DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TIMOTHY J. McGHEE, Defendant and Appellant.	Case No. S169750 Los Angeles County Superior Court No. BA244114 **Death Penalty Case**

APPEAL FROM THE LOS ANGELES COUNTY SUPERIOR COURT
Honorable Robert J. Perry, Judge

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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Under Appointment of the
California Supreme Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Penal Code:

Evidence Code:

Other Authorities

Jury Instructions:

Senate & Assembly:

Articles & Research:

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INTRODUCTION

Appellant's trial should have focused on law and evidence. Instead, the prosecutor turned it into a "gangsta" movie with rap playing on a loop throughout. The storyline was not original, but it was effective: a stereotypical Hispanic male, in a stereotypical Hispanic gang, performing stereotypically evil acts, and then chronicling the perverse pleasure he took in those acts in rap lyrics, the language of murderers. How do we know such a claim is not far-fetched? Because the Legislature has recently acknowledged that it happens a lot and that it must stop. In enacting Assembly Bill Nos. 2799 (rap lyrics), 2542 (Racial Justice Act), and 333 (gang evidence), the Legislature was ensuring that California law finally caught up with what researchers have been empirically documenting for decades: the use of rap lyrics, the stereotyping of minorities, and a vast amount of gang evidence can decimate the chances of a fair trial for people of color. That is what happened to appellant. The prosecutor vilified appellant as the worst of the worst kind of gang member, the "hard-core," depraved, "sick" leader of the

menacing Toonerville gang. This was accomplished through the unbridled admission of 28 pages of rap lyrics penned by appellant, the white-washing of the jury, improper expert opinion, hearsay evidence, and damning editorial comments by the prosecutor.

Combined with the improper juror discharge, outrageous government misconduct outlined in prior briefing, and several other errors in this case, appellant's conviction and death sentence must be reversed if the Legislature's intent to restore a sense of justice to our legal system is to be realized.

ARGUMENT

I

The trial court erred in allowing the prosecutor to introduce highly prejudicial rap lyrics as evidence of gang affiliation, gang loyalty, motive, and intent in violation of Evidence Code section 352, as well as new section 352.2 enacted by AB 2799.

A. Introduction

Appellant was a member of a street gang called "Toonerville." (20 RT 3874, 3982, 3986-3987.) At the time of his arrest, on February 12, 2003, police seized a notebook containing 28 pages of what appeared to be original "gangsta'" rap lyrics

written by appellant. (7 CT 1534-1562; RT 2726-2727, 2729.) There was a prominent note on the cover of the notebook stating, "Everything in this book is a work of fiction." (7 CT 1534; 13 RT 2729, 2732.) Nevertheless, throughout trial, the prosecutor was permitted to use these lyrics against appellant to ostensibly show gang affiliation, gang loyalty, motive, and intent. (7 CT 1532; 20 RT 3975-3979, 3982-3986, 3993-3997.)

During the pendency of this appeal, on January 1, 2023, Assembly Bill No. 2799 ("AB 2799"), codified as Evidence Code section 352.2 ("section 352.2"), took effect. The Legislature enacted AB 2799 to prevent the use of rap lyrics and other "creative expressions" as a way of "introduc[ing] stereotypes or activat[ing] bias against the defendant," or as "character or propensity evidence." (Assem. Bill No. 2799, § 1(b).) Because the Courts of Appeal have divided over whether section 352.2 should be deemed retroactive to criminal matters not yet final on appeal, this Court has granted review to decide the matter. (See *People v. Venable* (2023) 88 Cal.App.5th 445, 456, 457 [Evidence Code section 352.2 should be deemed retroactive], review granted May

17, 2023, S279081; see also *People v. Ramos* (2023) 90 Cal.App.5th 578, 596 [Evidence Code section 352.2 does not apply retroactively], review granted July 12, 2023, S280073.)

Appellant believes *People v. Venable* was decided correctly, that section 352.2 applies retroactively to cases that are not final, such as this one, because the legislation "offers a potentially ameliorative benefit for a class of individuals" (*People v. Frahs* (2020) 9 Cal.5th 618, 631 (*Frahs*), and "reduces the possible punishment for a class of persons" (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303). However, as discussed further below, the admission of this evidence was also erroneous under additional grounds, Penal Code section 745 ("section 745") and Evidence Code section 352 ("section 352").

Prior to new section 352.2, judges had wide discretion, under existing section 352, to admit rap lyrics as long as they were relevant and not unduly prejudicial. Now, a trial judge must: (1) presume such evidence has minimal probative value unless it contains certain "markers of truth"; and (2) consider that undue prejudice will occur not only because the use of such

evidence will improperly indicate the defendant's propensity for violence but also that the evidence will possibility inject racial bias into the proceedings. (Evid. Code, § 352.2, subd. (a); see also *People v. Venable*, *supra*, 88 Cal.App.5th 445, 455 [describing new factors by which to judge "literal truth" or "truthful narrative" for probative value, as "markers of truth"].)

The pervasive use of rap lyrics in this case was minimally probative, but highly inflammatory and prejudicial to appellant, serving as propensity evidence in line with a stereotype of appellant as a hate-filled, ruthless, hard-core gang member who took perverse pleasure in killing and attempting to kill rival gang members and the police. In addition, because appellant identifies as a Latino man of Mexican descent and was acknowledged as such at trial (RT 2376, 3479; 22 CT 5858), admission of the lyrics should have been rejected for their "inject[ion] of racial bias into the proceedings" under new section 352.2 and the Racial Justice Act based on research showing racial bias connected to rap music and Hispanic males, (§ 352.2, subd. (a); § 745, subd. (a)(2).)

B. Section 352.2 adds to a section 352 analysis by specifically requiring treatment of rap lyrics as a genre of music particularly susceptible to explicit and/or implicit racial bias.

In general, section 352 requires the exclusion of evidence when its "probative value" is "substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice[.]" Prejudicial evidence "inflames the jurors' emotions" such that they do not evaluate evidence logically, "but [] reward or punish the defense." (*People v. Valdez* (2012) 55 Cal.4th 82, 133, 145.)

Section 352.2 adds special considerations where the evidence sought to be admitted is in the form of "creative expression," defined as "the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film, and other such objects or media." (Evid. Cod § 352.2, subd. (c).)

Where a court is faced with creative expression evidence,

the following specific evaluation must be undertaken under new section 352.2:

> (a) In any criminal proceeding where a party seeks to admit as evidence a form of creative expression, the court, while balancing the probative value of that evidence against the substantial danger of undue prejudice under Section 352, shall consider, in addition to the factors listed in Section 352, that: (1) *the probative value of such expression for its literal truth or as a truthful narrative is minimal* unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available; and (2) *undue prejudice includes, but is not limited to, the possibility that the trier of fact will, in violation of Section 1101, treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings*.
>
> (b) If proffered and relevant to the issues in the case, the court shall consider the following as well as any additional relevant evidence offered by either party:
>
> (1) Credible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression.
>
> (2) Experimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings.
>
> (3) Evidence to rebut such research or testimony.

(§ 352.2, as added by Stats. 2022, ch. 973, § 2, eff. Jan. 1, 2023, emphasis added.) Thus, creative expression evidence is presumptively not probative of the truth, and even if it is, should be excluded if it will inject racial bias into the trial.

In enacting the new law, the Legislature intended for courts to engage in "a sufficiently robust inquiry into whether [creative expression] introduces bias or prejudice into the proceedings. *In particular, a substantial body of research shows a significant risk of unfair prejudice when rap lyrics are introduced into evidence.*" (Ass. Bill No. 2799, sess. 2021-2022, ch. 793, § 1, emphasis added.)

C. Why rap lyrics are minimally probative and highly prejudicial to defendants.

(1) Rap is a musical genre with recognized, but controversial, conventions.

Whether one finds rap lyrics offensive, by all objective measures, rap is art, and rapping is artistic expression. As a musical genre, rap is responsible for more musical innovation than the British Invasion of the 1960s—led by The Beatles and

The Rolling Stones—and the rise of rap has been dubbed "the single most important event" in popular music during the past 50 years. (Matthias Mauch, Robert M. MacCallum, Mark Levy & Armand M. Leroi, *The Evolution of Popular Music: USA 1960-2010*, ROYAL SOC'Y OPEN SCI., Feb. 2015, at 1, 6-9.) It is even used as a vehicle for youth therapy and counseling, and programs exist across the country that use rap music to help rehabilitate young offenders and reach people at risk of offending. (See Sarah Baker & Shane Homan, *Rap, Recidivism and the Creative Self: A Popular Music Programme for Young Offenders in Detention*, 10 J. YOUTH STUD. 459, 473 (2007); see also Norma Daykin, Yvonne Moriarty, Nick De Viggiani & Paul Pilkington, *Music Making with Young Offenders and Young People at Risk of Offending: An Evidence Review* 28 (2011).)

Rap's genre conventions militate against interpreting the lyrics literally. These conventions and complexities comprise common tropes, themes, and traditions including metaphor, collective knowledge, role play, rap battles, braggadocio, challenging social norms, as well as themes of violence and

hypermasculinity. (See Nicholas Stoia, Kyle Adams, & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?* 8 Race & Justice 330 (2018) (*Rap Lyrics as Evidence*); Andrea L. Dennis, *Poetic (In)Justice? Rap lyrics as Art, Life, and Criminal Evidence,* 31 Colum. J.L. & Arts 1, 4 (2007).)

Even if a rap artist is outwardly professing that they are living a certain lifestyle, it is impossible to tell simply from rap lyrics, music videos and social media who is being "real" and who is presenting a fictional criminal persona seeking fame and financial success.[1] (Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 Race and Justice 185, 197 (2014).) As a result of commercialization and industry norms, artist images are constructed and marketed for maximal financial profit and the images that are often the most marketable are those of the "stereotypical gangster, thug, outlaw." (Dennis, *supra*, *Poetic*

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[1] Of course, sometimes the truth lies in the middle – someone may engage in a modest level of criminal activity and then fabricate or exaggerate their exploits in their music. "[A]ccurate, historical representation is not the overriding goal." (Dennis, *supra*, *Poetic (In)Justice?*, 31 Colum. J.L. & Arts at p. 18.)

(In)Justice?, 31 Colum. J.L. & Arts at p. 18.) Thus, references to violence, weapons, or gang activity are extremely common in rap music and should not be attributed to a defendant's personal experience or as evidence of a defendant's knowledge, motive, or identity.

Furthermore, jurors who are not familiar with the genre may not know to separate an individual's actual life from the pop-culture-inspired image he seeks to project as an artist. When prosecutors equate a defendant's rap lyrics to an autobiographical confession, audiences that are "unfamiliar with rappers' complex and creative manipulation of identity, both on and off the stage . . . can easily begin to conflate artist with character and fiction with fact." (Kubrin & Nielson, *supra*, *Rap on Trial,* 4 Race and Justice at p. 197.) These fundamental characteristics make rap particularly susceptible to misinterpretation and mischaracterization, even while rap artists routinely use recognizable literary and poetic techniques.

Nearly 20 years ago, this Court recognized that "musical lyrics and poetic conventions" are "figurative expressions," which

"are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory." (*In re George T.* (2004) 33 Cal. 4th 620, 636-37, internal citations omitted.) More recently, the Court of Appeal used this standard to reject a prosecutor's argument that rap lyrics are inherently distinguishable from statements made in other contexts. (*People v. Coneal* (2019) 41 Cal. App.5th 951, 968.) Rather, the court held, "[a]bsent some meaningful method to determine which lyrics represent real versus made up events, or some persuasive basis to construe specific lyrics literally, the probative value of lyrics as evidence of their literal truth is minimal." (*Id.*) Thus, to have any probative value, rap lyrics must be sufficiently corroborated by other evidence." (*Id.* at p. 969.)

(2) Admission of rap lyrics results in highly prejudicial criminal propensity evidence.

The Court of Appeal has acknowledged that lyrics presenting images of violence – even if an accurate portrayal of the defendant – "pose[ ] a significant danger that the jury will use it as evidence of [a defendant's] violent character and criminal

propensity in violation of Evidence Code section 1101, subdivision (a)." (*People v. Coneal, supra*, 41 Cal.App.5th at p. 971.) Many published studies confirm this.[2]

Starting in the late 1990s, studies have found lyrics labeled as "rap" to be evaluated as offensive, less artistic, and more threatening compared to when those same lyrics were labeled as "country," or "folk." (Carrie Fried, *Who's Afraid of Rap? Differential Reactions to Music Lyrics*, 29 Journal of Applied Social Psychology 705, 705–721 (1999).) These results were confirmed and extended twenty years later in a study which concluded that lyrics labeled as "rap" were considered more offensive, in need of greater regulation, and judged as more literal and autobiographical compared to when they were labeled

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[2] Social science research, including experimental studies, in published academic articles is proper evidence for courts to consider in section 402 hearings requested by the defense. AB 2799 explicitly requires that trial courts "shall" consider "[e]xperimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings." (Evid. Code § 352.2, subd. (b)(2).)

as "country." (Adam Dunbar, Charis E. Kubrin, & Nicholas Scurich, *The Threatening Nature of 'Rap' Music*, 22 Psych. Pub. Policy & Law 280, 286 (2016).) Dunbar et al. found that participants who were told the lyrics were rap assumed the songwriter was more likely to be violent and involved in criminal activity compared to songwriters in the country or heavy metal genres. (*Ibid.*) In a related study, Stuart Fischoff found that study participants were more likely to form a negative opinion of artists who were merely associated with having written rap lyrics. (Stuart P. Fishoff, *The Gangsta' Rap and a Murder in Bakersfield*, 29 J. Applied. Soc. Psych. 795 (1999).) Study participants believed that a defendant who had authored rap lyrics was more likely to commit murder than an identical defendant who had not authored rap lyrics. (*Ibid.*)

In short, when the prosecution is permitted to admit rap lyrics, the primary purpose it serves is an impermissible one – proof of the defendant's presumed propensity for violence.

(3) Admission of rap lyrics injects racial bias into the proceedings.

The admission of rap lyrics has an additional intolerable effect on criminal trials – it injects racial bias into the proceedings. In enacting section 352.2, the Legislature considered several studies, such as the 2019 book entitled, "Rap on Trial: Race, Lyrics, and Guilt in America." (Assembly Floor Analysis, p. 2, 8/19/22.) In that book, "[t]he authors found that rap lyrics and other creative expressions get used as 'racialized character evidence: details or personal traits prosecutors use in insidious ways playing up racial stereotypes to imply guilt.' The resulting message is that the defendant is that type of Black (or Brown) person." (*Ibid*.)

Music associated with white communities, such as opera, heavy metal, or country—also music saturated in themes of violence—is at most considered a "bad influence" on the listener, but not as evidence of the artist's propensity for violence or as criminal confessions. (Erik Nielson & Andrea L. Dennis, *Rap on Trial: Race, Lyrics, and Guilt in America* (2019), pp. 89-93; see

also Stoia, et al., *supra*, *Rap Lyrics as Evidence*, 8 RACE & JUST. at p. 331 ["There is one musical genre that seems almost wholly devoted to violence. . . That genre, of course, is opera"].)

At its core, the use of rap lyrics as criminal evidence is racially discriminatory; "the attack on rap is part of a larger cultural response to race relations in the United States. Rap becomes a scapegoat, a proxy for people's deeper anxieties about young men of color." (Sam Lefebvre, *Rap's Poetic License: Revoked* (2015)[3], citing Erik Nielson.)

D. Evidence Code section 352.2 applies retroactively to this case.

In *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), the California Supreme Court held that an amendment to a criminal statute that mitigates punishment operated retroactively so that the lighter punishment is imposed, unless there is a savings clause, that is, a clear indication that the amendment is intended to apply only prospectively. (*Id.* at p. 748.) AB 2799 does not

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[3] https://eastbayexpress.com/raps-poetic-license-revoked-2-1/

contain a savings clause.

Not only does the *Estrada* retroactivity rule apply when the legislation at issue "alter[s] or reduce[s] criminal punishment or treatment for past criminal conduct" (see *People v. Cervantes* (2020) 55, Cal.App.5th 927, 939), but a procedural rule that "reduces the possible punishment for a class of persons" (see *People v. Superior Court* (*Lara*), *supra*, 4 Cal.5th at p. 303) or "offer[s] a potentially ameliorative benefit for a class of individuals" will also apply retroactively. (*People v. Frahs*, supra, 9 Cal.5th at pp. 624-626.) The scope of the *Estrada* rule extends to new statutes concerning only procedural changes that do not reduce punishment directly. (*People v. Superior Court* (*Lara*), *supra*, 4 Cal.5th at p. 303 [Proposition 57 applied retroactively even though it did not reduce the punishment for a crime].) In *Frahs*, the Court held that *Estrada*'s inference of retroactivity applied to a newly enacted mental health diversion program under section 1001.36, reasoning that "the ameliorative nature of the diversion program [benefitting a class of persons, that is, certain defendants with mental disorders], places it squarely

within the spirit of the *Estrada* rule." (*Frahs, supra*, 9 Cal.5th at pp. 624, 631.)

The Court of Appeal in *People v. Venable* correctly held section 352.2 "provides defendants of color charged with gang related crimes an ameliorative benefit, specifically, a trial conducted without evidence that introduces bias and prejudice into the proceedings, limitations designed to increase the likelihood of acquittals and reduce punishment for an identified class of persons," and therefore "applies to cases that are not yet final." (*People v. Venable*, *supra*, 88 Cal.App.5th at p. 456.) Because this case is not final following the legislation's effective date of January 1, 2023, its ameliorative provisions are applicable to appellant's claims.

E. The rap lyrics in this case lacked legitimate probative value.

In the opening brief, appellant listed the more inflammatory lyrics the prosecutor sought to introduce at trial. (Appellant's Opening Brief ("AOB") 125-127.) The prosecutor provided no information as to whether these lyrics were created

near in time to the charged crime or crimes (see CT 1535-1562 [writings are undated]), bore a *sufficient* level of similarity to the charged crime or crimes, or included factual detail not otherwise publicly available. (§ 352.2, subd. (a)(1), emphasis added.) Thus, there were none of the "markers of truth," under section 352.2 that would overcome the presumption that the lyrics had minimal probative value. (See *People v. Venable*, *supra*, 88 Cal.App.5th at p. 455.)

Rather, despite appellant's written statement that the lyrics were a work of fiction and despite the well-recognized conventions of rap music discussed above, the prosecutor insisted they: were autobiographical; showed that "defendant acted with specific, premeditated and deliberate intent to kill based on the very hatred expressed in his notebook;" were an "admission" that it was appellant's custom to shoot to kill; showed appellant's "twisted logic" for killing; and showed "extreme" and "intense" hatred of the police. (CT 1526-1530.) Although the prosecutor argued admission of the lyrics would show gang affiliation, gang loyalty, motive, and intent (CT 1532), the prosecutor's comments

throughout the trials reflect an intention to present the lyrics as literal truth of appellant's propensity for violence, and a general criminal disposition in line with living in the gangster world. (§ 352.2, subd. (a)(2) ["undue prejudice includes the possibility . . . that the trier of fact will . . . treat the expression as evidence of the defendant's propensity for violence or general criminal disposition"].)

In addition, based on the research outlined in section C. (3), *supra*, creative expression in the form of rap lyrics injects racial bias into a trial. (§ 352.2, subd. (a)(2) ["undue prejudice includes . . . the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings"].) The Legislature specifically intended that the evidentiary rules recognize "the use of rap lyrics . . . as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice." (Ass. Bill No. 2799, sess. 2021-2022, ch. 793, § 1.)

Finally, the lyrics were cumulative of other substantial

evidence introduced to show gang affiliation, gang loyalty, motive and intent. Yet, the jury was exposed to an egregious amount of references to the material throughout trial. In fact, in his opening statement, the prosecutor stated the lyrics were the "*third* source of evidence of [other than the gang expert and other gang members] about gang life and the way gang members think." (RT 2328.)

(1) Literal treatment of the lyrics in the prosecutor's opening and closing arguments.

In the prosecutor's opening argument he signaled his intent to use the lyrics as literal truth of appellant's character, the nature of gangs, gang "culture" and what "gang members do":

> And the *third* source of evidence [other than the gang expert and other gang members] about *gang life and the way gang members think* is going to be the written words of the defendant himself. … the law caught up with him. And there was a search of his house. And they found rap lyrics, *lyrics that talk about how he views the world*. They are in a notebook. And, yes, at the beginning, he has written "this is a work of fiction". [sic] In the back he writes "this is a work of fiction". [sic] It will be up to you to decide whether these lyrics are fiction or not. Let me tell you about this work of fiction. *It's written in the person of "I" or "we"*. [sic] This character that is in this fictional work happens to have *the same name, nickname as the defendant*. This character happens to have the same tattoos as the defendant. This

> character happens to *belong to the exact same gang as the defendant*. This character happens to *live in this exact same part of the country* as the defendant, Atwater village, okay. And this character *was on the run for murder charges, just like the defendant*, okay.

(RT 2328-2329, emphasis added.)

Such an argument goes to the heart of why section 352.2 was passed, inviting jurors to ignore the very nature of rap music itself and instead to conflate the real person with a persona. Writing in the first-person under a nickname or persona is ubiquitous in rap lyrics. For example, Marshall Mathers III, performs under the pseudonyms "Eminem" and "Slim Shady." Mathers once told Spin magazine, "Slim Shady is a name for my temper and/or anger. Eminem is just the rapper. Marshall Mathers is who I am at the end of the day." (See Eminem, *The Way I Am* 141, 148 (2008); Aaron McKrell, *Real Talk: Eminem Needs to Resurrect Marshall Mathers & Retire Slim Shady*, HIPHOPDX (Jan. 23, 2020, 4:00 PM)[4].) In addition, rap is highly

[4] <https://hiphopdx.com/editorials/id.4421/title.real-talk-eminem-needs-to-resurrect-marshall-mathers-retire-slim-shady>

geographically based on the neighborhood a rapper represents and the local slang. (See Kenneth French, *Geography of American rap: rap diffusion and rap centers*, GeoJournal, Vol. 2, No. 2 (2017), pp. 259-272.) The prosecutor's argument suggests an illogical counter-factual, that in order for rap to be "fiction," the rap artist would have to falsely claim a neighborhood with which he had no affiliation or perhaps even more implausibly, rap about a neighborhood that does not exist.

The prosecutor's opening statement continued with the following quotations from the lyrics and his explanation of how they reflected the truth:

> This is an example from Mc Ghee's rap lyrics, about *the attitude towards rival gang members*, the enemies:
>
> > "Fuck all enemies. You get execution style murder. Drop to your knees. And you know I'm steady plottin' how to make the next one smell fucking rotten. I'm out to make a killin'. Represent for all you villens. Toonerville on my back.
>
> Remember that big Toonerville on his back? Next one, please.
>
> > "Here I come. Here I come. Last chance to run. Killer with a gun. Out to have some fun. In my dreams I hear screams. Pleasure I feel is so obscene."
>
> *The way gang members think as you will hear in this case is different, just different*. Next one, please.
>
> > "Enemies, we body bagum. We love to tag um. Can't

> compete with our streets when we serve up such heat. The gang flow through us like drugs in veins. Won't stop bangin 'til we're memories and bloodstains. The village criminal conspiracy to murder with ways of killin you just never heard of. Through sunshine and stormy weather we slang that bang that there ain't none better. Mass killin grave fillin' true fuckin' villen."

Room covered in plastic bodies stacked to the ceiling. *That's the attitude I am talking to. That is what leads to four out of these five shootings*. I said four out of the five shootings. Why did I say that? Because the 5th shooting, … was also a shooting at police officers. And you will see there is a group of people that, depending upon the gang member, hates -- a group that the gang members hate almost as much as enemies and that's the police, the police who stop them from doing whatever they want to be doing. *Again, from McGhee's notebook. This is his attitude towards police. This is what motivates the ambush. This is pretty straight to the point.*

> "So fuck all police, judges and D.A.'s. You all can catch spray from m f – [AK]"

You can figure out what m f stands for -- you will hear evidence in this case about an AK 47 being used in one of the shootings. In fact, that is what happened to Margie Mendoza. That is why she had half her hand blown off, it was from an AK 47 round. Next one, please. Pig, of course, is a reference to police.

> "Kill a rat. Piggie, piggie, please stop tellin' them lies. Witness protection won't work. Realize your rat ain't going to make it to the stand to identify the man shooting up the ham. [] Can't promise protection when you can't protect yourself. Give it up, Mr. Pig, and place your badge on the shelf."

Last one, please. This is really short and sweet.

> "I love to see a punk police flat line."

(RT 2332-2335, emphases added.) The prosecutor kept returning to the lyrics as a source of literal truth, concluding with:

> I won't deny, I've never cried for an enemy that died. And if I said I wished them all dead, I wouldn't have lied. I laugh at the laws and challenge them to find me guilty.

(RT 2390.)

There are compelling reasons why these lyrics should never have been admitted and treated as literal truth.

First, violence has long been a prevalent theme in rap—especially gangsta rap. Beginning in the 1980s, audience interest in gangsta rap's dark themes led it to become increasingly popular and more profitable than any other rap subgenre. (Charis E. Kubrin, *Gangstas, Thugs, and Hustlas*: *Identity and the code of the street in rap music*, Social Problems, 52(3), 360–378 (2005), at p. 367.) Rappers from all walks of life often project an image of toughness, referring to themselves as soldiers, assassins, gangstas, hustlers, killas, thugs, and outlaws. (*Id*. at p. 369.) A study found 65 percent of over 400 rap songs reviewed referred to some aspect of violence, and many of these songs were graphic in their depictions. (*Ibid*.) These lyrics may shock older or

more traditional listeners (those most likely to serve on juries) – and particularly for the consumers of rap music *that is the point*.[5]

Second, lyrics calling out the police or threatening the police are also a common theme, usually as commentary on injustices in the community. (Carlton Ridenhour & Yusuf Jah, *Fight the Power: Rap, Race, and Reality* 256 (1997).) The phrase "fuck the police," for example, has a long history in rap music, first popularized in N.W.A.'s famous song, and versions of the song have been remade numerous times by other rappers. Likewise, over the years, literally dozens of rappers have called out or harshly criticized the police in their lyrics, including nationally-known artists such as Ice T (Cop Killer), 2Pac (Open Fire), S.O.U.L. Purpose (The Other White Meat), 50 Cent (Officer Down), and Cypress Hill (Pigs)—to name a few. Rapper Ice Cube even identified some of the officers in the Rodney King beating by

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[5] "Part of the seduction of rap for mainstream America, particularly white young people, lies in its iconoclasm in relation to white American cultural norms. It is Other, it is hard, it is deviant." (Imani Perry, *Prophets of the Hood* 136 (Duke University Press 2004).)

name in his song *We Had to Tear this Mothafucka Up*, at various points describing the revenge he would take against them with lines like "Born, wicked, Laurence Powell, foul/Cut his fuckin' throat and I smile" and "Pretty soon we'll catch Sergeant Koon/Shoot him in the face, run up in him with a broom." (ICE CUBE, WE HAD TO TEAR THIS MOTHAFUCKA UP (Priority Records 1992).)

During closing arguments, the prosecutor repeated many of these same lyrics and the rap lyrics generally, treating them as evidence of appellant's character, state of mind, and commission of the charged crimes. (RT 4448-4449 ["He has his gang lyrics. Anybody doubt in any way, I can read those gang lyrics."], 4297 ["Matching lyrics as to both motive and method"], 4298 ["I just recommend to you reading all the lyrics. Because it is incredible how much hatred this guy has towards rival gang members"], 4306 ["4311 ["You should read the lyrics . . . about snitches and what happens to snitches. There is a horrific thing about snitches. . . . Should be gang raped and left to die on the side of the road, things like that"].) Put simply, the prosecutor sought to

shore up the deficiencies in his case by leaning heavily on the inflammatory nature of appellant's creative expressions. (See e.g., RT 4306 ("When we look at his rap lyrics, everything is corroborated.")

As to certain lyrics—stepping out of "the ride," "running like Forrest Gump," "chase them down faster than a Cheetah," "hunting season," and "commence to dump"— the prosecutor's comment, which can only be described as a wild stretch, was, "Of all the methods of shooting that he should write about, what a coincidence, he writes about the exact same method of shooting that occurred in Cardiel-Sanchez." (RT 4290-4292.) He claimed the lyrics were corroborative of that crime because, "he [appellant] stepped out the ride. He chased the victim like a Cheetah, and he commenced to dump [shoot]." (RT 4301, 4452 ["He likes to chase victims. That is what was in his rap lyrics"].)

Again, during closing, the prosecutor claimed appellant "did the Ronald Martin Cloudy shooting," to avenge the death of Hozer because the lyrics twice mentioned "R.I.P Hozer"; the prosecutor argued "What a coincidence. Ladies and gentlemen,

that's it. . . . I mean, this guy is guilty. Enough said." (RT 4296-4297, 4451.) The prosecutor further argued the portions of the lyrics mentioning "piggy" or "pig," and "I'd love to see a punk police officer flat line," proved that appellant was the person who shot at the police officers. (RT 4306-4308, 4457.)

(2) Literal treatment of the rap lyrics during the gang expert's testimony.

The rap lyrics were extensively discussed and treated as literal truth during the testimony of the prosecution's gang expert, Officer Ferreria. Worse still, the *actual* expertise for which Ferreria was qualified to testify (gang evidence) was conflated with expertise as to appellant's creative expression (rap lyrics). First, the prosecutor used the lyrics to elicit testimony from Ferreria that appellant was the leader of the Toonerville gang:

> Q. Now, you said that you knew or had an opinion that this defendant was the leader of Toonerville gang; do you remember that?
>
> A. Yes.
>
> Q. And I want to ask you about if some of these lyrics are consistent with that. . . . Let's read this

lyric. “I’m like a mad pitbull on the attack. Find yourself on your back when I let the gat crack.” Let’s stop there for a second. What does “gat” refer to?

A. Gat is kind of like a street slang or vernacular of a weapon of some sort or even a handgun or even an AK 47. because that is because you can actually hear the crack of the mechanism of the weapon. It actually does make a cracking sound.

Q. “This baldheaded loco guaranteed to pack a weapon so when I come in, jaws drop and pussies get wet. Big Eskimo with more stripes than a Vietnam vet.” That last line, “Big Eskimo with more stripes than a Vietnam vet”, [sic] can you help us interpret that?

A. First of all, gang members -- if there are other gang members like Eskimo they would be like tiny, little. Basically it is rank and file. If you are Big Eskimo, it means that you are the Eskimo. He’s referring to that I am the one and only Eskimo. Of course, stripes as a Vietnam vet. It was one of the major wars fought by the United States. The more stripes, indicates he is top ranking in his gang.

Q. And within a gang how do you earn stripes?

A. Committing crimes.

Q. Okay. And is there some correlation between how serious the crime and how many stripes you get?

A. Yes. The more serious the crime, the more stripes you get. And all the way up to murder, I mean, that’s heavy stripes. Almost from the shoulder all the way to the arms, you know.

Q. You are talking about that figuratively?

A. Yes, figuratively.

Q. Explain to us how is it that you can actually in this culture be respected and earn respect and stripes for killing people?

A. Well, the gist of it is basically it's about protecting the neighborhood, protecting -- and your family is considered your neighborhood. And, of course, if you are willing to kill or die for your neighborhood, your status is that much elevated. It's just like any one of us that would want to protect our family members. That's how they look at it.

Q. And also do -- oh, also that lyric that we heard or read "with one collect call with a name to my homie is all it takes to put your witness at stake"; do you remember that?

A. Yes.

Q. That was on page 6125. Is that also indicative of somebody with status within the gang?

A. Yes.

Q. In what way?

A. Well, to go out -- if you are going to make a phone call and someone is going to kill for you, you pretty much have to have some status in that gang. They're just not going to kill for a two bit gangster in their mind from one collect call. You have no real status. In order for you to gain that status, you have

to commit this crime or be a leader to make that one call.

Just like if we go down to my chief of police, if you were to make a phone call, it's the same thing because he's the head of the police department. So it's the higher up and the more power you basically have.

Q. I want to change the exhibit just very briefly to People's 79. And just the first line, please. "Got more juice than tropicana." Okay, do you have an opinion as to what that refers to, especially the word "juice"?

A. Yes.

Q. Okay. Tell us about that?

A. Well, I think a lot of people know, with that term juice meaning I have the power; you know, kids are using it in rap lyrics and such to just indicate that I'm the man or the head -- the head guy.

(RT 3982-3986.)

As the above exchanges illustrate, there was no limit on how many (and the vulgarity) of the lyrics the prosecutor could reference and no evaluation of their probative value (i.e. their truthfulness) versus their prejudicial impact. And their probative value does not pass muster under either section 352 or 352.2, because "[b]ragging and boasting, known as braggadocio . . . have always been an important part of hip-hop lyrics and are an art

form all in themselves." (Paul Edwards, *How to Rap: The Art and Science of The Hip-Hop MC 25* (2009).) Boasting, the penchant for violence, the displays of guns and drugs, the discussion of prostitution, the territorialism – are all standard "gangsta rap" tropes, and hence prove little about what appellant did or did not do. (See Dennis, *supra*, *Poetic (In)Justice*, 31 Colum. J.L. & Arts at p. 22; see also Kubrin & Nielson, *supra*, *Rap on Trial*, 4 Race and Justice at pp. 185-211.)

Later in Ferreria's testimony, the prosecutor again makes reference to the rap lyrics ostensibly to prove animosity between rival gangs:

> Q. I want to read a few lyrics, just a few and ask you if this is typical of the animosity felt towards enemies.
> "Ready or not, here I come. Lyrics kick like a magnum. Enemies we body bagum. We love to tag 'em. Can't compete with our streets when we serve up such heat. The game flow through us like drugs in veins. Won't stop bangin 'til we're memories and bloodstains. The village criminal conspiracy to murder with ways of killin you just never heard of. Through sunshine and stormy weather we slang that bang that there ain't none better. Mass killin, grave, true fucking villain. Room covered in plastic bodies stacked to the ceiling."
> And that was page 6129. All right. Is this indicative or typical of the kind of attitude that rival gang members have toward one another?

A. Yes.

Q. And just a few phrases that may or may not be self-evident. “Body bagum”, [sic] what does that refer to?

A. Meaning the coroner’s bag when you are dead.

Q. “Enemies” referring to what?

A. Enemies, rival gangs.

Q. And this term “village criminal conspiracy”. [sic] What does the village refer to?

A. The village refers to Toonerville. They call that the village as well, the ville, village.

Q. What is this, “we slang that bang”, [sic] what does that refer to?

A. You know on that one, I am not quite sure but slinging means to deal. Slanging that bang, I am assuming it is –

MR. PETERS: Objection, your honor, assumption.
THE COURT: If he's assuming, I will sustain. If the word slang --slinging has a special word meaning to you.
THE WITNESS: Yes, slinging and slang.
THE COURT: What does that mean?
THE WITNESS: Dealing drugs.

Q. BY MR. CHUN: The word “slang” means to deal?

A. That’s correct.

Q. In this case it’s not dealing drugs, it says dealing that bang, correct?

A. Yes.

Q. "Mass killing, grave filling, true fucking villain." What does the word "villain" refer to?

A. Well, the word villain, of course, is a bad person. But in this particular case villain meaning Toonerville because they are considered from the ville, villains.

(RT 3993-3995.) It is hard to overstate the immense prejudice such unbridled references to the lyrics must have had on the jury, especially where it is unclear what particular fact the prosecutor was attempting to prove. If the prosecution's goal was merely to establish that rival street gangs engage in violent conflict, one would hope that Officer Ferreria had a far more substantial basis upon which to offer such testimony than these rap lyrics.

The prosecutor then used the lyrics to portray appellant as being even "sicker" than regular gang members:

Q. Page 6122, just three lines. "Killer" -- I am sorry, four lines. "Here I come. Last chance to run. Killer with a gun out to have some fun. In my dreams I hear screams. Pleasure I feel is so obscene." Do some of the gang members actually get pleasure out of killing rivals?

A. In my opinion, yes.

Q. Now, let's be clear. You are not saying that every single gang member has that kind of sick attitude; are you?

A. No.

Q. So even within the gang world that would be somewhat a little unusual?

A. Hard core is what they would say.

(RT 3995-3996.)

Further conflating the conventions of gangsta rap with autobiography, the prosecutor leaned into the characterization of appellant as an especially hard-core gang member based on his lyrics:

Q. "I won't deny I've never cried for an enemy that died. And if I said I wished them all dead I wouldn't have lied. I laugh at the laws and challenge them to find me guilty." Do you see that?

A. Yes.

Q. And this stuff about wishing all his enemies dead, is that also indicative of somebody who is a hard-core gang member?

A. Yes.

Q. 6121. "No one knows who will die when we let these bullets fly. In the ville someone will, when we shoot, shoot to kill. I'm a Toonerville gangster coming out to play in Atwater village, northeast L.A. with a glock on b-block."
First of all, "the glock," does that refer to a particular

kind of gun?

A. Yes.

Q. And also, this lyric that we read, does this -- is this indicative of someone that is a hard-core gang member?

A. Yes.

Q. All right. And there's a reference to something "glock on b-block"; do you see that?

A. Yes.

Q. So that's referring to a glock, a hand firearm; is that right?

A. Glock is a manufacturer of a firearm.

Q. On B-block. What does B-block reference to?

A. B-block is a street in Toonerville called Bemis, B-block. Police know that as B Street, B-block.

(RT 3996-3997.) It is only at this point that the court made the obvious under-statement by calling counsel to the bench and telling him, "I think you are getting a little cumulative with this." (RT 3997.)

The lyrics appellant had written were creative expressions that he specifically labeled as fiction. The prosecution offered the jurors no basis to discriminate between the fiction, exaggeration

and truth contained in those lyrics. They did not describe specific victims by name, or specific incidents on particular dates; rather, the lyrics followed the generic rap music conventions of outrageous claims of violence, misogyny, and anti-authoritarian values. Such music is particularly misunderstood by predominantly white juries.[6]

(3) Cumulative nature of the lyrics

As stated, the disproportionate amount of time the prosecutor spent dissecting the rap lyrics was so apparent that the court sua sponte asked the prosecutor to approach the bench to tell him the evidence was "getting a little cumulative." (RT 3997.)

In fact, the lyrics as a whole were cumulative of other evidence establishing gang membership and motive. (See AOB 133 [28 pages of lyrics cumulative to evidence presented by most

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[6] As further discussed in section IV, having used at least 12 of 14 strikes against people of color, almost exclusively those of Latinx descent and/or with Hispanic names, the prosecutor was likely addressing a predominantly white jury.

all of the state's other witnesses]; see also (*People v. Coneal*, *supra*, 41 Cal.App.5th at 967-968 [lyrics were cumulative where substantial other evidence of defendant's gang membership was introduced; the only "new 'information' provided by the videos is the lyrics, and the lyrics are the problem"].)

F. The introduction of the lyrics was prejudicial.

Absent fundamental unfairness, state law error in admitting evidence is subject to the *Watson*[7] test: "whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439, citations omitted.) Without the writings, there was a reasonably probable chance of a more favorable verdict. The prosecution relied on the writings as motive and intent evidence to bolster an otherwise weak case supported largely by informant testimony. As discussed more fully in Appellant's Opening Brief, one juror was prepared to acquit appellant based on the flaws in the state's evidence and was wrongfully removed.

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[7] *People v. Watson* (1956) 46 Cal.2d 818.

As discussed in Argument V below, the prosecution relied on the writings to present appellant as a racialized threat to society and to convince the jury to sentence him to death.

As stated earlier, research by Stuart Fischoff found study participants believed that a defendant who had authored rap lyrics was more likely to commit murder than an identical defendant who had not authored rap lyrics. (Fishoff, *supra*, *The Gangsta' Rap and a Murder in Bakersfield*, 29 J. Applied. Soc. Psych. At pp. 795-805.) The prosecutor's repeated and unlimited use of 28 pages of lyrics and his arguments in this case appealed to such perceptions. Far from extraneous to the state's guilt phase case, the rap lyrics were the *foundation* of the prosecution's case. The prosecutor's guilt phase opening statement mentioned or quoted the rap lyrics seven times, sometimes at length. (RT 2328-29; 2332 -36; 2339-40; 2342; 2350-51; 2373; and 2390.) During closing argument, the prosecutor claimed, "When we look at his rap lyrics, everything is corroborated." (RT 4307.) At another point in closing, the prosecutor stated:

> But this guy, our luck, we found his own writings.

> And you read these wrtings. And they're horrifying , okay. I mean, look at this. "Fuck all enemies. You get execution style murder. Drop to your knees. You know what, I'm steady plotting how to make the next one smell rotten. I am out to make a killing, to all you villain. Toonerville on my back.". . . All of those thumpers. Here I come. Last chance to run. Killer with a gun. Out to have some fun." Fun? This guy thinks killing is fun.
>
> Am I over reading this? "In my dreams"—he dreams about this—"I hear screams." What is his reaction? "Pleasure I feel is so obscene." He likes it. He likes it, okay. So you have that. You have a big motive on his part to kill rivals.

(RT 4282-4283.)

In guilt phase closing arguments, the prosecutor quoted or discussed the lyrics twelve times. (RT 4281-82; 4289-4290; 4296-4297; 4300-4301; 4305-4307; 4309-4310; 4324; 4447-4448; 4450; 4451; 4456; 4469.) The lyrics contained graphic violence, anti-police sentiment, and first-person descriptions of the protagonist as a cold-blooded killer. Just as in *Coneal*, this evidence "paint[ed] of appellant and his fellow gang members as eagerly and ruthlessly seeking out and engaging in violence, with no empathy for their victims," which "pos[ed] a significant danger that the jury [used] it as evidence of appellant's violent character

and criminal propensity." (*People v. Coneal*, *supra*, 41 Cal.App.5th at 970-971.)

In the second penalty phase, the prosecutor tipped his hand, disclaiming that he was presenting the rap lyrics as admissions to the crimes, but only to show his "attitude." (RT 6419.) Again confusing rap conventions with reality, he argued the lyrics showed that appellant was motivated by "thrill" and "ego" (RT 6420), and emphasized the "repeated references to killing as a kind of play, joy, thrill that he gets out of it. Repeated references as to boasting and feeling like a big shot as a result of this. Ego, ego and thrill" (RT 6429-6430). The prosecutor twice repeated the lyrics, "I laugh at the laws and challenge them to find me guilty," to argue this showed appellant's "attitude" towards the criminal justice system. (RT 4470.) The lyrics, "This one I will read. It's about me, myself and I. So don't ask why if I don't cry if a snitch gots to die. It's about me, myself and I," was presented to reflect appellant's attitude towards snitches. (RT 6438.) The prosecutor also cited the lyrics to demonstrate how appellant would behave in custody. (RT 6443.)

The record establishes that, even if the lyrics were relevant—which they were not to the degree allowed—they were cumulative, inflammatory, and highly prejudicial. Had trial counsel objected to them, the trial court would have excluded or severely restricted them. If the court had the benefit of section 352.2 at the time, the lyrics would have been found inadmissible under that section because the prosecutor could not establish they were written close in time to any of the crimes, bore a sufficient level of similarity to the alleged crimes, or included factual detail not otherwise available to the public. (§ 352.2, subd. (a)(1).) Even if some of the lyrics could have been admitted under these "markers of truth," there would have been no justification for their admission under section 352.2's new undue prejudice standard because they "inject[ed] racial bias into the proceedings," and led the jury to "treat the expression as evidence of the defendant's propensity for violence or general criminal disposition." (§ 352.2, subd. (a)(2).)

G. Trial counsel was ineffective for failing to object to the admission of the lyrics under section 352 and to the gang expert's qualification to testify about those lyrics.

The standard for determining ineffective assistance of counsel is well established. A defendant must demonstrate that: (1) their attorney's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).) Because "[r]epresentation of an accused murderer is a mammoth responsibility," the "seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance" (*In re Jones* (1996) 13 Cal.4th 552, 566, internal quotation marks and citations omitted.)

Prejudice is shown if the court finds a reasonable probability that a more favorable result would been achieved but for the deficient representation. (*Strickland*, 466 U.S. pp. 687–688, 693–694.) Reasonable probability" is one "sufficient to

undermine confidence in the outcome." (*Id*. at 694.)

(1) Failure to object under section 352

Prior to trial, the prosecutor filed a motion in limine to introduce the rap lyrics ("defendant's gang writings"). (7 CT 1523 et seq.) Incredibly, the defense did not respond in writing, or in court, other than to suggest that the prosecution motion should be under seal because the media had already started regurgitating the lyrics in newspaper articles. (8 RT 1734.) Defense counsel's lapse in this regard could not be explained by any plausible strategic rationale.

The prosecution's arguments that the lyrics had any relevance were weak. (7 CT 1523 et seq.) For example, the prosecutor stated appellant's notebook "contains his admission that it is [appellant's] custom as a Toonerville gangster to shoot to kill, not merely to wound: 'No one knows who will die when we let these bullets fly/ In the Ville someone will/ When we shoot we shoot to kill'." This is directly relevant because in each of the shootings, [appellant] is alleged to have personally shot with premeditated and deliberate intent to kill." (7 CT 1528.) This

argument is specious and begged a response. Defense counsel offered none.

During trial, the court told the prosecutor, "You're always pushing," after the court interjected its own Evidence Code section 352 objection to testimony from Ferreria that was "too much," and "fairly speculative." (RT 3970.) Later, at another point, the court *sua sponte* called counsel to approach the bench to admonish the prosecutor that the use of Ferreria's testimony to interpret the rap lyrics was "getting a little cumulative." (RT 3997.)

All of these examples show the prosecutor used the lyrics as improper "evidence of [appellant's] character or a trait of his . . . character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct)" to prove his disposition to commit the crimes charged. (Evid. Code § 1101, subds. (a) & (b).)

(2) Failure to object to Ferreria testifying as "gangsta rap" expert

Notable throughout Ferreria's testimony, is how he was

permitted to give "expert" testimony about rap lyrics and the meaning of certain language in those lyrics. There was no showing that Ferreria was qualified to give such testimony. (See *Commonwealth v. Gray* (Mass. 2012) 978 N.E.2d 543, 561 ("[a] police officer who has been qualified as a 'gang expert' cannot, without more, be deemed an expert qualified to interpret the meaning of rap music lyrics"].) Police gang experts rarely have specialized knowledge about rap lyrics and can misinterpret or misconstrue the meaning of the lyrics in question. (See Jeff Weiss, *Stabbing, Lies, And A Twisted Detective: Inside the Murder Trial of Drakeo the Ruler,* FADER (July 11, 2019)[8], note 323; see also Tracey Kaplan, *Man Acquitted of Murder After Oakland Hip-Hop Artist Boots Riley Testifies About Meaning of "Where da Licks,"* MERCURY NEWS (Jan. 27, 2017, 5:38 PM)[9] [rapper and film director Boots Riley served as an expert witness

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[8] <https://www.thefader.com/2019/07/11/drakeo-the-ruler-murder-trial-los-angeles-report.>

[9] <https://www.mercurynews.com/2017/01/27/rare-end-to-murder-trial-man-acquitted-after-oakland-hip-hop-artist-boots-riley-testifies/>

in a San Jose, CA case to explain that the question "Where da licks?" has varied meanings, including "What's happening?" or "What's up?," and may not necessarily imply a question about robbery, as the prosecution had argued].)

Trial counsel did not object to Ferreria's lack of qualifications to testify as an expert in the meaning or translation of rap lyrics. Perhaps most egregiously, this lapse led to the following exchange between the prosecutor and Ferreria:

> Q. Do some of the gang members actually get pleasure out of killing rivals?
> A. In my opinion, yes.

(RT 3995.) Defense counsel did not object.

(3) Counsel's deficient performance was prejudicial.

The trial court's comments and interjections to the rap lyrics highlights counsel's deficient performance and show that, had counsel responded to the prosecution's motion in limine prior to trial and objected to it under section 352 and on due process grounds, the court would likely have ruled in appellant's favor. (See e.g., RT 3997 [court interposes its own objection]; see also RT 3970 ["You're always pushing"].) Indeed, the prosecution's

decision to file the motion in limine suggests that even the state expected the defense to object to the use of the lyrics.

Having encountered no resistance, the prosecution was free to argue that the lyrics reflected appellant's "attitude," how he would behave in the future, and that he was motivated by "thrill" and "ego," among other things. In other words, the prosecutor clearly spoke to appellant's character and propensity to commit the crimes charged. Even if relevant, this evidence was "unduly prejudicial" under section 352 because it "uniquely tend[ed] to evoke an emotional bias against [appellant] as an individual" while its probative value on the issues was minimal, creating "a substantial likelihood the jury would use it for an illegitimate purpose." (*People v. Doolin* (2009) 45 Cal.4th 390, 439, internal quotations and citations omitted.)

Defense counsel's only attempt to meet this evidence was in argument, at which point he dismissed the writings as fiction. (RT 4339-40.) This fleeting argument could not defeat the harm caused by the juror's repeated exposure to this inflammatory and racially biased testimony. This was an argument to make to the

trial court, not the jurors. Given the gravity of the case for appellant, counsel's failure to object to or attempt to limit the use of the rap lyrics under sections 1101 and 352, constituted ineffective assistance of counsel.

II.
The gang enhancements and gang-murder special circumstance must be reversed under AB 333.

Assembly Bill 333 ("AB 333") effected retroactive changes to section 186.22, California's gang enhancement statute, by modifying the definitions of a "criminal street gang" and "pattern of criminal gang activity." (See *People v. Tran* (2022) 13 Cal.5th 1169, 1206-1207 (*Tran*) [holding AB 333's amendments to the section 186.22 gang enhancement are retroactive to all non-final cases].) In turn, these changes impacted the gang-murder special circumstance in section 190.2, subdivision (a)(22), because that section incorporates section 186.22's definition of criminal street gang. Here, the jury found true the alleged gang enhancements (§ 186.22, subd. (b)(1)) in counts 3, 4, 5, 6, 12, 13, and 14, and the alleged gang-murder special circumstances (§ 190.2(a)(22)) in counts 4 and 12. (CT 3828-3833.) Under AB 333's new provisions,

the evidence presented at trial does not support the jury's gang enhancement and special circumstance findings. As a result, the sentences imposed in accordance with these findings must be reversed.

A. Proceedings below

Appellant was charged by way of an information with three counts of murder in violation of Penal Code section 187 (Counts 3, 4 and 12), and six counts of attempted willful, deliberate and premeditated murder in violation of sections 664 and 187 (Counts 1, 2, 5, 6, 13 and 14)[10]. (7 CT 1478-1485.) The information also alleged the gang enhancement described in section 186.22, subdivision (b)(1), the multiple-murder special circumstance described in section 190.2, subdivision (a)(3), and the active gang participant special circumstance described in section 190.2, subdivision (a)(22). (7 CT 1478-1484.) The jury convicted appellant of all three murder counts, four of the six attempted

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[10] The numbered charges in the information are the same as those listed in the original felony complaint although counts seven through 11 were dismissed before trial.

murder counts, and further found all of the enhancement and special circumstance allegations to be true. (15 CT 3828-3835.) The jury found appellant was not guilty of two of the attempted murder counts. (15 CT 3826-3827.) After the first penalty phase jury was unable to agree on the appropriate sentence (29 RT 5764), a second penalty phase jury recommended a death sentence (39 RT 7768).

B. AB 333 narrowed the definition of "criminal street gang" in section 186.22.

"In 1988, the Legislature enacted the California Street Terrorism Enforcement and Prevention Act (STEP Act; § 186.20 et seq.) to eradicate 'criminal activity by street gangs.'" (*People v. Valencia* (2021) 11 Cal.5th 818, 828.) In 2021, about thirty-three years after the STEP Act was imposed, the Legislature enacted AB 333, The Step Forward Act, finding that: "The gang enhancement statute is applied inconsistently against people of color, creating a racial disparity;"[11] that "[t]he current statute

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[11] Ass. Bill No. 333 §2. (d)(l)

disproportionately impacts communities of color, making the statute one of the largest disparate racial impact statutes that imposes criminal punishments;"[12] and that, "[i]n Los Angeles alone, the state's largest jurisdiction, over 98 percent of people sentenced to prison for a gang enhancement are people of color."[13] The findings of the Legislature make it abundantly clear that gang allegations and enhancements were a mechanism that disproportionately targeted and punished people of color and injected racial and ethnic bias into criminal proceedings.[14] Thus, AB 333 is an attempt to reduce the bias, racism, and harm that gang allegations have had on communities of color as a consequence of the original STEP Act which has been devastating for Black and Latino communities, especially in Los Angeles.

Originally, the STEP Act defined a criminal street gang as "any ongoing organization, association, or group of three or more

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[12] Ass. Bill No. 333 §2. (d)(2)

[13] Ass. Bill No. 333 §2. (d)(4)

[14] These findings also implicate the California Racial Justice Act (see discussion infra, section V).

persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated predicate offenses], which has a common name or common identifying sign or symbol, whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Stats. 1988, ch. 1242, § 1, p. 4129, italics added.) Effective January 1, 2022, the Legislature through AB 333 removed "organization," replaced it with "organized," and dropped the phrase "individually or." (Stats. 2021, ch. 699, § 3.) The definition of a "criminal street gang" is now:

> an *ongoing, organized association or group* of three or more persons, whether formal or informal, having as one of its primary activities the commissions of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members *collectively* engage in, or have engaged in, a pattern of criminal gang activity.

(§ 186.22, subd. (f), emphasis added.)

AB 333 additionally narrowed the definition of "pattern of criminal gang activity" necessary to prove that criminal street gang exists. (Stats. 2021, ch. 699, § 3.) Originally, this "pattern" was proven by the commission, attempted commission,

conviction, etc., of two or more enumerated predicate offenses where: (1) the last of the predicate offenses occurred within three years of a prior offense; and (2) the predicate offenses were committed on separate occasions or by two or more persons. (Stats. 1988, ch. 1242, § 1, pp. 4128-4129.) Now, under AB 333, this "pattern" is proven only where: (1) the last of the predicate offenses occurred within three years of the prior offense *and within three years of the currently charged offense*; (2) the predicate offenses must be committed on separate occasions or by two or more *gang members*; (3) *the predicate offenses must commonly benefit a criminal street gang*; (4) *the common benefit must be more than reputational*; and (5) *the currently charged offense cannot be used as one of the two required predicate offenses*. (§ 186.22, subds. (e)(1), (2); accord, *People v. Tran*, *supra*, 13 Cal.5th at pp. 1205-1206.)

AB 333 further provided examples of the types of more-than-reputational "common benefit" required: financial gain, retaliation, targeting perceived gang rivals, intimidating witnesses, etc. (§ 186.22, subd. (g); accord, *People v. Tran*, *supra*,

13 Cal.5th at p. 1206.)

As explained below, the evidence offered in this case failed to meet these requirements.

C. Under *People v. Rojas,* AB 333 applies retroactively to the gang special circumstance in Penal Code, § 190.2(a)(22).

To find true a gang-murder special circumstance, the prosecution must prove, among other things, that the defendant "was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).) As written, the special circumstance incorporates the definition of "criminal street gang" set out in section 186.22, subdivision (f), which in turn incorporates the definition of "pattern of criminal gang activity" in section 186.22, subdivision (e). As explained above, AB 333 heightened the evidentiary requirements that must be satisfied to prove both a "criminal street gang" and a "pattern of criminal gang activity."

The gang-murder special circumstance was created by the voters—not by the Legislature—in section 11 of Proposition 21

(Prop. 21) on the March 7, 2000, ballot. (See *Robert L. v Superior Court* (2003) 30 Cal.4th 894, 897.) The question of whether application of AB 333 to the gang-murder special circumstance in section 190.2(a)(22) constituted an unlawful amendment to Proposition 21 divided the Courts of Appeal but was recently resolved by this Court. In *People v. Rojas* (2023) 15 Cal.5th 561 (*Rojas*), the Court concluded the words of Proposition 21 did not make clear that the initiative intended to lock in the then-current definition of a criminal street gang. This omission was significant, given that other portions of the initiative did use specific lock-in language. (*People v. Rojas*, *supra*, 15 Cal.5th at pp. 573-574.) The Court further found that application of AB 333 was not inconsistent with voters' intent to punish gang murderers more harshly because it did not change the punishment associated with gang crimes. Rather, after decades of experience with the original definition of gang crime, the legislature chose to redefine the term in order to target the population for which the greater punishment was warranted. (*People v. Rojas*, *supra*, 15 Cal.5th at pp. 574-578.)

Finally, the Court pointed out the illogic in the Attorney General's position that would allow a more stringent definition of a gang crime in all circumstances except for the special circumstance. (*People v. Rojas*, *supra*, 15 Cal.5th at p. 578.) Given the Attorney General's concession that the evidence was insufficient to support the special circumstance under the new law, the Court reversed the judgment.

In sum, AB 333's ameliorative effect applies to all nonfinal cases, such as this one, in which the prosecution alleged the gang-murder special circumstance under section190.2, subdivision (a)(22).

D. The prosecutor failed to establish the facts now required to prove the gang enhancements or the gang-murder special circumstance under AB 333.

As noted above, AB 333 amended the definition of a criminal street gang and added new limitations to the types of predicate offenses that sufficiently establish "a pattern of criminal activity" under the new definition. Here, the prosecution's predicate offenses evidence was the conviction of Sergio Cabrera for assault with a firearm and voluntary

manslaughter (RT 3961-3963), and the conviction of Joseph Anthony Osorio for assault with a firearm and voluntary manslaughter (RT 3963-3964). This evidence was insufficient to establish a pattern of criminal activity under current law.

(1) The evidence did not establish the date of either predicate.

To prove a "pattern of criminal activity," the last of the predicate offenses must have occurred within three years of the prior offense and within three years of the currently charged offense. (§ 186.22, subds. (e)(1).)

Here, each predicate was established only by certified conviction records: of Osorio's offense, dated May 23, 2002; and Cabrera's offense, dated December 12, 2000. (RT 3961-3963 [People's Exhibits 81 and 82].) While these conviction records were admissible under Evidence Code section 452.5, subdivision (b)(1) as official records, they were admissible only to prove the fact of the prior convictions. "[T]he use of a record of a prior conviction to prove any fact other than the fact of conviction violates the Sixth Amendment. In the words of modern

jurisprudence, records of convictions used to prove facts other than the fact of conviction itself are testimonial." (*People v. Garcia* (2020) 46 Cal.App.5th 123, 171.)

"[A] fact which can be primarily established only by witnesses cannot be proved against an accused, charged with a different offense, for which he may be convicted without reference to the principal offender, except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. " (*Kirby v. United States* (1899) 174 U.S. 47, 55).

Because the certified conviction records could not be used to prove the date of each predicate, and there was no other evidence of the dates, there was no proof that the predicate offenses occurred within the required time period.

(2) The predicates did not establish a "pattern of criminal gang activity" that "commonly benefited" the gang.

To prove a pattern of criminal gang activity, the prosecutor must now establish that the predicate offenses "were committed on separate occasions or by two or more members," and that they "commonly benefited a criminal street gang and [that] the common benefit from the offenses [was] more than reputational." (§ 186.22, subd. (e)(1).) Here, each predicate offense was committed by a lone gang member with an unknown purpose for committing the crime.

First, this Court has yet to resolve the question of whether, under section 186.22 as amended by AB 333, a pattern of criminal gang activity can ever be established by evidence of *individual* gang members committing separate predicate offenses, rather than evidence of two or more gang members working in concert with each other during each predicate offense. (*People v. Clark* (2022) 88 Cal.App.5th 133, rev. granted Oct. 19,

2022, S275746.)[15] This is because the Legislature excised the word "individually" from the original definition of "any ongoing organization, association, or group" whose members "individually or collectively engage in, or have engaged in, a pattern of criminal gang activity" (former (§ 186.22, subd. (f)), in favor of the current language, "an ongoing, organized association or group" whose members "collectively engage in, or have engaged in, a pattern of criminal gang activity" (AB 333, § 3; amended § 186.22, subd. (f), eff. Jan. 1, 2022). The Courts of Appeal are divided over the interpretation of this new language.(Compare *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1088-1089 [two predicates must each be committed by at least two gang members] and *People v. Lopez* (2021) 73 Cal.App.5th 327, 344-345 [same] with *People v. Clark*, *supra*, 88 Cal.App.5th at pp. 145-146 [two predicates may be committed by two gang members who separately committed crimes on different occasions].)

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[15] Clark was argued before this Court on December 5, 2023, and the result is pending.

Appellant believes *Clark* is less persuasive because a reading of subdivision (e) consistent with *Clark*'s reasoning would render the deletion of "individually or" in subdivision (f) meaningless and the remaining word "collectively" surplusage. As the *Delgado* court noted, the legislative history of AB 333 makes clear that the pattern of criminal activity required under the definition of criminal street gang "must be done by members collectively, *not individually*." (*People v. Delgado*, supra, 74 Cal.App.5th at p. 1090, citing Sen. Com. on Appropriations, Analysis of Assem. Bill No. 333 (2021-2022 Reg. Sess.), italics added.) Thus, because the Legislature specifically deleted the term "individually" from the requisite pattern of gang activity, it is difficult to discern a persuasive construction of that term that allows for individual action to satisfy the requirement.

However, this Court need not select among any of these alternative readings because, under any theory, there was no evidence that the lone-actor predicates were gang- related. The only evidence the prosecution presented of the predicates offenses was through Officer Ferreria's testimony that he knew Cabrera

and Osorio to be Toonerville members. (RT 3962-3964) Beyond this reputational evidence, Ferreria did not testify that the predicate offenses were in any way committed for the common benefit of the Toonervilles or in any way linked to gang activity. (RT 3962-3964.)

Reviewing courts have reversed section 186.22 enhancements on appeal in cases where prosecutors offered evidence of the reputational benefit arising from the predicate offenses, even if the prosecution also offered evidence of more than a reputational benefit. (*People v. E.H.* (2022) 75 Cal.App.5th 467, 479; *People v. Sek* (2022) 74 Cal.App.5th 657, 668-669.) Here, the prosecution failed to offer any evidence that the predicate offenses "commonly benefitted" Toonerville. (§186.22, subd. (e)(1).)

"Not every crime committed by an individual gang member is for the gang's benefit or to promote criminal conduct by gang members, as the gang enhancement statute requires in such cases; gang members can, of course, commit crimes for their own purposes. Without more, expert testimony about the reputational

benefits of crime does not support an inference that a lone gang member committed a crime for gang-related reasons — as opposed to acting from other, more personal motives." (*People v. Renteria* (2022) 13 Cal.5th 951, 957.) Here, because each proffered predicate offense was committed by a lone actor without any evidence that the offense was gang related, the two offenses failed to meet the requirements of subdivisions (e) or (f).

(3) The prosecutor impermissibly used the current offenses to establish a pattern of criminal activity.

Under AB 333, the currently charged offense "shall not be used to establish the pattern of criminal gang activity." (§ 186.22, subd. (e)(2); *Lopez, sup*ra, 73 Cal.App.5th at p. 345.) Yet, that is what happened in this case.

During closing, the prosecutor told the jury, "[H]ere is the most important thing you need to remember about—about defining a gangs [sic] and whether there is a pattern of criminal activity. You can use the charged offenses." (RT 4334-4335.)

AB 333 makes clear that is no longer permissible. Therefore, since the requisite "pattern of criminal activity" could

not have been established by the current offenses or the two predicate offenses of Cabrera and Osorio, the prosecution failed to show there was a pattern of criminal gang activity within the meaning of revised §186.22(e).

E. The above errors allowed the jury to find true the gang enhancement allegations and the gang-murder special circumstances.

The failure to prove a pattern of criminal gang activity by a criminal street gang requires reversal of the gang-murder special circumstance (§ 190.2, subd. (a)(22)) and the gang-related sentencing enhancements (§ 186.22, subd. (b)(1)).

When a substantive change occurs in the elements of an offense and the jury is not instructed as to the proper elements, the omission implicates the defendant's right to a jury trial under the Sixth Amendment and reversal is required unless "it appears beyond a reasonable doubt" that the jury verdict would have been the same absent the error. (*Chapman v. California* (1967) 386 U.S. 18; see also *People v. Tran, supra*, 13 Cal.5th at p. 1207, quoting *People v. Flood* (1998) 18 Cal.4th 470, 504.)

Here, it cannot be concluded beyond a reasonable doubt

that the jury verdict would have been the same absent the errors. The jury instructions and arguments of counsel allowed the jury to find the enhancements and special circumstances true without finding that the predicate offenses were committed "within three years of the date the current offense," "by two or more gang members," and for the "more than reputational" benefit of the gang, that is, without finding a "pattern of criminal activity." (Assem. Bill 333, § 3, revised § 186.22, subd. (e)(1) and (2).)

Where the existing record is insufficient to support a heightened evidentiary requirement that was not required at the time of trial, reversal and remand to afford the prosecutor an opportunity to prove that element is proper. (*People v. Ramos* (2022) 77 Cal.App.5th 1116, 1128; *People v. Lopez, supra,* 73 Cal.App.5th at p. 346; *People v. Eagle* (2016) 246 Cal.App.4th 275, 280; *People v. Figueroa* (1993) 20 Cal.App.4th 65, 71-72, fn. 2.) Specifically, where "the evidence presented at trial failed to establish that the gang members 'collectively' engaged in a pattern of criminal gang activity, as required by section 186.22 as newly amended" and "the jury was not presented with any

discernible theory as to how [gang] members 'collectively engage[d] in' these predicate crimes (§ 186.22, subd. (f))," "reversal of the gang enhancement is required." (*People v. Tran, supra*, 13 Cal.5th at p. 1207.)

F. The above errors resulted in prejudice.

The imposition of the gang enhancements and gang-murder special circumstances was highly prejudicial with respect to the penalty phase. Under the Eighth Amendment, the death penalty is qualitatively different from all other punishments, and its imposition requires a greater level of reliability, with respect to both the guilt and penalty phases of a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Gardner v. Florida* (1977) 430 U.S. 349.) Moreover, when state law gives the jury a role in sentencing, the defendant has a liberty interest, protected under the due process clauses of the Fifth and Fourteenth Amendments, in having the sentence imposed by a jury accurately informed of state law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

Here appellant's death sentence was necessarily tainted by

the jury's gang findings, now invalidated by AB 333. In the absence of such findings, there is a reasonable probability that at least one juror would have struck a different balance and decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537; *People v. Danielson* (1992) 3 Cal.4th 691, 738 (conc. & dis. opn. of Kennard, J.) ["When evidence has been erroneously received . . . , this court should reverse the death sentence if it is 'the sort of evidence that is likely to have a significant impact on the jury's evaluation of whether defendant should live or die'"].) As the Legislature noted in enacting AB 333, "California courts have long recognized how prejudicial gang evidence is." (AB 333, § 2, subd. (e), citing *People v. Williams* (1997) 16 Cal.4th 153, 193 [recognizing that "admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged"].)

Accordingly, appellant's gang enhancements, gang-murder special circumstances, and death sentence must be reversed.

III.
Failure to bifurcate the gang enhancements and gang special circumstances from the non-gang charges constituted prejudicial error.

On appeal, the whole of AB 333, including newly enacted section 1109, should apply retroactively to appellant's trial where there are no grounds for treating just one section of the bill as prospective only.

A. Newly enacted section 1109 requires retroactive application to all non-final cases that include gang enhancements under section 186.22.

AB 333 created Penal Code section 1109. (Stats. 2021, ch. 699, § 5; accord, *People v. Tran* (2022) 13 Cal.5th 1169, 1206.) In relevant part, section 1109 states that, when "requested by the defense," gang enhancements under subdivision (b) of section 186.22 "shall be tried in separate phases" with the underlying question of guilt tried first. (§ 1109, subd. (a).) In *People v. Tran, supra*, 13 Cal.5th at p. 1208, this Court recognized a split of authority regarding the retroactivity of section 1109 and declined to resolve it. (See, e.g., *People v. Burgos* (2022) 77 Cal.App.5th 550, 564-569, review granted July 13, 2022, S274743 [section

1109 applies retroactively]; *People v. Ramos* (2022) 77 Cal.App.5th 1116, 1128-1133 [same]; *People v. Montano* (2022) 80 Cal.App.5th 82, 105-109 [section 1109 applies retroactively only as to gang enhancements]; *People v. Perez* (2022) 78 Cal.App.5th 192, 207, review granted Aug. 17, 2022, S275090 [section 1109 does not apply retroactively]; *People v. Ramirez* (2022) 79 Cal.App.5th 48, 64-65, review granted Aug. 17, 2022, S275341 [same]; *People v. Boukes* (2022) 83 Cal.App.5th 937, 946-949, review granted Dec. 14, 2022, S277103 [same].)

Ordinarily, the Legislature makes laws that apply to events that will in occur in the future, and, as a canon of statutory interpretation, there is a presumption that laws apply prospectively. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1222; accord, § 3.) The Legislature can enact laws that apply retroactively, either explicitly or by implication. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 311 (dis. opn. of Mosk, J.).) AB 333 does not contain any express statements concerning retroactivity. (Stats. 2021, ch. 699, §§ 1-5.) Under *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*), this Court can retroactively

apply a bill's provisions by ascertaining the Legislature's intent despite its silence on the matter. (*People v. Nasalga* (1996) 12 Cal.4th 784, 789-794.) The *Estrada* doctrine presumes legislation that ameliorates or lessens punishment applies to all cases not yet final unless there is some indication of contrary legislative intent. (*People v. Esquivel* (2021) 11 Cal.5th 671, 675, 679.)

First, an express indication of intent is sufficient to overcome the *Estrada* rule (*People v. Conley* (2016) 63 Cal.4th 646, 657-659), and so courts often look for any legislative indication that the enactment was intended to apply only prospectively (*People v. Esquivel, supra*, 11 Cal.5th at p. 675). For example, when "ameliorative legislation sets out a specific mechanism as the exclusive avenue for retroactive relief, [this Court has] held that such legislation does not apply retroactively to nonfinal judgments on direct appeal." (*People v. Gentile* (2020) 10 Cal.5th 830, 852; see also *In re Pedro T.* (1994) 8 Cal.4th 1041, 1045 [sunset provisions attached to penalties rebut the *Estrada* presumption].) Section 5 of AB 333 however contains no language, nor any specific mechanisms or date-based provisions,

to support the notion that the Legislature intended section 1109 to apply prospectively. (Stats. 2021, ch. 699, § 5.)

Second, courts evaluate any ameliorative statutory changes to assess the Legislature's intent on retroactive application of a silent statute. (*People v. Esquivel, supra*, 11 Cal.5th at pp. 675-676.) Though *Estrada* focused on the benefit of reducing punishment (*Estrada, supra*, 63 Cal.2d at p. 745), ameliorative effects need not include an overt reduction or elimination of penalty but can include any bestowal of favorable benefit that could potentially result in a lesser punishment. (See, e.g., *People v. Francis* (1969) 71 Cal.2d 66, 75 [*Estrada* applied to statute granting discretion to reduce an offense to a misdemeanor]; *People v. Wright* (2006) 40 Cal.4th 81, 94 [applied to affirmative defenses]; *People v. Vela* (2018) 21 Cal.App.5th 1099, 1103-1104 [applied to juvenile transfer hearings], *People v. Stamps* (2020) 9 Cal.5th 685, 698-699 [applied to elimination of prior restriction to strike felony enhancements].) If, however, the legislation gives rise to no "clear and unavoidable implication" of retroactivity and the legislative findings provide only ambiguous indicia of intent,

courts will not apply *Estrada*. (*People v. Brown* (2012) 54 Cal.4th 314, 319-320.)

Here, AB 333's legislative findings on the ameliorative benefits are unambiguous. It "clearly reflects the Legislature's intent to eliminate or reduce what it views as unwarranted punishment stemming from the admission of prejudicial gang evidence." (*People v. Montano, supra*, 80 Cal.App.5th at p. 106.) More specifically, section 1109 "intended to benefit a class of criminal defendants by reducing the potential harmful and prejudicial impact of gang evidence through bifurcation. . . . [These changes were] geared to address wrongful convictions and mitigate punishment resulting from the admission of irrelevant gang evidence at trial." (*People v. Ramos, supra*, 77 Cal.App.5th at p. 1129.)

Indeed, the Legislature noted the disparity these gang statutes have had on people of the color, who overwhelmingly comprise the class of defendants charged with the enhancements and who may be more likely to be punished based on their neighborhoods, cultural identity, who they know, or where they

live. (Stats. 2021, ch. 699, § 2, subds. (a), (d)(1), (4) [in Los Angeles, 98% of people sentenced to prison for a gang enhancement are people of color].) The Legislature called the current gang enhancement statute "one of the largest disparate racial impact statutes that imposes criminal punishment." (*Id*. at § 2, subd. (d)(2).) While it further explained bifurcation amplified fairness and reduced the highly prejudicial impact of gang evidence on jurors (*id*. at § 2, subd. (d)(1), (f)), the Legislature did not suggest that the statute was designed only to minimize the prejudicial impact of gang evidence (cf. *People v. Perez, supra*, 78 Cal.App.5th at p. 207, review granted Aug. 17, 2022, S275090 [claiming section 1109 only sought to minimize prejudice through a procedural change without any regard to punishment]; *People v. Ramirez, supra*, 79 Cal.App.5th at pp. 64-65, review granted Aug. 17, 2022, S275341 [same]; *People v. Boukes, supra*, 83 Cal.App.5th at pp. 946-949, review granted Dec. 14, 2022, S277103 [same]).

The Legislature, instead, also addressed the penological impacts of the statute and the purpose of the amendments it

made. (See, e.g., Stats. 2021, ch. 699, § 2, subd. (a) ["Current gang enhancement[s] . . . punish people based on their cultural identity, who they know, and where they live"]; subd. (b) [designation as a gang member influences sentencing, etc.]; subd. (d)(5) [these enhancements can result in life sentences]; subd. (i) [these enhancements are used to legitimize severe punishments].) The "mere specter" of gang enhancements "pressures defendants to accept unfavorable plea deals rather than risk a trial filled with prejudicial evidence and a substantially longer sentence" and increases the chance of wrongful convictions when juries "hear the kind of evidence that supports a gang enhancement before it has decided whether the defendant is guilty." (Stats. 2021, ch. 699, § 2, subd. (e).)

Section 1109, therefore, was designed to benefit defendants by preventing wrongful convictions and unfavorable plea deals, both of which are properly categorized as the real-world reduction of potential punishment in a system where wrongful convictions, unfair plea deals, and severe lengthy sentences do exist. (Accord, *People v. Ramirez*, supra, 79 Cal.App.5th at p. 70, review granted

Aug. 17, 2022, S275341 (conc. opn, Wilson, J.) ["section 1109 is designed . . . to enhance fairness and reduce the possibility of punishment," concepts that are not "mutually exclusive"]; see also Eisen, et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?* (2014) 62 UCLA L. Rev. Discourse 2, 17 [data shows introducing gang membership significantly increases the likelihood of a guilty verdict and "when a gang expert is called to inform the jury [of that gang membership] a significant minority of jurors will vote to convict even when reasonable doubt has been clearly established"].)

This benefit—this "increased possibility of acquittal"—implicated in the legislative findings is alone enough to trigger retroactivity under *Estrada*. (*People v. Burgos, supra*, 77 Cal.App.5th at p. 567, review granted July 13, 2022, S274743.) This *Estrada* inference of retroactivity is rebutted only where the Legislature clearly demonstrated its contrary intention. (*People v. Frahs* , *supra*, 9 Cal.5th at pp. 624, 634 (*Frahs*) [finding statute that created a pretrial diversion program applied retroactively].) But the Legislature here has done the opposite. It unambiguously

expressed the ameliorative nature of its changes and said nothing suggesting that it intended only prospective application of AB 333. Without indication from the Legislature disavowing the retroactive treatment of its bifurcation provision, *Estrada* controls.

People v. Superior Court (Lara), supra, 4 Cal.5th at p. 303 provides another framework by which section 1109's ameliorative benefits may be ascertained. In *Lara*, this Court addressed Proposition 57, which prohibited prosecutors from charging juveniles directly in adult court. (*Ibid.*) The Court applied those changes retroactively even though they concerned purely procedural matters, i.e., the process by which a defendant would be subject to an adult criminal trial. (*Ibid.*) The Court applied the inference of retroactivity even though "*Estrada* [was] not directly on point [and] Proposition 57 [did] not reduce the punishment for a crime." (*Ibid.*) It reasoned that the mere possibility of being treated as a juvenile in juvenile court could result in more favorable treatment and could ultimately reduce the possible punishment for a class of persons, i.e., juveniles who would

otherwise be subject to a trial in adult court and subject to criminal punishment. (*Ibid*.) The Court determined that the opening of a procedural avenue that may lead to more lenient punishment supports a presumption of retroactivity under *Estrada*.

Building on that logic, the Court in *People v. Frahs, supra*, 9 Cal.5th at pp. 624, 631, concluded that a pretrial diversion statute should apply retroactively because it "provide[d] a possible ameliorating benefit for a class of persons—namely, certain defendants with mental disorders" by offering an opportunity for a diversion hearing early in the proceedings and the ultimate dismissal of their charges. Under these principles, "possible reduction in the extent of punishment and the possibility of avoiding any punishment whatsoever are both 'potentially ameliorative benefit[s]'" of any new rule of criminal procedure. (*People v. Montano, supra*, 80 Cal.App.5th at p. 106, quoting *Frahs, supra*, 9 Cal.5th at p. 631.)

Like the statutes at issue in *Lara* and *Frahs*, the section 1109 procedure applies to a subset of criminal defendants: those

charged with gang enhancements. Just as Proposition 57 created a bifurcated process, ensuring that juvenile defendants have a hearing on their fitness for juvenile court before exposure to adult criminal trial, section 1109 creates a bifurcated process ensuring that the defendants to which it applies have a trial on the guilt of the underlying offense before they are subject to a trial on their gang involvement. Its purpose in doing so is to ensure that convictions are not reached unfairly and that guilty pleas are not coerced by previously extant unfair procedures.[16] Appellant asks this Court to recognize that the logic of *Lara* carries over to section 1109 and applies here.

Though section 3 erects a presumption of prospective

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[16] The benefit offered by the statute in *Lara* was a process that was more likely to produce an ultimately just punishment, one that comported with the defendant's true culpability. The benefit offered in section 1109 is the same, even though the statute reaches this result in a slightly different manner. The bifurcation provision at issue ensures that the finding of guilt is not reached through procedures rife with bias. The end goal is a judgment that reflects the defendant's true culpability. Through these procedures, the Legislature created an ameliorative benefit subject to *Estrada*'s presumption of retroactivity.

statutory operation, that rule of construction is "not a straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule . . . should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. [Section 3's presumption] is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." (*Estrada, supra*, 63 Cal.2d at p. 746.) Here, it would be both inappropriate in light of the legislative findings and against the spirit of *Estrada*, *Lara*, and *Frahs* for this Court to only prospectively apply section 1109 to gang enhancements under section 186.22.

Neither the text nor the history of section 1109 suggests the Legislature intended that the *Estrada* inference not apply to this new bifurcation provision in gang enhancement cases. In fact, the Legislature identified for this Court both the mechanism's benefits (i.e., lessening the statute's potential penological impact on defendants, preventing wrongful convictions, harsh plea deals and longer sentences, and reducing the highly prejudicial impact of gang evidence on jurors) and the

articulable class of defendants who will receive the benefit of it (i.e. those charged with gang enhancements, and in particular the communities of color more likely to be punished with them). Section 1109 is, therefore, retroactive to all non-final cases involving gang enhancements under section 186.22.

B. To avoid unintended consequences, section 1109 must also apply to the gang-murder special circumstance, at least in cases where gang enhancements have also been alleged.

Courts have held that AB 333, which altered the elements required to prove a gang enhancement in section 186.22 and which also created the bifurcation requirement in section 1109, applies to statutes that incorporate provisions of section 186.22, namely the gang-murder special circumstance. (*People v. Lopez* (2021) 73 Cal.App.5th 327, 346.) "'As the definition of a criminal street gang has been narrowed by [AB] 333 and new elements added in order to prove a criminal street gang and a pattern of criminal activity,' the requirements for establishing liability under section 190.2[, subdivision] (a)(22) have also changed.'" (*People v. Montano, supra*, 80 Cal.App.5th at p. 109, quoting

Lopez, at p. 347.) However, section 1109 itself refers to only the gang crimes and enhancements in section 186.22, subdivisions (a), (b), and (d). It does not reference any of the special circumstances under section 190.2, subdivision (a). (See § 1109.)

To decide whether section 1109's bifurcation procedure applies to a gang-murder special circumstance, this Court must determine the Legislature's intent. The Court must construe the statute, as a whole, in light of its scope and not in isolation, by following its plain meaning "unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) Any interpretation by a court that renders a provision superfluous or void must be avoided. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Literal construction will not prevail if it is contrary to the legislative intent apparent in the statutory scheme. (*People v. King* (1993) 5 Cal.4th 59, 69.) Under these principles, when requested by the defense in a trial that alleges both a gang enhancement in section 186.22, subdivision (b) and a gang-murder special circumstance,

section 1109 must logically apply to both; otherwise, this Court will strip the meaning and effect of section 1109 in those cases.

This Court has recognized that trial courts have the power to bifurcate special circumstance allegations when there is a compelling need to do so because highly prejudicial evidence threatens the overall fairness of the trial. In *People v. Bigelow* (1984) 37 Cal.3d 731, 746-747, the defendant committed a dozen uncharged burglaries, robberies, and thefts as part of his supposed plan to finance and perpetuate an escape from custody, which resulted in an escape-murder special circumstance. Determining that this evidence was "highly prejudicial," "only marginally relevan[t]" to prove motive for the charged crimes, and primarily relevant only to prove the special circumstance, this Court decided the lower court should have bifurcated by "exclud[ing] it at the guilt trial and conduct[ing] a separate trial of the special circumstance allegations." (*Id*. at p. 748.) Later refining this *Bigelow* exception, the Court explained that bifurcation was permissible where the evidence to be introduced would be "so 'highly prejudicial' [citation] that the jury's ability to

render a fair and impartial verdict" would be impaired. (*People v. Fierro* (1991) 1 Cal.4th 173, 229.)

The gang evidence at issue here meets this standard, and appellant asks the Court to find that the trial of the gang-murder special circumstance must be bifurcated upon request, in light of section 1109. As explained above, the Legislature recognized the highly inflammatory nature of gang evidence and the risk that jurors will be overwhelmed by negative associations. Section 1109 seeks to cure this by bifurcating evidence related specifically to gang charges, and *Bigelow* offers an analytical framework for carrying forth this legislative recognition. Section 190.1 requires a simultaneous determination as to the truth of any special circumstances alleged, but it follows language explaining that the defendant's guilt "shall be first determined" (§ 190.1, subd. (a)), which leaves space for bifurcation to achieve a fair result (*People v. Bigelow, supra*, 37 Cal.3d at p. 748). Having a jury determine the truth of an allegation at the same time it determines the defendant's guilt of the charged offense often poses a grave risk of prejudice because there is a "serious danger that the jury will

conclude that defendant has a criminal disposition and thus probably committed the presently charged offense." (*People v. Calderon* (1994) 9 Cal.4th 69, 75; accord, *People v. Tindall* (2000) 24 Cal.4th 767, 774; see, e.g., *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [Legislature "has specifically recognized the potential for prejudice when a jury deciding guilt hears of a prior conviction"].)

Reading the statute in this manner—to require bifurcation of both the gang-murder special circumstance and the gang enhancement—is the sole means to enact the Legislature's express purpose. Section 1109 neither permits nor prohibits the bifurcation of the special circumstance. But its purpose (i.e., bifurcating gang evidence to decrease punishments, wrongful convictions, harsh plea deals, and longer sentences, and to reduce its highly prejudicial impact on jurors) would be defeated if the prosecutor were permitted to present the same prejudicial gang evidence during trial on the underlying offense. This would permit the prosecutor to import into the guilt phase all the evidence that would otherwise be bifurcated under section 1109,

and through a quirk in the drafting, would permit all of the bias and harm that the statute set out to prevent.

The court in *People v. Montano, supra*, 80 Cal.App.5th at pp. 113, 114, refused to apply the new bifurcation process to gang-murder special circumstance allegations, but it did recognize this problem: read improperly, the Legislature's failure to reference section 190.2 in section 1109 would have "incentivized" gamesmanship and the "potential for mischief" by allowing prosecutors in gang-related homicide cases with gang enhancements to circumvent bifurcation by simply alleging a gang-murder special circumstance, thereby leveraging the "type of one-sided plea bargains [AB] 333 was intended to mitigate and prevent." (*Id.* at p. 112.) *Montano* should have retroactively applied section 1109 to the gang-murder special circumstance because courts are obligated to select the statutory construction that comports most closely with the apparent intent of the Legislature, to promote rather than defeat the statute's general purpose, and to avoid an interpretation that would lead to unintended consequences. (*People v. King, supra*, 5 Cal.4th at p.

69.)

The Legislature set out to avoid the prejudice caused by inflammatory gang evidence. It noted those concerns throughout AB 333: Gang evidence "can be unreliable and prejudicial to a jury because it is lumped into evidence of the underlying charges which further perpetuates unfair prejudice . . . ." (Stats. 2021, ch. 699, § 2, subd. (d)(6)); "California courts have long recognized how prejudicial gang evidence is. [Citation.] Studies suggest that allowing a jury to hear the kind of evidence that supports a gang enhancement before it has decided whether the defendant is guilty or not may lead to wrongful convictions. [Citations.]" (*id*. at § 2, subd. (e)); and "Bifurcation of trials where gang evidence is alleged can help reduce its harmful and prejudicial impact" (*id*. at § 2, subd. (f)). The prejudice identified in these findings mirrors the prejudice of prior-murder allegations and presents a compelling need to bifurcate: the grave risk that jurors will convict based on past acts and criminal disposition. Admission of "any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and

prejudicial effect' on the trier of fact." (*In re Jones, supra,* 13 Cal.4th at p. 581, quoting *People v. Thompson* (1980) 27 Cal.3d 303, 314.)

Moreover, these legislative findings do not distinguish between capital and non-capital gang offenses and, instead, repeatedly reference "gang evidence," which could be used to support either the section 186.22 enhancement or the section 190.2 special circumstance. It would therefore be an unintended consequence to allow prosecutors to thwart the legislative will where the Legislature made no such distinctions between capital and non- capital gang offenses: "where[ver] gang evidence is alleged" bifurcation can reduce "prejudicial impact." (Stats. 2021, ch. 699, § 2, subd. (f).)

Finally, judicial economy suggests that section 1109 should apply to gang-murder special circumstance allegations at least in cases where a gang enhancement is also alleged. Section 1109 mandates bifurcation of gang enhancements under section 186.22, subdivision (b) when requested by the defense. (§ 1109, subd. (a) ["shall be tried in separate phases"].) In that mandated,

bifurcated trial, evidence will be presented to prove the gang enhancement under section 186.22, subdivision (b). That evidence must comport with AB 333's narrowed definition of a criminal street gang and the new elements to prove it; but, because the gang-murder special circumstance also incorporates AB 333's changes, the requirements for establishing liability under section 190.2, subdivision (a)(22) have also changed. (*People v. Montano, supra*, 80 Cal.App.5th at p. 109, citing *People v. Lopez, supra*, 73 Cal.App.5th at p. 347.) If the gang-murder special circumstance allegation is not also bifurcated, the jury will be required to hear the same evidence twice. For example, the predicate offenses required for both the enhancement and the special circumstance will need to be proven twice: once during the guilt trial for the special circumstance and again during the bifurcated enhancement trial. (See § 186.22, subd. (e)(1); § 190.2, subd. (a)(22).) If section 1109 does not also require the bifurcation of a gang-murder special circumstance when charged with a gang enhancement, there will be a duplication of fact-finding functions, unnecessary delay for the defendant, the jurors, and the public,

and overall judicial efficiency will be jeopardized.

In sum, to disallow section 1109's application to section 190.2, subdivision (a)(22) would render its bifurcation mandate specific to the gang enhancements in section 186.22 ineffective where both are alleged. It would frustrate AB 333's underlying legislative purpose, which includes reducing the highly prejudicial impact of gang evidence on jurors. It cannot reasonably be believed that the Legislature intended section 1109 to be so limited in cases involving gang-murder special circumstances—an allegation which expressly incorporates definitions that were altered by way of AB 333, the very bill that created section 1109.

C. Failure to bifurcate the gang evidence contributed to appellant's guilt determination and special circumstance finding.

The failure to bifurcate under section 1109 is not structural error. (*People v. Tran, supra*, 13 Cal.5th at pp. 1208-1210.) Where the introduction of gang evidence renders the trial fundamentally unfair, the Court applies the *Chapman* standard of harmless error. (*Ibid*.) And where the error is statutory only, it is reviewed

under *People v. Watson* (1956) 46 Cal.2d 818 to determine how the exclusion of gang evidence would have been reasonably likely to change the jury's verdict of guilt as to the underlying murder. (*Id*. at pp. 1209-1210.) Here, the error violated both the statute and appellant's right to a fair trial, and was prejudicial under either standard.

It is at least reasonably probable that this prejudicial gang evidence contributed to appellant's guilt verdict. "Bifurcation begins a process of demystification" of defendants charged with such enhancements. (Hayat, *Preserving Due Process: Applying Monell Bifurcation to State Gang Cases* (2019) 88 U. Cin. L.Rev. 129, 136.) When enhancements are bifurcated, those defendants are no longer seen as "'all powerful,' well-equipped members of a group who can avoid or overcome prosecution." (*Ibid*.)

Here, the prosecutor used the gang enhancement evidence to purportedly show appellant's motive and intent in the charged crimes. As discussed in section V *ante*, an unbridled amount of this gang evidence served as racially biased propensity evidence. The rap lyrics, in particular, were extensively and repetitively

used by the prosecutor as the literal truth or proof that appellant committed the crimes. (See Arg. I, *supra*; see also Arg. V, *ante*.) The following are examples of highly prejudicial gang evidence referred to by the prosecutor in closing argument:

- "**These are shootings that don't make any sense because there's not like some sort of argument, fight, that precedes it. It's just somebody comes up and starts shooting, okay. And it's all based on gang rivalry. That is the only plausible explanation here.**" (RT 4280, emphasis added.)
- **"There are different degrees of intensity of hatred within a gang member. Not every gang member is the same. But this guy, our luck, we found his own writings. And they're horrifying…"** (RT 4281, emphasis added.)
- "I can't emphasize enough what that is, the significance of going into enemy territory. Make no mistake about it, there is a war between these gangs. It's not unlike finding an American soldier during World War II going into Nazi territory or the reverse. It's not just an innocent thing. Okay." (RT 4288.)
- **"Now in combination with everything else, oh, come on. Toonerville gang member…"** (RT 4288, emphasis added.)
- **"And then on top of everything else…rap lyrics."** (RT 4289-4291, emphasis added.)

- **"There is no other evidence of why he would be shot other than his gang affiliation, Toonerville gang membership…I'm not going to repeat all of the lyrics he has expressed about hating. I just recommend to you reading all the lyrics. Because it is incredible how much hatred this guy has towards rival gang members. But that is, of course, not enough by itself."** (RT 4297, emphasis added.)

- **"If you are in rascals territory armed with a gun, you are going to do a mission."** (RT 4299, emphasis added.)

- **"What did this guy do, as corroborated by the lyrics?"** (RT 4300, emphasis added.)

- **"You should read the lyrics what the defendant writes about snitches and what happens to snitches. There is a horrific thing about snitches. Should be gang raped and left to die on the side of the road, things like that."** (RT 4310, emphasis added.)

- "And then, ladies and gentlemen, look at these lyrics. I mean, Ferreria told you, gang members are different like any other group. **Some of them really hate the police.** And some of them don't hate the police as much. **And certainly if we looked at his rap lyrics and there was an absence of any hatred of police or showed at most kind of a making fun of police, not particularly hateful, then, of course, they would be able to make a point."** (RT 4305, emphasis added.)

- "What is this? You are saying he's shooting at these cops. Awful shooting. They set up an

ambush. **Is he really that kind of person? I will let you decide reading these lyrics.** 'Piggy, piggy, please stop telling them lies. Witness protection won't work. Realize your rat ain't going to make it to the stand to identify the man shooting up the ham.' . . . 'Can't promise protection when you can't protect yourself. Give it up Mr. Piggy and place your badge on the shelf.' This is right to the point. 'I'd love to see a punk police officer flat line.' Is he really one of those? When we look at the rap lyrics, what a coincidence. When we look at his rap lyrics, everything is corroborated." (RT 4305-4306, emphasis added.)

- "Let's go to the fifth shooting. That's the murder of Marjorie Mendoza. Let's discuss that. First off for starters we consider – there isn't much dispute about this -- that he was really upset about Palo's death. Just in case you're wondering where that appears, it is exhibit 17 [rap lyrics]." (RT 4309-4310.)

- "You have to find at the time of the killing the defendant was an active participant in the gang. There is not really a dispute he is an active participant. Between all the tattoos, all the testimony, it is not really disputed he was an active gang member." (RT 4333.)

- "None of these were like robbery-murders, or burglary-murders where a burglary went down. **These are gang murders, true gang murders**." (RT 4335, emphasis added.)

- "[Natividad] says, she [Mendoza] was . . . killed by some Toonerville guy named Eskimo. . . . . **In this world, this gang world**, it is very important to

> identify your enemy because it's the people you want to avoid." (RT 4316, emphasis added.)

As reflected above, the prosecutor claimed the jury needed no more proof of appellant's guilt than that these murders were "true gang murders," made plausible because they occurred in a violent "gang world," where appellant was the leader of the pack, a cold-blooded, worst of the worst type of "gangbanger," with an unusually intense hatred for the police, rivals, and snitches, the truth of which was corroborated by the rap lyrics. It is likely that the weight of prejudice caused by this evidence played a significant role in tipping the scales against appellant in the second penalty phase jury's verdict, given that the jury in the first penalty phase trial was deadlocked, indicating that imposition of the death penalty was a close call.

On this record, the failure to comply with Evidence Code section 1109's bifurcation provision cannot be deemed harmless no matter which standard of prejudice applies. Reversal of the guilt and penalty phase verdicts is required.

IV

Appellant's trial counsel provided constitutionally ineffective assistance of counsel under the Sixth Amendment by failing to object to the prosecutor's striking of numerous jurors of the same ethnicity as appellant.

A. Introduction

The record shows the prosecutor inordinately struck prospective jurors based on their race or ethnicity, violating appellant's state and federal constitutional rights pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258, and *Batson v. Kentucky* (1986) 476 U.S. 79 ("*Batson/Wheeler*"). Counsel's failure to object constituted ineffective assistance.

B. Proceedings below

As stated previously, appellant identifies as a Latino man of Mexican descent and was acknowledged as such at trial. (RT 2376, 3479; 22 CT 5858.) At the outset of the first trial, the prosecutor used at least 12 of 14 strikes against people of color,

almost exclusively those of Latinx descent and/or with Hispanic[17] surnames (which are bolded) and 12 of 14 strikes against women (underlined):

1. **J. Abitia** (Prospective Juror No. 5)
2. **G. Arambula** (Prospective Juror No. 10)
3. **M. Villegas** (Prospective Juror No. 13)
4. **C. Guerrero** (Prospective Juror No. 49)
5. **R. Salazar** (Prospective Juror No. 58)
6. E. Sherwood (Prospective Juror No. 64)
7. N. Madyun[18] (Prospective Juror No. 65)
8. **A. Hernandez** (Prospective Juror No. 71)
9. **D. Campos** (Prospective Juror No. 74)
10. **G. Barranco** (Prospective Juror No. 82)
11. **P. Covarrubias** (Prospective Juror No. 91)

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[17] If not Latino then likely these jurors were married to Latinos or possibly of Filipino origin. This Court has previously accepted Hispanic surnames as evidence of potential jurors' ethnicity. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1156 , n. 2, citing *People v. Trevino* (1985) 39 Cal.3d 667, 686 and *People v. Johnson* (1989) 47 Cal.3d 1194.) If the Court is unwilling to accept these ethnic attributions, appellant would request the opportunity to remand the case to definitively settle the record as to this issue.

[18] This name is of Arabic origin. As discussed below, Ms. Madyun was almost certainly a person of color and most likely Black.

12. **R. Lopez** (Prospective Juror No. 97)

13. S. Campbell (Prospective Juror No. 112)

14. **B. Herrera** (Prospective Juror No. 129)

(14 CT 3677 et seq; RT 2154-2161, 2301.) Hispanics are a cognizable group for purposes of *Batson/Wheeler* analysis (*People v. Trevino* (1985) 39 Cal.3d 667, 686, disapproved on another ground in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221), as are women (*People v. Panah* (2005) 35 Cal.4th 395, 438). The California Supreme Court has assumed Hispanic-surnamed women constitute a cognizable group. (*People v. Bonilla* (2007) 41 Cal.4th 313, 344, fn. 14; *People v. Garceau* (1993) 6 Cal.4th 140, 171, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; see also *People v. Clair* (1992) 2 Cal.4th 629, 652 [African-American women are cognizable subgroup].)

Thus, the record demonstrates the prosecutor's disproportionate exclusion of Latinx jurors from service, Latina jurors in particular (nine of eleven), established a prima facie

case of discrimination under *Batson/Wheeler*.[19] (See *People v. Gutierrez*, *supra*, at pp. 1156-1157 (acknowledging that a prosecutor's using ten out of sixteen strikes to eliminate Latino jurors was disproportionate and that the inclusion of a small number of Latino jurors on the final jury panel was not dispositive of the *Batson* issue.)

Counsel's failure to object was tantamount to a complete failure to provide representation during a critical state of the proceeding and requires per se reversal of appellant's convictions. (*United States v. Cronic* (1984) 466 U.S. 648, 659, fn. 25.) Alternatively, counsel's deficient performance was prejudicial because the record provides no evidence upon which the prosecutor could have justified such an inordinate use of strikes

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[19] The full ethnic composition of the seated jurors is not evident on the record. However, based on surnames, there was only one Latina on the jury (Juror No. 1) and four Latino men, Jurors No. 5, 7, 8 and 12. As discussed in Appellant's Opening Brief, Juror No. 5 was improperly removed from the jury and replaced with an alternate.

against a cognizable ethnic/racial group.

C. General principles of law under *Batson/Wheeler*.

When a party, due to a presumed group bias, removes jurors on the basis of race, religion, ethnicity, gender or sexual orientation, this action violates the opposing party's right under Article 1, section 16 of the California Constitution to a trial by a jury drawn from a representative cross-section of the community. (*People v. Turner* (1986) 42 Cal.3d 711, 715-716; *People v. Wheeler, supra*, 22 Cal.3d at pp. 276-277.) Such action also violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. (*People v. Turner, supra*, 42 Cal.3d at p. 716; *Batson v. Kentucky, supra*, 476 U.S. at p. 89.) Essentially, the same standards govern both issues. (*People v. Alvarez* (1996) 14 Cal.4th 155, 193.)

Under California case law, "[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in a timely fashion and make a prima facie case of such discrimination to the satisfaction of the court." (*People v. Wheeler,*

supra, 22 Cal.3d at p. 280.) "If the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone." (*Id*. at p. 281; footnote omitted.) Likewise, under *Batson*, once the defendant establishes a prima facie case of discrimination, the burden shifts to the opposing party to come forward with neutral explanations for challenging the jurors. (*Batson v. Kentucky, supra*, 476 U.S. at p. 97.)

If a party uses even a single improper peremptory challenge, this can constitute a prima facie case of discrimination under both *Wheeler* and *Batson*. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 478; *People v. Fuentes* (1991) 54 Cal.3d 707, 715-716 [and cases cited].)

D. Trial counsel rendered deficient performance by failing to object to the prosecutor's strikes.

To demonstrate a violation of his Sixth Amendment right to effective counsel, the accused's initial burden is to show that his attorney's "representation fell below an objective standard of reasonableness . . . under prevailing professional norms."

(*Strickland, supra,* 466 U.S. at p. 688.)

Under the usual standard for ineffective assistance of counsel, the accused must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) The Supreme Court, however, has recognized an exception to this general rule, "where assistance of counsel has been denied . . . during a critical stage of the proceeding." (*Mickens v. Taylor* (2002) 535 U.S. 162, 166; *United States v. Cronic, supra*, 466 U.S. at p. 659, fn. 25.) In this situation, "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary," and the reviewing court may simply presume prejudice. (*Mickens*, at p. 166; *Cronic*, at p. 659, fn. 25.)

(1) Counsel's complete lack of objection during jury selection amounted to structural error and requires per se reversal.

Jury selection is a critical stage of the proceedings. (*People v. Wall* (2017) 3 Cal.5th 1048, 1059; see also *In re Manriquez* (2018) 5 Cal.5th 785, 797 ["'Voir dire plays a critical function in

assuring the criminal defendant that [his or her] Sixth Amendment right to an impartial jury will be honored'"], internal citations omitted.)

Several courts have presumed prejudice due to trial counsel's woefully deficient performance during jury selection. In *Quintero v. Bell* (6th Cir. 2004) 368 F.3d 892, 893, trial counsel failed to exercise peremptory challenges against seven jurors who had already voted to convict the accused's codefendant. The Sixth Circuit found that these actions constituted "an abandonment of 'meaningful adversarial testing,'" rendering the entire trial process "presumptively unreliable." (*Ibid*., internal citations omitted.)

Remarkably, questionnaires were not used to select the jurors in the first trial. So the only information the prosecution had upon which to base decisions were the scant statements these prospective jurors made in response to voir dire questions.[20]

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[20] Relevant prospective jurors' responses to questions: No. 5 (RT 1819; 1825-1826, 1984-1985; 2047-2048; 2094-2096); No. 10 (RT 1825, 1877, 1896, 1909-1910, 1949, 1987-1988, 2049-2050, RT

Although the prosecutor was not asked to explain the reason for his strikes, the pattern of his use of strikes, based on the names of the jurors and their voir dire answers, suggests that he was eliminating jurors of the same ethnic and socio-economic background as the defendant—Latinx jurors who grew up in neighborhoods in which gangs were present—and a near-total elimination of Latina jurors in particular. (See *People v. Ramirez* (2022) 13 Cal.5th 997, 1087 [a *Batson/Wheeler* challenge to the dismissal of Hispanic jurors can be based on the last names of jurors where the last names indicate Spanish ancestry and there

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2104-2106); No. 13 (RT 1826-1827; 1951 , 1989; 2050-2051; 2115-2116); No. 49 (RT 1846, 1904-1905, 1936, 1956-1957, 2011, 2045-2047, 2131-2132); No. 58 (RT 1848, 1886-1887, 1905-1906, 1914-1916, 1936-1937, 1958-1959, 2069-2070, 2139); No. 64 (RT 1849, 1959, 2017-2018, 2071, 2088-2092, 2139-2140); No. 65 (RT 1850, 1887-1888, 1928-1931; 1959, 2018, 2071-2073, 2140); No. 71 (RT 1850, 1918-1919,1960, 2020-2021, 2073-2074, 2141); No. 74 (RT 1852, 1890, 1919-1920, 1960-1961, 2074-2075, 2142); No. 82 (RT 1854, 1920-1921, 2023-2024, 2075-2076; No. 91 (RT 1856, 1924-1926, 1963-1964, 2025-2026, 2076-2077); No. 97 (RT 1857, 1891-1892, 1925-1926, 1932, 1965, 2027-2028, 2078, 2147-2148); No. 112 (RT 2203, 2231, 2241, 2254, 2260-2261, 2274-2275, 2290); No. 129 (RT 2214-2215, 2233-2234, 2254, 2264-2265, 2279-2280, 2287, 2292-2293)

is no other information available]; see also *People v. Motton* (1985) 39 Cal.3d 596, 603-604 [a party raising *Baston/Wheeler* need only make "'as complete a record of the circumstances as is feasible'" and need not establish the race of a juror by direct question and answer].) Far from being a disqualifying detail, these individuals' backgrounds should have made them the best jurors – coming out of the community affected by the alleged crimes, which involved primarily Latino victims. (See *People v. Bryant* (2019) 40 Cal.App.5th 525, 546 ("[A]llowing [peremptory strikes based on individuals' experiences with the criminal justice system] compounds institutional discrimination by excluding more minorities than nonminorities from juries, diminishes public confidence in the fairness of our justice system, and undermines the value of having juries that represent a fair cross-section of the community, as it risks 'losing perspectives that may be essential to the ideal of a jury made up of diverse experiences and viewpoints"].)

Here, the prosecutor's use of strikes was so markedly targeted towards excluding "a cognizable group within the

meaning of the representative cross-section rule," that any reasonably competent counsel would have raised an objection and made a prima facie case of discrimination to the satisfaction of the court. (*People v. Wheeler, supra*, 22 Cal.3d at p. 280.) Counsel's failure to raise a *Batson* challenge to compel an explanation for the prosecutor's strikes in this case amounted to an abandonment of meaningful advocacy during jury selection, as in *Quintero* and *Hughes*. Such denial of assistance of counsel during a critical stage of the proceedings indicates a high likelihood that the verdicts are unreliable. (See *Mickens*, *supra,* at p. 166; *Cronic*, *supra,* at p. 659, fn. 25.) As such, this Court should presume appellant was prejudiced, and that the error is structural, requiring automatic reversal. (*Ibid*.)

(2) Counsel's deficient performance resulted in prejudice.

To the extent this court believes counsel's error is subject to harmless error analysis under *Strickland*, the error was clearly prejudicial.

As discussed above, the record shows defense counsel could have shown a prima facie case of discrimination under both

Wheeler (*People v. Wheeler, supra*, 22 Cal.3d at pp. 276, 280 [the record must show persons likely excluded because of their cognizable racial or ethnic group association]), and *Batson* (*Purkett v. Elem* (1995) 514 U.S. 765, 767-768 [first step under *Batson* is a prima facie showing of discrimination]).

The burden would then have shifted to the prosecutor to provide at least a facially valid, non-discriminatory or race-neutral explanation for the questioned challenges. (*Batson v. Kentucky, supra*, 476 U.S. at p. 97; *People v. Wheeler, supra*, 22 Cal.3d at p. 281.) One could speculate that the prosecutor was concerned about jurors who feared retaliation or retribution for sitting on the jury. However, although the prosecutor had the opportunity to explore this issue in jury selection, he chose not to ask the jurors how their experience with gangs would impact their ability to deliberate. (See *People v. Gutierrez, supra,* 2 Cal.5th at pp. 1169-70.) In fact, there is no support in the record for any plausible reason for the prosecutor's strikes. (Accord, *People v. Silva* (2001) 25 Cal.4th 345, 386 [when a prosecutor's stated reasons for a challenge are factually unsupported by the

record, the court's ultimate finding accepting the challenge is unsupported under *Batson* and *Wheeler*].)

There is no conceivable rational purpose for counsel's failure to object to the prosecutor's blatant exclusion of Latinx jurors, the inclusion of whom would likely have benefitted appellant, particularly considering the factors discussed in section V below, pursuant to the RJA. Accordingly, there can be no other conclusion than defense counsel's performance was deficient and resulted in prejudice. (See *People v. Pope* (1979) 23 Cal.3d 412, 426 [an appellate court will reject the claim of ineffective assistance "unless there simply could be no satisfactory explanation" for the challenged behavior].)

V
The proceedings were permeated by racial bias in violation of the California Racial Justice Act.

A. Introduction

In 2020, the California Legislature passed Assembly Bill 2542, known as the California Racial Justice Act of 2020 ("RJA"). (Assem. Bill No. 2542 (2019-2020 Reg. Sess.) (AB 2542).) Codified in Penal Code section 745 ("section 745"), the Legislation became

effective on January 1, 2021. (Assem. Bill No. 2542, Stats. 2020, ch. 317, § 2, subds. (a)-(c).) The purpose of this legislation is "to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system, is a miscarriage of justice under Article VI of the California Constitution, and violates the laws and Constitution of the State of California." (*Id.* at § 2, subd. (i).)

In 2022, the Legislature enacted Assembly Bill No. 256, expanding the scope of the RJA to apply retroactively to all cases in which judgment is not final. (Assem. Bill No. 256 (2020-2021 Reg. Sess.) The bill took effect on January 1, 2023. (§ 745, subd. (j)(1), as amended by Stats. 2022, ch. 739, § 2.)

Section 745 prohibits the state from seeking or obtaining a criminal conviction on the basis of race, and from using racially discriminatory language about the defendant's race or exhibiting bias or animus towards the defendant based on race. (§ 745, subds. (a)(2).) These provisions were violated here because: (1) the prosecutor used racially incendiary or coded language

throughout trial, dehumanizing appellant by evoking prejudicial stereotypes of Hispanic men and gangs, including but not limited to the introduction and exploitation of appellant's rap lyrics; and (2) the prosecutor exhibited bias towards appellant's race[21] by inordinately striking Hispanic jurors.

B. The Legislature enacted the California Racial Justice Act to address racial discrimination in the criminal legal system.

Section 745, subdivision (a), states, "[t]he state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin." A defendant may establish a violation of this provision if he proves any one of four categories of conduct, the second one of which applies in this case:

> During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, *used racially discriminatory*

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[21] Although the term Hispanic identifies a person's ethnicity, not race, courts have "used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons." (*Peña–Rodriguez v. Colorado* (2017) 580 U.S. 206, 2014; *State v. Zamora* (Wash. 2022) 512 P.3d 512, 516, fn.6.)

> *language*[22] about the defendant's race, ethnicity, or national origin, *or otherwise exhibited bias or animus* towards the defendant because of the defendant's race, ethnicity, or national origin, *whether or not purposeful*. This paragraph does not apply if the person speaking is describing language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.

(See § 745, subds. (a)(2), emphasis added.)

As the above language reflects, the RJA specifically rejects the jurisprudential paradigm created in *McCleskey v. Kemp* (1987) 481 U.S. 279, which required a defendant to establish *intentional* discrimination to prevail under the Equal Protection Clause. (Stats. 2020, c. 317, eff. Jan. 1, 2021; AB 2542, supra, §

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[22] Subdivision (h)(4) of the act defines "racially discriminatory language" expansively, as that which, to an objective observer, "explicitly or implicitly appeals to racial bias, including, but not limited to," the following: (1) racially charged or racially coded language; (2) language that compares the defendant to an animal, or; (3) language that references the defendant's physical appearance, culture, ethnicity, or national origin. In the context of a statute or rule designed to eliminate bias, an "objective observer" is described as a "person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision-making in nonexplicit, or implicit, unstated, ways." (*State v. Zamora*, supra, 512 P.3d at p. 523.)

2(f) [findings and declarations]; see also *Young v. The Superior Court* (2022) 79 Cal.App.5th 138, 150 (*Young*).) This is because, as the Legislature recognized, "all persons possess implicit biases," which "tend to disfavor people of color," and "under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish," which has resulted in tolerance of "racially incendiary or racially coded language, images, and racial stereotypes in criminal trials." (Assem. Bill No. 2542, Stats. 2020, ch. 317, § 2, subds. (c), (e), (g) and (i) ["Even the 'simplest of racial cues' can automatically evoke racial stereotypes and affect the way jurors evaluate evidence"], citing Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response* (2018) 86 Fordham L.Rev. 3091, 3101.)

While explicit bias is "consciously accessible through introspection and endorsed as appropriate" by the person who harbors it, implicit bias "can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness." (Kang, et al., *Implicit Bias in*

the Courtroom (2012) 59 UCLA L. Rev. 1124, 1129.) Implicit bias "may surface for various decisionmakers repeatedly in policing, charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer persuasiveness, guilt determination, sentencing recommendations, sentencing itself, appeal, and so on. Even small biases at each stage may aggregate into a substantial effect." (*Id*. at p. 1151.)

Implicit biases may be "primed" or activated, or prepared for activation, through direct or indirect reference to historical, cultural, or popular racial stereotypes. (See Levinson, *Race, Death, and the Complicitous Mind* (2009) 58 DePaul L.Rev. 599, 605, 608-609, 632.) Priming is "activated through the presentation of certain information that triggers associations with other ideas." (Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial* (2020) 71 Case Western L.Rev. 39, 57 (*Racist Prosecutorial Rhetoric*).) It works subliminally and evokes prejudice regardless of the listener's intent or awareness of the triggering information. (See Anders Kaye, *Schematic Psychology and Criminal Responsibility* (2009) 83 St. John's

L.Rev. 565, 577.) "Just as propensity evidence might prime a jury to find that an individual acted in conformity with past behavior, race-coded language might prime a jury to find that an individual acted in conformity with widely-known stereotypes about an individual's racial or ethnic group." (Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom* (2018) Mich. St. L.Rev. 1243, 1258 (*Bias on Trial*).) Such priming creates "outgroup bias," which occurs when people make negative judgements about individuals who are not part of the same "in group." (Bowman, *supra*, *Racist Prosecutorial Rhetoric*, 71 Case Western L.Rev. at p. 51, citing Maureen Johnson, *Separate But (Un)equal: Why Institutionalized Anti-Racism is the Answer to the Never-Ending Cycle of Plessy v. Ferguson* (2018) 52 U. Rich L.Rev. 327, 378.) Jurors are "more likely to render guilty verdicts and recommend harsh sentences when defendants are accused of committing crimes that are stereotypically associated with their racial or ethnic group." (Bowman, *supra*, *Racist Prosecutorial Rhetoric*, 71 Case Western L.Rev. at p. 56, internal citation omitted.)

Critically, the RJA recognizes the way implicit bias works in that even a code word or animal metaphor — though not explicitly racist — can activate subconscious bias in jurors. (§ 745, subds. (a)(2) & (h)(4); Stats. 2020, ch. 317, § 2, subd. (i); see also *State v. Zamora* (2022) 512 P.3d 512, 521 [observing that subtle references "are "just as insidious" and [p]erhaps more effective . . . Like wolves in sheep's clothing, a careful word here and there can trigger racial bias"].)

C. There is a long history of racial bias against Hispanic communities and Hispanic men.

Appellant identifies as a Latino man of Mexican descent and was acknowledged as such at trial. (RT 2376, 3479; 22 CT 5858.) As discussed at length above, the prosecutor emphasized and exploited evidence that played to historically rooted stereotypes about Latino men. This rhetoric during appellant's trials "tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation." (*Calhoun v. United States* (2013) 568 U.S. 1206 (Sotomayor, J.).)

"Negative stereotypes of those of Mexican descent have

been present since the … the 1800s" including being "characterized as lazy, indolent, ignorant, immoral, degraded, savage, and violent." (Cynthia Willis-Esqueda, Ph.D., *Bad Characters and Desperados: Latinxs and Causal Explanations for Legal System Bias* (2020) 67 UCLA L. Rev. 1204, 1212 (*Bad Characters and Desperados*).) These stereotypes justified the establishment of White power structures in the Southwest after its annexation. (*Id.* at 1210.) Mexican-Americans were granted the rights of U.S. citizenship on paper, but not in practice. "In the 18th and 19th centuries, institutional discrimination against Latinxs pervaded the country. Latinxs were subject to school and social segregation, barred from 'white only' establishments and schools. Mob violence against Latinxs (and Latinx-appearing persons) was common, and Latinx men, women, and children alike were brutalized, tortured, and lynched by white mobs with impunity. Additionally, Latinxs were subject to illegal deportations because of their ethnicity. In the 1930s, local governments and authorities forcibly removed approximately 1.8 million people from the United States whom they *suspected* to be

of Mexican descent." (*State v. Zamora*, *supra,* 512 P.3d at p. 524, emphasis in original, internal citations omitted.)

Discrimination was legitimized and rationalized through dehumanization and demonization. (Kevin Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons* (1997) 28 U. Miami Inter-Am. L.Rev. 263, 264-292 (*Aliens*).) Over a million Hispanics, including many U.S. citizens were deported to Mexico in 1953 during "Operation Wetback." (Kevin Johnson, *Trump's Latinx Repatriation* (2019) 66 UCLA L.Rev. 1444, 1446, 1460-1464.) Following the civil rights movement, "illegal alien" became the new code for anti-Hispanic bias. (Johnson, *supra*, *Aliens*, 28 U. Miami Inter-Am. L.Rev., at p. 263.) More recently, President Trump infamously stated, "When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're . . . bringing drugs. They're bringing crime. They're rapists. . . ." (Donald Trump, Remarks Announcing Candidacy for President in New

York City (June 16, 2015)[23].)

Like Black men, Hispanic men have historically been stereotyped as law breakers and gang members. (See Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 Wis. L. Rev. 369, 389-90 (2018).) "The prototype of a gang member is metaphorically related to deeply buried racist schema or beliefs and justifies the demonization of the other." (John Hagedorn, *Gangs on Trial: Challenging Stereotypes and Demonization in Courts* (2022) (*Gangs on Trial*), p. 86.)

Hispanic men are also perceived as more prone to violence and criminality and more of a danger to society. "[I]mages and characterizations of the criminal, lazy, immoral, and undocumented Mexican American are pervasive in literature, television, film, and cultural imagery. (Willis-Esqueda, *supra*, *Bad Characters and Desperados:* 67 UCLA L. Rev. at p. 1213 (citing other sources); see also Yolanda F. Niemann, Leilani

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[23] <https://www.presidency.ucsb.edu/documents/remarks-announcing-candidacy-for-president-new-york-city>

Jennings, Richard M. Rozelle, James C. Baxter & Elroy Sullivan (1994) *Use of Free Responses and Cluster Analysis to Determine Stereotypes of Eight Groups*, 20 Personality & Soc. Psych. Bull. 379 (identifying stereotypical attributes of Latinos as uneducated, ambitionless, poorly groomed, lower class, and criminal.)

In 2012, a survey conducted by the Associated Press in conjunction with Stanford University, the University of Michigan, and NORC (National Opinion Research) at the University of Chicago found that 58% of respondents answered that the word "violent" described Hispanic people slightly or moderately well, closely comparable to the 62% who said "violent" described Black people slightly or moderately well. (Radical Attitudes Survey, The Associated Press, Conducted by GfK (Oct. 29, 2012)[24], see also AP Poll: US majority have prejudice against

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[24] <http://surveys.associatedpress.com/data/GfK/AP_Racial_Attitudes_Topline_09182012.pdf>

blacks, USA Today (Oct. 27, 2012)[25].) Similarly, studies have shown white people report higher perceptions of criminal threat when Latinos live nearby in greater numbers. (Ted Chiricos et al., *Perceived Racial and Ethnic Composition of Neighborhood and Perceived Risk of Crime*, 48 Soc. Problems, 322, 335 (2001).) Researchers have found that jury-eligible participants strongly associated Latino men with "Danger" and white men with "Safety," and that they held similar dangerousness stereotypes for Latino men as they do for Black men. (Justin D. Levinson et al., *Deadly "Toxins": A National Empirical Study of Racial Bias and Future Dangerousness Determinations*, 56 GA. L. Rev. 1, 37 (2021).) In addition, Latinos have been associated with "innate criminality." (Malcolm D. Holmes & Brad W. Smith, *Race and Police Brutality: Roots of an Urban Dilemma*, 68 (2008).) Other researchers have noted Latinos are typified as "dangerous" and "violence-prone." (Katherine Beckett & Theodore Sasson, *The*

[25] <https://www.usatoday.com/story/news/politics/2012/10/27/poll-black-prejudice-america/1662067/>

Politics of Injustice: Crime and Punishment in America (2d ed. 2003); see also Coramae Richey Mann et al., *Images of Color, Images of Crime: Readings*, (Oxford U. Press 3d ed. 2006).)

There is no doubt that both explicit and implicit bias against Hispanics and Hispanic men exist in our society.

D. The prosecutor's conduct in inordinately striking jurors of the same ethnicity as appellant violated the RJA.

Under the RJA, the prosecutor's removal of Latino and Latino-surnamed jurors (see section IV (B), supra), whether intentional or not, amounted to "seek[ing], obtain[ing], or impos[ing] a sentence on the basis of race, ethnicity, or national origin." (§ 745, subd. (a).)

The seminal cases dealing with various forms of racial discrimination in the composition of criminal juries have made clear, barring members of the defendant's race from serving as jurors when the defendant is facing criminal sanctions is itself discrimination against the defendant. The point was already well-established when the high court reiterated, nearly a century-and-a-half ago, that,

> "... it is a right to which [a person of color] is entitled, that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.'"

(*Neal v. Delaware* (1880) 103 U.S. 370, 394; accord, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231, 237 ["Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury ...."], citing *Strauder v. W. Va.* (1879) 100 U.S. 303, 308; *Batson*, supra, 476 U.S. at p. 86 ["The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race."].) By skewing the ethnic composition of the jury away from jurors who share an ethnic background with the defendant (and presumed to be biased *towards* the defendant), a party does not arrive at a more objective jury, but rather one that is more biased *against* the defendant. (See Rachel Kunjummen Paulose, *Black Jurors Matter: Why the Law Must Protect Minorities' Right to Judge* (2022) 27 Berkeley J. Crim. L. 133, 180 (*Black Jurors Matter*) ["A court's denial of the everyday experiences of people of color unfairly affects our concept of the

'community standard' or the 'societal norm' by baselining the white experience"].) The prosecutor's conduct of preventing members of appellant's ethnicity from serving as jurors was thus, a form of discrimination the Racial Justice Act was adopted to eliminate.

Eliminating bias in the composition of juries was at the forefront of the Legislature's thinking when it enacted the RJA. When, in framing its findings and declarations in support of the new law, the Legislature noted that "[m]ore and more judges in California and across the country are recognizing that current law, as interpreted by the high courts, is insufficient to address discrimination in our justice system," three of the four cases it cited in support concerned allegations of racial bias in jury selection. (A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (c), citing *Turner v. Murray* (1986) 476 U.S. 28, 35; *People v. Bryant* (2019) 40 Cal.App.5th 525 (Humes, J., concurring); and *State v. Saintcalle* (2013) 178 Wash.2d 34, 35.) Making the point even more explicitly, the Legislature again invoked the *Bryant* case as presenting a prime example of the courts' failure to deal with

precisely the sort of discrimination that the Act was designed to root out:

> Even when racism clearly infects a criminal proceeding, under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish. For example, one justice on the California Court of Appeals recently observed the legal standards for preventing racial bias in jury selection are ineffective, observing that "requiring a showing of purposeful discrimination sets a high standard that is difficult to prove in any context."

(A.B. 2542, Stats. 2020, ch. 317, § 2, subd. (c), quoting *People v. Bryant*, supra, 40 Cal.5th at p. 544 (Humes, J., concurring).)

Despite *Batson/Wheeler*'s prohibition of using peremptory challenges against a prospective jurors based on race or ethnicity (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 276; *Batson v. Kentucky, supra,* 476 U.S. 79), "[m]any decades after *Wheeler* and *Batson* were decided, California prosecutors' use of peremptory challenges to exclude African Americans and Latinx citizens from juries is still pervasive." (Elisabeth Semel, et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory*

Exclusion of Black and Latinx Jurors, (2020), p. v;[26] see generally, Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice* (2005) 25 Chicano-Latino L. Rev. 153 [the right to serve as jurors is one aspect of citizenship, and one that has often been denied to Latinos].)

Semel, et al.'s study, *supra*, conducted by the Berkeley Death Penalty Clinic, collected empirical evidence that "overwhelmingly show[ed] implicit biases play a significant role in prosecutors' peremptory challenges," and that, among other things, district attorney training manuals "encourage discriminatory strikes" by: (1) training prosecutors to pick the "'ideal juror'" on bases that exclude people of color; (2) instructing prosecutors to strike jurors based on their "'gut reactions' to jurors' facial expressions, body language, clothing, and hairstyle" which "[s]ocial science has repeatedly shown are often the product of implicit biases that correlate with racial and ethnic

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[26] <https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic.>

stereotypes; and (3) instructing prosecutors to strike jurors "who have had or whose relatives have had a negative experience with law enforcement or are distrustful of the criminal legal system"—"in other words, instructed to exploit the historic and present-day differential treatment of Whites and people of color, especially African Americans and Latinx people, by the police, prosecutors, and the courts." (Elisabeth Semel, et al., supra, *Whitewashing the Jury Box* at pp. v-vi.) The study evaluated 700 cases decided by the Courts of Appeal from 2006 through 2018, finding that prosecutors struck Latinx jurors in about 28% of the cases, in contrast to White jurors in only 0.5% of the cases. (*Ibid.*)

If, as declared, it was "the intent of the Legislature to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable," and that "the further intent of the Legislature [was] to provide remedies that will eliminate racially discriminatory practices in the criminal justice system" (A.B. 2542, Stats. 2020, ch. 317, § 2, subds. (i) & (j)), it would be unthinkable to conclude that the provisions of the Act were not

meant to remedy racial discrimination in the jury selection process. In fact, the legislation was enacted in two alternative forms: in its primary form, the bill explicitly prohibited the discriminatory use of peremptory challenges. (A.B. 2542, Stats. 2020, ch. 317, §§ 3, 745, subd. (a)(3).)

The alternative form omitted that provision and was to come into effect only if the Legislature also enacted Assembly Bill 3070 (A.B. 3070, Stats. 2020, ch. 318, eff. Jan. 1, 2022) ("AB 3070") the "Better than *Batson*" bill –which more comprehensively addressed such discrimination. (A.B. 2542, Stats. 2020, ch. 317, § 7.) The Legislature's purpose was clear: as both the RJA and AB 3070 were (at that point) entirely prospective in application, it sought to avoid any possible confusion by allowing the more specific provisions of the latter to govern in future cases. Assembly Bill 3070 passed, is codified as Code of Civil Procedure, section 231.7, and provides the mechanism for addressing discrimination in the use of peremptory challenges in criminal cases in which jury selection began on or after January 1, 2022. (Code Civ. Proc., ' 231.7, subd.

(n).) The RJA, however, has since been made retrospective in application as well as prospective. (A.B. 256, Stats. 2022, ch. 739, eff. Sept. 29, 2022). As to cases tried before 2022, there is no danger of its provisions conflicting with the "Better than *Batson*" law which continues to apply only to cases tried in 2022 or later. It thus would be most consistent with the intent of the Legislature - and indeed, necessary to effectuate that intent - for the provisions of the RJA to be applied to all forms of racial discrimination in jury selection in pre-2022 cases, including appellant's.

Here, it is particularly striking to note the connection between the erroneous dismissal of Juror No. 5 discussed in AOB Argument I and the discriminatory removal of Latinx jurors. (See section IV (B), *supra*.) As discussed more fully in that Argument, Jurors 9 and 11 sought to remove Juror 5 from the jury primarily because he had a different view of the evidence.[27] That view of

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[27] The prosecutor all but invited this bullying behavior in closing argument, suggesting that jurors view disagreements as evidence of irrational personalities. (RT 4259-4260 ("Sometimes people get

the evidence may have been informed by Juror 5's life experience as a Latino. Jurors 9 and 11, by contrast, appear to have been white women. "Part of the perpetuation of implicit bias in the jury selection process is the failure to recognize that white Americans have different experiences with law enforcement, the legal system, and government than do people of color. People of color have different perceptions of the fairness of the legal system, including law enforcement. This perspective does not make minorities 'biased.' It simply reflects the ill treatment minorities have long endured[.]" (Paulose*, supra*, *Black Jurors Matter*, 27 Berkeley J. Crim. L. at p. 157.) Indeed, "most participants in the criminal justice system believe that they can make fair and unbiased decisions," but social science research indicates race continues to have a profound effect on criminal

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back there [and] you get the kind of personality -- you know the kind of person, they like to raise their hand in a group like a lecture. And you get the feeling they're kind of asking questions just to show off how smart they are rather than really asking questions. Sometimes people get into some kind of imagination contest and try to show off how imaginative they are or creative.")

trials. (Bowman, *supra*, *Racist Prosecutorial Rhetoric* 71 Case Western L.Rev. at p. 50, internal citation omitted.)

Notably, the other jurors' assessment of the reasonableness of Juror 5's position largely broke down along ethnic lines, with the other Latinx jurors taking a far more charitable view of Juror 5's position. (Juror 1 (23 RT 4601 (disagreeing that there was a problem); Juror 7 (23 RT 4626-4627 (describing "healthy discussions" although Juror 5 struggled to explain his viewpoint); Juror 8 (23 RT 4630 (describing Juror 5 as "hardheaded" and isolated on the jury, but open to deliberate); Juror 12 (23 RT 4633-4634 (Juror 5's views are a product of his experience).

Though the RJA does not require intent, removing potential jurors of the same ethnicity as the defendant is "excellent circumstantial evidence that the prosecution intended to provoke racial animus against the defendant, since it prepares the field for the use of covert racist allusions." (Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 Mich. J. of Race & L. 325, 363 (2006) (*Racist Summations*).) Jurors who are not of the ethnicity

being stereotyped would be less likely to recognize the biased arguments and allusions. In this case, the prosecutor's exploitation of appellant's rap lyrics provides a classic example of a prosecutor trafficking in racialized stereotypes that jurors with similar backgrounds to appellant would be most likely to recognize as harmful and unwarranted. (See Stoia et al., *supra*, *Rap Lyrics as Evidence*, 8 RACE & JUST., at p. 29 n. 3 ["jurors who are not rap literate (and thus not likely the intended audience for the lyrics) may judge lyrics to be substantially more threatening than those who are rap literate and may be influenced by racial stereotypes about rap music"].)

E. The jury's implicit bias was primed to find that appellant acted in conformity with widely held stereotypes about Hispanic men, gangs, and gangsta rap.

Appellant incorporates his previous arguments based on Evidence Code sections 352 and 352.2 outlining the prejudicial propensity evidence caused by the admission of rap lyrics—that appellant behaved in conformity with the stereotype of a Hispanic male gang member. Here, the rap lyrics and the

prosecutor's comments primed the jury's "bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful." (§ 745, subds. (a)(2).)

The prosecutor repeatedly read aloud appellant's lyrics and suggested how they showed: "gang life and the way gang members think" (RT 2328-2329); "[t]he way gang members think . . . is different, just different," (RT 2332-2335); "their culture, custom, habit, how they view the world" (RT 3959); "how [it is] in this culture [that you can] be respected and earn respect and stripes for killing people" (RT 3984); and "there are different degrees of intensity of hatred within a gang member" (RT 4281). This type of repetition and rhetoric, play key roles in priming for racial stereotypes, particularly in the case of people who do not harbor explicit bias. (Alford, *supra*, *Racist Summations,* 11 Mich. J. Race & L. at pp. 327, 347.)

Research indicates the prosecutor's language was a long-used technique of "othering" a defendant as someone outside of the moral community to induce a negative emotional response towards a defendant. (See Alford, *supra*, *Racist Summations*, 11

Mich. J. Race & L. at p. 335.) Given that jury members hold stereotypical beliefs about Black and Hispanic men, rap artists and gangs, and rap as a genre, repeated use of rap lyrics as evidence "constitutes a pernicious tactic that plays upon and perpetuates enduring stereotypes about the inherent criminality of young men of color; the lyrics must be true because what is written 'fits' with what we 'know' about criminals, where they come from, and what they look like." (Kubrin & Nielson, *supra, Rap on Trial*, 4 Race and Justice at pp. 200-201.)

Another attendant factor to stereotyping and othering is dehumanizing. Dehumanization involves using rhetoric that takes away a person's humanity and does not give the person the full measure of dignity or result in treating another person with respect. For example, the prosecutor rarely used appellant's given legal name, preferring to use his gang nickname or, even more demeaning, "this guy": "[T]hey're going to realize this guy is making us chase our tails." (RT 4446); "[T]his guy, our luck, we found his own writings. . . . And they're horrifying, okay." (RT 4281); "This guy thinks killing is fun" (RT 4282); "I mean, this

guy is guilty. Enough said." (RT 4296); "[I]t is incredible how much hatred this guy has towards rival gang members." (RT 4297); and "What did this guy do, as corroborated by the lyrics?" (RT 4300).

The prosecutor also used the lyrics to invoke animal and hunter/prey imagery:

> Echoing the pattern of a number of these shootings the defendant wrote this:
>
> > I keep them all running like Forrest Gump. When I step out the ride -- slang for car -- and commence to dump.
>
> That's slang for shooting. Next one, please.
>
> > There goes one now. I pull out the heater and chase him down faster than Cheeta. It's hunting season and I'm searching for the khakis and the Nikes.
>
> It's a reference to how gang members dress. You heard earlier I said "prey". [sic] The word he used was "quarry."
> "I am the hunter, you are the hunted--"
> Oh, the title is murder 187.
> "I am the hunter, you are the hunted. When I let the bullets fly, you're stunted. City of Angeles is where I trap my quarry."

(RT 2339-2340.)

> Q. Now, you said that you knew or had an opinion that this defendant was the leader of Toonerville gang; do you remember that?
> A. Yes.
> Q. And I want to ask you about if some of these lyrics are consistent with that. . . . Let's read this lyric.

> "I'm like a mad pitbull on the attack. Find yourself on your back when I let the gat crack."

(RT 3982-3983.)

Research has shown the use of animal imagery—even if not explicitly racist—to describe the defendant is likely to activate juror's subconscious biases against a defendant. (Prasad, *supra*, *Implicit Racial Biases in Prosecutorial Summations*, 86 Fordham L.Rev. at p. 3101; see also Stats. 2020, ch.317, § 2, subds. (e) & (f) ["Because use of animal imagery is historically associated with racism, use of animal imagery in reference to a defendant is racially discriminatory and should not be permitted in our court system"].) Use of animal imagery, including comparing a defendant to a predator or a victim to prey, dehumanizes the defendant. (Shana Heller, *Dehumanization and Implicit Bias: Why Courts Should Preclude References to Animal Imagery in Criminal Trials*, 51 CRIM. L. BULL. 870, nn. 45-70 and related text (2015).) Here the prosecutor used appellant's own lyrical words against him, if anything an even more pernicious way to prime the jurors' implicit biases. The jurors were *even less* likely to

recognize the appeal to their own dehumanizing prejudices because the words seemingly came from the defendant's own mouth.

The prosecutor also used the label "hard-core gang member" when speaking of appellant. (RT3996-3997.) The label "hardcore gang member" is racially coded language that primes the jurors with the stereotype of Hispanic men being violent and threatening. (Hagedorn, *supra*, *Gangs on Trial*, at p. 86, 190-191 [prototype of gang member is related to racist beliefs and the "demonizing" language used to describe members lead to assumptions of guilt that are hard to overcome].)

"When a decision-maker feels fear, anger, or both, the need for retribution automatically becomes heightened" and the resulting dehumanization and "othering" of the defendant makes the decision-maker more likely to justify violence against them. (Bowman, *supra*, *Racist Prosecutorial Rhetoric*, 71 Case W. Res. L.Rev. at pp. 59-61, internal citations omitted.)

Here, under the totality of these circumstances, the prosecutor's direct and indirect references to historical, cultural,

or popular racial stereotypes, activated the jury's implicit biases against appellant in violation of the RJA, section 745, subd. (a)(2).

F. Appellant does not need to make a showing of prejudice.

"The [RJA] forecloses any traditional case-specific harmless error analysis. . . . Subdivision (e) of section 745 therefore provides that, once a violation of the RJA has been established, the trial court 'shall impose' one of the enumerated remedies. The plain language of the statute thus mandates that a remedy be imposed without requiring a show of prejudice." (*People v. Simmons (*2023) 96 Cal.App.5th 323, 337] [noting the California Constitution allows for setting aside a judgment that is a result of a "miscarriage of justice," and does not prohibit the Legislature from presumptively determining racism in any form and at any stage is a miscarriage of justice], citing Couzens, et al., Sentencing California Crimes (The Rutter Group, Aug. 2022) § 28:5, subd. (C)(1) ["The Legislature's directive is clear: if the court finds a violation, a remedy shall be imposed, and the remedy

must come from the list provided by the Legislature. The imposition of a remedy does not depend on a finding of actual harm or prejudice to the defendant's case"].)

Under the RJA, the remedy here is to "vacate the conviction and sentence, find that it is legally invalid, and order new proceedings consistent with [the RJA]." (§ 745, subd. (e)(2).) Appellant "shall not be eligible for the death penalty." (§ 745, subd. (e)(3).)

VI

The gang and firearms experts' testimony included hearsay that was excludable under *Sanchez* and the constitutional right of confrontation.

A. Introduction

In *People v. Sanchez*, this Court held, "[W]hen the gang expert testif[ies] to case-specific facts based upon out-of-court statements and assert[s] those facts [are] true because he relied upon their truth in forming his opinion, he [is] reciting hearsay. Ordinarily, an improper admission of hearsay would constitute statutory error under the Evidence Code, [section 1200, subdivision (b)]. Under *Crawford* [*v. Washington* (2004) 541 U.S.

36, 62], however, if that hearsay was testimonial and *Crawford*'s exceptions did not apply, defendant should have been given the opportunity to cross-examine the declarant or the evidence should have been excluded." (*People v. Sanchez* (2016) 63 Cal.4th 665, 685 (*Sanchez*).)

Here, the prosecution's gang expert, Officer Ferreria, opined that appellant was the leader of the Toonerville gang based on out-of-court, testimonial statements made to him by gang members. Together with Ferreria's testimony that the rap lyrics established appellant was a hard-core member of the gang with a lot of "stripes," this testimony prejudicially suggested appellant was responsible for undertaking or ordering the commission of all the crimes charged.

In addition, the firearms expert, Starr Sachs, consulted and relayed information from the testimonial ballistics report of a non-testifying firearms expert to connect appellant to the Mendoza murder.

This evidence was inadmissible hearsay and violated appellant's Sixth Amendment right of confrontation. The

evidence was also prejudicial and amounts to reversible error.

B. No forfeiture

Lack of an objection has been excused by this Court "where to require defense counsel to raise an objection 'would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal.'" (*People v. Perez* (2020) 9 Cal.5th 1, 9, internal quotation marks and citations omitted.) Thus, "the failure of defense counsel to object at trial before *Sanchez* was decided did not forfeit a claim on appeal based upon *Sanchez*." (*Ibid*.)

C. The gang and firearms experts testified to testimonial out-of-court statements to establish case-specific facts.

It is true that experts may "relate information acquired through their training and experience, even though that information may have been derived from conversations with others." (*People v. Sanchez, supra*, 63 Cal.4th at p. 675.) However, "[w]hen giving such testimony, the expert often relates relevant

principles or generalized information rather than reciting specific statements made by others." (*Ibid*.) If an expert seeks to testify to an out-of-court statement to establish a case-specific fact and no hearsay exception applies to the statement, the statement is inadmissible hearsay that the expert may not relate to the jury, regardless of whether the hearsay is testimonial for purposes of the confrontation clause. (*Id*. at p. 685.)

In addition, "[w]hen the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, *Crawford* teaches those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial." (*People v. Sanchez supra*, 63 Cal.4th at p. 694, internal citations omitted.)

"Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id*. p. 676.)

(1) The gang expert's opinion that appellant was the leader of the Toonervilles was based on hearsay evidence.

Ferreria testified that, in his opinion, appellant was the leader of the Toonerville gang. The following exchange reflects the basis for that opinion:

> Q. Do you have an opinion as to the defendant's status within Toonerville gang? . . .
> [A]. Yes, I do.
> Q. And what is that opinion based on, please just tell us in general terms, first of all. Then we may get into more specifics. So just tell us in general terms what is that based on?
> A. Basically from talking to other gang members themselves.
> Q. Within Toonerville gang?
> A. Within Toonerville.
> Q. And did you talk to them about, look, who are your leaders, who are the people who are running the show?
> A. Yes.
> Q. Based upon that during this time period, 1997 to 2001, what is your opinion regarding the defendant's status within Toonerville gang?
> A. That Mr. McGhee is the leader of Toonerville.

(RT 3975.)

On cross-examination, Ferreria admitted his opinion was based on hearsay:

> [Q]. Your information and your opinion of him as being quote, unquote, "the" leader, that's based on

hearsay; is that right?
A. From other gang members.
Q. Yeah, based on hearsay from other gang members, correct?
A. Yes, sir.

(RT 4025-4026.) Ferreria went on to say who these gang members were:

Q. You know, how many other gang members were referring to McGhee as the leader of the Toonerville gang. Just give us an approximation?
A. That immediate come off the top of my head was probably about 15.
Q. 15 different -- are you talking about fifteen different times or 15 different Toonerville gang members were referring to that man, this defendant in this court, as the leader of Toonerville gang?
A. 15 different gang members. . . .
Q. Who are these gang members, sir, these 15 gang members; who are they? . . .
A. Okay. Mr. Charles Gothard, both senior and junior.
Q. Okay, they are members of the same family?
A. Yes.
A. The Vallejo family. There's a lot of those guys. The Vallejos, Cabreras.
Q. Hold on. Hold on. Included in these fifteen, are there like
five Vallejo family members?
A. That I know of there's only like three or four.
Q. So included in this fifteen are four – four Vallejos, two members of another family; is that right?

A. Yes.
Q. All right. So half of your information or close to half of your information came from two families; is that correct?
A. Yes.
Q. And did you say the Cabreras?
A. Yes.
Q. And how many are those?
A. There's two of them that I know of.
Q. All right. So basically you got your information from a few families, a few different families and their members as to Mr. McGhee; is that what you are saying?
A. Yes, sir.

(RT 4028-4029.)

There is no indication that any of these gang members independently testified at trial that appellant was the leader of the Toonervilles. Thus, when Ferreria testified gang members told him appellant was the leader of the Toonerville gang, he related hearsay to prove a case-specific fact. Under *Sanchez*, in the absence of a valid exception, the testimony was inadmissible as a matter of state hearsay law. (Evid. Code § 1200, subd. (b).) Since Ferreria's primary purpose for gathering information from gang members was to preserve facts for use at trial, the hearsay evidence was also testimonial and violated appellant's Sixth

Amendment right of confrontation.

The jury instruction here did not sufficiently address the admission of this evidence. The *Sanchez* court expressly overruled "prior decisions concluding . . . that a limiting instruction, coupled with a trial court's evaluation for the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns." (*People v. Sanchez, supra,* 63 Cal.4th at p. 686, fn. 13,) Here, the jury was instructed that an expert's opinion "is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based." (CT 3803 [CALJIC 2.80, 2.82, 2.83].) The equivalent instruction was given in *Sanchez* under CALCRIM No. 332, where the jury was instructed it "must decide whether information on which the expert relied was true and accurate." (*Id*. at p. 684.) The *Sanchez* court rejected the sufficiency of this instruction: "Without independent competent proof of those case-

specific facts, the jury simply had no basis from which to draw such a conclusion." (*Ibid*.)

(2) The firearms expert relied on a non-testifying colleague's report.

The prosecutor's firearms expert was Starr Sachs. Her testimony was used to connect ballistics evidence from the crime scenes to appellant. Regarding the Mendoza murder, Sachs relied on a coworker's report:

> Q. And could you tell whether they [bullet fragments] matched each other or not?
> A. 37 and 67 – *I'm looking at my coworker's report*. Let me look at my notes. 37 and 67 were fired from the same firearm.
> Q. So that's a definitive opinion, 37 and 67 match?
> A. Yes.
> Q. Now I want to talk about 11 pieces that were numbered 26, 28, 44, 46, 47, 68b, 70, 72b and 77a, 77b-2, and 77c.
> A. We discussed 77b-2 earlier. This is also included in this group of items that I did not examine.
> Q. Okay.
> A. *The report from my coworker reads* that all of those items are consistent with bullet fragments but lack markings necessary to identify the firearm from which they were fired.
> Q. And what caliber?
> A. He does not list any caliber.
> Q. Okay. So these are just completely

inconclusive; is that correct?
A. According to his report.

(CT 3583-3584, emphasis added.)

Citing *Bullcoming, supra*, 564 U.S. at p. 660, the *Sanchez* court stated that testimony from "a surrogate analyst" does not satisfy confrontation clause principles just because the testing analyst merely recorded objective facts. (*People v. Sanchez, supra*, 63 Cal.4th at p. 695.) The same is true here. This evidence should have been excluded as improper hearsay.

D. The *Sanchez* errors were prejudicial.

Sanchez errors, like any other erroneously admitted hearsay, do not affect the sufficiency of the evidence to convict and are instead subject to a two-part harmless error analysis. (*People v. Navarro* (2021) 12 Cal.5th 285, 311-314.) The first part asks whether there is sufficient evidence to support the necessary statutory requirements in the absence of the *Sanchez*-offending testimony; and the second asks whether the jury's judgment would have been different in the absence of the offending testimony, even if the nonhearsay evidence is otherwise

sufficient. (*Id.* at p. 313.) If the error permitted testimonial hearsay, the *Chapman* standard applies to that analysis; if the error permitted only nontestimonial hearsay, the *Watson* standard applies. (*People v. Tran*, *supra*, 13 Cal.5th at p. 1212.) *Sanchez* itself applied *Chapman* where the improper admission was a mix of both testimonial and nontestimonial hearsay. (*Sanchez, supra*, 63 Cal.4th at pp. 698-699; accord, *People v. Martinez* (2018) 19 Cal.App.5th 853, 861 [in cases "involv[ing] a mix of testimonial and nontestimonial hearsay, we will apply the federal standard"].)

Under any standard, Ferreria and Sachs' introduction of hearsay was prejudicial. A vast amount of the witness testimony in this case was tainted by police misconduct in coaching witnesses, manufacturing evidence, and providing immunity to testifying gang members. For example, the only evidence that appellant was a gang leader came from Wilfred "Pirate" Recio and Mark Gonzales, former Toonerville members who claimed appellant was a "shot-caller." (13 RT 2777, 2788; 15 RT 3171, 3174, 3179-3180, 3182.) Both Recio and Gonzales had long

criminal records and were in custody when they testified. (13 RT 2761-2762; 15 RT 3166-3167, 3169.)

Gonzales was implicated in the 2000 police shooting and the Cloudy Martin murder but was never arrested or charged in connection with those incidents. (RT 3301-3306, 3318-3319, 3326-3328.) It was only after Gonzales was arrested for domestic violence and terrorist threats that he told police a different story about his whereabouts on the night of the incident and appellant's involvement in the crime. (RT 3309-3310, 3313-3314.) Gonzales testified he was receiving immunity from prosecution for his admitted role in the killing of Huerto from the Rascals in exchange for his testimony against appellant in this case. (RT 3331-3332.)

Recio said he had once been a shot-caller in the gang, although appellant had more power. (13 RT 2777, 2788.) Recio was a Toonerville member facing murder charges, had a bad heroin and methamphetamine problem, and was responsible for many murders although he could not recall how many. (14 RT 2819-2830.) He testified about appellant's involvement in the

Ryan Gonzalez killing hoping to get favorable treatment in his own case. (14 RT 2808.) Recio's parole officer had told him that he was a suspect in two murder cases, and he was then approached and interviewed by Detective Teague. (14 RT 2827-2828.) He understood he would be sentenced to life in prison or death if convicted of the two murder charges he was facing, and he had "no love" for appellant anyway. (14 RT 2826, 2829-2830.) Before being approached by Detective Teague, he had never mentioned appellant's involvement in the killing. (14 RT 2829.) After he implicated appellant, the prosecutor provided him with food, housing, clothing and dental care. (14 RT 2842.) Detective Teague also offered Recio $5,000 for information against appellant. (14 RT 2869.) Charges were never filed against Recio for the double murders in his case after he implicated appellant. (14 RT 2868.)

Evidence of this type of police misconduct was claimed by witnesses who did not know each other but were all consistent in their claims of witness tampering by the police. (See AOB, Arg. II.) The unreliability of witness testimony tainted the entire case against appellant. Thus, there was considerable reasonable doubt

that appellant was the perpetrator of the charged crimes, let alone the leader and "shot-caller" of the Toonerville gang. Ferreria's testimony undercut this reasonable doubt by suggesting that because appellant was the head gang member and leader, he must have been responsible for undertaking or ordering the commission of all the crimes charged. Similarly, Sachs' testimony bolstered the prosecution's attempt to counter the weaknesses of the unreliable witnesses. Under these circumstances, the *Sanchez* errors were not harmless and their admission requires reversal.

VII
Appellant's attempted murder convictions must be reversed pursuant to SB 1437 and SB 775.

A. Introduction

Appellant was convicted of four counts of willful, deliberate, and premeditated attempted murder (Counts 5, 6, 13, and 14.) Under newly enacted SB 1437 and SB 775 to find appellant liable for premeditated attempted murder, the jury must have found appellant was the actual attempted killer or a direct aider and abettor acting with his own intent to kill. However, the

prosecutor's arguments and the jury instructions did not require the jury to consider appellant's mental state. Instead, the jury was permitted to impute the attempted killer's intent to appellant. Accordingly, appellant's attempted murder convictions must be reversed under the new laws.

B. Senate Bills 1437 and 775

Effective January 1, 2019, the Legislature passed Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437) "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).)

Senate Bill No. 775 (2021-2022 Reg. Sess.) (SB 775) expanded the scope of those changes to (i) permit the same relief to those convicted of attempted murder or manslaughter under a theory of felony murder or natural and probable consequences doctrine and (ii) encompass murder, attempted murder, and

manslaughter convictions "under the natural and probable consequences doctrine *or other theory under which malice is imputed to a person based solely on that person's participation in a crime*." (§ 1170.95, subd. (a), as amended by Stats. 2021, ch. 551, § 2, emphasis added.)

Together, SB 1437 and SB 775 allow non-final convictions to be challenged on direct appeal or by petition (§ 1172.6 petition) to the sentencing court. (See Stats. 2018, ch. 1015, § 4, p. 830 and Stats. 2021, ch. 551, §2, subd. (g).)

C. The jury did not find appellant was the actual attempted killer.

Attempted murder requires: (1) a specific intent to kill; and (2) a direct but ineffectual act toward accomplishing the intended killing. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) One can be guilty of attempted murder as the actual perpetrator or as a direct aider and abettor. Here, the jury was instructed on the following:

> Persons who are involved in committing a crime are referred to as principals in that crime. *Each principal, regardless of the extent or manner of participation is equally guilty*. Principals include: (1)

> Those who directly and actively commit the act constituting the crime, or (2) Those who aid and abet the commission of the crime." [CALJIC 3.00]
>
> (CT 3805, emphasis added.)
>
> In order to prove attempted murder, each of the following elements must be proved: (1) A direct but ineffectual act was *done by one person* towards killing another human being; and (2) *The person committing the act harbored express malice aforethought*, namely, a specific intent to kill unlawfully another human being…" [CALJIC 8.66]
>
> (CT 3812, emphasis added.)
>
> To constitute willful, deliberate, and premeditated attempted murder, *the would-be slayer must weigh and consider the question of killing* and the reasons for and against such a choice and, having in mind the consequences, decides to kill and makes a direct but ineffectual act to kill another human being. [CALJIC 8.67]
>
> (CT 3813, emphasis added.)

Together, these instructions refer generically to the "person committing the act" and the "would be slayer," without specifically referring to appellant or the requisite role of appellant in the alleged attempted murders. They did not require that appellant be the actual perpetrator to establish liability.

In addition, the prosecution did not allege that, in the commission of the attempted murders, appellant personally discharged a firearm proximately causing great bodily injury or death, and the jurors were never called to make this determination. (CT 3819, 3828-3834.) Thus, the jury did not make any findings that established appellant was the actual perpetrator rather than an aider and abettor.

D. The instructions allowed the jury to convict appellant based on imputed malice rather than an intent to kill.

Unlike murder, an attempted murder requires express malice and cannot be proved based upon a showing of implied malice [citation]," *People v. Mejia* (2012) 211 Cal.App.4th 586, 605, or imputed malice. (See *People v. Montes* (2021) 71 Cal.App.5th 1001, 106-108 [reversing trial court's denial of §1172.6 because jury was given natural and probable consequences instruction allowing it to "impute[] [the perpetrator's] specific intent to kill" to defendant without "consider[ing] appellant's own intent to kill"].)

As given, CALJIC No. 8.66 required only that "[t]he person

committing the act harbored express malice aforethought," not appellant specifically or an aider and abettor generally. (CT 3812.) Similarly, CALJIC No. 8.67 specified that "the would-be slayer…weigh and consider the question of killing and…decide[ ] to kill." (CT 3813.) Again, this instruction did not require that appellant or an aider and abettor generally "weigh and consider the question of killing and…decide[ ] to kill," only the "would-be slayer." Because these instructions only required express malice on the part of "the person committing act," and premeditation by a "would-be slayer," the jury could have found appellant "equally guilty" of attempted murder based on the actual perpetrator's intent to kill and premeditation, without considering appellant's own *mens rea*. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164 [holding it is error to instruct a jury with the "equally guilty" language of CALJIC 3.00 if the facts of the case would allow the jury to convict without an individualized inquiry into the *mens rea* of the aider and abettor].) In this way, the jury could have imputed malice to appellant in violation of SB 1437 and 775.

The prosecutor's comments on aiding and abetting encouraged this interpretation of the instructions. The prosecutor told the jury it had to "show that [appellant] himself shot or he himself tried to kill or aided and abetted, okay, act or words, knowledge and intent, *you know, was one of the participants. That's all. He was part of it. That's all we're saying*." (RT 4278.) The prosecutor continued, "[W]ith the exception of one case you'll see – you know, I think it's the Ryan Gonzales case where there's only one shooter – we have multiple shooters. You maybe [sic] asking, Mr. Prosecutor, you didn't link a bullet in the body to a gun in the defendant's hand. Oh, yeah, you don't need to. Aiding and abetting. Right. If you are participating in the shooting you don't need to, okay." (RT 4278-4279.)

E. The jury's additional findings do not establish appellant harbored an intent to kill with respect to the attempted murder counts.

The jury's additional findings do not preclude the possibility that the jury imputed malice to appellant. The attempted murder of a peace officer findings with respect to Counts 5 and 6 were not preclusive because CALJIC 8.66 did not

require a finding that defendant acted with an intent to kill (CT 3814). Nor was the multiple murder special circumstance finding preclusive because (i) CALJIC 8.80.1 only required an aider and abettor have an intent to kill with respect to the murders, not the attempted murders (CT 3815); and (ii) CALJIC 8.81.3 did not require a separate finding of intent to kill. (CT 3815-3816.) Similarly, the gang-murder special circumstance did not require an intent to kill with respect to the attempted murders. [CALJIC 8.81.22] (CT 3816.) The same is true for the section 12022.53, subdivision (b) enhancement findings because under CALJIC 17.19 and 17.19.5 the jury had to find only that "defendant personally used" and "defendant intentionally and personally discharged a firearm" (CT 3819).These findings only establish defendant had the intent to fire a weapon, they do not establish defendant had an intent to kill while firing the weapon.

F. It was error to include the major participation and reckless indifference to human life elements in the special circumstance instruction.

In addition, as given, CALJIC 8.80.1 instructed that the jury could find any of the specials true if appellant acted "with

reckless indifference to human life and as a major participant, aided." (CT 3815.) Unless corrected, this was instructional error because inclusion of the reckless indifference (RIHL) and major participant (MP) elements are only requirements of the felony-murder special circumstance, which was not charged in this case. While the court noticed this when delivering the instruction and indicated he would "give [the jury] a clean instruction on this after the break" (RT 4521-4522, 4546), there is no evidence of a corrected instruction in the record.

The trial court has a duty not only to instruct on the relevant principles of law, but also "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) Not only was CALJIC 8.80.1 irrelevant, but it was also confusing and misleading. (See *People v. Von Villas* (1992) 11 Cal.App.4th 175, 238 [a superfluous instruction is generally held harmless unless it "creates a substantial risk of misleading the jury to the

defendant's prejudice"]; see also *People v. Mathson* (2012) 210 Cal.App.4th 1297 [instructing on theory of liability not supported by the evidence "could be potentially confusing for the jury"].)

CALJIC 8.80.1's basis for liability—major participant acting with reckless indifference to human life—further misled the jury into finding appellant as "equally guilty" (CALJIC 300) for attempted murder merely based on his presence at the scene where the "person committing the act" and the "would be slayer" (CALJIC 8.66, 8.67) committed the crime, rather than based on appellants own intent to kill. This relieved the prosecutor from having to establish appellant's *mens rea*, effectively reducing the burden of proof to simply showing appellant was a gang member who was present at the scene.

G. The instructional errors were not harmless.

When the jury is "instructed on correct and incorrect theories of liability, the presumption is that the error affected the judgment..." (*In re Martinez* (2017) 3 Cal.5th 1216, 1224.) Therefore, the reviewing court "must reverse the conviction[s] unless, after examining the entire case, including the evidence,

and considering all relevant circumstances," we determine the error is "harmless beyond a reasonable doubt." (*People v. Aledamat* (2019) 8 Cal.5th 1, 13.) "This [harmless error] test is exacting, and it requires much of a reviewing court. '[S]afeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.'" (*In re Lopez* (2023) 14 Cal.5th 562, 581, citing *Neder v. United States* (1999) 527 U.S. 1, 19.) The Attorney General bears the burden of showing that the error was harmless beyond a reasonable doubt. (*Id.* at p. 585.)

Here, the evidence that purportedly proved appellant attempted to murder police officers Langarica and Baker (counts

5 and 6), and Natividad and Rhee[28] (counts 13 and 14) was largely circumstantial. (See AOB 9-19.) In addition, the evidence was highly unreliable, given the criminal background of the witnesses, and the outrageous pattern of police misconduct in coaching interview statements, losing evidence, and offering deals to witnesses in return for testimony. (AOB 23-27, 76-98 [Argt. II].)

The prosecutor reinforced the evidentiary shortcomings by arguing that the jury could find appellant guilty if he "participated" by "acts or words." (RT 4278-4279.) Together, the prosecutor's argument and the flawed jury instructions significantly lowered the prosecution's burden of proof and allowed the jury to find appellant guilty of the premeditated attempted murders without finding appellant had an intent to kill or premeditated the attempts in any way. Thus, a thorough examination of the record precludes a conclusion that

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[28] Natividad and Rhee were with Margie Mendoza when she was shot and killed. (16RT 3413, 3418, 3457.)

instructional error was harmless beyond a reasonable doubt and requires reversal.

VIII

The court's errors require reversal and remand.

In determining whether a constitutional error is reversible under the federal Constitution, the United States Supreme Court distinguishes between "trial errors," which are subject to harmless error analysis, and "structural errors," which require automatic reversal. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-310.) Trial errors are those that occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt." (*Id.* at pp. 307-308.)

Structural errors are "structural defects in the constitution of the trial mechanism . . . affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (Id. at pp. 309-310.) Some examples of structural error "include: (i) 'total deprivation of the right to counsel at trial'; (ii)

trial by a 'judge who was not impartial'; (iii) 'unlawful exclusion of members of the defendant's race from the grand jury'; (iv) denial of the right to self-representation at trial; and (v) denial of the right to a public trial." (*People v. Stewart* (2004) 33 Cal.4th 425, 462, quoting *Arizona v. Fulminante, supra*, at pp. 309-310.)

Structural errors require per se reversal since prejudice is "necessarily unquantifiable and indeterminate." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282; *People v. Anzalone* (2013) 56 Cal.4th 545, 554 ["A structural error requires per se reversal because it cannot be fairly determined how a trial would have been resolved if the grave error had not occurred"].) Section 352.2 creates an uncommonly strict rule that rap evidence is completely inadmissible except under extremely narrow exceptions. It necessarily affects the entire framework of the trial. Thus, to apply harmless error analysis here would undermine the compelling policies that gave rise to section 352.2, thus effectively allowing trial courts to disregard the Legislature's mandate so long as they believed the error would be found harmless on appeal.

Even if the *Chapman* "harmless beyond a reasonable doubt" standard is applied, admitting the evidence was prejudicial. (See *Chapman v. California, supra*, 386 U.S. at p. 24.) In *People v. Albarran* (2007) 149 Cal.App.4th 214, 229-232, the court held admission of inflammatory gang evidence was subject to *Chapman* harmless error analysis because the evidence deprived defendant of a fair trial. The *Albarran* court said, "Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Id.* internal quotation marks and citations omitted.) As demonstrated above, the rap lyrics presented in this case are of such a quality.

Federal courts have identified situations in which the admission of evidence violated due process. For example, in *Bowen v. Giurbino* (C.D. Cal. 2004) 305 F. Supp. 2d 1131, 1143, the court found due process was violated when there were no

permissible inferences the jury could have taken from the evidence of petitioner's prior theft-related conviction, but only the impermissible inference of criminal propensity. In *Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, the court found the admission of a bite mark expert's testimony violated due process because "Dr. Warnick's opinion that the petitioner was the only person in the entire Detroit metropolitan area who could have made the mark on the corpse carried an aura of mathematical precision pointing overwhelmingly to the statistical probability of guilt, when the evidence deserved no such credence." (*Id*. at p. 376.)

The Seventh Circuit has acknowledged that state court evidentiary rulings may implicate the Due Process Clause when "evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice[.]'" (*Richardson v. Lemke* (7th Cir. 2014) 745 F.3d 258, 275.)

In *People v. Venable*, the court concluded admission of a rap video without the new safeguards was prejudicial because it "contain[ed] offensive language, including frequent uses of the n-word, depictions of guns and drugs, and references to violent

gang activities. . . . Most of the lyrics had nothing to do with the shooting in this case, though one line could be interpreted as referring to the shooting. . . . Nothing in the song indicates the rapper or others in the video had personal knowledge or involvement in the shooting, only that they had heard about it. The prosecution nevertheless placed a lot of emphasis on the video. They played it twice during their case-in-chief and a third time during closing arguments." (*People v. Venable, supra*, 88 Cal.App.5th at pp. 455-456.) The same is true in this case, where the prosecutor bombarded the jury with offensive lyrics to show appellant was "hard-core," that he was "sick," that he had an "attitude" that "leads to four out of these five shootings," that he was the "leader," and that, "This guy thinks killing is fun." Just as in Venable, there is "substantial doubt whether the trial judge would have admitted [this evidence] under the new standard, and it's clear the prosecution used that evidence to tie [defendant] to the specific crime." (*Id*. at 458.) Given that the trial court specifically told the prosecutor the rap lyrics line of questioning was becoming cumulative, there is at least substantial doubt that

the court would have admitted so much of the material under new section 352.2 regardless of which standard of prejudice is applied.

CONCLUSION

For all the reasons argued above, and those stated in appellant's earlier briefing, both the judgment of conviction and sentence of death must be reversed.

Dated: February 26, 2024

Respectfully submitted,

s/Patrick Morgan Ford
Patrick Morgan Ford
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TIMOTHY J. McGHEE

Certificate of Compliance

I, Patrick Morgan, certify that the within brief consists of 30041 words, as determined by the word count feature of the program used to produce the brief.

Dated: February 26, 2024

s/Patrick Morgan Ford
PATRICK MORGAN FORD

PROOF OF SERVICE

I, Patrick Morgan Ford, declare that I am over 18 years of age, employed in the County of San Diego, and not a party to the instant action. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I served the attached Appellant's Supplemental Opening Brief on February 26, 2024, in the following ways:

--By placing a copy in the United States Postal Service, enclosed in a sealed envelope, with postage fully prepaid, to:

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--By electronically serving a copy of the above document to each of the following persons at the following authorized email service addresses:

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

Executed on February 26, 2024

/s *Patrick Morgan Ford*

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. McGHEE (TIMOTHY J.)**
Case Number: **S169750**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ljlegal@sbcglobal.net**

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