim that the term "great bodily injury" is unconstitutionally vague and overbroad as used in sections 245

and 12022.7. (See *People v. Guest* (1986) 181 Cal.App.3d 809, 812; *People v. Roberts* (1981) 114 Cal.App.3d 960, 962-963 (*Roberts*).) In *Roberts*, which also rejected the claim that the court should have instructed sua sponte on the meaning of "great bodily injury," the court explained:

> "In our case, the kicking on the head and torso of a largely defenseless man on the ground appears to us to be unmistakably an assault which a jury could reasonably find was likely to produce great bodily harm. And here, of course, the injuries inflicted bear out that fact. In addition to the cuts and bruises and the unconsciousness produced, the victim received a blow to the forehead which produced a large welt. If this blow had struck the nearby eye, it might well have produced blindness in that eye, surely a great bodily injury.
>
> "We do not believe that any instructional amplification on the words 'likely' or 'great bodily injury' would have significantly enlightened the jury. In the last analysis, it is the jury's province to determine what the ultimate product of the assault might have been. It was clearly within the jury's province to determine that appellant intended to kick his victim with whatever force was required to permit appellant to accomplish his purpose, the robbery of his victim. No amount of 'hair splitting' would or should have deterred the jury from its task of deciding whether the assault as the jury heard it described was likely to have resulted in 'great bodily injury.'" (*Roberts, supra,* 114 Cal.App.3d at p. 965.)

Based on the foregoing, we conclude the court did not abuse its discretion in responding to the jury's request for clarification of "great bodily injury" in this case by directing it to consider the "ordinary, everyday" meaning of the term as set forth in the "full and complete" instructions on assault. Accordingly, counsel's performance did not fall below that expected of a reasonably competent attorney, and Sitthideth did not receive ineffective assistance. (*Strickland, supra*, 466 U.S. at pp. 687-688, 693-694; *Berryman, supra*, 6 Cal.4th at p. 1081.)

V. *Ha's Probation Condition*

Ha's probation order included the following condition: "Not be in possession of any cell phone or paging device except in course of lawful employment." Ha contends the condition is facially overbroad and therefore unconstitutional. The Attorney General responds that Ha is challenging the condition *as applied* and forfeited it by failing to object on that ground at sentencing. However, the parties nonetheless agree that we can resolve the issue by modifying the probation condition to read: "Not use a cell phone to communicate with any known gang member, or a paging device, except in the course of lawful employment." We agree that modification is appropriate.

VI. *Review of Pitchess Materials*

Before trial, Ha filed a *Pitchess* motion in which he sought discovery of the personnel records of Officer Scott Holden and Officer Michael Dewitt. The court reduced the scope of the request in response to the People's opposition, and reviewed the records in camera to determine whether there were any discoverable files, specifically: (1) as to Officer Holder, files showing "excessive force, aggressive conduct, unnecessary violence, unnecessary force . . . [or] false statements in reports" and (2) as to Officer Dewitt, files showing "false statements in reports." The court determined that nothing was discoverable as to Officer Dewitt, but ordered release of the names, addresses and phone numbers contained in one file pertaining to Officer Holden.

On appeal, Ha asks that we review the materials in camera to determine whether the court followed the procedures set forth in *People v. Mooc* (2001) 26 Cal.4th 1216,

1226-1229, and made the required-on-the record inquiry. We reviewed the officers' personnel records in camera and are satisfied that the court complied with *Mooc*.

DISPOSITION

Ha's probation order is modified and the court is directed to amend item 12G of that order to read: "Not use a cell phone to communicate with any known gang member, or a paging device, except in the course of lawful employment." The judgment is affirmed as modified.

_____

McINTYRE, J.

WE CONCUR:

_____

McCONNELL, P. J.

_____

O'ROURKE, J.

EXHIBIT B

COURT OF APPEAL ORDER MODIFYING OPINION AND DENYING REHEARING

Filed 6/25/10

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. XUE VANG et al., Defendants and Appellants.	D054343 & D054636 (Super. Ct. No. SCD213306) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [No Change in Judgment]

THE COURT:

It is ordered that the opinion filed herein on June 7, 2010, be modified as follows:

On page 15, line 6, delete the sentence beginning "Based on this record . . . " and replace it with a new sentence, which reads:

> Applying the *Watson* standard of prejudice—not the substantial evidence standard of review—we conclude on this record that it is not reasonably probable that an outcome more favorable to defendants would have resulted in the absence of the evidentiary error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

There is no change in the judgment. Appellants' petitions for rehearing are denied.

McCONNELL, P. J.

Copies to: All parties

DECLARATION OF SERVICE BY MAIL (Page 1 of Two Pages)
(*People v. Xue Vang et al.*, Consolidated Nos. D054343, D054636)

I, Kevin D. Sheehy, am employed in the County of Los Angeles, State of California. I am over 18 years of age, a member of the State Bar and not a party to the within action. My business address is 2118 Wilshire Boulevard, #1118, Santa Monica, California 90403.

I served a copy of the attached document, **PETITION FOR REVIEW AFTER A PUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, AFFIRMING THE JUDGMENT** (including "Certificate of Word Count" and Exhibits A-B), on each and every interested party in this action by placing a true copy of said document in a separate envelope for each addressee listed below, addressed to such addressee as follows:

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[Respondent's Counsel]

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Fourth Appellate District, Division 1
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The Clerk of the Court for delivery to
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DECLARATION OF SERVICE BY MAIL (Page 2 of Two Pages)
(*People v. Xue Vang et al.*, Consolidated Nos. D054343, D054636)

Each envelope was then sealed, fully prepaid postage was affixed thereto, and each envelope was deposited in the United States Mail at Santa Monica, California, on July 8, 2010.

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

Executed on July 8, 2010, at Santa Monica, California.

KEVIN D. SHEEHY